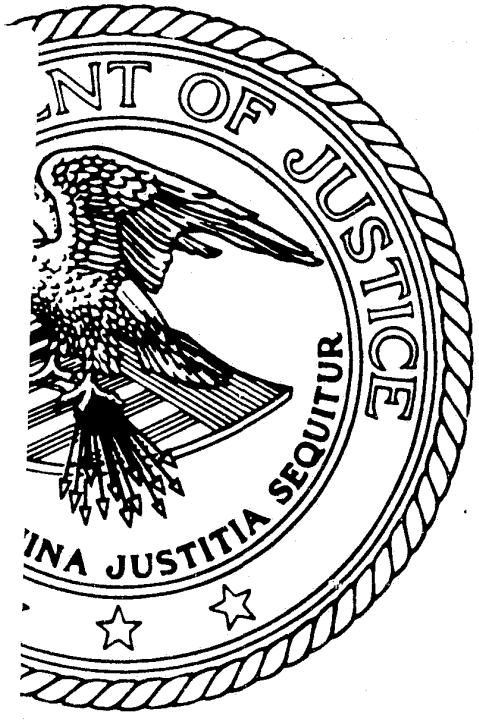
U.S. Department of Justice
Criminal Division

Narcotic and Dangerous Drug Section Monograph:

Manual for Federal Grand Jury Practice

Volume I



MANUAL FOR FEDERAL GRAND JURY PRACTICE

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FORWARD

The legal terrain of federal grand jury practice is changing rapidly. The diminished reluctance of the federal courts to look beyond the face of the indictment and to entertain challenges to government practices before federal grand juries have spawned judicial rulings in areas of grand jury practice that have heretofore not been the subject of judicial review. Although these rulings have not diminished the powers of the federal grand jury, there is sufficient judicial interest in the grand jury practice of federal prosecutors as expressed in these rulings to justify a continuing effort to standardize and refine our grand jury procedures. It is this purpose that prompts our publication of the Manual for Federal Grand Jury Practice.

The manual is an edited collection of materials that have been prepared in recent years as lecture outlines, office manuals, and guidelines of suggested practices on the subject of grand jury practice. The reader will find many statements that forcefully advocate a particular practice be followed. When there is not citation to a judicial opinion, the United States Attorneys' Manual, or some authoritative source from the United States Department of Justice, the suggested practice is advisory only and is not a Department policy. However, we have reserved the right to edit any suggested practices of questionable merit. If we have erred in this regard, the fault is completely ours and not that of the original authors.

Edward S.G. Dennis, Jr., Chief,
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PREFACE

The Manual for Federal Grand Jury Practice has been compiled from the United States Attorneys' Manual and other outlines and materials in order to have a single sourcebook with forms, procedures and discussion of some of the issues pertaining to federal grand jury practice. This manual is not a statement of policy of the Criminal Division or the Tax Division of the Department of Justice. Users of the manual should refer to the United States Attorneys' Manual and to appropriate offices of the Department of Justice for matters of policy regarding grand jury practice.

We acknowledge the contributions made by the lawyers in the Attorney General's Advocacy Institute, the Criminal Division, Tax Division and United States Attorneys' Offices who wrote some of the material which we have included. We specifically acknowledge the contributions made by the United States Attorneys' Offices in the Districts of Maryland, Northern Illinois, Central and Southern California, Eastern Pennsylvania, and Southern New York, for material which lawyers from those offices have prepared in the past and for some of the forms which we have included. There are a number of people who should be specifically mentioned as having played a part in this manual. We acknowledge Richard E. Carter, Director of the Office of Legal Education and the Attorney General's Advocacy Institute. During the past several years, the excellent course on federal grand jury practice has occasioned the preparation of some of the materials which we have included. We also acknowledge William B. Lytton, First Assistant United States Attorney in Philadelphia, whose materials and lectures have played a part in the success of that effort. Additionally, we mention Greg Jones, Scott Lasar and Chuck Sklarsky, Assistant United States Attorneys in Chicago who published a Grand Jury Practice Manual several years ago. Some of their work has been included in this manual.

Acknowledgment for specific chapters is as follows:

Chapter V: Much of this chapter was borrowed from a piece written by Michael Ross of the U.S. Attorney's Office in the Southern District of New York in July, 1981, for the Attorney General's Advocacy Institute. The search warrant material was taken from the Bulletin on Economic Crime Enforcement Vol. 3, No. 4, December 1982, Karlyn Stanley, Editor.

Chapter VI: Some of this chapter was borrowed from Michael Ross' article referred to above. We also acknowledge the contribution of Martin C. Carlson of the Criminal Division of the Department of Justice, who researched and wrote the additional material which we have included.

Chapter VII and Chapter VIII: These chapters were written by Jo Ann M. Harris, Executive Assistant United States Attorney for the Southern District of New York.

Chapter IX: This chapter was written by Frederik A. Jacobsen, Assistant United States Attorney for the Central District of California.

Chapter X and Chapter XI: These chapters were taken from materials written by Willard C. McBride, George T. Kelley, Richard H. Kamp and John R. Maney. These individuals were all with the Criminal Section of the Tax Division at the time of the preparation of the materials.

Chapter XII: This chapter was written by Edward M. Vellines of the Criminal Section of the Tax Division.

The editors have written some of the material which has been included. We have attempted to give credit for other contributions which have been made. Any omission which we may have made was not intended and will be corrected if brought to our attention in the event another edition of this manual should be published.

A table of cases has been included to make it easier to use this Manual, particularly to find case authority applicable in each of the federal circuits. Although several cases may have been cited in support of a particular point of law, the Manual is not a review of all the Courts of Appeals on each point. Care should be taken to ascertain whether additional cases have been decided which address issues discussed herein.

We expect that this Manual will be reviewed periodically and revised. Suggestions for additions and revisions may be sent to William J. Corcoran, United States Department of Justice, Washington, D.C., 20530.

This manual is not intended to create or confer any rights, privileges or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

We are gratefully indebted to the secretaries in the Narcotic and Dangerous Drug Section of the Criminal Division who have done all the typing for this project. The Manual went through several revisions during the past year before we settled on the final format. Without their efforts, we would not have been able to publish this Manual.

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Washington, D.C.

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I. INTRODUCTION AND MECHANICS OF THE GRAND JURY

I. INTRODUCTION AND MECHANICS OF THE GRAND JURY

A. When Required

The Fifth Amendment to the Constitution provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury." The Constitution requires a grand jury indictment to shield persons from unfounded or arbitrary criminal charges and to investigate crime unimpeded by the restrictions imposed by the trial court. See, e.g., United States v. Mandujano, 425 U.S. 564, 571 (1976); United States v. Calandra, 414 U.S. 338, 343 (1974). The Fifth Amendment protection is embodied in Fed. R. Crim. P. 7. Under Rule 7(a), an offense punishable by death must be prosecuted by indictment, while an offense punishable by imprisonment for more than one year must be prosecuted by indictment unless indictment is waived. See 18 U.S.C. Section 1; USAM 9-11.030

Since a corporation can only receive a fine and not a term of imprisonment, it is not necessary to use the indictment process to charge a corporation. United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980).

B. Functions of the Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, it is more accurate to say that a grand jury's function is to conduct an Ex parte investigation to determine whether or not there is probable cause to believe that a certain person committed a federal criminal offense within the jurisdiction of the district court.

1. Accusatory function

The grand jury determines whether there is probable cause to believe a certain federal offense has been committed by the defendant.

No federal grand jury can indict without the concurrence of the United States Attorney. For the indictment to be valid, the attorney for the government (usually the U.S. Attorney), must sign the indictment. Fed. R. Crim. P. 7(c); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

A prosecutor's use of presigned indictments is not unduly influential on the grand jury's deliberations. See United States v. Singer, 660 F.2d 1295, 1303 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

2. Investigatory function

The grand jury has been afforded the broadest latitude in conducting its investigations. Such investigations are directed by the U.S. Attorney, while the grand jury is supervised by the district court.

a. In a joint tax and narcotics grand jury investigation approval for the tax investigation must be obtained through the Tax Division. With respect to investigation of possible narcotics violations, Department of Justice approval is not required. However, all indictments for violation of Title 21 U.S.C. 848 (Continuing Criminal Enterprise) must be approved by the Narcotic and Dangerous Drug Section of the Criminal Division. Moreover, approval for RICO charges, 18 U.S.C. Sections 1961 - 1968, must be obtained from the Attorney General or his agent (Organized Crime Section, Criminal Division).

C. Description of Grand Jury

1. General composition

A grand jury is composed of between 16 and 23 members. Fed. R. Crim. P. 6(a). Sixteen members must be present at each session to consitute a quorum.

2. Minimum required concurrence for indictment

The return of an indictment requires a quorum of at least 16 members with 12 members concurring. Fed. R. Crim. P. Rule 7(f).

3. Length of grand jury service

Fed. R. Crim. P. 6(g) provides that a grand jury serves until discharged by the district court, but may serve no longer than 18 months. The 18 months begins to run from the date of empanelment. United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980).

There is a provision in 18 U.S.C. Section 3331 for empaneling "Special Grand Juries" in districts which contain more than four million inhabitants. A "Special Grand Jury" under 18 U.S.C. Section 3331 can remain active for up to 36 months. (See USAM 9-11.400 - 441, for more details on Special Grand Juries).

The district court may excuse a grand juror upon a showing of undue hardship or other just cause if a

grand juror makes an application to be excused through the foreman or the Clerk's Office. Fed. R. Crim. P. 6(g).

4. Duties of the Foreman and Deputy Foreman

a. Rule 6(c) provides: "The court shall appoint one of the jurors to be foreman and another to be deputy foreman." The rule also provides that the deputy foreman shall act as foreman during the latter's absence. See also USAM 9-11.340

b. The rule confers on the foreman the power to administer oaths and affirmations. Four different oaths have been provided to the foreman to give to the stenographic reporter (each day), any interpreter, each witness, and each record custodian witness.

c. The foreman presides over the grand jury and serves as its spokesman. Whenever it is necessary to direct a witness to do something (i.e., to answer questions, to return on another day, to provide physical evidence, to appear in a lineup), the foreman (not the assistant) must issue the order. United States v. Germann, 370 F.2d 1019 (2nd Cir. 1967).

d. The rule requires the foreman to sign each indictment, although failure to do so does not vitiate the indictment. Frisbie v. United States, 157 U.S. 160 (1895).

e. The rule requires the foreman or another juror (usually the deputy foreman) to keep a record of the jurors voting for each indictment, and to file that record (referred to here as the ballot) with the Clerk's Office when the indictments are returned. The ballot cannot be disclosed without a court order.

f. In addition, a set of minutes is maintained by the grand jury, indicating the votes on all indictments, the names of all witnesses appearing before the grand jury, the assistant who presented them, and the attendance records of the grand jurors. These minutes are turned into the grand jury clerk after each session, and are available for review by the assistants.

5. Who may be present: Rule 6(d)

a. Attorneys for the government - USAM 9-11.351

Fed. R. Crim. P. 54(c) defines the attorney for the government to include, among others, the United States Attorney and Assistant U.S. Attorneys. The authority of the U.S. Attorney and his assistants to conduct grand jury proceedings is 28 U.S.C. Section 515(a). See 28 U.S.C. Section 515(b) (special assistants to the Attorney General), and 28 U.S.C. Sections 543, 544 (special assistants to the U.S. Attorney).

b. Presence of the witness under examination - USAM 9-11.352

Only one witness may appear at a time. United States v. Echols, 413 F. Supp. 8 (E.D. La. 1975) (agent cannot be present to run movie projector while another witness is testifying). See United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971) (agent may not be present to operate a tape recorder while the witness is testifying).

(1) The lawyer for the witness may not be present. United States v. Mandujano, 425 U.S. 564 (1976); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Fitch, 472 F.2d 548 (9th Cir. 1973) (presence before grand jury not adversary proceeding triggering Sixth Amendment right to counsel);

(2) The parent of a child witness may not be present. United States v. Borys, 169 F. Supp. 366 (D. Alas. 1959).

(3) A deputy marshal may not be present to control an unruly witness. United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953).

c. Presence of an interpreter - USAM 9-11.354

Normally, the court interpreters are used in the grand jury. The interpreter is given a special oath by the foreman prior to any questioning of the witness. The assistant should insure that the interpreter understands the secrecy provisions relating to the grand jury.

d. Presence of a stenographer - USAM 9-11.353

Stenographers are sometimes allowed in place of electronic recording devices.

e. Deliberations

No one other than the jurors may be present during deliberations or voting.

D. Recordation

All proceedings before the grand jury must be recorded. Fed. R. Crim. P. 6(e)(1). Effective August 1, 1979, Rule 6(e) was amended to require that: "All proceedings (except deliberation and voting) shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case."

1. What must be recorded

a. The rule is mandatory - "shall be recorded," and does not exempt any proceedings except deliberations and voting.

b. All witness testimony (including agent testimony before accusatory grand jury or summary testimony before investigatory grand jury).

c. All prosecutor's comments.

This includes not only presentation on a particular case, but general comments made at the beginning or end of the day (often non-case related).

2. Transcription of recorded material

The amended rule only requires recordation, not transcription of the recording.

a. Routine accusatory grand jury proceedings

Proceedings related to the routine cases presented an accusatory grand juries by the AUSA in charge of the grand jury will not be transcribed automatically. The AUSA in charge of the

grand jury will request transcripts only in those cases which, in his/her discretion, appear to merit the expense, either because of the relative complexity of the case, or the likelihood of trial. Of course, the AUSA who is subsequently assigned the case for trial may order the transcript from the reporter as he/she desires.

b. Investigative grand jury proceedings

Each AUSA who interrogates witnesses before the grand jury is responsible for ordering the transcripts that he/she desires. This applies to document returns as well as fact witnesses.

c. Instructions to court reporters

Many reporters with whom USA's contract to record grand jury proceedings are instructed to ask each AUSA whether or not he/she desires a transcription of the proceedings. If a particular transcription should be given precedence, the AUSA should so instruct the reporter. Normally, the reporter has ten days to complete and deliver a transcript. If the transcript is needed sooner than that, the AUSA should so instruct the reporter, and notify the Administrative Assistant.

3. Reviewing the transcripts

The AUSA in charge of the grand jury will not review the transcripts for accuracy or completeness. Those transcripts will be routed to the AUSA assigned the case who should complete the evaluation forms. Obviously, each trial AUSA who handles a case before an accusatory grand jury or who questions witnesses before an investigatory grand jury should evaluate the transcripts he/she orders. Any errors should immediately be reported to the grand jury reporter, and a corrected transcript or an erratum should be prepared. Any significant problems must be immediately reported to the Administrative Assistant.

4. Miscellaneous matters related to recordation

a. The AUSA should never go off the record. This includes non-case related matters (i.e., lunch schedules, personal introduction, etc.)

b. If the AUSA reads the indictment (or summarizes repetitive counts), the statute, or the essential elements of the offense to the grand jury, that should be on the record. The AUSA must

insure that the record reflects evidence on each of the essential elements (i.e., that bank is federally insured, specific intent, if required, etc.).

c. Grand jurors upon occasion will ask questions calling for misleading, irrelevant, or prejudicial information (i.e., defendant's record, drug addiction, other investigations, other prejudicial conduct, defendant's race, that defendant has invoked a privilege, etc.).

There are competing concerns in formulating an answer: The recognition that jurors should be allowed the widest latitude in receiving evidence and the recognition that prosecutors have a duty to act as legal advisors to the grand jury and prevent infusion of irrelevant or prejudicial material.

(1) The AUSA may answer the inquiry and then advise the grand jurors of its limited value, if any.

(2) Alternatively, the AUSA may tactfully decline to answer the question, advising the grand jury that the material is not relevant, may be prejudicial, and could cause a claim that the grand jury was being prejudiced.

E. Outline of Procedures before the Grand Jury

1. Voir dire

At the first session of the grand jury, the government attorney, particularly in highly publicized or otherwise noteworthy cases, may want to consider conducting a procedure similar to a voir dire. This would ascertain whether any grand jurors may personally know the anticipated subjects, may be employed by a subject company, may have particular knowledge of previous or collateral investigations, or in any other way is biased toward the investigation. Any grand jurors who cannot fairly judge the case should be excused from participating in the case.

2. Summary of nature and scope of investigation

An introductory statement which summarizes the intended nature and scope of the investigation to the grand jury is usually helpful. This may be done by the AUSA or the case agent. If there are breaks in the

proceedings, it may be of assistnce to summarize the evidence to date to refresh recollection or to ascertain what problems the grand jurors have or what additional evidence they desire.

3. Transcript reviews by new or absent jurors

Throughout the grand jury investigation, the assistant must insure that any replacement grand juror, or any grand juror who missed a grand jury session, reviews the transcripts of the witnesses whose testimony they missed. In order to neutralize a post-indictment attack on the indictment based on the issues raised in United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied 452 U.S. 961 (1981),the attorney must develop a procedure to ensure that the record reflects that every grand juror who votes on the indictment has either attended every session of the grand jury or has read the transcripts of the witnesses he or she missed.

In United States v. Garner, 663 F.2d 834 (9th Cir. 1981), cert. denied, 102 S.Ct. 1750 (1982), the Ninth Circuit held that an indictment is proper even when some grand jurors voting to indict do not directly hear all the evidence, provided that replacement jurors rely on transcripts of all testimony heard by previous jurors. The mere possibility that an absent juror might not hear any evidence on one count is an insufficient basis for challenging the indictment. See also, United States v. Cronic, 675 F.2d 1126, 1130 (10th Cir. 1982); United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); cf. United States v. Barker, 675 F.2d 1055, 1058 (9th Cir. 1982) (per curiam) (court presumes that grand juror voting to indict has heard sufficient evidence).

As the investigation proceeds, the attorney should make available to new or absent grand jurors the transcripts of witnesses whose testimony they missed. The grand jurors should be directed, on the record, to read specifically enumerated transcripts, either before or after that day's session, or during recesses. After the grand juror has read the transcript, the assistant and/or the foreman and the grand juror should so indicate on the record.

If a replacement or absent grand juror has missed a substantial amount of testimony, it may be necessary to have those grand jurors report to the U. S. Attorney's Office on a future occasion to read the appropriate transcripts. At the next session of the grand jury, that grand juror should indicate on the

record the specific transcripts he read and when he did so.

It may also be appropriate in extreme cases, after consultation with the foreman, to suggest that a grand juror who has missed a significant proportion of the testimony abstain from voting, rather than to try to read voluminous or numerous transcripts. If this procedure is followed, the foreman should ensure that his minutes reflect the names of any grand jurors who abstain from voting.

Prior to returning an indictment in a case which resulted from a prolonged grand jury investigation, the assistant should review the grand jury attendance records kept by the foreman, which may be in the custody of the Grand Jury Clerk. The assistant should summarize for the record the fact that specific grand jurors who missed certain witnesses have read those transcripts, and have the foreman and the grand jurors affirm that fact.

4. Record of grand jury subpoenas

A record should be kept of all grand jury subpoenas duces tecum issued during the investigation. Many times the production of subpoenaed records and documents are accepted through the mail or by delivery to the agent, which only complicates the problems of accounting for all subpoenaed records.

Prior to closing the investigation, the attorney should review with the grand jury all subpoenas duces tecum issued in the case and discuss generally what was produced in response to each subpoena. This procedure will foreclose any argument that the AUSA improperly subpoenaed documents without informing the grand jury. Good record keeping in this area is a must. A separate grand jury subpoena file should be kept by the attorney in each investigation.

5. Strategy and tactics: Witnesses

The attorney must also carefully consider how to use the grand jury to perfect the government's case within the limits of the law. Rather than using the grand jury solely to obtain an indictment with the minimum of effort, the AUSA should be prepared to maximize the power of the grand jury to gather as much evidence as possible. There is nothing to be gained simply by the return of a valid indictment if the case cannot be proven beyond a reasonable doubt at trial.

It is virtually impossible to develop any hard and fast rules as to which witnesses should be called before the grand jury. Each case must be evaluated on its own facts. The following illustrations, however, may be helpful.

a. Under some circumstances, the assistant may want to take a witness before the grand jury to "lock in" the witness' testimony. This will usually occur when you have a reluctant or uncooperative witness, or a cooperating defendant who may become uncooperative with the passage of time.

b. If the credibility of a witness is crucial or questionable, that credibility can be tested in the grand jury.

c. If you are aware of potential defense witnesses, you should consider calling them before the grand jury, thereby exposing the nature of the defense so that you can prepare to meet it at trial, or, in some cases, catching the witness before he has a chance to fabricate a defense or conform his testimony to that of the defendant or other defense witnesses. This will effectively neutralize that person as a trial witness.

d. Be careful not to generate unnecessary Jencks Act (18 U.S.C. Section 3500) material. There should be a specific reason for taking each and every witness before the grand jury. Repetitive appearances by the same witness of the same subject before the grand jury can lead to inadvertent inconsistencies which a competent defense attorney will use to impeach the witness at trial. Furthermore, the witness should be given the opportunity in the grand jury to explain any inconsistencies between statements made outside the grand jury and his testimony before the grand jury.

6. Procedures before the grand jury

a. Each AUSA presents the case to the grand jury through sworn testimony.

(1) Before the witness is sworn, the AUSA should tell the grand jury that he/she is presenting a specific case listed on the Partial Report and give the defendant's names and a brief summary of the charges. If it is

an unusual case, a new grand jury, or a statute which the grand jury is not familiar with, then the attorney should read or summarize the statute and set forth the basic elements. It may also be appropriate to read or summarize the entire indictment.

(2) After the witness is sworn, the AUSA should then elicit the essential facts from the witness insuring that the witness sticks to the relevant facts and does not wander from this present testimony. Evidence must be presented to support each count and each overt act (if any).

(3) When the AUSA finishes asking questions of the witness, he may ask the grand jury if they have any questions of the witness.

b. After the AUSA has presented the evidence, the grand jury would be given the opportunity to ask any questions they have of the AUSA. The AUSA should advise the foreman to call the AUSA back into the grand jury room if any problems arise during deliberations that the AUSA may be able to resolve. Thereafter, the witness and the reporter leave the room for the grand jury to deliberate and vote.

(1) The AUSA should wait outside the door in the event that the grand jury has additional questions.

(2) When they have voted, they will knock on the door and advise the AUSA.

c. If the grand jury has voted to return a True Bill, then the AUSA gets the original indictment and the ballot from the foreman and returns them to the Grand Jury Clerk. The AUSA should check to make certain the foreman signed the indictment and the ballot. If the grand jury should return a "No Bill" (less than 12 concur), then the attorney should assist the foreman in advising the court in writing, forthwith if a complaint or information is pending against the defendant. Rule 6(f)

d. When all of the indictments for that day have been presented, the Grand Jury Clerk takes them to the U. S. Attorney for signature, and arranges for a judge or magistrate to take the "Partial Report."

(1) The U. S. Attorney may authorize the Chief Assistant, the Chief of Criminal, the Chief of Fraud, and the Chief of Narcotics to sign indictments in his absence.

e. The designated AUSA (usually the Grand Jury Assistant or the last one on the list) has the duty of having the entire grand jury appear before a judge to return the indictments and the Partial Report. The foreman signs the original Partial Report, the court clerk polls the grand jury, the Partial Report and the indictments are presented to the court, and the AUSA makes appropriate motions.

7. Pre-indictment conference

An attorney representing a target of an investigation will often request a pre-indictment conference. Such a conference offers the AUSA a good chance to learn of possible defenses or mitigating factors. In some cases the attorney may want to have his client cooperate.

If the conference will cause a delay in the investigation, it should be questioned. The AUSA may want to consider declining a conditional request, i.e., "I'd like a pre-indictment conference to talk about cooperation, but only if you intend to indict." Such a conference can be fruitless and result in delay.

At a pre-indictment conference, the AUSA should refrain from disclosing the facts of the investigation, particularly the witnesses cooperating, and confine disclosure to the nature of the charges and statutes being considered.

8. Closing statement

In some cases, it may be appropriate for the AUSA to give a closing statement to the grand jury in order to summarize the evidence. The little case law that exists indicates that there is no impropriety in the government attorney summarizing the evidence or making a closing statement. United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, sub nom Valley Bell Dairy Co., Inc. v. United States, 352 U.S. 981 (1957) (prosecutor may summarize evidence before a previous grand jury and urge grand jury to indict). It seems that few districts give a closing statement. Ad Hoc Task Force of U.S. Attorney's on Rule 6, July 1979. If the attorney makes a summary statement, the grand jury

should be cautioned that the attorney's remarks are not evidence.

9. Instructions

There is no constitutional requirement that the attorney give legal insturctions to the grand jury. United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Even if improper instructions are given, the indictment is not invalidated. United States v. Linetsky, 533 F.2d 192, 200-201 (5th Cir. 1976).

In United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982), the Eighth Circuit held that a government prosecutor who explains to the grand jury the elements of the offenses under investigation does not act as an improper witness before the grand jury in violation of Rule 6(d). Such conduct falls within the prosecutor's role as "guiding arm of the grand jury" and is consistent with his responsibility for an orderly and intelligible presentation of the case.

F. Transferring Investigations from Panel to Panel

In some jurisdictions it becomes necessary to transfer an investigation from one grand jury in the district to another grand jury in the district. The transfer may arise when the grand jury expires, or for example, subpoenaed documents have been returned before one grand jury, but the investigation is going to proceed before another grand jury panel.

In effectuating a transfer, consider observing the following:

1. Presentation of evidence to new grand jury

Usually, all documents and testimony before the first grand jury should be presented to the new grand jury. United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975). This is generally the rule and should be followed whenever feasible. See United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979). There is room for some discretion, however, in situations where numerous witnesses were called before the first grand jury in a particular investigation, and only a small percentage were actually necessary for the proposed indictment. However, if the AUSA believes that re-presenting all of the live testimony is not necessary, or that a summary of the evidence would be proper, he/she should first discuss the matter with his/her supervisor. The use of summaries of prior testimony can bias a grand jury and void the

indictment. United States v. Mahoney, 495 F. Supp. 1270 (E.D. Pa. 1980).

2. Use of transcripts

If the case is going to be represented via transcripts, the best procedure is to have the foreman or one of the grand jurors read the transcripts aloud to the other members. This prevents any claim or improper inflection, etc., if the prosecutor or agent reads the testimony. The court reporter should note that the foreman read the testimony, but it is not necessary to record the entire testimony. When he finishes reading the transcript the person reading it should state on the record that he/she has accurately read the entire transcript to the other grand jurors.

3. Hearsay nature of transcripts

The new grand jury must be advised of the hearsay nature of the transcripts and be offered the opportunity to recall any witness.

4. Credibility problems

Any specific credibility problem relating to any witness whose transcript has been read to the grand jury should be brought to their attention by the assistant.

5. Any exculpatory evidence must be re-presented

6. Consider whether a disclosure order under Rule 6(e)(3)(C)(i) is necessary

There is no abuse of power where successive grand juries consider matters previously presented to another grand jury. Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1116 (E.D. Pa. 1976). Therefore, you may subpoena documents before one grand jury and thereafter present the case to another grand jury. This often occurs at the beginning of a lengthy investigation where the attorney does not anticipate extensive grand jury work, other than document returns, for some period of time. If this practice is used, be sure the new grand jury is properly advised of all prior grand jury matters. See In re Grand Jury Proceeding (Sutton), 658 F.2d 782 (10th Cir. 1981) (when a grand jury's term expires with a subpoena for documents outstanding, a grand jury may obtain the documents without a court order to transfer the documents).

Normally, evidence should not be presented before several different grand juries at the same time. However, there are exceptions, such as when you wish to subpoena a target and do not know if he/she will refuse to testify under the Fifth Amendment, or it is necessary to present evidence which could be highly prejudicial.

An attorney can represent a case to a second grand jury when the first grand jury returned a "no-bill". United States v. Thompson, 251 U.S. 407 (1920). To represent such a case requires advance approval of the responsible Assistant Attorney General. USAM 9-11.220. It may be appropriate to advise the second grand jury that a "no-bill" was returned by a prior grand jury.

G. Superseding Indictments

The procedures for preparing and presenting superseding indictments to the grand jury are the same as for original indictments, with the following exceptions.

1. Caption

When the indictment is being typed, the caption should reflect that it is a superseding indictment, and should reference the case number of the original indictment.

2. The superseding indictment should be presented to the same grand jury that returned the original indictment

a. Under exceptional circumstances (e.g., original grand jury panel has expired, not enough time to bring in original panel, etc.), the case can be re-presented in its entirety to a different panel.

b. Be aware of scheduling problems so that multiple panels are not brought in needlessly.

3. Advise to grand jury

The grand jury should be advised that a superseding indictment is being presented, the date of the original testimony and indictment, the nature of the intended change in the indictment, and the manner in which the case will be re-presented.

4. Live testimony

a. Depending upon the nature of the change, it may be necessary to present live testimony as to some or all of the indictment.

b. Technical changes, such as redrafting of the language of the indictment, correction of typographical errors, or the addition or modification of particular counts, may not require the presentation of any additional witnesses if the prior testimony already supports the anticipated changes.

c. In some cases, the transcripts of prior testimony will suffice.

d. In other cases, it may be necessary to present the entire case again or to present additional witnesses to support the requested changes.

5. Avoid the appearance of vindictveness

Be careful to avoid any appearance of vindictiveness when adding additional counts to superseding indictments after a hung jury, dismissal, reversal on appeal, etc. See USAM 9-2.141.

H. Bond Recommendations in the Grand Jury

1. Bond recommendations

a. When the AUSA or the Grand Jury Assistant is preparing the indictment authorization form, a bond recommendation should be included.

b. If the defendant has already been arrested and bail has already been set, the AUSA should adopt the existing bail setting as his/her recommendation, unless special circumstances or new facts exist which were not known to the magistrate when bail was set.

c. If the defendant has not been arrested or bail has not been set, the AUSA should recommend bail in an appropriate amount, considering all relevant circumstances.

2. The bail recommendation will be included on the Partial Report

a. The grand jury is free to set its own bail

recommendation if they disagree with the recommendation of the AUSA.

b. The AUSA presenting the case to the grand jury should ensure that the grand jury is advised of the bail recommended by the AUSA.

(1) If the bail recommendation of the AUSA is unusually high or low, the AUSA should explain the reasons for the recommendation to the grand jury.

(2) If the bond information contains facts which could be considered prejudicial to the defendant, then the bond information should be presented after the grand jury has voted on the indictment.

c. If the bond recommendation is unusually high or low, then the AUSA should also make sure that the assistant presenting the Partial Report is aware of the reasons, because the judge will often ask what the reasons are for the recommendations.

d. The grand jury's recommendation becomes a Court Order when the partial is returned, but the defendant is entitled to a bail review [(18 U.S.C. 3146(a))].

I. Secret/Sealed Indictments

When the defendants named in the indictment have not yet been arrested, and there is reason to believe that the defendants will flee if they learn of the indictment, the indictment should be kept secret and be sealed by the judge before whom the indictment and partial report are returned. This may also be appropriate in especially sensitive cases regardless of the likelihood that the defendant would flee.

II. SECRECY OF GRAND JURY PROCEEDINGS: RULE 6(e)

II. SECRECY OF GRAND JURY PROCEEDINGS: RULE 6(e)

A. The Obligation of Secrecy

The rule of grand jury secrecy has been upheld consistently by the Supreme Court, which summarized the reasons for safeguarding the confidentiality of grand jury proceedings as follows:

> (1) [to] prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to the indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. United States v. Proctor & Gamble Co., 356 U.S. 677, 681-682, n.6 (1958)(citation omitted).

This judicial tradition has been codified in Fed. R. Crim. P. 6(e)(2), which imposes an obligation of secrecy on all participants, except witnesses, in grand jury proceedings.

B. Disclosure to Attorneys for the Government: Rule 6(e)(3)(A)(i)

Despite the obligation of secrecy, the rule permits disclosure of matters occurring before the grand jury under certain circumstances.

1. Definition

An "attorney for the government" has free access to grand jury material for use in the performance of the attorney's duties. Fed. R. Crim. P. 6(e)(3)(A)(i).

a. An "attorney for the government" is defined in the Notes of Advisory Committee for Fed. R. Crim. P. 54(c). This definition includes the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, and an authorized Assistant United States Attorney.

b. The phrase "attorney for the government" includes only attorneys for the United States government and not for any county or state government. In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973); In re Holovachka, 317 F.2d 834 (7th Cir. 1963); Corona Construction Co. v. Ampress Brick Co., Inc., 376 F.Supp. 598 (N.D. Ill. 1974).

c. An "attorney for the government" does not include an attorney for an administrative agency. In re Grand Jury Proceedings, 309 F.2d 440, 443 (3rd Cir. 1962).

d. Disclosure is permitted to a civil AUSA or a civil Department of Justice attorney, for use in the preparation of a civil suit. In re Grand Jury, 583 F.2d 128 (5th Cir. 1978) (following a grand jury investigation, indictment and plea, the U.S. Attorney sought a court order to disclose grand jury matters to Department of Justice attorneys to defend a civil action; the court held that no 6(e) order or notice was necessary). See also, In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

2. Policy

As a matter of policy, however, a non-civil AUSA may not want to disclose grand jury materials to a civil AUSA without first obtaining a court order, especially while the grand jury investigation is still in progress. Without a 6(e) order, discovery to the civil division of the U.S. Attorney's Office should only be made with the approval of the U.S. Attorney.

C. Disclosure to Other Government Personnel: Rules 6(e)(3)(A)(ii) and 6(e)(3)(B)

1. When necessary to assist in enforcing federal criminal law

Rule 6(e)(3)(A)(ii) permits a government attorney to disclose grand jury matter to "such government personnel" as the attorney deems necessary to assist in the performance of the attorney's duty to enforce federal criminal law.

2. Notice to the court

The attorney shall "promptly provide" notice to the court stating the names of the particular government personnel to whom disclosure is made. Rule 6(e)(3)(B).

3. Record of disclosure

The record should reflect that the government personnel have been cautioned to maintain grand jury secrecy and that the materials are for use in the enforcement of federal criminal laws only. Where the officer to whom disclosure is contemplated has administrative duties (such as an IRS agent), the better practice is to write a letter to the officer stating that disclosure is being made in the officer's capacity as an assistant to the U.S. Attorney and the grand jury in the criminal investigation, and that the information disclosed may not be used for any other purpose.

4. Need for outside expertise

Rule 6(e)(3)(ii) thus allows an AUSA to disclose grand jury testimony to investigative personnel from the government agencies "without the time-consuming requirement of prior judicial interposition," and such disclosure will help meet "an increasing need on the part of government attorneys to make use of outside expertise in complex litigation." Notes of Advisory Committee on Rules. Moreover, such agents may use the materials in their interviews. United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979).

5. State and local officials

Whether or not the term "government personnel," as used in Rule 6(e)(3)(A)(ii), is broad enough to include state or local law enforcement officers is open to question.

a. In one case, In re Grand Jury Proceedings, 445 F. Supp. 349 (D. R.I.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978), the court concluded that the term applied only to employees of the federal government; state or local police officers, even if assisting in the criminal investigation, were not within the rule.

b. To the contrary, In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979), concluded that Rule 6(e)(2)(A)(ii) -- now Rule 6(e)(3)(A)(ii) -- authorized disclosure to state and local personnel who were assisting the attorney for the government in the grand jury investigation. Basically, the court in the New York opinion concluded that the legislative history demonstrated that Congress did not literally mean what it said. See Sen. Rep. No. 95-354, 95th Cong., 1st Sess., at 2, reprinted in [1977] U.S. Code Cong. & Admin. News, at 527, 529-532.

c. Until more definitive rulings are made by the courts, the safest way to proceed when dealing with state or local officers is to seek authorization to disclose.

D. Disclosure Under Court Order: Rule 6(e)(3)(C)(i)

1. General rule

Disclosure of otherwise non-disclosable matter is permitted under Rule 6(e)(3)(C)(i) when the court so directs "preliminarily to or in connection with a judicial proceeding."

Judge Learned Hand, in the seminal case, defined "judicial proceeding" as follows:

> [T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.
>
> Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958)(emphasis added).

Rosenberry held that disclosure of grand jury minutes to the New York City Bar's Grievance Committee for investigation as to whether disciplinary proceedings should be instituted before the Appellate Division of the New York Supreme Court was "preliminary to a judicial proceeding." The holding was framed on the Grievance Committee's

quasi-judicial nature, and on the fact that judicial action on charges predicated on the Committee's findings necessarily followed the Committee's hearings. See also, In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981) (disclosure of grand jury material to IRS as preliminary to a judicial proceedings); In re The Special February 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981) cert. granted 102 S.Ct. 955 (1982). (nondisclosure protection extended to documents not actually read to the grand jury; denied disclosure to IRS of grand jury material used to indict a taxpayer, tax liability too speculative to constitute preliminary to or in connection with a related judicial proceeding; court's supervisory power very limited in this area), cert. granted, 102 S.Ct. 955 (1982); In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) (police board disciplinary hearing); United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977) (a procedure for the reprimand, supervision, demotion or dismissal of city employees which did not permit any judicial review was not preliminary to or in connection with a judicial proceeding); In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960) (city disciplinary proceedings, nonreviewable, cannot be disclosed).

State judicial proceedings are encompassed by the rule. United States v. Goldman, 439 F.Supp. 337 (S.D.N.Y. 1977).

2. State/Local Law Enforcement Personnel

United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979), upholds disclosure to state law enforcement personnel pursuant to court order. The order should limit use of disclosed material to the enforcement of federal criminal laws. Furthermore, in Stanford, the state personnel were sworn as agents of the grand jury and cautioned them about secrecy. The court specifically held that a grand jury proceeding is preliminary to a court proceeding. 589 F.2d at 292. The 6(e) order should name the recipient and limit use of the disclosed materials to the immediate investigation.

a. Stanford is reflective of the policy expressed in the legislative history to Rule 6(e). "There is no reason for a barrier of secrecy to exist between the facets of the

criminal justice system upon which we all depend to enforce the criminal laws." Sen.Rep. No. 95-354, 95th Cong. 1st Sess., at 8, reprinted in [1977] U.S. Code Cong. & Admin. News, at 527. In re 1979 Grand Jury Proceedings, 479 F.Supp. 93, 96-97 (E.D.N.Y. 1979).

b. Several other cases, however, have reached a contrary result. The court in In re Grand Jury Proceedings, 445 F. Supp. 349 (D. R.I.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978), concluded that disclosure under Rule 6(e)(3)(C)(i) to a state police detective who was assisting the grand jury in the investigation of federal crimes was not authorized. The court held that there was no "authority for a court to order disclosure to assist with the present grand jury proceedings." 445 F. Supp. at 350.

Furthermore, more recently, United States v. Tager, 638 F.2d 167 (10th Cir. 1980), held that the rule did not permit court-ordered disclosure to a private investigator (who had initially referred the case to federal investigators), so that he could continue to assist the investigation. Tager rejected the conclusion in United States v. Stanford, supra, that grand jury proceedings are "judicial proceedings" within the meaning of Rule 6(e)(3)(C)(i), and distinguished Stanford because that case dealt with state law enforcement personnel rather than a private investigator.

c. The Tager case casts some doubt on the authority of a court to authorize disclosure to non-law enforcement expert witnesses, such as computer experts, accountants, medical experts, etc., who are deemed necessary by the attorney for the government (and the grand jury) to analyze, examine, or interpret grand jury evidence.

d. Prior to seeking disclosure to state and local law enforcement agents or expert witnesses, an AUSA should consult with the Chief of the criminal division of the U.S. Attorney's office. The assistant should

prepare an ex parte application or motion for disclosure, accompanied by an affidavit which demonstrates (1) a compelling need for the disclosure, (2) that the person for whom disclosure is sought has been warned of the secrecy provisions relating to grand jury materials, and (3) that the disclosure is limited to the investigation of federal crimes. A proposed order specifying (1) the name(s) of the persons for whom disclosure is sought, (2) the limitations on the use of the materials to be disclosed, and (3) a description of the materials disclosed should accompany the application and affidavit.

e. A distinction can be drawn between pre-indictment and pre-trial (viz., post-indictment) requests for disclosure. The cases and problems discussed above relate specifically to pre-indictment disclosures. Those problems dissipate, and the propriety of disclosure increases, when requesting disclosure to prepare for trial, since such disclosure is clearly "in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i).

3. Unauthorized disclosures

It was improper to release grand jury transcripts to the U.S. Parole Commission and a probation officer to assist them in deciding whether to revoke the probation of the subject under investigation. None of the disclosure provisions of Rule 6(e) permits such disclosure. Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

E. Disclosure to Defendant or Other Parties Under Court Order; Rule 6(e)(3)(C)(ii)

1. Disclosure when grounds for dismissal

Disclosure may be made at a defendant's request "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Rule 6(e)(3)(C)(ii).

a. In some districts, a defendant may file a formal motion for disclosure, or may seek the same relief at the omnibus hearing stage.

b. If disclosure is granted by the court under either procedure, the court should sign an order to that effect to ensure that the record is clear.

c. Unless there is a compelling reason not to disclose, such as danger to the witness, ongoing investigation, etc., do not oppose the disclosure of grand jury transcripts, either at the omnibus stage or motion stage. Disclosure can be conditional, i.e., ten (10) days prior to trial.

d. Mere "unsubstantiated, speculative assertions of improprieties in the grand jury proceedings" are not sufficient to demonstrate the "particularized need" necessary to justify disclosure. United States v. Rubin, 559 F.2d 975, 988 (5th Cir. 1977), vacated on other grounds, 439 U.S. 810 (1978). Accord, United States v. King, 478 F.2d 494, 507 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974). Assertions of impropriety, based only on the speed with which the indictment was returned, do not justify disclosure or necessitate an in camera inspection by the trial judge. United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980).

2. Defendant has a right to a transcript of his testimony

A defendant is entitled to a transcript of his or her own grand jury testimony (Fed. R. Crim. P. 16(a)(3)) and copies of the grand jury testimony of government witnesses after they have testified on direct examination at trial (Jencks Act, 18 U.S.C. §3500(e)(3)).

3. Particularized need test

The court may permit disclosure to a private party only when the requesting party has demonstrated a particularized need that outweighs the policy of grand jury secrecy. Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979). Such disclosure, if ordered, "may include protective limitations on the use of the disclosed material." Id. at 223.

4. Balancing test

Courts generally balance the alleged particularized need against the reasons established for secrecy. As the considerations justifying secrecy become less relevant -- for instance, where the grand jury has ended its activities -- a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. U. S. Industries, Inc. v. United States District Court, 345 F.2d 18, 21 (9th Cir.), cert. denied 382 U.S. 814 (1965).

Examples:

United States v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 102 S.Ct. 2932 (1982) (district court abused discretion by not requiring defendants to show particularized need).

United States v. Mayes, 670 F.2d 126 (9th Cir. 1982) (no abuse of discretion in disclosure to expert witness preparing grand jury testimony).

In re Grand Jury Investigation (New Jersey State Commission of Investigation), 630 F.2d 996 (3rd Cir. 1980) (party need not demonstrate compelling need for disclosure when documents sought intended for use in investigation of unrelated matter because all documents reviewed by grand jury are not matters occurring before grand jury).

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977) (plaintiff's need for defendant's grand jury transcripts for use in civil antitrust action outweighed need for secrecy; plaintiff needed transcripts to refresh recollection and impeach witness at trial; secrecy dissipated because criminal investigation terminated, and defendants had received transcripts during criminal discovery).

United States Industries, Inc. v. United States District Court, supra. (Court-ordered disclosure of government report to probation for sentencing, which contained recital of grand jury material, to plaintiffs in civil antitrust suit. Criminal case had ended. Need justified by liberal discovery policy.)

United States v. Interstate Dress Carriers Inc., 280 F.2d 52 (2d Cir. 1960). (Rule 6(e) order approved permitting ICC to review grand jury

documents regarding a motor carrier. ICC had independent authority to obtain records; records were being examined for their intrinsic value and not to determine what occurred before grand jury.)

In re Grand Jury Investigation of Ven-Fuel, 441 F.Supp. 1299 (M.D. Fla. 1977). (Rule 6(e) order approved disclosing documents to congressional subcommittee. Indictment had been returned; the subcommittee had independent authority to obtain documents.)

F. Disclosure to Other Grand Jury Panels

Can the prosecutor present grand jury material obtained by one grand jury panel to a second grand jury panel without first obtaining a disclosure order pursuant to Rule 6(e)(3)(C)(i)? Does it matter whether the two grand jury panels are in the same district as opposed to different districts? Is the rule different if the grand jury material consists of documents and records as opposed to transcripts of the testimony of fact witnesses?

1. Cases requiring a court order

a. Two cases have squarely held that a court order pursuant to Rule 6(e)(3)(C)(i) is required. Both cases involved the transfer of transcripts of the testimony of fact witnesses from a grand jury in one district to a grand jury in another. United States v. Stone, 633 F.2d 1272, 1275 (9th Cir. 1979); United States v. Malatesta, 583 F.2d 748, 752-754 (5th Cir. 1978).

The analysis of this issue in the Stone case was limited, due to the concession by the government that it had violated the disclosure provisions of Rule 6(e). In Malatesta, however, the court relied upon the literal language of Rule 6(e), refusing to sanction a broader policy of disclosure absent legislative amendment.

Fundamental to both decisions was a judicial concern over possible prosecutorial abuse. Neither court was willing to sanction a procedure which would allow the government unfettered discretion in the re-presentation of material to a second grand jury. Both courts demonstrated a desire to

ensure that a judicial officer controlled the kind and amount of material that would be transferred from grand jury to grand jury.

Both decisions refused to dismiss the indictments, but only because there was no evidence of prosecutorial abuse in the way the material was re-presented to the second grand juries. Both decisions reminded the government that a contempt citation was the appropriate sanction.

While both cases dealt with district-to-district transfers, there is nothing in the language of either case to suggest that the rule would be any different in an intra-district transfer.

b. One other Court of Appeals case, In re Kitzer, 369 F.2d 677 (9th Cir. 1966), implies, but does not hold, that disclosure orders are required when transferring grand jury material (transcripts of fact witnesses) from one district to another. The Rule 6(e) issue was not squarely presented. See Wright, Federal Practice and Procedure, §107 (1982).

c. In United States v. Phillips, 664 F.2d 971, cert. denied 102 S.Ct. 2965 and 103 S.Ct. 208 (1982), the Fifth Circuit held that a government attorney violated Rule 6(e) when he disclosed the grand jury material of a prior grand jury to a successor grand jury without first obtaining a court order, but that the dismissal of the indictment would not necessarily follow because there had been no showing of impairment of the substantial rights of the defendant, nor that the integrity of the grand jury proceedings had been inpugned.

d. Other cases requiring a court order include:

- In re Minkoff, 349 F. Supp. 154 (D. R.I. 1972);
- In re Grand Jury Investigation of the Banana Industry, 214 F. Supp. 856 (D. Md. 1963);

- See In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522, 532 (W.D. Tex. 1973).

2. Cases not requiring a court order

a. Two cases have squarely held that a court order is not required when transferring grand jury material from one panel to another, under completely different circumstances.

In United States v. Garcia, 420 F.2d 309 (2d Cir. 1970), a prosecution for perjury, the defendant's testimony before one grand jury was re-presented without a disclosure order to a second grand jury in the same district, which indicted her. In rejecting her argument, the court reasoned:

> If government attorneys have the right to use grand jury minutes to the extent of making them public during a trial, without court approval, it is certainly no less a proper performance of their duties to use them without court approval before another grand jury where the proceedings are secret and the purpose is the enforcement of the perjury and false statement statutes.

420 F.2d at 311.

United States v. Malatesta, supra, distinguished the Garcia case on the grounds that Garcia involved a perjury prosecution.

In United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979), cert. denied, 446 U.S. 917 (1980), two U.S. Attorneys' Offices and two grand juries in adjacent districts were conducting a joint investigation. Documents subpoenaed by one grand jury were turned over by one prosecutor to the other grand jury without a court order for disclosure. The court found no violation of Rule 6(e), since the second grand jury received the documents "in the course of the investigation of the matter at hand." 609 F.2d at 1097.

b. In United States v. E. H. Koester Bakery Co., 334 F. Supp. 377 (D. Md. 1971), documents and records which had been subpoenaed by one grand jury were turned over to a second grand jury in the same district without a disclosure order. After noting that the first grand jury had heard no oral testimony in the case, and had never studied the documents themselves, the court concluded:

> The purpose of a court order in connection with successive grand juries is to guard against prejudice to defendants which might result where one grand jury has failed to indict and government counsel seeks to be selective in the matters to be presented to another grand jury convened to consider the same subject matter. Here there could have been no possible prejudice . . . since the first grand jury saw no documents and heard no testimony and therefore no part of any testimony taken before a previous grand jury nor any documents seen by them were used a second time.

334 F. Supp. at 382.

c. Both United States v. Chanen, 549 F.2d 1306 (9th Cir. 1976), cert. denied, 434 U.S. 825 (1977), and United States v. Samango, 607 F.2d 877 (9th Cir. 1979), involved the intra-district transfer of transcripts of fact witnesses and documents from one grand jury to another, apparently without disclosure orders. However, no Rule 6(e) issue was involved in either case. The issues presented dealt with abuse of the grand jury in the presentation of hearsay (transcripts) rather than live witnesses.

G. Orders for Nondisclosure ("Gag" Orders)

1. General rule

There is no specific rule or statute that creates or permits authority for a "gag" order. In fact, Fed. R. Crim. P. 6(e)(2) provides: "No obligation of secrecy may be imposed on any person except in accordance with this rule." Accordingly,

any witness subpoenaed to appear before a grand jury cannot be compelled to keep secret the fact that he/she is a witness, has been subpoenaed, or what transpired before the grand jury.

2. No rule requiring disclosure

On the other hand, there is no federal rule or statute which requires a witness to disclose to anyone else the fact that the witness has been subpoenaed to appear before a federal grand jury, except the Financial Privacy Act (12 U.S.C. §3401 et seq.) in certain circumstances.

a. Grand jury subpoenaes are expressly excluded from that Act, 12 U.S.C. 3413(i), with certain exceptions not relevant here. Accordingly, the customer disclosure provisions of the Act do not apply when issuing grand jury subpoenas to financial institutions for bank records.

b. By the same token, since the Act does not apply to grand jury subpoenas, neither do the nondisclosure provisions of the Act apply with respect to court ordered delayed notice to the customer (12 U.S.C. §3409).

c. In fact, the legislative history of the Act supports the view that customer notice and disclosure of grand jury subpoenas is contrary to the intent of the Act. See H.Rep. No. 95-1383 at 228, U.S. Code Cong. & Admin. News, at 9358. [1979]

(1) In many cases customer notice would frustrate the investigation or endanger the physical safety of grand jurors, witnesses, and officials working with the grand jury.

(2) Such notice jeopardizes grand jury secrecy.

(3) All duties of customer notification set out in the Act are imposed upon government authorities, not the financial institutions.

(4) No legitimate purpose is served by customer notification since customers have no standing to challenge government

access to records pursuant to grand jury subpoena (See United States v. Miller, 425 U.S. 435 (1976)).

Supplement to USAM dated September 21, 1979, Section XV (new USAM 9-4.844a).

3. Issuance of protective orders by the court

While it is by no means clear, and notwithstanding the impediments set forth above, it is the position of the Department of Justice [Supplement to USAM dated September 21, 1979, Section XV, (new USAM 9-4.844a)] that the district court has the authority to prohibit customer notice upon ex parte motion of the government. The arguments in support of this position are:

a. The Financial Privacy Act, by authorizing imposition of an obligation of secrecy upon financial institutions in connection with administrative subpoenas, trial subpoenas, and formal written requests, implicitly authorizes a similar obligation in connection with grand jury subpoenas, under 12 U.S.C. Section 3409 and 28 U.S.C. Section 1651.

b. Such orders do not conflict with Rule 6(e) because they are limited to the fact of receipt of a grand jury subpoena rather than to matters occurring before the grand jury.

c. In the alternative, even if Rule 6(e) is found to embrace the fact of receipt of a grand jury subpoena, protective orders directed to financial institutions are not subject to Rule 6(e) because such orders are based upon the institution's status as a record custodian regulated by the Financial Privacy Act rather than upon the financial institution's status as a grand jury witness. Supporting this interpretation is the fact that it would be ironic if courts were empowered to prohibit customer notification in connection with a formal written request but not in connection with a constitutionally contemplated form of legal process which was excepted from the Financial Privacy Act because customer notification in connection therewith would jeopardize grand jury secrecy.

4. Alternatives

Instead of utilizing grand jury subpoenas for financial records, the assistant should consider the feasibility of acquiring the records pursuant to other provisions of the Financial Privacy Act.

a. Administrative subpoenas and summons, 12 U.S.C. Section 3405;

b. Search warrants, 12 U.S.C. Section 3406;

c. Judicial (non-grand jury) subpoenas, 12 U.S.C. Section 3407;

d. Formal written requests, 12 U.S.C. Section 3408.

The delayed notice provisions of 12 U.S.C. Section 3409 apply to each of these alternatives, thus avoiding the problems associated with "gag" orders for grand jury subpoenas.

H. Intrusions

Defense counsel have increasingly begun to challenge indictments on the grounds of unauthorized intrusions on the grand jury in violation of Rule 6(d).

Rule 6(d) lists those persons who may be present during grand jury sessions: "no person other than the jurors may be present while the grand jury is deliberating or voting."

In United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), the court held that five intrusions by unauthorized persons into the grand jury during a period of eighteen months did not constitute "demonstrable prejudice or substantial threat thereof." Id. at 1185. However, the court noted that "each situation should be addressed on a sui generis basis," id., and warned prosecutors not to interpret the favorable result here as encouragement to depart from "scrupulous compliance with Fed. R. Crm. P. 6(d)." Id. at 1186.

III. EVIDENCE PRESENTED TO THE GRAND JURY

III. EVIDENCE PRESENTED TO THE GRAND JURY

A. Permissible Evidence

The grand jury is generally not restricted by technical procedure or evidentiary rules. United States v. Calandra, 414 U.S. 338, 343 (1974). The rules of evidence (other than the rule with respect to privileges) do not apply to grand jury proceedings. Fed. R. Evid. 1101(d)(2).

1. Hearsay

Hearsay is permitted before the grand jury. Costello v. United States, 350 U.S. 359 (1956). Care must be taken, however, not to mislead a grand jury concerning the hearsay nature of the evidence presented, United States v. Estepa, 471 F.2d 1132 (2nd Cir. 1972); and an indictment is subject to dismissal if the actions of the prosecutor in presenting evidence undermines the integrity of the judicial process or results in fundamental unfairness. United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.1976), cert. denied, 434 U.S. 825 (1977). Sound judgment should be exercised in determining what evidence to present through direct testimony and what to present through hearsay testimony. Whenever possible, live witnesses should be used rather than hearsay witnesses, especially in assault and rape cases, and any other case which depends substantially on the credibility of lay witnesses. Furthermore, when hearsay is presented, each level of hearsay must be fully explained to the grand jury. As a general rule, a prosecutor should not seek an indictment in other than routine cases unless it is supported by substantial non-hearsay evidence before the grand jury.

2. Illegally obtained or incompetent evidence

Illegally obtained or otherwise incompetent evidence is admissible. United States v. Calandra, supra. Consideration of this evidence does not invalidate an indictment. Costello v. United States, supra. Although illegally obtained evidence is admissible before a grand jury, the grand jury itself may not obtain evidence in an illegal manner. The grand jury must respect any

valid privileges asserted, whether established by the Constitution, statutes, or the common law. United States v. Calandra, supra, at 346. In addition, under 18 U.S.C. Sections 2515 and 3504, a witness may challenge any questioning based on illegal interception of oral or wire communications of the witness. Gelbard v. United States, 408 U.S. 41 (1972). Again, however, the fact that evidence derived from an illegal interception was presented to a grand jury would not invalidate an indictment. Id. at 60.

Pursuant to Department of Justice policy, a prosecutor,

> should not present to the grand jury for use against a person whose constitutional rights clearly have been violated, evidence which the prosecutor knows was obtained as a direct result of a constitutional violation.

USAM 9-11.331. Further, the prosecutor should not seek indictments where convictions cannot be obtained because of inadmissible evidence.

3. Evidence derived from intercepted communications (wiretap)

A witness before the grand jury may testify concerning the contents of an intercepted communication or evidence derived therefrom if he obtained that information in a manner authorized by 18 U.S.C. Section 2517(1) or (2). 18 U.S.C. Section 2517(3). However, if the evidence related to an offense not specified in the original interception order, a court order authorizing disclosure is required. 18 U.S.C. Section 2517(5). United States v. Brodson, 528 F.2d 214 (7th Cir. 1975). See USAM 9-7.550.

The method of preparing and presenting such evidence is summarized at USAM 9-7.610.

B. Presentation of Exculpatory Evidence

1. General rule

The prosecutor is under no legal obligation, by statute or case law, to present exculpatory

evidence to a grand jury. United States v. Kennedy, 564 F.2d 1329, 1335-1338 (9th Cir. 1977), cert. denied, sub nom., Meyers v. United States, 435 U.S. 944 (1978); United States v. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976); Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968). Courts will generally not inquire into what evidence was presented to the grand jury. Costello v. United States, supra; United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974).

2. Department of Justice policy

Nevertheless, under Department of Justice policy, the prosecutor should present exculpatory evidence to the grand jury "under many circumstances." USAM 9-11.334. As an example, the manual states:

> when a prosecutor conducting a grand jury investigation is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

If it is unclear whether known evidence is exculpatory, a prosecutor should err on the side of disclosure.

In routine immigration cases involving material witnesses, the grand jury should be advised if the material witnesses have made inconsistent statements. The case agent should testify concerning any sworn statements made by the material witnesses, and any subsequent statements of which he or the assistant is aware.

The AUSA should evaluate any statements made by the defendant to determine if they are exculpatory (substantial evidence which directly negates guilt).

3. Requests by the defense to present evidence

Often a defendant or defense counsel will request that certain evidence be presented to the grand jury. Such requests should be dealt with on

a case-by-case basis, being mindful of the policy of presenting exculpatory evidence.

If a target or subject wishes to testify or present a written statement, he or she should be given the opportunity, unless it would cause substantial delay. The grand jury should always be advised of the request and be permitted to make the decision.

If the defendant or defense counsel requests that witnesses be allowed to testify, the prosecutor should seek a proffer of the testimony. Unless the prosecutor decides on his own that the proffered testimony should be presented, the grand jury should be advised of the request and the proffered testimony, and be asked if it wants to have the testimony presented. Unless it would cause substantial delay, the prosecutor should honor the request. Tactically, this provides an opportunity for the prosecutor to hear and evaluate the defense in advance.

The presentation of statements in lieu of testimony by third-party witnesses is to be handled on a case-by-case basis, always advising the grand jury of the request. Although the value of cross-examining the witness and having the statement under oath is lost, the advantage of advance notice of the defense is still helpful.

C. Impeaching Government Witnesses

The Seventh Circuit has recognized that the grand jury is not an adversary proceeding and the government need not "produce evidence that undermines the credibility of its witnesses." United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975); Accord, United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977).

> [The defendant] was accorded the full protection of the Fifth and Fourteenth Amendments when, at the trial on the merits, he was permitted to expose all the facts bearing upon his guilt or innocence. Loraine v. United States, 396 F.2d 335, 339 (9th Cir. 1968).

D. Testimonial Privilege: USAM 9-11.224

Pursuant to Fed. R. Evid. 1101(c) and (d)(2), the rules with respect to privileges as set forth in Fed. R. Evid. 501, apply to witnesses before the grand jury. Accordingly, in addition to the constitutional and statutory privileges that may apply, a witness can assert in the grand jury any common law privilege recognized by the federal courts. See United States v. Woodall, 438 F.2d 1317 (5th Cir.), cert. denied, 403 U.S. 933 (1970).

E. Answering Questions about Past Criminal Record

The prosecutor should never answer a juror's questions regarding a defendant's prior criminal record. In addition, where a prior conviction is an essential element of the crime sought to be charged, e.g., a felon in possession of a firearm, the case agent or some other witness should testify as to the defendant's record. Where a subject with a prior record testifies before a grand jury, the Assistant may impeach the subject by questioning him regarding his prior record. In response to questions as to the record of the defendant, the Assistant should advise the jury that generally this type of information is not admissible at trial because it is considered irrelevant and possibly prejudicial, and therefore should not be considered by them in deciding the question of probable cause. If a juror insists upon knowing the record of the defendant, the Assistant should ask the jury first to vote on the question of whether they need to know the record of the defendant. The Assistant should leave while the grand jurors deliberate on the question. If they vote affirmatively, have the agent testify as to the defendant's record. There is some authority to the effect that the jury's knowledge of the defendant's record will not invalidate the indictment. See United States v. Camporeale, 515 F.2d 184 (2nd Cir. 1975)(grand jury's knowledge of a witness' prior criminal record did not preclude filing subsequent perjury indictment).

F. Relating Facts not in Evidence

In answering a grand juror's questions, Assistants should not make it a habit to relate facts of the case to the grand jury. If answering the question requires disclosure of facts not previously presented to the jurors, the Assistant should indicate to them that if they desire he or she will recall the case agent or other witness to answer the question. If a prosecutor

in answering a grand juror's questions or otherwise addressing the jury relates specific facts not previously presented, the Assistant should give a cautionary statement to the effect that his comments are not evidence and should not be considered by the jury in determining probable cause. The Assistant should present the evidence later through a witness.

G. Testimony of the Prosecutor

An Assistant should never testify before a grand jury to which he is presenting evidence in the same case. Functioning as both witness and attorney in the same proceeding is arguably prohibited by Disciplinary Rule 5-101(b) and Ethical Consideration 5-9 of the ABA Code of Professional Responsibility (1975) and may constitute such a conflict of interest that dismissal of the indictment may result. United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979); See United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (Leighton, J.); United States v. Treadway, 445 F. Supp. 959 (N.D. Texas 1978).

H. Expression of Personal Opinion by Prosecutor

A prosecutor should avoid expressing his own personal belief as to the guilt of the defendant, the strength of the evidence, or the credibility of witnesses because such opinion arguably might unduly influence the jury and diminish its independence. In those situations in which summarization of the evidence is appropriate, an Assistant may relate how the evidence establishes the credibility of witnesses or probable cause for the charges contained in the recommended indictment.

I. Discussions of Strategy

Particularly in long investigations, it may be necessary to explain questions of "strategy," such as the order of witnesses or the use of hearsay evidence, so that the jury follows the proceedings. The Assistant should not argue, but rather state the matter factually. The jury may have to decide certain questions, such as whether they want to hear live testimony as opposed to having a transcript of prior testimony read to them, or whether they want to subpoena certain documents. The Assistant can discuss the alternatives and help guide the jurors, but the

ultimate decision must be made by the jurors themselves.

J. Disclosure of Internal Office Procedures

An attorney should not initiate a discussion of internal office procedures. If a juror should ask why the jury is not being presented with an indictment at that time or some similar question, the attorney should answer in a general way that internal procedures, which require a certain amount of paperwork, have not been completed. The attorney should caution the jury that neither internal procedures nor delay resulting from internal procedures should influence their vote regarding the existence of probable cause. Details of internal office procedures, such as review of indictments and other case controls and analysis, should not be explained so as to avoid any allegation that discussions of the procedures improperly influenced the jury. The only exception to this general rule is where a defendant or witness in testifying before the jury alleges that internal office procedures or those of the Department of Justice are not being followed.

K. Alternatives to Prosecution or Lesser Included Offenses

Should grand juries be informed of alternatives to prosecution other than a felony indictment (i.e., misdemeanor, Pre-Trial Diversion, Immunity, etc.)?

It is not necessary to voluntarily advise the grand jury of the alternatives to prosecution or of a lesser included offense. If specifically asked about either area, an Assistant should acknowledge that there are alternatives to prosecution and, where applicable, that a lesser included offense exists, but that the prosecutor is presenting for their determination the question of whether there is probable cause to return the indictment submitted to them. It is their duty alone to determine whether there is probable cause to believe that the crime(s) charged were committed by the proposed defendants. If they do not find probable cause to support the proposed indictment, they should return a "No Bill."

L. Insufficiency of Evidence

Existing authority strongly suggests that an in-depth analysis by the district court of the

sufficiency or adequacy of the evidence presented to the grand jury is improper. The district courts cannot dismiss indictments by substituting their own view of the evidence for that of the grand jury. A determination by the district court that the evidence before the grand jury did not establish probable cause as to an element of the offense would require such review and is contrary to present law. The Supreme Court has explained in Costello v. United States, 350 U.S. 359, 363 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. Accord, Lawn v. United States, 335 U.S. 339, 348-50 (1958); See also Calandra v. United States, 414 U.S. 338, 344-45 (1974).

Although the law appears to disfavor dismissal of indictments because the evidence before the grand jury was insufficient, under extreme circumstances a court might dismiss an indictment. Accordingly, if an Assistant becomes aware prior to trial that all elements of the offense were not proven, he should discuss the matter with his supervisor and consider returning a superseding indictment. Assistants should carry a checklist as to the elements of the offense when they present a case to the grand jury and should make certain that sufficient evidence is presented to avoid this type of challenge.

IV. WITNESSES BEFORE THE GRAND JURY

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A. Rights of the Witness

Except as set forth in Paragraph B, infra, a grand jury witness has:

1. No right to refuse to answer questions

There is no right to refuse to answer questions unless he can assert the right against self-incrimination or establish that some other privilege applies. United States v. Wong, 431 U.S. 174 (1977) (witness who was being investigated for criminal activity, indicted for perjury before grand jury. The Fifth Amendment testimonial privilege does not condone perjury, which is not justified by even the predicament of being forced to choose between incriminatory truth or falsehood, as opposed to a refusal to answer); United States v. Mandujano, 425 U.S. 564, 580 (1976) (grand jury has the right to every person's testimony).

2. No right to refuse to respond on the basis of relevance

There is no right to refuse to respond to a subpoena or refuse to answer questions on the grounds of relevance, Blair v. United States, 250 U.S. 273 (1919); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); or because that testifying may result in physical harm. LaTona v. United States, 449 F.2d 121 (8th Cir. 1971). A witness must respond to a grand jury subpoena even if his compliance results in hardship or inconvenience. United States v. Calandra, 414 U.S. 338, 345 (1974).

3. No right to be advised of Fifth Amendment (Miranda) rights

A witness, who is a prospective or target defendant, has no right to be advised of his or her Fifth Amendment right not to be compelled to be a witness against himself. United States v. Wong, supra; United States v. Washington, 431 U.S.181 (1977).

4. No right to be notified by status

There is no right to be told that he or she

is a potential defendant or target of the investigation. United States v. Washington, supra, (witness testified following a Miranda-type warning at the grand jury and these statements were later used against him at trial, there was no right to be told at the grand jury that he was a putative or potential defendant.) See also United States v. Swacker, 628 F.2d 1250, 1263 (9th Cir. 1980). The prosecutor has no duty to tell a grand jury witness what evidence it may have against him. United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

5. No right to be advised of right to recant testimony

There is no right to be advised that he or she may recant the testimony and thereby avoid a perjury charge under 18 U.S.C. 1623. United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

However, a better and fairer practice, if the AUSA suspects the witness may have perjured himself or herself, is to ask the witness if he or she wishes to retract or correct any testimony and to even advise the witness of the contradictory evidence.

6. Newsmen have no special rights

There is no right, as a newsman, to refuse to testify concerning his news sources. Branzburg v. Hayes, 408 U.S. 665 (1972). However, the Department of Justice has adopted a policy which restricts the authority to issue subpoenas for newsmen. Departmental procedures are set forth in 28 C.F.R. 50.10 (as revised effective November 12, 1980). See USAM 1-5.410.

7. No right to counsel in grand jury room

There is no right to counsel present in the grand jury room. Fed. R. Crim.P. 6(d). However, the witness may leave grand jury room in order to consult with counsel. Compare United States v. Mandujano, supra, at 606 (Brennan, J. concurring) (may consult with attorney at will) with In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973), (witness allowed to consult only after every two or three questions; court has power to prevent disruption of

proceedings by frivolous departure from grand jury room); United States v. Weinberg, supra.

8. No right to appointed counsel

The Sixth Amendment right to counsel does not attach, because no criminal proceedings have been instituted, nor do the Miranda rights of appointed counsel attach because grand jury is not the equivalent of custodial police interrogation).

a. The Criminal Justice Act (18 U.S.C. 3006A), authorizing appointment and payment of counsel in indigent cases does not provide for appointment of counsel for an indigent grand jury witness.

b. Often, it is to the advantage of the government to seek counsel for the witness. The Federal Defender's Office will represent the witness without appointment. In the unusual case where Federal Defenders will not advise the witness because of a conflict or other reason, appointment of a panel attorney may be made under the provisions of CJA allowing for counsel when the witness faces loss of liberty (for example, potential contempt charges).

9. Privilege rights

The right to claim privilege. Fed. R. Evid. 1101(c) provides that privileges apply in grand jury proceedings. The rule of privileges is found in Rule 501.

B. Department of Justice Policy Re: Advice of Rights and Target Status

The Department of Justice has established an internal policy of advising grand jury witnesses of their Fifth Amendment rights and of their status as "targets", if that is the case. Under Department of Justice policy (USAM 9-11.250), witnesses before the grand jury will be advised of the following items.

1. General nature of the inquiry

The general nature of the grand jury's inquiry, unless such disclosure would compromise the investigation. For example, if advising the witness that the grand jury is investigating narcotics violations might jeopardize the case,

the AUSA may state that the investigation concerns violations of federal criminal law.

2. Fifth Amendment rights

The witness may refuse to answer any question if a truthful answer would tend to incriminate him or her.

3. That anything said may be used against the witness

4. The witness may leave the room to consult with his attorney

5. Their target status, if appropriate

a. A "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."

b. A "subject" is defined as "a person whose conduct is within the scope of the grand jury's investigation." USAM 9-11.250.

c. A "nontarget" may subsequently become a "target" and be indicted, even though the "nontarget" claimed the privilege against self-incrimination when first called before the grand jury; that alone is insufficient to show vindictive prosecution. United States v. Linton, 655 F.2d 930 (9th Cir. 1980).

6. Warnings

The above warnings should not be given to the following categories of witnesses:

a. a clear victim of a crime;

b. law enforcement personnel testifying about their investigation;

c. a custodian of records;

d. a person from whom physical evidence is sought (handwriting, fingerprints, voice examplars, etc.);

e. witnesses with no potential criminal liability.

7. Advisement of rights attached to subpoena

The above advisement of rights should be attached to the subpoena; in addition, the witness should acknowledge on the record that he understands his rights. Only targets need be specifically advised on the record of their rights.

C. Obtaining the Testimony of a Target or Subject Before the Grand Jury

1. Subpoenas to targets or subjects

The grand jury may subpoena and question a target or a subject. United States v. Washington, supra. However, under Department of Justice policy, because of possible prejudice in requiring a subject or target to invoke the Fifth Amendment before the grand jury, a target should not be subpoenaed unless the U.S. Attorney or appropriate Assistant Attorney General approves. USAM 9-11.251.

2. Notification of targets

The AUSA should consider notifying the target that he is being investigated in order that he or she may appear before the grand jury if desired. Such notification is not necessary;

a. in a routine case; or

b. if it may cause destruction of evidence, intimidation of witnesses; or

c. increase likelihood of flight; or

d. otherwise delay or jeopardize the investigation.

USAM 9-11.253. The target notification letter should indicate a date by which the target must respond concerning his decision.

3. Request by targets to testify

Although there is no legal duty to allow a target to testify before the grand jury, United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied 452 U.S. 961 (1981). United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975); as a matter of policy, any such person so

requesting should be permitted to testify, unless it will cause delay or otherwise burden the grand jury. USAM 9-11.252. Always advise the grand jury of this request.

If the target testifies, the record should reflect:

a. an explicit waiver of privilege against self-incrimination (which may be shown by the target himself or by a letter from his attorney);

b. waiver of counsel if not represented; and

c. the fact of the voluntary appearance.

Although a less preferable procedure, a request by the target to submit a written statement to the grand jury should be accommodated unless it will cause delay. (Note: The statement may and probably will contain exculpatory material, which by policy the AUSA has a duty to present.) Again, the grand jury should be advised of any such request and allowed to make the decision.

4. Advice to grand jury about the Fifth Amendment

Where a subject has been subpoenaed and has indicated that he intends to assert his Fifth Amendment privilege and the grand jury is aware of such subpoena, do not volunteer to the grand jury that the subject intends to assert the Fifth. Obviously, you should not call the subject if you are aware that the subject is going to take the Fifth, but this does not necessarily resolve the question before the grand jury as to why the subject did not show up. If pushed by the grand jury to tell them why the subject is not going to testify, in order to avoid prejudice against the subject the grand jury should be told that the subject has elected not to appear and that they cannot rely on this failure to appear to imply any guilt in the matter.

D. Alternative Procedures for the Questioning of Witnesses by Grand Jurors

Normally, the AUSA conducts the questioning of a grand jury witness. Questions by members of the grand jury to the witness should be deferred until

the prosecutor's examination is completed.

1. Procedures

There are alternative procedures that an AUSA may use in taking grand juror's questions:

a. The assistant may allow the grand jurors to ask the questions without prior screening or discussion.

b. The assistant may ask the witness to leave the room, discuss the questions with the grand jury, and screen out wholly improper questions. Upon the witness' return, either the grand jurors or the assistant may pose the question.

2. Considerations

The following considerations should be kept in mind when determining whether a question to a witness is appropriate:

a. whether the question discloses other facts in the investigation which should not become known to the witness;

b. whether the witness is hostile;

c. whether the question may call for privileged, prejudicial, misleading or irrelevant evidence.

E. Immunity for a Grand Jury Witness

1. Formal immunity under 18 U.S.C. 6002-6003

a. A witness called before the grand jury can invoke his or her Fifth Amendment privilege against self-incrimination and refuse to answer a question. If the grand jury witness invokes the privilege, the government may request that he or she be granted use immunity, which supplants the privilege. A witness who has been granted use immunity must answer the question of the grand jury or face contempt proceedings. 18 U.S.C. 6002-6003, Kastigar v. United States, 406 U.S. 441, 462 (1972).

b. When use immunity is granted, the immunized testimony and any evidence derived

from it may not be used against the witness in a subsequent criminal proceeding, except in a prosecution for perjury. Further, truthful testimony given under a grant of immunity cannot be used to show that the witness perjured himself or herself on other occasions. United States v. Berardelli, 565 F.2d 24, 28 (2d Cir. 1977)(witness who may have perjured himself before grand jury cannot refuse to testify at trial under grant of immunity).

c. The statute does not prohibit the use of the immunized testimony in either civil or administrative proceedings that may arise in connection with, or as a result of, the criminal investigation. Accordingly, the prosecutor is not authorized to promise an immunized witness that his testimony will not be used against him in subsequent civil or administrative proceedings. (This applies equally to informal immunity grants.)

d. The possibility of the use by a foreign jurisdiction of grand jury testimony compelled by the immunity under Section 6002 does not violate a witness' privilege against self-incrimination. In re Campbell, 628 F.2d 1260, 1262 (9th Cir. 1980); In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979); In re Weir, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974). But see In re Grand Jury Subpoena of Flanagan, 690 F.2d 116 (2d Cir. 1982); In re Baird, 668 F.2d 432 (8th Cir.), cert. denied, 102 S.Ct. 2255 (1982).

e. The witness cannot be forced to answer, nor sanctions imposed for refusal, unless and until ordered by the district court. Therefore, the AUSA must follow the appropriate procedures before a witness can be compelled to testify, or punished for refusing to do so.

f. If the AUSA has been advised by counsel for the witness that he or she will claim the Fifth Amendment privilege and the AUSA is prepared to obtain an immunity order, the witness need not first appear before the grand jury. 18 U.S.C. 6003(b)(2) provides that an immunity order may be requested when the witness "is likely to refuse to testify."

2. Procedures for obtaining use immunity

a. The procedures for obtaining use immunity are set forth in detail at USAM 1-11.000 et seq.

b. After a witness has appeared before a grand jury and has refused to testify based on the Fifth Amendment, or, if the AUSA has been advised by the witness or his/her attorney that the witness will invoke the Fifth Amendment if called before the grand jury, the AUSA must complete a "Request For Authori- zation to Apply for Compulsion Order" (Form) OBD-111-A). (The sample form located at USAM 1-11.901 is out-of-date.)

c. The completed form, along with a memorandum containing a narrative summary of the case, (see USAM 1-11.902) must be forwarded to the United States Attorney, who must personally sign the request.

d. The completed request form is then sent to the Witness Records Unit of the Criminal Division at the Department of Justice, which will forward the request to the appropriate authority.

e. Allow a minimum of two weeks for normal processing; it often takes much longer.

f. See USAM 1-11.101 for the procedures for emergency requests.

g. If the request is approved, an authorization letter will be signed and sent to the AUSA (see USAM 1-11.903).

h. Upon receipt of the authorization, a motion for an order to compel testimony, or memorandum of points and authorities, and an order to the court to sign, must be prepared. The pleadings, along with a copy of the letter of authorization from DOJ, are then presented to the court ex parte for approval.

3. Informal or "letter" immunity

The possibility of offering informal or "letter" immunity should be explored and considered where appropriate.

V. GRAND JURY SUBPOENA POWER

Introduction

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Introduction

The grand jury may subpoena witnesses to appear, answer questions and/or produce documents, records, or physical evidence.

As a general rule, the breadth of the investigative powers of a grand jury justifies the issuance of subpoenas ad testificandum without any requirement of relevancy or materiality of the testimony likely to be adduced. It follows that witnesses cannot resist questioning by a grand jury on the grounds of relevancy or materiality or require any showing of the reasons why individuals were subpoenaed. A grand jury may, for example, subpoena a large number of witnesses in order to obtain voice exemplars without being limited by Fourth Amendment standards. Only if there was a real abuse of the grand jury's powers -- if, for example, the jury were to pry into someone's business or domestic affairs for idle purpose -- would a court exercise its inherent power to control the grand jury's use of subpoenas ad testificandum. United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Doe, 460 F.2d 328 (1st Cir.), cert. denied, 411 U.S. 909 (1972); In re April 1956 Term Grand Jury (Cain), 239 F.2d 263 (7th Cir. 1956), cert. granted 77 S.Ct. 552 (1957).

A. Issuance of Subpoenas

Grand jury subpoenas are governed by Fed. R. Crim. P. 17. The Clerk's Office provides a supply of blank subpoenas which have been presigned and sealed. Rule 17(a); United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974). Generally, subpoenas are served by the U.S. Marshal or the case agent, and can be served anywhere in the United States. Rule 17(d) and (e). A subpoena may be served abroad for a national or resident of the United States, but not for a foreign national. Rule 17(e)(2); 28 U.S.C. Section 1783; USAM 9-11.230.

It has been held that there is no requirement of a preliminary showing of reasonableness or relevancy for the issuance and enforcement of subpoenas. United States v. Dionisio, 410 U.S. 1 (1973); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hergenroeder); 555 F.2d 686 (9th Cir. 1977) (subpoena to produce handwriting).

Since United States v. Dionisio, supra, the Third Circuit, in an often cited case, has required the government

to make a minimal prima facie showing that (1) the item sought is relevant to an investigation; (2) the investigation is properly within the grand jury's jurisdiction; and (3) the item is not sought primarily for another purpose. In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3rd Cir. 1973), and In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1972). This showing is only required when a challenge is made by the witness.

It is the policy of the Department of Justice that an "Advice of Rights" form, including an indication as to the nature of the investigation, must be attached to all grand jury subpoenas. USAM 9-11.250. The subpoena should also identify the possible violations that are being investigated. A reference to the applicable code section is sufficient.

No subpoena should be issued for an attorney to appear before the grand jury without the prior approval of the United States Attorney. There are also limitations on the issuance of subpoenas to members of the news media.

B. Grand Jury Subpoenas v. Claims of Constitutional and Common Law Privilege

A grand jury subpoena is not a search or seizure within the meaning of the Fourth Amendment. United States v. Calandra, supra.

During the course of investigations it is frequently necessary to subpoena financial records from third persons not directly involved in the investigation, e.g., subpoenas to banks for for the bank records of a target. The Supreme Court has held that a bank depositor does not have standing to object to a subpoena for his bank docucments by a federal grand jury. United States v. Miller, 425 U.S. 435 (1976). The Court said that the checks and deposit slips sought in Miller were not "confidential communications but negotiable instruments to be used in commercial transactions". The Ninth Circuit has considered this same issue and ruled the same way. In re Grand Jury Subpoena Duces Tecum (Privitera), 549 F.2d 1317 (9th Cir.), cert. denied, 431 U.S. 930 (1977).

However, the district court might entertain a motion to quash a subpoena for bank records if other constitutional improprieties in the conduct of the grand jury are alleged, such as First Amendment grounds. Therefore, do not assume that the prosecutor will always prevail when defending against a motion to quash bank records, solely on the Miller test.

After documents or records have been produced pursuant to subpoena, the person who produced the records may request access to the records, or, in some cases, return of the records. Assuming that reasonable grounds or a legitimate need exists, access should be granted under appropriate safeguards. Alternatively, if such a request is made, you may want to keep the original records and return copies (but not at government expense). For a thorough discussion of constitutional and common law privileges in the grand jury context, see Chapter VI, infra.

C. Grand Jury Subpoena for Documents and Records

1. In general

In the typical grand jury investigation, the assistant will draft a subpoena compelling the production of the documents or records and have it served by the case agent (or the U.S. Marshal). The agent may receive the documents from the witness and make the return before the grand jury on the witness' behalf, if the witness wishes. The best practice is to have the witness request or approve such a procedure in writing.

It used to be a matter of practice to type on the face of the subpoena that the requested documents could be turned over directly to the agent serving the subpoena. That practice is no longer appropriate, and has been abandoned. As an alternative, it is appropriate to type on the subpoena a note of the following or similar nature:

> Upon receipt of this subpoena, [or] Prior to producing the requested documents, please call AUSA _____ at ( ) ___-____.

It is also appropriate to have the agent serving the subpoena inform the person served to call the assistant to discuss the method of compliance with the subpoena.

Even if the grand jury is not sitting at the time of the issuance of the subpoena, the issuance of the subpoena is proper if the return date coincides with the date that the grand jury is actually in session. United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974).

Any grand jury may consider documents and records subpoenaed by a previous grand jury without the

necessity of a new subpoena. United States v. Thompson, 251 U.S. 407 (1920).

The responsibility for the issuance of subpoenas to obtain evidence belongs to the prosecutor. The prosecutor assists the grand jury in bringing evidence to it in the nature of documents, records and witnesses. United States v. Kleen Laundry & Cleaners, Inc., supra, 381 F. Supp at 520.

Although broadly construed, the investigative powers of the grand jury do not justify the issuance of general subpoenas duces tecum. Subpoenas duces tecum must be reasonably specific.

Rule 17 does not require a precise identification of the exact documents sought by the grand jury; a reasonable particularity is all that is necessary. The description is usually given in terms of subjects to which the writings relate, and if a subpoena is broader in one respect (covering for example, a lengthy period of record-keeping), it may have to be narrower or more specific in another. Illustrated cases are collected in Wright, Federal Practice and Procedure; Criminal Section 275.

It is clear from the discussion above that a witness can move, albeit on limited grounds, to quash a grand jury subpoena directing him to produce documents. This is not to say, however, that third parties who may have generated or were the source of documents can move to quash. For the "standing" doctrine, applicable to the Fourth Amendment, has now been grafted onto grand jury practice.

The Fourth Amendment creates a personal right which cannot be vicariously asserted. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963). If a person has no reasonable expectation of privacy in records or documents, he cannot object even if the prosecution acquired them through an invalid subpoena duces tecum. Thus, the Supreme Court held in United States v. Miller, 425 U.S. 435 (1976), that a depositor had no legitimate expectation of privacy in bank records that were obtained through the use of a defective subpoena. The Court held:

> All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees

> in the ordinary course of business.... The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. 425 U.S. at 442-431.

Of course, if there is a privileged relationship between the subpoenaed possessor of the documents and the source of the documents, the narrow standing rule of Miller does not necessarily apply. In addition, the narrow approach to standing will not be applied if it would effectively result in the third party's inability to protect itself from prosecutorial harassment. For example, in In re Grand Jury (C. Schmidt & Sons, Inc.), 619 F.2d 1022 (3rd Cir. 1980), the court allowed a corporation to appeal a denial of its motion to quash a subpoena directed at its employees. The court emphasized that, unlike its employees, the corporation, which was claiming governmental harassment, could not obtain appellate review of the subpoena by going into contempt. The court held that the company had standing, and it rejected

> the government's suggestion that the courts limit standing to claims of abuse of the grand jury process to persons whose property interest or privileges have been invaded.... Third party standing to asset claims of grand jury abuse cannot be determined by categorizing the claimed interest as one of property or privilege, but only by examining the nature of the abuse, and asking whether, and in what manner, it impinges upon the legitimate interests of the party allegedly abused. In this case Schmidt claims that the grand jury is not investigating violations of federal law, and that the Strike Force is attempting to harass it. It asserts that it is being deprived of the time and effort of its employees. It has standing to make these claims by moving to quash the subpoenas. 619 F.2d at 1026-27.

See also Katz v. United States, 623 F.2d 122 (2d Cir. 1980) (client may intervene in grand jury proceedings to move to quash subpoena directing his attorney to

produce client's books and records); In re 1979 Grand Jury (Velsicol Chem. Corp.), 616 F.2d 1021 (7th Cir. 1980) (client has standing to intervene to contest document subpoena directed to his attorney).

2. Right to Financial Privacy Act of 1978

The Right to Financial Privacy Act of 1978, (12 U.S.C. Section 3401 et seq.), specifically exempts grand jury subpoenas. 12 U.S.C. Section 3413(i). In general, therefore, the provisions of the Act do not apply when issuing grand jury subpoenas for financial records, even when banks or other financial institutions are the entity to which the subpoena is directed.

Hoever, the Act does require that all grand jury subpoenas to financial institutions be "returned and actually presented to the grand jury." 12 U.S.C Section 3420. Therefore, if the institution has turned over the records to the agent for compliance (versus custodian appearing at the grand jury), or when the records are mailed to the assistant, the AUSA must insure that the agent makes an appearance before the grand jury, or that the records that were mailed in are actually presented to the grand jury, on the return date or as soon thereafter as possible.

Also, at the conclusion of the investigation, the records must be destroyed or returned to the institution if not used in connection with an indictment or disclosed under Rule 6(e). Further, the records (as well as any description of their contents) must be separately maintained, sealed and marked as grand jury exhibits, unless used in prosecuting the case.

The government currently will reimburse certain institutions for reasonable costs of complying with subpoenas for certain types of financial records. Check with the Administrative Office to determine under what circumstances the Government will pay and what procedures ought to be followed. For a detailed discussion of the Financial Privacy Act, see USAM 9-4.810, et seq.

3. Fair Credit Reporting Act

The Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.) authorizes a consumer reporting agency to furnish a consumer report in response to the "order of a court." 15 U.S.C. Section 1681b(1). Otherwise, such as agency may only furnish a governmental agency with

the name, address, former addresses, and present and past places of employment of a consumer. 15 U.S.C Section 1681(f).

The Ninth Circuit has recently held that a grand jury subpoena is not an "order of a court." In re Gren, 633 F.2d 825 (9th Cir. 1980). In so doing, the court limited the decision in United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) to the facts of that case. In re Gren, supra, at 829, n.5.

In re Gren is inconsistant, therefore, with the position of the Department of Justice as reflected at USAM 9-11.230, "Bluesheet" dated August 13, 1980. It would appear necessary, then, to seek a special order of the court under Section 1681(b)(1) to obtain information from a consumer reporting agency.

4. Attorney-Client Privilege/Attorney Work Product Doctrine

See Chapter VI.

5. Handling and marking grand jury exhibits

Following a subpoena return, all documents and records should be marked or inventoried in some manner. This is particularly important for documents received from financial institutions because of the Financial Privacy Act.

There are several acceptable procedures.

a. Have the custodian of records describe, separately or by category (in cases of voluminous records), the documents presented when making the return. After the records are turned over to the case agent, he should inventory and perhaps even mark each exhibit (individually by number or description).

b. Have the custodian of records describe and mark each exhibit. The AUSA may want to have the custodian testify to the foundation of each document before the grand jury.

c. If the records were either delivered to the agent or mailed in, the documents, should be described for the record, marked, and then turned over to the prosecutor or the case agent (with the permission of the grand jury). Thereafter, an inventory should be prepared.

Instances where records are not inventoried are more common than they should be, and can only lead to later difficulties.

During a grand jury investigation, witnesses (other than custodians) may be examined about and shown various documents. The AUSA should consider using an exhibit list, similar to that used at trial, in cases where the witness may testify concerning numerous documents. This provides a good record of the testimony and documents shown. The AUSA may want to tag each exhibit separately for each witness testifying.

D. Limitations of Grand Jury Power

1. Power limited by grand jury functions

a. General rule and limitations

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. Costello v. United States, 359 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used to obtain additional evidence against a defendant who has already been indicted for the crime under investigation. United States v. Woods, 554 F.2d 242, 250 (6th Cir. 1976). After indictment, the grand jury may be utilized if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. In re Grand Jury Proceedings (Pressman), 586 F.2d 724 (9th Cir. 1978).

A grand jury cannot be used for pretrial discovery or trial preparation. United States v. Star, 470 F.2d 1214 (9th Cir. 1972) (where defendant's alibi witnesses were subpoenaed before grand jury after indictment, court condemned the practice but did not reverse conviction).

b. Locating fugitives

The USAM (9-11.220) states that it is a misuse of the grand jury process to use the grand jury to aid in the apprehension of a fugitive. The same section of the USAM also stated that using the grand jury to locate a fugitive where the grand jury wants to hear the fugitive's testimony or is investigating crimes such as harboring, misprison, accessory, or UFAP's may be permissible but that prior approval of the General

Litigation and Legal Advice Section of the Department of Justice Criminal Division is required. The section also clearly states that the grand jury should not be used to locate fugitives in escape and bail jump cases.

c. Subpoenas must be for appearance before grand jury

It is impermissible to use the grand jury subpoena to compel the witness to appear in the U. S. Attorney's Office instead of the grand jury. Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).

However, no rule of law prohibits the government from interviewing a grand jury witness before or after the witness has appeared before the grand jury. United States v. Mandel, 415 F. Supp. 1033, 1039-40 (D. Md. 1976). If the witness consents to the interview, this procedure is actually preferred. It may expedite the interrogation before the grand jury, especially if there are voluminous records for the witness to review.

If an interview is conducted, the fact that an interview took place, and the witness' consent thereto, should be placed on the record. Furthermore, if, after the interview, the assistant determines that the witness' testimony is not relevant or probative, the witness need not testify. However, the grand jury should be advised of that fact in order to forestall a subsequent claim of grand jury abuse.

d. Naming unindicted co-conspirators

In United States v. Briggs, 514 F.2d 794 (5th Cir. 1975), the court held that the naming of unindicted co-conspirators exceeded the power and authority of the grand jury, and denied persons so named of due process. This rule has been applied in the Ninth Circuit. United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977). It is the policy of the Department of Justice and this office to avoid naming unindicted co-conspirators in indictments absent some sound reason (e.g., where the identity of the unindicted co-conspirator is already a matter of public record, as in superseding or ancillary indictments). USAM 9-11.225.

e. Grand jury reports

While the authority of a federal grand jury to issue a report is ambiguous, the policy of the Department of Justice is clear; the Department must be consulted before the U. S. Attorney can request a report, and should be advised if the grand jury intends to issue a report on its own. USAM 9-2.155.

2. Power limited by venue

Although a matter should not be presented to a grand jury in a district unless it has venue, the grand jury may investigate matters even though they occurred partly outside the district. A witness cannot challenge the right of the grand jury to inquire into events that happened in another district. Blair v. United States, 250 U.S. 273, 282-3 (1919); In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522 (W.D. Tex., 1973).

The grand jury has jurisdiction to investigate a conspiracy if it appears that it was formed in the district or any overt act occurred within the district. 18 U.S.C. Section 3237; Hyde v. Shine, 199 U.S. 62 (1905); Downing v. United States, 348 F.2d 594 (5th Cir.), cert. denied 382 U.S. 901 (1965).

3. Power limited by district court

The grand jury is under the supervision of the courts. The grand jury must rely on the district court's subpoena and contempt powers, because it lacks its own enforcement power. Brown v. United States, 359 U.S. 41 (1959).

It has been said that the grand jury is essentially an agency of the court, and that it exercises its powers under the authority and supervision of the court. United States v. Basurto, 497 F.2d 781, 783 (9th Cir. 1974) (Hufstedler, J., concurring); Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972).

On the other hand, it is sometimes asserted that grand juries are basically law enforcement agencies and are for all practical purposes an investigative and prosecutorial arm of the executive branch of the government. United States v. Doulin, 538 F.2d 466 (2d Cir.), cert. denied, 429 U.S. 895 (1976).

These opposing points of view present a conflict between the executive and judicial branches of the federal government over their respective relationships to the grand jury.

The Ninth Circuit strikes a balance between the two positions. In United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977), the court recognized that "under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." Id. at 1312. The court states [G]iven the constitutionally-based independence of each of the three actors -- court, prosecutor and grand jury -- we believe a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their 'supervisory power' could readily prove subversive of the doctrine of separation of powers." Id. at 1313.

Chanen offers an excellent discussion of the supportive and complementary roles played by court and prosecutor with respect to the work of the grand jury. The discussion supports the description of the grand jury as being "supervised" by the court rather than as an appendage of it.

The district court may properly deny a grand jury use of subpoenas to engage in "the indiscriminate summoning of witnesses with no objective in mind and in the spirit of meddlesome inquiry" and may curb a grand jury when it clearly exceeds its historic authority. Hale v. Henkel, 201 U.S. 43, 63 (1906).

4. Power limited by the prosecutor

In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose function is to insure that justice is done and that the guilty shall not escape nor the innocent suffer. He must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecutions but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors. (USAM 9-11.015).

The authority of the United States Attorney to initiate grand jury proceedings in certain specific instances is limited by the Department of Justice. See generally USAM 9-2.120, and specifically USAM 9-2.130 through 9-2.134.

E. Motions to Quash a Grand Jury Subpoena

A witness can properly challenge a subpoena from the grand jury with a motion to quash. Fed. R. Crim. P. 17(c). It is clear that the courts have jurisdiction to quash and modify any unreasonable and oppressive federal grand jury subpoenas. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956). However, there is a presumption of regularity that attaches to all grand jury subpoenas duces tecum. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972), In re Grand Jury Subpoenas Duces Tecum (M.G. Allen and Associate, Inc.), 391 F. Supp. 991 (D. R.I. 1975). Therefore, an individual who seeks to quash a grand jury subpoena bears a heavy burden in proving that the subpoena is unreasonable and oppressive. In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 994-995.

1. Test for determining whether subpoena is unreasonable or oppressive

Several courts have adopted a three part test to use in determining if a given subpoena is unreasonable and oppressive. First, the subpoena may only require the production of documents relevant to the investigation being pursued. Second, the subpoena must specify the things to be produced with a reasonable particularity. Third, the subpoena can require the production of records covering only a reasonable period of time. United States v. Gurule, 437 F.2d 239 (10th Cir. 1970); In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991 (D. R.I. 1975); In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295 (E.D. Pa. 1974). In re Corrado Brothers, Inc., 367 F. Supp. 1126 (D. Del. 1973).

a. Government's burden

Once the motion to quash has been made, the government must shoulder the initial burden of demonstrating the relevance of the subpoenaed documents to a legitimate grand jury investigation. Once the government makes such a minimal preliminary showing, that prima facie showing of relevance becomes irrebuttable and

parties opposing the enforcement of the subpoena cannot obtain any further evidence concerning the nature of the grand jury investigation. In re Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977). In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 995. See also, In re Horowitz, 482 F.2d 72 (2d Cir.), cert, denied, 414 U.S. 867 (1973).

(1) Demonstration of relevance

In some districts the initial demonstration of relevance can be done with an affidavit by the case agent. This will set forth the nature of the investigation, the fact that there is a grand jury investigation, and the general relevancy of the subpoenaed documents to the investigation. This affidavit should be submitted to the judge in camera.

The government need not demonstrate the relevance and necessity of each document requested. Unlike a trial subpoena, the grand jury subpoena, issued at the inital stages of an investigation, cannot always describe precisely what records exist or are required to prove particular criminal conduct. Schwimmer v. United States, supra; In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295 at 1299 (E.D. Pa. 1974); In re Grand Jury Subpoenas Duces Tecum, supra, 391 F. Supp. at 998.

In motions to quash, typically allegations are made that the grand jury is on a fishing expedition. A grand jury investigation may be triggered by tips, rumors, evidence prompted by the prosecutor or the personal knowledge of the grand jurors. Costello v. United States, 350 U.S. 359 (1956). Some exploration or fishing necessarily is inherent and appropriate in all document production sought by a grand jury. Schwimmer v. United States, supra, at 862.

(2) Test for determining specificity

The second requirement is that the documents be described with the required specificity. Several district courts have

used a two-part examination to determine if this requirement is satisfied. First, is the description of the subpoenaed document sufficiently particular so that a person commanded to comply may in good faith know what he is being asked to produce, and second, is the subpoena so overbroad that a person complying in good faith would be harassed or oppressed to the point that he experiences an unreasonable business detriment. In re Corrado Brothers, Inc., supra, 367 F. Supp. at 1132; In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp at 999.

If the subpoena has been properly drawn, there should be no difficulty with the first problem. However, complaints will arise about the second aspect of this requirement. Frequently, targets complain that their business will be halted or that the volume of records sought is excessive. It should be noted that the volume of records sought is not itself a sufficient basis upon which to quash a subpoena. In re Corrado Brother, Inc., supra, 367 F. Supp. at 1132; In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295, 1298 (E.D. Pa. 1974). The petition must demonstrate why the business will be seriously disrupted if the subpoena is complied with. If the subpoenaed papers are not currently being used for any purpose, the subpoena is not oppessive. In re Horowitz, supra.

(3) Reasonableness of time period covered by subpoena

The third requirement is that the subpoena be restricted to a reasonable time period. The period of time covered by the request should bear a reasonable relation to the nature and scope of the grand jury investigation. In re Corrado Brothers, Inc., supra; In re Horowitz, supra. In one case a subpoena Duces Tecum requiring the production of voluminous records from the Radio Corporation of America over a period as long as 18 years has been upheld. In re Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952). Subpoenas Duces Tecum covering periods of 27 and 20 years have also been

upheld. In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); In re Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948). Be advised, however, that if records covering that extensive time period have been requested the assistant must be prepared to justify it to the court.

b. Other grounds

Occasionally other unusual grounds for the motion to quash will arise. Petitioners will sometime claim that other government agencies, such as the SEC, the California Department of Corporation, etc., have already had access to the documents sought, and nothing was done; that it is harassment for the grand jury to subpoena them. A claim similar to this was raised in In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 1001, and the court ruled that the grand jury was entitled to have the evidence produced before it. See also, In re Motions to Quash Subpoenas Duces Tecum, 30 F. Supp. 527, 531 (S.D. Cal. 1939); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

Petitioners will sometimes assert that they have not been given adequate time to review, assemble and deliver the requested documents. The burden of showing the possibility of prejudice rests heavily on the subpoenaed parties. In re Corrado Brothers, Inc., supra, at 113.

2. Reimbursement for costs of production

The government is generally not required to reimburse the parties for their costs in complying with subpoenas. Obviously, if the subpoenaed party and the records are covered by the Financial Privacy Act, the Act controls and under the proper circumstances the government will reimburse the subpoenaed party for the cost of compliance with the subpoena. 12 U.S.C. Section 3415. Frequently when subpoenaing documents from a business, the Financial Privacy Act will not be applicable, yet the business will seek to require the government to pay the costs of compliance.

a. There is some question as to whether a

district court has the authority to direct the government to pay the cost of complying with a grand jury subpoena. Some courts have said that authority stems from the Fed. R. Crim. P. In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978); In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, 555 F.2d 1306 (5th Cir. 1977); In re Grand Jury Subpoena Duces Tecum, 436 F. Supp. 46 (D. Md. 1977).

b. Assuming arguendo, that the court has jurisdiction to direct the government to pay the costs of compliance with the subpoena, under what circumstances should this occur?

The general principle is beyond dispute that there is a public obligation to provide evidence and that this obligation persists no matter how financially burdensome it may be. Hurtado v. United States, 410 U.S. 578 (1973); United States v. Dionisio, 410 U.S. 1 (1973). On a subpoena to testify before a grand jury the party should not expect reimbursement for the cost of testifying (such as loss of wages or income, etc.). In re Grand Jury Investigation, supra, 459 F. Supp. 1335; In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, supra; Hurtado v. United States, supra. A person who is subpoenaed to produce records before a grand jury has no "right" to be reimbursed for his costs. In re Grand Jury NO. 76-3 (MIA) Subpoena Duces Tecum, supra. (Of course, a grand jury witness, like any other witness, is entitled to a witness fee plus the cost of transportation and per diem.)

c. The courts have exercised the power to quash or modify subpoenas (or to condition enforcement on the advancement of costs) on the grounds of unreasonableness or oppressiveness. In re Grand Jury Investigation, supra, 459 F. Supp. at 1340; In re Morgan, 377 F. Supp.281 (S.D.N.Y. 1974); In re Corrado Brothers, Inc., supra.

d. The subpoena should actually call for originals and not copies, thus negating the claim that the subpoena requires the recipient to do copying work. The Fifth

Circuit has held that in determining whether a subpoena is unreasonable or oppressive a court must first determine what it would cost to produce the documents requested for the government's inspection or use. The cost of reproduction of documents - so that the holder may retain the originals and the government have the copies - is a cost that in all but the most excep- tional of cases is undertaken by the holder for his own convenience. Only after a court has determined that production of the original documents is a practical impossiblity may it consider the convenience and cost of reproduction as a necessary consequence of compliance with the subpoena. In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, supra, 555 F.2d at 1307-1308.

e. When the subpoenaed party is the object of the grand jury investigation the cost of compliance should not be shifted to the government unless those costs would be destructive to the persons subpoenaed. In re Grand Jury Subpoena Duces Tecum, supra, 436 F. Supp. 46; In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975).

There is one case where the court directed the government to advance the costs of compliance to the subpoenaed party. In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975), after a finding by the court that it was virtually impossible for the target to comply with the subpoena at his own expense. The court found that the production of the required documents would entirely disrupt the target's business; therefore, copying of the records was required. The court concluded that since it was virtually impossible for the target to comply, the government would have to pick up the cost or else have the motion to quash granted.

3. Time for filing motion to quash

Unlike Rule 45(b) of the Federal Rules of Civil Procedure, the criminal rule allows for the

consideration of a motion to quash even if made as late as the time set for compliance. See Wright, Federal Practice and Procedure, Criminal Section 275.

4. Government Appeals from motions to quash

Under 18 U.S.C. Section 3731, the government may appeal an order to the district court quashing a grand jury subpoena. In re Special September 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Investigation, 599 F.2d 1224, 1226 (3rd Cir. 1979); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); United States v. Calandra, 455 F.2d 750 (6th Cir. 1972).

5. Appeal of orders denying motions to quash

a. General rule

> [O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its command or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey...
>
> United States v. Ryan, 402 U.S. 530, 532 (1971). See Cobbledick v. United States, 309 U.S. 323 (1940).

b. Exceptions

United States v. Ryan, supra, at 533, indicated that in a "limited class of cases where denial of immediate review would render impossible any review whatsoever," appellate review would be appropriate.

In Perlman v. United States, 247 U.S. 7 (1918), the court allowed immediate review of an order directing a third party to produce documents which were Perlman's property; to have denied review would have left Perlman "powerless to avert the mischief of the order," for the custodian could not be expected to risk a contempt citation in order to vindicate Perlman's rights. 247 U.S. at 12-13.

A similar exception was recognized in the more recent case of In re Gren, 633 F.2d 825 (9th Cir. 1980). There, a consumer reporting agency which was regulated by the Fair Credit Reporting Act, 15 U.S.C. Section 1681 et seq., was permitted an immediate review of an order denying a motion to quash, since the agency was subject to civil suit for improperly divulging consumer credit information.

F. Enforcement of Grand Jury Subpoenas

Instead of properly moving to quash, the party may simply (1) refuse to appear, or (2) appear and refuse to testify or produce the material. In such cases, the grand jury must rely on the district court's contempt powers to compel attendance and testimony. The grand jury has no power to enforce its own orders; therefore, it must rely on the district court to compel production, attendance or testimony.

1. Available sanctions

Failure to appear or testify can lead to either criminal (18 U.S.C. Section 401, Fed. R. Crim. P. 42) or civil (28 U.S.C. Section 1826) contempt charges. Punishment for contempt includes both fines and imprisonment, but an unwilling witness rarely will be subjected to both sanctions simultaneously. Under normal circumstances, the court will impose the least onerous sanction reasonably calculated to gain compliance with the order. In re Grand Jury Impaneled January 21, 1975, 529 F.2d 543, 551 (3rd Cir.), cert. denied, 425 U.S. 992 (1976). If the recalcitrant witness is already serving a sentence when he is held in contempt, the contempt sentence interrupts the existing sentence. In re Garmon, 572 F.2d 1373 (9th Cir. 1978).

2. Deciding how to proceed

If a witness appears before the grand jury and refuses to comply with the subpoena based on some objection to the subpoena, e.g., attorney/client privilege, work product privilege, Fourth, First, or Fifth Amendment objections, Sections 3504, 2515 or Title 18, etc., the prosecutor must consider various alternatives.

a. The prosecutor may decide to proceed directly with a contempt proceeding. The witness and his

lawyer should be taken before a district court judge immediately, and, upon oral motion of the government, be directed to answer the questions. In the alternative, a motion to compel compliance with the subpoena before the district court may be more appropriate. If there are substantial issues of fact or law to be litigated, the latter may be the best way to proceed.

b. This motion should be brought with proper notice under the appropriate ten-day rule and probably should be accompanied by some indication in writing to counsel that if the motion is granted and there is then a lack of compliance with the court's order, the government intends to proceed immediately against the witness in a contempt proceeding under 28 U.S.C. Section 1826.

c. The witness should be forced to raise all possible objections to the subpoena at the hearing on the motion to compel, rather than relitigating new issues at the contempt hearing, and in order to minimize successive hearings to litigate additional objections. Care should be taken to research the case law prior to the hearing on the motion to compel regarding the particular objection because frequently the government does have additional minimal burdens to meet, i.e., if a First Amendment objection is raised the government must make certain showings as to the legitimacy of the grand jury investigation.

3. Notice and opportunity to prepare a defense

Although civil contempt proceedings brought under 28 U.S.C. Section 1826 do not give rise to a constitutional right to a jury trial, courts have held that Fed. R. Crim. P. 42(b) does apply to such procedures and as such a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense. In re Di Bella, 518 F.2d 955 (2d Cir. 1975). United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert, denied, 419 U.S. 1079 (1974); United States v. Alter, 482 F.2d 1016 (9th Cir.1973).

a. What constitutes a reasonable time may vary according to the circumstances in the given case (five days is generally acceptable); however, the time is left to the discretion of the district court. United States v. Hawkins, supra; In re Lewis, 501 F.2d 418 (9th Cir. 1974); United States v. Alter, supra; United States v. Weinberg, 439

F.2d 743 (9th Cir. 1971). The courts have in fact upheld as little as one day as enough notice. United States v. Hawkins, supra. The Ninth Circuit in the Lewis case held that Lewis had adequate notice of the possible contempt proceedings when he had known for more than one week that the government would seek a contempt citation if he did not comply with the subpoena.

b. Furthermore, if the witness had adequate opportunity to raise all the issues prior to the actual contempt proceeding (for example, in a motion to compel), the district court can reasonably find that there was sufficient time to prepare even though there was actually very little time that elapsed between the actual contempt and the contempt hearing. United States v. Hutchinson, 633 F.2d 754, 756 (9th Cir. 1980); United States v. Hawkins, supra; United States v. Alter, supra.

4. Government response

At a contempt proceeding it is helpful to provide the district court with an affidavit setting forth the general relevancy of the subpoenaed documents to the grand jury investigation. In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3rd Cir. 1973). The Ninth Circuit has declined to require Schofield affidavits in grand jury proceedings. In re Liberatore, 574 F.2d 78 (2d Cir. 1978); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977).

5. Defenses

A witness charged with contempt may plead "just cause" in defense of a refusal to testify, but a substantial showing of improper motives on the part of the government is required before a full evidentiary hearing will be ordered. In re Archuleta, 561 F.2d 1059, 1061 (2d Cir. 1977)(witness may not object to question on grounds of incompetency or irrelevance).

a. Wiretaps - Gelbard Doctrine

One exceptional situation is to be noted. A grand jury witness is entitled, by reason of 18 U.S.C. Sections 2515, 3504, to refuse to resond to questions based on illegal interception of oral or

wire communications. Gelbard v. United States, 408 U.S. 41 (1972). The decision is based on the statute and not any broader principle.

Gelbard does not confer standing on a grand jury witness to suppress evidence before a grand jury. In re Marcus, 491 F.2d 901 (1st Cir. 1974). It merely extends the right not to testify in response to questions based on the illegal interception of his communications. Gelbard v. United States, 408 U.S. at 47.

The government's response to such a defense depends on whether any interception occurred. If there was no interception, the assistant should file an affidavit denying that any interception took place. Under some circumstances, the affidavit must be reasonably specific, and conform with the requirements set forth in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

If an interception did occur, the government should so indicate, and provide the court with appropriate documents demonstrating that the interception was pursuant to court order. For a discussion as to what documents are necessary to prove a valid intercept, see USAM 9-7.620.

b. Fear of retaliation (safety of the witness

Fear of retaliation and for the physical safety of the witness does not constitute just cause. Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975). Even where fears are legitimate, just cause is not always proven. In re Grand Jury Proceedings (Taylor), 509 F.2d 1349 (5th CIr. 1975); LaTona v. United States, 449 F.2d 121 (8th Cir. 1971).

6. Findings of fact

At the time of the contempt hearing or shortly thereafter, prepare findings of fact and conclusions of law for the judge that set forth the legitimacy of the grand jury, the necessary factual findings, and the conclusions of law that lead the judge to conclude that the witness should be held in contempt.

7. Bail

If a witness is jailed on contempt under 28 U.S.C.

Section 1826, the statute provides that the witness shall not be released on bail if the appeal is frivolous or taken for delay. 28 U.S.C. Section 1826(b). The statute also provides that the appeal must be heard and decided by the Court of Appeals within 30 days. There are some cases that hold that the 30-day period is jurisdictional and cannot be waived even if the appellant is released on bail. In re Berry, 521 F.2d 179 (10th Cir.), cert. denied, 423 U.S. 928 (1975). However, the Ninth Circuit has heard and decided cases in longer than 30 days when the witness is on bail. In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979). See In re Grand Jury Proceedings (Smith), 604 F.2d 318 (5th Cir. 1979), for a summary of other cases and circuits.

8. Successive contempt sanctions

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Department of Justice. See USAM 9-11.255. Although the decision in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1965), may authorize successive contempts, the Department has taken a more restrictive stance.

In order to maintain the coercive effect of a possible contempt sanction, a witness expected to refuse to testify should be taken before a grand jury panel which has a period of time left to serve, rather than a panel which is about to expire.

9. Procedures for enforcement

In order to enforce a subpoena or the grand jury's order, the following procedures are necessary:

a. If witness fails to appear after service of subpoena

Because grand jury subpoenas are issued under the authority of Fed. R. Crim. P. 17 and likewise enforceable, United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975), a failure to appear following proper service is a contempt of court. Fed. R. Crim. P. 17(g).

If the witness does not appear, the grand jury foreperson should ascertain by reasonable means that the witness did not appear (call for

witness in the hallways, call to witness' home, etc.). The foreperson, attorney and process server should present evidence to the duty judge or magistrate that

(1) the witness was property served and had notice of appearance; and

(2) the witness did not appear.

This evidence can be presented by affidavit. The AUSA should then seek an order to show cause re contempt and a warrant for arrest.

b. If the witness fails to answer questions or produce records

Here, the witness appears before the grand jury and fails to answer a question or produce material called for in the subpoena.

The witness should state his refusal on the record before the grand jury. The grand jury, AUSA, the foreperson, the grand jury reporter, and the witness then appear before the judge (usually the chief judge unless the matter relates to a case assigned to another judge). The foreperson should inform the court of the refusal. The court hears the testimony from the reporter. The witness or his attorney states the basis for refusal to testify or comply. If the court rules there is no basis to refuse to answer the question, then the court orders the witness to return to the grand jury and comply. (It is important that the court make this order, as it becomes the order to be enforced.)

The witness returns to the grand jury and is again ordered to testify or otherwise comply. If the witness continues to refuse, all parties return to the judge and report this fact.

The matter then should be set for a hearing on an order to show cause why the witness should not be held in contempt as discussed supra.

c. Material witness warrant

If there is reason to believe that a witness will fail to appear or destroy evidence if served with a grand jury

subpoena, the AUSA may obtain a material witness warrant. Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). The district court (usually the duty magistrate) may issue the warrant if there is probable cause to believe:

(1) that the testimony of the witness is material to the grand jury investigation (Note: AUSA need only state materiality in conclusory terms as there is no requirement of good cause for issuance of grand jury subpoena); and

(2) that it may become impracticable to secure the appearance by subpoena. Sufficient facts must be presented to the judicial officer; a mere assertion is insufficient.

G. Use of "Forthwith" Subpoenas

A forthwith subpoena should only be used in extraordinary circumstances, such as where there is a reasonable likelihood that business records or documents otherwise not subject to a claim of the Fifth Amendment privilege are likely to be concealed or destroyed if an immediate return is not required on the subpoena. Before seeking a forthwith subpoena, careful consideration should be given to the feasibility of obtaining a search warrant.

Although infrequently challenged, courts have indicated that forthwith grand jury subpoenas are proper in certain situations. In United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970), the court held that a forthwith subpoena duces tecum was permissible in circumstances where: the grand jury (government) had reason to fear destruction or alteration of documents; the documents were not too cumbersome to be physically produced forthwith; and there was no ground upon which a motion to quash could have succeeded if more time were allowed. While the court In re Nwamu, 421 F. Supp. 1361 (S.D.N.Y. 1976) apparently accepted the proposition that a grand jury has the power to compel a witness to appear before it and produce certain documents and things forthwith, the court clearly indicated that this power does not authorize an agent of the grand jury serving such a subpoena (e.g., FBI agent, Postal Inspector, etc.) to seize the items sought himself or to demand that the items be

immediately surrendered to him. At most, such a subpoena compels the person served with the subpoena to appear forthwith before the grand jury and to produce such documents called for in the subpoena or raise appropriate objections to their surrender to the grand jury.

Forthwith subpoenas cannot be issued without the prior approval of the U.S. Attorney. The following factors should be considered:

1. the risk of flight;

2. the risk of destruction or fabrication of evidence;

3. the need for the orderly presentation of evidence; and

4. the degree of inconvenience to the witness.

USAM 9-11.230.

It is important for the assistant to lay the proper foundation for the subpoena in the event that a challenge to that subpoena is made. Ideally, he should have the case agent or other appropriate witness testify before the grand jury to relate the facts and circumstances which would justify the issuance of a forthwith subpoena. Thereafter, with the grand jury's approval and at the direction of the foreperson of the grand jury, the Assistant should have the subpoena served by the case agent returnable later that same day before the same grand jury.

H. Use of Search Warrants

The use of a search warrant instead of a grand jury subpoena can be extremely advantageous for several reasons. It saves time and may substantially shorten the investigation; it may produce current, up-to-date evidence of a present violation; and it has enormous psychological impact on the perpetrators. A great benefit is that a warrant does not allow the targets of the investigation time to alter or destroy evidence, which often happens with documents requested through a grand jury subpoena. Use of a warrant also obviates any Fifth Amendment claims available to subjects when documents are subpoenaed.

Certain circumstances must exist to make the use of a search warrant feasible. Evidence already obtained in the investigation must show probable cause to believe the existence of a criminal violation, the existence of documents and property constituting instrumentalities and fruits of the crime, and that the property to be seized is presently at the place to be searched. Searches are ideal in on-going operations such as a Medicare/Medicaid mill, a securities or commodities boiler room, or a current fraud by a government contractor. They are also useful in obtaining evidence of "completed" offenses, such as the seizure of records of a non-corporate private accountant for a labor union (an action taken by the New Jersey Strike Force in the Teamsters investigation) and the seizure of computerized time and labor information, a successful technique used in the Texas Bell Instruments case.

The drafting and serving of the warrant are crucial to its success in surviving defense challenges. A great concern in the drafting of a warrant is that it specify with particularity the documents to be seized. The warrant must specify not only the types of records, but also the dates or time frame of the documents to be seized. Also, it must be clear that the records are relevant to the probable cause stated in the affidavit. Some cases that illuminate the pitfalls of drafting and executing search warrants in fraud cases are: United States v. Cook, 657 F.2d 730 (5th Cir. 1981) (no guidance for agents on how to determine illegally-obtained films); United States v. Jacob, 657 F.2d 49 (4th Cir. 1981) (Medicare fraud; language of warrant too broad); United States v. Brien, 617 F.2d 299 (1st Cir. 1980) (good warrant in commodities case); United States v. Roche, 614 F.2d 6 (1st Cir. 1980) (insurance fraud; overbroad seizure); Montilla Records of Puerto Rico Inc. v. Morales, 575 F.2d 324 (1st Cir. 1978) (probable cause to seize only Motown records but warrant authorized other seizures); In re Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979) (warrant did not incorporate affidavit and was not limited to seizure of student loan program records in HEW fraud case).

The requirement of particularity does not defeat the goal of an effective search. When a searching agent observes either evidence or instrumentalities of the crime that were not described with particularity in the warrant, but which were described in the probable cause affidavit, the items can be seized without the issuance of a new warrant if a saving clause such as

the one described in Andresen v. Maryland, 427 U.S. 463 (1976) has been included in the warrant. The Andresen warrant specified seizure of a list of particular "books, records, documents, papers, memoranda and correspondence, tending to show a fraudulent intent and/or knowledge as elements of the crime of false pretence, in violation of [statute cite] together with other fruits, instrumentalities and evidence of crime at this [time] unknown." Id. at 479. The Supreme Court found the phrase "together with other fruits, instrumentalities and evidence at this [time] unknown" to be acceptable in the context of the warrants because the executing officers were not authorized to conduct a search for evidence of other crimes, but only for evidence relevant to the crime described in the affidavit. Hence, the affidavit must be incorporated by reference in the warrant.

Courts have held that all of the agents in the search party must be familiar with the facts set forth in the search warrant and affidavit for the use of the saving clause to be permissible. Therefore, prior to the search, the government attorney responsible for the search should read the affidavit to the entire search party, give a copy of the affidavit to each searcher and obtain the acknowledgement of each agent that he or she has read the affidavit.

Some important cases that discuss these saving procedures are: United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1448 (1982); In re Search Warrant Dated July 4, 1977, (II), 667 F.2d 117 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1448 (1982); Church of Scientology v. United States, 591 F.2d 533 (9th Cir.), cert. denied, 444 U.S. 1043 (1979). Zurchere v. Stanford Daily, 436 U.S. 547 (1978); In re Search Warrant Dated July 4, 1977,(I), 572 F.2d 321 (D.C. Cir. 1977), cert. denied, 435 U.S. 925 (1978).

The potential liabilities of a search warrant are several. First, if a lack of probable cause can be shown, it will invalidate the search and its fruits and taint the subsequent investigation. Second, an improperly drafted or executed warrant may result in the suppression of all or most of the evidence obtained. Finally, a tactical decision must be made about whether the benefits anticipated from a search warrant outweigh the possibility that disclosure of the

affidavit will give defense counsel unduly premature disclosure of the government's evidence, witnesses, and theories of prosecution.

1. Pracitcal suggestions for the use of search warrants

a. To minimize the risk that all evidence may be tainted if the search warrant is invalidated, identify and date all evidence obtained before the search.

b. To eliminate the risk that documents may have been moved to another location, serve all defendants with a grand jury subpoena for the documents specified in the search warrant.

c. To prevent problems in the execution of the warrant, agents should have a photograph of the location to be searched and an information sheet about what to specifically include and exclude in the search, as well as the responsible attorney's phone number to call with questions. The attorney should stand by at another location during the search to answer questions by telephone about whether or not to seize a certain document.

d. Attorneys should never be present during a search. One reason is that at trial, they may be called as witnesses by the defense.

e. The responsible attorney should instruct the searching agents to inventory everything seized; a copy of the inventory should be given to both the subject of the search and the magistrate who authorized the search.

f. The subject of the search should be informed that if any of the documents are crucial to the operation of the business, he or she may call the government attorney and obtain a photocopy of the document.

g. In situations where records and relevant documents are in a computer, the computer may be placed under constructive seizure until the government's computer expert has the opportunity to read the computer system

operating manual seized under the search warrant. The expert may then proceed to run the computer's programs and generate all the documents and records specified in the search warrant.

Finally, it should be understood that drafting and executing a search warrant is time-consuming and often difficult. However, it can advance an investigation greatly. Since litigation about compliance with a grand jury subpoena may be expected, the government attorney may choose to litigate with the documents obtained by search warrant safely in hand, rather than to wonder whether documents will be destroyed or altered as defendants assert a variety of Constitutional privileges. It should be noted that seizure under search warrant obviates any Fifth Amendment claims. Andresen v. Maryland, 427 U.S. 463 (1976), is the most important case in this area. In Andresen the Court determined that the search of an individual's business records, their seizure and their subsequent admission into evidence did not offend the Fifth Amendment's proscription that "[n]o person... shall be compelled in any criminal case to be a witness against himself." Id. at 477.

I. Foreign Bank Secrecy Acts

If presented with a situation in which foreign bank records are sought from a local branch bank and a foreign bank secrecy act is involved, the following should be considered before issuing a subpoena duces tecum.

1. Check with OIA

Determine from the Justice Department's Office of International Affairs (FTS 724-7600) that no treaty is presently under negotiation with the foreign country, that use of letters rogatory has been unsuccessful in the past, that OIA has no strong opposition to your subpoena duces tecum, or that an existing treaty allows the records to be obtained expeditiously.

2. Foreign Bank Secrecy Act exceptions

Establish whether the particular foreign

bank secrecy act in your case has exceptions which would permit disclosure of the documents in that country. (The Library of Congress in Washington, D.C. has research specialists who are familiar with secrecy acts of all tax haven countries and are able to provide you with copies of the applicable statutes.)

3. Affidavits to establish relevance

Prepare an affidavit for possible in camera submission to the court regarding the relevance of the documents sought should defense counsel raise the objection. The Third Circuit requires such a showing, see In re Grand Jury Proceedings Schofield I, II), supra, but the Fifth and Eleventh Circuits do not. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

4. Comity or due process problems

The Bank of Nova Scotia, supra, concludes that the principle of comity between nations does not preclude enforcement of federal grand jury subpoenas duces tecum. See In re Grand Jury Proceedings United States v. Field, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Nor does the imposition of contempt sanctions for failure to turn the records over violate due process. Compare Societe Internationale v. Rogers, 357 U.S. 197 (1958) and United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Compare, United States v. First National Bank of Chicago, No. 80-2713, (7th Cir. January 24, 1983).

5. Serving subpoenas

There is the possibility of serving a subpoena on appropriate officers of foreign banks if the officers enter the United States. United States v. Field, 532 F.2d 404 rehearing denied 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Before doing this it is necessary to obtain review by the Office of International Affairs of the Criminal Division. Attorneys and

agents for foreign corporations who travel in the United States may be subpoenaed to produce records of foreign corporations. United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982).

VI. PRIVILEGES

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A. Constitutional Privileges

1. Fourth Amendment

Neither the history nor the language of the Fourth Amendment suggests any limits to a grand jury subpoena duces tecum for books and records. Nonetheless, the Supreme Court in Boyd v. United States, 116 U.S. 616 (1886), extended the reach of the amendment to any "compulsory extortion of ... private papers to be used as evidence...." Boyd was followed by Hale v. Henkel, 201 U.S. 43 (1906), in which the Supreme Court held that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment."

The broad view of the grand jury's powers was reaffirmed in United States v. Morton Salt Company, 388 U.S. 632 (1950). There, the Supreme Court compared an administrative investigation to that of the traditional grand jury function. The Court observed that the Federal Trade Commission's power of inquisition is analogous to the grand jury "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id. at 642-43.

a. Fourth Amendment Limitations on a Subpoena Duces Tecum

(1) Particularity

After a number of subsequent decisions that appeared to limit, at least to some degree, the acceptable scope of a subpoena, the Supreme Court in Brown v. United States, 276 U.S. 134 (1928), found that a demand for all written communications covering a span of almost three years and relating to the manufacture and sale of goods in 18 categories was not unreasonable under the Fourth Amendment. Later, in Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 (1946), the Supreme Court observed that the requirement of "particularity"

> comes down to specification of the documents to be produced adequate, but not excessive, for the purpose of the

> relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purpose and scope of the inquiry [footnote omitted].

Today, briefly stated, a subpoena for books and records is free from the Fourth Amendment's probable cause requirement and is subject only to the general Fourth Amendment requirement of particularity. United States v. Dionisio, 410 U.S. 1, 10-12 (1973); See, e.g., United States v. Powell, 379 U.S. 48, 56-58 (1964). Even strenuous "particularity" objections to subpoenas are often overcome by the Supreme Court's language in Blair v. United States, 250 U.S. 273, 282 (1919), in which it described the grand jury as

> a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

(2) Reasonable and Relevant

A subpoena duces tecum may be quashed on Fourth Amendment grounds if it is "unreasonable," and Fed. R. Crim. P. 17(c) authorizes the court to quash if the subpoena is "unreasonable and oppressive." The authority under Rule 17(c) is not dependent on the Fourth Amendment, but courts usually consider them together. In re Radio Corp. of America, 13 F.R.D. 167, 171 (S.D.N.Y. 1952) (Rule 17(c) gives the court powers in addition to those granted under the Fourth Amendment, but the tests are considered together). To be

reasonable, the subpoena must seek materials relevant to the grand jury inquiry. United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied sub nom. In re Corrado Brothers, 367 F. Supp. 1126, 1130 (D. Del. 1973); See In re Grand Jury Subpoena Duces Tecum (Local 627), 203 F. Supp. 575, 578 (S.D.N.Y. 1961); Baker v. United States, 403 U.S. 904 (1971). The courts are split, however, on who bears the burden of proving relevance.

A limited number of courts have held that the government must make a minimal showing of relevance. In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973). See also In re Corrado Brothers, Inc., supra, note 62 at 1131; In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 991, 995, 997 (D.R.I. 1975) (Government's prima facie showing of relevance is irrefutable). The government need only show that there is an investigation and that documents bear some possible relation, however indirect, to the subject of the investigation. The Second Circuit approach, however, is that the witness must show there is no conceivable relevance to any legitimate subject of investigation. See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied, 414 U.S. 867 (1973) (as to older documents, government must make minimal showing; but as to recent documents, witness must show there is no conceivable relevance); In re Morgan, 377 F. Supp. 281, 284 (S.D.N.Y. 1974).

(3) Other

A subpoena duces tecum may also be challenged on the grounds that it does not specifically describe the items called for. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Brown v. United States, 276 U.S. 134 (1928); Hale v. Henkel, 201 U.S. 43 (1906). In addition, the documents called for must cover a reasonable time period, In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975), In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947), and the burden

of compliance must not be oppressive, In re United Shoe Machinery Corp., supra; In re Harry Alexander, 8 F.R.D. 559 (S.D.N.Y. 1949); cf. In re Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948) (a subpoena requiring a search of files covering a twenty year period was not unreasonable.)

b. Standing to Raise an Objection to a Subpoena Duces Tecum

It is clear from the discussion above that a witness can move, albeit on limited grounds, to quash a grand jury subpoena directing him to produce documents. This is not to say, however, that third parties who may have generated or were the source of documents can move to quash. For the "standing" doctrine, applicable to the Fourth Amendment, has now been grafted onto grand jury practice.

The Fourth Amendment creates a personal right which cannot be vicariously asserted. See, e.g., WongSun v. United States, 371 U.S. 471 (1963). If a person has no reasonable expectation of privacy in records or documents, he cannot object even if the prosecution acquired them through an invalid subpoena duces tecum. Thus, the Supreme Court held in United States v. Miller, 425 U.S. 435 (1976), that a depositor had no legitimate expectation of privacy in bank records that were obtained through the use of a defective subpoena. The Court held:

> All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.... The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. Id., 425 U.S. at 442-431.

Of course, if there is a privileged relationship between the subpoenaed possessor of the documents and the source

of the documents, the narrow standing rule of Miller does not necessarily apply. In addition, the narrow approach to standing will not be applied if it would effectively result in the third party's inability to protect itself from prosecutorial harassment. For example, in In re Grand Jury (C. Schmidt & Sons, Inc.), 619 F.2d 1022 (3d Cir. 1980), the court allowed a corporation to appeal a denial of its motion to quash a subpoena directed at its employees. The court emphasized that, unlike its employees, the corporation, which was claiming governmental harassment, could not obtain appellate review of the subpoena by going into contempt. The court held that the company had standing, and it rejected

> the government's suggestion that the courts limit standing to claims of abuse of the grand jury process to persons whose property interest or privileges have been invaded.... Third party standing to assert claims of grand jury abuse cannot be determined by categorizing the claimed interest as one of property or privilege, but only by examining the nature of the abuse, and asking whether, and in what manner, it impinges upon the legitimate interests of the party allegedly abused. In this case Schmidt claims that the grand jury is not investigating violations of federal law, and that the Strike Force is attempting to harass it. It asserts that it is being deprived of the time and effort of its employees. It has standing to make these claims by moving to quash the subpoenas. 619 F.2d at 1026-27.

See also Katz v. United States), 623 F.2d 122 (2d Cir. 1980) (client may intervene in grand jury proceedings to move to quash subpoena directing his attorney to produce client's books and records); In re November 1979 Grand Jury (Veliscol Chem. Corp.), 616 F.2d 1021 (7th Cir. 1980) (client has standing to intervene to contest document subpoena directed to his attorney).

c. Remedy

Even if evidence is improperly obtained pursuant to subpoena, or even a search, and subsequently introduced before the grand jury, this will not serve as a basis to dismiss the indictment. An indictment valid on its face ordinarily cannot be challenged on the ground that illegally obtained evidence was presented to the grand jury. United States v. Calandra, 414 U.S. 338, 349-52 (1977) (exclusionary rule does not bar presentation to grand jury of evidence obtained during illegal search and seizure). The sole remedy is to suppress the evidence at trial. See e.g., United States v. Fultz, 602 F.2d 830, 833 (8th Cir. 1979); United States v. Franklin, 598 F.2d 954, 957 (5th Cir.), cert. denied, 444 U.S. 870 (1979). This does not, however, necessarily mean that courts will ignore the abuse of subpoena or search powers in examining the evidence presented to a grand jury. A court may exercise its "supervisory" powers to dismiss an indictment based on illegally obtained or incompetent evidence in order to prevent prejudice to a defendant or to control a pattern of misconduct. Pieper v. United States, 604 F.2d 113, 1133-34 (8th Cir. 1979) (court may exercise equitable jurisdiction to suppress illegally obtained evidence before indictment in order to control improper presentation of evidence and to deter unlawful conduct of law enforcement officers).

2. Fifth Amendment

The Fifth Amendment provides that no person "shall be compelled in a criminal case to be a witness against himself." A claim of privilege which relies upon the Fifth Amendment requires proof of three elements. These are: (1) personal compulsion, (2) of testimonial communication, (3) that is incriminating of the one so claiming.

The Fifth Amendment has frequently been raised as a bar to the compelled production of evidence before the grand jury. Much of the litigation in this area has turned on the definitions of the phrases "incriminating communication" and "testimonial communication." Of these two phrases, it is the latter which

raises the most troubling questions on the context of grand jury proceedings. These two phrases, which define the scope of this privilege, are discussed below.

a. Interpretation of the Term "Incriminating Communication"

The Fifth Amendment provides that no person can be compelled to be a witness against himself in a criminal proceeding. But this constitutional protection is not limited to facially incriminating communications. Rather, courts have uniformly held that the privilege extends to any compelled communications that lead to an incriminating inference. See, e.g., Andresen v. Maryland, 427 U.S. 463, 473-74 (1976) (act of production of subpoenaed personal records may constitute compulsory authentication of incriminating information); United States v. Praetorius, 622 F.2d 1054, (2d Cir.), cert. denied, sub nom. Lebel v. United States, 449 U.S. 860 (1980) (act of production of defendant's passport utilized for corroborating evidence not protected testimony because existence and location of passport not in question and passport nontestimonial in nature), In re Grand Jury (Markowitz), 603 F.2d 469, 476-77 (3d Cir. 1979) (act of production that acknowledges possession and control of subpoenaed documents usually held by attorney for client not compelled testimonial communication, therefore whether contents are incriminatory is not relevant); Walker v. Butterworth, 599 F.2d 1074, 1082-83 (1st Cir. 1979) (defendant's Fifth Amendment rights violated when court required defendant to announce preemptory jury selection challenges and prosecutor then used challenges to erode insanity defense).

In applying what has been described by some legal writers as the "frivolous assertion" doctrine, courts have held that a person may invoke this Fifth Amendment privilege when he has reasonable cause to believe that a direct, truthful answer would either furnish evidence or lead to the discovery of evidence needed to prosecute him for a crime. Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (privilege validly invoked if any possibility that response will be selfincriminating); United States v. Neff, 615 F.2d 1235, 1240-41 (9th Cir. 1980) (privilege invalidly invoked when defendant

declined to answer questions on tax return because of desire to protest taxes and not because of fear of self-incrimination); Dunbar v. Harris, 612 F.2d 690, 694 (2d Cir. 1979) (witness who refused to answer question whether he has visited scene where three drug sales took place validly invoked privilege because answer would furnish link in chain of evidence needed to prosecute); United States v. Metz, 608 F.2d 147, 156 (5th Cir. 1979) (witness convicted under federal narcotics statute entitled to assert Fifth Amendment privilege when substantial possibility of prosecution by state authorities existed); United States v. Jennings, 603 F.2d 650, 652-53 (7th Cir. 1979) (defendant's conviction for misprision violation of Fifth Amendment because disclosure of narcotics sale by third party to co-conspirator would have provided link in chain of evidence that could have led to defendant's criminal prosecution); In re Grand Jury (Markowitz), 603 F.2d 469, 473 (3d Cir. 1979) (attorney validly invoked privilege in refusing to reveal client's identity because identification might have linked attorney to conspiracy being investigated by grand jury). Indeed, even if it is not entirely clear that a prosecution based upon the incriminating conversation would be successful, a court must honor the privilege. All that a witness need establish is that the possibility of prosecution is more than "fanciful." In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979).

(1) Fear of Foreign Prosecution

In re Baird, 668 F.2d 432 (8th Cir.) cert. denied 102 S.Ct. 2255 (1982) held that Baird failed to show a real and substantial fear that his testimony, compelled under a grant of use immunity (18 U.S.C. Sections 6002 and 6003), would subject him to prosecution on drug-related charges in Canada. The possibility that incriminating testimony will be funneled to foreign officials by government attorneys for use against Baird in a criminal prosecution in Canada was "remote and speculative" because of the secrecy of grand jury proceedings maintained by Rule 6(e). The court did not reach the constitutional question of whether the Fifth Amendment privilege against compelled self-incrimination provides protection for a witness who,

although granted immunity from prosecution, has a real and substantial fear of foreign prosecution.

Similarly, a majority of the U.S. Court of Appeals for the Second Circuit refused to decide if the Fifth Amendment protects an immunized grand jury witness from having to give testimony that would subject him to a substantial risk of foreign prosecution. Instead, the majority held that an alleged co-conspirator in a scheme to run guns to the Irish Republican Army had not shown any "real or substantial risk" of prosecution by the United Kingdom or Ireland if he were compelled to testify under a grant of immunity. In re Grand Jury Subpoena (Flanagan), 691 F.2d 116 (2d Cir. 1982).

The district court had held that an immunized witness may invoke the Fifth Amendment privilege against compelled self-incrimination on the basis of a legitimate fear of foreign prosecution. The majority agreed with the lower court that Fed. R. Crim. P. 6(e), which restricts disclosure of grand jury testimony, doesn't guarantee that such testimony won't be disclosed to officials of another country.

Nevertheless, the circumstances in this case demonstrate that the witness' fear of foreign prosecution would not be reasonable. In reaching this conclusion, the majority cites the following factors: "The absence of any present or prospective foreign prosecution of Flanagan, the limitation of the grand jury's questioning of him to activities in the United States, the failure to proffer any evidence that extraditable crimes might be revealed by the grand jury's investigation, the non-extraditability of Flanagan for the crimes that have been suggested (e.g., membership in the IRA), the government's assurance that it would not reveal his testimony, directly or indirectly, to the U.K. or Republic of Ireland and that it would, on the contrary, oppose any effort to extradite him to face foreign charges that might be derived from his testimony, and the unlikelihood (notwithstanding instances of "leaks" in violation of Rule 6(e) ...)

that any of his testimony would be directly or indirectly communicated to Irish or U.K. authorities ..."

b. Testimonial Communication -- The Production of Documents Pursuant to Subpoena is Not "Testimonial Communication" Protected by the Fifth Amendment

Originally it was thought that Boyd v. United States, 116 U.S. 616, 630 (1886), would prevent the introduction at trial of private documents held by an individual, and thus the documents themselves were free from production. However, the Supreme Court's trilogy of cases, Andresen v. Maryland, 427 U.S. 463 (1976), Fisher v. United States, 425 U.S. 391 (1976), and Couch v. United States, 409 U.S. 322 (1973) established that generally, the compelled production of documents is not testimony and therefore not privileged. For example, in Fisher, several taxpayers transferred their accountant's papers to their lawyers. When summons were issued for the papers, they were resisted on Fifth Amendment grounds. The Court found that the taxpayers' Fifth Amendment privilege was not violated by the en- forcement of a summons issued to a third party. The Court held:

> [W]e are confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them -- the only thing which the taxpayer is compelled to do -- would not in itself involve testimonial self-incrimination.
>
> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him and are the kind usually prepared by an accountant working on tax returns of his client. Surely the government is in no way relying on the 'Truth Telling' of the taxpayer to prove the existence of or his

> access to the documents. 425 U.S. at 410-11, 96 S.Ct. at 1580 [emphasis added.]

Because not all compelled conduct is testimonial,not only can a corporate document custodian be required to produce documents, but he must also identify and authenticate them before the grand jury even if the documents criminally implicate him. As Judge Friendly observed in United States v. Beattie, 522 F.2d 267, 271 (2d Cir. 1975), modified on other grounds, 541 F.2d 329 (2d Cir. 1976): "It is well settled that the possessor cannot refuse to produce [corporate] records even if the incriminating entries were made by himself..." [emphasis added]. And as the Second Circuit Court of Appeals held in United States v. O'Henry's Film Works, Inc., 598 F.2d 313 (2d Cir. 1979):

> It is well settled that the Fifth Amendment privilege against self-incrimination does not extend to corporations and similar organizations. An agent of such an organization has a duty to produce the organization's records, even where the records might incriminate the corporation or the agent, if a ... valid subpoena has been issued for those records."

In O'Henry's Film Works, the Second Circuit reaffirmed Judge Learned Hand's holding in United States v. Austin-Bagley Corp., 31 F.2d 229 (2d Cir. 1929), that "an agent must identify the documents he does produce because 'testimony auxiliary to the production is as unprivileged as are the documents themselves.'" 598 F.2d at 318 [quoting Austin-Bagley, supra, 31 F.2d at 234].

(1) Thus, it seems clear that the Fifth Amendment prohibition against self-incrimination does not protect individuals from compelled production of a wide range of documents, including:

(a) Records of various separate entities where the records are being held in a representative capacity by a custodian,

including corporations, Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911); unincorporated associations, United States v. White, 322 U.S. 694 (1944); and partnerships (other than strict small family owned partnerships), Bellis v. United States, 417 U.S. 85 (1974). This is true even if the records would in fact incriminate the custodian who is producing them.

The Ninth Circuit has interpreted Bellis and said that if the records sought deal with "organized and institutional activity," then the Fifth Amendment privilege is not applicable. In re Grand Jury Witness (Molina), 552 F.2d 898 (9th Cir. 1977). There is no personal Fifth Amendment privilege against the production of the corporate records of a hotel where the witness hotel manager was not merely the custodian but actually prepared the records himself. In re Witness Before Grand Jury (Marlin), 546 F.2d 825 (9th Cir. 1976).

In United States v. Hutchinson, 633 F.2d 754 (9th Cir. 1980), the Court rejected a Fifth Amendment claim by a target of the investigation who was also a trustee of a trust she had created. The court indicated that the trust was not the alter ego of the target, since it had independent functions. Therefore, since the documents and records were not personal to the target, she had no legitimate expectation of privacy as to the subpoenaed material.

(b) Records required to be maintained by law. Grosso v. United States, 390 U.S. 62, 68 (1968); United States v. Rosenberg, 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031 (1975) (doctor had no Fifth Amendment privilege against production of patient records concerning dispensation of narcotic substances).

(c) Physical evidence, i.e. handwriting samples, United States v. Mara, 410 U.S. 19, 21-2 (1973); fingerprints and photographs, In re Grand Jury Proceedings (Balliro), 558 F.2d 1177, 1178 n.1

(5th Cir. 1977); appearance in a lineup, including use of reasonable force to compel this, In re Maguire, 571 F.2d 675 (1st Cir.), cert. denied, 436 U.S. 911 (1978); In re Melvin, 550 F.2d 674 (1st Cir. 1977); voice exemplars, United States v. Dionisio, supra; blood samples, Schmerber v. California, 384 U.S. 757 (1966).

(2) Exceptions

This is not to say that no subpoena duces tecum can trigger the Fifth Amendment's testimonial communications protections. Although the Supreme Court has declined to hold that the Fifth Amendment guarantees against "any invasion of privacy" (see Andresen, supra, 427 U.S. at 477) the Supreme Court in Fisher, supra, left open the question of whether a different result might have been reached if the government had subpoenaed the taxpayer's "private papers." 425 U.S. at 414. Courts which have addressed the issue have been careful to insulate witnesses from a subpoena of their personal documents. For example, in In re Grand Jury Subpoena Duces Tecum (John Doe), 466 F. Supp. 325 (S.D.N.Y. 1979), the court quashed a subpoena served upon an individual, which required production of certain documents in issue. The witness further argued that the very act of producing the documents would be tantamount to an incriminatory statement. The court, after reviewing the principles laid down in Fisher held that not only can a person not be required to produce his own papers and admit their genuineness (see United States v. Beattie, supra, 522 F.2d at 270), but he cannot be required to produce documents created for his benefit in his possession whose existence is not a "foregone conclusion." "The target's possession of a note evidencing a debt is substantial evidence that such a debt existed and, in turn, that he committed a crime." 466 F. Supp. at 327.

Similarly, even though the Supreme Court has narrowly viewed what types of business entities can claim a privilege as to subpoenaed documents, several courts have held that authentication of business records may nonetheless be testimonial. In In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980), a grand jury subpoena was issued for a doctor's appointment logs. Reasoning that compliance by the doctor would essentially authenticate the records and thus possibly

incriminate him, the First Circuit held that the doctor properly refused to produce them even though the records were not privileged. The court did hold, however, that the doctor could be given limited immunity pursuant to 18 U.S.C. Section 6002. Thereafter the Government could obtain the records and use them at trial if it could otherwise authenticate them. 626 F.2d at 1058. Accord, United States v. Doe, 628 F.2d 694 (1st Cir. 1980) (in addition to ruling on the privilege issue, the court held that statements made by the subpoenaed witness in his affidavit in support of the motion to quash cannot be used against him).

c. Fifth Amendment Privilege and Access to Corporate and Other Business Documents

Questions regarding the applicability of the Fifth Amendment privilege to documents most frequently arise in the context of grand jury subpoenas calling for business records. This is hardly surprising. Given the pervasiveness of the corporate form of business, a high percentage of grand jury subpoenas in economic crime cases are directed to corporations and their documents. Although corporate document custodians often attempt to refuse to produce documents based upon their personal Fifth Amendment privilege, courts have not been receptive to such claims. As a corollary to the principle that the Fifth Amendment privilege cannot be invoked by corporations, courts have consistently held that even where a corporation is a mere alter ego of its owner it still cannot invoke a Fifth Amendment privilege. Hair Industry Ltd. v. United States, 340 F.2d 510, 511 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965). See also United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972) (even where the witness owns substantially all the stock of a "subchapter S" corporation and its alter ego, he cannot assert a Fifth Amendment privilege to bar production of incriminating records); United States v. Shlom, 420 F.2d 263, 265-66 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970) (court rejected "alter ego" argument made by sole stockholder and treasurer of the corporation, who was the only officer active in corporate affairs); United States v. Fago, 319 F.2d 791, 792-93 (2d Cir.), cert. denied, 375 U.S. 906 (1963). The basis for the rejection of Fifth Amendment claims even by sole

incrimination through his own testimony or personal records." Id. at 89-90.

It should be noted that even if certain business records are "personal" in nature, the privilege does not protect them if they are "required" by statute or regulation. In Grasso v. United States, 390 U.S. 62 (1968), the Supreme Court set out the three basic requirements for obtaining information pursuant to the "required records" exception: (1) the purpose of the inquiry must be essentially regulatory; (2) the information requested is contained in documents of a kind which the regulated party has customarily kept; and (3) the records must have assumed "public aspect" which render them analogous to public documents. 390 U.S. at 68-69.

In determining what business entities are so distinct from their owners or stockholders as to preclude a claim of personal privilege in response to a subpoena for business records, courts have examined the relevant facts of each case to determine whether a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. United States v. Silverstein, 314 F.2d 789, 791-92 (2d Cir.), cert. denied, 374 U.S. 807 (1963) (limited partnership of three partners establishes a "close analogy to corporate form"); In re Grand Jury Empanelled January 21, 1975, 529 F.2d 543, 547-48 (3d Cir. 1976) (law firm consisting of two practitioners); United States v. Mahady, 512 F.2d 521, 524 (3d Cir. 1975) (law firm consisting of four brothers).

Apparently, doctors, lawyers, and other professionals doing business as "professional corporations" also lose their ability to raise Fifth Amendment claims against subpoenas. In Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975), the court affirmed a contempt citation against the sole stockholder and sole professional employee of a professional corporation for failing to comply with a grand jury subpoena to produce certain corporate records, relying upon the statement in Bellis, supra, 417 U.S. at 100, that no [Fifth

Amendment] privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." 506 F.2d at 1346.

(1) Sole Proprietorships

The issue often arises whether the records of a sole proprietorship should be treated as personal documents and afforded Fifth Amendment protection or as corporate type business records subject to subpoena. Generally, the records of a sole proprietorship are treated as privileged personal communication. In In re Grand Jury Impanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), the Third Circuit upheld the application of Fifth Amendment protection for sole proprietorships even when the proprietorship is a large and complex operation. The government pointed out the inconsistency in affording Fifth Amendment protection to such large and impersonal sole proprietorships while denying it to closely held corporations and partnerships. In rejecting this argument the court noted that the critical factor in recognizing a Fifth Amendment claim is not the size of the business "but rather the nature of the capacity - either personal or representational - with respect to which the privilege is being claimed." Id. at 330. Because sole proprietorships have no separate recognized legal existence, the court reasoned, Fifth Amendment claims by sole proprietors on behalf of their proprietorships are personal.

However, in In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979), the Third Circuit held that a sole proprietor may not quash a grand jury subpoena duces tecum for business records which are not in his possession. The sole proprietor could not claim constructive possession where the subpoena was served on his office manager who prepared and maintained the records even though the records might contain entries made by the owner. The court did not face the question of whether a sole proprietor may deny a business records visitation inspection which is in all respects analogous to a business records subpoena addressed to him. The court considered this question in ICC v. Gould, 629 F.2d 847 (3d Cir. 1980). The court indicated that under Bellis, supra, the Fifth Amendment may be asserted by a sole proprietor to shield the

business records of his sole proprietorship, where there is no organized institutional activity. By contrast, under Andresen, the Fifth Amendment affords no protection against the search and seizure of business records. The court remanded for further findings of fact to determine if the ICC procedure sub judice more nearly resembled a subpoena summons or a search and seizure. "If...the district court concludes that the ICC procedure resembles most closely an agency subpoena, the ICC may be foreclosed from obtaining inspection of documents for which Gould is able to claim Fifth Amendment privilege specifically" rather than as a blanket proposition. Gould, 629 F.2d at 861.

(2) Nature of the documents subpoenaed

The nature of the documents themselves may also be an issue. The Second Circuit recently addressed the problem of classification of a document's character as personal or corporate in the business office setting. The case of Grand Jury Subpoena Duces Tecum dated April 23, 1981 Witness v. United States, 657 F.2d 5 (2d Cir. 1981) involved a personal Fifth Amendment claim asserted by a corporate executive concerning pocket and desk calendars used to record business appointments. The court remanded the case to the district court for clarification of the nature of each item. It proposed a "non-exhaustive list of criteria" to be used in deciding whether production of the calendars would amount to self-incrimination. These criteria included: "who prepared the document, the nature of its contents, the purpose claimed, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation's business." (Id. at 274). The district court held that the desk calendar was a corporate document but that the pocket calendar was more of a personal paper and therefore within the scope of the Fifth Amendment privilege. These cases continue the case-by-case method of determination of the issue. See, e.g., In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980) (individual's pocket-sized appointment books prepared by individual held private papers protected by Fifth Amendment); In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980) Fifth Amendment protects physicians'

business records which pertain to private practice as a sole practitioner and over which physician retained close control).

The few courts that have considered specifically whether documents are personal or corporate find that mixed documents are corporate and outside the privilege. Citing these cases the Ninth Circuit in United States v. MacKey, 647 F.2d 898 (9th Cir. 1981) held that a diary and desk calendar used to record business meetings and transactions, kept in the office, and used in the daily management of the corporation indicate they were properly discoverable corporate papers despite personal non-business notations and lack of corporate possession or ownership.

(3) Possession

The fact of possession or control may itself become an issue. The Ninth Circuit, in United States v.Rylander, 656 F.2d 1313 (9th Cir. 1981), cert. granted, 102 S.Ct. 2006 (1982), held that once a defendant makes a bona fide Fifth Amendment claim his statement that documents sought by an IRS summons are not in his posssession or under his control is enough to satisfy his burden of production. The burden then shifts to the government to produce evidence showing that the documents do exist and are in the defendant's possession or under his control. This burden is not met by inference that the records are of a sort usually maintained and kept by someone in the defendant's position.

3. First Amendment Privileges

In several instances individuals have raised First Amendment considerations as a limitation on grand jury subpoena power. These claims of a constitutional privilege grounded in the First Amendment have met with little success in the courts. Those courts which have considered this issue have refused to recognize a First Amendment testimonial privilege.

The leading case on this question is Branzburg v. Hayes, 408 U.S. 665 (1972). In Branzburg the petitioner, a newspaper reporter, refused to comply with a grand jury subpoena which called for him to testify regarding criminal activities he had reported. The petitioner's story

had been obtained from confidential sources who were themselves involved in these activities.

The petitioner argued that if reporters were compelled to reveal information obtained from confidential sources their ability to gather news would be impeded. Therefore petitioner contended that a grand jury subpoena directed at a journalist would impair freedom of the press and violate the First Amendment.

The court rejected this argument. Noting that "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order", the court refused to exempt reporters from the general public duty to testify when called by the grand jury. Id. at 703-04. According to the court in the absence of bad faith, harassment or grand jury abuse a newsman must comply with a grand jury subpoena.

Subsequent cases have extended the Branzburg rationale to other claims of testimonial privilege founded on the First Amendment. See In re Possible Violations of 18 U.S.C. 371, 641, 1503 (Maren), 564 F.2d 567 (D.C. Cir. 1977) (Minister of Church of Scientology may not invoke a First Amendment privilege and refuse any response to grand jury); In re Cuetto, 554 F.2d 14 (2d Cir. 1977).

It should be noted, however, that a number of cases have seized upon the language of Justice Powell's concurrence in Branzburg to conclude that a limited First Amendment privilege may exist. See United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied sub nom. Schaffer v. United States, 449 U.S. 1113 (1981); Appeal of Maren, 564 F.2d 567 (D.C. Cir. 1977), (Robinson, J., concurring). This limited privilege would be triggered only by harassment, grand jury abuse or other actions calculated to chill First Amendment freedoms.

B. Common Law Privileges

1. The Attorney-Client Privilege

In recent years, prosecutors have, with increasing frequency, attempted to utilize grand jury subpoenas to obtain information from attorneys concerning their clients. Resistance to such subpoenas has been strong since the privilege is "subjectively for the client's freedom from apprehension in consulting his legal advisor." 8 J. Wigmore, Evidence, Section 3290 (1961). Indeed, the privilege belongs to the client and only the client

may waive it; and unless the client does waive it, the attorney must assert it at all proceedings. See United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965).

However, the privilege is not without qualification. As one court has explained:

> [T]he privilege applies only if:
>
> (1) the asserted holder of the privilege has sought to become a client;
>
> (2) the person to whom the communication was made
>
> a) is a member of the bar of a court, or his subordinate and
>
> b) in connection with this communication is acting as a lawyer;
>
> (3) the communication relates to a fact which the attorney was informed
>
> a) by his client,
>
> b) without the presence of strangers,
>
> c) for the purpose of securing primarily either
>
> (i) an opinion on law, or
> (ii) legal services, or
> (iii) assistance in some legal proceeding;
>
> d) and not for the purpose of committing a crime or tort; and
>
> (4) the privilege has been (a) claimed and (b) not waived by the client.
>
> United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950). See also Fed. R. Evid. 501.

It should be noted, however, that the attorney-client privilege does not protect communications which relate to collusion to commit a crime, to continuing illegality or to contemplated future crimes. As Justice Cardoza observed in Clark v. United States, 289 U.S. 1, 15 (1933), "[t]he privilege takes flight if the relation is abused."

The mere assertion of fraudulent or criminal abuse of the attorney-client relationship is not automatically sufficient to "break" the privilege. In Clark, supra, Justice Cardozo observed that in order to drive the privilege away "there must be prima facie evidence that the attorney-client privilege has been abused." Id.

A client either seeking legal advice or preparing for litigation may give documents and papers in his possession to his attorney. Such documents and papers are not automatically privileged. The Supreme Court, in Fisher v. United States, 425 U.S. 391, 403 (1976), carefully set out the limits of the attorney-client privilege. The court held that the privilege protects only those disclosures necessary to obtain informed legal advice which might not be made absent the privilege. Pre-existing documents which could be obtained from the client can also be obtained from the attorney. The simple act of transferring the papers to the attorney does not give otherwise unprotected documents protection. But, if the documents are unobtainable from the client, they are still protected by the attorney-client privilege. See also Couch v. United States, 409 U.S. 322, 335 (1973).

Recently, the Eleventh Circuit Court of Appeals affirmed an order of the District Court in South Florida holding Nigel Bowe, an attorney who practices law in the Bahamas, in contempt for failing to produce corporate records called for in a grand jury subpoena duces tecum. In re Grand Jury Proceedings, (Bowe), 694 F.2d 1256 (11th Cir. 1982). The subpoena had been served on Bowe while he was in Miami, Florida, and the records sought related to corporations believed to be associated with Bowe and two United States citizens who were under investigation by the grand jury.

Bowe's primary ground for refusing to produce the records was that for him to do so would subject him to sanctions for violation of the attorney-client privilege accorded under Bahamian law. The Evidence Act of the Bahamas contains a statutory privilege for the attorneyclient relationship - a broader privilege than is found in American common law - and it was Bowe's contention that the records in question would fall within that privilege. Without addressing the applicability of the Bahamian privilege, the Eleventh Circuit held that even if production of the records would subject Bowe to sanctions in the Bahamas, the records still must be produced. Relying on its recent decision in In re Grand Jury Proceedings,

(Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), the Court of Appeals found that enforcement of the subpoena violates neither the principles of due process nor comity between nations. "The perons being investigated in this case are United States citizens under suspicion of violations of United States law. A possible conflict with Bahamian standards of privilege cannot protect these records and they must be produced." 694 F.2d at 1258.

Bowe further contended that before the subpoena can be enforced, the government should be required to show that the documents sought by the grand jury are relevant to its investigation. Such a showing was required by the Third Circuit in In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3rd Cir. 1973), and In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1975). The Eleventh Circuit, however, refused to impose such a requirement. 694 F.2d at 1258; 691 F.2d at 1387. The court did observe that the records sought from Nigel Bowe are "almost certainly" relevant to the grand jury's ongoing investigation which concerns possible violations of the tax and narcotics laws, 694 F.2d at 1258, but held that no such showing is required. Id.

Finally, Bowe asserted that production of the records would violate his and his client's Fifth Amendment privileges. The court easily disposed of this contention on the ground that the district court's modified order requiring production pertained only to non-privileged corporate records and specifically excused the production of any privileged material.

If faced with a situation where an attorney refuses to produce subpoenaed records on the ground that to do so would violate the attorney-client privilege, remember that it is the attorney's burden to establish not only the existence of the privilege but also that the records sought fall within that privilege. It is possible, for example, that the attorney is holding the records not in his capacity as an attorney but rather as a participant in a business transaction. In that situation, the attorney-client privilege does not protect the records from production. Thus, caution should be exercised in deciding whether to stipulate that an attorney-client relationship exists or that the records sought fall within the attorney-client privilege.

a. Client Identity

The general rule is that matters involving the identity of clients are not normally protected by the attorney-client privilege. There is a large body of case law applying the general rule. See, e.g., In re Grand Jury Empanelled Feb. 14, 1978, 603 F.2d 469, 473 (3d Cir. 1979); United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973); In re Semel, 411 F.2d 195 (3d Cir.), cert. denied, 396 U.S. 905 (1969); National Union Fire Ins. Co. of Pittsburgh v. Aetna Casulty and Surety Co., 384 F.2d 316, 317 n.4 (D.C. Cir. 1967). An ambitious collation of the leading cases applying the general rule can be found in In re Grand Jury Proceedings (Jones), 517 F.2d 666, 670 n.2 (5th Cir. 1975).

However, these cases do allow that there may be circumstances where the general rule will not apply and the client's identity will indeed be privileged.

In Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962) the court wrote that the privilege extends only to the substance of matters communicated to an attorney in professional confidence. The identity of the client, or the fact that a given individual has been a client are normally not privileged even if the fact of having retained counsel can be used in evidence against the client. The court provided, however, that "to be sure, there are many circumstances under which the identity of a client may amount to prejudicial disclosure of a confidential communication as where the substance of a disclosure has already been revealed but not its source." Id. at 637.

Similarly, in United States v. Pape, 144 F.2d 778, 783 (2d Cir.), cert. denied, 323 U.S. 752 (1944), the court observed that there may be "situations in which so much has already appeared of the actual communications between an attorney and a client, that the disclosure of the client will result in a breach of the privilege." For a discussion of some of the cases recognizing an exception to the general rule see In re Grand Jury Proceedings (Jones), 517 F.2d 666, 671, 672 n.3 (5th Cir. 1975).

An exception was recognized in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) which involved an IRS summons seeking disclosure of the identity of the client on whose behalf the witness-lawyer had made an

anonymous tax payment. The court held that the general rule must be considered on a case-by-case basis, depending on the particular facts of each case. Each principle, both privilege and disclosure, should be limited to the purpose for which it exists. "If the identification of the client conveys information which ordinarily would be conceeded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors." Id. at 632.

The Fifth Circuit applied the exception in In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975). Jones called the exception "only a limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-by-case basis." Id. at p. 671. In Jones the idenity was privileged because it would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment.

Recently, the Fifth Circuit appeared to have limited its Jones exception in the case of In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc), reversing 633 F.2d 1057 (5th Cir. 1981). That case held that "where the government makes a prima facie showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies to deny a privilege to the identity of the person paying for the services - even if he himself is a client of the attorney and the attorney is unaware of the improper arrangement." See also, In Re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981).

Thus, the facts and circumstances of the individual case should be examined carefully to determine if it falls within the general rule of no privilege regarding identity or within the narrow exception to the rule which permits the privilege. If revelation of the name of the client is being sought for purposes of indictment of that individual, and the name will indeed provide the last link in a pre-existing chain of criminal conduct about which something is already known, then the identity of the client may fall within the traditional view of privileged confidential communication.

2. Work Product Privilege

The work-product doctrine, recognized initially in Hickman v. Taylor, 329 U.S. 495 (1947), protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible

litigation." Id. at 505. See also Fed. R. Civ. P. 26(b)(3). This doctrine has been extended to criminal and grand jury investigations. See United States v. Nobles, 422 U.S. 225, 236 (1975); In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973). The application of the work-product doctrine is best illustrated by examining how it has been used to thwart prosecutors' attempts to obtain copies of interviews of witnesses conducted by corporate and retained attorneys who have conducted their own "in-house" investigations. Three questions determine the applicability of the work-product doctrine. First, were these materials collected or prepared in preparation for possible litigation so as to qualify as "work product"? Second, if they are entitled to protection as work product, is the protection afforded them absolute or qualified? Third, if the documents are entitled to only qualified protection, has the government made an adequate showing to overcome that protection?

a. "Prepared in the course of preparation for possible litigation."

In Hickman v. Taylor, supra at 505, the Supreme Court held that the work-product doctrine protects materials prepared "in the course of preparation for possible litigation." The term "possible litigation" is sufficiently flexible that the work-product doctrine extends to material prepared or collected before litigation actually commences. On the other hand, some possibility of litigation must exist. Courts and commentators have offered a variety of formulas for the necessary nexus between the creation of the material and the prospect of litigation. See, e.g., Home Insurance Co. v. Ballenger Corp., 74 F.R.D. 93, 101 (N.D. Ga. 1977) (must be a "substantial probability that litigation will occur and that commencement of such litigation is imminent"); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 948 (E.D. Pa. 1976) (threat of litigation must be "real and Imminent"); Stix Products, Inc. v. United Merchants Manufacturers, Inc., 47 F.R.D. 334, 337 (S.D.N.Y. 1969) (prospect of litigation must be "identifiable"); 4 Moore's Federal Practice 26.63[2.-1] at 26-349 (1970) (litigation must "reasonably have been anticipated or apprehended"). Several commentators have suggested that:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is

> formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situtation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

8 Wright & Miller, Federal Practice and Procedure, Civil Section 2024 at 198 (1970) (emphasis added; footnote omitted).

Thus, in the context of in-house investigations, most corporate and retained attorneys will have to argue that their investigation concerned suspected criminal violations and that further investigation confirmed that suspicion, making litigation of some sort almost inevitable. The most obvious possibilities include criminal prosecutions, derivative suits, and securities litigation. Moreover, the potential for litigation is often intensified by a corporation's legal obligations to report any wrongdoing to its stockholders and to various governmental agencies.

b. Qualified Versus Absolute Work-Product Protection

In Hickman, the Supreme Court examined two categories of work product. The first category related to written witness statements which had only qualified protection. The second category of work product examined in Hickman has been dubbed by some as "absolute." These documents relate to the content of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the attorney. The Hickman Court called for greater protection of this information than it had afforded the written statements:

> "[A]s to oral statements made by witnesses to [defendant's attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the conditions of this case so as to justify production. Under ordinary circumstances, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No

> legitimate purpose is served by such production. The practice forces an attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer. 329 U.S. at 512-13 (emphasis added).

Although there is some language which suggests the posssibility of "rare" exceptions to the absolute nature of the protection (Id. at 513), at least one court has interpreted Hickman as calling for absolute protection of such interview memoranda. In In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943, 949 (E.D. Pa. 1976), the court stated that such memoranda "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure." The Court of Appeals for the Eighth Circuit also has indicated that such memoranda are "absolutely, rather than conditionally, protected." In re Grand Jury Proceedings (Duffy), supra at 848.

However, other courts have still resisted giving the cloak of "absolute" protection to work-product material and have held that "rare" and compelling need would break the privilege. See In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (only in a "rare situation" will interview memoranda be discoverable); In re Grand Jury Subpoena (General Counsel v. United States, 599 F.2d 504, 512 (2d Cir. 1979) (government's claim that it needed memoranda of interviews in order to make immunity decisions was "farfetched" since the government "is not entitled to be served on a silver platter"). Indeed, in the Upjohn case, the Supreme Court held under the work product provisions of Rule 26(b)(3) of the Federal Rules of Civil Procedure that because a memorandum of a witness statement "tends to reveal the attorney's mental processes," the government was required to establish more than mere "substantial need and inability to obtain the equivalent without undue hardship." 101 S.Ct. at 688.

3. Grand Jury Investigation of Corporate Crime -

Attorney Client and Work Product Privileges

Recently, prosecutors have made efforts to subpoena corporate records relating to interviews with its own employees concerning possible crimes committed by or on behalf of the corporation. While it is well established that a corporation is entitled to claim the attorney-client privilege, courts have repeatedly struggled to decide just which communications are those of the corporate client for purposes of the privilege. With a human client, the question answers itself. But, a corporation acts only through its directors, officers and employees. When corporate employees speak with corporate counsel, which communications, if any, would be privileged? For example, in light of recent allegations that corporate payoffs have been made to both domestic and foreign officials, companies have begun "in-house" investigations in which employees have been interviewed by in-house or outside counsel concerning the illegal activities. In turn, prosecutors have attempted, through grand jury subpoenas, to obtain corporate documents reflecting contact with the company employees.

The subpoenaed corporation generally argues that when a corporation engages legal counsel to obtain legal advice all business-related communications between corporate counsel and corporate employees are absolutely shielded from disclosure by the attorney-client privilege. This would be the result of using the so-called "scope of employment" test. That test was first formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd mem., 400 U.S. 348 (1971). Until recently, prosecutors argued, quite often successfully, that the scope of employment test was inconsistent with the historical purpose of the attorneyclient privilege, and that the proper test for determining which communications between corporate counsel and corporate employees are privileged is the so-called "control group" test initially enunciated in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963).

These two competing tests reflect efforts to determine who was sufficiently important to the corporation to be its alter ego, and thus have its conversations with corporate counsel protected by the privilege. The control group test "restricts the availability of the privilege to those officers who play a 'substantial role' in deciding and directing a

corporation's legal response." Upjohn Co. v. United States, 449 U.S. 383 (1981). The "scope of employment" test provides broader protection because it covers all employees who possess information gleaned within the scope of their employment, i.e.." [m]iddle level -- and indeed lower level -- employees . . ." 101 S.Ct. at 683.

The conflicting court decisions in this area were resolved, at least somewhat, by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1980). In Upjohn, the Government sought, through an IRS summons, corporate attorney memoranda of interviews of employees relating to foreign corrupt practices. While it declined to "lay down a broad rule or series of rules to govern all conceivable future questions" concerning the attorney-client privilege in the corporate context, the Court nonetheless took a significant step in broadening the privilege. The Court rejected the control group test because it protected only communications between a lawyer and those corporate officers and agents who direct the corporation's response to the lawyer's advice. The problem with this, Justice Rehnquist wrote for the majority, was that it overlooked the fact that the privilege protects not only the lawyer's giving of advice, but also the client's giving of information. The information the lawyer needs to formulate his advice is as likely to be possessed by middle or lower level employees as by top management. Justice Rehnquist also stressed the lack of certainty about how "control group" should be defined. This uncertainty made it difficult for corporate attorneys and officers and employees to know whether particular conversations will be protected. The result is "to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." 101 S.Ct. at 684.

With respect to the specific facts before the Court in Upjohn, Justice Rehnquist concluded that the communications were clearly privileged. Upjohn's employees were ordered by their supervisors to respond to questionnaires from in-house counsel, who was to use the information provided solely to formulate legal advice concerning the company's possible involvement in illegal pay-offs. The legal implication of the investigation was made clear to the employees, the matters were within the scope of their duties, and they were told to consider their answers highly confidential.

Of course, even if the corporation could invoke

the attorney-client privilege and refuse to produce statements by its employees to corporate attorneys, the corporation may choose to waive the privilege and "disenfranchise" the employee. A "disenfranchised employee" is the term given to a present or former employee who has spoken to a corporate attorney concerning his personal criminal conduct. The corporation has in turn consented to the attorney's grand jury testimony concerning the conversations and/or his submission to the grand jury of memoranda reflecting the conversations.

A problem from a corporate employee's perspective can arise if the attorney fails to tell him the nature of his engagement -- that is, that he represents the corporation alone. Thus, the questioned employee may not later be able to prevent the waiver of the attorney-client privilege. In re Grand Jury Proceedings (Jackier), 434 F. Supp. 648 (E.D. Mich. 1977), typifies this familiar pattern -- the corporation waived the attorney-client privilege and the attorney was required to testify about employee's incriminating statements. As the court explained, absent a directive by the employee that the lawyer must act in the capacity of the employee's legal representative, he cannot object to the attorney's testimony before the grand jury:

> If the communicating officer seeks legal advice himself and consults a lawyer about his problems, he may have a privilege. If he makes it clear when he is consulting the company lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, he may have a privilege. But, in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from [officers], the privilege is and should remain that of the company and not that of the communicating officer. 434 F. Supp. at 650.

Thus, to the extent that a corporate board of directors believes that it is in the best interests of the corporation to cooperate fully in the investigation, the corporation may be able to make available what would otherwise be privileged matters. The corporation, through its attorney, may be able to readily establish that the attorney's communications with the employee were purely on the corporation's

behalf and hence that any privilege involved may be waived.

Recently there has been a great deal of discussion among attorneys who act as corporate counsel concerning how to "defuse a document bomb" that may be uncovered during in-house investigations. (See, e.g., The National Law Journal, 8/6/79, p.24, article entitled "How To Defuse A Document Bomb....") New strategies are being developed which are aimed at structuring in-house investigations so that the fruits of the investigation will not be subject to grand jury subpoenas due to the work-product and attorney-client privileges.

First, efforts are being made to have all investigations, either through in-house or outside counsel, carried out pursuant to a clear directive from the board of directors, highly placed employees or officers in management structure. The directives specify that it is the attorney's job to uncover violations of law and to give advice on how they should be handled. Second, counsel have been attempting to "set up" a direct attorney-client relationship between the corporate attorney and the present or former employee. Thus, the corporate attorney will inform the employee that the employee was directly involved in the crime and may be or has been granted or offered immunity for his testimony against the corporation.

4. Spousal Privilege

Confidential communications made from one spouse to another in the confidence of the marital relationship are privileged. Trammel v. United States, 445 U.S. 40 (1980); J. Wigmore, Evidence Sections 2332-41 (McNaughton Rev. 1961). This privilege extends even to grand jury proceedings. Fed. R. Evid. 1101(d). Thus, a grand jury witness may choose to withhold testimony that would incriminate his or her spouse if the information sought was gained by the witness in a confidential communication with the spouse.

At common law, the spousal privilege excluded not only private marital communications, but also all other evidence to be given by one spouse that incriminated his or her partner. See Hawkins v. United States, 358 U.S. 74 (1954). This privilege was narrowed in the 1980 Trammel decision, supra, to protect only information privately disclosed between husband and wife in the confidence of the marital relationship." 100 S.Ct. at 913. Trammel sought to confine the breadth of the spousal privilege to the

more limited protection provided by the priest-penitent, attorney-client, and physician-patient privileges. Id.

Under Trammel, the witness spouse retains an option of refusing to testify; the decision to invoke the spousal privilege is left completely with the witness spouse, who neither may be compelled to testify nor foreclosed from testifying. That the witness spouse decides to testify because of a grant of immunity and assurances of lenient treatment does not render the testimony involuntary. 100 S.Ct. at 914.

In addition to Trammel, apparently there are two other exceptions to the spousal privilege. Unlike Trammel, these exceptions allow testimony to be compelled. First, testimony may be compelled when both spouses are granted immunity. United States v. Doe, 478 F.2d 194 (1st Cir. 1973). As neither spouse can be prosecuted for what is then said, the underlying precept of the privilege -- preservation of the family -- is maintained. Second, testimony also may be compelled under the co-conspirator exception. If the husband and wife are co-conspirators or co-participants in a crime, the privilege does not apply and testimony may be compelled. United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974) (where wife was an unindicted participant and was called as a witness by the government, spousal privilege did not extend to instances where wife was a party to crime).

5. Physician-Patient Privilege

The physician-patient privilege is entirely a statutory creation. J. Wigmore, Evidence Section 2380 (McNaughton Rev. 1961). Because the privilege was unknown at common law, under Rule 501 of the Federal Rules of Evidence, the physician-patient privilege will generally not be recognized in the absence of a special statute. See, e.g., United States v. Mullings, 364 F.2d 173, 176 n. 2 (2d Cir. 1966).

6. Priest-Penitent Privilege

Another privilege that can be invoked to avoid testifying before a grand jury is that of priest-penitent. While there are few cases on the scope of this privilege, the Second Circuit has held that "[w]hile the privilege has been recognized in the federal courts, it appears to be restricted to

confidential confessions or other confidential communications of a penitent seeking spiritual rehabilitation." United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (letter to priest not privileged because it contained no hint of secrecy and sought no religious advice). See also United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (murder confession to prison chaplain not privileged when prison guard present). Compare Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (admission of defendant to minister that she abused her children was privileged and inadmissible); In re Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (draft counselling services performed by clergyman and staff were privileged ministerial functions).

7. Parent - Child Privilege

The United States District Court for the District of Nevada recently held that children do not have to testify against their parents in criminal proceedings and parents likewise enjoy the right to refuse to testify against their children.

C. Developing Principles of Access to Third-Party Records

Although historically the Constitution has limited the grand jury's access to the books and records of the subject of an investigation, in recent years a new body of law has emerged. Court decisions have expanded the grand jury's access to the records of banks and phone companies and to a lesser extent to the records of businesses and professionals. Because these sources of documents can have a dramatic impact upon the prosecution of economic crimes, they will be briefly discussed below.

1. Access to Bank Records

Tracing and analyzing the flow of cash through financial and business records is a significant tool in the investigation of economic crimes. Banks maintain a variety of records that can be utilized by prosecutors. They hold signature cards, periodic account statements listing all deposits and withdrawals, and safe deposit rental contracts and entry slips. In addition, the daily proof sheet kept by tellers recording all purchasers of cashier's checks are significant because many individuals involved in criminal transactions mistakenly believe that cashier's checks cannot be traced.

Many putative defendants have attempted to utilize the Fourth Amendment to challenge the grand jury's access to their bank records. The Supreme

Court answered many questions surrounding a bank's duty to produce its records in United States v. Miller, supra. In Miller, bank records were obtained by a faulty subpoena served on Miller's bank and were used against him at his tax fraud trial. The Court held the records to be admissible because there was no instrusion into any area in which the defendant had a protected Fourth Amendment interest. The Court based its opinion on two grounds: first, the subpoenaed bank records were not Miller's private papers but rather the business records of the bank; and second, Miller had no legitimate expectation of privacy in the bank records concerning him.

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.... This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.... 425 U.S. at 443 [citations omitted].

Furthermore, in Miller the Court held that a probable cause standard similar to a search warrant was not applicable to a subpoena for bank records and only the bank, and not the depositor, can challenge the subpoena. 425 U.S. at 443-444. Because most banks are corporations, they have no Fifth Amendment privilege against self-incrimination and cannot refuse to produce books and records on that ground. See California Bankers Association v. Schultz, 416 U.S. 21, 55 (1974).

Recently the Eleventh Circuit Court of Appeals affirmed the holding of the United States District Court for the Southern District of Florida requiring the Bank of Nova Scotia to comply with a federal grand jury subpoena duces tecum calling for the production of bank records of a grand jury target maintained at the main office or any branch office of the Bank of Nova Scotia in Nassau, Bahamas, even though the lower court found that disclosure in compliance with the subpoena might subject the bank to criminal charges in the Bahamas for violation of the Bahamian Bank Secrecy Act. The subpoena had been served on the bank of its South Florida branch office. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982).

The case follows a decade of attempts by the Internal Revenue Service to penetrate the secrecy of offshore banks located in "tax haven" countries - where many high-level drug traffickers and other criminals shield their illegal income from disclosure to the IRS through the use of foreign bank accounts and phony corporations. The bank accounts in these countries are protected by bank secrecy laws which subject bank employees and other individuals to criminal prosecution for disclosure of information regarding customer accounts. The first breakthrough in this area occurred in the case of In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 rehearing denied, 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976). In that case, a Cayman Islands bank official who had travelled to the United States was served with a subpoena and was compelled to answer questions concerning his activities on behalf of the bank and its clients, even though there was a reasonable likelihood that such conduct would subject him to criminal prosecution abroad. The court reached this conclusion after balancing the interests of the United States in obtaining the information sought by the grand jury subpoena against the interest of the Cayman Islands in protecting the privacy rights of its banks and bank customers.

The Court of Appeals in Bank of Nova Scotia stressed the importance of unhindered grand jury inquiries, even when they impact on foreign relations. As the court stated, "[a]bsent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process." The court also rejected the bank's request that the government be required to show that the documents sought were relevant to an investigation properly within the grand jury's jurisdiction, as was required in the Third Circuit's rulings in In re Grand Jury Proceedings, (Schofield I), 486 F.2d 85 (3rd Cir. 1973), and In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1975). In reaching its decision on the relevance issue, the Eleventh Circuit noted that the Schofield requirements were imposed under the Third Circuit's inherent supervisory power; the Eleventh Circuit declined "to impose any undue restrictions upon the grand jury investigative process pursuant to [its] supervisory power."

This decision involves the situation where a foreign bank has a branch which is subject to the jurisdiction of the United States. Nonetheless, it is expected to be an invaluable tool for obtaining the foreign bank records of targets of major criminal investigations. It will further raise the veil of secrecy which surrounds many foreign bank records, and will provide the government with the necessary means for prosecuting many individuals who have relied on foreign bank secrey laws to elude prosecution for their criminal activities, especially drug trafficking.

Practical Pointers:

If presented with a similar situation in which foreign bank records are sought from a local branch bank and a foreign bank secrecy act is involved, the following should be considered before issuing a subpoena duces tecum.

- Determine from the Justice Department's Office of International Affairs (FTS 724-7600) that no treaty is presently under negotiation with the foreign country, that use of letters rogatory has been unsuccessful in the past, that OIA has no strong opposition to your subpoena duces tecum, or that an existing treaty allows the records to be obtained expeditiously.

- Establish whether the particular foreign bank secrecy act in your case has exceptions which would permit disclosure of the documents in that country. (The Library of Congress in Washington, D.C. has research specialists who are familiar with secrecy acts of all tax haven countries and are able to provide you with copies of the applicable statutes.)

- Prepare an affidavit for possible in camera submission to the court regarding the relevance of the documents sought should defense counsel raise the objection. The Third Circuit requires such a showing, see In re Grand Jury Proceedings, (Schofield I, II), supra, but the Fifth and Eleventh Circuits do not. In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404, rehearing denied 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

- The Bank of Nova Scotia, supra, concludes that the principle of comity between nations does not preclude enforcement of federal grand jury subpoenas

duces tecum. See In re Grand Jury Proceedings (Field), supra,. Nor does the imposition of contempt sanctions for failure to turn the records over violate due process. Compare Societe Internationale v. Rogers, 357 U.S. 197 (1958) and United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

2. Access to Phone Records

Telephone companies maintain a variety of records that are regularly subpoenaed by grand juries. Billing records, for example, show the date, time, duration and destination of all long distance telephone calls and the name and address of the person owning the telephone. MUD (Multiple Unit Dialing) records are also significant in that they provide the destination of local calls from a given phone. This information can be used for investigative leads, to provide probable cause for the issuance of a search warrant, to authorize electronic surveillance or as actual evidence to be presented to a grand jury or at trial. See, e.g., Nolan v. United States, 423 F.2d 1031, 1044-45 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970). The Fourth Amendment's use as a basis to challenge subpoenaed phone company records was substantially undercut in the United States Supreme Court's decision of Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1975). There the Court held that no warrant was required to install a pen register because there was no reasonable expectation of privacy in the records that were produced by a subscriber's use of his phone. While Smith was decided in the context of the use of the phone records as evidence in the trial, other courts have employed the identical approach to challenges to grand jury subpoenas. The Ninth Circuit held that "[n]o one justifiably could expect that the fact that a particular call was placed will remain his private affair when business records necessarily must contain this information." United States v. Fithian, 452 F.2d 505, 506 (9th Cir. 1971). Similarly, courts have held that there is no Fifth Amendment justification for denying a prosecutor access to Western Union telegram records as opposed to mere telephone company records. In United States v. Gross, 416 F.2d 1205, 1213 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970), the court held that Western Union records are "not the property of the customer who has no standing to object ... on Fifth Amendment grounds."

3. Access to Corporate and Commercial Enterprise Records

While bank and phone records provide significant evidence to prosecutors, the most significant source of evidence lies within the realm of the books and records of commercial enterprises. For example, records from credit card companies reveal how and where a suspect spends money; and because card-issuing companies keep monthly accounts for several years, investigators can reconstruct the pattern of the suspect's expenditures over a significant period of time. Similarly, car rental agencies, airlines, hotels, and credit reporting bureaus can provide valuable material.

Law enforcement officials can often obtain commercial records upon oral request alone. Under current law, privacy interests are defined to exclude "information revealed to a third-party..., even if the information is revealed on the assumption that it will be used only for a limited purpose...." Miller, supra, 425 U.S. at 443. As a result, a customer has no standing to object to the surrender of a third-party's records. The only limitation on law enforcement is private commercial policy. Generally, commercial records are obtained through a grand jury subpoena and only the recipient of the subpoena has the right to object to the production of the records. See United States v. Sahley, 526 F.2d 913 (5th Cir. 1976).

For a case in which an attorney was held in contempt for failure to produce corporate records in his possession called for in a grand jury proceedings which he felt were protected by the attorney-clent privilege. See In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982).

VII. CONFLICTS OF INTEREST/MULTIPLE REPRESENTATION

VII. CONFLICTS OF INTEREST/MULTIPLE REPRESENTATION

A. Introduction

Conflicts frequently arise when an attorney represents an organization, such as a union, as well as individuals within that organization, such as its officers. The interests of the organization often do not coincide with those of the individuals.

The attorney who attempts to represent more than one individual before the grand jury is courting conflict of interest problems. An offer of immunity for any one client may prejudice the interests of the other clients (assuming the client to be immunized will give damaging testimony against the others). This situation is the one an AUSA is most likely to meet. When all the witnesses are represented by the same attorney and all invoke their Fifth Amendment privileges before the grand jury, it will be difficult for the AUSA to decide which witness should be offered immunity. The practical matter of actually making the offer of immunity to any one witness is made next to impossible by the attorney's multiple representation.

Each district, as seen below, approaches the problem of conflicts in different ways under their local rules of practice and procedure. It is recommended that you confirm the suggestions offered here with your office.

B. Procedures

1. Informal contacts

The first step to take may be to informally contact the defense attorney who the AUSA thinks may have a conflict or potential conflict of interest. An indication that the government intends to offer immunity to one of the clients should bring the conflict to light, and it is unlikely that the attorney will resist informing the client of the conflict and withdrawing if necessary. This should be followed by a written communication to the lawyer.

2. Motion to the court

If telephone calls and letters are not enough to convince an attorney to withdraw from representation (and again, it should be emphasized that in most cases that will be enough), the AUSA should consider filing a formal motion with the court asking that the attorney be disqualified. The motion should detail the facts supporting the government's contention that a conflict

of interest does exist and should recite the efforts that the AUSA has already made to convince the attorney to withdraw. Copies of any letters should be included by way of affidavit.

3. Multiple representation cases

There are relatively few cases dealing with motions to disqualify because of multiple representation at the grand jury stage. These motions are usually made when witnesses are not cooperating with the grand jury investigation (i.e., they are invoking the Fifth Amendment), and are all represented by the same attorney. The government's motion is usually an attempt to break the "stonewall" of silence and facilitate the investigation. The cases seem to agree that the government must show something more than multiple representation and a continued invocation of the privilege in order to force the disqualification.

Pirillo v. Takiff, 341 A.2d 896 (Pa.), aff'd. 352 A.2d 11 (1975) cert. denied, 423 U.S. 1083 (1976) (an often-cited case disqualifying an attorney from representing 12 officers before grand jury. The attorney was paid by the police organization and the court held that the witnesses were deprived of a completely loyal attorney).

In re Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976) (court refused to uphold a disqualification motion based solely on the fact that one attorney represented nine witnesses, each of whom had claimed the Fifth Amendment privilege. There had not been an offer of immunity to any witness).

In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976) (Washington Post pressmen, represented by one attorney, claimed the Fifth before grand jury. The government's motion to disqualify because of the indiscriminate assertions of the Fifth was held to be premature until it was shown that immunity was not feasible due to the conflict).

In re Taylor, 567 F.2d 1183 (2d Cir. 1977) (court refused to uphold motion to disqualify attorney representing witness and target. The motion was premature as witness had not actually claimed the privilege and immunity had not been given. If the witness knowingly waived the conflict, was given immunity and still refused to testify, the contempt power was the appropriate remedy, not disqualification by the court).

In re Gopman, 531 F.2d 262 (5th Cir. 1976) (attorney represented the union and several officers who claimed the Fifth Amendment. Disqualification was proper based on the actual conflict and the court's power to regulate the conduct of attorneys).

4. Other multiple representation cases

In re Investigation Before the February, 1977, Lynchberg Grand Jury, 563 F.2d 652 (4th Cir. 1977).

United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).

United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976).

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

United States v. Garofala, 428 F. Supp. 620 (D.N.J. 1977), aff'd sub nom., United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

C. Appeals from Rulings on Motions to Disqualify

Neither a witness nor his lawyer may take an interlocutory appeal from an order of disqualification; an appeal may only be taken after contempt proceedings or conviction. In re Investigative Grand Jury Proceedings on April 10, 1979 (Wittenberg), 621 F.2d 813, 814 (6th Cir. 1980).

Nor is an order denying a motion to disqualify a government lawyer from participation in a grand jury investigation appealable. In re April 1977 Grand Jury Subpoenaes (General Motors Corp.), 584 F.2d 1366 (6th Cir. 1978).

D. Specifics on Multiple Representation

1. The interests involved

a. The prosecutor's - preventing stonewalls.

b. The defense attorney's - controlling and defeating investigations.

c. The client's:

(1) Not getting indicted.

(2) The prosecutor going away.

(3) Undivided, loyal legal representation.

d. The public's - vigorous, full search for truth.

e. The bar's maintaining ethical standards and the appearance of ethical standards.

2. The problems

There are, at least, three types of conflict situations in the grand jury which are guaranteed to attract a prosecutor's attention and which can serve as the basis for a motion to disqualify. The underlying theory is that these conflict situations are proscribed by ethical considerations.

a. Multiple representation includes:

(1) One lawyer or law firm representing corporation and employees, officers, etc.; or

(2) One lawyer or law firm representing more than one target; or

(3) Each of the above have separate lawyers, but the fees are coming from one interested source.

b. Lawyer who is representing target or witness was participant in events under investigation and is likely to be a witness or a target in same investigation.

c. Lawyer has, in the past, represented parties now adverse to present client's interest (government lawyer in past; or represented someone who is now a government witness).

3. The pertinent ethical standards

a. ABA Model Code of Professional Responsibility can be read to support all positions, but private lawyers are increasingly urging members of the Bar to take the conservative position and to get out if there is possibility of conflict.

(1) Canon 4. A lawyer should preserve the confidences and secrets of a client.

(a) This applies to all three conflict situations.

(b) It is virtually impossible to avoid violation in multiple representation situation even with knowing, voluntary waiver, potential for future conflict great in multiple representation situations, e.g., one of grand jury clients becomes a government witness at trial; or a once represented defendant takes the stand.

(2) Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

(a) DR 5-101; 5-102 (Withdrawal as counsel when lawyer becomes a witness)

(b) DR 5-105 (Interests of one client impair independent judgment re another client)

(c) DR 5-107 (Fees paid by some interested party)

(d) EC 5-1 through EC 5-13 (interests of lawyer that may affect his judgment) applies to the lawyer as a subject, participant, possible witness)

(e) EC 5-14 through 5-20 (interests of multiple clients)

(3) Canon 9. A lawyer should avoid even the appearance of professional impropriety. Applies to all situations, but see, in particular, DR 9-101(B) when you are confronted with an ex-government lawyer who is attempting to represent the other side in a matter with which there was contact during government employment. See, e.g., United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979).

(4) All other canons. Throughout the ABA Model Code, you will find proscriptions useful to bolster the government's claim of conflict based on ethical consideration. See, e.g., Canon 1 and DR 1-102(a)(5); and Canon 7 and DR 7-102 which add up to the proposition that it is unethical to advise a client to take the 5th to protect others (of course, it may be criminal as well) See, e.g., United States v. Fayer, 523 F.2d 661 (2nd Cir. 1975).

4. Basis for bringing motion to disqualify in grand jury setting

a. It is settled that courts have general authority over attorneys, See, e.g., In re Abrams, 521 F.2d 1094, 1099 (3rd Cir. 1975), cert. denied, 423 U.S. 1038 (1975); local federal district court rules; and over grand jury proceedings, See, e.g., Brown v. United States, 359 U.S. 41, 49 (1959); United States v. Calandra, 414 U.S. 338, 346 n.4 (1974).

b. At the trial stage there have been contradictory court decisions as to whether the court has a duty to inquire, sua sponte, regarding an apparent conflict situation, but the Supreme Court appears to have settled the matter in Cuyler v. Sullivan, 446 U.S. 335, 345-48 (1980). (unless the state trial court knows or reasonably should know that a conflict exists the court need not initiate an inquiry into the propriety of multiple representation).

c. In any event, courts cannot identify, sua sponte, conflict situations at the grand

jury stage. It is the prosecutor's duty to bring it to the attention of the court. See In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976). Cf. United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978).

5. The foundation for disqualification motions. Government usually urges at least one of three claims.

a. Multiple representation interferes with grand jury's investigation.

(1) Importance of unimpeded grand jury. See, e.g., United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

(2) Balanced against witnesses' due process or First Amendment right to select own counsel. Stronger Sixth Amendment right is not involved. See, e.g., In re Taylor, 567 F.2d 1183 (2d Cir. 1977); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), cert. denied, 423 U.S. 1083 (1976). But see, United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa. 1979)(motion granted, balancing 6th Amendment rights).

(3) Successful motions:

See In re Investigation Before the February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); In re Gopman, 531 F.2d 262 (5th Cir. 1976); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), cert. denied, 423 U.S. 1083 (1976). United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa. 1979); In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, Dkt. No. 79, Slip Op. (6th Cir., May 20, 1980); United States v. Clarkson, 567 F.2d 270 (4th Cir. 1977) (attorney under indictment).

(4) Unsuccessful motions:

See In re Taylor, 567 F.2d 1183 (2d Cir. 1977); In re Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976); In re Investigation

Before April 1975 Grand Jury (Rosen), 403 F. Supp. 1176, 1179 (D.D.C. 1975), vacated, 531 F.2d 600 (D.C. Cir. 1976) (for failure to test invocation of Fifth Amendment).

b. Multiple representation is unethical and mandates disqualification.

(1) Some courts do not hesitate to avoid potential conflict. See, e.g., In re Gopman, 531 F.2d 262 (5th Cir. 1976); In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977), aff'd per curiam by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, sub nom. In re Janavitz, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976).

(2) Proof of actual conflict necessary in some courts. These courts have demanded that the government prove facts as a condition of disqualifications: proof that the clients would not invoke the Fifth Amendment if separately represented, In re Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600, 607 (D.C. Cir. 1976); proof that the immunized client would incriminate the non-immunized clients; or proof that counsel's advice was contrary to the client's best interest, would not have been given by a different attorney, or was given to obstruct justice, In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980); In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wisc. 1979); In re Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978); In re Special February, 1975 Grand Jury, 406 F. Supp. 194, 199 (N.D. Ill. 1975).

c. Multiple representation in grand jury raises questions which may provide an ultimate defendant with basis for 1) moving to dismiss the indictment; 2) manipulating

the trial; or 3) getting the conviction reversed. See, e.g., In re Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980); United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978) (motion to dismiss indictment).

See United States v. Dickson, 508 F. Supp. 732 (S.D.N.Y. 1981) (government motion to disqualify trial counsel granted because he had represented co-defendants and trial witnesses during grand jury proceedings).

See United States v. McDonnell-Douglas Corp., Crim. No. 79-00516 (D.D.C. 1971) (government's motion for a hearing to determine existence of conflict of trial counsel based on multiple representation during grand jury stage) (motion papers available from DOJ Fraud Section).

6. How to establish factual basis for disqualification motion.

a. Determine who is paying fees. This is not privileged information.

(1) Fees coming from target? Check Canon 5. See In re Abrams, 56 N.J. 271, 266 A.2d 275, 278 (1970); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 aff'd., 352 A.2d 11 (1975), cert. denied, 423 U.S. 1083 (1976).

(2) Alone, usually not enough. See, e.g., In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wisc. 1979). In re Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978).

(3) But see, Wood v. Georgia, 450 U.S. 261 (1981).

b. Questions for witnesses who have separate counsel or who are cooperating without counsel about approaches made by lawyers who are attempting to represent multiple witnesses, witnesses and targets, corporation and all employees.

(1) What fee arrangement offered?

(2) What advice re: 5th?

(3) What advice re: what to do if government contacts?

(4) What attempts to learn what cooperating witnesses are saying?

(5) Peer pressure to use same lawyer?

c. Question witnesses who are represented by the offending counsel as to same things, in grand jury.

d. Insist in a writing from lawyer as to precisely who has retained him or her to represent them. Do not accept blanket "all employees," etc.

e. Keep good notes of directions to you by lawyers who purport to represent everyone you reach out for, build record of "stone-wall"; But see, In re FMC Corp., 430 F. Supp. 1108 (S.D. W.Va. 1977).

f. Analyze varying degrees of culpability between people represented jointly and pin down from other witnesses or circumstances what one could say inculpating the other. Be as specific as possible.

g. When your record is good and in your judgment the conflict is clear, notify counsel in writing, advise client in presence of counsel or in grand jury. See United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978).

h. If notification produces no action consider alternatives to motion. See In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980).

i. Test invocation of 5th Amendment by witnesses. See, e.g., Garner v. United States, 424 U.S. 648, 658 n.11 (1976); Hoffman v. United States, 341 U.S. 479 (1951);

Rogers v. United States, 340 U.S. 367 (1951); In re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176 (D.D.C. 1975), vacated, 531 F.2d 600 (D.C. Cir. 1976) (for failure to test invocation of Fifth).

(j) Where you can safely do so, offer immunity.

(k) Test waivers. May not be the kind court will accept as voluntary and knowing. See, e.g., In re Investigative Grand Jury Proceedings (April 10, 1979), supra, 480 F. Supp. 162 (N.D. Ohio 1979); In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977); In re Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976); Pirillo v. Takiff, supra. See, generally, Westinghouse Electric Corp. v. Gulf Oil Co., 588 F.2d 221 (7th Cir. 1978).

7. Motion for disqualification

If still no action, make motion for disqualification (in some courts styled as a motion for restraining order), but consider how much information you may be required to share with opposing attorneys. In camera submissions by the Government are possible, but risky. See In re Taylor, 567 F.2d 1183 (2d Cir. 1977). In camera interviews of clients by judge outside presence of government and defense are probably good idea.

8. Make a sufficient record.

Be sure good record is made in district court of all factors, or it will be denied as "not ripe," In re Taylor, 567 F.2d 1183 (2d Cir. 1977), or "not fully developed," In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976).

a. File complete affidavit setting forth the case you have built.

b. Counsel and clients should be forced to testify as to

(1) counsel's explanation to client of conflict problem.

(2) client's understanding,

(3) evidence of voluntary waiver, and

(4) all about the attorney - client relationship.

9. Orders denying motions for disqualification of counsel are not appealable.

Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). You will have to proceed by mandamus if you lose in the district court.

10. Other resources

See suggested voir dire, Tague, "Multiple Representations of Targets and Witnesses During Grand Jury Investigation," 17 Am. Crim. L. Rev. 201, 325 (1980).

VIII. GRAND JURY MOTIONS, (CONTEMPT)

VIII. GRAND JURY MOTIONS, (CONTEMPT)

A. General Form (check local practice)

1. Two categories

a. Ex parte

b. Motions with notice, including motions with regular notice and Orders to Show Cause.

2. Judge selection

Government offensive grand jury motions provide one of the few occasions, in some districts, where you can control the selection of the judge to hear the matter. For instance, in some districts using the Individual Calendar System, judges sit in an Emergency Part (which handles grand jury items) for two week periods on an announced schedule. A grand jury ex parte application, or an Order to Show Cause will be heard by the judge assigned to the Part when the Government's motion is made. However, motions with the ordinary 10-day notice will likely be bounced to the judge sitting on the return date.

3. Oral motions

Some courts will allow certain motions to be made orally, obviating the necessity for papers.

a. If motion is made orally, the grand jury reporter should be present to make a record of the application and the court's decision (In some jurisdictions the court reporter is permitted to fill this role).

b. If oral motion relates to matters occurring before the grand jury, it is wise to have a grand jury officer with you to confirm facts.

4. Motion on paper

If motion is made on papers it should usually contain:

a. Notice of motion, or Order to Show Cause which is signed, ex parte, by judge who selects the time for appearance and enters it on the face of the order,

b. Affidavit by government lawyer setting forth factual basis for relief sought,

c. Proposed final order, and

d. Memorandum of law.

5. Sealing Order

Whether motion is ex parte, or on notice, the application should contain a request for a protective order sealing the motion papers, or the transcript, any related court entries, and any proceedings which may flow from the application.

6. In Camera Proceedings

If a proceeding of any kind follows the motion, in the ordinary case the proceeding in the district court should be conducted in camera, recorded by a grand jury reporter (or in some jurisdictions, the court reporter) and the reporter's notes and transcript sealed. If the court posts a calendar the identity of the parties should be disguised.

If your motion is with notice, but there is information pertinent to the matter which you do not want to disclose to parties, consider additional in camera, ex parte presentations to court of sensitive matters.

Cf. United States v. Manley, 632 F.2d 978 (2d Cir. 1980)(court must balance any unfairness of non-disclosure with the government's secrey interest). Of course, the other side has the same opportunity for ex parte review when matters pertain to 5th Amendment privilege or the attorney-client privilege, etc. See, e.g., In re Grand Jury Proceedings, 522 F. Supp. 977 (S.D.N.Y. 1981)(ex parte hearing when evidence is taken, while the government is excluded).

NOTE: Be alert to Department of Justice guidelines on closed proceedings and consult the United States Attorneys' Manual.

B. Ex Parte Motions

1. Generally

There are several types of government motions (applications) which are properly made to the

court, ex parte, in the course of a grand jury investigation. Some are routine; some have been created by imaginative government lawyers faced with particular problems. Defense attorneys and attorneys for third parties can be counted upon to attempt to assert the standing of their clients to receive notice of many of these matters and to be heard. Indeed, some statutes have notice provisions while other statutes specifically support the ex parte nature of the application. If there is no controlling statute, our best arguments against notice and intervention are:

a. No standing.

b. The strong public interest served by the ability of the grand jury to continue its work in secrecy, unimpeded by the inherent delay involved in frivolous mini-hearings. Fed .R .Crim. P. 6; United States v. Johnson, 319 U.S. 503, 513 (1943); United States v. Calandra, 414 U.S. 338 343-44, 350 (1974); United States v. Proctor & Gamble, 356 U.S. 677, 681 (1958)

2. Routine ex parte motions

a. Application for an order authorizing tax disclosure. See, USAM 9-4.900 et seq., for forms and procedures. United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980)(tax disclosure application is ex parte in nature).

b. Application for an order authorizing disclosure of information otherwise protected by privacy statutes, for instance:

1. The Drug Patient Privacy Statute, 21 U.S.C. Section 1175 et seq., and

2. The Fair Credit & Report Act, 15 U.S.C. Section 1611 et seq.

See, In re Gren, 633 F.2d 825 (9th Cir. 1980)(grand jury subpoena is not a court order within the meaning of the Act). Although DOJ has consistently taken the position that a grand jury subpoena is "an order of court" within the meaning of the Act (see, USAM 9-11.230). DOJ

has decided not to appeal this decision. It is, thus, probably necessary now to obtain a "so ordered" and a judge's signature on the bottom of your subpoena addressed to a credit agency.

c. Application for letters to obtain evidence and testimony abroad. See, 28 U.S.C. Section 1781.

d. Application for subpoena compelling appearance in the United States, directed at U.S. national who is abroad. See, 28 U.S.C. Sections 1783-84.

e. Application for a material witness warrant and for bail. See, Stein v. New York, 346 U.S. 156, 184 (1953); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); 18 U.S.C. Section 1349; Fed. R. Crim. P. 46(b).

Most courts will require a showing that the witness has information material to the investigation and that the witness' presence cannot be secured by subpoena.

f. Application for arrest warrant in lieu of Order to Show Cause for subpoenaed witness who has failed to appear. Fed. R. Crim. P. 42(b).

g. Application for a Writ of Habeas Corpus Ad Testificandum for production of incarcerated potential witness.

h. Application for a grant of immunity pursuant to 18 U.S.C. Section 6001 et seq. See Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 539-40 (7th Cir.1977), cert. denied, 439 U.S. 820 (1978) (no notice and no opportunity to be heard is required). However, in the ordinary case, it is probably productive and protective of later contempt action to have witness and lawyer, if any, present so that judge can explain consequences of not testifying. See, e.g., Goldberg v. United States, 472 F.2d 513, 514 (2d Cir. 1973).

i. Application for an order authorizing disclosure pursuant to Fed. R. Crim. P. 6(e). There are instances when the public interest in disclosure of grand jury material during

the course of a grand jury investigation outweighs the public interest in secrecy. Nothing precludes the government, for instance, from obtaining these orders in connection with agency civil actions which may be necessary to fire a corrupt employee, or to debar a crooked contractor, or to recoup fast disappearing proceeds of a fraud, or to stop (with a civil injunctive action) an ongoing crime. The value of such disclosure must of course, be weighed against the potential damage to the criminal case.

3. Non-routine ex parte motions

a. Application for a protective order directing a bank not to disclose the existence of a grand jury subpoena for customer records.

This "order" has no basis in the Financial Privacy Act, 12 U.S.C. Section 3401 et seq., because grand jury subpoenas are excepted from the notice requirements of the statute. However, many banks, are undertaking to notify customers, to the detriment of countless grand jury investigations.

Some districts have obtained court orders directing the banks to maintain secrecy.

(1) Arguments against

(a) Fed. R. Crim. P. 6(e) limits obligations of secrecy and does not provide for this kind of protection against a witness.

(b) The Act doesn't provide for this kind of order in connection with grand jury proceedings.

(2) Arguments for

(a) Inherent power of court to protect integrity of grand jury proceedings.

(b) Legislative history of Act supports view that disclosure is not intended and can be harmful. See H. Rep. No. 95-10383 at 228, U.S. Code Cong. & Admin. News, 9358 (January 1979).

(c) No legitimate purpose served by notice because customers have no standing. United States v. Miller, 425 U.S. 435 (1976). (Query whether this is still good law given standing conferred by some provisions of Financial Privacy Act passed after this decision).

(d) No conflict with the proposition that witnesses cannot be bound by secrecy requirements because orders are limited to fact of receipt of subpoena rather than to "matters occuring before grand jury."

b. Applications for orders permitting disclosure even when requirements of Fed. R. Crim. P. 6(e) are not met, e.g., to state officers assisting in joint investigation; outside contractors or experts necessary to assist in technical matters (for instance, computerization of grand jury transcripts).

(1) It is unclear whether state officers are "government personnel" within the meaning of the rule. Compare In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979) with, In re Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978) appeal dismissed, 580 F.2d 13 (1st Cir. 1978). Therefore, before disclosure to state officers or technicians it is wise to:

(a) try to get order authorizing the disclosure, under Rule 6(e)(3)(A)(ii) (deeming state agents to be "government personnel") and Rule 6(e)(3)(C)(i) (deeming the grand jury to be "preliminary to a judicial proceeding"), and

(b) have the officer or expert sworn as an agent of the grand jury.

See United States v. Stanford, 589 F.2d 285, 292 (7th Cir. 1978) cert. denied, 440 U.S. 983 (1979).

(c) Certain experts, of course, can be exposed to grand jury materials without problems, e.g. expert witnesses.

(2) Beware the private agent and the outside contractor, e.g., the computer people, the photocopy company people. See United States v. Tager, 638 F.2d 167 (10th Cir. 1980) (indictment dismissed in spite of court order).

c. The All Writs Act, 28 U.S.C. Section 1651, is an all purpose basis for creative orders "necessary and appropriate in aid of the court's jurisdiction and agreeable to the usages and principles of law."

(1) To obtain all manner of relief. See, e.g., United States v. New York Telephone Company, 434 U.S. 159 (1977) (telephone company ordered to assist with the installation of a pen register). No visible jurisdiction except Fed. R. Crim. P. 41.

(2) For protective order of all kinds.

C. Adversarial Motions

1. Motions with Notice (or by Order to Show Cause) for orders enforcing subpoenas, compelling testimony, etc.

a. Witness has failed to appear on required date.

b. Witness has failed to produce document on required date.

c. Witness has refused to give:

(1) Testimony, under immunity or after court has ruled that 5th Amendment privilege not valid.

(2) Handwriting. United States v. Mara, 410 U.S. 19 (1973).

(3) Fingerprints.

(4) Voice Exemplars. United States v. Dionisio, 410 U.S. 1 (1973).

(5) Self in line-up. In re Maguire, 571 F.2d 675 (1st Cir. 1978), cert. denied, 436 U.S. 911 (1978).

(6) Any non-testimonial thing properly demanded.

d. Substantive law is the same as in witness' motion to quash. Procedurally, however, you will be asking for a court order directing witness to comply or to be held in contempt of court.

e. Contempt - Civil and Criminal

(1) Civil contempt, pursuant to 28 U.S.C. §1826, allows wherein the witness to be incarcerated until such time as he complies with the court order, or life of the grand jury (not to exceed 18 months). A fine may be imposed although not specifically stated in statute, In re Grand Jury Impaneled January 21, 1975, 529 F.2d 543 (3d Cir.); cert. denied, 425 U.S. 992 (1979). Court must impose sentence for order to be final, In re Stewart, 571 F.2d 958 (5th Cir. 1978); Lewis v. S.S. Baune, 534 F.2d 1115, 1119 (5th Cir. 1976).

Court of appeals must handle within thirty days, conditioned on order of confinement, In re Berry, 521 F.2d 179 (10th Cir.), cert. denied, 423 U.S. 928 (1975). Thirty day rule still applies if witness allowed bail, Id. Contra, In re Grand Jury Proceedings (Gravel), 605 F.2d 750 (5th Cir. 1979) (court allowed itself more than 30 days saying the 30 day rule is non-jurisdictional).

(2) The basis for contempt, is found in Criminal, 18 U.S.C. §401(3), Fed. R. Crim. P. 42(b) Note that most criminal contempts at the grand jury stage are not 42(a) summary contempts because the actual refusal to obey the order will occur in the grand jury, out of the presence of the court. See Harris v. United States, 382 U.S. 162 (1965). For criminal contempt judge can sentence for any amount of time if case is tried by jury, Frank v. United States, 395 U.S. 147 (1969), but 6 months limit if tried non-jury, see, e.g., Bloom v. Illinois, 391 U.S. 194 (1968).

(3) Fines can be used as sanctions for both civil and criminal contempt and are particularly useful for corporate contemnors. Mitchell v. Fiore, 470 F.2d 1154 (3rd Cir. 1972).

(4) Local rules of the court have contempt provisions as well, both civil and criminal.

f. The courts often confuse the two types of contempt. To see the difference look to the purpose. Shillitani v.United States, 384 U.S. 364, 370 (1966).

(1) Overall characteristic of civil contempt is remedial. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911). Civil contempt commitment should have a purge clause. Witness has keys to jailhouse. See, e.g., United States v. Hughey, 571 F.2d 111 (2d Cir. 1978).

(2) Criminal contempt purpose is to punish. It is intended to vindicate authority of court. See Gompers; Hughey, supra.

(3) A person can be charged and "tried" simultaneously for civil and criminal contempt. United States v. Aberbach, 165 F.2d 713 (2d Cir. 1948).

(4) If civil contempt efforts are unsuccessful criminal contempt proceedings may be initiated. No double jeopardy. See, e.g., United States v. Hughey, supra.

(5) A sentenced prisoner's regular term can be interrupted with a civil contempt commitment. See, e.g., United States v. Liddy, 510 F.2d 669 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975). A criminal contempt sentence would go at the end of a regular sentence.

(6) As a matter of policy, courts have held that the civil contempt sanction should be tried before criminal sanctions are applied.

See, e.g., United States v. Doe, 405 F.2d 436 (2d Cir. 1968).

(7) Note that the court has the power to terminate coercive civil contempt confinement if it is not getting anywhere. In re Cueto, 443 F. Supp. 857 (S.D.N.Y. 1978); Matter of Archulella, 446 F. Supp. 68 (S.D.N.Y. 1978).

(8) Note the Department of Justice policy against the use of successive grand juries to extend civil contempt incarceration. USAM 9-11.255.

g. Most civil contempt proceedings fall under 28 U.S.C. §1826. Controlled by statute with developing procedural nicities. See In re Sadin, 509 F.2d 1252 (2d Cir. 1975); United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 419 U.S. 1079 (1974), which held that due process rights created under Fed. R. Crim. P. 42(b) must be observed under 28 U.S.C. §1826.

(1) Counsel

(2) Some sort of notice of proceeding and consequences

(3) Chance to demonstrate "just cause" for refusal to comply.

(a) 5th Amendment

(b) Attorney-Client

(c) Other privileges

(d) Privacy

(e) Illegal wiretaps

(f) Flaw in service

(g) Flaw in grand jury

(h) Prosecutorial abuse, misconduct.

(i) Oppressive

Note: Substantive law is same as if witness had moved to quash on all these items.

Note: Fear is not just cause. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); nor is religious conviction, see Smilow v. United States, 465 F.2d 802 (2d Cir. 1972); nor fear of foreign prosecution. In re Grand Jury Subpoena (Flannagan), 691 F.2d 116 (2d Cir. 1982).

(4) No right to allocute. In re Roshan, 671 F.2d 690 (2d Cir. 1982).

h. The motion itself generally unfolds in four stages:

(1) Judge signs Order to Show Cause, ex parte, indicating date and time when witness is to appear before court, or you make oral application in presence of witness.

(2) The Hearing.

(a) At the resulting appearance, there is a demonstration in some form or other (affidavit, statement by grand jury officer, reading of grand jury transcript) that witness has refused or failed to comply with subpoena or grand jury direction.

(b) At this appearance, witness will normally be given the due process opportunity to show "just cause."

(c) The court will decide there is no "just cause" and order the witness to comply at a time and date certain.

(d) The judge should spell out the consequences of non-compliance and tell the witness that the government can proceed not only in civil contempt but also in criminal contempt.

(e) The witness, then, should be directed to re-appear in grand jury.

(3) If witness does not return to the grand jury, or returns but refuses to comply, he is in violation of court order.

(4) It may take another Order to Show Cause, or an arrest warrant to get the witness back before the judge, where without further ado the judge could find him in civil contempt (or in criminal contempt, providing he has been given notice that he faces that sanction).

(a) Most courts at this point will give the witness yet another opportunity to be heard. This is absolutely unecessary providing the judge has given a full opportunity to be heard the first time around. In re Fula, 672 F.2d 279 (2d Cir. 1982).

(b) If judge finds the witness to be in contempt, the witness will be instantly remanded.

2. Motions with Notice (or by Order to Show Cause) to seek court assistance against obstructionist tactics.

a. Rely on All Writs Act, 28 U.S.C. §1651, if appropriate, and on the Calandra, Brown argument regarding court's authority over grand jury proceedings.

b. Types of conduct which court may control.

(1) Undue interruptions to consult with counsel. See In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

(2) Tedious note-taking by witness.

(3) Photographing and otherwise seeking to identify or intimidate grand jurors.

(4) Hanging around grand jury room with no apparent purpose.

3. Motions with Notice (or by Order to Show Cause) to seek stays, protective orders, injunctive relief in other courts.

a. When there is a parallel civil case pending between the government and private parties, or a purely private civil action, the occasion can arise when further proceedings in the civil case will prejudice the grand jury investigation, e.g.,

(1) government witness noticed for deposition, and

(2) friendly parties are served with defense subpoenaes to turn over all documents given to the prosecutor.

b. There is ample precedent for government intervention in the civil suit to seek protection from these defense tactics. See United States v. Kordel, 397 U.S. 1, 12 n.12 (1970). See Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); United States v. One 1967 Ford Galaxy, 49 F.R.D. 295 (S.D.N.Y. 1970); Federal Deposit Insurance Corp. v. Fireman's Fund Ins. Co., 271 F. Supp. 689 (S.D. Fla. 1967); United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D.N.Y. 1966); United States v. $2,437.00 United States Currency, 36 F.R.D. 257 (E.D.N.Y. 1964); United States v. Steffes, 35 F.R.D. 24 (D. Mont. 1964); United States v. Bridges, 86 F. Supp. 931 (S.D. Cal. 1949); United States v. A.B. Dick Co., 7 F.R.D. 442 (N.D. Ohio 1947).

c. Courts have issued such orders specifically when criminal case is in preindictment stage, e.g., Securities and Exchange Commission v. Control Metals Corp., 57 F.R.D. 56 (S.D.N.Y. 1972); Penn v. Automobile Ins. Co., 27 F. Supp. 336 (D. Ore. 1939).

d. Such an order demands a showing of a clear case of hardship, see Landis v. North American Co., 299 U.S. 248 (1936), which is frequently not difficult in the grand jury context.

IX. GRAND JURY ABUSE ISSUES

IX. GRAND JURY ABUSE ISSUES

A. Importance of Avoiding "Misconduct" Before Grand Jury

1. Puts prosecutor's credibility in issue at the outset of a case.

2. Generally, the only remedy available to court is dismissal of entire indictment.

B. Nature of Court's Jurisdiction

1. Due Process: See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

2. Supervisory Powers: See United States v. Cruz, 478 F.2d 408 (5th Cir.) cert. denied, 414 U.S. 910 (1973); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

3. Under either standard, court's role is to protect integrity of judicial process from unfair prosecutorial conduct. United States v. Leibowitz, 420 F.2d 39 (2d Cir. 1969).

4. Dismissal appropriate only when prosecutor's conduct was flagrant or outrageous.

C. Typical Allegations of Misconduct

1. Use of hearsay evidence

   a. Indictment can be based entirely on hearsay evidence. Costello v. United States, 350 U.S. 359 (1956).

   b. Exception (in the Second and Fifth Circuits):

      (1) If the grand jury is misled into believing that hearsay evidence is actually first-hand, direct evidence, and

      (2) If there is a high probability that grand jury would not have indicted if live witnesses testified, dismissal may be appropriate.

      (3) United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, sub nom L & A Creative Arts Studio Inc. v. Redevelopment Authority of the City of Philadelphia, 414 U.S. 910 (1973); United States v. Estepa 471 1132 (2d Cir. 1972).

2. Use of perjured testimony

a. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) prohibits "knowing use" of perjured testimony before grand jury. See also United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

b. Importance: In Basurto, prosecutor did not become aware of perjury until after indictment (but before trial); indictment was still dismissed.

c. In Basurto, balancing test applied: if perjury discovered by prosecutor after jeopardy has attached or after statute of limitations has expired, dismissal not appropriate because indictment cannot be re-presented.

d. Perjury must be material.

3. Exculpatory evidence

a. Generally, no duty to present such evidence. United States v. Leverage Funding Systems Inc., 637 F.2d 645 (9th Cir. 1980) cert. denied, 452 U.S. 961 (1981); United States v.Ciambrone, 601 F.2d 616 (2d Cir. 1979).

b. No duty to present evidence impeaching government witness, Loraine v. United States, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933 (1968).

c. Some courts have hinted that dismissal is appropriate if exculpatory evidence which was not presented would clearly have negated guilt. See United States v. Mandel, 415 F. Supp. 1033 (D. Md. 1976).

d. In Mandel and Ciambrone, court considered fact that defendant was invited to testify or make a proffer of exculpatory evidence, and failed to do so.

e. Notwithstanding absence of legal duty to present, there may be tactical reasons for presenting exculpatory evidence.

f. DOJ policy requires prosecutors to present "substantial evidence" known to prosecutor "which directly negates guilt." U.S. Attorney's Manual, Section 9-11.334. However, violation of internal DOJ policies is not a ground for dismissal. United States v. Caceres, 440 U.S. 741 (1979).

4. Use of inadmissible evidence

a. Generally, rules of evidence do not apply in grand jury. Fed. R. Evid. 1101(d)(2); United States v. Blue, 384 U.S. 251 (1966).

b. Evidence obtained in violation of Fourth and Fifth Amendments can be used. United States v. Calandra, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973). But as a matter of policy, this type of evidence should not be used since it will be inadmissible at trial.

c. Exception: Illegally obtained wiretap evidence cannot be used. 18 U.S.C. Section 2515.

5. Privileges

a. Generally, privileges available at trial can also be asserted in grand jury; United States v. Calandra, supra; Fed. R. Evid., 501 and 1101(d).

b. If privilege is violated before grand jury remedy should be suppression of privileged evidence at trial, not dismissal of indictment. See United States v. Colosardo, 453 F.2d 585 (2d Cir. 1971); United States v. Bonnell, 483 F. Supp. 1070 (D. Minn. 1979); United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975).

c. Work product privilege applies to grand jury proceedings. In re Grand Jury Proceedings (Duffy),473 F.2d 840 (8th Cir. 1973).

6. Statements made by prosecutor

a. Giving opinion as to sufficiency of evidence or credibility of witnesses may result in dismissal. United States v. Samango, 450 F.Supp. 1097 (D. Hawaii 1978); United States v. Wells, 163 F.d 313 (D. Idaho 1908).

b. Prosecutor cannot act as witness. United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978); United States v. Treadaway, 445 F. Supp. 959 (N.D. Texas 1978).

1. Prosecutor must be extremely careful in responding to questions that he or she does not give evidence.

c. Instructions on the law

1. Practice differs from district to district.

2. No legal requirement to instruct on the law. United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied 452 U.S. 920 (1981). c.f. United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 102 S.Ct.1030 (1982) (government attorney may explain elements of the offense).

3. Unclear what effect an incorrect legal instruction has. United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976) and United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952) suggest that incorrect instruction should not result in dismissal. cf. United States v. Sousley, 453 F. Supp. 754, 758, fn.1 (W.D. Mo. 1978).

D. Parallel Proceedings and the Use of Agency Lawyers

1. Definition - Successive and/or simultaneous civil, administrative and criminal proceedings dealing with the same course of conduct. See generally, Pickholz and Pickholz, Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards, 36 Wash. & Lee L. Rev. 1027 (1979); Developments, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1340-1365 1979).

2. General rule - parallel proceedings are permissible. See United States v. Kordel, 397 U.S. 1 (1970); Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52 (1912).

3. Agency Disclosure

Before indictment, an agency may provide the Justice Department with the fruits of its independent concurrent investigation. See SEC v. Dresser Industries, 628 F.2d 1368 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980).

a. Internal Revenue Service - special case.

(1) See United States v. LaSalle National Bank, 437 U.S. 298 (1978).

(2) See Tax Reform Act, 26 U.S.C. Section 6103 et seq.

(a) To Justice - criminal or civil tax case, 26 U.S.C. Section 6103 (1976) (written request).

(b) To Justice - non-tax criminal case, 26 U.S.C. Section 6103(i)(1)(A), (B) (1976); ex parte, court order upon application of Attorney General or Assistant Attorney General.

(c) To Justice - non-tax civil case, 26 U. S. Section 6103(i)(5) (1976); only when United States is involved in suit regarding contract negotiations.

4. Strict limits on providing grand jury material to agency e.g., Fed. R. Crim. P. (6)(e).

a. Cannot use the grand jury solely to prove a civil case. United States v. Proctor & Gamble Co., 356 U.S. 677, 689 (1958); United States v. American Pipe & Construction Co., 41 F.R.D. 59 (S.D. Cal. 1966).

b. No agency access to grand jury material during a grand jury investigation. The rationale for this is:

(a) To prevent the escape of those whose indictment may be contemplated; to insure the utmost freedom to the grand jury in its deliberations; and to prevent persons subject to

indictment or their friends from importuning the grand jurors.

c. Attorney General has authority to designate agency personnel to assist Justice, 28 U.S.C. Sections 515, 548.

d. Rule 6(e) permits such use by the agency.

e. Case law, United States v. Birdman, 602 F.2d 547, cert. denied, 444 U.S. 1032 (1979); In re Perlin, 589 F.2d 260 (7th Cir. 1978); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

f. Be careful who gets access. One case indicates that a properly authorized agency attorney could be an unauthorized person, if acting in a dual role as agency lawyer and prosecutor. United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979), (sufficient reason to dismiss indictment.)

(1) In an opinion that was later withdrawn, the Sixth Circuit dismissed an indictment because an agency (IRS) lawyer, appointment as a Special Assistant United States Attorney, was not sufficiently insulated from the ongoing civil investigation. General Motors Corp. v. United States, 573 F.2d 936 (6th Cir.), appeal dismissed en banc, 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979).

g. Agency lawyers assisting in a grand jury investigation and reviewing material protected by Rule 6 should be insulated from agencies conducting ongoing civil investigations.

(1) Explicit instructions regarding Rule 6 confidentiality and agency lawyer's special status should be set forth in letter to agency lawyer and head of agency.

(2) Agency lawyer should not refer to Rule 6 material in reports to his superiors.

E. Conflicts of Interest in the Appointment of a Special Prosecutor

The Seventh Circuit has refused to adopt a per se rule that an appearance of impropriety is sufficient to taint the grand jury where an agency attorney who refers the criminal matter for investigation is subsequently appointed a Special Assistant to assist in the investigation. In re Perlin, 589 F.2d 260 (7th Cir. 1978); accord, United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979). An actual conflict of interest resulting in serious misuse of the grand jury or a breach of its secrecy could, however, vitiate the indictment. See United States v. Gold, supra. The Seventh Circuit has stated that "a mere assertion of impropriety by government attorneys is not enough to call for an evidentiary hearing and further inquiry." In re Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977). To avoid charges of a conflict of interest, an agency attorney who has been appointed as a Special Assistant to aid in a criminal investigation must sever all connections with any civil or administrative proceedings relating to the same, or to a related matter. He must be apprised by the Assistant with whom he is working of the seriousness of any violation of Rule 6(e) of the Federal Rules of Criminal Procedure.

While generally only actual conflicts of interest which diminish the independence of the grand jury may result in the dismissal of indictments, it should be noted that a court may use its supervisory powers even absent actual prejudice to correct flagrant or persistent grand jury abuses where the challenged conduct is something other than an isolated incident unmotivated by sinister ends. United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979). Every case in which a special assistant is appointed from an agency outside the Department of Justice should be handled with caution.

F. Preventive Measures

1. Make liberal use of limiting instructions to grand jury (e.g., prior similar acts, prior convictions).

2. Inform grand jury when they are receiving hearsay evidence, and instruct them that they have the right to hear live witnesses.

3. Present exculpatory evidence

   a. Insist on such evidence from investigators.

   b. Solicit this evidence from defense counsel.

4. Don't hesitate to supercede the indictment if you discover perjury, misstatement of law, etc.

   a. This may avoid motion to dismiss and issue on appeal.

   b. This gives impression of fairness.

X. SPECIAL PROCEDURES FOR CRIMINAL TAX GRAND JURIES

X. SPECIAL PROCEDURES FOR CRIMINAL TAX GRAND JURIES

The use of the grand jury to investigate criminal tax violations must first be approved and authorized by the Tax Division. Decisions will be made on a case-by-case basis.

A. When a grand jury is utilized to investigate criminal tax violations

1. When potential tax crimes are uncovered in other investigations

Where the U.S. Attorney or Strike Force Attorney is conducting grand jury investigation of violations of Titles 18, 21 and 31 and potential tax crimes are uncovered, the Tax Division can be requested to authorize a grand jury investigation.

2. When administrative investigative procedures are inadequate

When IRS is unable to complete its investigation through administrative investigative procedures or IRS determines it is not practically feasible to proceed administratively.

a. Instances of public corruption where IRS is unable to define limits of investigation, IRS may refer matter to Tax Division.

b. Inordinate delays in gathering information through summons.

c. Multi-jurisdictional investigation.

B. Grand Jury Authorization

1. Notification of authorization

When a Title 26 grand jury investigation is authorized, the U.S. Attorney or Strike Force Attorney will be notified by letter of authorization from the Tax Division.

2. Procedures to expand grand jury investigations to include tax violators

a. Request the Chief of the District IRS Criminal Investigation Division to analyze grand jury material supporting potential tax crimes and request that they [through IRS

Regional Counsel channels] seek Tax Division authorization. This procedure allows local criminal investigators to utilize their expertise and examine the grand jury material to determine the potential for criminal tax violations. (But see: Paragraphs C 3,4 infra)

b. Tax Division will promptly decide the question of grand jury authorization upon receiving request from IRS, Regional Counsel.

3. Post-authorization procedures. (This procedure has been revised and the revision will appear in the final edition)

a. Periodic reports of grand jury progress should be made to the Criminal Section, Tax Division.

b. No indictments are to be returned or informations filed without prior authorization of the Tax Division.

c. When investigation has produced sufficient evidence to seek indictments, U.S. Attorney should --

(1) Have the special agent prepare a Special Agent's Report and assemble the relevant exhibits.

(2) Seek a recommendation on Special Agent's proposed charges by Regional Counsel.

(3) Provide the Criminal Section, Tax Division with views and recommendations.

(4) Tax Division should be provided a 60-day time period to review proposed prosecution recommendations. Regional Counsel, IRS has requested it be allowed 90 days to consider in advance of recommendation to Tax Division.

(5) In obtaining expert assistance from IRS, advise them that all grand jury material is supplied under following conditions:

(a) Grand jury material remains under aegis of U.S. Attorney's office and Tax Division.

(b) No disclosure is to be made for anything but criminal purposes and only to IRS personnel assisting in the criminal recommendation.

(c) IRS is to furnish the Tax Division with advice and recommendations whether favorable or unfavorable.

(d) All grand jury materials, including copies, must be returned to the U.S. Attorney or Tax Division.

C. Use of Internal Revenue Service Personnel

1. It is not necessary to obtain a court order to disclose grand jury material to designated IRS personnel. Under Rule 6(e)(3)(A)(ii), disclosure of grand jury material may be made by a governmenet attorney to such government personnel as are deemed necessary by the attorney for the government in the performance of his duty. United States v. Block, 497 F. Supp. 629 (N.D. Ga. 1980).

2. Such disclosure can be made only for the purpose of assisting the government attorney in the performance of his duties to enforce federal criminal law. Such disclosures must not be used for civil, or other purposes.

3. The attorney for the government will promptly provide the district court, before which the grand jury was impaneled, the names of the persons to whom disclosure has been made. Rule 6(e)(3)(B).

4. Persons to whom grand jury material is to be disclosed should be advised in writing that such material is secret and that it may be used only for the purpose of assisting the government attorney in the performance of his duties in enforcing federal criminal law.

5. Suggestion: Request that the District Director of IRS of the particular district involved, prepare a memorandum specifically assigning persons who are to assist the government attorney in the grand jury investigation. These persons will most likely include special agents, revenue agents, and necessary secretarial staff. Such assignments should include the above.

6. Agents of IRS, assisting the government attorney, may contact witnesses or other third parties

during the grand jury investigation to examine records and to conduct interviews. Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1109-1112 (E.D. Pa. 1976). Care should be taken, however, that no summons is issued, and that records examined and interviews conducted are not done under the threat of a subpoena and are free from harassment: "Information gathered via summons after a case is actually referred to the Department of Justice for prosecution necessarily infringes on the role of the grand jury as the principal tool of federal criminal investigation." United States v. Davis, 636 F.2d 1028, 1036 (5th Cir. 1981).

NOTE: As a practical matter, it is unlikely that employees of the target or persons who deal with the target for a profit will cooperate without being brought before the grand jury by subpoena.

D. Segregate Non-Grand Jury Evidence From Grand Jury Evidence.

Initial and date all documents, workpapers, memos, memos of interviews, question and answer statements, reports, etc., obtained or created prior to the commencement of the grand jury investigation.

Appropriate markings, utilizing a numbering system, should be made on such materials, especially documents, identifying them as non-grand jury material, since such material may be referred to in the grand jury proceedings and may become mixed with subpoenaed material.

E. Subpoenas Duces Tecum -- Large Case Investigation.

1. Numbering

Number subpoenas, utilizing the same numbering key upon receipt of documents. Control of documents is essential.

a. Hundreds or thousands of documents or records may be called for in one subpoena to, for example, the Covina Manufacturing Company. Later, a second and perhaps a third or fourth subpoena will go to the same corporation.

b. Suggestion: On each subpoena enter the number 1 CMC, 2 CMC, 3 CMC, and 4 CMC (Covina Mfg. Co.). Ask by letter to the Covina Mfg. Co. to enter on a packing list or the

container, or both, the numbers shown on the respective subpoenas.

As the records are produced relating to subpoena 1 CMC, for example, each could be numbered 1 CMC-1, 1 CMC-2, 1 CMC-3, etc. Similarly, for records produced pertaining to Subpoena 2 CMC, each should be numbered 2 CMC-1, 2 CMC-2, 2 CMC-3, etc.

A similar procedure would be followed with respect to records subpoenaed from each corporation or individual using an appropriate numbering system.

Utilizing a type of numbering system suggested above will enable the government personnel to key the documents produced to the documents subpoenaed.

It will enable all concerned to immediately discern records received through the grand jury process from the non-grand jury material.

Numbers assigned to both the non-grand jury documents and the documents received through the grand jury process can be used to identify documents referred to during the grand jury proceedings.

2. Microfilm

Microfilm all records subpoenaed and produced after numbering as noted above. IRS personnel usually have access to microfilming equipment. This provides a permanent record of all documents in the event any are lost, or for later use even though the originals may have been returned.

3. Packing list for each container

Where records subpoenaed are voluminous, request by letter attached to the subpoena that the firm prepare a packing list for each container (carton) reflecting the subpoena number and a general description of the records housed in each container (carton).

4. Affidavit by one who conducted the search

It may well be that the "custodian" of the records who produces them to the grand jury will have had

little or nothing to do with the search that was made to obtain the subpoenaed records. Accordintly, where records that have been subpoenaed are not produced or only partly produced, the person(s) in charge of performing the search should execute an affidavit to the effect that certain records called for in the subpoena (giving the subpoena number) are not maintained or cannot be found.

F. Motion by Target for Discovery of Matters Pertaining to the Grand Jury Investigation.

1. Grounds for discovery

A target may allege that the grand jury process and the process of the court will be abused by the enforcement of subpoenas, and file a motion for discovery seeking access to as much as possible of the government's files. Included in such motion will probably be large numbers of interrogatories.

a. There are few, if any, grounds for discovery during a grand jury investigation (Rule 16) until after indictment. Likewise, Rule 17(c) is not available to anyone but the government until after indictment. The Jencks Act, Title 18 U.S.C. Section 3500, provides no basis for discovery until after indictment and the witness has testified at a trial. This is likewise true with respect to Brady material.

b. Nor are the discovery provisions in the Federal Rules of Civil Procedure applicable, since a grand jury investigation is criminal in nature. [Note: Civil Procedure rules can be invoked for discovery purposes in the contesting of a summons under Title 26 U.S.C. Sections 7402, 7602, and 7604, but such is civil in nature, not criminal. For an extensive discussion of the scope of required discovery in IRS summons enforcement proceedings see United States v. Harris, 628 F.2d 875 (5th Cir. 1980).]

c. Cases that infer that a motion for discovery during a grand jury investigation would be denied, include In re Grand Jury Investigation (General Motors Corporation), 32 F.R.D. 175 (S.D. N.Y. 1963), and In re September 1975 Grand Jury Term, 532 F.2d 734, 737 (10th Cir. 1976).

d. As a practical matter, the district judge may request that the government file, ex parte and under seal, certain documents envisioned by the discovery motion as well as written responses to the interrogatories sought by the target.

G. Motions to Quash Subpoenas.

1. When they may be filed based on alleged abuses of grand jury

A motion to quash may be filed based on alleged abuse of the grand jury process in that (1) the open-ended grand jury investigation has been conceived, precipitated, and is dominated by IRS to obtain evidence for IRS in violation of Congressionally imposed limitations; (2) that the procedure, unlike a standard grand jury, violates the constitutional mandate that a grand jury be secret and independent (referring to disclosing grand jury materials to agents of IRS); and (3) that alleged unlawful procedure is being employed as a substitute for a lawful IRS investigation, in that IRS, by the summons power under Title 26, Section 7602, has its own provisions for making an investigation.

a. Such motions to quash can be met and overcome. As to (1) above, see In re April 1956 Term Grand Jury (Cain), 239 F.2d 263, 267-268 (7th Cir. 1956) cert. granted, 77 S.Ct. 552 (1957), involving a grand jury investigation into tax offenses where grand jury information had been disclosed to IRS agents: The power of the grand jury is not dependent upon the court, but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the prosecutor, its own members or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court."

In In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978) the court found "totally devoid of merit" the claim that the grand jury process was abused

because the government failed to adhere strictly to its internal procedures for initiating grand jury investigations in tax cases, holding that "[p]etitioner has no entitlement to have any particular internal policy followed with regard to the decision to institute a grand jury investigation."

b. As to objection (2), supra, the independence and secrecy of the grand jury is not infringed upon. It is still their decision whether or not to return an indictment. See In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 476 (E.D. Pa. 1971).

Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, fully provides for disclosure of grand jury materials to agency personnel by the attorney for the government for assistance to him in the performance of his duties in enforcing federal criminal laws.

The Attorney General is the hand of the President in insuring that the laws of the United States are faithfully executed. An attorney for the Government, acting under the direction of those designated by the Attorney General, determines whether or not there shall be a grand jury investigation to seek an indictment. It follows, as an incident of the separation of powers that the courts are not to interfere with the free exercise of discretionary powers of the attorneys of the United States in their control over criminal investigations or prosecutions. United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

A grand jury's inquiries are, "not to be limited narrowly by questions of propriety of forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 282 (1919).

Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the

criminal laws. United States v. Dionisio, 410 U.S. 1, 17 (1973).

c. With respect to objection (3), supra, that a grand jury investigation into Title 26 offenses is an unlawful substitute for an IRS investigation because Section 7602 provides IRS with summons power to investigate, see In re Grand Jury Subpoenas, April, 1978 at Baltimore, 581 F.2d 1103 (4th Cir. 1978). This case affirmed the decision not to quash eight subpoenas in which the government sought certain documents which the petitioner had previously successfully resisted turning over in a summons enforcement proceeding. The court recognized that "if the powers of the grand jury ... are used, not for the purpose of criminal investigation but rather to gather evidence for civil enforcement, there exists an abuse of the grand jury process" but held that no evidentiary hearing into the matter was necessary in light of the affidavit of the prosecutor "attesting to the government's good faith in utilizing the grand jury." 581 F.2d at 1108.

Note: Once a district court has denied a motion to quash subpoenas, generally an appeal will be granted only if the witness or corporation involved refused to appear or produce documents and is found in contempt. Otherwise appellate courts usually find themselves without jurisdiction, holding that the district court's order is not final, or is interlocutory. See United States v. Ryan, 402 U.S. 530, 532 (1971); Cobbledick v. United States, 309 U.S. 323, 326 (1940).

However, if the district court certifies that the matter, under Title 28 U.S.C. Section 1292(b), involves a controlling question of law as to which there is a substantial ground for difference of opinion, an appeal might be heard as was done in In re April, 1977 Grand Jury Subpoenas, (General Motors Corporation) 584 F.2d 1366 (6th Cir. 1978).

2. Basis for Motions to quash

Motions to quash have been made based on the grounds that : (1) the subpoenaed material is not relevant to the grand jury investigation; (2) the

subpoena lacks specificity or particularity; and (3) the time period covered by the subpoena is unreasonable or oppressive. See United States v. Gurule, 437 F.2d 239 (10th Cir. 1970).

a. As to (1) above, the government can overcome the claim by making "a minimal showing by affidavit that the items sought are relevant to an investigation." In re Grand Jury Proceedings, 579 F.2d 836, 837 (3rd Cir. 1978). See also, United States v. Olivia, 611 F.2d 23 (3rd Cir. 1979); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3rd Cir. 1975); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3rd Cir. 1973).

   The affidavit should set forth briefly the nature of the investigation and possible statutes which may have been violated as was done in Schofield II, supra, and Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1112 (E.D. Pa. 1976).

b. As to (2) above, the subpoena duces tecum must properly identify or describe the documents requested. The degree of particularity depends on the scope of the inquiry but the particularity need not be such "as to enable the witness to pick out a certain piece of paper and say, 'Here it is.' However, the request must be sufficiently definite to provide evidence as to what is to be produced by standards or criteria that make clear the duty of the person subpoenaed." In re Grand Jury Proceedings, 601 F.2d 162, 168 (5th Cir. 1979). See In re Grand Jury Subpoenas Duces Tecum, (M. G. Allen & Associates, Inc.), 391 F. Supp. 991, 999-1000, (D.R.I. 1975) and cases cited therein.

c. With respect to (3) above, "[n]o magic figure limits the vintage of documents subject to a grand jury subpoena. The law requires only that the time bear some relation to the subject of the investigation." In re Rabbinical Seminary Netzach Israel Ramailis, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978). See also, In re 1980 United States Grand Jury Subpoena Duces Tecum, 502 F. Supp. 576 (E.D. La. 1980) (ten year period not unreasonable);

In re Grand Jury Subpoena Duces Tecum Local 627, 203 F. Supp. 575, 578-79 (S.D. N.Y. 1961) (collecting cases).

H. Recordation of Grand Jury Proceedings (see Chapter I, supra).

1. Rule 6(e)(1)

Rule 6(e)(1) requires all proceedings, except when the grand jury is deliberating, to be recorded, either stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. Cf. United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. June 16, 1982).

2. The Jencks Act

The Jencks Act (Section 3500, Title 18 U.S.C.) provides that a witness's recorded statement before a grand jury be made available to the defendant at trial after the witness testifies.

I. Right of Witness To A Transcript of His Grand Jury Testimony.

1. No inherent right

A witness before a grand jury has no inherent right to a transcript of his testimony. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). It is within the discretion of the court to provide a witness with such a transcript under Rule 6(e) where the witness demonstrates a particularized need for the transcript that outweighs the policy of grand jury secrecy. See Douglas Oil Co. of California v. Petro Stops Northwest, 441 U.S. 211 (1979).

2. Particularized need test

An example of a particularized need accepted by a court is when a witness testifies before a grand jury for a second time. Bursey v. United States, 466 F.2d 1059, 1079 (9th Cir. 1972). In re Minkoff, 349 F. Supp. 154 (D.R.I. 1972) (witnesses required to testify only on condition that a

transcript would be furnished to them). Cf. In re Russo, 53 F.R.D. 564 (C.D. Ca. 1971); But see In re Bottari, supra, 453 F.2d 370, 371-372 (1st Cir. 1972); In re Grand Jury Investigation, 424 F. Supp. 802, 806 (E.D. Pa. 1976); In re Alvarez, 351 F. Supp. 1089, 1091 (S.D. Ca. 1972).

3. Balancing approach

Unless a strong, particularized need can be shown, generally a transcript of his testimony will not be given a grand jury witness. In this respect, motion for transcripts were denied in the following cases: In re Bianchi, 542 F.2d 98, 100 (1st Cir. 1976); Bast v. United States, 542 F.2d 893, 895 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548, 549 (9th Cir. 1973); Valenti v. United States Department of Justice, 503 F. Supp. 230(E.D. La. 1980).

4. FOIA

A witness is not entitled to a transcript of his testimony under the Freedom of Information Act. Valenti v. United States Department of Justice, supra.

5. Fed. R. Crim. P. 16A(1)(a)

Fed. R. Crim. P. 16A(1)(a) provides for a defendant to obtain copies of his own grand jury testimony.

J. Internal Policy of Department of Justice When Subpoenaing Witnesses, Targets and Subjects To Testify Before a Grand Jury.

1. Wintesses' rights

The government attorney will apprise each witness subpoenaed: (1) of the general subject matter of the grand jury's inquiry (if doing so does not compromise the progress of the proceeding); (2) that he may refuse to answer any question if a truthful answer would tend to incriminate him; (3) that anything he says may be used against him; and (4) that the grand jury will give him a reasonable opportunity to step outside the grand jury room and consult with his counsel if he desires.

The substance of these items of advice will be attached to all grand jury subpoenas.

2. Target policies

If a target of the grand jury investigation is subpoenaed and comes before the grand jury, he will be informed on the record that his conduct is being investigated for possible violation of federal criminal law.

Before a target of the grand jury is subpoenaed, an effort should be made to obtain his voluntary appearance (by invitation). If this fails, he should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. If a target or a subject of the grand jury investigation requests the opportunity to tell the grand jury his side of the story, if no undue burden is placed on the grand jury, ordinarily favorable consideration should be given to the request.

However, if this request is granted, the target or subject should explicitly waive his privilege against self-incrimination and consent to full examination under oath without counsel present in the grand jury room.

Generally, if a target has not testified before the grand jury, and has not requested to do so, favorable consideration should be given to notify him in advance before seeking an indictment against him. Of course, this should not be done if notification might jeopardize the prosecution because of flight, destruction of evidence, etc.

3. Use of the Fifth amendment

When a subpoenaed witness, or his attorney, informs the Government attorney that he intends to invoke his Fifth Amendment right and will refuse to testify, to excuse him from appearing would be improper and too convenient for the witness to avoid testifying.

However, if a target of the investigation and his attorney state in writing signed by both that the target will refuse to testify on Fifth Amendment grounds, he should ordinarily be excused from testifying unless the grand jury and the United

States Attorney insist on his appearance, and this insistence should be based on sound reasons.

K. Multiple Representation of Clients During A Grand Jury Investigation (See Chapter VII supra).

1. When it occurs

The multiple representation of clients arises in situations where, during a grand jury investigation, an attorney or a firm of attorneys (or in-house counsel) represents a corporation as well as the corporation's officers and other employees. The same problem is posed in the case of an attorney representing both a labor union and members of that union during a grand jury investigation.

2. When conflict of interest occurs

A conflict of interest occurs where the attorney representing two or more clients may have to make a judgement in the case of one that could or will adversely affect the interest of the other client.

a. The ABA Code of Professioanl Responsibility, Rule EC-5-15 provides in part: "A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests."

3. Standing of government to challenge multiple representation

The government has standing to challenge an alleged conflict of interest where multiple client representation situations exist. In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).

4. Principles involved

Multiple representation where the various clients want the same attorney to represent them presents two conflicting principles: (1) the entitlement of witnesses to representation by an attorney of their choice in a grand jury proceeding verging on a constitutional right; and (2) the right of a grand jury to pursue its investigative functions, which includes the right to every man's testimony.

In re Investigation Before February 1977, Lynchburg Grand Jury, 563 F.2d 652, 658 (4th Cir. 1977).

a. Cases supporting the proposition that the right of the grand jury to every man's testimony, even if it involves denying a witness the attorney of his choice (where there is a conflict of interest) because not to do so may deprive the public of the testimony of the witness include: In re Investigation Before the February, 1977, Lynchburg Grand Jury, supra, 563 F.2d at 652; In re Grand Jury, (Schofield I), supra, 486 F.2d at 85 and In re Copman, supra, 531 F.2d at 262.

These cases hold, in effect, that the First Amendment right of freedom of association and the Sixth Amendment right of a witness to obtain counsel of his choice must yield to the overriding public interest of a properly functioning grand jury and to the judge's duty to the grand jury proceeding he supervises.

b. Cases tending to permit multiple representation and holding that a witness has a right to an attorney of his choice include In re Investigation Before the April 1975 Grand Jury (Rosen), 531 F.2d 600 (D. D.C. 1976); In re The Grand Jury Empaneled January 21, 1975, (Curran),536 F.2d 1009 (3rd Cir. 1976).

In the former case, the D.C. Circuit refused to disqualify the attorney, but suggested, that with more specific information as to the conflict of interest, its ruling might be different. The court stated that it was not passing on the merits of the conflict of interest claim, but held that before bringing the motion to disqualify, the government should have obtained more specific facts.

Note: Read this case carefully before seeking disqualification orders, so as to avoid the errors of omissions and ambiguity noted by the court.

In the latter case the Third Circuit also held that the attorney should not be disqualified because, the government had not elicited sufficient evidence. It noted that

the only evidence to support the motion to disqualify was (1) that the attorney involved represented all nine witnesses; and (2) that all nine witnesses had invoked their Fifth Amendment right against self-incrimination.

L. Attorney-Client Privilege -- Work Product (See Chapter VI, supra).

1. Representing a corporation and its employees

A problem is posed at times when a corporation and certain of its employees are under a grand jury investigation, wherein the corporation is represented by one attorney and the employees are represented by one or more different attorneys. Before and after witnesses appear before the grand jury they are briefed and debriefed by their attorneys and the attorneys for the corporation exchange their memoranda, notes and thoughts stemming from their interviews with their respective clients. Can the government obtain these memoranda, etc. on the theory that, since they have been disclosed to others, they are no longer privileged?

a. The answer is, generally, No. "Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation ... the communication is made not for the purpose of allowing unlimited publication and use, but in confidence for the limited and restricted purpose in asserting their common claims ... The recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently cannot be compelled to produce it or disclose its contents." Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). See also American Optical Corporation v. Medtronic, Inc., 56 F.R.D. 426 (D. Mass. 1972).

This is applicable whether during a grand jury investigation or after indictment. See Continental Oil Co. v. United States, supra.

b. Likewise, where two attorneys and their two clients, who were being investigated for income tax evasion, met to discuss a possible guilty plea by one client which might preclude prosecution of the other client, that which transpired at the meeting and memoranda prepared were privileged. Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965).

2. Examples of work product

Are conversations, memoranda prepared, etc. stemming from communications between in-house counsel (or other counsel) and directors, officers and other employees of a corporation privileged?

a. One court has held that communications of corporate officials to counsel are privileged only if the employee is in a position to control or participate substantially in a decision the corporation might make on the legal advise sought. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). But see In re Grand Jury Proceedings, Detroit, Michigan, August 1977, 434 F. Supp. 648 (E.D. Mich. 1977) aff'd. 570 F.2d 562 (6th Cir. 1978) wherein the court found that a vice-president of a corporation who in his corporate capacity consulted a corporate attorney, could not quash a subpoena on the attorney when the company had waived the attorney-client privilege. Held, "in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from control group personnel, the privilege is and should remain that of the company and not that of the communicating officer." 434 F. Supp. at 650.

In Upjohn Company v. United States, 449 U.S. 383 (1981), the Supreme Court rejected as too narrow the "control group" test first adopted in City of Philadelphia v. Westinghouse, supra. The Court refused to enunciate a new test, however, and left the development of the law in this area to a case-by-case basis. Of future import in the decision is that, in

upholding the privilege with respect to lower level company employees in the case before it, the Court found relevant the fact that the communications at issue were made by company employees to company counsel acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Moreover, "[t]he communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."

c. Where the government makes a prima facie showing that an agreement to furnish legal services was part of a conspiracy, the crime of fraud exception applies to deny a privilege to the identity of the one who pays for those services even though he himself, as well as the other conspirators, is a client of the attorney and the attorney is unaware of the criminal relationship between the parties. In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc), reversing 633 F.2d 1057 (5th Cir. 1981). See also, In re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981).

d. For an example of a subpoena for attorney records concerning files and fee arrangements, see Matter of Walsh, 623 F.2d 489 (7th Cir.), cert. denied 449 U.S. 994 (1980).

M. Pretrial Procedures in Criminal Tax Cases

1. Complaint -- Fed. R. Crim. P. 3

a. A complaint in effect is an application for a warrant of arrest; it does not function as a pleading. It normally is not used in tax cases; however, it has been used to extend the statute of limitations. 8 Moore's Federal Practice, Paragraph 3.02.

b. The complaint is a statement made under oath before a magistrate alleging that a crime has been committed. Such a statement is usually signed by the special agent who knows the facts alleged, although the United States Attorney or an assistant can sign the statement.

c. Warrants of arrest for violations of Internal Revenue law upon complaint may be issued pursuant to 18 U.S.C. Section 3045.

d. A complaint may be used to extend the statute of limitations. 26 U.S.C. Section 6531 provides for an extension of the limitation period for nine months when a complaint is filed within the prescribed time period.

(1) This procedure is intended for use when the violation alleged can be established but an indictment cannot be obtained prior to the expiration of the statute of limitations because the grand jury is not available. Jaben v. United States, 381 U.S. 214, 219, (1965).

(2) The government is not required to call a grand jury into session on a day it is not scheduled to sit before it can proceed by way of complaint. United States v. Miller, 491 F.2d 638, 644 (5th Cir.). cert. denied 419 U.S. 970 (1974).

(3) A complaint used to toll the statute of limitations is an emergency procedure and should relate to the one year which faces expiration under the statute. The government should be cautious to avoid the appearance of deliberate delay in order to proceed by way of complaint to avoid possible due process problems.

2. Warrant

a. A warrant of arrest may be issued by the court based on a written complaint (Rule 3).

b. A warrant may also be issued by the court based upon an indictment or information (Rule 9).

c. In order for a warrant to issue on an information additional evidence must be presented in order to meet the probable cause requirement (Rule 9(a)).

d. The finding of an indictment by a grand jury conclusively establishes the element of probable cause so a warrant of arrest may be issued on an indictment without any additional showing. 8 Moore's Federal Practice, Paragraph 9.02.

e. Special agents of the Internal Revenue Service are authorized to execute and serve warrants pursuant to 26 U.S.C. Section 7602(b). Only special circumstances dictate that a warrant be utilized in a criminal tax case; for example, the taxpayer is about to leave the country.

3. Information and Indictment

a. Any offense punishable by death or imprisonment for a term exceeding one year is a felony and must be prosecuted by indictment; any other offense is a misdemeanor and may be prosecuted by an information. 18 U.S.C. Section 1, Fed. R. Crim. P. 7(a).

b. An information can be amended with leave of court at any time before verdict if no additional or different offense is charged and substantial rights of the defendant are not prejudiced. Fed. R. Crim. P. 7(e).

c. The same basic concepts apply to the drafting of both an indictment and an information. You must know the statute which is being charged. An indictment is sufficient if it contains the elements of the offense charged and fairly informs the defendant of the charge against him. Hamiling v. United States, 418 U.S. 87 (1974).

d. The Tax Division Manual for Criminal Tax Trials includes a section of information and indictment forms for the various Title 26 violations and selected Title 18 violations generally charged in tax cases.

e. An indictment cannot be amended (where the amendment is substantial or material) even though an information could have been filed, i.e., misdemeanor cases are also bound by indictment rules. United States v. Goldstein, 502 F.2d 526 (3rd Cir. 1974).

f. When it is doubtful that correct figures are available for indictment or information purposes, it is permissible to use open-ended language.

g. In failure to file cases the defendant should be charged with receiving gross income in excess of the statutory minimum requirement for filing as specified in 26 U.S.C. Section 6012(1)(A).

h. In false return cases brought under Section 7206(1) the defendant can be charged with reporting an amount of income which he did not believe to be true and correct because, "as he then and there well knew and believed, he received substantial income in addition to that heretofore stated." United States v. Grayson, 416 F.2d 1073, 1076 (5th Cir. 1969), cert. denied 396 U.S. 1059 (1970).

i. Open-ended language has also been approved in prosecutions under 26 U.S.C. Section 7201. United States v. Buckner, 610 F.2d 570 (9th Cir. 1979).

4. Discovery and Disclosure

a. Rule 16

(1) Rule 16(a)(1)(A) provides that a defendant upon request, shall be permitted to inspect and copy or photograph any of the three following statements:

(a) any written or recorded statements;

(b) any oral statements made by defendant to a person then known to the defendant to be a government agent;

(c) any testimony of a defendant before a grand jury which relates to the events charged.

(2) The defendant is not entitled to be furnished with his statement unless it was made directly to a government agent. United States v. Pollack, 534 F.2d 964, 976 (D.C. Cir.), cert. denied 429 U.S. 924 (1976).

(3) Pre-arrest oral statements made by defendant to an undercover agent, not then known as such to the defendant, do not have to be produced. United States v. Johnson, 562 F.2d 515 (8th Cir. 1977).

(4) Vicarious admissions through the defendant's attorney or accountant should be treated as statements of the defendant and supplied under Rule 16.

(5) Rule 16(a)(1)(C) requires the government, upon request, to permit inspection and copying of books, papers, documents, etc. which were obtained from or belonged to the defendant, or which are material to the defendant's preparation of his case, or are intended for use by the government as evidence during its case-in-chief.

(6) A defendant may, pursuant to Rule 16, attempt to obtain a copy of the summary schedules intended by the government for use at trial. Even if summary schedules are prepared the government should resist this disclosure as Rule 16(a)(2) precludes discovery of reports, memoranda, etc. made by the government in connection with the prosecution of the case unless specifically required in Rule 16(1)(A), (B), or (D).

b. Jencks (18 U.S.C. Section 3500)

(1) After a witness has testified on behalf of the United States, the government, upon request by the defendant must produce any statement made by that witness which is in the possession of the United States and relates to the subject matter to which the witness has testified.

(2) What constitutes a statement within the meaning of Jencks?

(a) If a witness approves notes taken during an interview or approves a more formal interview report prepared thereafter, such approval renders the notes or report the witness's own statement to the same extent as it would if he had written the notes or signed them himself. See Proving Federal Crimes, Pars. 5-6, and 5-7: Goldberg v. United States, 425 U.S. 94 (1976); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied sub nom. Smith v. United States, 424 U.S. 925 (1976); United States v. Pacheco, 489 F.2d 554, 556 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Chitwood, 457 F.2d 676, 678 (6th Cir.), cert. denied 409 U.S. 858 (1972).

(b) Interview reports not signed or otherwise adopted or approved by the witness at the conclusion of the interview, or sometime thereafter are not the witness's statements. Proving Federal Crimes, Para. 5-6 and 5-7, 7; United States v. Shannahan, 605 F.2d 539, 542 (10th Cir. 1979); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979); United States v. Gates, 557 F.2d 1086, 1089 (5th Cir. 1977), cert. denied, 434 U.S. 1017 (1978); United States v. Larson, 555 F.2d 673, 677 (8th Cir. 1977).

(3) Statements, in order to be producible, under 18 U.S.C. Section 3500 must be in the possession of the government; possession of the government has been interpreted to mean only those statements possessed by the prosecutorial arm of the Federal government. United States v. Trevino, 556 F.2d 1265, 1271 (5th Cir. 1977); United States v. Dansker, 537 F.2d 40, 61 (3rd Cir. 1976), cert. denied 429 U.S. 1038 (1977).

(4) A statement given by a witness to an NLRB official may not have been in the Government's possession within the meaning of the Jencks Act since NLRB is not a prosecutorial agency. Proving Federal Crimes, Para. 5-4; United States v. Weidman, 572 F.2d 1199, 1207 (7th Cir.) cert. denied 439 U.S. 821 (1978).

(5) Statements of prospective witness not called to the stand

(a) Always check for Brady -- whether witness takes stand or not.

(b) Jencks does not require production of exhibits, or statements of a prospective witness who is not called as a witness at the trial. Ayash v. United States, 352 F.2d 1009, 1010 (10th Cir. 1965).

(6) Special Agent's Report

(a) In the Seventh Circuit, it appears that if the special agent testifies in a net worth case, both the special agent's report and all of the case files must be produced. United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974).

(b) The Fifth Circuit in a net worth case permitted the Government to supply a special agent's report where the agent's suggestions for rebutting defenses and his discussion of the defendant's criminal intent had been redacted since these comments were not relevant to the agent's direct testimony at trial. United States v. Medel, 592 F.2d 1305, 1317, rehearing denied 597 F.2d 772 (5th Cir. 1979).

(c) The same principles that apply to the special agent's report also apply to the revenue agent's report.

(7) Jencks and pretrial proceedings.

(a) The statute states that the material will be used, "in the trial of the case." 18 U.S.C. Section 3500(a).

(b) Jencks does not apply to suppression or preliminary hearings. Robbins v. United States, 476 F.2d 26 (10th Cir. 1973); United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v. Montos, 421 F.2d 215 (5th Cir. 1970);

(c) As of December 1, 1980, Rule 26.2, F.R.Cr.P. provides that the government, upon motion, after the witness testifies, may obtain the statement of any defense witness (other than the defendant) which is in the possession of the defense and relates to the witness' testimony on direct examination.

c. Bill of Particulars

(1) Fed. R. Crim. P. 7(f) provides that a defendant may obtain a bill of particulars where the charge is not framed with enough detail to: (1) permit the defendant to enter a plea of double jeopardy in the event of acquittal or (2) to enable him to prepare his defense and not be surprised at trial. Wong Tai v. United States, 273 U.S. 77 (1927); United States v. Giese, 597 F.2d 1170 (9th Cir.), cert. denied 444 U.S. 979 (1979); United States v. Hill, 589 F.2d 1344 (8th Cir.), cert. denied 442 U.S. 919 (1979); United States v. Haas, 583 F.2d 216 (5th Cir. 1978), cert. denied 440 U.S. 981 (1979); United States v. Brimley, 529 F.2d 103 (6th Cir. 1976); Proving Federal Crimes, Para. 4-2.

(2) It is not the function of a bill of particulars to force disclosure of the government's evidence in advance of

trial. United States v. Kilrain, 566 F.2d 979, 985 (5th Cir.), cert. denied 439 U.S. 819 (1978); United States v. Long, 449 F.2d 288 (8th Cir. 1971) cert. denied 405 U.S. 974 (1972).

(3) The Government's response to a bill of particulars tends to restrict the scope of evidence which can be offered at trial. United States v. Haskins, 345 F.2d 111 (6th Cir. 1965); United States v. Neff, 212 F.2d 297 (8th Cir. 1954).

(4) Where the government in response to defendant's motion stated that it was supplying a partial list of payments made to the defendant and where the defendant did not seek more complete particulars the government was not limited to proving only those items listed in its response. United States v. Lacob, 416 F.2d 756 (7th Cir. 1969), cert. denied, 396 U.S. 1059, (1970).

(5) If the government, in response to a bill of particulars, does not have to provide the requested information, but "voluntarily" chooses to respond, the defendant is entitled to rely on the responses until validly amended. The government's departure from its unambiguous response to the defendant's bill was error. United States v. Flom, 558 F.2d 1179, (5th Cir. 1977).

(6) The government is not required to prove exact figures in tax cases. United States v. Johnson, 319 U.S. 503, rehearing denied, 320 U.S. 808 (1943); United States v. Marcus, 401 F.2d 563 (2d Cir. 1968) cert. denied 393 U.S. 1023 (1969); Tinkoff v. United States, 86 F.2d 868 (7th Cir.), cert. denied, 301 U.S. 715 (1937).

(7) Therefore, the government should not in a response to a bill of particulars provide an exact amount of unreported income thereby creating an unnecessary limitation.

(8) Method of Proof

(a) The defense is entitled to this.

(b) The method of proof should be described completely and precisely, viz., net worth plus expenditures and partially corroborated by specific items; or bank deposits plus cash expenditures, etc.

(c) If specific items are used in addition to an indirect method of proof, but only as evidence of intent, this should be set out.

(d) Every item disclosed through a bill of particulars need not be proven. On the other hand, going beyond the bill of particulars in the case-in-chief may be fatal if the court refuses to permit an amendment.

The contrary is permissible, and the government can prove less than the bill alleges. United States v. Mackey, 345 F.2d 499 (7th Cir. 1965).

d. The Brady Rule

(1) "The suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." Brady v. Maryland, 373 U.S. 83 (1963).

(2) In Augurs v. United States, 427 U.S. 97 (1976), the Court stated that the disclosure rule provided for in Brady applied in the following different situations:

(a) Where the undisclosed evidence case includes perjured testimony, any conviction obtained using this evidence, must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103.

(b) Where there is a pretrial request for specific evidence. If such evidence is withheld, any conviction will be reversed if the withheld evidence is determined to be material; and materiality is defined as that evidence which "might have affected the outcome of the trial. 427 U.S. at 104."

(c) Where there has only been a general request for "Brady material." If exculpatory evidence is not disclosed under these circumstances, a guilty verdict is reversed only if it is found that the undisclosed evidence creates a reasonable doubt that did not otherwise exist. 427 U.S. at 112.

(3) The government does not have a burden to minutely comb their files for bits and pieces of evidence, but has a continuing burden to turn over Brady material as it is discovered. North American Rockwell Corporation v. N.L.R.B., 389 F.2d 866 (10th Cir. 1968).

(4) The prosecutor is generally not held to a duty of disclosure of evidence for witnesses who are already known or are accessible to the defendant. United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), cert. denied, 442 U.S. 909 (1979); United States v. Craig, 573 F.2d 455, 492 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977); Proving Federal Crimes, para. 4-16.

(5) Exculpatory material should be provided even if no request has been made by the Defense.

5. Motions to Suppress

a. A Revenue Agent conducting an audit does not have to advise the taxpayer the cases could be referred for criminal investigations.

(1) The government however cannot affirmatively mislead the taxpayer, as this constitutes deceit.

(2) A taxpayer's ignorance of his "right" is not sufficient to establish fraud and deceit. United States v. Mancuso, 378 F.2d 612 (4th Cir. 1967); United States v. Spomar, 339 F.2d 941 (7th Cir. 1965).

(3) The defendant's burden to establish fraud and deceit is "clear and convincing." United States v. Marra, 481 F.2d 1196 (6th Cir. 1973); United States v. Prudden, 424 F.2d 1021 (5th Cir.), cert. denied 400 U.S. 831 (1970).

b. Miranda and Escobedo

Miranda v. Arizona, 384 U.S. 486 (1966).

Escobedo v. Illinois, 378 U.S. 478 (1964).

Miranda warnings are not required in criminal tax cases unless the taxpayer is in custody.

Beckwith v. United States, 425 U.S. 341 (1976).

Mathis v. United States, 391 U.S. 1 (1967).

c. I.R.S. Warnings.

See: I.R.S. News Release No. I.R. 897, October 3, 1967. I.R.S. News Release No. I.R. 949, November 26, 1968.

(1) By these News Releases, the Internal Revenue Service volunteered warnings to prospective targets of criminal tax investigations.

(2) The first News Release required only that the agent identify himself as a criminal investigator stating his function in that capacity on the initial contact.

(3) The second News Release went beyond the first in that it required the following warning by the special agent on initial contact with the taxpayer:

(a) Identification.

(b) Description of the function of a special agent.

(c) That the taxpayer did not have to answer questions.

(d) That anything that was said or any documents provided could be used in any proceeding against the taxpayer.

(e) That the taxpayer had the right to seek counsel.

d. Custodial interrogations where the taxpayer is under arrest or his actions are otherwise restricted require a full Miranda warning which informs the taxpayer that an attorney will be appointed if he cannot afford one.

e. There are a series of cases which hold evidence must be suppressed when an I.R.S. special agent fails to give the taxpayer warnings required by published I.R.S. rules. United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1970).

f. News Release warnings should be given as a matter of practice. However, it can now, under certain circumstances be argued that such warnings are not mandated by law. United States v. Caceres, 440 U.S. 741 (1979); Beckwith v. United States, 425 U.S. 341 (1976); United States v. Nuth, 605 F.2d 229 (6th Cir. 1979).

g. However, if there is deliberate deception by the agent, evidence obtained as a result of this deception will be suppressed. United States v. Tweel, 550 F.2d 297 (5th Cir. 1977).

h. Where there is no trickery or misrepresentation by the auditor, evidence obtained during the course of the audit will not be suppressed. United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973).

United States v. Prudden, 424 F.2d 1021 (5th Cir.), cert. denied 400 U.S. 831 (1970).

i. The fact that information originated with the Criminal Investigation Division and was forwarded to the Audit Division does not give the audit a criminal complexion requiring disclosure of such to the investigated taxpayer. Truitt v. Lenahan, 529 F.2d 230 (6th Cir.), cert. denied, 427 U.S. 912 (1976);

United States v. McCorkle, 511 F.2d 482 (7th Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); United States v. Robson, 477 F.2d 13 (9th Cir. 1973).

j. The Audit Division may do an in-depth audit prior to transferring the case to the Intelligence Division. United States v. Lockyer, 448 F.2d 417 (10th Cir. 1971).

k. However, where the court determined that the revenue agent had possessed "firm indications of fraud" six months before referring the case to the Criminal Investigation Division and had, during these six months, worked on the case intensively, the evidence was suppressed because the court found these actions to have been an intentional violation of Audit Regulations requiring referral upon a firm indication of fraud. United States v. Toussaint, 456 F. Supp. 1069 (S.D. Tex. 1978).

l. Hearing on Motion to Suppress.

(1) A hearing is not necessary unless an issue of fact is presented. United States v. Marra, 481 F.2d 1196 (6th Cir. 1973); United States v. Hickok, 481 F.2d 377 (9th Cir. 1973).

(2) The burden is on the defense. United States v. Thompson, 409 F.2d 113 (6th Cir. 1969).

(3) The defendant's burden is a preponderance of the evidence, not reasonable doubt. Alego v. Toomey, 404 U.S. 477 (1972); United States v. Lehman, 468 F.2d 993 (7th Cir.), cert. denied, 409 U.S. 967 (1972).

m. Suppressed Material.

(1) Statements suppressed are still available for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971).

(2) The so-called poisonous tree doctrine is not necessarily applicable and the Government may be able to use the leads obtained from the suppressed statements. Michigan v. Tucker, 417 U.S. 433 (1974).

n. Appeals.

(1) The government has direct appeal from a pretrial order, 18 U.S.C. Section 3731.

(2) Fed. R. Crim. P. 12(b)(3) requires that motions to suppress be raised prior to trial.

(3) There is no appeal from a motion to suppress once the trial is under way. Therefore, it is important to insist that motions to suppress be raised prior to trial.

XI. CIVIL USE OF GRAND JURY MATERIAL

XI. CIVIL USE OF GRAND JURY MATERIALS

A. Fed. R. Crim. P. 6(e)'s secrecy provisions (viz., (e)(2) and (e)(3)) do not except the civil use of grand jury material from the general rule of grand jury secrecy, and therefore there should be no civil use of such material without a court order.

B. Rule 6(e)(C)(i) provides:

"Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made...when so directed by a court preliminarily to or in connection with a judicial proceeding."

1. [(Sen. Rep. No. 95-354)] The Senate Report on Rule 6(e) states, in part:

* * * There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy.

2. IRS disclosure report

IRS will undoubtedly request disclosure in aid of a civil determination of tax liability or to support a tax claim involved in a proceeding.

a. A court order allowing disclosure will obviate the need for a costly investigation and audit independent of the grand jury.

b. The ability to obtain disclosure at the proper time may deter IRS reluctance to participate in grand jury investigations.

3. Leading court decisions --

a. The leading decision is Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). The Court noted that a court determining whether grand jury transcripts should be released "necessarily is infused with substantial discretion," but should be guided by the principle "that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy." The court added that the burden of demonstrating this balance rests upon the private party seeking disclosure, but stated that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. 441 U.S. at 223.

The Court also enumerated the traditional considerations justifying secrecy.

(1) If pre-indictment proceedings were made public, many perspective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of the testimony.

(2) Witnesses might be less likely to testify fully and frankly as they would be open to retribution as well as inducements.

(3) There is a risk that those about to be indicted would flee or attempt to influence the grand jury.

(4) Persons accused but exonerated will not be held up to public ridicule.

b. Note that "[o]nce a grand jury has completed its work, indictments having been brought, the reasons for secrecy become less compelling." Wisconsin v. Schaffer, 565 F.2d 961, 967 (7th Cir. 1977). See also In re Disclosure of Testimony Before the Grand Jury-, 580 F.2d 281 (8th Cir. 1978); cf. In re Grand Jury Proceedings, 613 F.2d 501 (5th Cir. 1980).

c. Interpretation of "Preliminary to a Judicial Proceeding"

(1) Prior to Douglas, this term was given a liberal interpretation. See, e.g. In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958).

(2) In Patrick v. United States, 524 F.2d 1109, 1117 (7th Cir. 1975), the court found it was reasonable for the district court to anticipate that judicial proceedings would arise out of grand jury testimony admitting the receipt of gambling income where no gambling returns were filed.

(3) Douglas hinted that the particularized need may be related to a functional use at trial -- e.g. "to impeach a witness, to refresh his recollection, to test his credibility and the like." 441 U.S. at 222 n. 12.

(4) District Courts are now taking a more narrow view. See United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980).

(5) One court flatly held that disclosure of grand jury evidence to the IRS for civil proceedings is "purely administrative." In re 1978-1980 Grand Jury Proceedings, 503 F. Supp. 47 (N.D. Ohio 1980). The court reasoned that the IRS is authorized to calculate a deficiency and send notice to the taxpayer, and it is only when and if the taxpayer chooses neither to pay the deficiency nor to contest the assessment that the IRS may initiate proceedings to collect it. The Department of Justice disagrees with the decision.

(6) A better reasoned decision is In re December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978).

(a) The court, after an extensive analysis of the legislative history of the amendments to Rule 6(e), found that there was no congressional intent that Rule

[6(e)(3)(C)(i)] is intended to permit disclosure by court order to government agency personnel for civil law enforcement use where the grand jury was utilized for the legitimate purpose of a criminal investigation.

(b) The court then established the following procedure:

> First, there must be a showing under oath by a responsible official of the government that the grand jury proceeding has not been used as a subterfuge for obtaining records for a civil investigation or proceeding. In this case, this would appear easily demonstrated by virtue of the indictment and successful prosecution of the taxpayer. Further a general description of the materials sought to be disclosed should be provided in order that the court can intelligently determine that the materials sought to be disclosed have some rational connection with the specific existing or contemplated judicial proceeding as envisioned by Rule [6(e)(3)(C)(i)] ... [Then]
>
> An ex parte hearing will be scheduled at which the government will be expected to satisfy the requirements set forth above. Id.

(c) This procedure was cited with approval by the Fourth Circuit. In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978).

XII. IMMUNITY PROCEDURES AND CONSIDERATIONS

XII. IMMUNITY PROCEDURES AND CONSIDERATIONS

A. Prosecutorial Discretion

1. Federal system

a. Consideration of the methods used by federal prosecutors in exercising prosecutorial discretion is a natural prerequisite to a discussion of the federal immunity statutes.

b. Under the criminal justice system as it exists at the federal level, the prosecutor has wide latitude in determining when, who, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas, has been recognized on numerous occasions by the courts. E.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966). This discretion is based on the U.S. Attorney's status as a member of the executive branch, which is charged under the Constitution with ensuring that the laws of the United States are "faithfully executed." U.S. Const., Art. II, Sec. 3. See Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

2. Means and methods utilized to exercise prosecutorial discretion

a. Initiation, declination, or dismissal of criminal charges,

b. Selection of charges,

c. Plea Agreements, and

d. Immunity Conferral.

(1) Informal

(2) Formal - statutory

e. The government may confer transactional or use immunity.

B. Criminal Tax Considerations

1. Non-prosecution agreements

a. Conferral of transactional immunity is prohibited when the proposed agreement would preclude prosecution on tax charges.

b. Authority regarding the handling of cases referred to the Department of Justice for criminal proceedings arising under the revenue laws is assigned to the Assistant Attorney General for the Tax Division (28 C.F.R. 0.70).

c. The Tax Division utilizes the following procedures for handling of criminal tax matters in carrying out its assigned responsibilities under federal regulations. These procedures further suggest restrictions on the non-statutory modes of conferring immunity concerning possible criminal tax charges.

(1) Authorization of Tax Prosecutions

Proposed tax prosecutions, with the exception of "direct referral" cases, are reviewed and processed by the Criminal Section of the Tax Division. The final decision whether to initiate prosecution is made by or on behalf of the Assistant Attorney General, Tax Division.

(2) Authority to Decline Prosecution

Except in cases referred directly to United States Attorneys, the final decision whether to initiate prosecution is made by or on behalf of the Assistant Attorney General, Tax Division. (28 C.F.R. 0.70). In the event that the United States Attorney does not desire to prosecute a criminal tax case, this decision should be communicated to the Assistant Attorney General, Tax Division. The Assistant Attorney General for the Tax Division shall decide whether to decline or to proceed with prosecution by attorneys from the Tax Division.

(3) Dismissals

Indictments returned, or informations or complaints filed in criminal tax cases, including those cases directly referred to the United States Attorney, are within the general supervisory responsibility of the Tax Division. Accordingly, indictments, informations or complaints should not be dismissed without prior approval of the Tax Division, except when a superseding indictment has been returned, or information or complaint has been filed against the same particular defendant or the defendant has died. (U.S.A.M. 6-2.420)

(4) Prohibition on Civil Tax Negotiations

Prior to final disposition of the criminal liability, no negotiations with the taxpayer for the separate settlement of any civil tax liability are authorized. (U.S.A.M. 6-2.380)

2. Agreements to obtain witness cooperation

a. Considerations

(1) Non-culpability (person is reasonably viewed solely as a potential witness).

(2) Willing to cooperate (waive privilege) if given appropriate assurances.

b. Procedures

(1) Provide a Letter of Assurance. This does not not preclude prosecution on completely independent information.

(2) Present oral agreements, etc.

C. Federal Statutory Immunity to Compel Testimony or the Production of Other Information

1. Authority

Organized Crime Control Act of 1970. Pub.L. 91-452, Title II, Section 201(a), enacted October 15, 1970 (18 U.S.C. Sections 6001-6005).

a. The Organized Crime Control Act of 1970 added sections 6001-6005 to Title 18 of the United States Code, creating a single comprehensive provision to govern immunity grants in judicial, administrative, and congressional proceedings, and amending or repealing all prior immunity provisions. The immunity granted under this provision is that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case...." 18 U.S.C. Section 6002.

The act was designed to reflect the "use" and "derivative use" immunity concept of Murphy v. Waterfront Commission, 378 U.S. 52 (1964), rather than the "transactional" immunity concept of Counselman v. Hitchcock, 142 U.S. 547 (1892).... In addition to granting only use and derivative use immunity, these provisions differ from prior immunity statutes in three ways: (1) the immunity may be granted without regard to the particular federal violation at issue; (2) the witness must claim his privilege; and (3) use of the immunity provisions must be approved in advance by the Attorney General or certain other designated persons.

Before application to the court, the United States Attorney must make a judgment that the testimony or information sought may be necessary and in the public interest and that the witness has refused or is likely to refuse to testify. 18 U.S.C. Section 6003(b). The immunity authorized by the statute is not self-executing; the witness must physically appear and claim the privilege before he can be held in contempt for refusing to testify. United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971). (Excerpts from Proving Federal Crimes, pp. 3-15 through 3-17).

2. Immunity provisions - statute summary

a. Section 6001. Definitions as used in this part:

(1) "agency of the United States" means any executive department as defined in section 101 of Title 5, United States Code;

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court ..., the Tax Court of the United States,....

b. Section 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

(4) and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information

indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added)

c. Section 6003. Court and grand jury proceedings

(1) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court for the judicial district in which the proceeding is or may be held shall issue, of the United States or a grand jury of the United States, the United States district court in accordance with subsection (b) of this section, upon the request of the United States [A]ttorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(2) A United States [A]ttorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment --

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

d. Section 6004. Certain administrative proceedings

(1) In the case of any individual who has been or who may be called to testify or provide other information at any

proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(2) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment --

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

e. Section 6005. Congressional proceedings

3. Impact of statute on criminal tax cases

a. Note: Title 18 U.S.C. Section 6001, et seq., is the first federal statute whereby authority to grant immunity extends to criminal tax offenses. The statute prohibits the "use" of compelled information "in any criminal case" against the witness ordered to comply. Statutory language obviously precludes "use" against the witness in criminal tax prosecutions.

b. Previous federal immunity statutes which provided authorization for "transactional" type immunity with regard to certain offenses enunciated by statute did not include tax violations among the list of such offenses. See, e.g., 18 U.S.C. Section 2514 (repealed effective December 14, 1974). Prior to enactment of 18 U.S.C. Section 6001, et seq.,

grants of immunity in criminal tax cases were a rarity, as such action was considered tantamount to a determination that prosecution should be declined, requiring approval of the Assistant Attorney General, Tax Division.

4. Delegation of authority to authorize applications for orders compelling testimony

a. Under 28 C.F.R. 0.175(a)-(c), the Attorney General's authority in 18 U.S.C. Sections 6001-6004 is delegated to the Assistant Attorneys General, including the Assistant Attorney General for the Tax Division, when 18 U.S.C. Section 6001, et seq., is utilized in matters in the cognizance of their respective Divisions, "[p]rovided, however, that no approval shall be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity."

b. 28 C.F.R. Subpart W (Sections 0-130-0.132)- Additional Assignments of Functions and Designation of Officials to Perform the Duties of Certain Offices in Case of Vacancy, or Absence Therein or in Case of Inability or Disqualification to Act:

(1) Section 0.131 - Designation of Acting United States Attorneys.

Each U.S. Attorney is authorized to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, or with respect to any matter from which he has recused himself, and to sign all necessary documents and papers, including indictments, as Acting U.S. Attorney while performing such functions and duties.

(2) Section 0.132 - Designating officials to perform the functions and duties of certain offices in case of absence, disability or vacancy.

In the event of a vacancy in the office of head of any other organizational unit, the ranking deputy (or an equivalent official) in such unit who is available shall perform the functions and duties of and act as such head, unless the Attorney except as otherwise provided by law, if there is no ranking deputy available, the Attorney General shall designate another official of the Department to perform the functions and duties of and act as such head.

The head of each organizational unit of the Department is authorized, in case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the unit who is available to act as head. If there is no deputy available to act, any other official in such unit may be so designated.

c. 28 C.F.R. 0.178 - Redelegation to respective Deputy Assistant Attorneys General to be exercised solely during the absence of such Assistant Attorneys General from the City of Washington.

5. Scope of protection from federal prosecution afforded by 18 U.S.C. Section 6001, et seq.

a. The statutory prohibition against use is obviously broad in scope and general in nature (i.e., not limited to enumerated offenses but rather "any criminal case"). Nevertheless, some limitations are said to exist, in that the "use" type immunity does allow for prosecution of the witness for the same offenses related to the compelled information provided such a prosecution results from completely independent information. Therefore, in theory at least, there exists some basis for viewing "use" type immunity as more limited in scope than "transactional" immunity.

b. Even after a witness has been granted "derivative use" immunity, he may still be prosecuted for crimes about which he has testified. Such prosecutions, however, face two hurdles. First, because it is the policy of the Department of Justice to avoid future prosecutions of witnesses for offenses disclosed under a grant of immunity, any such prosecution must be personally authorized by the Attorney General. Second, the immunity prohibits the prosecution from using the compelled testimony in any respect. The testimony therefore may not be used either for investigative leads or to focus investigation on the witness. Once the defendant establishes that he has testified under a grant of immunity to matters related to the federal prosecution, the government has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source testimony. Kastigar v. United States, 406 U.S. 441, 453-60 (1972). That is, the government cannot satisfy its burden merely by denying that immunized testimony was used; it must affirmatively prove an independent source of evidence, United States v. Nemes, 555 F.2d 51 (2d Cir. 1977).

Where immunity is conferred on a potential defendant, the government has been strongly advised to make a written certification, prior to the testimony, stating what evidence it already has. Goldberg v. United States, 472 F.2d 513, 516 n. 5 (2d Cir. 1973). If testimony relevant to the charges is compelled from a witness before a grand jury, and the government then seeks his indictment, it may be appropriate to present the case to a different grand jury. Id. at 516 n. 4. But see United States v. Calandra, 414 U.S. 338 (1974). In the view of some courts that have adopted a highly attenuated notion of "taint" in connection with use immunity statutes even these procedures may be insufficient. United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684

(S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir.), cert. denied, 419 U.S. 872 (1974). But see United States v. Bianco, 534 F.2d 501, 511 n.14 (2d Cir.), cert. denied, 429 U.S. 822 (1976).

c. The burden of the government on establishing a completely independent source is so great that in most situations there is very little basis on which to distinguish the scope of "use" vs. "transactional" immunity.

(1) United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

Federal conviction of a defendant who had previously testified under a grant of immunity before a state grand jury overturned: Though U.S. Attorney was unaware, after reading the state grand jury transcript, that he had read McDaniel's immunized testimony, he could not have obliterated it from his mind while preparing for trial. Government could thus not establish that the federal conviction was based on sources wholly independent of McDaniel's immunized testimony.

(2) United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

Where a defendant's indictment was in part a product of testimony from a witness against whom defendant had previously testified pursuant to 18 U.S.C. Section 6002, the witness' testimony would not be considered a source completely independent of defendant's immunized testimony if it is considered that the witness, in testifying against the defendant, was influenced by the fact that the defendant had previously testified against him.

(3) United States v. Bianco, 534 F.2d 501 (2d Cir.), cert. denied, 492 U.S. 822 (1976).

In a 26 U.S.C. Section 7203 prosecution of Bianco, where federal prosecutors had no knowledge of or access to Bianco's prior immunized state grand jury testimony, and where the contents of the immunized statements were already known to federal prosecutors before Bianco's appearance before the state grand jury, prosecution on Section 7203 charges was not barred, as it arose from completely independent sources of evidence.

(4) The use immunity statute applies only to past offenses. Specifically excepted by the statute are "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. Section 6002. The grant of immunity covers only truthful testimony. It does not protect the witness against the subsequent use by the government of falsehoods or willful evasion in his immunized testimony. United States v. Traumunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). The Fifth Amendment clause itself would not protect a witness's refusal to answer questions which would incriminate him in the future as to crimes about to be committed. See United States v. Freed, 401 U.S. 601, 606-607 (1971).

In New Jersey v. Portash, 440 U.S. 450 (1979), the Supreme Court ruled that testimony compelled pursuant to a grant of immunity could not be used to impeach a defendant in a later trial. In United States v. Apfelbaum, the Supreme Court held that the prosecution may use all prosecution may use all relevant portions of an immunized witness's testimony in a subsequent perjury prosecution, and that the evidence should not be limited to those portions of the witness's testimony

that constitute the corpus delicti or core of the false statement offense. See also United States v. Frumento, 552 F.2d 534 (3rd Cir. 1977); United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973). Truthful immunized testimony cannot be used to prove earlier or later perjury. United States v. Berardelli, 565 F.2d 24 (2d Cir. 1977); United States v. Housand, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977).

D. Tax Division Practices and Procedures

1. Initiating request

a. Follow Department Guidelines (U.S.A.M., Title 1, Chapter 11).

b. Fully complete and forward Application (Form No. OBD-111).

c. Forward application to Witness Records Unit, Criminal Division. (Suggest cc of Application be sent to Criminal Section, Tax Division simultaneous to forwarding original to Witness Records Unit, Criminal Division when justified need to accelerate normal processing exists).

d. Witness Records Unit performs a Criminal Division check in order to determine whether the Criminal Division has any objection to the proposed request for a compulsion order, and routes the application to the appropriate Division for consideration and review.

e. The normal processing time for a request for authorization to apply for a compulsion order is two weeks from the time the Department receives a request. Conscientious case preparation usually enables the requester to make the request in sufficient time to allow for the two-week processing period before the witness is scheduled to testify. However, situations inevitably arise where an important witness unexpectedly refuses to testify, asserting his privilege against self-incrimination. In such situations, the necessary application can be made to the Department by

teletype or magnafax, and the review process is accelerated; in such situations the Tax Division should be directly advised of the need for expeditious review prior to the submission of the request.

2. Administrative tax purpose An application to compel testimony in proceedings which come within the cognizance of the Tax Division will not be considered unless the subject proceeding concerns a matter wherein either:

   a. Prosecution for tax offenses was approved by Tax Division.

   b. Grand Jury Investigation concerning tax administration matters was approved by Tax Division.

   These prerequisites are necessary to assure the subject proceeding is in a proper posture to negate certain attack on the validity of the immunity authorization while also assuring that the proceeding is fully in compliance with the tax disclosure provisions (Section 6103) of the Tax Reform Act of 1976.

3. Tax Division procedures

   a. Secure documented "no objection" to the proposed immunity authorization from the Criminal Division (28 C.F.R. 0.175).

   b. Secure and document the views of the appropriate Internal Revenue Service officials concerning the proposed immunity authorization.

   c. It is the requester's responsibility to contact and receive clearance from any other governmental agency which can reasonably be anticipated to have an interest in the immunity authorization under consideration. In the event agencies considered pertinent have not been contacted, the immunity application, at the discretion of the Tax Division, will be held in abeyance until it is determined whether the involved agencies have any objection to the subject request.

d. Assemble back-up materials and prepare detailed recommendation memoranda for consideration by the Assistant Attorney General, Tax Division.

e. If approved, an immunity authorization letter for each witness, signed by either the Assistant Attorney General, Tax Division, or an appropriate official "acting" in that capacity, will be forwarded to the requesting office.

f. A follow-up questionnaire for each witness for whom an application has been approved will also be forwarded to the requesting office with instructions that it be completed after the witness has been compelled to testify, or after it has been determined that the Department's authorization should not be utilized.

E. Tax Division Policy and Criteria

1. Tax Division policy

The Tax Division's policy regarding the utilization of 18 U.S.C. Section 6001, et seq., is two-fold, mandating that:

a. Restraint and selectivity be used in authorizing requests to apply for or issue compulsion orders; and

b. All available information regarding the extent of the witness' involvement in the matter under investigation, and the nature of the expected testimony, be sought in the evaluation process in order to make an informed and objective assessment of the advantages and risks involved in compelling the witness to testify.

2. Tax Division critera

The following situations are areas of particular concern:

a. Requests for authorization to compel testimony of individuals currently designated as a target of the on-going grand jury investigation will not be considered as long as the

individual remains a designated target (culpability issues). If the proposed witness is the "target" of a separate investigation, Tax Division will consider the relationship of the matters involved and potential effects of the immunity grant. In such situations, unless it is clearly established that compliance with the compulsion order will not adversely impact on the other investigation, the request will be denied (insure integrity of any future prosecution).

b. Requests for authorization to compel testimony from close family relatives of a proposed target of an investigation will not be entertained unless the requester affirmatively establishes those exigent and extraordinary circumstances which may justify departure from this policy (if such a request is approved, the Tax Division may inform the requester that the witness shall not be prosecuted on contempt charges if he refuses to testify).

c. The Tax Division is extremely reluctant to authorize applications for orders compelling testimony from witnesses who are perceived to be in a position whereby they are likely to exculpate the target (for example, bookkeepers and return preparers known to be close associates of the target who, under the circumstances of the case, might accept responsibility for any wrongdoing).

d. It should be noted that an order compelling testimony will not prevent or obviate the witness's reliance on the attorney-client privilege or other legal privilege that might apply. Therefore, if a request is submitted in a situation where a legal privilege other than the Fifth Amendment might apply, a statement should be included as to the possible effect of that privilege on the government's attempts to obtain the witness' testimony.

e. Applications for witnesses who have been convicted, but not yet sentenced, on criminal charges will not be approved unless arrangements can be made to insure that the witness' compelled testimony will not be brought to the

attention of the sentencing judge without the witness' consent, or that the witness will be sentenced by a different judge than the judge who hears his compelled testimony.

F. Department Guidelines - Procedures

1. Chapter 11 U.S. Attorneys' Manual

Chapter 11, Title 1, of the United States Attorneys' Manual sets forth the considerations found in the Attorney General's January 14, 1977 guidelines for the utilization of 18 U.S.C. Section 6001, et seq., for determining that authorization should be sought to compel a witness to testify or provide other information. Also found in Chapter 11 are the procedures for requesting and utilizing such authorization.

2. Detailed Table Of Contents for Chapter 11, Title 1

3. Proving Federal Crimes (May 1980, Edition)

a. The Grand Jury and Immunity (Chapter 3)

b. Statutory Immunity Summary (Id. pp. 13-16)

G. Issues of Law Raised on Behalf of Compelled Witness (In an Attempt to Defend Noncompliance) and/or the Defense

1. Constitutionality of statute

Validity of "use" type immunity upheld in Kastigar v. United States, 406 U.S. 441 (1972).

2. Whether utilization of statutory provisions should be restricted to organized crime cases

Held that although" use" immunity statute was enacted under Organized Crime Act of 1970, the statute is for general use. See In re Kilgo, 484 F.2d 1215 (4th Cir. 1973).

3. No showing of public interest

Court precluded from reviewing propriety of immunity grant. Court's only function is to see that procedures enumerated in the statute are complied with. In re Kilgo, supra.

4. Fourth Amendment issue (grand jury witness)

Grand jury witness cannot invoke exclusionary rule. United States v. Calandra, 414 U.S. 338 1973), reversing 465 F.2d 1218 (6th Cir. 1972).

5. Electronic surveillance (grand jury witness)

If there is only a mere claim, witness must still testify. See In re Persico, 491 F.2d 1156 (2d Cir. 1974).

(b) Government denial of illegal surveillance by affidavit is sufficient. United States v. Fitch, 472 F.2d 548 (9th Cir. 1973).

(c) If Government concedes illegal wiretap, see Gelbard v. United States, 408 U.S. 41 (1972).

6. Foreign witness

Foreign Witness' compelled testimony might result either in violation of a foreign country's secrecy laws, or in the disclosure of crimes committed for which the witness has no assurance of immunity in a foreign country.

a. United States v. Field, 532 F.2d 404, rehearing denied, 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

A Canadian citizen who is a director of a Grand Cayman bank was compelled to testify pursuant to 18 U.S.C. Section 6002, and the witness refused to do so on the ground that, by the very act of testifying as to bank matters he would violate the bank secrecy laws of the Cayman Islands (here witness did not contend that the contents of his answers would subject him to prosecution in the Cayman Islands). Fifth Circuit held that the act of testifying was not within the score of the Fifth Amendment, which protects only against the use of testimony. C.f. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982).

b. In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied 410 U.S. 914 (1973).

The secrecy of grand jury proceedings mandated by Fed. R. Crim. P. 6(e) is sufficient to guard against a "substantial risk" of foreign prosecution based on the use of the compelled testimony, even if the Fifth Amendment privilege were assumed to extend that far.

7. Defense witness immunity

a. Claims for defense witness use courts immunity have been uniformly rejected by United States v. Praetorious, 622 F.2d 1054, (2d Cir.),

cert. denied, sub nom. Lebel v. United States, 449 U.S. 860 (1980); United States v. Gleason, 616 F.2d 2 (2d Cir. 1979), cert. denied 444 U.S. 1082 (1980); United States v. Lang, 589 F.2d 92, 96 n. 1 (2d Cir. 1978); United States v. Wright, 588 F.2d 31, 33-37 (2d Cir. 1978); cert. denied, 440 U.S. 917 (1979); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); see also United States v. Lenz, 616 F.2d 960 (6th Cir. 1980); United States v. Housand, 550 F.2d 818, 823-824 (2d Cir.), cert. denied, 431 U.S. 979 (1977); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976); United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.), cert. denied, 426 U.S. 948 (1976); Thompson v. Gerrison, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967) (transactional immunity). The claim is a matter of divided opinion in the Third Circuit, compare United States v. Rocco, 587 F.2d 144 (3rd Cir. 1978); United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973), with Government of the Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980); United States v. Herman, 589 F.2d 1191, 1203-04 (3rd Cir. 1978), cert. denied, 411 U.S. 913 (1979); United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976). Additional support for the claim has been expressed by the former Chief Judge of the District of Columbia Circuit, see United States v. Gaither, 539 F.2d 753 (D.C. Cir.) (Bazelon, C.J., concurring in denial of rehearing en banc); cert. denied, 429 U.S. 961, (1976); United States v. Leonard, 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (Bazelon, C.J. concurring and dissenting), and by two District Courts, United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), and United States v. LaDuca, 447 F. Supp. 779 (D. N.J. 1978).

The only federal appellate decisions ruling in favor of defense witness immunity appear to be the Third Circuit decisions in Morrison and Smith. For the most recent discussion of the issues involved see United States v. Turkish, 623 F.2d 769 (2d Cir. 1980).

b. United States v. Turkish, supra.

The appellant in Turkish sought to overturn his conviction on the ground that he was denied due process by the government's failure to grant use immunity to seventeen prospective defense witnesses who, according to appellant, would otherwise refuse to testify. The panel, after an exhaustive analysis of the concept of reverse (defense witness) immunity, concluded that due process considerations of fairness seldom, if ever, require immunization of potential defense witnesses. While not ruling out the possibility that in some extreme situations the government's refusal to grant use immunity to defense witnesses might pose constitutional problems, the panel held that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." Id. at 778.

Judge Lumbard filed a separate opinion in Turkish, concurring in the result, but dissenting from that portion of the majority opinion that implied "that under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness." Id. at 779.

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