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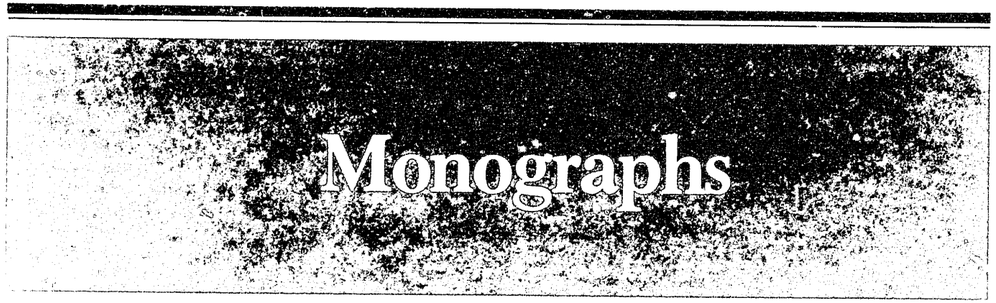

Grand Jury Reform: A Review of Key Issues

A publication of the National Institute of Justice

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James K. Stewart
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Grand Jury Reform: A Review of Key Issues

by
Deborah Day Emerson

Prepared for the National Institute of Justice, U.S. Department of Justice, by Abt Associates Inc., under contract number J-LEAA-013-78. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

January 1983

U.S. Department of Justice
National Institute of Justice
Office of Development, Testing and Dissemination

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ACKNOWLEDGEMENTS

A number of individuals and organizations provided invaluable assistance in the development of this Monograph. Ms. Laurie Robinson, Director of the Section of Criminal Justice of the American Bar Association, generously responded to the author's many requests for materials and advice, as did her assistant, Ms. Diane Church. The author gratefully acknowledges the considerable time and effort they contributed to the development of this document. Prosecutors, judges and defense attorneys across the country responded to the mail survey and provided copies of statutes, grand jury manuals and other materials. In addition, practitioners in the states visited--California, Colorado, Massachusetts, New Mexico, New York, and South Dakota--contributed their insights and practical experience to this Monograph. Thanks are extended to all of these individuals.

The author extends her thanks to the members of the Advisory Board who provided guidance in the conceptualization and substantive content of this Monograph: Mr. Francis Bellotti, Attorney General of the Commonwealth of Massachusetts; Mr. John Keenan, former Special Prosecutor in New York City; Mr. Robert Morgenthau, District Attorney for New York County; and Dr. Charles Wellford, who was with the U.S. Department of Justice throughout the time this Monograph was being developed and who is currently the Director of the Institute of Criminal Justice and Criminology at the University of Maryland. These individuals provided invaluable advice and practical insights regarding the issues involved in the area of grand jury reform. Mr. Peter Benitez, an Assistant District Attorney in New York County, also provided assistance of this nature. Special appreciation is also extended to Mr. Richard Gerstein, Chairman of the American Bar Association's Committee on the Grand Jury, and Mr. James Gramenos of the Cook County Public Defender's Office. These individuals provided an extremely thorough review of the Monograph and shared their expertise by reviewing many detailed points of the law surrounding grand jury procedures for the author's benefit.

The author is indebted to two individuals within Abt Associates. Ms. Nancy Ames made a significant contribution to this Monograph through her services as technical reviewer and her direct assistance in successive revisions. Mr. Robert Spangenberg was very helpful in the initial process of defining the scope of the Monograph and identifying the key legal issues involved.

Within the National Institute of Justice, the author gratefully acknowledges Mr. Anthony Pasciuto, the original Program Monitor whose idea it was to write a Monograph on the topic of grand jury reform, and Ms. Maureen O'Connor, who has reviewed successive drafts and offered helpful suggestions for their improvement.

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Cambridge, Massachusetts

June, 1982

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Chapter 1

INTRODUCTION

The grand jury, although embedded in our legal history and culture from centuries of development in England and incorporated into the Bill of Rights of the United States Constitution, is nonetheless an institution whose purpose and operation in our society are the subject of current controversy. As illustrated by the quotations below, both judicial decisions and the relevant literature contain divergent views.

- The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges.[1]

- Unauthorized disclosures of grand jury proceedings compromise the purposes of the grand jury resulting in documented instances of 343 witnesses having their identities revealed before any indictments were returned, including 5 witnesses who were murdered, 10 witnesses who were intimidated, and 1 who disappeared.[2]

- If the history of the grand jury reveals an institution that all too often has failed to achieve its idealized function of buffering innocents from official misuse of the power to prosecute, and if, worse still, it has become perverted into a weapon for harassing and silencing the not-so-loyal opposition, questions about its possible abolition squarely confront us.[3]

- The recent hue and cry for abolishing or reforming the grand jury system constitutes an unwarranted assault upon the one part of the criminal justice system which functions as effectively as it has functioned in years past.[4]

Modern debate on the grand jury is not limited to argument over minor revisions in a generally accepted system, but involves questions regarding the continued existence of the grand jury system itself. The grand jury has been targeted for abolition by some of its opponents, while some of its supporters have firmly resisted even the discussion of change. As illustrated by the quotations cited above, both judicial decisions and the relevant literature contain divergent views. Between these two extremes are those who advocate the retention, with modification, of the grand jury. Proponents of grand jury reform seek to institutionalize reasonable safeguards against abuse without altering the character of the grand jury to such an extent that it ceases to be a viable component of the criminal justice process. However, both the current controversy and the actual evolution of the grand jury have occurred to a great extent without the benefit of objective, systematic research or an assessment of the experience to date with reform initiatives. While this Monograph does not attempt empirical research on grand jury reform, it is intended to provide the reader with an objective assessment of current practice as well as to identify those issues in need of further research.[5]

1.1 Purpose and Scope of This Report

This report focuses on grand jury reform initiatives that have been identified through an analysis of national standards, state legislation and court rules, and describes the practical experiences of a sample of states in implementing these initiatives. The objectives of this Monograph are:

- to provide a review of several key changes being suggested by those proposing grand jury reform;
- to provide a national overview of the implementation of grand jury reform through laws or rules of court;
- to report the experiences of sample states with a variety of grand jury reforms and to describe the perceived impact of these measures; and
- to describe issues to be considered in implementing grand jury reforms and to identify potential unintended consequences of reform.

Ultimately, the report raises a range of issues that need to be considered by those who are responsible for balancing the overall fairness of the grand jury process with its independence and effectiveness. The primary audience for this report is prosecutors at all levels of the criminal justice system and in all jurisdictions, since it is the prosecutor who is involved with the grand jury on an ongoing basis and who makes many of the decisions regarding

its tasks and objectives. Additional audiences for this report include judges and defense attorneys because they also have an important role to play in adopting and implementing changes in the grand jury system. Policymakers in all three branches of government may also benefit from the findings of this study, since they have the responsibility for enacting and implementing the legislation and administrative rules required to achieve many of the possible modifications that are reviewed throughout this report.

In scope, this Monograph addresses modifications as they apply to grand juries performing either an investigative or screening function. The screening grand jury makes decisions on indictments in routine criminal cases where both the suspect and the charge have already been identified, whereas the investigative grand jury often determines both the existence of and the perpetrators of criminal activity. Although investigative grand juries have attracted far more public attention and have generated more criticism than screening grand juries, the issues raised by an analysis of grand jury reform have application to both types of grand jury. The discussion in this report is relevant to both types of grand jury and will distinguish between the two only where the applicability or impact of a particular reform is dependent on the function of the grand jury.

A number of issues have been intentionally excluded as outside the scope of this document. The question of abolition of the grand jury is one of these. Since the continued existence of the grand jury is a basic assumption underlying this research, this report does not attempt to provide guidance on the issue of abolition; instead it offers suggestions on the format and rules for a reformed grand jury proceeding.

Another set of issues intentionally excluded are those involving grand jurors; criteria for selecting individual jurors and the different ways of using the jurors selected have been documented and evaluated in numerous publications and federally sponsored projects.[6] The reform measures addressed in this Monograph then, are unique to grand juries rather than those applicable to jurors.

1.2 Research Methodology

This Monograph is based upon four distinct sources of information: literature focusing on issues of grand jury reform (including standards promulgated by organizations such as the American Bar Association and the National District Attorneys Association); statutes and rules governing grand juries in the 50 states; illustrative examples of practitioner experiences in six sample states visited during the course of this research; and rules and guidelines governing grand jury practice at the federal level. A review of the available literature conducted in the early stages of this research

revealed numerous critiques of the grand jury system and many recommendations for change, but little descriptive information on the degree of reform implementation throughout the country. Since such information was central to this research, it was necessary to examine the laws of each state directly.

The American Bar Association's (ABA) Policy on the Grand Jury, prepared by the Section of Criminal Justice, outlines legislative principles for grand jury reform.[7] These principles, which have since been incorporated into a Model Act, were used to identify the range of possible reforms that might have been enacted by individual states. An initial survey of state laws was conducted using the statutes and court rules available in local law libraries to ascertain which elements of the ABA principles had been adopted by the states.

To obtain more comprehensive and up-to-date information on each state's laws and to determine whether any reforms had been implemented through local initiatives, a national mail survey was conducted. Survey respondents included the prosecutors, chief or administrative judges, and public defenders or representatives of the local bar association in selected local jurisdictions, and the state Attorneys General.[8] Although information was obtained from survey returns or follow-up telephone calls from every state except Tennessee (and information on that state was available from our own statutory analysis), the survey did not provide reliable national data. Since the statutes and rules governing grand jury operation are often general and not precisely defined, many different interpretations of the applicable provisions of law are possible. The survey returns reflected this diversity in that there were even conflicts in the answers given by respondents within jurisdictions. Therefore, survey data are used only in selected instances in this report.

It is important to stress that this report focuses primarily on statutes and rules of court, although selected judicial rulings which significantly modify or refine the law as specified in statutes or rules are reported. An exhaustive analysis of the applicable case law pertaining to each issue of grand jury operations and reform was not within the scope of this research. Therefore, unless otherwise noted, reference to the law of a state means the law as reported in either the statutes or procedural rules of that state.

After examining the results of the statutory analysis and the survey returns, and consulting with the experts in the field who served on the Advisory Board, six states were selected for more intensive study: California, Colorado, Massachusetts, New Mexico, New York and South Dakota. California was selected because of the State Supreme Court's 1978 decision in Hawkins v. Superior Court which held that the due process protections offered by the grand jury were not equal to those offered by the preliminary hearing.[9] The remaining states were selected because they all had implemented one or more of the grand jury reforms of interest and because they varied in urban/

rural character, geographic region of the country, and mandatory versus discretionary use of the grand jury to initiate prosecutions. In the first three months of 1980, interviews were conducted in each of these states with prosecutors, judges and defense attorneys.

Given the different type of contact each category of respondent has with the grand jury, the type of information resulting from our interviews varies by type of respondent. Furthermore, in any jurisdiction, only one or two judges or prosecutors may be routinely involved with grand jury cases. For these reasons, this Monograph reports the experience and perceptions of the practitioners who are most familiar with the grand jury in each jurisdiction, without attempting to quantify respondents' perceptions or to report the view of all prosecutors in each site. Given the controversial nature of many of the issues related to grand jury reform and the frankness with which interviewees responded, the author assured respondents that their comments would not be attributed to them by name. As noted above, naming the county in some jurisdictions would be tantamount to naming the individual, since one prosecutor or judge may be singularly identified as the grand jury expert. Therefore, the author has strived to ensure anonymity by referring to a respondent's state, rather than county, affiliation.

Interviews were not conducted at the federal level since this report was primarily intended to examine state experience. However, as will be described more fully in Chapter 2, much of the controversy surrounding grand jury reform has focused on the federal system. Therefore, references to the U.S. Attorney's Manual, federal case law and other sources are included where appropriate to indicate the status of federal practice on these issues.

In summary, this Monograph synthesizes legal provisions and qualitative perceptions on grand jury reform issues. It is not a quantitative, case-level study. Such a study, however, is currently in progress under funding from the National Institute of Justice. This project is examining the role of the grand jury in case processing primarily through an analysis of case-level data and interviews in two counties and at the state level in Arizona. In addition, it will address the grand jury's screening function through a comparison to the preliminary hearing and its investigative function through an analysis of a small sample of cases. The results of this study should be available in late 1982.

1.3 Guide to This Report

Chapter 2 provides an historical and legal context for the study of grand jury reforms in the selected states. Following a discussion of the historical development and contemporary debate surrounding the grand jury, the

chapter outlines the current requirements for grand jury involvement in criminal prosecutions. Finally, Chapter 2 discusses the factors contributing to the impetus for reform and provides an overview of the passage of reform legislation in the 50 states.

Chapters 3 through 6 focus on specific categories of grand jury reform and the experiences of selected states with these reforms. The role of the grand jury as an entity with powers independent of the prosecutor, and strategies by which that independence can be facilitated by the prosecutor and the judge are described in Chapter 3. Chapter 4 examines the presentation of evidence to the grand jury, including guidelines for presenting the government's case and the use of exculpatory evidence in grand jury hearings. Chapter 5 discusses the creation and distribution of a formal stenographic or electronic record of the grand jury hearing and the provisions governing judicial review of that record. The benefits and consequences of limitations on the disclosure of grand jury information also are explored. Reforms designed to protect both individuals subpoenaed by the grand jury as witnesses or who are targets of grand jury investigations are the focus of Chapter 6. Specifically, this chapter reviews procedures to notify witnesses of their rights before the grand jury and of their status as a target or a non-target of the investigation. In addition, the right to counsel in the grand jury room, probably the most strongly contested of all suggested grand jury reforms, is discussed in detail using mini-case studies of the five states visited which have enacted the right to counsel in the grand jury room. Measures to prohibit, or minimize the harm of, multiple representation, a potentially negative consequence of the right to counsel, also are discussed.

Many of the reforms discussed throughout this volume are closely interrelated. The effectiveness of one reform initiative may be contingent upon the implementation of another reform. Moreover, the goals of some reforms may seem to be at cross purposes with other reforms as well as with other goals of the grand jury. Reforms designed to increase the fairness of the grand jury process, for example, may reduce efficiency or turn the grand jury into a "mini-trial." Reforms designed to open up the grand jury proceeding (e.g., increased disclosure, presence of counsel) may jeopardize grand jury secrecy and the use of broad investigatory powers. These issues and concerns are synthesized in the final chapter (Chapter 7) of this report.

REFERENCES

Chapter 1

1. United States v. Mandujano, 425 U.S. 564, 571 (1976).

2. General Accounting Office, Comptroller General, Report to Congress, More Guidance and Supervision Needed Over Federal Grand Jury Proceedings, GGD-81-18 (Washington, D.C.: Government Printing Office, 1980).

3. Leroy D. Clark, The Grand Jury: The Use and Abuse of Political Power (New York: Quadrangle, The New York Times Book Co., 1975), p. 104.

4. Curran, "The Grand Jury Needs Protection from Those Who Abuse It, Not Major Surgery--The Grand Jury Defended," N.Y.L.J., January 22, 1976.

5. We use the term "reform" throughout this document, despite the controversial nature of many of the proposed changes. Each of the modifications discussed is intended to increase the procedural safeguards available to defendants or to guarantee the independence of the grand jury. Few dispute the intent of these changes. What is most often in question is the impact of these changes on the efficiency and effectiveness of the grand jury process.

6. Materials and technical assistance on jury utilization and management techniques are available from the Center for Jury Studies, National Center for State Courts, 6723 Whittier Avenue, McLean, Virginia 22101, (703) 893-4111.

7. American Bar Association, "Policy on the Grand Jury." As of this date, there are 30 principles--25 of which were approved by the ABA in 1977, 3 of which were added in 1980, and 2 of which were developed in 1981. The principles are contained in Appendix A.

8. Local jurisdictions receiving surveys included the 50 largest cities in the nation; the largest city in those states not already represented; and 24 randomly selected rural counties.

9. Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916 (1978), is discussed in detail in Chapter 2.

Chapter 2

NATIONAL OVERVIEW OF THE GRAND JURY

Although this report focuses on the specific issues of grand jury reform and deals primarily with the laws and experiences in six sample states, it is important to present these issues in the appropriate context. A brief summary of the historical origins of the grand jury in England and the circumtances of its adoption into the American system provide part of this context. The remaining contextual framework consists of a discussion of a more recent impetus for change as well as an overview of current provisions governing grand jury usage and the extent of implementation of grand jury reform in all 50 states.

2.1 Historical Development of the Grand Jury

The grand jury has been characterized in two diametrically opposed fashions. Although often regarded as a panel serving to safeguard individuals against government abuse,[1] the grand jury has also been described as an instrument through which government oppression occurs.[2] At various times in history, it has played each of these roles.

The grand jury was created in England in the 12th century as an arm of the king, and essentially combined aspects of law enforcement, prosecution and the judiciary. The members of the panel were quite powerful, since they identified the subjects of their inquiry, frequently presented evidence from their own knowledge, and determined on their own that an accusation should be made. Since the only trial was by ordeal, their accusation was all but tantamount to a conviction. Although changes in trial procedures gradually evolved, the grand jury remained virtually unchanged for nearly 500 years.[3]

The first recorded instance of grand jury independence from the king occurred in 1681. In the cases of two Protestants accused of treason for opposing the king's attempts to reestablish the Catholic Church, the grand jury refused to accede to the king's wishes that a public rather than private hearing be held, and, after holding a secret session, refused to return an indictment.[4] Although this defiance had little ultimate effect (the king

simply found a more compliant grand jury), this incident marked the emergence of the view of the grand jury as a protection against government abuse.

In the American colonies (all colonies had some type of grand jury system in place by 1683), the grand jury became more active in defying governmental authority. As the Revolution approached, grand juries became less responsive to the wishes of the loyalists and more sympathetic to those resisting British rule.[5] In 1765, for example, a grand jury in Boston refused to indict leaders of protests against the Stamp Act.[6] The grand jury obtained the reputation as a strong bulwark against unwarranted prosecution and government oppression during this period. In fact, the grand jury was considered so important that it was incorporated into the Fifth Amendment to the United States Constitution which specifies that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

Although the grand jury achieved recognition in the Constitution, its role in initiating prosecutions has not been free of criticism. Research conducted in the 1920's and 1930's assessed the effectiveness and efficiency of the grand jury and identified several shortcomings: that use of the grand jury had negative impacts in the areas of cost, timeliness and successful outcomes,[7] and that the grand juries did not actively seek out evidence of criminal offenses but rather yielded to the direction established by the prosecutor.[8] Morse recommended that the use of informations be substituted for grand jury indictments to initiate prosecution except in limited instances. The National Commission on Law Observance and Enforcement (often referred to as the Wickersham Report)[9] cited the inefficiency of the grand jury and the need to place accountability for prosecutorial decisions on the prosecutor, and supported the establishment of a dual system of prosecution where both the indictment and the information would remain available options.

The impact of these studies may have been minimized by a series of activist grand juries in New York and elsewhere which buttressed the arguments of those who believed the grand jury to be a vital and beneficial institution. Successful investigations into political corruption and labor unions in the 1930's illustrated the positive contribution of the grand jury and may have helped counter the trend towards replacing the grand jury with an alternative process.[10] These events marked the emergence of the grand jury's investigative function in addition to its role in case screening.

Although England, which provided the model for our system, abolished the grand jury in 1933, the U.S. courts continue to this day to operate under

the general requirement of grand jury indictment for the prosecution of serious criminal cases. The Constitutional rule mandating an indictment has never been applied to the individual states, however; they are free to formulate their own requirements.[11] As a result, the 50 states vary considerably in their requirements regarding the need for grand jury indictment as a precursor to prosecution.

2.2 State Provisions Governing the Use of the Grand Jury for Case Screening

While a number of state constitutions require a grand jury indictment for certain categories of crime, other state constitutions allow the legislature to specify the rules governing the initiation of prosecution. The legislatures in these states typically give prosecutors complete discretion in choosing between the use of grand jury indictment or the filing of an information, the latter generally in conjunction with some form of probable cause hearing. Figure 2.1 illustrates the legal requirements for grand jury involvement in the initiation of prosecution in each of the 50 states.

In California and Wisconsin, two of the states in which an indictment is an optional method of initiating prosecutions, the procedures for filing charges have recently been restructured and the discretion available to the prosecutor has been redefined. In both states, a preliminary hearing must now be held after an indictment is returned. Consequently, the grand jury no longer serves as the sole determinant of the existence of probable cause nor can it be used by the prosecutor to avoid a preliminary hearing.

The ruling handed down in November 1978 by the California Supreme Court in Hawkins v. Superior Court mandated post-indictment preliminary hearings on grounds of the equal protection clause of the state constitution.[12] The Court found "that a defendant charged by indictment is seriously disadvantaged in contrast to a defendant charged by information."[13] Specifically, the fundamental rights of counsel, confrontation, and a hearing before a judicial officer were cited as unavailable to defendants charged by grand jury indictment. It was the existence of a dual system of prosecution with differing due process safeguards that triggered the equal protection issue. As noted by the Court,

> the prosecuting attorney is free in his completely unfettered discretion to choose which defendants will be charged by indictment rather than information and consequently which catalogue of rights, widely disparate though they may be, a defendant will receive.[14]

The Court in Hawkins found no compelling state interest to justify this discrimination; the solution devised by the Court was to require a post-

Figure 2.1
Requirements for Grand Jury Indictment to Initiate Prosecutions

Grand Jury Indictment Required[a]	Grand Jury Indictment Optional	Grand Jury Lacks Authority to Indict
All Crimes	Arizona	Pennsylvania[d]
New Jersey	Arkansas	
South Carolina	California	
Tennessee[b]	Colorado	
Virginia	Idaho	
	Illinois	
All Felonies	Indiana	
Alabama	Iowa	
Alaska	Kansas	
Delaware	Maryland	
District of Columbia	Michigan	
Georgia	Missouri	
Hawaii	Montana	
Kentucky	Nebraska	
Maine	Nevada	
Mississippi	New Mexico	
New Hampshire	North Dakota	
New York	Oklahoma	
North Carolina	Oregon	
Ohio	South Dakota	
Texas	Utah	
West Virginia	Vermont	
	Washington	
Capital Crimes Only	Wisconsin	
Connecticut	Wyoming	
Florida		
Louisiana		
Massachusetts[c]		
Minnesota		
Rhode Island		

[a] With the exception of capital cases a defendant can always waive his right to an indictment. Thus, the requirement for an indictment to initiate prosecution exists only in the absence of a waiver.

[b] The information on the laws of Tennessee derives exclusively from our statutory analysis. No survey instrument was returned from that state.

[c] In Massachusetts, felonies punishable by five years or less in state prison may be prosecuted on the basis of a complaint in the District Court. However, if this option is selected instead of prosecuting the case in Superior Court following an indictment, the defendant may not be sentenced to state prison but only to 2½ years in the House of Correction. Capital offenses and felonies punishable by more than five years in prison must be prosecuted by indictment.

[d] The grand jury in Pennsylvania has investigative powers only and does not have the authority to issue indictments.

Source: Survey and analysis of state laws conducted by Abt Associates.

indictment adversarial hearing at which the defendant would have access to the full range of due process protections that would be available during any preliminary hearing.

Although similar challenges to the grand jury have been raised for years in many other states, the courts have consistently supported the use of the grand jury indictment to initiate prosecutions.[15] The Hawkins decision remains unique at this time. However, the procedural requirements of Hawkins were adopted in Wisconsin through legislation. In 1979, the law was amended to require:

> "[u]pon indictment by a grand jury a complaint shall be issued [and] . . . the person named in the indictment . . . shall be entitled to a preliminary hearing . . . and all proceedings thereafter shall be the same as if the person . . . had not been indicted by a grand jury."[16]

Therefore, a grand jury indictment is either required to initiate prosecution or is an optional method of filing formal charges according to the laws of each state, with the exception of Pennsylvania, where the grand jury has no power to indict. Even in Wisconsin and California, where the legal changes described above have occurred, the grand jury may still be used to file charges, although a preliminary hearing must follow the indictment. There have been predictions that this requirement will deter grand jury usage due to the duplication of effort involved in presenting a case to the grand jury and then at a subsequent preliminary hearing. However, as noted by the California Supreme Court in Hawkins and other commentators, under certain circumstances prosecutors may prefer to use the grand jury or be forced to do so by events outside their control. For example, a grand jury indictment may be used to file charges when the defendant cannot be located and the time limits allowed for prosecution under the statute of limitations are about to be exceeded. Similarly, the secrecy of the grand jury may allow defendants to be charged and taken into custody before they can pose potential danger to a witness's safety or flee from the jurisdiction. In addition, the need to protect the identity of undercover agents, the ability to test a witness before a jury, or the opportunity to involve the community in case screening might be contributing factors. Thus, grand juries in California and Wisconsin are still available mechanisms for initiating prosecutions. Moreover, in all 50 states, the grand jury's investigative powers remain an important component of its role regardless of any limitations on its screening function.

2.3 Movement Towards Grand Jury Reform

In recent years, the major thrust of debate and activity involving grand juries has focused on changing the rules and procedures of the grand jury itself, rather than restructuring the process for case screening as occurred in California and Wisconsin. For the most part, the changes which have been

proposed are designed to reform the grand jury by implementing a number of due process protections with respect to the operation of the grand jury and have principally been directed at its investigative role.

The call for reform has largely occurred at the federal level and arose from perceptions of abuse of the grand jury process in the 1960's and 1970's. Investigations by the Justice Department's Internal Security Division into the activities of political dissidents were seen as a deliberate strategy to "harass leftists and quash the anti-war movement" and were characterized as the 1970's equivalent of the legislative anti-subversive committees operating in the 1950's.[17] Critics claimed the inquiries were open-ended fishing expeditions which, under the cover of grand jury secrecy, allowed the government to intimidate and berate innocent witnesses in its search for information on criminal activity by targeted groups.

Criticism of the grand jury came not only from radical groups but also from the news media, the business community, organized labor and many other groups. In addition to groups lobbying for the abolition of the grand jury and filing lawsuits to challenge the activities of grand juries, a number of measures to reform the grand jury system were also proposed.[18]

The American Bar Association's Efforts

Perhaps the best known set of proposals for grand jury reform has been developed by the American Bar Association's (ABA) Section of Criminal Justice through its Grand Jury Committee.[19] The Committee, established in 1974, has developed 30 legislative principles of grand jury reform. Initially, 25 of these were approved as ABA policy by the House of Delegates in August 1977; three were approved in 1980; and two more followed in 1981. The 30 principles suggest reforms intended to protect the rights of witnesses, including the right to counsel in the grand jury room and the right against self-incrimination, as well as to establish evidentiary standards for grand jury proceedings, to require recording of testimony and commentary, and to set up guidelines for granting immunity and using the contempt powers of the grand jury.

The ABA policy was developed, in large measure, to urge grand jury reform at the federal level. To this end, ABA representatives and a number of other proponents of grand jury reform have testified before the United States Congress.[20] Some of the proposed reforms have generated a significant level of opposition from those fearing that these modifications would jeopardize either the efficiency of the grand jury process or its inherent advantages as a mode of prosecution or investigation. Perhaps the most controversial proposal involves the right to counsel in the grand jury room. The Department of Justice, for example, opposes this proposal for several

reasons. Among these are concern that the presence of counsel might jeopardize grand jury secrecy and witnesses' freedom to testify or might cause delay and result in a mini-trial.[21] The Department of Justice has accepted many of the other ABA principles, however, through policy statements or inclusion in its U.S. Attorneys' Manual. It is important to note that standards promulgated by professional associations such as the ABA or the NDAA are not legally binding. Thus, a federal court has ruled that failure to follow the guidelines set forth in the U.S. Attorneys' Manual is not grounds for dismissal of an indictment, since the Manual does not have the force of law.[22]

The ABA has continued to be in the forefront of those advocating grand jury reform and has developed model legislation incorporating the 30 principles into a Model Grand Jury Act. The Section of Criminal Justice drafted the Model Act (originally designed to be a model for state legislative efforts) and submitted it to the ABA's House of Delegates for consideration as official policy in August 1981. Consideration of the Model Act was deferred until 1982, however, due in part to a need for further examination of the Act by members of the House of Delegates and in part to opposition to the scope of the Act. The Model Act was revised by deleting selected provisions which had met the strongest opposition and was resubmitted to the House of Delegates in January 1982. At that time, the revised Model Act was approved as official policy of the ABA. The Model Act and the deleted provisions are contained in Appendix B.

State Initiatives Toward Reform

States vary widely with respect to their passage of legislative reforms: some states have adopted none of the ABA's provisions whereas others have revised their grand jury system to include even the most controversial reforms. To assess the extent to which states have modified their grand jury operations through legislation, three issues were selected as key measures: the right to counsel in the grand jury room, applicability of trial rules of evidence, and requirement of a formal record of the proceedings. These were selected because proponents of reform include them as central elements in proposals to modify the grand jury and because these provisions are typically specified by law rather than local custom or informal practice. Figure 2.2 illustrates the extent to which the 50 states and the District of Columbia have implemented these provisions.

Figure 2.2 clearly illustrates that fewer than half of the states have implemented any of these reforms and that fewer still have implemented more than one. The requirement of a formal record of the proceedings is the most frequently enacted of the three provisions. However, states vary considerably in their requirements governing the scope and distribution of the record. The right to counsel in the grand jury room has been adopted by fifteen states, but with considerable variance in eligibility for that right.

Figure 2.2
National Overview of Enactment of Grand Jury Reforms[a]

Grand Jury Reforms	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	Washington, D.C.	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi
Right to Counsel in the Grand Jury Room			X[b]			X								X			X[c]					X	X[d]	X[e]	
Trial Rules of Evidence					X								X												
Requirement of Formal Record of Grand Jury Proceedings			X		X	X	X							X			X					X		X	

Grand Jury Reforms	Missouri	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee[g]	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
Right to Counsel in the Grand Jury Room							X[b]	X[e]				X		X[f]			X					X[h]	X[i]		X	
Trial Rules of Evidence				X			X	X		X		X	X				X			X						
Requirement of Formal Record of Grand Jury Proceedings				X		X	X	X		X		X		X[f]	X					X	X	X[h]	X			

[a] For purposes of this figure, the right to counsel is available to all witnesses, unless otherwise specified, and jurisdictions are characterized as requiring trial rules of evidence—although one or two exceptions to the trial rules are made for grand jury hearings.

[b] Right to counsel available only for target witnesses.

[c] Only state in which counsel is allowed to object to questions.

[d] Right to counsel available only for those witnesses who have been granted immunity.

[e] Right to counsel available only for those witnesses who have waived their right to immunity.

[f] These provisions only apply to investigatory grand juries. Grand juries in this state are not authorized to issue indictments.

[g] The information on the laws of Tennessee derives exclusively from our statutory analysis. No survey instrument was returned from that state.

[h] These provisions only apply to special grand juries, which are investigative only and do not have the power to issue indictments.

[i] Right to counsel available for all witnesses except those testifying under a grant of immunity.

Source: Survey and analysis of state laws conducted by Abt Associates.

Although some of the states have incorporated some of the ABA's principles into their statutes--for example, New Mexico's 1979 grand jury law included many of the ABA's principles and closely paralleled the ABA's language--other states, such as Arizona and South Dakota, acted even before the development of the principles.

It is difficult to define precisely the factors contributing to each state's decision to modify its grand jury system. The controversy and claims of abuse at the federal level may well have encouraged states to examine their own institutions. The stand taken by the ABA is another important factor in this regard. Respondents interviewed in the course of this study stated that there were no significant claims of abuse at the state level similar to those voiced about the federal system. Instead, grand jury reform proposals were sometimes adopted as part of a larger movement, as in South Dakota where the entire criminal code, including the sections governing the grand jury, was revised.

The existence of reform legislation was a key factor in selecting the six states for site visits. As can be seen in Figure 2.3, each of the six states

Figure 2.3
Summary of Grand Jury Usage and Reform Provisions in States Selected for Site Visits

State	Requirement of an Indictment to Initiate Prosecution	Right to Counsel in the Grand Jury Room	Trial Rules of Evidence	Formal Record of Grand Jury Proceedings
California	None		X	X
Colorado	None	X		X
Massachusetts	Capital and some felonies[a]	X		X
New Mexico	None	X[b]	X	X
New York	All felonies	X[c]	X	X
South Dakota	None	X	X	

[a] In Massachusetts, felonies punishable by five years or less in state prison may be prosecuted on the basis of a complaint in the District Court. However, if this option is selected instead of prosecuting the case in Superior Court following an indictment, the defendant may not be sentenced to state prison but only to 2½ years in the House of Correction. Capital offenses and felonies punishable by more than five years in prison must be prosecuted by indictment.

[b] Targets only.

[c] Only those witnesses who have waived their right to automatic immunity.

Source: Survey and analysis of state laws conducted by Abt Associates.

selected for field visits has enacted two or three of the key grand jury reforms, with all but California having legislated the right to counsel in the grand jury room for various categories of witnesses. Figure 2.3 shows the configuration of the three major reforms for these six states--California, Colorado, Massachusetts, New Mexico, New York and South Dakota. This figure also indicates whether a grand jury indictment is required to initiate prosecution for certain offenses or is optional in these states.

As outlined earlier, the following chapters focus on these three specific reforms and on other related procedures. For each reform strategy, the discussion will examine the major issues posed by the reform and the arguments of both proponents and opponents, followed by a detailed presentation of the laws and experiences of the six states visited.

REFERENCES

Chapter 2

1. Wood v. Georgia, 370 U.S. 375 (1962).

2. Marvin E. Frankel and Gary P. Naftalis, The Grand Jury: An Institution on Trial (New York: Hill and Wang, 1977).

3. Ibid., pp. 6-9.

4. Ibid., pp. 9-10.

5. Leroy D. Clark, The Grand Jury: The Use and Abuse of Political Power (New York: Quadrangle, The New York Times Book Co., 1975), pp. 13-17.

6. Frankel and Naftalis, The Grand Jury: An Institution on Trial, p. 11.

7. Moley, "The Initiation of Criminal Prosecutions by Indictment or Information," 29 Mich. L. Rev. 403 (1931).

8. Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. 101, 215, 295 (1931).

9. National Commission on Law Observance and Enforcement, Report on Prosecution, 124 (1931).

10. Richard Younger, The People's Panel: The Grand Jury in the United States, 1634-1941 (Providence, R.I.: Brown University Press, 1963).

11. In Hurtado v. California, 110 U.S. 516, 538 (1884), the U.S. Supreme Court ruled that, for the states, the information method of prosecution was a Constitutionally permissible alternative to prosecution by indictment. The authority of states to choose whether to use the grand jury was more recently upheld in Branzburg v. Hayes, 408 U.S. 665 (1972).

12. Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P. 2d 916 (1978).

13. Ibid. at 592.

14. Ibid.

15. See, for example, State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975) and Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969).

16. Wis. Stat. Ann. Section 968.06 (West Supp. 1981-1982).

REFERENCES

17. Fine, "Federal Grand Jury Investigation of Political Dissidents," Harv. C.R. - C.L.L. Rev. 432 (1972).

18. For further information on proposed grand jury reforms at the federal level, see Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary, House of Representatives, Ninety-fifth Congress, First Session on H. R. 94, Grand Jury Reform, March 17, April 27, June 1 and 29, 1977, Parts 1 and 2, and Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, Ninety-fifth Congress, Second Session on S.3405, The Grand Jury Reform Act of 1978, August 17, 22, and 24, 1978, Parts 1 and 2.

19. Reference is made to the ABA principles and the associated commentary throughout this Monograph. It is important to note that only the principles themselves and not the commentary reflect official ABA policy as voted by the House of Delegates.

20. See the Congressional Hearings referenced above.

21. Prepared Statement of Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice, Hearings on S. 3405, pp. 98-102.

22. United States v. Shulman, 466 F. Supp. 293 (S.D.N.Y. 1979).

Chapter 3

THE INDEPENDENCE OF THE GRAND JURY

In most jurisdictions, the grand jury is considered a branch of the court.[1] In reality, however, the grand jury interacts continuously with the prosecutor who is typically responsible for screening the case initially, setting out the broad parameters of the investigation, and researching and interpreting the relevant law. This interaction raises questions concerning the need for and extent of grand jury independence. The appropriate balance between the power and authority exercised by the grand jury in fulfilling its functions and the control asserted by the prosecutor has been and continues to be the subject of considerable debate. Several of these arguments are presented below.

The ability of the grand jury to act independently has been questioned using empirical data. For example, in an in-depth case study of a single jurisdiction, Carp found that the grand jury spent approximately 5 minutes hearing and deliberating upon each case.[2] Through case analysis and participant observation, Carp found that grand juries in this site only discussed the case before voting on it in 20 percent of the cases sampled; rarely (in 5 percent of the cases sampled) dissented on whether or not to indict; and rarely (in 6 percent of the cases sampled) disagreed with the prosecutor's recommendation.

Other critics use theoretical arguments, including organizational theory, to challenge the grand jury's independence. Beckner, for example, argues that grand juries lack a number of characteristics necessary for the efficacy of any organizational unit, including: clearly specified goals, a well-defined and well-articulated constituency, self-interest and productive ways to pursue it, professional incumbents with training and experience, well-established mechanisms for effecting change, continuity of members, and human and financial resources. While the grand jury lacks these characteristics, courts and prosecutors, on the other hand, have well-defined jobs, clear self-interest, relevant training, access to resources and all of the other elements necessary to fulfill their roles. This imbalance makes grand jury effectiveness largely dependent on the goodwill and ethics of the courts and prosecutors.[3]

Civiletti and Walsh have counter-arguments for many of the above criticisms. In their review, involving individuals from outside the criminal justice

system in the screening process is an asset rather than a liability in the overall administration of justice. Participation by community members can help avert the concentration of government power, generate increased citizen participation in governmental affairs and involve the community-at-large in determining which types of cases to pursue. At the same time, Civiletti and others believe that the prosecutor must provide the grand jury with strong legal and practical guidance. The return of more "no bills" would not represent greater independence on the part of the grand jury, but rather poor prosecutorial screening beforehand. Prosecutors have little incentive for promoting unsound indictments since they have the burden of preparing for trial. Indeed, the incidence of guilty pleas and verdicts following indictment may be seen as evidence of the ultimate effectiveness of the grand jury process. A more active grand jury might bring about a significant reduction in efficiency by turning the grand jury proceeding into a "mini-trial," thereby slowing down the investigative and screening processes without substantially altering the result.[4]

In the remainder of this chapter, we discuss several measures intended to strike a balance between the powers of the prosecutor and the meaningful exercise of the grand jury's screening and investigative functions. Although the level of actual involvement of the grand jury may vary considerably depending on the complexity of a case and the extent to which the prosecutor has previously developed the evidence, providing the opportunity for the grand jury to exercise its independence remains an important consideration. Therefore, the strategies which follow may be applied, as appropriate, to both screening and investigative grand juries.

Grand Jury Participation in Identifying and Eliciting Evidence

The power of the grand jury to seek out and acquire evidence is closely related to its effectiveness in performing its investigative role and is also important to its ability to make independent judgments in its screening capacity. In many instances, especially those in which a suspect has already been identified and perhaps even arrested, the government's case has already been developed and the evidence prepared for presentation to the grand jury. However, even in these circumstances, the jurors need not be relegated to listening passively to that evidence. The rights of the grand jury to question any witnesses who testify or to ask the prosecutor directly about questions of law are widely recognized. Through these mechanisms, the grand jury may be able to clarify a confusing point or obtain additional information. However, the involvement of the grand jury in decisions on what evidence should be introduced or what witnesses should be called is less standardized.

Judicial decisions have typically granted the grand jury considerable latitude in conducting inquiries.[5] In fact, there need not be a specific

controversy or set of facts to justify an inquiry: the grand jury has the right to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[6] The mechanisms available to the grand jury to carry out this broad power and the role it typically fulfills are described below. (Because many of these mechanisms operate at the discretion of the prosecutor, it is difficult to assess the extent to which any of them are used across the country.)

One mechanism sometimes proposed for the investigative grand jury is access to its own investigative staff and resources. In some jurisdictions, including California[7] and South Carolina,[8] provision is made for the grand jury to hire experts such as accountants to assist the grand jury in conducting special investigations, typically where the activities of public officials are being scrutinized. This approach appears to be the exception, however, since it is costly and is considered by many to involve an unnecessary duplication of effort.

Another way in which the grand jury may be involved in determining the scope and direction of an inquiry is through the issuance of subpoenas. The extent to which the power of subpoena should be allocated to the grand jury, to the prosecutor, or to the grand jury and the prosecutor operating jointly, is the subject of disagreement among observers of the grand jury. Several of the grand jury reform bills introduced before the 95th Congress in 1977 and 1978 called for grand jury approval of all subpoenas issued.[9] The ABA, in its Policy on the Grand Jury, opposed such a procedure, however, asserting in the commentary accompanying principle 12 that, ". . . this requirement would not only be cumbersome, but would cause unnecessary delay."[10] The prosecutor, according to the ABA, "is better suited to make determinations regarding the issuance of subpoenas than are lay grand jurors."

As a result of case law, the grand jury is involved in issuing subpoenas to a certain extent, as federal prosecutors are prohibited from obtaining nontestimonial evidence such as handwriting exemplars or fingerprints without grand jury authorization. Moreover, they are constrained from using the grand jury subpoena power to obtain information of any type without the intended participation of the grand jury. In this regard, the ABA Standards for Criminal Justice consider it unprofessional conduct to use the "office" subpoena to call a person to be interviewed by the prosecutor in his office rather than to testify at a hearing.[11]

To ensure that subpoenas are issued in relation to a grand jury proceeding, the ABA adopted a principle stating: "A subpoena should be returnable only when the grand jury is sitting."[12] As described in the accompanying commentary, this principle "is intended to avoid potential abuse of the subpoena power by the prosecutor's office . . . [and it] will help to insure the integrity of the grand jury function."

These policies or rules do not preclude the prosecutor from interviewing a witness prior to the witness's appearance before the grand jury. In fact, such interviews are often useful in assessing the value of the witness's information and ensuring that the testimony is elicited as efficiently as possible during the grand jury proceeding. However, if a preappearance interview results in the cancellation of a scheduled appearance by a witness who has been subpoenaed, prosecutors may want to advise a grand jury of their decision not to call that witness. By advising the grand jurors, an accurate record can be made that the prosecutor was not using an "office" subpoena.

In general, by the time a matter is brought to the grand jury, the prosecutor has investigated the merits of a case and is better apprised than the grand jury of the alternative approaches to a case, the available evidence and the possible outcomes. Moreover, subpoenaing witnesses and evidence prior to the convening of the grand jury may indeed increase the timeliness of the grand jury process. As a result of these factors, the prosecutor is in a position to offer guidance to the grand jury if it takes a proactive role in the issuance of subpoenas.

The grand jury's involvement in developing an investigation is most feasible and effective when the prosecutor describes the anticipated scope and direction of the case for the grand jury at the earliest possible time. The prosecutor may solicit requests from the grand jurors for additional evidence or may respond to requests initiated by the grand jury. In either situation, the prosecutor fulfills an important function by offering guidance on the practical consequences of calling (or not calling) individual witnesses and advising the grand jury on technical, legal and tactical considerations. However, it is equally important that this guidance support rather than inhibit grand jury participation.

Sometimes, the grand jury must balance its interest in obtaining additional evidence with larger policy considerations which are normally identified by the prosecutor. An illustrative example related by an interview respondent involved a grand jury that requested the medical report in a rape case where the only testimony came from the police. Since the medical report had not been completed, the prosecutor explained that the grand jury had two options: waiting for the report or deliberating on the indictment given the available evidence. By pointing out that an indictment would result in the rapid arrest of the suspect, the prosecutor enabled the grand jury to evaluate its need for the evidence in relation to the benefits and drawbacks of delaying the proceedings.

The grand jury's subpoena power may be extremely broad in certain circumstances. For example, a prosecutor investigating allegations of illegal practices in city government chose to involve the grand jury in shaping the entire proceeding. After presenting overview testimony on the organization and functions of the various government agencies involved, the prosecutor

allowed the grand jury to identify all other witnesses to be called. This technique is particularly applicable when a broad investigation is underway and probable targets have not been identified. While this approach maximizes grand jury participation, the importance of prosecutorial guidance is not diminished.

In summary, the grand jury's ability to issue subpoenas is particularly useful in a number of situations: when it has reason to believe the evidence will be exculpatory; when the appearance of additional witnesses, or the production of documentary evidence, will clarify contradictory testimony or elaborate on the facts presented to date; and occasionally in its screening function, when the grand jury seeks to go beyond the hearsay testimony of the police (which is admissible before the grand jury in some states) and subpoena the victim or eyewitnesses in order to assess their credibility. In all of these cases, if the grand jury were unable to subpoena witnesses or documentary evidence, its ability to assess the strength of the government's case or to probe further into the facts might be impaired. Therefore, the opportunity for grand jury involvement in issuing subpoenas in combination with supportive prosecutorial guidance provides a balanced approach to gathering and assessing the evidence in each case or inquiry.

3.2 Grand Jury Participation in the Charging Decision

In its screening function, the grand jury is responsible for deciding the offenses to be charged in each case. The extent to which the grand jury plays an independent role in the charging process can be assessed by analyzing the responses to two questions:

- Does the prosecutor make recommendations to the grand jury regarding whether an indictment should be issued?
- Who decides what the exact charges will be if an indictment is issued?

The issue of prosecutorial recommendations to the grand jury is extremely delicate; there is a narrow line between providing guidance to the grand jury and exercising control to the point of inhibiting grand jury independence. Specific prosecutorial instructions pose a significant threat to that independence. Prosecutorial advice or interpretation may, on the other hand, often be appropriate. In this regard, one of the ABA principles states: "A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing laws."[13] Although the grand jury may choose to ignore this advice, it does provide the grand jury with an expert legal assessment of the case.

The practice of recommending a "no bill" is far from institutionalized, however. In response to our national mail survey, respondents in three states--Massachusetts, New Jersey and South Carolina--indicated that case law required the prosecutor to recommend a "no bill" if appropriate. Only Illinois addresses this issue legislatively. Illinois law provides that if an indictment is not warranted, the prosecutor may prepare a written memorandum to that effect.[14] Under this statute, however, a recommendation of "no bill" is discretionary, not mandatory. Therefore, in most states such recommendations are left within the discretion of the prosecutor.

The decision on the specific crime to be charged provides another opportunity for the prosecutor to facilitate grand jury participation. There are often many possible offenses that may be charged. The prosecutor can present the grand jury with a number of options including the full range of lesser-included offenses or can ask the grand jury to deliberate on a single charge. Clearly, the grand jury is more actively involved when the first approach is adopted. In addition, the grand jurors are more capable of making an informed judgment on the appropriate offenses to be charged if each possible offense is explained to them. With this in mind, the ABA has adopted the following principle: "The grand jury shall be informed as to the elements of the crimes considered by it."[15]

According to respondents in our sample states, prosecutors do seek grand jury input in certain circumstances but more typically structure the grand jury's options. For example, in New York, a prosecutor indicated that he typically submitted to the grand jury the highest degree of the crime for which evidence existed. If the grand jury declined to return an indictment on that charge, he would then consider submitting lesser degrees of the crime. Occasionally the grand jury itself would suggest a lesser degree crime. This respondent indicated that the grand jury would be provided with options from which to choose only if the prosecutor had some doubts concerning the appropriate charge. A prosecutor in New Mexico, however, indicated that an indictment with the charge already specified was submitted to the grand jury, although the jurors also received copies of all relevant statutes; only in homicide cases was the decision on the crime to be charged left completely to the grand jury following an explanation of all charging alternatives.

3.3 Measures to Ensure Grand Jury Participation

The preceding sections have discussed some of the ways in which grand juries can play an active and independent role in the proceedings as well as some techniques that prosecutors may use on an ongoing basis to strengthen grand jury involvement. In this section we describe two mechanisms by which grand jurors' participation may be enhanced and their dependence on the prosecutor reduced: 1) providing grand jurors with proper instruction regarding their role; and 2) making legal advice available throughout the course of the grand jury proceeding.

3.3.1 Instructing the Grand Jury in its Role

Typically, grand juries are instructed in their powers and duties by the judge who impanels them at the start of their term. Depending on the law and practice in a jurisdiction, this charge may be oral, in writing, or both. The American Bar Association in its Policy on the Grand Jury recommends written instructions. The ABA states, "It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations."[16] The Model Grand Jury Act, adopted by the American Bar Association, provides more specific guidelines for the contents of the charge to the grand jury. The Model Act provides that:

> Upon impanelment of each grand jury, the court shall properly instruct or charge the grand jury, and shall inform the grand jury inter alia of the following:
>
> (a) its duty to inquire into offenses against the criminal laws alleged to have been committed within the jurisdiction;
>
> (b) its independent right to call and interrogate witnesses;
>
> (c) its right to request the production of documents or other evidence; including exculpatory evidence;
>
> (d) the necessity of finding credible evidence of each material element of the crime or crimes charged before returning a true bill;
>
> (e) its right to have the prosecutor present it with draft indictments for less serious charges than those originally requested by the prosecutor;
>
> (f) the obligation of secrecy;
>
> (g) such other duties and rights as the court deems advisable.[17]

Although the charge to the grand jury might consist of reading the relevant statutory sections governing the grand jury, one approach is to advise grand jurors of their duties and powers using nontechnical language, through materials developed by either the court or the prosecuting attorney. Such handbooks or manuals are distributed to grand juries in many jurisdictions. The

process of instructing grand jurors in two states is described below. Regardless of the specific method used, members of the grand jury should be given the opportunity to review any written materials available and to ask questions prior to commencing their term of service.

Colorado

In Colorado, the court is legally obligated to provide the grand jury with written information. The statutory requirement states:

> Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:
>
> a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;
>
> b) Its right to call and interrogate witnesses;
>
> c) Its right to request the production of documents or other evidence;
>
> d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;
>
> e) The duty of the grand jury . . . to determine the violations to be included in any such indictments . . . .[18]

In addition to the instructions provided by the court, the grand jury in Denver is provided information from a manual developed by the District Attorney in accordance with the recommendations of a 1973 grand jury that such a document was needed.

The independence of the grand jury and the fact that it should be free of outside influence is emphasized in these excerpts from the "Denver Grand Jury Manual":

> No person, group or agency, no matter how prominent, can dictate to the Grand Jury. The Grand Jury may resist pressure from any source, whether district attorneys, police chiefs, or governors. Not even the President of the United States can command its obedience. Although the court instructs the Grand Jury, and the district attorney advises it, the Grand Jury can ignore them, except as to the law.

> The Grand Jury can petition the court to appoint a special prosecutor if it has reason to believe that the district attorney is not trustworthy, or is in some way failing to cooperate in a Grand Jury investigation.
>
> Grand Jurors are not subject to libel. No power can punish them for having indicted, or for refusing to indict. The responsibility for finding an indictment, or refusing to do so, rests solely with the Grand Jury. The Grand Jury, as an independent body, is not bound by the prosecutor's opinion.
>
> You, as a Grand Juror, should be fully aware of these Grand Jury powers, and be constantly vigilant to uphold the responsibilities that go with them. As a Grand Juror, you are a member of a completely independent body and need fear no one in the exercise of your duties.[19]

California

An extremely detailed charge to the grand jury is used in Los Angeles County.[20] (The table of contents of the 1979 version is attached to this document as Appendix C.) Such a detailed description of rights and responsibilities can contribute a great deal to the members' understanding of their role. While some fear that jurors may become mired in debating details of specific obligations, powers or practices that might not have been raised except for a reference in the text, there is no indication that the level of detail used in the Los Angeles manual has obscured the basic message intended for the grand jury.

Under California law, a major responsibility of the grand jury is its "civil watchdog" function under which the grand jury has the authority to investigate all county agencies.[21] Although most cases are commenced by law enforcement personnel, the grand jury may initiate inquiries on its own authority or may respond to complaints from the public. However, due to the independent power of the grand jury to initiate an investigation and the great potential for abuse, the impanelling judge's instructions provide guidelines for the judicious exercise of this power:

> You will receive a number of letters from public and private persons throughout the year. You will find that you will be asked to examine some complaints which are groundless, which are false accusations, or which are motivated by private enmity or for political reasons.
>
> In light of the experience of past grand juries, a comparatively small percentage of the accusatory complaints which you will receive from other than law enforcement officials will deserve your official action. Some, however, may

result in disclosures of offenses that would not otherwise have been brought to light. When you obtain reliable information indicating an offense or misconduct within your jurisdiction, it is your duty to fearlessly and fairly investigate and take appropriate action.

When a complaint is presented to you by persons other than law enforcement officials, I suggest that you ascertain whether or not the same complaint has theretofore been presented to the District Attorney. In some instances, you will find that the same matter has been submitted previously to the District Attorney and either acted upon by him, or prosecution thereon refused for valid legal reasons.[22]

A summary of tips for the grand jurors is included in a section on "Practical Suggestions to Jurors." As with other examples in the manual, the power of a juror to engage in a specific behavior is acknowledged along with advice on the appropriate use of the power. Instructions from this section of the Los Angeles Charge to the Grand Jury include:

Wait until the prosecuting officer has finished, ordinarily, before asking questions of a witness. It usually happens that the evidence you are seeking will be brought out.

Listen to the evidence and the opinions of your fellow jurors, but don't be a rubber stamp.

Be independent, but not obstinate.

Be absolutely fair--you are acting as a judge. Because of the secrecy of the hearing, no one else may inquire into what you have done.

A reckless grand jury can do as much harm to the community and to law enforcement as a weak grand jury.

Do not investigate matters out of the province of the Grand Jury, or merely because someone suggested an investigation without sufficient information, or merely because it would be an interesting matter to investigate.[23]

In short, the grand jury may be informed of its specific rights and responsibilities in a relatively simple fashion or in a more detailed document such as that used in Los Angeles County. Although instructions may be developed by either the judge or the prosecutor, they should be given in language that is readily understandable and not rely exclusively on quotations of statutory provisions. A key component of the use of information to foster grand jury independence is pairing advice on appropriate use of a power with the explanation of the power itself. Use of this technique will contribute to the

independence of the grand jury, while simultaneously helping to provide a safeguard against misuse of the grand jury's power.

3.3.2 Providing Legal Advice to the Grand Jury

Given that the grand jury is a lay body, it is essential that jurors have access to legal advice during the course of an inquiry. Typically, the prosecutor serves as legal advisor to the grand jury on a day-to-day basis. Some observers of the grand jury system note, however, a potential conflict of interest in the prosecutor's dual functions--one, as advocate for the government and the other, as advisor to the grand jury.

The American Bar Association's Standards for Criminal Justice address the prosecutor's relationship with the grand jury.[24] Where the prosecutor is the legal advisor to the grand jury, Standard 3-3.5 states that that role permits the prosecutor to explain the law and to express an opinion on the legal significance of evidence. However, the Standard cautions the prosecutor to respect the status of the grand jury as an independent legal entity. Under the ABA Standard, prosecutors are forbidden to make statements or arguments to influence the outcome of a grand jury proceeding. The commentary accompanying Standard 3-3.5 suggests that the prosecutor should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury.[25] The United States Attorneys' Manual also defines the responsibilities of the prosecutor before the grand jury:

In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape or innocence 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 prosecution but also the protection of the citizenry from unfounded criminal charges . . . . 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.[26]

As Holderman points out, fulfillment of a prosecutor's dual role depends on the personal integrity of the prosecutor. If the prosecutor's role as an advocate conflicts with his advisory role, fairness requires that the latter take precedence.[27]

One proposal for avoiding the possibility of conflict is to create a special position such as "legal advisor to the grand jury." This approach is often regarded unfavorably, however, for two reasons: 1) there is insufficient

demand for legal advice to justify a position solely for this purpose; and 2) the distance between the legal advisor and the grand jury might lessen as time passes, with a likely decrease in the advisor's objectivity. In only one of the jurisdictions visited--New Mexico--was a third-party legal advisor included in the state's overall proposal for grand jury reform. This position, however, was not incorporated into the legislation enacted in 1979.

A more generally accepted approach has been to designate the judge as legal advisor to the grand jury. A variation of this option (used in Massachusetts) is to notify the grand jury of the judge's availability to respond to questions, although the judge is not officially designated the legal advisor to the grand jury. In either instance, the grand jury has the option of seeking advice from the judge.

Typically, however, little interaction occurs between the judge and the grand jury once the jurors have been impanelled and instructed regarding their duties and powers. Hearings on contempt charges or witness immunity generally involve both the judge and the grand jury, but these hearings occur infrequently. The judge is rarely called upon by the grand jury during the course of an inquiry. Moreover, as questions and conflicts arise concerning, for example, requests by the grand jury for additional evidence, confusion occasionally results regarding the appropriate judicial role in resolving such disputes.

A number of judges who were interviewed in the course of this study indicated their desire to bring about increased contact with the grand jury. One judge suggested scheduled meetings between the judge and the grand jury to reinforce the initial charge regarding duties and powers. These meetings could also be used to solicit legal questions from the grand jury. However, this judge pointed out that the potential for bias in such an arrangement could easily outweigh any benefit. The general consensus on the best way to facilitate contact between the judge and the grand jury was to notify the grand jury of its right to ask for, and the judge's willingness to provide, legal advice. Additionally, judges indicated that it was important for the prosecutor to accept the jury's decision to seek advice from the judge and to facilitate such requests.

Clearly, increasing the involvement of the judge as legal advisor to the grand jury is compatible with the overall thrust toward increased grand jury participation in the investigative and screening processes. The judge can provide an impartial and independent perspective on the proceedings during the course of an inquiry, providing advice on such legal and technical issues as the appropriateness of certain lines of questioning, the elements of different crimes or the feasibility of subpoenaing additional witnesses or evidence.

The judge's role as legal advisor is largely a matter of local practice, and as such must be flexible. At a minimum, it is important to ensure that not only is the judge authorized to give legal advice, but that access to the judge for this purpose is facilitated as well.

3.4 Summary

Some observers have challenged the independence of the grand jury, citing its reliance on the prosecutor for guidance and expert knowledge. Others fear that increasing the independence of the grand jury might seriously diminish the efficiency of the grand jury process, making the grand jury proceeding more cumbersome, without substantially altering the result. This chapter has discussed a number of strategies designed to increase the grand jury's involvement in the investigative and screening processes, without sacrificing efficiency. These strategies are summarized below:

Participation in Identifying and Eliciting Evidence

Proposals for increasing the role of the grand jury in the development of evidence have ranged from providing the opportunity for the jurors to question witnesses or the prosecutor to providing the grand jury with its own investigative staff and resources. Grand jury participation is most frequently facilitated in the exercise of the power of subpoena. Although the ABA has recommended that, in the interest of avoiding delay, prosecutors not be required to obtain grand jury approval for all subpoenas, federal case law and ABA Prosecution Standards frown on "office subpoenas" which would exclude any involvement by the grand jury. Techniques utilized by prosecutors in the sites visited include asking the grand jury whether it wishes to hear additional evidence beyond that presented by the prosecutor and, in limited circumstances, allowing the grand jury to direct the course of an entire inquiry once a general focus is specified.

Participation in the Charging Decision

The extent to which a prosecutor structures the charging options is related to the degree of independence of the grand jury. The ABA recommends that the grand jury be informed of all elements of the crimes under consideration but offers no guidance on how broad a range of offenses should be submitted to the grand jury for deliberation. Typically, the prosecutor is free to decide whether to present a prespecified charge to the grand jury or to allow it to select from a range of options on a case by case basis. In the sample states, prosecutors used both alternatives but generally preferred to have the grand jury deliberate on a specific charge or charges.

Instructing the Grand Jury in its Role

The instruction by the judge upon impanelment provides information regarding rights and duties of the grand jury. The ABA recommends that this charge be in writing. In some jurisdictions, such as Denver and Los Angeles, the jurors receive detailed manuals in lay terminology. Elements of the instruction provided to the grand jury through these mechanisms may include: its rights to seek evidence and question witnesses, the subject matter of its investigations, the type and quantity of evidence needed for indictment, and its right to seek advice from the prosecutor or the judge.

Legal Advice

Commentators have noted the difficulties in balancing the dual roles of the prosecutor--legal advisor to the grand jury and advocate for the state. Standards of professional ethics require the prosecutor to safeguard the independence of the grand jury while providing legal advice. One proposal for alleviating this situation is to designate the judge as joint or sole legal advisor to the grand jury. In the sample sites which had adopted this proposal, no formal procedures to foster this judicial role had been implemented. The general perception of those interviewed was that, in the absence of any specific mechanisms for judicial involvement, the grand jury continued to obtain the vast majority of legal advice from the prosecutor.

REFERENCES

Chapter 3

1. In a small number of jurisdictions, the grand jury is organized as a completely independent entity.

2. Carp, "The Harris County Grand Jury--A Case Study," 12 Hous. L. Rev. 90 (1974).

3. Bickner, "The Grand Jury--A Layman's Assessment," 48 Calif. St. B. J. 660 (1973). See also Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 153 (1965); and Boudin, "The Federal Grand Jury," 61 Geo. L.J. 1 (1972-1976).

4. Civiletti and Walsh, "The Grand Jury Goes on Trial," Litigation, Summer 1978, at 37.

5. Costello v. United States, 350 U.S. 359 (1956).

6. United States v. Morton Salt Company, 338 U.S. 632, 642-643 (1950).

7. Cal. Penal Code, Section 926 (West Supp. 1982).

8. S.C. Code Section 38-409 (1962).

9. For example, H.R. 3736.

10. American Bar Association, "Policy on the Grand Jury," Commentary to Principle 12.

11. American Bar Association, Standards for Criminal Justice, Standard 3-3.1(d).

12. American Bar Association, "Policy on the Grand Jury," Principle 14.

13. American Bar Association, "Policy on the Grand Jury," Principle 4.

14. Ill. Ann. Stat. Chapter 38 Section 112-4(e) (Smith-Hurd 1980).

15. American Bar Association, "Policy on the Grand Jury," Principle 27.

16. American Bar Association, "Policy on the Grand Jury," Principle 22.

17. American Bar Association, Model Grand Jury Act, Section 204(1), 1982.

18. Col. Rev. Stat. Section 16-5-204(3) (1978).

REFERENCES

19. "Denver Grand Jury Manual," prepared by the Office of the District Attorney for Denver County, Colorado, p. 9.

20. Although California's use of the grand jury has decreased following the Hawkins decision discussed in Chapter 2, the material contained in these examples is generalizable to any jurisdiction with minor modification.

21. The "civil watchdog" role of the grand jury is not unique to California. Although most states include such activities within the scope of the grand jury's authority, the specific responsibility of the grand jury may be as broad as that in California or may only entail periodic inspections of prisons and jails.

22. "Charge to the Grand Jury of Los Angeles County" by William B. Keene, Supervising Judge, Criminal Division, Superior Court, Los Angeles County, California, July 2, 1979, pp. 15-16.

23. Ibid., pp. "o"-"p".

24. American Bar Association, Standards for Criminal Justice, Standard 3-3.5.

25. Ibid., p. 3.49.

26. United States Attorneys' Manual, Sec. 9-11.015.

27. Holderman, "Preindictment Prosecutorial Conduct in the Federal System," 71 J. Crim. L. and Criminology (1980).

Chapter 4

THE PRESENTATION OF EVIDENCE

As discussed previously, it is highly unusual for a case to be initiated by the grand jury without any prior involvement by the prosecutor. The majority of the cases heard by the grand jury are screened and developed by the prosecutor before being presented for the jury's consideration. As a result, the prosecutor typically directs the introduction of testimony and documentary evidence in the grand jury proceeding.

The prosecutor's judgment regarding the witnesses to be called and the evidence to be introduced is largely unregulated. Even in states which have promulgated evidentiary guidelines for the grand jury, enforcement is difficult. Typically, only the prosecutor or the grand jury identifies evidence to be presented (as discussed in the previous chapter), and there are no provisions for anyone else to perform that function; the suspect therefore has no right to introduce evidence or to suggest additional witnesses.

Proposals for evidentiary reform focus on two key issues: guidelines for presenting the government's case and procedures for and limits on the introduction of exculpatory evidence. In this chapter, we discuss each of these reform issues in turn.

It should be noted that adoption of standards governing the introduction of evidence is unlikely to effect real changes in grand jury proceedings without the implementation of one or more related reforms. Evidence which is taken in secret, not recorded and not subject to independent review cannot be assessed to determine whether it meets standards of admissibility. Moreover, without giving the target the right to testify or suggest additional witnesses it is difficult to ensure that whatever exculpatory evidence is available has been presented to the grand jury. A number of these related reforms--recording grand jury proceedings, judicial review and witness rights--are discussed in subsequent chapters.

4.1 Guidelines for Presenting the Government's Case

4.1.1 Obtaining Evidence

The use of the grand jury to gather evidence, conduct investigations, and screen cases for potential prosecution is extremely important within the criminal justice system. The power to subpoena witnesses and to require the production of documentary evidence is essential to fulfilling these tasks. However, the power to obtain evidence is not completely unregulated. As noted in Chapter 3, the grand jury's involvement in the use of subpoena power may be governed by statute, court rules or case law. Other types of restraints on the use of grand jury subpoenas to gather evidence include: restrictions on subpoenaing targets,[1] requirements for subpoenaing documentary evidence, and limits on the purposes for which the grand jury may be used to obtain evidence.

Subpoenaing Target Witnesses[2]

The power of the grand jury to subpoena the target of an investigation is clear and is not a violation of the Fifth Amendment right against self-incrimination.[3] However, as the U.S. Attorneys' Manual notes, "such a subpoena may carry the appearance of unfairness."[4] The Manual goes on to encourage attempts to obtain a voluntary appearance by the target before resorting to the use of a subpoena. In the event that such attempts do not succeed, a subpoena should be issued only with the approval of the grand jury and the U.S. Attorney or the appropriate Assistant Attorney General. The Manual specifies three considerations to be addressed in making the decision to subpoena a target: the importance of the evidence sought, the availability of the evidence from alternative sources, and the existence of a valid claim of privilege which would bar access to the evidence.[5]

The ABA has adopted as its policy the following provision limiting the power of the prosecutor to call certain witnesses before the grand jury:

> No prosecutor shall call before the grand jury any witness who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination. However, the prosecutor may seek a grant of immunity or contest the right of the witness to assert the privilege against self-incrimination.[6]

In its 1979 revision of the laws governing the grand jury, the state of New Mexico incorporated provisions which are similar to the restraints on the use

of the subpoena that appear in the U.S. Attorneys' Manual and those promulgated by the ABA. The New Mexico law specifies:

> The target of the investigation shall not be subpoenaed except where it is found by the prosecuting attorney to be essential to the investigation. If the target and his attorney, if he has one, sign a document stating that the target will assert the fifth amendment, he shall be excused from testifying on those matters as to which the district judge determines he has a valid fifth-amendment privilege.[7]

Subpoenaing Documentary Evidence

Prosecutors may be subject to a number of constraints in compelling the production of documentary evidence as well as testimonial evidence. Rule 17(c) of the Federal Rules of Criminal Procedure states that a subpoena may compel the recipient to produce books, papers, documents or other objects. The Rule further provides that the issuing court may, upon motion, quash or modify the subpoena if compliance would be unreasonable or oppressive.

In determining whether such a subpoena for the production of documents or other materials is properly drawn, courts at the federal and state level generally consider three factors: the relevance of the materials sought to the subject under investigation, the specificity with which the materials are described, and the reasonableness of the request. In considering the question of relevance, the courts have typically demanded less than the traditional trial standard, ruling something relevant if it is reasonably related to the overall investigation being pursued. The subpoena must also describe the information sought with sufficient detail to inform the recipient of what is required. Finally, in considering the reasonableness of the request, most courts have taken into account both the time period covered and the volume of material requested.[8]

Restraints on the Purposes of Obtaining Evidence

The ABA Policy on the Grand Jury includes two principles designed to delimit the purposes for which the prosecutor may use the grand jury to gather evidence. One of these principles forbids using the grand jury to assist in any administrative inquiries.[9] This concept has not been adopted to any extent by the states. The second principle would prohibit the prosecutor from using the grand jury to obtain any evidence in preparation for the trial of a defendant already under indictment or charged by information. Inquiry into other offenses by the same or other defendants would not be restricted.[10]

The U.S. Attorneys' Manual is quite specific in clarifying the acceptable boundaries for use of the federal grand jury after an indictment has already been returned. The Manual defines the calling of witnesses for purposes of discovery or trial preparation where formal charges have already been filed as "an abuse of the grand jury process."[11] However, the Manual states that it is not abuse to gather evidence after charging if superseding or additional indictments are contemplated or the information is used only for related civil purposes.

New Mexico's grand jury reform legislation enacted in 1979 contains one of these restraints. Closely paralleling the ABA principle, the New Mexico law prohibits the prosecutor from using the grand jury "solely for the purpose of obtaining additional evidence against an already indicted person on the charge or accusation for which the person was indicted."[12] Prosecutors in several states pointed out that this issue rarely arises, particularly with regard to the screening grand jury, since most cases are fully developed at the time they are presented to the grand jury.

The law in Colorado provides that no person shall be required to testify or produce documentary evidence pursuant to a subpoena if the court, upon motion, holds an evidentiary hearing and finds that:

> A primary purpose or effect of requiring such person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information, indictment, or criminal complaint;
>
> Compliance with a subpoena would be unreasonable or oppressive;
>
> A primary purpose of the issuance of the subpoena is to harass the witness.[13]

The protections incorporated in the Colorado statute are in accord with the policies proposed by the ABA. One of the ABA principles states, "Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment."[14] However, Colorado goes beyond this principle by providing for the evidentiary hearing.

Another area in which some limitations have been placed on grand jury usage involves instances in which a grand jury has already refused to return an indictment. At both the federal and state level, restrictions have been placed on the prosecutor's power to resubmit the same charge to the same or another grand jury. Although prosecutors interviewed in the course of this

study indicated this issue rarely arises, since grand juries return "no bills" very infrequently, the need for restrictions is based on the concern that the grand jury's decision be accorded a degree of finality. In the Model Grand Jury Act, the ABA's Section of Criminal Justice prohibits resubmittal of cases to the grand jury unless the appropriate court determines "that additional evidence relevant to such inquiry has been discovered or that the interests of justice demand reconsideration."[15] The "interests of justice" provision is intended to be utilized only in unusual circumstances, such as when a potential defendant had tampered with the grand jury or with witnesses.

Closely paralleling the ABA proposal, the Manual for U.S. Attorneys states that a resubmittal requires supervisory approval that acknowledges the existence of "additional or newly-discovered evidence or a clear circumstance of a miscarriage of justice."[16]

Several states do allow resubmittal of charges to the same or a subsequent grand jury after a "no bill" has been returned, if directed by the courts.[17] However, these states generally do not provide any criteria to be considered by the court in determining whether to allow a case to be resubmitted to the grand jury. Colorado differs from the other states by specifying the circumstances in which the courts may authorize resubmittal of a case. The law in that state allows a resubmittal if the court finds that there is additional evidence to be considered which was unavailable to the grand jury during its original inquiry.[18] New York does not supply precise criteria for the court's determination, but does specify that no additional consideration may be given to the case if a "no bill" is returned a second time.[19]

4.1.2 Admissibility of Evidence

Providing standards for use of the subpoena power is only one way of guiding the presentation of the government's case. Another strategy is to control the introduction of certain categories of evidence, such as illegally obtained evidence or hearsay.

There is no legal prohibition on the use of illegally obtained evidence at grand jury proceedings. The Supreme Court's decision in United States v. Calandra[20] held that the Fourth Amendment exclusionary rule did not protect grand jury witnesses from having to respond to questions based on illegally obtained evidence. The Court noted that the grand jury had traditionally been allowed to operate without the "evidentiary and procedural restrictions applicable to a criminal trial" since it did not adjudicate final guilt or innocence.[21] The Court envisioned serious difficulties if restrictions such as the exclusionary rule were placed on the grand jury:

> Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings . . . might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective.[22]

Although there may be inherent difficulties if an overly restrictive standard of evidence is imposed on the grand jury (which may be particularly acute in the case of the investigative grand jury), the lack of any evidentiary requirements also may be detrimental. The U.S. Attorneys' Manual, recognizing the potential drawbacks of relying on hearsay evidence, directs that the use of such evidence be considered in light of its impact including whether it afforded the grand jurors a substantial basis for voting upon an indictment.[23] This issue was also raised in United States v. Arcuri, which suggests that the grand jury's ability to make a reliable preliminary determination of factual guilt or assess the likelihood of a defendant's conviction at trial is hindered when it is presented with hearsay accounts of eye-witness testimony.[24]

The provisions of the ABA's draft Model Act governing the introduction of hearsay evidence in the grand jury proceeding were deleted from the Model Act in response to opposition to this and other provisions which went beyond the principles contained in the ABA Policy on the Grand Jury. Therefore, the draft statute discussed below is not part of official ABA policy, since it was never approved by the House of Delegates. As drafted by the Section of Criminal Justice, the Model Act would have allowed hearsay in selected instances but provided guidelines for its use. Noting that a total prohibition of hearsay would have particularly severe consequences for investigative grand juries, the Model Act as proposed suggested allowing hearsay in instances involving expert witnesses, details of property ownership, or the introduction of certain documents.

As a general guideline, the draft Model Act would have allowed the introduction of hearsay evidence that would be inadmissible at trial only if there were a compelling necessity that it be introduced at the grand jury. Moreover, the prosecutor would be required to state the basis of the necessity on the record. The draft Model Act would have permitted the introduction of inadmissible hearsay during grand jury investigations only if the grand jury used the evidence to further the investigation and not as the basis for an indictment. To ensure that the hearsay was used only for this limited purpose, the draft Model Act would have required that the grand jurors be advised not to consider the designated evidence when voting on an indictment. Paralleling case law which held that the introduction of illegally obtained, privileged or otherwise incompetent evidence before the grand jury was not grounds for dismissing the indictment,[25] the draft Model Act would not have invalidated the indictment solely on the grounds that improper evidence was introduced. Although Costello does not permit inquiry

into the sufficiency of the remaining evidence, the draft Model Act would have permitted the indictment to stand only if the remaining competent evidence were legally sufficient to constitute probable cause as to each element of the crime.[26] In an exception to this rule, however, the draft Model Act would have invalidated the indictment "in those cases where the nature, extent, and prejudicial effect of the incompetent evidence presented to the grand jury provides strong grounds for believing that the grand jury would not have indicted the defendant if it had only considered the legally admissible evidence presented to it."

Although most states have established some form of evidentiary standard, the quality of admissible evidence varies widely. In many states, the standard is very broad and requires only that evidence be "relevant." As noted in Chapter 2, the national mail survey revealed that only 10 states have established evidentiary guidelines that closely approximate the rules of evidence that must be followed during a trial.[27] Even in some of those states, exceptions to the trial rules of evidence are permitted before the grand jury. The most common exceptions involve more relaxed standards for the admission of documentary evidence or an expansion of the type of hearsay evidence that is admissible. For example, Oregon requires that evidence before the grand jury be the same as that at trial with two exceptions: 1) scientific reports certified by the writer to be a true copy may be admitted; and 2) an affidavit from a witness unable to attend the grand jury proceedings may be admitted if the presiding judge finds good cause for the inability to appear and authorizes receipt of the affidavit.[28]

The six states in which interviews were conducted represent a range of evidentiary restrictions. Three of the states visited--California, New Mexico and South Dakota--are part of the group of ten imposing trial rules of evidence on the grand jury. New York has a similar standard but permits hearsay in place of scientific reports. In both Colorado and Massachusetts, the only requirement for evidence presented to the grand jury is that it be "relevant."

Although none of the interview respondents could point to specific instances of problems with evidentiary standards in their jurisdictions, they concurred with critics of proposals to implement evidentiary requirements who assert such proposals could restrict the grand jury's investigative powers. For example, they argue that in large-scale investigations involving official corruption, white-collar or organized crime, hearsay may be extremely useful in identifying additional witnesses to be called and developing additional lines of inquiry.

Another concern expressed by prosecutors faced with evidentiary standards is that an honest mistake on their part will cause the dismissal of an indictment. They point out that issues relating to the admissibility of evidence at trial are quite complex and sometimes resolved only after extensive

research and argument by counsel for both sides and with judicial involvement. In contrast, the prosecutor has sole responsibility for decisions regarding evidence before the grand jury. In actuality, the courts have generally refrained from second-guessing a prosecutor's actions before the grand jury unless there is blatant abuse. Even in jurisdictions with strict evidentiary standards, courts have typically been consistent with the ruling in Costello that the introduction of inadmissible evidence in itself is not enough to require dismissal of the indictment. California has incorporated this provision into its statutory law which states:

> The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action, but the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury.[29]

In two of the four sample states with strict evidentiary standards, there was a consensus among interview respondents who expressed doubts regarding the level of compliance with the standards. One prosecutor characterized the situation by stating that any evidence was likely to be presented unless clearly illegal due to the fact that there was no one present during the proceedings to raise an objection regarding admissibility. The absence of a formal record of the proceedings (a reform discussed in Chapter 5) makes it particularly difficult to review adherence to the rules. For example, in South Dakota, a state where no record of the testimony is required, the only means of determining the quality of evidence used is to examine the names of witnesses listed on the indictment. Defense attorneys use this technique to determine whether a victim actually testified or whether the grand jury relied solely on a police officer who may have summarized the victim's statements rather than testifying from his first-hand knowledge of the facts. This technique is very limited but provides the only available information in the absence of a transcript.

4.1.3 General Limits on Prosecutorial Conduct in the Grand Jury Room

In addition to restraints on the use of the subpoena power of the grand jury and the admissibility of evidence before the grand jury, there are other general limitations on the presentation of the government's case. These include the extent to which prosecutors may question witnesses or comment on matters under investigation. Principle 16 of the ABA Policy on the Grand Jury states, "The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." As noted in the ABA commentary, this principle is identical to the prosecution standards adopted by the National District Attorneys Association (NDAA)[30] and by the ABA in its Standards for Criminal

Justice.[31] The principle is considered essential because of the ex parte nature of the grand jury proceeding and because of the prosecutor's role as the only legally trained person before the lay grand jurors. Although the federal courts traditionally have been reluctant to use their authority to monitor prosecutorial conduct, recent case law indicates that this reluctance may be diminishing. In some instances, the federal courts have responded to impropriety by remanding the case to a lower court for reconsideration of the effect of the impropriety,[32] whereas the indictment has been dismissed in other cases where the prosecutor has intentionally misled the grand jury or presented false information.[33]

4.2 Use of Exculpatory Evidence

Specific procedures to bring exculpatory evidence to the attention of the grand jury can address the criticism that the grand jury is one-sided. Evidence tending to negate guilt may be introduced by either the prosecutor or the suspect. The suspect may either testify or identify additional witnesses. Proponents of grand jury reform have focused on both mechanisms.

By the Prosecutor

The American Bar Association has enunciated as one of its principles that: "No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt."[34] The ABA commentary accompanying this principle notes that "indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor knowingly used perjured evidence or failed to present evidence that squarely negated guilt." A similar standard is found in the National District Attorneys Association Prosecution Standard 14.2D. As discussed in the NDAA Standards, such a standard is designed to increase the accuracy of the indictment process "by providing that the grand jury be allowed to consider--as the trial fact finder would--any facts tending to negate the defendant's guilt."

Although federal prosecutors do not operate under any legal obligations to present exculpatory evidence, the Department of Justice has adopted a policy governing the appropriate use of exculpatory evidence. Recognizing that such evidence should be presented in many circumstances, the U.S. Attorneys' Manual cites the following as an example of the use of exculpatory evidence:

> For example, when a prosecutor conducting a grand jury inquiry 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.[35]

The standards and policies discussed above treat all exculpatory evidence in the same manner. The Model Grand Jury Act adopted by the ABA defines two distinct categories of exculpatory evidence, describes different obligations of the prosecutor for each category, and suggests sanctions in the event that the prosecutor fails to meet these obligations. The relevant section of the Model Act states:

> 1. If the prosecutor is aware of exculpatory evidence, that is, evidence which, if believed, tends to negate one of the material elements of the crime, he must disclose and if feasible present such evidence to the grand jury.
>
> 2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.
>
> 3. After arraignment upon an indictment, the court, upon motion . . . may dismiss any indictment where the prosecutor knowingly failed to disclose exculpatory evidence of the type defined in section 1. The court should not dismiss an indictment because of the prosecutor's failure to disclose exculpatory evidence of the type defined in section 2 unless the court determines that such omitted exculpatory evidence was so compelling that indictment by the grand jury was not justified upon the evidence presented.[36]

Of the six states whose laws were examined in detail, only New Mexico has enacted legislation regarding exculpatory evidence: "The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence."[37] None of the persons interviewed in New Mexico reported any difficulties in complying with this requirement regardless of whether they represented the court, the prosecutor or the defense point of view. Although no formal procedure for an individual to bring exculpatory evidence to the attention of the prosecutor or the grand jury has been developed, a public defender indicated that he had been successful in getting exculpatory evidence introduced by notifying the prosecutor of its existence. In one of the other sample states, California, case law has created a requirement that known exculpatory evidence be presented to the grand jury.

Respondents in most other states indicated that prosecutors were obligated to present exculpatory evidence but differed as to whether that obligation was attributable to long-standing local practice, ethical considerations or judicial decisions. Those who oppose codification of this requirement fear that it would lead to many dismissals or, at a minimum, would result

in increased appellate challenges to indictments. This concern is based on a belief that review would focus on what the prosecutor knew or should have known and would force prosecutors to prove that they did not intentionally overlook sources of exculpatory evidence.

By the Suspect

Evidentiary reforms also encompass mechanisms by which a suspect or a third party may introduce evidence either directly through testimony or by presenting documentary or physical evidence. The ABA addresses the issue of suspects producing evidence through their own testimony by recommending that:

> A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.[38]

According to ABA commentary, this principle is intended to ensure that the prosecutor "take all reasonable steps to notify . . . prospective defendants." It recognizes that in some instances the individual's right to testify might conflict with society's interest in achieving justice and, therefore, notification to the target is not unilaterally mandated.

The U.S. Attorneys' Manual notes that a refusal to allow a target to testify may create the appearance of unfairness although no legal right to testify exists. The Manual delineates the following guideline:

> . . . [U]nder normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation . . . personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his privilege against self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.
>
> Some such witnesses undoubtedly will wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests, reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses is a matter which is left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that

> the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence.[39]

As Figure 4.1 illustrates, the six states studied in depth represented a wide range of provisions in this area. Two states--New Mexico and New York--give the target the right to testify before the grand jury. Both states, however, decided in the course of preparing and enacting their laws to place some limitation on that right. In New Mexico, the law requires the prosecutor to notify a target of his status[40] and provide an opportunity for him to testify, except when there is reason to believe the target will flee or obstruct justice or when the prosecutor cannot locate the target.[41] Under New York law, a suspect has an affirmative right to testify but must waive his right to the automatic, transactional immunity from prosecution which is afforded to all grand jury witnesses in the state.[42] This requirement of a waiver

Figure 4.1

PROVISIONS CONTROLLING THE RIGHT TO INTRODUCE EVIDENCE

Nature of the Right to Introduce Evidence	State
Right of the target to testify	
• Unqualified	New Mexico
• Only upon waiver of right to immunity	New York
• May be granted by the prosecutor and/or the grand jury	South Dakota
Right of the target to notify the grand jury of potential witnesses or evidence	New York
Right of any person to request to testify	Colorado
No provisions governing the right to introduce evidence of anyone other than the prosecutor	California Massachusetts

of immunity points out an important issue in providing the right to testify or present evidence. Any procedure of this type must be placed in the context of each jurisdiction's immunity laws and must not be construed to require a prosecutor to grant a witness immunity against his or her judgment.

Colorado has the broadest statute allowing any individual to request to testify and specifies detailed procedures to be followed: a person seeking to appear before the grand jury may approach the prosecutor or the grand jury.[43] Records of denials of such requests must be maintained under the statute and must contain the reasons for the denials. The law provides for a petition to the court for a hearing on a denial by the prosecutor or the grand jury. If the court grants a hearing and finds that the interests of justice would be served by allowing the petitioner to appear before the grand jury, it may permit such an appearance. In the county in Colorado where interviews were conducted, requests to testify under this statute were never denied by prosecutors. Although defense attorneys support the right of the target to testify, this rarely occurred in practice since the target would be potentially subject to impeachment if he or she testified at trial. Similarly, the statute was not typically used by a suspect to introduce exculpatory evidence through another person. In addition to the risk of impeachment, the defense would be hesitant to reveal its case to the prosecution so far in advance of the trial. Only one observer (not in Colorado) regarded the requirement of written justification for refusing a request to testify to be an infringement on the traditional secrecy of grand jury deliberations and a potential cause of additional litigation. These concerns were not raised by any respondents in Colorado, the only state visited that had this provision.

New York is the only state of the six visited whose laws go beyond the issue of a target testifying and address the process by which a target can have other witnesses called or evidence introduced. The law does not provide any guaranteed right to a suspect but states only that the prosecutor is obligated to inform the grand jury of any suggestions he receives. The grand jury may elect to hear the evidence at its discretion.[44] Respondents in New York did not indicate that this situation occurred with any frequency or with any negative consequences.

4.3 Summary

The procedures for obtaining and presenting evidence to the grand jury are regulated by law and/or internal prosecutorial policy in many jurisdictions. Key components of the requirements and procedures governing evidence before the grand jury are summarized in this section.

Restraints on Subpoenaing Target Witnesses

Recognizing that subpoenaing a target of a grand jury inquiry may create the appearance of unfairness, the U.S. Attorneys' Manual suggests that such subpoenas be issued only when the target will not appear voluntarily and when his testimony is necessary for the investigation, not protected by a valid privilege and cannot be obtained from alternative sources. Similarly, the ABA recommends that a witness not be called before the grand jury if the prosecutor has already been notified that the witness intends to assert his Fifth Amendment rights and there is no intent to immunize that witness from prosecution.

Restrictions on Subpoenaing Documentary Evidence

The courts have typically scrutinized grand jury subpoenas, particularly those for documentary evidence, to ensure that they request relevant materials, describe the materials sought with reasonable particularity and are reasonable in volume of material requested and time period covered.

Restraints on the Purposes of Obtaining Evidence

In addition to regulating the process of gathering evidence, there are restrictions placed on the purpose of grand jury subpoenas. The use of the grand jury to gather evidence in a case after the return of an indictment would be prohibited under the principle adopted by the ABA and is considered an abuse of the grand jury process in the U.S. Attorneys' Manual. In a number of states, a grand jury inquiry subsequent to a return of a "no bill" requires court approval. Colorado requires the court to find that new evidence exists for such approval. It has been recommended by the ABA that the grand jury not be used to gather evidence for an administrative proceeding, but restraints of this type have not generally been adopted. In addition, a recent statute in Colorado allows subpoenas to be scrutinized to determine if a primary purpose of the subpoena is to harass a witness.

Admissibility of Evidence

The type of evidence which may be introduced before the grand jury is the subject of controversy among observers of the system. While urging caution that evidentiary standards not transform the grand jury into a mini-trial, some limits on the use of hearsay evidence have been proposed. The draft Model Act as developed by the ABA's Section of Criminal Justice would have required a compelling necessity for the use of hearsay and would have required that the indictment be based on other evidence. The U.S. Attorneys' Manual suggests that decisions regarding the evidence before the grand jury be based on the need to ensure that jurors are afforded a substantial basis for their deliberations. Three of the six states visited require that the evidence before the grand jury be admissible at trial whereas a fourth state upholds that general rule with a few exceptions.

Limits on Prosecutorial Conduct

Both the ABA and the National District Attorneys Association have adopted policies limiting the conduct of the prosecutor by prohibiting statements or arguments before the grand jury that would be impermissible before a trial jury. Federal courts have dismissed indictments where prosecutors have intentionally misled the grand jury or presented false information.

Exculpatory Evidence

There is a growing consensus that it is appropriate for the prosecutor either to inform the grand jury of the existence of substantial exculpatory evidence, leaving the decision to hear that evidence to the grand jury, or to introduce such evidence directly. Another component of evidentiary reform involves procedures for the introduction of evidence by someone other than the prosecutor. The U.S. Attorneys' Manual suggests that a target be allowed to testify as long as it does not involve any burden on the grand jury or delay and if the target waives his Fifth Amendment rights and appears with or waives counsel. The Manual leaves requests for other testimony to the discretion of the grand jury. Colorado defines a process through which any person may

apply to testify if they are aware that the grand jury is inquiring into a particular subject. In New York, a target may identify evidence and request the grand jury to hear that evidence. In neither instance is there any obligation on the prosecutor or the grand jury to approve such requests or to confer any immunity from prosecution.

REFERENCES

Chapter 4

1. Individuals who potentially may be indicted as a result of a grand jury proceeding are sometimes referred to as suspects, targets, potential defendants or prospective indictees. The U.S. Attorneys' Manual distinguishes between subjects of investigations and targets:

   > "A subject of an investigation is a person whose conduct is within the scope of the grand jury's investigation. A target is 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."

   In this Monograph, the term "target" will be used broadly to encompass all who may be subject to indictment, except for those subject to indictment solely for perjured testimony before the grand jury.

2. The use of forced immunity and the contempt power to compel testimony is related to the right against self-incrimination and is therefore discussed in Chapter 6, Protections for the Rights of Witnesses and Targets. Provision for the presentation of evidence by the target is covered later in this chapter in Section 4.2 on Exculpatory Evidence.

3. United States v. Dionisio, 410 U.S.1 (1973); United States v. Mara, 410 U.S. 19 (1973).

4. U.S. Attorneys' Manual, Section 9-11.251.

5. Ibid., Section 9-11.1.51.

6. American Bar Association, "Policy on the Grand Jury," Principle 26.

7. N.M. Stat. Ann. Section 31-6-12(B) (1979).

8. Holderman, "Preindictment Prosecutorial Conduct in the Federal System."

9. American Bar Association, "Policy on the Grand Jury," Principle 9.

10. American Bar Association, "Policy on the Grand Jury," Principle 10.

11. U.S. Attorneys' Manual, Section 9-11.220.

12. N.M. Stat. Ann. Section 31-6-9.1 (1979).

13. Colo. Rev. Stat. Section 16-5-204(4)(i) (1978).

14. American Bar Association, "Policy on the Grand Jury," Principle 11.

15. American Bar Association, Model Grand Jury Act, Section 204(4), 1982.

16. U.S. Attorneys' Manual, Section 9-11.220.

17. For example, see Alaska Stat. Section 12.40.080 (1980), Code Ann. Section 813.2 Rule 3(4)(i) (West 1979); and Or. Rev. Stat. Section 132.430 (2) (1975-1976).

18. Col. Rev. Stat. Section 16-5-204(4)(e) (1978).

19. N.Y. Crim. Proc. Law Section 190.75(3) (McKinney 1971).

20. United States v. Calandra, 414 U.S. 338 (1974).

21. United States v. Calandra, 414 U.S. at 349-350.

22. Ibid.

23. U.S. Attorneys' Manual, Section 9-11.332.

24. United States v. Arcuri, 282 F. Supp. 347 (E.D.N.Y.), aff'd 405 F.2d 691 (2d cir. 1968), cert. denied, 395 U.S. 913 (1969).

25. Costello v. United States, 350 U.S. 359 (1956).

26. Section of Criminal Justice, American Bar Association, Draft Model Grand Jury Act, Section 100 (2), deleted prior to adoption as official ABA policy.

27. The states whose rules of evidence applicable to the grand jury are similar to those required at trial are: California, Idaho, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota and Utah.

28. Or. Rev. Stat. Section 132.320 (1975-1976).

29. Cal. Penal Code, Section 939.6(b) (West 1970).

30. National District Attorneys Association, National Prosecution Standards, Standard 14.4B, 1977.

31. American Bar Association, Standards for Criminal Justice, Standard 3-3.5.

32. See, for example, United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979).

33. See, for example, United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1978), aff'd 607 F.2d 877 (9th Cir. 1979); United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975).

34. American Bar Association, "Policy on the Grand Jury," Principle 3.

35. U.S. Attorneys' Manual, Section 9-11.334.

36. American Bar Association, Model Grand Jury Act, Section 101, 1982.

37. N. M. Stat. Ann. Section 31-6-11 (1979).

38. American Bar Association, "Policy on the Grand Jury," Principle 5.

39. U.S. Attorneys' Manual, Section 9-11.252.

40. The procedures for notifying witnesses or targets of their rights and status are an important component of grand jury reform and will be discussed in detail in Chapter 6.

41. N.M. Stat. Ann. Section 31-8-11(B)(1979).

42. "By state and federal statutes, a witness may be granted immunity from prosecution for his or her testimony (e.g., before grand jury). States either adopt the 'use' or the 'transactional' immunity approach. The distinction between the two is as follows: 'Use immunity' prohibits witness' compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness: on the other hand, 'transactional immunity' affords immunity to the witness from prosecution for offense to which his compelled testimony relates." West Pub. Co., Black's Law Dictionary, 5th ed.

43. Colo. Rev. Stat. Section 16-5-204(4)(1) (1978).

44. N.Y. Crim. Proc. Law Section 190.50 (McKinney 1971).

Chapter 5

DISCLOSURE OF GRAND JURY PROCEEDINGS AND JUDICIAL REVIEW

Of all the procedures studied during the development of this document, recording testimony before the grand jury was most frequently cited by respondents as a fundamental safeguard against potential abuse. The requirements for creating a formal record of the grand jury proceedings differ from state to state. While every state has some provision for a member of the grand jury to serve as a clerk and take notes of the testimony produced, these notes are neither required to be nor expected to be a verbatim record of all testimony. Notes of this type are typically not transcribed or provided to anyone other than the grand jurors, and they are not given any legal weight. However, as noted in Chapter 2, 20 states currently require electronic or stenographic recording of grand jury proceedings.[1]

In the following sections, a variety of strategies for recording and releasing transcripts of grand jury testimony will be set forth, as well as mechanisms for limiting unwanted disclosure and suggested limits on grand jury reports. Finally, a related issue--judicial review of the grand jury proceeding--will be addressed.

5.1 Recording Grand Jury Proceedings

5.1.1 Creation of a Formal Record

The initial decision facing a jurisdiction considering recording grand jury proceedings is whether that record should be mandated by law or should be left to the grand jury's or the prosecutor's discretion. Respondents in jurisdictions which do not require a record indicated that the option to record testimony is infrequently exercised, except in certain instances, e.g., when perjury is anticipated, when a certain witness might be unavailable at the trial, or in a particularly sensitive case.

The cost of creating and transcribing a stenographic record of testimony was frequently cited as the reason for opposition to this requirement. In addition, prosecutors also discussed tactical advantages in not recording testimony. Where there is no transcript of the grand jury testimony, the defense

is unable to attack the credibility of the witness at trial by pointing to prior inconsistent statements. Moreover, some prosecutors felt the existence of a record might jeopardize grand jury secrecy.

The need to record the actual testimony of each witness is rarely questioned. There is much less agreement whether other aspects of a grand jury proceeding should be recorded, however. For example, should the record include interactions between the grand jury and a judge or between the grand jury and the prosecutor? The deliberation of the grand jury is one component of the proceeding that is universally excluded from the record, as is the case with trial juries.

The ABA Committee on the Grand Jury has recommended not only that a formal record be made but that it include the entire proceeding except for the grand jury's deliberation. The legislative principle adopted by the ABA states:

> All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.[2]

The ABA commentary on this principle points out that, although recording may "formalize what should be an informal working relationship between the grand jurors and government attorneys, it is exactly this 'informal' relationship which invites subtle abuses."[3] The ABA principle is designed to guard against two possible forms of abuse: abusive questioning, harassment or intimidation of an individual witness; and the introduction of bias in discussions between the prosecutor and grand jurors.

The federal system has recently adopted the requirement of a recording of grand jury proceedings. Effective August 1, 1979, the Federal Rules of Criminal Procedure require that:

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device.[4]

The six states visited in the course of this study vary in their requirements for a complete record of the proceedings. The statutes of two of these states which require a complete record--Colorado and New Mexico--do not define the mandate with the level of detail and clarity contained in the ABA principle but more closely resemble the wording in the Federal Rule. The law in Colorado imposes a fairly broad requirement for the grand jury

record, stating that: "A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported."[5] New Mexico's law is also broad, simply requiring that "[a]ll proceedings in the grand jury room, with the exception of the deliberations of the grand jury, shall be reported verbatim."[6]

In California, a stenographic reporter must be present whenever the grand jury is investigating a criminal case but is required by law only to "report in shorthand the testimony given."[7] Respondents differed as to whether commentary was recorded although a few years ago a grand jury exercising its "civil watchdog" role had recommended that all proceedings be recorded and that there should be no "off the record" material.

Regardless of the language of the controlling statute, questions concerning the completeness of the recording arose in all jurisdictions. Respondents in all states indicated that "off the record" comments could not be completely eradicated by a statutory requirement. Remedies proposed by respondents include allowing the defense to subpoena either the grand jury foremen or the stenographer to document any off-the-record remarks.

In general, both prosecutors and defense attorneys cited the importance of recorded proceedings in deterring abuse and providing a more equitable system. The absence of a record was cited frequently by defense representatives in the states visited as a major flaw in the grand jury process. However, the creation of a record is not an end in itself. Both the manner in which access to the record is provided and the timing of that access are vital to the concerns of fairness and efficiency.

5.1.2 Access to the Record

There is less consensus on the need for defendants to have access to the grand jury record and on procedures for distributing transcripts than on the contents of the record itself. As stated in United States v. Price, "[t]he making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means."[8]

At the federal level, copies of the grand jury minutes are not available to defendants as a matter of right. Disclosure, which is fairly restrictive, is governed by Rules 6(e) and 16(a) of the Federal Rules of Criminal Procedure, 18 U.S.C. 3500, and the cases interpreting these provisions. Essentially, Rule 6(e) prohibits disclosure of grand jury proceedings in most circumstances with these two major exceptions:

(i) when . . . directed by a court preliminary to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.[9]

The remaining provisions govern disclosure to defendants of their own and other government witnesses' grand jury testimony. The defendant may have access to the grand jury testimony of government witnesses under the circumstances set forth in 18 U.S.C. 3500. As stated in the U.S. Attorneys' Manual:

> . . . a defendant is entitled to the transcript of grand jury testimony of government witnesses only after they have testified on direct examination in the trial of the case. The court is authorized under 18 U.S.C. 3500(c) to inspect the grand jury transcript in camera before turning it over to the defendant and to excise any portion of the transcript that does not relate to the subject matter of the witness' grand jury testimony on direct examination. If a part is excised and the trial continues to an adjudication of guilt, the excision is subject to appellate review.[10]

Case law interpreting this provision puts the burden on the defense to show that a "particularized need" exists for the grand jury minutes which outweighs the traditional policy of secrecy.[11] Among the reasons considered by the courts have been the need to impeach a witness, to refresh his recollection, and to test his credibility.

Finally, Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure governs disclosure of a defendant's own testimony. The rule mandates that, upon the defendant's request, he or she be permitted to inspect and copy or photograph any recorded testimony given by him or her before the grand jury. The testimony must relate to the offense charged before disclosure is required.

The Draft Model Grand Jury Act as developed by the ABA's Section of Criminal Justice included a provision to provide defendants with a generally broad and automatic right of access to grand jury materials. Under the proposed rule, the defendant would have been allowed, after the indictment but before the trial, to examine, and when appropriate and necessary, to copy a transcript or electronic recording of the following items:

- the grand jury testimony of all witnesses to be called at trial;
- all statements to the grand jury by the court and the attorney for the Government relating to the defendant's case;

- all exculpatory grand jury testimony or evidence; and
- all other grand jury testimony or evidence which the court may deem material to the defense.[12]

In addition to allowing the court to establish reasonable conditions and limitations, the Draft Act would have provided further protections against unwarranted disclosure. If the prosecutor were able to show good cause, the court would have been allowed to deny, restrict or defer release of the transcript, or take other action as appropriate. The prosecutor, upon motion, would have been able to establish the necessary cause for court action through a written statement available only to the judge. That statement would have been sealed and preserved for the appellate court in the event of a later appeal by the defendant. These provisions allowing the defendant to have access to grand jury materials were deleted prior to the adoption of the Model Act as official ABA policy.

At the state level, practices differ on what is provided to the defendant and on the timing of the release of that information. Some jurisdictions provide the defense with a full transcript of the grand jury proceedings as soon as it is prepared; others give the defendant a copy of a witness' grand jury testimony only after that witness testifies on direct examination at trial. In some jurisdictions, release of transcribed material is automatic; in others, the defendant must demonstrate a particularized need for the transcript. In the latter instance, requests under the general rules governing discovery are not considered sufficient.

Of the six states whose laws and practices were examined in depth, California provides the defendant with the broadest access to the transcript. It provides for automatic pretrial disclosure to the defendant of all recorded testimony within a specified time limit. It also provides a remedy for the defendant should the time limit be exceeded. The law states:

> If an indictment has been found or accusation presented against a defendant, . . . [the] stenographic reporter shall certify and deliver to the county clerk an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants. The reporter shall complete [this] within 10 days after the indictment has been found or the accusation presented unless the court for good cause makes an order extending the time. The time shall not be extended more than 20 days. The county clerk shall file the original of the transcript . . . and deliver a copy of such transcript to each such defendant or his attorney. If the copy of the testimony is not served as provided in this section the court shall on motion of the defendant continue the trial to such time as may be necessary to secure to the defendant receipt of a copy of such testimony 10 days before such trial.[13]

Both prosecution and defense respondents noted that it is important that the defense be given adequate time to review the grand jury record if it is to serve one of its purposes--providing assistance with pretrial preparation. Receiving portions of the transcript at trial may not allow the defense sufficient time to prepare meaningful cross-examination, particularly if the testimony is at all detailed or lengthy.

An unusual provision in California expands access to the grand jury record to the general public, in contrast to most states which tightly limit access to the record. Under legislation enacted in 1971, grand jury transcripts in California are open to the public within 10 days of delivery to the defendant, unless the court "determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial."[14] If that is the case, the court may seal parts of the transcript until the trial is completed.

5.2 Judicial Review of the Indictment

One of the reasons given for recording grand jury proceedings is the opportunity for review of the basis of the indictment. Those advocating record keeping note that judicial review of the record can provide an objective assessment of the evidence heard by the grand jury and the procedures followed. In fact, some observers have argued that the availability of judicial review negates the need for the defendant to have access to the transcript and the need for the presence of counsel in the grand jury room. On the other hand, it should be noted that many fear that a dramatic increase in judicial review of the grand jury proceeding may simply slow down the criminal justice process and consume already strained judicial resources, without substantially altering the result. These observers believe that litigation over evidentiary and procedural issues should be reserved for the trial.

The Draft Model Grand Jury Act proposed by the Section of Criminal Justice of the ABA would have authorized judicial review of the legal sufficiency of the evidence presented to the grand jury.[15] The court would have had the power to dismiss the indictment upon motion of the defendant if it found that the evidence, viewed in the light most favorable to the government, would not have supported a conviction at trial. Only transcripts and exhibits would have been considered; further testimony or oral argument would not have been permitted under the provisions of the Draft Act. This provision never became part of the Model Act, however, as it was deleted by the Section of Criminal Justice prior to the Act's passage.

Judicial review is not available in all states. In New Mexico, the court does not have jurisdiction to review the quantity or quality of evidence

presented to the grand jury. In other jurisdictions, review of the indictment is effectively foreclosed by the absence of a legal record of the grand jury proceedings. Where such review is prohibited either as a result of lack of jurisdiction or lack of a record, compliance with evidentiary standards or absence of bias cannot be assessed.

Of the states studied in detail for this research, three--California, Colorado and New York--have formalized procedures for judicial review of an indictment. In Colorado, the law requires the defendant to initiate the review process by motion but respondents were in agreement that a review of the record typically occurs automatically upon the defendant's request. The defendant is not required to enumerate specific grounds on which he or she is challenging the indictment. Although the only basis for dismissing the indictment outlined in the law is lack of probable cause, a judge suggested that an indictment might be overturned if bias were found. Although argument or further evidence are not to be considered under the statute, the judge indicated that where there was a possibility that the grand jury process had been biased or abused by the prosecutor, he might require the parties to submit briefs on the point.[16]

In California, an indictment may be dismissed by a judge for lack of probable cause, as well as for bias. Indictments can be set aside if more inadmissible than admissible evidence were introduced. In a case cited as an example of the care given to the review function, a judge struck hearsay evidence from the record and found that the remaining evidence constituted probable cause only for a misdemeanor whereas the indictment had originally charged a felony. Indications of prejudice or improper influence also can cause an indictment to be dismissed.

In New York practices differ from judge to judge regarding the requirements for granting a defendant's motion to inspect the grand jury record. Some judges require the defendant to allege specific flaws in the indictment, whether lack of legal sufficiency or the introduction of biased information. Other judges will automatically inspect the grand jury record upon request. One judge stated that he initiated a review of an indictment from time to time "just to keep the prosecutors on their toes."

In instances where the defendant is required to show a compelling reason for judicial review, either due to statutory mandate or the policy of an individual judge, respondents noted that the requirement is sometimes adhered to only in form. Often the defendant must challenge the indictment without access to the full transcript and therefore is taking a "shot in the dark." Where this is the case and review occurs upon request, a large number of indictments may be reviewed unnecessarily. However, although some observers felt that review is sought routinely in the hope that some defect will be discovered, other respondents suggested that this is not the case; defendants are more likely to request judicial review selectively to avoid angering judges where there is little likelihood of success.

Allowing judicial review of indictments can clearly increase the judicial workload. The potential costs may be controlled to a certain extent by limiting the availability of or criteria for review. However, some observers caution that such restrictions might engender more litigation--consuming more of a judge's time than would the actual review and thus delaying the ultimate disposition of the charges.

5.3 Grand Jury Secrecy

The tradition of secrecy is deeply rooted in the history of the grand jury. The major reasons underlying the policy of grand jury secrecy have been summarized by the Supreme Court 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 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 the 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.[17]

Recently, however, many commentators have expressed concern that the policy of secrecy shields the grand jury from public scrutiny and independent review. Indeed, a number of the measures described in this report--e.g., right to counsel and recording the proceedings--are designed to mitigate the potentially negative impacts of grand jury secrecy.

Clearly, the need for making the grand jury process more open must be balanced against the protections and benefits provided by grand jury secrecy. Unregulated disclosure of information arising from the grand jury proceeding serves neither the public interest nor the interests of the defendant. Many people interviewed in this research question the advisability of publishing

grand jury findings where no indictments are returned. In the following sections we discuss methods designed to limit disclosure of:

- Details of the ongoing grand jury process, including the subject matter under inquiry, the identities of witnesses, or the identity of the target of an investigation;
- Products of the grand jury describing illegal or questionable conduct but not charging a crime.[18]

5.3.1 Controlling Leaks

Information concerning the ongoing grand jury process is generally considered secret. When such information becomes public without authorization, the occurrence is labelled a "leak," meaning a breach in the wall of secrecy. Although grand jury leaks are generally regarded as harmful, the sources of the leaks and the reasons for them vary widely.

The General Accounting Office (GAO) of the federal government recently conducted a study on the federal district court system to determine how well the criminal justice system was accomplishing the goals of grand jury secrecy and to identify areas needing improvement.[19] Staff reviewed federal laws, rules and regulations; reviewed and evaluated policies and procedures regarding the security of grand jury information; interviewed district court judges and law enforcement officials who routinely have access to grand jury information; reviewed relevant internal audit reports; and observed actual practices being used to safeguard grand jury information. Extensive on-site work was conducted in seven of the 95 U.S. Districts, with limited data collected in two other districts.

On the basis of their field work, GAO concluded that there were numerous unauthorized disclosures which compromised the purposes of grand jury secrecy. The major sources of leaks, according to this report, were:

Disclosure Occurred Through	Total
Witnesses	0
Grand jurors	2
Court reporters	4
Government attorney/agency	85
Public document/proceeding	292
Inadequate security provision	24
Unknown	85
	492[20]

As a result of the public availability of privileged grand jury information, the following instances were documented:

--343 witnesses had their identities revealed before any indictments were returned by grand juries, including 5 who were murdered, 10 who were intimidated, and 1 who disappeared;

--10 persons' reputations were damaged even though they were never indicted;

--147 targets were publicly identified before being indicted;

--23 grand jury investigations had to be dropped or delayed; and

--168 grand jury investigations had the specific nature of the investigations revealed and discussed.[21]

According to this report, one of the problems leading to leaks is the lack of an adequate program to protect grand jury secrecy. Judges, government attorneys, and law enforcement officials do not agree on what information must be kept secret. Often rules of procedure are interpreted in ways that result in both the identities of witnesses and targets and the nature of investigations reaching the public and the press during the duration of grand jury proceedings.

One of the American Bar Association's principles on the grand jury states that "the confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny."[22] The commentary accompanying the ABA principles provides the rationale for this policy by stating: "The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one--it taints the witnesses' reputations by the mere fact of their appearance." As a practical matter, however, it is almost impossible to prohibit the press or the public from observing the individuals entering or exiting from the area in which a grand jury is sitting. It is also extremely difficult to prohibit the publication of such information given the guarantees of freedom of speech and freedom of the press.

Another problem cited in the GAO report is that judges disagree on whether preindictment court proceedings should be closed or open to the public. If held in open court, such proceedings may disclose information to the public, the news media, and others resulting in a compromise of grand jury secrecy. Furthermore, judges differ as to whether grand juror names should be disclosed to the public while the jurors are still impaneled. Those opposing disclosure cite the danger of attempts to tamper with the grand jury or threats to the safety of jurors. On the other hand, there is historical

reluctance to treat most court proceedings or related information as secret. Even if everyone involved agreed upon the parameters of what should be kept secret, security procedures and practices might not adequately protect grand jury secrecy. According to GAO, in the federal jurisdictions studied:

--Security procedures were lax or nonexistent for limiting access to, storing, and disposing of grand jury materials.

--Grand jurors were not usually screened to determine whether they had connections with persons being investigated.

--Grand jury rooms provided inadequate security to keep unauthorized persons from eavesdropping and observing witnesses and jurors.

--Security practices in use in each judicial district were not assessed.[23]

The GAO report included a number of suggestions designed to remedy these problems. These recommendations are also relevant for state legislatures and courts. They include:

--Developing rules and laws which clearly define what must be kept secret during the duration of grand jury proceedings, including specific guidelines for handling (1) preindictment proceedings, (2) grand jury subpoenas, (3) evidence developed independently of a grand jury but later introduced to it, (4) duplicates and copies of original documents presented to a grand jury, and (5) internal government memoranda and other documents that tend to disclose what transpires before a grand jury;

--Reviewing plans so that courts and government attorneys' offices are in a position to react appropriately whenever situations calling for maintaining the confidentiality of grand juror names arise;

--Establishing guidelines setting forth the minimum physical security requirements needed to protect the secrecy of grand jury materials;

--Requiring each custodian of grand jury materials, including court appointed reporters, to establish procedures consistent with the security guidelines and document them in a security plan to be approved by the appropriate court;

--Providing for periodic audits by the court administrator's office of all custodians of grand jury materials to determine whether they are complying with appropriate security plans and whether security procedures need to be improved; and

--Evaluating the physical security around grand jury rooms and developing an appropriate plan to upgrade and modify deficient facilities to insure that the secrecy of grand jury proceedings will not be compromised.[24]

Although the GAO report found no evidence that witnesses were the source of grand jury leaks, respondents in the sample states indicated that this was indeed a problem. Under federal and state law, witnesses are not included in the rule which imposes an obligation of secrecy on other participants.[25] According to our respondents, witnesses may disclose aspects of grand jury proceedings to create a favorable public image or to damage the investigation by alerting others to its thrust. Prosecutors interviewed agreed that the effects of publicizing details of the grand jury process were generally detrimental to an inquiry. There was, however, less agreement on the propriety or feasibility of restricting this type of leak.

Generally, prosecutors interviewed for this research indicated that any attempts to restrict disclosures by witnesses themselves were unrealistic and would be ineffective. A possible option might be to prohibit a witness from disclosing the specific questions and answers heard by the grand jury, but this would have minimal impact since the witness would be free to describe his testimony in general terms. Treating leaks by witnesses as a category of contempt is another option, although it is not widely supported since the use of the power to charge someone with contempt is generally perceived as justified only in extreme circumstances. One option for discouraging disclosures by witnesses noted in the U.S. Attorneys' Manual would involve a request to the witness by the grand jury foreman pointing out the potential harm from disclosure and the benefits to the witness of secrecy.

Another source of leaks from the grand jury can be the members of the jury itself. One measure recommended by the GAO to avoid potential problems is screening of grand jurors for possible conflicts of interest with cases to be presented to the grand jury. In practice, the burden is typically on individual jurors to notify the prosecutor of any potential conflicts on a case by case basis. Traditionally, the oath taken by grand jurors includes an affirmation that they will maintain the secrecy of what is presented to them. However, not all states provide any penalty for violation of that oath. The 1979 revision of New Mexico's grand jury laws clearly specified the obligation regarding secrecy and provided for criminal prosecution for violations of the juror's oath. A portion of the oath mandated by statute states that: ". . . you will forever keep secret whatever you or any other juror may have voted on any matter before you; and that you will keep secret the testimony

of any witness heard by you unless ordered by the court to disclose the same in the trial or prosecution of the witness for perjury before the grand jury . . . ."[26] The law goes on to state that "[a]ny person found to have violated the oath . . . shall be guilty of a misdemeanor."[27] Those interviewed in New Mexico could not recall any prosecutions under this law. Since the statute has not been in effect for very long, its impact is as yet undetermined.

Two additional types of information would be subject to restrictions on disclosure under the ABA principles: 1) the identities of co-conspirators who were not indicted (although the names could be disclosed in a bill of particulars--the intent of this prohibition is to avoid damaging the reputation of someone who has no forum for vindication);[28] and 2) the existence of grants of immunity prior to an indictment or testimony (designed to protect reputations as well as to avoid harm to an investigation).[29]

5.3.2 Restricting Grand Jury Reports

In many jurisdictions, grand juries have a number of options regarding the nature of their final product. In addition to returning indictments charging an individual with a specific crime or declining to indict, grand juries performing a more investigative function may, in some jurisdictions, submit a report to the court describing illegal or questionable conduct by an individual without instituting a criminal charge. Reports of this nature are most frequently used when the grand jury wishes to document abuses in government agencies but may not be able to substantiate a criminal charge. The purpose of the report in this instance is to alert the public to potentially corrupt practices so that appropriate remedies may be designed and implemented.

Although the use of grand jury reports can bring corruption into the public eye even though a criminal prosecution is not feasible, critics warn of the potential for abusive use of this reporting power. For example, an individual named in a report will likely suffer damage to his or her reputation; however, since the allegations in a report may not result in criminal charges, the individual accused of misconduct will not be able to attack the charges at trial nor can he or she hope for an acquittal. To minimize these abuses, the American Bar Association has recommended specific procedures to be followed before a grand jury report may be issued. The relevant principle states:

> A grand jury shall not issue any report which singles out persons to impugn their motives, holds them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits in camera a copy thereof to all persons named or identifiable and such persons are given

> the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held in camera.[30]

The commentary accompanying the principles provides the rationale for the ABA's view of grand jury reports. Stating that the purpose of these reports is to "inform the public of situations requiring administrative, judicial or legislative corrective action--not the castigation of individuals," the ABA commentary goes on to specify that a report can comment on "the job that an office holder is performing; but such reports should not condemn character alone."[31]

As illustrated by Figure 5.1, grand jury reports are restricted in a variety of ways in the six states visited in preparation for this Monograph. In addition to the elements identified by the ABA--restricting the purpose of reports and specifying a process for an individual to respond to the charges--some states have adopted such strategies as restrictions on publication of reports and the availability of judicial review. Examples of these different approaches are discussed in detail below.

Figure 5.1

RESTRICTIONS ON GRAND JURY REPORTS

Type of Restriction	State
Court review	California, New York, South Dakota
Restrictions on purpose of report	New Mexico, New York
Opportunity of subject of report to answer allegations	New York
Not publicized unless provides exoneration	Colorado
No statutory restrictions on reports	Massachusetts

New York law parallels the ABA's policy with regard to the category of grand jury reports which focus on the conduct of specified public officials. The law requires that:

> The order accepting a report . . . , and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken . . . until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal . . . whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges . . . and, except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report and the appendix if any, for appropriate action to each public servant or body having removal or disciplinary authority over each public servant named therein.[32]

New York law specifies that grand jury reports may be used only for limited purposes and directs the court to monitor adherence to these limits which are even more stringent than those recommended by the ABA. The court to which a report is submitted is required to review the report and the grand jury minutes to determine whether the report is for one of the three statutorily authorized purposes: 1) documenting improper conduct by a public official as the basis for a recommendation of removal or disciplinary action; 2) documenting the conduct in office of a public official who requested such a report; or 3) proposing recommendations for action by legislative, executive or administrative agencies in response to the grand jury's findings.[33] Also, the court must ensure that the findings are based on facts revealed in the course of a lawful investigation and are supported by a preponderance of credible and legally admissible evidence. Failure to meet this standard may result in the court sealing the report. If the purpose of the grand jury report is to document a recommendation of removal or disciplinary action, each individual identified in the report must be allowed the opportunity to testify before the grand jury. Otherwise, reports must be reviewed to ensure that they are not critical of identified or identifiable persons.

In addition to the protections provided for individuals named in grand jury reports, New York law includes measures to safeguard the criminal justice

process as well. A report may be sealed and closed to access by subpoena if the court finds that making the report public may "prejudice fair consideration of a pending criminal matter."[34]

In the three states visited which require the court to review a grand jury report, the type of response the court may make when a report does not meet its standards differs. As noted earlier, New York courts are authorized to order the report sealed. South Dakota law permits a grand jury with a prosecutor's approval to file a report, although the court may, in the interests of justice, excise any portion of the report.[35] In California, the courts must approve any report by the grand jury before it is published. However, impact of this law may have been partially diluted. In one instance, a grand jury successfully sued a judge who had refused to let them file a report. As a result of this action, the extent of judicial control of grand jury reports in California remains unclear.

Colorado has taken a different approach to the need for controls on grand jury reports. Rather than regulating the scope of reports or the process by which they are compiled, Colorado simply prohibits their publication except in limited circumstances. Under the law in Colorado, a grand jury report or a particular portion of a report may be made public only if the chief judge of the district court finds that the person or persons seeking the release of the report will be exonerated.[36]

The use of grand jury reports has been almost completely abandoned in Colorado, primarily due to this statutory restriction. The Colorado law does, however, demonstrate an alternative use for grand jury reports, i.e., exonerating an innocent witness or target of an investigation. This theme is more thoroughly expressed in the laws of California.

> (a) A grand jury which investigates a charge against a person, and as a result thereof cannot find an indictment against such person, shall, at the request of such person and upon the approval of the court which impaneled the grand jury, report or declare that a charge against such person was investigated and that the grand jury could not as a result of the evidence presented find an indictment. The report or declaration shall be issued upon completion of the investigation of the suspected criminal conduct, or series of related suspected criminal conduct, and in no event beyond the end of the grand jury's term.[37]

5.4 Summary

Recording grand jury proceedings is frequently cited as providing benefits to the defendant, including the opportunity for discovery and the potential to impeach government witnesses if later testimony is inconsistent. It is also viewed as a deterrent against potential abuse, such as attempting to exert influence on the grand jury or intimidating a witness. Jurisdictions have several options for structuring the creation and use of grand jury transcripts. The content of the record, the rules governing access to the record and the timing of disclosure are all elements which vary between jurisdictions. Similarly, the provisions under which a grand jury transcript may be judicially reviewed and the grounds on which an indictment may be overturned--procedures possible only where the grand jury proceeding is recorded--are the subject of debate. These issues are summarized below.

Unauthorized disclosure of grand jury information is often cited as an issue of considerable concern. In addition, the use of grand jury findings where no indictment is issued is regarded as a potential source of abuse. The summary below discusses strategies to control grand jury leaks and to restrict the use of grand jury reports.

Creation of a Formal Record

The major issue concerning the creation of a grand jury record is whether the record should contain all aspects of the proceeding including commentary by the prosecutor or others or whether only testimony need be recorded. Under the ABA policy and the Federal Rules of Criminal Procedure, all proceedings before the grand jury except their deliberations and voting are to be recorded. Twenty of the 50 states have some requirement for recording grand jury proceedings. In all jurisdictions visited, even those requiring a complete record, some concern over off-the-record comments was raised.

Access to the Record

Access to the grand jury record is a matter of right in some jurisdictions whereas in others there must be a showing of a "particularized need" which outweighs the traditional policy of secrecy. Similarly, the timing of access to the record ranges from immediately upon transcription to after a government witness has testified at trial. In the federal system, there is no automatic

right to the grand jury transcript. The defendant's request to inspect his own testimony will be granted if the testimony is related to the offense charged. For other witnesses, access is provided after their direct testimony at trial with the courts applying the "particularized need" standard. The Draft Model Grand Jury Act proposed by the ABA's Section of Criminal Justice would have provided a defendant with a broad and automatic right of access unless otherwise ordered by the court. California law, which is the broadest of the states' laws studied, generally requires that the transcript be made available to the defendant within 10 days of the indictment. California has also opened the transcript to the public unless the court orders otherwise.

Judicial Review of the Indictment

The Section of Criminal Justice of the ABA proposed in its Draft Model Grand Jury Act that indictments be subject to judicial review to insure the sufficiency of the evidence. Three of the states visited--California, Colorado and New York--have formalized the availability of judicial review. Although a defendant must request judicial review, some judges indicated that such requests were automatically granted whereas others required the defendant to show cause for the review. Insufficiency of the evidence or the presence of bias were the two grounds most often cited as the basis for dismissing the indictment after review.

Controlling Leaks

The study of the federal system conducted by the U.S. General Accounting Office revealed numerous unauthorized disclosures leading to compromises of the purposes of grand jury secrecy. In the states visited, leaks were also cited as a problem. While few had adopted specific measures to prevent unauthorized disclosures, New Mexico's law enacted in 1979 made disclosure of grand jury information by a juror a misdemeanor.

Restricting Grand Jury Reports

Grand jury reports, alleging illegal or questionable conduct without instituting a criminal charge, have been

criticized for damaging individuals who are not provided with a forum to rebut or disprove the allegations. The ABA's policy would restrict the purpose of such reports and would allow persons named in a report to review and request that portions of the report be expunged with the final decision left to the court. Four of the states visited have adopted components of this policy. In addition, Colorado forbids the publication of grand jury reports unless they result in the exoneration of an individual.

REFERENCES

Chapter 5

1. In two of these states, Pennsylvania and Virginia, this provision is applicable only to investigatory grand juries.

2. American Bar Association, "Policy on the Grand Jury," Principle 15.

3. Ibid., Comments on Principle 15.

4. Fed. Rules of Crim. Proc. Section 6(e)(1).

5. Colo. Rev. Stat. Section 16-5-204(4)(f) (1978).

6. N.M. Stat. Ann. Section 31-6-8 (1979).

7. Calif. Penal Code, Section 938a (West Supp. 1982).

8. United States v. Price, 474 F. 2d 1223 (9th Cir. 1973).

9. Fed. Rules of Crim. Proc. Section 6(e)(3)(c).

10. U.S. Attorneys' Manual, Section 9-11.364.

11. See for example, Dennis v. United States, 302 F. 2d 5 (C.A. Colo. 1962).

12. Section of Criminal Justice, American Bar Association, Draft Model Grand Jury Act, Section 104(1), deleted prior to adoption as official ABA policy.

13. Cal. Penal Code Section 938.1(a) (West Supp. 1982).

14. Cal. Penal Code Section 938.1(b) (West Supp. 1982).

15. Section of Criminal Justice, American Bar Association, Draft Model Grand Jury Act, Section 105, deleted prior to adoption as official ABA policy.

16. Colo. Rev. Stat. Section 16-5-204(4) (1978).

17. United States v. Proctor & Gamble Co., 35 U.S. 677, 681 n.6 (1958).

18. This type of product of the grand jury is labelled differently from jurisdiction to jurisdiction and may be known, for example, as either a "report" or a "presentment." Throughout this Monograph the term "report" is used to identify a grand jury product of this nature.

19. General Accounting Office, Comptroller General, Report to the Congress: More Guidance and Supervision Needed Over Federal Grand Jury Proceedings. GGD-81-18 (Washington, D.C.: Government Printing Office, 1980).

20. GAO, Report to the Congress, p. 45.

21. GAO, Report to the Congress, p. 6.

22. American Bar Association, "Policy on the Grand Jury," Principle 21.

23. GAO, Report to the Congress, p. 33.

24. GAO, Report to the Congress, pp. 33-34.

25. Federal Rule 6(e)(2) states that:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule . . . .

26. N.M. Stat. Ann. Section 31-6-6(A)(1) (1979).

27. N.M. Stat. Ann. Section 31-6-6(B) (1979).

28. American Bar Association, "Policy on the Grand Jury," Principle 7.

29. Ibid., Principle 19.

30. Ibid., "Policy on the Grand Jury," Principle 8.

31. Ibid., Commentary on Principle 8.

32. N.Y. Crim. Proc. Law Section 190.85(3) (McKinney 1971).

33. Ibid.

34. N.Y. Crim. Proc. Law Section 190.85(4) (McKinney 1971).

35. S.D. Compiled Laws Ann. Section 23A-5-19 (1979).

36. Colo. Rev. Stat. Section 16-5-205(4) (1978).

37. Cal. Penal Code, Section 939.91(a)(West Supp. 1982).

Chapter 6

PROTECTIONS FOR THE RIGHTS OF WITNESSES AND TARGETS BEFORE THE GRAND JURY

Proposals designed to institute protections for grand jury witnesses and targets (who may or may not be called as witnesses) are an important component of the recent debate on the grand jury. Strategies in this area are of two general types:

- procedures for notifying targets and witnesses of their legal rights and status before the grand jury; and
- procedures for protecting these rights.

Critics of the grand jury have identified characteristics of the proceeding which they claim necessitate formalized protections of these two types for witnesses and targets. In large part, these issues are raised in the context of the investigative grand jury, since targets or non-police witnesses are rarely called before screening grand juries. Hixon, primarily writing on the federal system, described several aspects of the grand jury process as conducive to abuse and in need of modification, including:

- the lack of any requirement of a minimum time that must elapse between the service of a subpoena and the witness' appearance;
- the lack of any requirement that the witness be informed of the purpose of the subpoena or the subject matter under investigation;
- the possibility that witnesses are not notified of their Fifth Amendment rights or their status if they are a target of the grand jury inquiry; and
- the absence of the right to counsel inside the grand jury room.[1]

Other authors have identified additional factors which limit the ability of grand jury witnesses to assert their rights. For example, Rodis summarizes a number of barriers which prohibit witnesses subpoenaed before the grand jury from challenging the proceeding:

- witnesses typically are unable to challenge the jurisdiction of the grand jury;

- witnesses cannot object to questions on the grounds of incompetency or irrelevancy;

- witnesses cannot object to questions on the grounds that the questions are based on or call for hearsay; and

- subpoenas for handwriting or voice exemplars cannot be challenged on Fourth Amendment grounds, since they are not considered seizures.[2]

Given the perceived absence of procedural protections and the vulnerability of witnesses, critics of the grand jury have focused particular attention on the dangers of self-incrimination by witnesses who may not be notified of their constitutional rights and may not know how to assert them. Hixon characterizes this dilemma by stating that "the average witness will not know when to invoke the fifth amendment, and may be totally unaware that by answering some questions he may have waived his right to invoke the fifth amendment later in the questioning."[3] In addition, the author points out that witnesses before the grand jury also risk being charged with either contempt, if they refuse to answer after being ordered to testify, or with perjury, although both may be unintentional.

The two types of measures proposed to safeguard witnesses' rights vary considerably in their potential impact on the grand jury system and have met with different levels of support and resistance. Notifying witnesses of the subject matter of the grand jury's inquiry or of their status as target or non-target have been resisted by some, but have not been central in the debate over grand jury reform. The most controversial set of proposals for grand jury modification has been that directed at defining the due process requirements applicable to grand jury witnesses. Both the substantive rights of witnesses and the procedures for their implementation have been the subject of considerable debate. The key focus of this controversy has been on access by grand jury witnesses to counsel in the grand jury room.

Proponents of grand jury reform claim that the results of notifying witnesses of their legal rights and of providing access to counsel in the grand jury room would include the following:[4]

- protection against self-incrimination;

- protection against unintentional perjury;

- protection against divulging information subject to a testimonial privilege;

- full understanding by the witness of the penalties of perjury and/or contempt;

- full understanding by the witness of the ramifications of immunity, if applicable; and

- deterrence of abusive or prejudicial questioning.

Although some commentators have suggested that these protections are offered by allowing grand jury witnesses to consult with an attorney outside the grand jury room, those who advocate permitting counsel inside the room claim that two additional benefits will accrue: 1) elimination of the prejudicial effect of a witness' exits from the grand jury room to consult with counsel; and 2) increased efficiency of the proceeding since witnesses will no longer need to leave the room for each consultation.[5]

As Hixon points out, the presence of counsel inside the grand jury room removes the need for the witness to understand and recall each question in precise detail and to convey that information while conferring with counsel after each question. Moreover, counsel inside the room would eliminate questions arising from limitations on the time used in leaving the room to consult with counsel or restrictions on the frequency of consultation.[6]

Proponents of measures designed to enhance the rights of grand jury witnesses and targets base their support on two grounds. According to one line of argument, the grand jury has all the elements of custodial interrogation that trigger the due process requirements defined in the Miranda decision.[7] The second rationale relies on case law defining due process at "critical stages" of the criminal justice process. Although these arguments primarily focus on the issue of right to counsel, they are also applicable to provisions ensuring that witnesses and targets are notified of their legal rights.

The first line of reasoning can be summarized as follows:

> . . . there are evident parallels between a 'custodial interrogation' by law enforcement officers and an interrogation of a witness by a prosecutor before a grand jury. The witness before the grand jury is in a 'custodial' situation; he cannot leave until he is excused. Further, he could be jailed for failing to appear in response to a subpoena. The witness before the grand jury needs the assistance of counsel during questioning to judge whether and when to invoke the fifth amendment privilege against self-incrimination, just as he would during an interrogation by law enforcement officers.[8]

Citing case law identifying other stages of a criminal proceeding as being "critical stages" requiring the right to counsel to protect an individual's due process rights, Dash argues that such a right should also attach at the grand jury proceeding.[9] Although Dash clearly supports the right to counsel before the screening grand jury, he does not believe in this right in the context of the investigative grand jury. The author's argument is based on a comparison between the grand jury and the preliminary hearing as parallel systems whose function is to determine probable cause. Analyzing Coleman v. Alabama[10] which held that counsel was required at the preliminary hearing, Dash concludes that such a right is even more important before the grand jury. In his dissenting opinion in Coleman, Chief Justice Warren Burger refers to the grand jury as a more critical proceeding than the preliminary hearing. Dash concurs with this characterization, using it to support the extension of the right to counsel to the grand jury.

To date, the courts have not given much support to either of these arguments. An article summarizing relevant case law points out that some courts approve but do not mandate giving witnesses notice of their rights. It further states:

> . . . most federal courts that have been faced with the issue have held that Miranda warnings are not required in the grand jury context, rejecting the argument that being summoned is a form of coercion and that the grand jury interrogation may be as deleterious to the accused's rights as a station house interrogation.[11]

Fenster reviews recent case law and concludes that there is no constitutional right to counsel in the grand jury room. Noting that the Supreme Court in United States v. Wade[12] mentioned that the right to counsel might not have been mandated at post-indictment lineups if alternative safeguards were available, Fenster suggests that such safeguards are present at grand jury proceedings.[13] The presence of impartial jurors who can observe and report any irregularities is one form of protection identified by Fenster as obviating the need for counsel in the eyes of the court. Fenster also includes as key safeguards the record of the proceedings and the potential for judicial review in jurisdictions where those provisions are applicable.

Opponents of grand jury proposals governing witness rights base this opposition on both legal and practical grounds. For example, opponents of required notice to witnesses cite United States v. Mandujano[14] in which the court declined to require the suppression of perjured testimony of a grand jury witness who had not been advised of his Miranda rights. That case also declared that the purpose of the grand jury's inquiry need not be stated in the subpoena. Although a 1977 case indicated that the Court had not yet decided whether the grand jury was so coercive that Miranda or general

Fifth Amendment warnings were necessitated,[15] the court clearly stated in that case that there is no legal requirement to notify targets of a grand jury probe.

A number of commentators have offered practical arguments in opposition to the right to have counsel present inside the grand jury room. In addition to asserting their belief that counsel outside the grand jury room provides a fair and adequate level of protection, these observers point out perceived negative consequences of establishing an expanded right to counsel.[16] The following are some common concerns regarding the right to counsel in the grand jury room:

- Right to counsel is a departure from standard practice in any other proceeding, since right of direct consultation during testimony is not permitted elsewhere.
- The spontaneity of the witness' response is lessened and the question arises regarding who is testifying--the witness or the attorney.
- The danger of delay or disruption of the proceedings exists. Whether intentional or not, any effects of this sort would be detrimental to the efficiency of the grand jury.
- The possibility exists that the presence of counsel would turn the grand jury proceeding into an adversarial mini-trial. This would be inefficient and a wasteful duplication.
- The proposed presence of counsel raises concerns that the secrecy of the grand jury proceeding could be breached as more people are involved in the process.
- The possibility exists that a single attorney may represent multiple witnesses, thus harming the integrity of the process and potentially the rights of witnesses. This issue arises primarily in the context of the investigative grand jury.
- The presence of counsel may inhibit a witness from testifying as freely as he might otherwise if counsel were not present.
- Failure to differentiate between screening and investigative grand juries may result in the application of inappropriate due process requirements on the investigative grand jury and may lead to a reduction in the usefulness or effectiveness of such grand juries.

This section has summarized the primary claims of proponents and opponents of reforms aimed at increasing the protection available to witnesses and targets of the grand jury. In the sections that follow, specific reforms will be discussed and jurisdictional variations outlined. As discussed earlier, it is important to consider the implementation of reform measures of this nature in the context of the type of grand jury proceeding and the category of witness testifying.

6.1 Notifying Witnesses and Targets of Their Rights and Status

This section discusses formal and uniform procedures to ensure that all grand jury witnesses have adequate knowledge concerning their rights, the purpose of their testimony, and their status before the grand jury. Currently, there is very little regulation in this area and the procedures used vary from jurisdiction to jurisdiction and sometimes from prosecutor to prosecutor. The result is considerable variance in the timing and content of the notice given to witnesses.

In its Model Grand Jury Act, the ABA suggests that a minimum of 72 hours notice be given on a subpoena unless the court finds special need for less notice. This advance notice would allow witnesses to prepare their testimony and seek legal advice if they wish. The Model Act also requires that the subpoena inform witnesses of the following legal rights:

(a) the general subject matter of the grand jury investigation;

(b) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpoena;

(c) the fact that anything the witness says or any evidence given by him to the grand jury may be used against him in a court of law;

(d) the witness' privilege against self-incrimination;

(e) the witness' right to the advice of an attorney who may be present with him as provided in Section 201(a) [of the Model Act] while testimony or other information is being elicited by the grand jury.[17]

In addition, Section 201 of the Model Act requires that the notice of rights be repeated prior to the commencement of testimony. At that time, the witness also would be advised whether he or she was under investigation or an actual target of the grand jury.

The following section of the U.S. Attorneys' Manual closely parallels the recommendations set forth by the ABA's Section of Criminal Justice.

> Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department that an "Advice of Rights" form, as set forth below, be appended to all grand jury subpoenas to advise [federal] grand jury witnesses of the following:
>
> Advice of Rights
>
> 1. The Grand Jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of the inquiry, e.g., the conducting of an illegal gambling business in violation of 18 USC 1955);
>
> 2. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you;
>
> 3. Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding;
>
> 4. If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.
>
> In addition, these "warnings" should be given by the prosecutor on the record before the grand jury when necessary and appropriate (e.g., when [the] witness has not been subpoenaed), and the witness should be asked to affirm that the witness understands them.
>
> Moreover, although the Court in United States v Washington, . . ., held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s) in danger of indictment," we will continue the long-standing internal practice of the Department to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of federal criminal law. This supplemental "warning" will be administered on the record when the target witness is advised of the matters discussed in the preceding paragraph.[18]

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The Manual also encourages the prosecutor to notify targets who are not called to testify of their target status and to afford them an opportunity to testify. This notice is not necessary if it poses danger to the investigation or raises the risk of flight, delay or other harm.

Under certain circumstances, notice to a witness is superfluous since the witness is cooperating and/or already knowledgeable about the inquiry and his rights. In some jurisdictions it may be standard practice to schedule grand jury appearances of law enforcement officers informally, in which case no subpoena is issued. A requirement of formal notice might be unduly burdensome in either of these circumstances. The U.S. Attorneys' Manual allows federal prosecutors to use their own discretion in using the "advice of rights" form when the subpoenaed witness represents one of the following categories: 1) the victim of a crime; 2) a federal or state law enforcement or investigative agent who will be testifying about his investigations into criminal activity; 3) a custodian of records responsible only for producing specific records and not testifying about their contents; and 4) a person who may or may not be a target and who is subpoenaed only to produce something not subject to the privilege against self-incrimination, such as a handwriting or other exemplar or physical evidence like a blood or hair sample.[19]

The extent to which the states studied in this research have adopted provisions requiring notice to witnesses and/or targets varies considerably as does the required content of any notice. Specific examples of different requirements are discussed below.

The state of Colorado has formalized the provision of notice to all witnesses far more than any other of the six jurisdictions visited, but still retains the element of prosecutorial discretion. The 1977 grand jury reform statute provides that:

> At the option of the prosecuting attorney, a grand jury subpoena may contain an advisement of rights. If the prosecuting attorney determines that an advisement is necessary, the grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:
>
> 1. You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.
>
> 2. Anything you say to the grand jury may be used against you in a court of law.
>
> 3. You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.
>
> 4. If you cannot afford or obtain an attorney, you may consult with the public defender's office, or request the court to appoint an attorney to represent you.[20]

The statute goes on to provide for complete immunity from prosecution for any witness who testifies without first being advised of the legal rights enumerated in the statute. Therefore, although the law allows the prosecutor the option of including the notice on the subpoena, the penalty for failure to advise a witness of his rights is so severe that most prosecutors exercise considerable care to see that all witnesses are advised of their rights. One prosecutor interviewed during this study indicated that all subpoenas issued at the direction of his office contained the exact language used in the statute.

New Mexico requires a minimum of 36 hours notice prior to the witness' scheduled appearance. However, flexibility is incorporated into the system through a provision allowing a judge to waive the minimum time limit.

A number of prosecutors have informally adopted practices which are designed to provide information to witnesses regarding their legal rights. Although not required by law, some prosecutors routinely give the Miranda warnings to grand jury witnesses. In Massachusetts, prosecutors in one office include with the subpoena the state statute permitting counsel in the grand jury room.[21] Another office in Massachusetts includes with the subpoena a notice informing witnesses of their right to counsel and to have counsel appointed if they are indigent, but also indicating that the unavailability of counsel is not grounds for refusing to appear.

Some states restrict the notice requirement to target witnesses. Provision of notice to the target of a grand jury investigation raises a number of sensitive issues. There are risks to society if a potential indictee flees after being informed of his status or takes other steps to thwart prosecution, including harassing or threatening witnesses against him. Another potential risk is that evidence will be destroyed or testimony orchestrated.

Two states, South Dakota and New Mexico, have codified the requirements under which notice is given to a prospective defendant. New Mexico law requires that all targets be notified of their status and given the opportunity to testify unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person.[22]

Defense attorneys in New Mexico have challenged the sufficiency of the notice used by some prosecutors, but no specific procedures or forms have been dictated by the courts. In one county the prosecutors provide a written notice to the target either at arrest or, more typically, at arraignment in lower court. If no arrest has occurred, the notice is mailed with a specified time

and place for the target's appearance. Notices that are hand delivered do not indicate any specific date or location for the testimony to occur. An example of the latter type of notice which is reproduced on plain paper with no letterhead identification or any reference to the individual receiving the form follows:

NOTICE

> You are hereby notified, pursuant to 31-6-11 NMSA 1978 Comp., as amended, that you are a target of a grand jury investigation and that you have the right to testify at the grand jury hearing to be held within the next ten days if you so desire. If you desire to testify at the grand jury hearing, or if you desire to have any other information with regard to that hearing, please telephone the District Attorney's Office at [phone number] and ask to speak to someone in the Screening Division. This is the only notice that you will receive regarding the grand jury hearing in your case, and therefore if you desire to know more about the grand jury hearing, you must call the District Attorney's Office.

In South Dakota the target of a grand jury investigation may be given the opportunity to testify at the discretion of either the grand jury or the prosecutor, but the target must waive immunity. If the opportunity to testify is made available and the target chooses to take advantage of that opportunity, South Dakota law provides certain protections:

> Before testifying or providing other evidence at any proceeding before a grand jury impaneled before a circuit court, the subject of the grand jury investigation shall be given adequate and reasonable notice of:
>
> (1) His right to counsel . . . ;
>
> (2) His privilege against self-incrimination;
>
> (3) The fact that anything he says can and will be used against him in a court of law; and
>
> (4) The fact that if he cannot afford an attorney, an attorney will be appointed by the court for him.[23]

Unless a target is to be offered the chance to testify, there is no affirmative statutory requirement that he be informed of his status. During the meetings and hearings conducted in 1977 and 1978 as part of the process of revising the entire state law governing criminal procedure, the legislature considered the possibility of enacting the ABA principle requiring that all

targets be notified of their status. This suggestion was rejected, however, as being too far reaching.

Although the ABA principles suggest that the subpoena should outline the general area of inquiry or the relevant statute being considered, none of the states visited had enacted such a provision. Prosecutors expressed hesitation in implementing a procedure of this nature, believing that the risks would far outweigh the benefits. Their greatest fear was that witnesses would use the information to falsify their testimony. The ABA's argument is that such a provision would allow the courts more accurately to resolve challenges to subpoenas on the basis of relevancy. Another concern raised about a provision of this type is that an indictment could be subject to challenge if its focus differed from that specified on the notice. In response, the ABA revised its principle and specifically stated that an indictment would not be subject to dismissal on those grounds.

Prosecutors indicated that they do disclose the focus of any inquiry in selected circumstances. In one county in New York, witnesses waiving their right to immunity sign a document which indicates the purpose of the investigation being conducted. Another example involved a prosecutor in South Dakota who made a public announcement that an ongoing investigation was directed towards identifying and correcting improper practices in city government and not on determining the criminal culpability of individuals who had already been identified as witnesses by the media. In this instance, disclosure was used to protect the reputations of the witnesses. Such disclosures are the exception, however, not general practice.

6.2 Right to Counsel Before the Grand Jury

As noted earlier, the issue of the right to counsel before the grand jury has generated a great deal of controversy. The focus of this concern is not merely access to an attorney but the actual presence of counsel for a witness in the grand jury room. Although the right to leave the grand jury room to confer with an attorney who is waiting outside is not formalized in all jurisdictions, such a procedure has been widely implemented in many jurisdictions through local practice.

The debate on the right to counsel in the grand jury room has centered not only on the right itself but also on the questions of who should have that right and what the role of counsel should involve. Following a policy first articulated in 1975, the ABA recommended that counsel be permitted into the grand jury room as the first of its 30 principles for grand jury reform. The principle states:

> Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.[24]

The Model Grand Jury Act further defines the role of the witness' attorney. The Model Act states that "counsel shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. Such counsel is authorized to disclose matters which occur before the grand jury to the same extent as is permitted to the client."[25]

In the federal system, witnesses do not have the right to be accompanied by counsel inside the grand jury room. The U.S. Attorneys' Manual specifies that "[i]t is the practice, however, for the witness to be permitted to leave the grand jury room from time to time, as reasonable, in order to consult with his counsel."[26]

As seen in Figure 6.1, 15 states have implemented some form of the right to counsel inside the grand jury room--six states have created that right only for specific categories of witnesses; two states allow the right to counsel only before investigative grand juries; and seven states provide all witnesses with the right to counsel before the grand jury.

Of the six states visited in the development of this Monograph, all except California have enacted a version of right to counsel before the grand jury. (It should be noted that the existence of the right to counsel was an important element in the site selection decision.) Two of these states--Colorado and New York--explicitly provide for appointed counsel for indigent grand jury witnesses. The laws of three of the states visited--Colorado, New York, and South Dakota--permit the expulsion of counsel from the grand jury room for disruptive behavior. The laws and experiences related to the right to counsel of the five states visited are detailed in the case studies which follow. In each state, the perceptions of respondents must be considered in the context of how recently the legislation was enacted, the extent to which the grand jury is used for case screening and/or investigation, and the interaction of the provision regarding right to counsel with other laws or rules. In general, all five states reported that the provision for right to counsel had little effect on the screening grand jury, since targets or

defendants (the type of witness most likely to feel the need for counsel) rarely appear before this type of grand jury, although the right to counsel is not limited to the type of grand jury proceeding (either screening or investigative). Therefore, even states with broad statutory provisions have fairly limited experience with the right to counsel.

Figure 6.1

PROVISIONS GOVERNING RIGHT TO COUNSEL IN THE GRAND JURY

TYPE OF REVISION	STATES
All witnesses have the right to counsel	Colorado, Illinois, Kansas, Massachusetts, Oklahoma, South Dakota, Wisconsin
Only target witnesses have the right to counsel	Arizona, New Mexico
Only those witnesses who have been granted immunity have the right to counsel	Michigan
Only those witnesses who have waived their right to immunity have the right to counsel	Minnesota, New York
All witnesses have the right to counsel except those testifying under a grant of immunity	Washington
The right to counsel applies only before investigative grand juries which do not have the power to return indictments	Pennsylvania, Virginia

Colorado

Even before the right to counsel was codified in Colorado, attorneys for witnesses had been allowed into the grand jury room through local practice in Denver County for a number of years. In 1977, a comprehensive grand jury reform statute was enacted and contained a provision granting the right to counsel to all grand jury witnesses. This provision, which is one of the more detailed and wide-ranging laws of this type, states:

> Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury, and counsel may be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an in camera hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.[27]

In addition to extending the right to counsel to all witnesses before the grand jury, the Colorado legislation also provides for the appointment of counsel for indigent witnesses, an area in which some other states have remained silent. The law in Colorado provides two measures to curtail the occurrence of breaches of secrecy: 1) attorneys are obligated to take an oath of secrecy; and 2) there is a prohibition against multiple representation unless grand jury permission has been obtained.[28] The State Supreme Court has upheld a grand jury veto of multiple representation.

Prosecutors in Colorado who were interviewed for this project indicated that there have been no difficulties arising from the presence of counsel either when it occurred as a matter of local practice, or after the 1977 legislation. Since the grand jury is rarely used for screening, and it does not have a large investigative caseload, experience in this state is somewhat limited, however. Prosecutors reported that witnesses appear more comfortable when accompanied by counsel and although they are permitted to leave the grand jury room with their attorney to confer in a more private

location, none have done so to date. Although prosecutors reported that they occasionally were asked to reschedule an appearance because of a scheduling conflict, they believed that these requests have been accommodated without detriment to the prosecution or the grand jury.

A judge who has had occasion to review grand jury transcripts indicated that the testimony of witnesses appearing with counsel was better prepared and presented more meaningful information. Another judge indicated that he had been required in one or two instances to mediate a dispute between the prosecutor and a witness' attorney on the way in which counsel was advising the witness, but that such occurrences were very rare. Since the types of witnesses appearing with counsel are not limited to those under investigation, but include bank officials and police officers as well, respondents believed that there was no prejudicial effect in the eyes of the grand jury.

From the perspective of the defense attorneys involved, the provision has had very little impact. A private defense attorney reported that few attorneys had taken the opportunity to enter the grand jury room during testimony because of the required oath of secrecy. By remaining outside the grand jury room, counsel is under no such restrictions and is free to discuss the case with the attorneys representing co-defendants and to plan a common strategy.

When discussing setting limits on the role of counsel, respondents in Colorado repeated the common concern that any increase in the involvement of counsel beyond advising the witness would turn the proceeding into a mini-trial and would necessitate the continuous presence of a judge. If such were the case, respondents indicated that it would be more appropriate to utilize the preliminary hearing and avoid the cost and time involved in convening a grand jury.

Massachusetts

Legislation was enacted in Massachusetts in 1977 to allow counsel to accompany witnesses into the grand jury room. The relevant statute provides that:

> Any person shall have the right to consult with counsel and to have counsel present at every step of any criminal proceeding at which such person is present, including the presentation of evidence, questioning, or examination before the grand jury; provided, however, that such counsel in a proceeding before a grand jury shall make no objections or arguments or otherwise address the grand jury or the district attorney. No witness may refuse to appear for reason of unavailability of counsel for that witness.[29]

Respondents in Massachusetts indicated that counsel accompanied witnesses before the grand jury more often than was suggested by prosecutors in Colorado. Nevertheless, the perceived impact of the presence of counsel was very similar to that in Colorado. Observers in Massachusetts reported that for the most part there have been no problems and that the presence of counsel had not hindered the functioning of the grand jury. One prosecutor suggested that the policy did not necessarily improve the integrity of the grand jury system as a whole, since the presence of counsel is limited to the time during which his client is testifying. The only impact of the new law perceived by this prosecutor was the avoidance of continual entrances and exits by the witness.

In general, the perception of the respondents interviewed in Massachusetts is that there have been few if any attempts by attorneys for grand jury witnesses to exceed the limits of their role. An unanswered question is whether the prosecutor has the authority to evict the attorney for any violation of the statutory parameters, although a defense attorney who raised the issue felt such authority did exist. A technique used by one prosecutor to forestall any questions concerning the role of counsel is to read the statutory provision when the witness and his counsel appear for the scheduled testimony.

Under both the Colorado and Massachusetts statutes, all witnesses are permitted to be joined by their attorney during their testimony. Unlike the Colorado law, however, Massachusetts has no statutory provision covering the appointment of an attorney for an indigent witness. When necessary, attorneys have been appointed to represent indigent witnesses by the judge supervising the grand jury. The issue of indigent witnesses rarely arises, however. When the grand jury is acting in an accusatory capacity, the prosecutor generally presents only the minimum amount of evidence required (usually the police report since hearsay is admissible). Moreover, in an investigatory grand jury, which typically focuses on white collar crime or political corruption, the majority of witnesses are generally able to afford their own attorney. This situation is typical for all jurisdictions visited.

The Massachusetts law requiring a witness to appear even if counsel is unavailable was designed to address the concern that provisions conferring the right to counsel would lead to delay of grand jury proceedings. This issue has not arisen with any frequency in Massachusetts, although a few requests that an appearance be rescheduled have been handled informally.

New Mexico

New Mexico recently adopted legislation expanding the role of counsel in grand jury proceedings as part of a comprehensive grand jury reform effort.

The legislation, enacted in 1979, addressed all facets of the grand jury and was modeled on the ABA's principles for grand jury reform.

While the ABA principles urge that all witnesses should be allowed to have an attorney present, the New Mexico statute limits that right to witnesses who are targets of the grand jury's probe. If a target witness exercises his right to an attorney, the statute specifies that "the attorney may be present only while the target witness is testifying and may advise the witness, but may not speak so that he can be heard by the grand jurors or otherwise participate in the proceedings."[30]

The Judicial Council of New Mexico, a statutory organization which provided the major impetus for the new grand jury act, originally recommended a broader right to counsel than was ultimately adopted. As initially proposed, the legislation would have accorded all witnesses the right to appear before the grand jury with counsel. Opposition to this provision came primarily from those prosecutors who believed that enactment of the right to counsel for all grand jury witnesses would have led to increased delay and additional costs for appointed counsel. The statute which was ultimately enacted reflected a compromise under which only target witnesses could appear with counsel.

The role of counsel for target witnesses is also specifically limited by the 1979 legislation. The intent of the provision was to allow the attorney to advise the witness of his rights against self-incrimination under the Fifth Amendment, not to allow counsel to object to questions on the grounds of irrelevance or immateriality. In the first nine months under the new law there were no known attempts to challenge or exceed the limitations placed on witnesses' attorneys.

There has been little opportunity for those involved with grand juries in New Mexico to observe the impact of the reforms because of the short period of time for which the new statute has been in effect. Although there has not been time to assess the Act formally or empirically, respondents reported their initial reaction as positive.

New York

In New York, under legislation enacted in September, 1978, the right to counsel before the grand jury is restricted to a narrow category of witnesses--those who have waived their right to immunity. The relevant statute provides that:

1. Any person who appears as a witness and has signed a waiver of immunity in a grand jury proceeding, has a right to an attorney as provided in this section. Such a witness may appear with a retained attorney, or if he is financially unable to obtain counsel, an attorney who shall be assigned by the superior court which impaneled the grand jury. Such assigned attorney shall be assigned pursuant to the same plan and in the same manner as counsel are provided to persons charged with crime.

2. The attorney for such witness may be present with the witness in the grand jury room. The attorney may advise the witness, but may not otherwise take any part in the proceeding.

3. The superior court which impaneled the grand jury shall have the same power to remove an attorney from the grand jury room as such court has with respect to an attorney in a courtroom.[31]

New York's unique provision for automatic transactional immunity[32] affects the issue of right to counsel in several ways. For those witnesses who appear before the grand jury and receive immunity from prosecution, there is no danger of self-incrimination and, therefore, one of the major reasons for an attorney's presence--advising a witness to avoid self-incrimination--no longer exists. In practical terms, automatic transactional immunity restricts the prosecutor's flexibility regarding which witnesses to call since any potential target will be unindictable if he testifies without waiving immunity. From the defense point of view, waiving immunity is potentially very dangerous and is done only in special circumstances.

With these factors at work, the right to counsel before the grand jury is rarely exercised in New York. However, there are situations in which a witness will testify without immunity--generally those where an investigatory grand jury is probing white collar or organized crime or political corruption. Before testimony is given without immunity, a waiver must be obtained using a process designed to safeguard the rights of the witness. One option used by prosecutors when requesting a waiver involves a stenographic record of the witness' oral waiver of immunity which takes place outside the hearing of the grand jury. Additionally, a written "Waiver of Privilege and Immunity" is executed. This document details the subject matter of the investigation; a definition of automatic, transactional immunity; the implication of a waiver of immunity; and the witness' right to counsel before executing the waiver and during his testimony.

Generally, response to the right to counsel in New York is mixed, with both positive and negative experiences cited. Since a variety of other safeguards

have been incorporated into the New York grand jury system, some respondents raised the issue of whether such a limited right to counsel has any real benefit for the witness compared to the protections offered through other procedures.[33] Moreover, some fear that the presence of counsel is prejudicial in and of itself. On occasion, prosecutors report that they attempt to negate this prejudicial effect by explaining to the grand jury the purpose of allowing a witness to have an attorney present while testifying.

Some respondents reported that the law providing the right to counsel before the grand jury needs clarification, since the precise limitations on the defense attorney's powers are subject to individual interpretation. One issue is whether the counsel may take notes during the testimony. Another quite controversial issue concerns whether the attorney has the power to object to a question put to a grand jury witness and, if so, what the prosecutor's response should be. In some instances, a prosecutor simply withdraws a disputed question, while in other circumstances the prosecutor and the attorney for the witness will confer privately and attempt to reach an agreement regarding the form and content of the question. Alternatively, the prosecutor may initiate a hearing before the judge who will then decide on whether the question must be answered.

For the most part, there have been no delays or confusion caused by the right to counsel, although apprehension regarding these consequences remains. Prosecutors attribute the lack of disruption in those few cases in which counsel is involved to two factors: (1) clarification by the prosecutor of the attorney's role for the benefit of the grand jury; and (2) concern on the part of the attorney that any display of aggressiveness may prejudice the grand jury against his client.

South Dakota

In 1972, South Dakota accorded the right to counsel to grand jury witnesses. The statute enacted at that time did not specify the role of counsel nor did it provide any mechanism for the removal of an attorney from the grand jury room. During the revision of the state's code of criminal procedure in 1978, these issues were addressed in new grand jury legislation. The law in South Dakota currently provides that:

> [T]he witness under examination and his counsel . . . may be present when the grand jury is in session . . . the role of counsel appearing with a witness shall be limited to advising the witness . . .[34]

In addition to providing the right to counsel, the 1978 statutes instituted the following procedures in an attempt to ensure that the grand jury process was not harmed by the introduction of counsel.

> The court shall have the power to remove a witness' attorney and order the witness to obtain new counsel, when it finds that the attorney has violated [Section] 23A-5-11 or that such removal and replacement is necessary to ensure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this section shall affect the power of the court to punish for contempt or impose other appropriate sanctions.[35]

The general reaction to the right to counsel in South Dakota followed the pattern observed in other jurisdictions. For the most part, prosecutors and private attorneys alike indicated that no significant problems had arisen from exercise of the right to counsel.

The fact that there has been little negative reaction to the presence of counsel in the grand jury room may be due to a number of factors. Targets or potential targets of an investigation are subpoenaed to testify relatively infrequently, thus reducing the opportunity or cause for disagreement between the prosecutor and the attorney for a witness. In some instances where the prosecutor and attorney have differed over the role of counsel, the issue has been raised informally before a judge. Minor disagreements have been resolved in this fashion before they developed into major conflicts.

Sometimes the need for counsel becomes apparent in the course of testimony. One prosecutor when faced with this situation would ask the foreman of the grand jury to advise the witness of his rights. The appearance of that witness was then postponed for a specified period of time so that he could obtain counsel. In one instance in which this occurred, the witness was indigent and requested that an attorney be appointed. Although the South Dakota statute does not specifically authorize appointed counsel for grand jury witnesses, the prosecutor brought the witness before a judge and counsel was appointed.

6.3 Multiple Representation

An area of concern in many jurisdictions is the representation of several witnesses by a single attorney. Multiple representation poses potential harm to both the interests of individual witnesses and the interests of the system in maintaining the secrecy of the grand jury and the integrity of the evidence obtained. Although the potential for harm from multiple representation exists whether the attorney is present outside or inside the grand jury room, the problems are perceived to be far greater when the attorney has the opportunity to hear the questions and answers directly.

Situations that are most likely to involve multiple representation (and are the most difficult to circumvent) are those in which the activities of several individuals within an organization or closely-knit group are under investigation. Examples might include probes that focus on the treatment of a suspect in the custody of police, on the purchasing practices of a city department, or on a conspiracy involving organized crime figures. When a union, government agency or a business is under investigation, it is not unusual for the attorney on retainer to the union, agency, or the corporation to represent all witnesses employed by the organization. A similar situation sometimes arises when a single attorney simultaneously represents several individuals suspected of organized criminal activity. In such circumstances, it is possible that the attorney is expected to provide maximum protection for the persons in management or leadership position in the agency to the detriment of the witnesses who are lower in the organizational structure. The criminal justice system suffers when an investigation is orchestrated in this fashion, if certain suspects are shielded, witnesses intimidated, or evidence withheld.

Among our respondents, a number of prosecutors indicated support for legislation prohibiting multiple representation. However, such a prohibition might result in a serious financial burden for the individuals involved. Furthermore, it might represent an undue hardship, if, for example, a police officer testifying before a grand jury were precluded from using the services of an attorney hired by the patrolmen's association, only because another officer was also going to testify. Sample states have dealt with the issue of multiple representation in various ways.

The law in New York, where multiple representation is a strong concern given the nature of many grand jury investigations, does not restrict multiple representation. Some prosecutors, however, have adopted strategies to prevent it when an investigation is threatened. For example, a prosecutor may ask the court to explain to the witness the possible conflict of interest under which his attorney is operating, or to appoint another attorney to so advise the witness, in the hope that the witness will terminate the multiple representation himself by obtaining alternate counsel. However, this result is unlikely due (at least partially) to the pressure placed on the witness by the organization hiring the attorney. An alternative solution, which has been successfully used, requires the prosecutor to persuade the court of the impropriety of the multiple representation and to convince the court to remove the attorney from the case.

Some states have prohibited multiple representation legislatively. As noted earlier, in Colorado it can take place only with the permission of the grand jury. The authority of the grand jury to veto multiple representation has been upheld by appellate review.

New Mexico has also acted to avoid this aspect of right to counsel before the grand jury. In the grand jury reform statute of 1979, it was provided that:

> A lawyer or lawyers who are associated in practice shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his own choosing.[36]

6.4 Summary

A key component of efforts to change grand jury procedure involves the development of procedures to guarantee the rights of witnesses and targets before the grand jury. The main elements of this type of reform are the provision of notice regarding legal rights to witnesses and targets and procedures for facilitating the witness' access to legal advice. The key provisions are summarized below.

Notification of Legal Rights and Status

The practice of notifying grand jury witnesses of their legal rights at the time they are subpoenaed is generally encouraged by both the American Bar Association and the Department of Justice. Both also advocate that notice be given immediately before testimony commences. Notifying targets of their status is a matter of practice by federal prosecutors and is recommended by the ABA if it is not likely to pose risks to society or the case being developed. The ABA and the Department of Justice further suggest that the subject matter of the inquiry be incorporated into the notice given to witnesses. New Mexico's law closely parallels the ABA policy regarding notice to targets whereas in other states notice is either discretionary or informal.

Right to Counsel in the Grand Jury Room

Perhaps the most controversial reform proposal, the right to counsel in the grand jury room remains the most significant issue on which the Department of Justice and the

ABA disagree. The ABA advocates that all witnesses should have the right to counsel before the grand jury. The Department of Justice urges that counsel be required to remain outside the grand jury room with the witness permitted to have reasonable access for consultation. Nationally, 15 states have adopted the right to counsel in the grand jury room, but differ on what type of witness has that right.

Procedures to Restrict Multiple Representation

Particularly in investigative grand juries, the issue of the right to counsel is linked with concern that representation of multiple witnesses by one attorney may be detrimental to the conduct of an investigation and possibly to the witnesses' interests. The ABA has proposed a role for the court in terminating instances of multiple representation when the need arises. New Mexico has adopted a similar provision, whereas Colorado has given the grand jury the power to approve or disapprove the multiple representation. In other states, the issue is handled on a case by case basis without statutory guidelines.

REFERENCES

Chapter 6

1. Hixson, "Bringing Down the Curtain on the Absurd Drama of Entrances and Exits--Witness Representation in the Grand Jury Room," 15 Am. Crim. L. Rev. 307 (1978).

2. Rodis, "A Lawyer's Guide to Grand Jury Abuse," 14 Crim. L. Bull. 123 (1978).

3. Hixson, "Bringing Down the Curtain," at 324.

4. See, for example, Hixson, "Bringing Down the Curtain;" "The Rights of a Witness Before the Grand Jury," 43 Mo. L. Rev. 714 (1978); and Fenster, "The Presence of Counsel in the Grand Jury Room," 47 Fordham L. Rev. 1138 (1979).

5. Fenster, "The Presence of Counsel in the Grand Jury Room."

6. Hixson, "Bringing Down the Curtain."

7. Miranda v. Arizona, 384 U.S. 437 (1966).

8. Hixson, "Bringing Down the Curtain," at 322.

9. Dash, "The Indicting Grand Jury: A Critical Stage?" 10 Am. Crim. L. Rev. 807 (1972).

10. Coleman v. Alabama, 399 U.S. 1 (1969).

11. Schneider, "The Grand Jury: Powers, Procedures, and Problems," 9 Colum. J. of L. and Soc. Prob. 681, 715 (1973).

12. United States v. Wade, 388 U.S. 218 (1967).

13. Fenster, "The Presence of Counsel in the Grand Jury Room."

14. United States v. Mandujano, 425 U.S. 564 (1976).

15. United States v. Washington, 431 U.S. 181 (1977).

16. See, for example, Keeney and Walsh, "The American Bar Association's Grand Jury Principles: A Critique from a Federal Criminal Justice Perspective," 14 Idaho L. Rev. 545 (1978); and Silbert, "Defense Counsel in the Grand Jury: The Answer to the White Collar Criminal's Prayers," 15 Am. Crim. L. Rev. 293 (1978).

REFERENCES

17. American Bar Association, Model Grand Jury Act, Section 200, 1982.

18. U.S. Attorneys' Manual, Section 9-11.250.

19. Ibid.

20. Colo. Rev. Stat. Section 16-5-204(4)(a) (1978).

21. The issue of right to counsel in the grand jury room is discussed in more detail in Section 6.2.

22. N. M. Stat. Ann. Section 31-6-11 (1979).

23. S.D. Compiled Laws Ann. Section 23A-5-13 (1979).

24. American Bar Association, "Policy on the Grand Jury," Principle 1.

25. American Bar Association, Model Grand Jury Act, Section 201, 1982.

26. U.S. Attorneys' Manual, Section 9-11.355.

27. Col. Rev. Stat. Section 16-5-204(4)(d) (1978).

28. The issue of multiple representation is an important topic in its own right and is discussed separately in Section 6.3.

29. Mass. Gen. Laws Ann., Chapter 277, Section 14A (West Supp. 1981-1982).

30. N.M. Stat. Ann. Section 31-6-4 (1979).

31. N.Y. Crim. Proc. Law Section 190.52 (McKinney Supp. 1981-1982).

32. Transactional immunity protects the witness from prosecution for any offenses that are part of the transaction which is the subject of his or her testimony.

33. These procedures include evidentiary standards, the requirement that the proceedings be recorded and judicial supervision, which are discussed in other sections of this report.

34. S.D. Compiled Laws Ann. Section 23A-5-11 (1979).

35. Ibid., Section 23A-5-14 (1979).

36. N.M. Stat. Ann. Section 31-6-14 (1979).

Chapter 7

CONCLUSION

Any jurisdiction contemplating change in its grand jury system will find literature either supporting or opposing various reform measures and assessing the anticipated impact of implementation. This document has attempted to discuss the major issues raised in this literature and related the arguments for and against specific reform proposals. What is not as readily available, however, is objective, empirical analysis of either modified or more traditional grand jury systems. As noted in this report, not only has there been little research of this type, but also the characteristics and experiences of each state are somewhat unique and may defy replication.

Although this Monograph is not able to provide policy guidelines for decisions concerning grand jury reform, it can suggest a few key issues that must be addressed by jurisdictions approaching such decisions. As noted throughout this document, there are several important considerations which must be balanced in defining the role and nature of the grand jury, and the extent to which change is needed. These issues are discussed below.

- Should the grand jury offer the same level of due process as the preliminary hearing?

The grand jury's screening functions are most often compared to those of the preliminary hearing. In states where both systems operate, the issues raised by the Hawkins[1] case in California may require an analysis of the varying levels of protection offered by each process. There are indications in the literature that there is as much inter-jurisdictional variation among preliminary hearing systems as there is among grand juries. For example, evidentiary standards, rules governing presentation of exculpatory evidence, and magistrates' qualifications vary widely. Therefore, it is important that these systems not be compared in theory, but only with respect to specific benefits offered by each in a given jurisdiction.

- How should the interests of fairness and efficiency be balanced?

A number of proposed grand jury reforms have been challenged as risking the transformation of the grand jury into an adversarial proceeding or a "mini-trial." Yet it is the criticism that the grand jury is too one-sided that has prompted some of the reform initiatives. One of the most sensitive aspects of deciding whether to implement any of the proposed grand jury modifications is balancing the anticipated due process benefits provided to witnesses and targets with the need to operate the system efficiently and effectively.

The elimination of hearsay, for example, may necessitate the appearance of several civilian witnesses, which may pose scheduling problems or necessitate a lengthy proceeding. Similarly, requiring experts to testify before the grand jury may have associated costs. On the other hand, respondents in sample sites report that the presence of counsel in the grand jury room has not resulted in the scheduling problems or disruption anticipated by some. In the final analyses, any jurisdiction faced with these decisions should consider the alternatives in the context of its own grand jury usage and its own definitions of due process and efficiency.

- What special issues arise concerning the impact of reform on investigative grand juries?

Some of the proposed reform measures may have particularly great impact on investigative grand juries. Reforms designed to safeguard the rights of targets are particularly relevant to investigative grand juries since such grand juries differ from the post-arrest screening grand jury where the defendant is already publicly identified and is apt to be at least partially aware of the evidence to be presented to the grand jury.

Providing targets with notice or the right to counsel raises a special concern in the context of the investigative grand jury where the target may not be known in advance. Similarly, requiring the prosecutor to specify the subject matter of an investigation may prove difficult since that also changes over time. Thus, each jurisdiction implementing reforms of this type must keep in mind the developing nature of grand jury investigations and the amount of flexibility reasonably required.

Two other issues are also frequently discussed in relation to the investigative grand jury--the need for secrecy and the problems posed by multiple representation. In jurisdictions which use the grand jury extensively for investigative purposes, implementing alternative procedures in these areas

requires special sensitivity to balancing the needs of the system and the individual.

- How do various proposed reforms interact?

Grand jury reform is composed of many individual elements which can be implemented individually or as a unit such as that contained in the ABA's Model Act. As a jurisdiction considers which elements it wishes to adapt to its system, it must consider the manner in which these elements interact. Figure 7.1 displays the major aspects of the provisions governing the introduction of evidence, the requirement of a record, and the right to counsel as proposed by the ABA, as implemented by the U.S. Attorneys' Manual, and as enacted in the six site-visited states. Some reforms may enhance the impact of other reforms. For example, the creation of a formal record of the proceedings is likely to be a prerequisite for judicial review. Similarly, a requirement that evidentiary standards be adhered to may have little impact without a system for monitoring compliance with that requirement. Provisions allowing a target to request to testify and those allowing counsel to be present in the grand jury room may be seen as complementary.

However, some reform measures may be countereffective or burdensome if implemented together. Measures to restrict leaks by punishing unauthorized disclosures may not easily be made compatible with procedures allowing greater access to the grand jury transcript. Moreover, a jurisdiction may consider that the benefits of a complete transcript outweigh the burden and the expense. Their assessment might be different, however, if hearsay were not admissible before the grand jury, thereby necessitating more witnesses and perhaps a longer proceeding.

These examples of the kinds of interactions between reform measures serve to illustrate the importance of analyzing the total effect of any proposed reforms. Similarly, the reform measures must be analyzed in light of other relevant laws of the jurisdiction including those governing the use of subpoena power and grants of immunity.

In summary, there is likely no prescribed package of reforms which is appropriate for every jurisdiction. Instead, each jurisdiction has to determine for itself which reforms are suitable in view of its philosophies and policies governing the grand jury. Once a jurisdiction has decided which approach to take, it is important that the system be continually monitored. In this way, the experiences with any modifications can be documented and the governing procedures or policies adjusted if needed.

Figure 7.1
Summary of Laws and Guidelines Governing Selected Grand Jury Procedures

TYPE OF PROVISION	SITE-VISITED STATES						AMERICAN BAR ASSOCIATION PRINCIPLE	U.S. ATTORNEYS' MANUAL
	California	Colorado	Massachusetts	New Mexico	New York	South Dakota		
Admissibility of evidence	Evidence admissible at trial	All relevant evidence	All relevant evidence	Evidence admissible at trial	Evidence admissible at trial except hearsay may replace scientific reports	Evidence admissible at trial	Prosecutor shall not knowingly present evidence constitutionally inadmissible at trial	Hearsay permitted
Right to introduce evidence or testify	None	Any person may request to testify	None	Target has the right to testify	Target has the right to testify but must waive right to immunity Target may suggest witnesses or evidence but grand jury not obligated to hear them	Target may testify at discretion of prosecutor and/or grand jury	Target has the right to testify but must waive right to immunity	Requests to testify normally allowed if right to immunity waived Request to introduce evidence left to discretion of grand jury
Requirements for recording grand jury proceedings	All testimony must be recorded	All proceedings must be recorded	None	All proceedings must be recorded	None	None	All proceedings must be recorded	All proceedings must be recorded
Restrictions on grand jury reports	Court review	Not publicized unless provides exoneration	None	Restrictions on purpose	Court review Restrictions on purpose Opportunity for subject to answer allegations	Court review	Court review Restrictions on purpose Opportunity for subject to move to expunge material	Supervisory review
Requirements for notice of rights to witnesses and targets	None	Notice of rights with subpoena is discretionary but automatic immunity if testimony given without notice	None	Targets must be notified of status with limited exceptions All witnesses must receive 36 hours notice before testifying unless waived by judge	None	If target is offered the opportunity to testify, must be notified of legal rights	All witnesses notified of rights Targets notified of status	Policy that all witnesses receive a notice of rights with the subpoena Targets notified of status
Right to counsel in the grand jury room	None	All witnesses	All witnesses	Target witnesses only	Only witnesses who have waived their right to immunity	All witnesses	All witnesses	None
Provision for appointed counsel for indigent witness in the grand jury room	Not applicable	Yes	None	None	Yes	None	None	Not applicable
Provision for court to eject disruptive counsel from the grand jury room	Not applicable	Yes	None	None	Yes	Yes	Yes	Not applicable

Source: Survey and analysis of state laws conducted by Abt Associates.

REFERENCES

Chapter 7

1. Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P. 2d 916 (1978).

APPENDIX A
American Bar Association Policy on the Grand Jury

AMERICAN BAR ASSOCIATION POLICY ON THE GRAND JURY

BASED ON PROPOSALS OF THE SECTION
OF CRIMINAL JUSTICE APPROVED BY
THE ABA HOUSE OF DELEGATES ON
AUGUST 9, 1977.

The American Bar Association supports grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowlingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice, or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits in camera a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held in camera.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena should not be basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

16. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion in camera by the trial court which convened the grand jury, under standards expressed in Principle number 17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any case.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgement on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

BASED ON PROPOSALS OF THE SECTION
OF CRIMINAL JUSTICE APPROVED BY
THE ABA HOUSE OF DELEGATES IN
AUGUST, 1980

26. No prosecutor shall call before the grand jury any witness who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination. However, the prosecutor may seek a grant of immunity or contest the right of the witness to assert the privilege against self-incrimination. In any such case, the prosecutor shall file under seal any motion to compel testimony or a witness who has indicated his refusal to testify in reliance upon his privilege against self-incrimination and any witness may file under seal any motion relating to or seeking to exercise or protect his right to refuse to testify. All proceedings held on such motions filed under seal shall be conducted in camera, unless the witness requests a public hearing.

27. The grand jury shall be informed as to the elements of the crimes considered by it.

28. No witness shall be found in contempt for refusal to testify before a grand jury unless (1) the witness is provided an opportunity to explain to the grand jury his refusal to testify; and (2) the grand jury thereafter recommends to the court that the witness be found in contempt.

BASED ON PROPOSALS OF THE SECTION
OF CRIMINAL JUSTICE APPROVED BY
THE ABA HOUSE OF DELEGATES IN
FEBRUARY, 1981

29. No attorney, his agent or employee, shall be questioned by the grand jury concerning matters he has learned in the legitimate investigation, preparation or representation of his client's cause or be subpoenaed to produce before the grand jury private notes, memoranda, and the like constituting his professional work product.

30. The grand jury should be provided separate voting forms for each defendant in a proposed indictment, and each count in an indictment should be the subject of a separate vote.

APPENDIX B
American Bar Association Model Grand Jury Act

ABA
MODEL GRAND JURY ACT
OF JANUARY, 1982

DEVELOPED BY THE AMERICAN BAR ASSOCIATION
SECTION OF CRIMINAL JUSTICE
1800 M STREET, NW
WASHINGTON, DC 20036
202/331-2260

NOTE: This Model Act was approved by the ABA House of Delegates in January 1982. Only the text of the Model Act constitutes ABA policy. The backup report is intended only for explanatory purposes.

DRAFT STATUTE §100: GRAND JURY; RULES OF EVIDENCE

The prosecutor should not present to the grand jury evidence against a target which he knows was obtained in violation of that target's constitutional rights.

DRAFT STATUTE §101: PROSECUTOR'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE TO THE GRAND JURY

1. If the prosecutor is aware of exculpatory evidence, that is, evidence which, if believed, tends to negate one of the material elements of the crime, he must disclose and if feasible present such evidence to the grand jury.

2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.

3. After arraignment upon an indictment, the court, upon motion of the defendant made within [30] days after the entry of a not guilty plea, may dismiss any indictment where the prosecutor knowingly failed to disclose exculpatory evidence of the type defined in section 1. The court should not dismiss an indictment because of the prosecutor's failure to disclose exculpatory evidence of the type defined in section 2 unless the court determines that such omitted exculpatory evidence was so compelling that indictment by the grand jury was not justified upon the evidence presented.

DRAFT STATUTE §102 -- RIGHTS OF THE TARGET OF A GRAND JURY INVESTIGATION

Except as hereinafter provided, the prosecutor shall advise a target of the grand jury either personally, through counsel, or at his last known address that:

1. he is a target of the grand jury investigation;
2. he shall be afforded a reasonable opportunity to testify before the grand jury, provided he signs a waiver of immunity; and
3. he has the right to present the prosecutor with exculpatory evidence; including the names and addresses of witnesses who possess exculpatory information.

Such notice need not be given if the prosecutor is unable with reasonable diligence to notify said person, or if the prosecutor demonstrates to the court in camera that there are reasonable grounds to believe that giving such notice would create an undue risk of danger to other persons, flight of the target or other obstruction of justice. Absent these circumstances justifying a failure to give notice, an indictment that issues without the notice required by this provision shall be dismissed.

DRAFT STATUTE §103: REPORTING OR RECORDING OF GRAND JURY PROCEEDINGS

Everthing which transpires before a grand jury, except for a grand jury's secret deliberations and voting and consultations between witnesses and their counsel, shall be on the record and shall be recorded electronically or reported stenographically.

DRAFT STATUTE §200 -- GRAND JURY SUBPOENA

1. Timely Notice -- Except where the court finds special need upon a showing by the prosecutor, no subpoena may require any witness to testify or produce under other information at a grand jury proceeding at any time before the expiration of a [72]-hour period following service of the subpoena, unless the witness consents to a shorter notice period.

2. Contents of Subpoena -- Subpoenas requiring any witness to testify or produce other information at any proceeding before a grand jury shall notify the witness of --

   (a) the general subject matter of the grand jury investigation:

   (b) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpoena;

   (c) the fact that anything the witness says or any evidence given by him to the grand jury may be used against him in a court of law;

   (d) the witness' privilege against self-incrimination;

   (e) the witness' right to the advice of an attorney who may be present with him as provided in §201(a) while testimony or other information is being elicited by the grand jury;

3. Subpoena Approval -- It shall not be necessary for the prosecutor to obtain grand jury approval for a grand jury subpoena

4. Return of Subpoenas -- A subpoena shall be returnable only when the grand jury is sitting.

5. Motion to Quash --

   (a) The court which issued a subpoena may take appropriate action with respect to any motion relating to, including any motion to quash, such subpoena made by a grand jury witness.

   (b) A motion relating to a subpoena may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before a grand jury.

(c) If a motion is made under this section at least two days before the day on which the person subpoenaed has been ordered to appear or books, records, or documents have been ordered to be produced, the appearance of such person, or the production of such documents, shall upon appropriate application, be stayed until the court has ruled on such motion.

(d) Upon motion, the court may quash a subpoena when it finds that --

(1) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure trial testimony or to secure other information in preparation for trial, regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment, provided that the grand jury shall not be restricted in investigating other potential offenses of the same or other defendants;

(2) a primary purpose of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure information for purposes other than investigation of criminal activity;

(3) the witness has not been advised of his rights, as specified in subsection (2);

(4) the evidence sought is not relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

(5) compliance with the subpoena would be unreasonable or oppressive;

(6) a primary purpose of the issuance of the subpoena is to harass the witness;

(7) the witness has given written notice that he intends to exercise his privilege against self-incrimination, unless a grant of immunity has been or is to be obtained or the court determines that the witness is not entitled to assert the privilege;

(8) the grand jury is inquiring into the same events that were under consideration by a grand jury which affirmatively refused to return an indictment based on such events unless there is additional, newly discovered evidence relevant to such inquiry or the court determines that it is in the interests of justice to permit reconsideration of the case.

DRAFT STATUTE §201 -- RIGHTS OF GRAND JURY WITNESSES

1. Counsel --

(a) A witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. Such counsel is authorized to disclose matters which occur before the grand jury to the same extent as is permitted to the client.

(b) If the court determines that counsel for a grand jury witness has violated Subsection (a), then the court may take such measures as are necessary to ensure compliance with this rule, including exclusion of the offending counsel from the grand jury room.

2. Witnesses' Rights -- Prior to being called into the grand jury room, all witnesses shall be informed of their rights as set forth in the notice provisions of §200(2), and in addition whether their own conduct is under investigation, including notice of whether they are a target of the investigation.

3. Availability of Statements and Grand Jury Transcripts --

(a) Any witness, who has previously testified before a grand jury, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the witness' prior testimony before said witness is required to testify again before the same or another grand jury considering matters relating to the witness' previous testimony. If such a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript shall be made available for inspection and copying not later than forty-eight hours before the witness is required to testify, unless, for cause shown, more time is required to prepare such a transcript. The disclosure requirement above shall not apply to the continuation of testimony interrupted by a routine recess of the grand jury.

(b) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the prosecution, the court shall permit the prosecution to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

4. Witness' Privilege Against Self-Incrimination --

(a) Assertion of privilege. Unless a grant of immunity has been or is going to be obtained, no prosecutor shall call before the grand jury any witness who has notified the prosecutor personally or through his attorney, within forty-eight hours prior to the scheduled time for his appearance, that he intends to invoke his privilege against self-incrimination. In the absence of such notification, the witness shall appear before the grand jury at the time and place specified in the subpoena.

(b) Opposition by the Prosecutor to availability of privilege. If the prosecutor contests the availability of the privilege under the circumstances, he shall file under a seal a motion to compel the witness to testify or give evidence. In such event, the court shall hold an in camera hearing, unless the witness requests a public hearing, to determine whether the witness must appear before the grand jury and assert his privilege against self-incrimination to specific questions asked by the grand jury.

DRAFT STATUTE §202: SCOPE OF WITNESS IMMUNITY

A witness giving evidence pursuant to an immunity order shall not be prosecuted, or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled under the order to give evidence, except that he shall not be exempt from prosecution for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order. If immunity is granted, a witness may not refuse to testify or give evidence on the basis of his privilege against self-incrimination.

DRAFT STATUTE §203: RECALCITRANT WITNESSES

1. (a) Whenever a witness in any proceeding before or ancillary to any grand jury appearance refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the prosecutor may apply to the court for an order directing the witness to show cause why the witness should not be held in contempt.

(b) After submission of such application, and a hearing, at which the witness is entitled to be represented by counsel, the court may, upon a finding that such refusal was without just cause, hold the witness in contempt and order the witness to be confined.

(c) No hearing under this subsection shall be held unless seventy-two hours' notice is given to the witness who has refused to comply with the court order, except that a witness may be given a shorter notice if the court, upon a showing of special need, so orders.

2. (a) Any confinement for refusal to comply with an order to testify or produce other information shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed 1 year. This subsection shall not prohibit confinement for longer than a year for criminal contempt for such refusal.

(b) No person confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events, may be again confined under this section, or for criminal contempt, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

3. Any person confined pursuant to this section may be admitted to bail or released in accordance with local procedures pending the determination of an appeal taken by him from the order of his confinement unless it affirmatively appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such an appeal.

DRAFT STATUTE §204: RIGHTS AND DUTIES OF GRAND JURY AND ATTORNEY FOR GOVERNMENT

1. Upon impanelment of each grand jury, the court shall properly instruct or charge the grand jury, and shall inform the grand jury inter alia of the following:

   (a) its duty to inquire into offenses against the criminal laws alleged to have been committed within the jurisdiction;

   (b) its independent right to call and interrogate witnesses;

   (c) its right to request the production of documents or other evidence; including exculpatory evidence;

   (d) the necessity of finding credible evidence of each material element of the crime or crimes charged before returning a true bill;

   (e) its right to have the prosecutor present it with draft indictments for less serious charges than those originally requested by the prosecutor;

   (f) the obligation of secrecy;

   (g) such other duties and rights as the court deems advisable.

2. (a) Any person, including a witness who has previously testified or produced books, records, or documents, may present the prosecutor with exculpatory evidence and request that it be disclosed to the grand jury, or request to appear personally before the grand jury to testify or present evidence to that body. The prosecutor shall promptly forward any request under this subsection to the grand jury and may make a recommendation as to such request;

   (b) the prosecutor shall keep a confidential record of all such requests and the action taken on each such request;

   (c) the grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the prosecutor. The grand jury may, upon an affirmative vote of a majority of its members, hear the testimony or consider the documents offered by, a person, under this subsection. If the grand jury decides not to hear the testimony or consider the documents offered, the prosecutor shall notify the person making such request, in writing, of the refusal.

3. The prosecutor shall not bring before the grand jury any witness who has given notice in compliance with section §201 (4)(a) that such witness intends to exercise his privilege against self-incrimination,

unless such witness has been given, or the prosecutor intends to seek, a grant of immunity or a court has determined that the witness must invoke the privilege in response to specific questions.

4. The prosecutor shall not initiate, and a grand jury shall not conduct, an inquiry into a transaction or transactions, event or events, if another grand jury has refused to return an indictment based on the same transaction or transactions, event or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered or that the interests of justice demand reconsideration.

5. The prosecutor shall not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

DRAFT STATUTE §205: UNINDICTED CO-CONSPIRATORS

The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

DRAFT STATUTE §206: GRAND JURY REPORTS

A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits in camera a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within 10 days of receipt of notice of such report. Hearings on such motions shall be held in camera.

The provisions which follow were initially proposed by the Section of Criminal Justice as part of the Draft Model Grand Jury Act but deleted prior to the adoption of the Model Act as official ABA policy by the House of Delegates.

DRAFT STATUTE §100: GRAND JURY; RULES OF EVIDENCE

2. The prosecutor shall present to the grand jury evidence admissible at trial on each of the material elements of the offense, absent some compelling necessity for use of evidence which is not admissible at trial, or unless the evidence falls within sections (3) or (4) below. Such necessity must be stated on the record at the time of its admission. The grand jury may receive evidence that would not be admissible at trial in the course of its investigatory activities if the grand jury is advised that it may not consider such hearsay evidence in support of an indictment. The fact that the grand jury considered evidence which would have been excluded at trial does not invalidate the indictment as long as the remaining competent evidence is legally sufficient to constitute probable cause as to each element of the crime; except in those cases where the nature, extent, and prejudicial effect of the incompetent evidence presented to the grand jury provides strong grounds for believing that the grand jury would not have indicted the defendant if it had only considered the legally admissible evidence presented to it.

3. Written or recorded reports or statements of experts concerning the results of physical or mental examinations or of scientific tests, experiments, or comparisons made in connection with a case which is the subject of a grand jury proceeding may be received as evidence in such grand jury proceeding.

4. A written or recorded statement, under oath, by a person attesting to one or more of the following matters may be presented to the grand jury as evidence of the facts stated herein:

(a) that person's ownership or possessory right to premises or property and the absence of any right of certain named individuals to enter, remain thereon, or use said premises or property;

(b) the value of property;

(c) that that person did not make or draft a certain written instrument.

(d) That the person is the custodian of certain documents, and that the entries contained therein were made at or near the time of the events therein memorialized by, or from information transmitted by, a person with knowledge of such events, if the documents were kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make such entries upon such documents;

(e) That the person is the custodian of certain documents of the type described in §100(4)(d); that he had made a careful inspection of said documents; and that specific matters are not included among the entries contained therein.

5. Nothing in subdivisions 2, 3, or 4 of this section shall be construed to limit the power of the grand jury to cause any person to be called as a witness where the grand jurors entertain doubts about the validity of that person's testimony.

DRAFT STATUTE §104: DISCLOSURE OF GRAND JURY TRANSCRIPT TO AN INDICTED DEFENDANT

1. A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and when appropriate and necessary copy a transcript or electronic recording of:

(a) the grand jury testimony of all witnesses to be called by the prosecution at trial.

(b) all statements to the grand jury by the court and the attorney for the Government relating to the defendant's case;

(c) all other grand jury testimony or evidence which the court may deem material to the defense.

2. Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

DRAFT STATUTE §105: MOTION TO DISMISS INDICTMENT ON GROUND OF INSUFFICIENCY OF GRAND JURY EVIDENCE

1. After arraignment upon an indictment, the court may upon motion of the defendant made within [30] days after receipt of the grand jury transcript or as the court otherwise provides, dismiss such indictment or any count thereof upon the ground that the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense.

2. The evidence presented to the grand jury is legally sufficient if, viewed in the light most favorable to the State, it would constitute probable cause as to each element of the crime. The court's review of the evidence shall be a review of the grand jury transcripts (either written or electronically recorded) and exhibits, without further testimony.

3. In evaluating the legal sufficiency of the evidence presented to the grand jury, the court can only consider evidence which would be admissible at trial except for hearsay testimony admitted under §100 (2)-(4). The fact that the grand jury considered evidence which would have been excluded at trial does not invalidate the indictment as long as the remaining competent evidence is legally sufficient to constitute probable cause as to each element of the crime; except in those cases where the nature, extent, and prejudicial effect of the incompetent evidence presented to the grand jury provides strong grounds for believing that the grand jury would not have indicted the defendant if it had only considered the legally admissible evidence presented to it.

4. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from a judgment of conviction following trial based upon legally sufficient evidence.

APPENDIX C

Table of Contents for Instructions Used at Impanelment of Los Angeles County Grand Jury

CHARGE TO GRAND JURY

including

GRAND JURY PROCEDURE

and

STATUTORY PROVISIONS

GRAND JURY OF LOS ANGELES COUNTY

IMPANELED AND SWORN

JULY 2, 1979

WILLIAM B. KEENE

SUPERVISING JUDGE, CRIMINAL DIVISION

SUPERIOR COURT

GRAND JURY CHARGE

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END