

ities in the selection and drawing of the grand jury ordinarily do not afford ground for challenging the array.⁸⁸ It has been held that a grand jury venire will be set aside only if there is fraud or if some irreparable injury has been caused by the selection process.⁸⁹

Statutes sometimes provide that a challenge to the array or panel may be interposed for certain causes.⁹⁰ Some statutes provide that a challenge to the array or panel may be interposed for certain enumerated causes only,⁹¹ and unless such statutes violate the constitution, they are controlling,⁹² and courts have no power to originate new and distinct grounds of challenge.⁹³

Formation or expression of opinion.

It has been held that it is not ground for challenge to the array that the grand jury, or a portion of its members, had formed an opinion as to the guilt of the one against whom a charge may be made.⁹⁴

§ 61. Individual Jurors

- a. In general
- b. Voir dire

a. In General

A challenge to the polls is a formal objection to one or more of the grand jurors.

Library References

Grand Jury ⇐18.

A challenge to the polls is a formal objection to one or more of the individual members of the grand jury panel.⁹⁵

It has been said that it is doubtful whether the right of challenge to the polls existed at common law.⁹⁶ Some authorities do not recognize the practice,⁹⁷ and some statutes prohibit it.⁹⁸ However, many authorities allow challenges to the polls⁹⁹ or challenges to individual grand jurors for cause.¹ The right has been held to arise under common law² or to be a constitutional right.³

Where the right to challenge the polls exists, individual grand jurors may be challenged where they lack the qualifications prescribed by law,⁴ and this is sometimes expressly declared by statute.⁵ Statutes sometimes expressly prohibit challenges on unenumerated grounds;⁶ and it has generally been held that the grounds enumerated by such statutes are exclusive even though the provisions thereof do not expressly so declare,⁷ although there is authority to the contrary.⁸ It has been held that a challenge may be based only on a lack of legal qualifications.⁹ Bias as a ground for disqualification or challenge is considered supra § 27.

drawn or summoned as provided by law, and was not ground to challenge grand jury.

Iowa—State v. Wellington, 264 N.W.2d 739.

88. La.—State v. Revere, App. 1 Cir., 572 So.2d 117, writ denied 581 So.2d 703.

N.C.—State v. Mallard, 114 S.E. 17, 184 N.C. 667.

89. La.—State v. Liner, 397 So.2d 506, concurred 406 So.2d 1312.

90. N.D.—State v. Fellows, 207 N.W. 477, 49 S.D. 481.

91. Cal.—People v. Simmons, 50 P. 844, 119 C. 1.

Miss.—Long v. State, 96 So. 740, 133 Miss. 33.

Mo.—State v. Richetti, 119 S.W.2d 330, 342 Mo. 1015—State v. Connell, 49 Mo. 282.

State v. Hoelscher, App., 267 S.W. 426—State v. Seidler, App., 267 S.W. 424.

N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

Tex.—Cantu v. State, 135 S.W.2d 705, 141 Tex.Cr. 99, certiorari denied 61 S.Ct. 617, 312 U.S. 689, 85 L.Ed. 1126.

92. N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

93. N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

94. Ill.—People v. Hammond, 191 N.E. 327, 357 Ill. 182.

95. Colo.—People ex rel. Bonfils v. District Court of Second Judicial District, 66 P. 1068, 29 Colo. 83.

96. Vt.—State v. Ward, 14 A. 187, 60 Vt. 142.

97. Vt.—State v. Ward, 14 A. 187, 60 Vt. 142.

98. Or.—State v. Carlson, 62 P. 1016, 39 Or. 19.

99. Fla.—State v. Lewis, 11 So.2d 337, 152 Fla. 178—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed 131 So. 147, 100 Fla. 373.

Mo.—State v. Richetti, 119 S.W.2d 330, 342 Mo. 1015.

Nev.—William J. Burns International Detective Agency v. Doyle, 208 P. 427, 46 Nev. 91, 26 A.L.R. 600.

1. Pa.—Commonwealth v. Millhouse, 386 A.2d 581, 255 Pa.Super. 206.

2. Pa.—Commonwealth v. Millhouse, 386 A.2d 581, 255 Pa.Super. 206.

3. Even in case of investigating grand jury

Pa.—Commonwealth v. Polof, 374 A.2d 1299, 248 Pa.Super. 26.

4. Ga.—Mize v. State, 69 S.E. 173, 135 Ga. 291.

5. N.J.—State v. Ruffu, 150 A. 249, 8 N.J.Misc. 392.

N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

6. U.S.—Gridley v. U.S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

Mo.—State v. Richetti, 119 S.W.2d 330, 342 Mo. 1015.

State v. Seidler, App., 267 S.W. 424.

Tex.—Staton v. State, 248 S.W. 356, 93 Tex.Cr. 356.

7. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed 131 So. 147, 100 Fla. 373—Oglesby v. State, 90 So. 825, 83 Fla. 132.

N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

8. Ind.—Merchon v. State, 51 Ind. 14.

9. D.C.—Khaalis v. U.S., App., 408 A.2d 313, certiorari denied Adam v. U.S., 100 S.Ct. 1059, 444 U.S. 1092, 62 L.Ed.2d 781.

The burden of proof is on the challenger.¹⁰ The presumption is that a grand juror is qualified and exercises sound judgment.¹¹ It is presumed that the grand jury is composed of persons having the qualifications required.¹²

The decision as to whether to overrule or sustain a challenge for cause is committed to the discretion of the court.¹³

Peremptory challenge.

A grand juror cannot be challenged peremptorily and without cause.¹⁴

Federal grand jury.

In the case of a federal grand jury, an individual juror may be challenged on the ground that the juror is not legally qualified.¹⁵ A motion to dismiss the indictment may be based on the lack of legal qualification of an individual juror, if not previously determined upon challenge.¹⁶

b. Voir Dire

In connection with an objection to individual grand jurors, it has been held that accused has no right to a voir dire, although there is authority to the contrary.

It has been held that on a challenge to the polls accused has the right to examine the grand jurors on their voir dire as to the alleged cause of challenge.¹⁷

However, it has also been held that there is no right to a voir dire.¹⁸ Thus, it has been held that there is no right to a voir dire concerning bias,¹⁹ at least in the absence of specific proof of prejudice or special circumstances.²⁰ Preindictment publicity justifies a voir dire only if it is so invidious as to cause vindictive and retributive feelings among members of the community.²¹ However, it has been held that a voir dire becomes essential when the potential for bias and prejudice is manifest.²²

A voir dire conducted by the government does not necessarily violate accused's rights.²³

§ 62. Persons Entitled to Object

At common law any person under prosecution for a crime may challenge the grand jury, and statute may authorize challenges to be made by particular persons.

Research Note

Whether accused may object to exclusion of group to which accused does not belong is treated supra § 19.

Library References

Grand Jury ⇨17, 18.

The rule as generally laid down is that, at common law, any person under prosecution for crime may, before he is indicted, for good cause challenge the array²⁴ or any person returned or placed on the grand jury²⁵ whether the person under prosecution is in prison or out on bail.²⁶

10. Fla.—Herman v. State, App., 396 So.2d 222, certiorari dismissed 402 So.2d 610, habeas corpus denied Herman v. Butterworth, 744 F.Supp. 1128, affirmed 929 F.2d 623.

Ohio—State v. Ross, 452 N.E.2d 339, 6 Ohio App.3d 25, 6 O.B.R. 76.

11. Fla.—Herman v. State, App., 396 So.2d 222, certiorari dismissed 402 So.2d 610, habeas corpus denied Herman v. Butterworth, 744 F.Supp. 1128, affirmed 929 F.2d 623.

12. Ohio—State v. Ross, 452 N.E.2d 339, 6 Ohio App.3d 25, 6 O.B.R. 76.

13. Ind.—Jones v. State, 385 N.E.2d 426, 270 Ind. 285.

14. D.C.—Whaalis v. U. S., App., 408 A.2d 313, certiorari denied Adam v. U.S., 100 S.Ct. 1059, 444 U.S. 1092, 62 L.Ed.2d 781.

Ind.—Jones v. State, 2 Blackf. 475.

15. Fed.Rules Cr.Proc., Rule 6(b)(1), 18 U.S.C.A.

16. Fed.Rules Cr.Proc., Rule 6(b)(2), 18 U.S.C.A.

17. Ga.—Justices of Inferior Court of Pike County v. Griffin & West Point Plank Road Co., 15 Ga. 39.

18. D.C.—Khaalis v. U.S., App., 408 A.2d 313, certiorari denied Adam v. U.S., 100 S.Ct. 1059, 444 U.S. 1092, 62 L.Ed.2d 781—Reed v. U.S., App., 383 A.2d 316, certiorari denied 99 S.Ct. 203, 439 U.S. 871, 58 L.Ed.2d 183.

Mich.—People v. Edmond, 273 N.W.2d 85, 86 Mich.App. 374.

Pa.—Brown v. Commonwealth, 76 Pa. 319.

After impaneling

Fla.—Porter v. State, 400 So.2d 5, appeal after remand 429 So.2d 293, certiorari denied 104 S.Ct. 202, 464 U.S. 865, 78 L.Ed.2d 176.

Postindictment interrogation

Defendant was not entitled to engage in postindictment interrogation of grand jury members.

Ariz.—State ex rel. Hastings v. Sult, 781 P.2d 590, 162 Ariz. 112.

19. U.S.—U.S. v. Grandison, C.A.4(Md.), 780 F.2d 425, certiorari granted and vacated Evans v. U.S., 107 S.Ct. 1269, 479 U.S. 1075, 94 L.Ed.2d 130, Kelly v. U.S., 107 S.Ct. 1270, 479 U.S. 1076, 94 L.Ed.2d 132 and 107 S.Ct. 1270, 479 U.S. 1076, 94 L.Ed.2d 131, on remand 721 F.Supp. 743, affirmed 885 F.2d 143, rehearing denied, certiorari denied 110 S.Ct. 2178, 495 U.S. 934, 109 L.Ed.2d 507.

In re Balistrieri, D.C.Wis., 503 F.Supp. 1112—Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

20. N.Y.—People v. Hussein, 568 N.Y.S.2d 296, 150 Misc.2d 119.

21. Fla.—Bundy v. State, 455 So.2d 330, certiorari denied 106 S.Ct. 1958, 476 U.S. 1109, 90 L.Ed.2d 366, stay granted Bundy v. Wainwright, 794 F.2d 1485.

22. Me.—State v. Barczak, 562 A.2d 140.

23. Fla.—Thompson v. State, 565 So.2d 1311.

24. Pa.—Commonwealth v. Brown, 28 Pa.Co. 529.

25. Ind.—Merchon v. State, 51 Ind. 14.

26. N.Y.—People v. Jewett, 3 Wend. 314.

It has even been said that a person wholly disinterested may, as *amicus curiae* suggest that a grand juror is disqualified.²⁷ However, according to some authorities, a court will not entertain a challenge at the instance of any other person than one under prosecution for an offense about to be submitted to a grand jury.²⁸ A mere witness lacks standing to challenge the composition of the grand jury.²⁹

Statutes frequently specify the persons who may challenge the grand jury or members thereof,³⁰ and it has been held that challenges may be made only by such persons as are specified by the statute.³¹

Prosecuting attorney.

The prosecuting attorney, it seems, has no right to interpose a challenge.³²

Federal grand jury.

In the case of a federal grand jury, the attorney for the government or a defendant who has been held to answer in the district court may challenge the array or an individual juror.³³ Persons entitled to challenge noncompliance with the Jury Selection and Service Act are treated *infra* § 65.

- 27. Mass.—*In re Tucker*, 8 Mass. 286.
- N.J.—*State v. Lang*, 68 A. 210, 75 N.J.L. 502, affirmed 28 S.Ct. 594, 209 U.S. 467, 52 L.Ed. 894.
- 28. Ind.—*Ross v. State*, 1 Blackf. 390.
- 29. Mont.—*Kelly v. Grand Jury of Lewis and Clark County*, 552 P.2d 1399, 170 Mont. 284.
- On constitutional grounds**
- U.S.—*Matter of Archuleta*, D.C.N.Y., 432 F.Supp. 583.
- 30. Fla.—*State v. Lewis*, 11 So.2d 337, 152 Fla. 178.
- 31. Mo.—*State v. Richetti*, 119 S.W.2d 330, 342 Mo. 1015.
- 32. Wash.—*State v. Ingels*, 104 P.2d 944, 4 Wash.2d 676, certiorari denied 61 S.Ct. 318, 311 U.S. 708, 85 L.Ed. 460.
- 33. Fed.Rules Cr.Proc., Rule 6(b)(1), 18 U.S.C.A.

Defendant must be held to answer

- Where petitioners were indicted by grand jury, indictment was dismissed and petitioners sought stay in all grand jury proceedings, mechanism for challenging array of jurors on grand jury had not been triggered in that magistrate had not yet held preliminary hearing in which petitioners were required to plead as to any offenses lodged against them.
- U.S.—*In re Grand Jury of Southern Dist. of Alabama*, D.C.Ala., 508 F.Supp. 1210.
 - 34. S.C.—*State v. Hann*, 12 S.E.2d 720, 196 S.C. 211.
 - 35. Ill.—*People v. Green*, 161 N.E. 83, 329 Ill. 576.
 - 36. N.Y.—*People v. McKay*, 18 Johns. 212.
 - 37. N.Y.—*People v. McKay*, 18 Johns. 212.

§ 63. Waiver in General

Accused may waive an objection that a grand juror is disqualified.

Library References

Grand Jury §19.

Where no fundamental requisite is involved,³⁴ accused may waive an objection that a grand juror is disqualified.³⁵

A challenge to the array should precede any challenges to the polls,³⁶ and the rule has been announced that at common law a challenge to the polls is a waiver of a challenge to the array.³⁷

§ 64. Time

An objection to the composition of the grand jury must be raised in a timely fashion.

Library References

Grand Jury §16-19.

An objection to the composition of the grand jury must be raised in a timely fashion³⁸ or it is waived.³⁹

It has been held that an objection must be raised at the earliest opportunity,⁴⁰ at the time of impaneling,⁴¹ before the grand jury has retired,⁴² before

- 38. U.S.—*Tennon v. Ricketts*, C.A.Ga., 574 F.2d 1243, certiorari denied 99 S.Ct. 874, 439 U.S. 1091, 59 L.Ed.2d 57, appeal after remand 642 F.2d 161, rehearing denied 647 F.2d 1123.
- Ill.—*People v. Lieber*, 192 N.E. 331, 357 Ill. 423—*People v. Hammond*, 191 N.E. 327, 357 Ill. 182.
- Tex.—*Acosta v. State*, App. 4 Dist., 640 S.W.2d 381, habeas corpus granted *Ex parte Acosta*, 672 S.W.2d 470.
- 39. Ga.—*Sullivan v. State*, 271 S.E.2d 823, 246 Ga. 426.
- La.—*State v. White*, 192 So. 345, 193 La. 775.
- Mo.—*State v. Richetti*, 119 S.W.2d 330, 342 Mo. 1015—*State v. Shawley*, 67 S.W.2d 74, 334 Mo. 352—*State v. Bobbst*, 190 S.W. 257, 269 Mo. 214.
- Tex.—*Bird v. State*, Cr.App., 692 S.W.2d 65, certiorari denied 106 S.Ct. 1238, 475 U.S. 1031, 89 L.Ed.2d 346, habeas corpus denied *Bird v. Collins*, 924 F.2d 67, rehearing denied, certiorari denied 111 S.Ct. 2819, 501 U.S. 1213, 115 L.Ed.2d 989.
- Garza v. State, App. 3 Dist., 695 S.W.2d 249, review refused.
- 40. U.S.—*Ratcliff v. Estelle*, C.A.Tex., 597 F.2d 474, certiorari denied 100 S.Ct. 143, 444 U.S. 868, 62 L.Ed.2d 93.
- Ga.—*Sullivan v. State*, 271 S.E.2d 823, 246 Ga. 426.
- Tex.—*Francis v. State*, App. 4 Dist., 636 S.W.2d 591.
- 41. Fla.—*State v. Lewis*, 11 So.2d 337, 152 Fla. 178.
- Ind.—*Porter v. State*, 391 N.E.2d 801, 271 Ind. 180.
- Iowa—*State v. Smith*, 193 N.W. 181.
- Mo.—*State ex rel. Graves v. Southern*, 124 S.W.2d 1176, 344 Mo. 14—*State v. Richetti*, 119 S.W.2d 330, 342 Mo. 1015—*State v. King*, 119 S.W.2d 277, 342 Mo. 975.
- Nev.—*William J. Burns International Detective Agency v. Doyle*, 208 P. 427, 46 Nev. 91, 26 A.L.R. 600.
- N.J.—*State v. Ruffu*, 150 A. 249, 8 N.J.Misc. 392.

the bill of indictment is submitted to the grand jury,⁴³ before the return of the indictment,⁴⁴ within a certain time after arraignment⁴⁵ or plea,⁴⁶ before trial,⁴⁷ or before verdict.⁴⁸

Time limitation rules must maintain a degree of guarded flexibility and adapt where good cause is shown and the interests of justice would be served.⁴⁹ A requirement that an objection be made at a particular time does not bar a subsequent objection where accused could not have raised the objection at such time,⁵⁰ as where accused had neither actual nor constructive notice of the alleged illegality.⁵¹ It has been held that accused must show both good cause and actual prejudice.⁵² The fact that accused fled the state does not justify relief from a time requirement.⁵³ Even where relief from a time requirement is proper, the objection must be raised at the earliest practical opportunity.⁵⁴

Even if a time requirement does not on its face raise an insuperable barrier to one making claim to federal rights, its application in a particular case may be improper in that it does not give a reasonable opportunity to raise a federal question.⁵⁵

Federal grand jury.

In the case of a federal grand jury, challenges shall be made before the administration of the oath to the jurors.⁵⁶ However, a motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge,⁵⁷ which motion is governed by the Jury Selection and Service Act, as discussed *infra* § 65. Pursuant to provisions of the Federal Rules of Criminal Procedure,⁵⁸ it has been held that objections to the composition of the grand jury must be raised prior to trial,⁵⁹ even in the case of a challenge on constitutional grounds.⁶⁰ However, the

Tex.—*Bird v. State*, Cr.App., 692 S.W.2d 65, certiorari denied 106 S.Ct. 1238, 475 U.S. 1031, 89 L.Ed.2d 346, habeas corpus denied *Bird v. Collins*, 924 F.2d 67, rehearing denied, certiorari denied 111 S.Ct. 2819, 501 U.S. 1213, 115 L.Ed.2d 989.

42. Dak.—*People v. Wintermute*, 46 N.W. 694, 1 Dak. 63.

43. Held for court

(1) Rule applies only to defendant held for court.

Pa.—*Commonwealth v. Millhouse*, 386 A.2d 581, 255 Pa.Super. 206.

(2) Defendant who has not had a preliminary hearing but is indicted on the recommendation of an investigating grand jury has not been held for court.

Pa.—*Commonwealth v. Millhouse*, 386 A.2d 581, 255 Pa.Super. 206.

44. U.S.—*Tennon v. Ricketts*, C.A.Ga., 574 F.2d 1243, certiorari denied 99 S.Ct. 874, 439 U.S. 1091, 59 L.Ed.2d 57, appeal after remand 642 F.2d 161, rehearing denied 647 F.2d 1123.

Ga.—*Clark v. State*, 338 S.E.2d 269, 255 Ga. 370.

N.J.—*State v. Ruffu*, 150 A. 249, 8 N.J.Misc. 392.

45. N.Y.—*People v. Davis*, 421 N.Y.S.2d 176, 101 Misc.2d 444.

46. Discretion

If motion challenging composition of grand jury is made prior to trial but more than 21 days after plea is entered, it is within sound discretion of trial justice to consider motion if it is filed within reasonable time after entrance of plea.

R.I.—*State v. Holland*, 430 A.2d 1263.

47. U.S.—*Wright v. Wainwright*, C.A.Fla., 537 F.2d 224.

Copeland v. State of Mississippi, D.C.Miss., 415 F.Supp. 1271.

Ala.—*Williams v. State*, 342 So.2d 1328.

D.C.—*Christian v. U.S.*, App., 394 A.2d 1, certiorari denied *Clark v. U.S.*, 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

Miss.—*Fermo v. State*, 370 So.2d 930.

Mo.—*State v. Wickizer*, App., 641 S.W.2d 849, appeal after remand 664 S.W.2d 582.

R.I.—*State v. Morin*, 422 A.2d 1255.

Tex.—*Connelly v. State*, 248 S.W. 340, 93 Tex.Cr. 295.

Acosta v. State, App. 4 Dist., 640 S.W.2d 381, habeas corpus granted *Ex parte Acosta*, 672 S.W.2d 470.

48. Fla.—*Porter v. State*, 478 So.2d 33.

49. N.J.—*State v. Porro*, 377 A.2d 950, 152 N.J.Super. 259, affirmed 385 A.2d 1258, 158 N.J.Super. 269, certiorari denied 99 S.Ct. 724, 439 U.S. 1047, 58 L.Ed.2d 706.

50. Fla.—*State v. Lewis*, 11 So.2d 337, 152 Fla. 178.

Okl.—*Fooshee v. State*, 108 P. 554, 3 Okla.Crim. 666.

S.D.—*State v. Shanley*, 104 N.W. 522, 20 S.D. 18.

Tex.—*Muniz v. State*, Cr.App., 672 S.W.2d 804.

Subsequently arising ground

Iowa—*State v. Osborne*, 16 N.W. 201, 61 Iowa 330.

51. Ga.—*Clark v. State*, 338 S.E.2d 269, 255 Ga. 370.

Accused has burden

Ga.—*Durham v. State*, 238 S.E.2d 334, 239 Ga. 697.

52. R.I.—*State v. Byrnes*, 433 A.2d 658, habeas corpus granted *Ouimette v. Moran*, 762 F.Supp. 468, affirmed 942 F.2d 1, post-conviction relief denied *Byrnes v. Vose*, 777 F.Supp. 171, affirmed 969 F.2d 1306.

53. U.S.—*Tennon v. Ricketts*, C.A.Ga., 574 F.2d 1243, certiorari denied 99 S.Ct. 874, 439 U.S. 1091, 59 L.Ed.2d 57, appeal after remand 642 F.2d 161, rehearing denied 647 F.2d 1123.

54. Ga.—*Sowers v. State*, 390 S.E.2d 110, 194 Ga.App. 205.

55. U.S.—*Michel v. State of Louisiana*, La., 76 S.Ct. 158, rehearing denied 76 S.Ct. 340, 350 U.S. 955, 100 L.Ed. 831, and rehearing denied *Poret v. State of Louisiana*, 76 S.Ct. 340, 350 U.S. 955, 100 L.Ed. 831.

56. Fed.Rules Cr.Proc., Rule 6(b)(1), 18 U.S.C.A.

57. Fed.Rules Cr.Proc., Rule 6(b)(2), 18 U.S.C.A.

58. Fed.Rules Cr.Proc., Rule 12(b)(1), (2), 18 U.S.C.A.

59. U.S.—*U.S. v. Ballard*, C.A.5(Miss.), 779 F.2d 287, certiorari denied 106 S.Ct. 1518, 475 U.S. 1109, 89 L.Ed.2d 916—*U.S. v. Hearst*, C.A.Cal., 638 F.2d 1190, certiorari denied 101 S.Ct. 2018, 451 U.S. 938, 68 L.Ed.2d 325.

60. U.S.—*Davis v. U.S.*, Miss., 93 S.Ct. 1577, 411 U.S. 233, 36 L.Ed.2d 216.

Rules provide that the court for cause shown may grant relief from a waiver.⁶¹

§ 65. Jury Selection and Service Act

The Jury Selection and Service Act contains a provision concerning challenges for noncompliance with such Act in selecting a federal grand jury.

Library References

Grand Jury ⇄16-19.

The Jury Selection and Service Act contains a provision concerning challenges for noncompliance with such Act in selecting a federal grand jury.⁶² In the case of a federal grand jury, a motion to dismiss the indictment based on objections to the array or on the lack of legal qualification of an individual juror is governed by such provision.⁶³

Before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the Act in selecting the grand jury.⁶⁴ Similarly, before the voir dire examination begins, or within seven days after the Attorney General discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to

comply with the Act in selecting the grand jury.⁶⁵ Substantial noncompliance is discussed supra § 13.

Upon motion filed under this provision, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the Act, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence.⁶⁶ If the court determines that there has been a substantial failure to comply with the Act in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with the Act or dismiss the indictment, whichever is appropriate.⁶⁷

The procedures prescribed by this provision shall be the exclusive means by which a person accused of a federal crime or the Attorney General may challenge any grand jury on the ground that such jury was not selected in conformity with the Act.⁶⁸ Nothing in the provision shall preclude any person or the United States from pursuing any other remedy which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand juries.⁶⁹

The contents of records or papers used by the jury commission or clerk in connection with the jury selection process may be disclosed as necessary in the preparation or presentation of a mo-

61. Fed.Rules Cr.Proc., Rule 12(f), 18 U.S.C.A.

62. 28 U.S.C.A. § 1867.

63. Fed.Rules Cr.Proc., Rule 6(b)(2), 18 U.S.C.A.

64. 28 U.S.C.A. § 1867(a).

Must be defendant

(1) Where petitioners had been indicted by grand jury, prior indictment was dismissed and petitioners filed motion to stay and terminate all grand jury proceedings, petitioners were not "defendants" and could not challenge selection of grand jurors.

U.S.—In re Grand Jury of Southern Dist. of Alabama, D.C.Ala., 508 F.Supp. 1210.

(2) Witness subpoenaed by grand jury had no standing.

U.S.—Matter of Archuleta, D.C.N.Y., 432 F.Supp. 583.

Must be same grand jury

(1) Defendants may challenge improprieties affecting only particular grand jury which indicted them.

U.S.—U.S. v. Bearden, C.A.Ga., 659 F.2d 590, certiorari denied Northside Realty Associates, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456 and Browning-Ferris Industries of Georgia, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

(2) A defendant has no standing under Act to challenge composition of grand jury which neither indicted him nor took any other action against him.

U.S.—U.S. v. Caron, D.C.Va., 551 F.Supp. 662, affirmed 722 F.2d 739, certiorari denied 104 S.Ct. 1602, 465 U.S. 1103, 80 L.Ed.2d 132.

Time

Requirement of Act of timely objection to noncompliance with Act is to be strictly construed, and failure to comply precisely with its terms forecloses challenge under Act.

U.S.—U.S. v. Bearden, C.A.Ga., 659 F.2d 590, certiorari denied Northside Realty Associates, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456 and Browning-Ferris Industries of Georgia, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

65. 28 U.S.C.A. § 1867(b).

66. 28 U.S.C.A. § 1867(d).

67. 28 U.S.C.A. § 1867(d).

68. 28 U.S.C.A. § 1867(e).

69. 28 U.S.C.A. § 1867(e).

grand jury.⁶⁵
 and supra § 13.
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 eorgia, Inc. v. U.S.,
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tion.⁷⁰ The parties in a case shall be allowed to inspect, reproduce, and copy such records or pa-

pers during the preparation and pendency of a motion.⁷¹

I. DISCHARGING OR EXCUSING JURORS

§ 66. In General

- a. Before organization
- b. After organization

a. Before Organization

The court may, in the exercise of a sound discretion, discharge or excuse a grand juror at any time before he is sworn, and this authority usually is not restricted by statutes specifying certain grounds of excusal or discharge.

Research Note

Prohibition on discrimination and fair cross section requirement as affecting excusing of grand jurors is considered supra § 17.

Library References

Grand Jury ⇐11.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface

The rule is generally laid down apart from statute that for any good cause shown and in furtherance of justice the court has the right, in the exercise of its sound discretion on its own motion, without challenge from either party, to discharge or excuse a grand juror at any time before he is sworn.⁷² Statutes sometimes expressly confer authority to discharge or excuse persons called to serve as grand jurors.⁷³ It is generally held that the discretionary power of a court to excuse or discharge persons called to serve as grand jurors for any reason it may deem sufficient is not restricted by a statutory specification of grounds of excusal or discharge,⁷⁴ although there is authority to the contrary.⁷⁵

A jury commissioner may have the authority to excuse a grand juror.⁷⁶

Where a grand juror is inadvertently excused by the court, the court has the right, before any order excusing him is entered, to correct the mistake by recalling the juror.⁷⁷

Voir dire.

It has been held that the court may conduct a voir dire to determine the impartiality of a potential grand juror.⁷⁸ The court has the highest obligation, first, to the prospective juror that, if sworn, he may serve with a free mind, unfettered by personal discomfiture, embarrassment, or subconscious restraint and, second, to all who stand before the bar of justice, to assure that such juror will be ultimately able to make his determination fairly and impartially, without fear, favor, or sympathy.⁷⁹ The court need not make a record of its voir dire.⁸⁰

b. After Organization

Pursuant to statutory authorization, and according to some authorities under their inherent power, the courts may excuse a grand juror after he has been sworn.

It has been held that, in the absence of statutory authority, a court has no power to excuse grand jurors for any cause after they have once been impaneled and sworn.⁸¹

However, it has also been held that a court may discharge persons who lack the qualifications required by law notwithstanding they may have previously been impaneled and sworn as grand jurors,⁸² and according to some authorities a court has power to excuse or discharge grand jurors after they have been impaneled and sworn for any cause which it may in the exercise of its discretion

70. 28 U.S.C.A. § 1867(f).

71. 28 U.S.C.A. § 1867(f).

Extends to master wheel

U.S.—U.S. v. Armstrong, C.A.Cal., 621 F.2d 951.

72. Ariz.—Territory v. Barth, 15 P. 673, 2 Ariz. 319.

Tex.—Robinson v. State, 244 S.W. 599, 92 Tex.Cr. 527.

Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

73. Wash.—State v. Ingels, 104 P.2d 944, 4 Wash.2d 676, certiorari denied 61 S.Ct. 318, 311 U.S. 708, 85 L.Ed. 460.

74. Wash.—State v. Guthrie, 56 P.2d 160, 185 Wash. 464.

75. La.—State v. Smith, 83 So. 264, 145 La. 1091—State v. McGarrity, 73 So. 259, 140 La. 436.

76. Ariz.—State v. Fendler, App., 622 P.2d 23, 127 Ariz. 464, certiorari denied 101 S.Ct. 3108, 452 U.S. 961, 69 L.Ed.2d 971.

77. Nev.—State v. Cohn, 9 Nev. 179.

78. N.J.—State v. Murphy, 538 A.2d 1235, 110 N.J. 20.

79. N.Y.—People v. Mulroy, 439 N.Y.S.2d 61, 108 Misc.2d 907.

80. Mich.—People v. Edmond, 273 N.W.2d 85, 86 Mich.App. 374.

81. Tex.—Ex parte Love, 93 S.W. 551, 49 Tex.Cr. 475.

82. La.—State v. Phillips, 114 So. 171, 164 La. 597.

deem sufficient⁸³ or for legal or good cause,⁸⁴ but only for legal cause,⁸⁵ such as that the juror no longer possesses the requisite qualifications,⁸⁶ and not for inconvenience.⁸⁷ The discharge of a grand juror on the sole ground that he fails to vote for an indictment on a matter pending before the grand jury is an abuse of discretion.⁸⁸

Courts are sometimes authorized by express statutory provision to excuse or discharge grand jurors after they have been sworn.⁸⁹ Such statutes sometimes designate certain grounds as sufficient reason for excusal or discharge.⁹⁰ According to authorities recognizing the inherent power of a court to excuse or discharge grand jurors after they have been sworn for any reason it may deem sufficient, such power is not restricted by statute specifying certain grounds of excusal or discharge.⁹¹ According to authorities holding that courts have no power, in the absence of statutes conferring such authority, to excuse grand jurors after they are sworn, a court has no authority to excuse or discharge a grand juror for a cause not specified by statute.⁹² It has been held that a grand juror who after being sworn has been excused, but not discharged, may avail himself of the excusal or not, as he may think proper.⁹³

The drawing and placing of a disqualified person on the grand jury as a member thereof, and the subsequent removal of such person from it by the court, for proper cause, does not, unless the number of grand jurors is thereby reduced below the number required by law, render the grand jury illegal or incompetent to act.⁹⁴

Excusal by grand jury.

The rule has been announced that the court alone has the power to excuse a grand juror.⁹⁵ Although

a grand jury may excuse temporarily one or more of its members, provided the body is not reduced below the number requisite to constitute a quorum,⁹⁶ it has no power to excuse one of its members for the term.⁹⁷

§ 67. Federal Grand Jury

Under the Jury Selection and Service Act, a person summoned for federal grand jury service may be excused or excluded by the court on certain specified grounds.

Library References

Grand Jury ⇨11.

Under the Jury Selection and Service Act, except as provided by statute, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as federal grand jurors.⁹⁸

However, any person summoned for federal grand jury service may be excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary; excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings; or excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.⁹⁹

Under the Federal Rules of Criminal Procedure, in the case of a federal grand jury, at any time for cause shown the court may excuse a juror either temporarily or permanently.¹

83. Minn.—State v. Strait, 102 N.W. 913, 94 Minn. 384.
 84. La.—State v. Richey, 196 So. 545, 195 La. 319—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.
 85. La.—State v. Cannon, 372 So.2d 1237.
 86. La.—State v. Cannon, 372 So.2d 1237.
 87. La.—State v. Cannon, 372 So.2d 1237.
 88. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
 89. Ark.—Sharp v. State, 3 S.W.2d 23, 175 Ark. 1083.
 La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.
 90. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.
 91. Ark.—Denning v. State, 22 Ark. 131.
 Minn.—State v. Strait, 102 N.W. 913, 94 Minn. 384.
 92. Miss.—Portis v. State, 23 Miss. 578.
 93. Ala.—Wilder v. State, 60 So. 923, 179 Ala. 45.
 Ga.—Thompson v. State, 9 Ga. 210.

94. La.—State v. Jackson, 72 So. 905, 140 La. 145.
 95. Miss.—McCoy v. State, 57 So. 622, 101 Miss. 613.
 96. Miss.—McCoy v. State, 57 So. 622, 101 Miss. 613.
 Tex.—Smith v. State, 19 Tex.App. 95.
 97. Miss.—McCoy v. State, 57 So. 622, 101 Miss. 613.
 98. 28 U.S.C.A. § 1866(c).
 Persons disqualified or barred from jury service see supra §§ 20–34.
 Persons automatically entitled to be excused on request see supra §§ 35, 36.
 99. 28 U.S.C.A. § 1866(c).
 Exclusion for inability to render impartial jury service see supra § 27.
 Limitations on exclusions for effect on deliberations 28 U.S.C.A. § 1866(c).
 1. Fed.Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

Voir dire.

The court has the power to question potential jurors on appropriate subjects in order to measure their ability to serve impartially.²

III. TERM OF SERVICE AND SESSIONS

§ 68. In General

- a. General considerations
- b. Federal grand jury

a. General Considerations

While at common law the term of service of grand juries ends on the expiration of the term of court for which they are summoned, their term of service may be regulated by constitutional or statutory provisions.

Library References

Grand Jury ⇨28-30.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The term of service of grand jurors is generally regulated by the constitution or statutes of the particular jurisdiction, the term of court or some other particular period being prescribed in some jurisdictions, while in other jurisdictions the matter is left to the discretion of the court.³ It is the general rule that a grand jury does not cease to exist until it is dissolved by operation of law or by order of court.⁴ When the term of a grand jury expires and is not extended, the grand jury ceases to exist as a *de jure* grand jury.⁵

2. U.S.—*U.S. v. Gibson*, D.C.Ohio, 480 F.Supp. 339.
3. Ala.—*Petty v. State*, 140 So. 585, 224 Ala. 451.
Cochran v. State, 92 So. 524, 18 Ala.App. 403, certiorari denied 92 So. 920, 207 Ala. 710.
La.—*State v. Smith*, 103 So. 534, 158 La. 129—*State ex rel. Smith v. Beauregard Parish Democratic Executive Committee*, 97 So. 876, 154 La. 603.
4. Ala.—*Petty v. State*, 140 So. 585, 224 Ala. 451—*Riley v. State*, 96 So. 599, 209 Ala. 505—*Whittle v. State*, 89 So. 43, 205 Ala. 639.
5. N.Y.—*People v. Heller*, 465 N.Y.S.2d 671, 120 Misc.2d 85.
6. Ala.—*Riley v. State*, 96 So. 599, 209 Ala. 505.
Miss.—*Oates v. State*, 421 So.2d 1025.
- Tex.—*State v. Young*, App.—Hous. [1 Dist.], 791 S.W.2d 176, affirmed 810 S.W.2d 221.

Extraordinary term

Grand jury impaneled for extraordinary term of court need not be given a definite termination date by court.

- N.Y.—*Tyler v. Polsky*, 395 N.Y.S.2d 21, 57 A.D.2d 422.
7. Ala.—*Cochran v. State*, 92 So. 524, 18 Ala.App. 403, certiorari denied 92 So. 920, 207 Ala. 710.
Mo.—*State ex rel. Hall v. Burney*, 84 S.W.2d 659, 229 Mo.App. 759.

In the absence of statute to the contrary, the grand jury usually serves during the entire term of court at which it has been summoned to attend,⁶ and, unless sooner discharged by the court, does not cease to be a legally constituted body until the expiration of that period.⁷ In the absence of statutory provision to the contrary, the life of the grand jury terminates on the expiration of the term of court for which it is summoned;⁸ and this is the common-law rule,⁹ although some authorities reject the common-law rule.¹⁰

Various periods of service for a grand jury have been held not unconstitutionally long.¹¹

Place of holding sessions.

The sessions of the grand jury must be held at the same place as that designated for the holding of the sessions of the court.¹²

b. Federal Grand Jury

No federal grand jury may serve more than 18 months in the absence of an extension.

A federal grand jury shall serve until discharged by the court.¹³ However, no such grand jury may

Tex.—*State v. Young*, App.—Hous. [1 Dist.], 791 S.W.2d 176, affirmed 810 S.W.2d 221.

8. Ala.—*Richerson v. State*, 162 So. 411, 26 Ala.App. 470.

Ark.—*Evers v. State*, 20 S.W.2d 622, 179 Ark. 1123.

Mo.—*State v. Shawley*, 67 S.W.2d 74, 334 Mo. 352.

State ex rel. *Hall v. Burney*, 84 S.W.2d 659, 227 Mo.App. 759—*State v. Brown*, 194 S.W. 1069, 195 Mo.App. 590.

N.J.—*State v. Davis*, 152 A. 782, 107 N.J.L. 199.

9. Ill.—*People v. Brautigan*, 142 N.E. 208, 310 Ill. 472.

N.D.—*State ex rel. Jacobsen v. District Court of Ward County, Fifth Judicial Dist.*, 277 N.W. 843, 68 N.D. 211.

10. Wis.—*State v. Wescott*, 217 N.W. 283, 194 Wis. 410.

Wyo.—*Kortz v. State*, 746 P.2d 435.

11. 20 months

Mass.—*Ventresco v. Commonwealth*, 565 N.E.2d 404, 409 Mass. 82.

24 months

U.S.—*U.S. v. Pisani*, D.C.N.Y., 590 F.Supp. 1326.

12. N.Y.—*People v. Pisanti*, 38 N.Y.S.2d 850, 179 Misc. 308.

13. Fed.Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

serve more than 18 months in the absence of an extension.¹⁴

The major purpose in promulgating the 18-month limitation was to establish a uniform limitation.¹⁵ A secondary purpose was to sever the prior relationship between grand jury terms and terms of court.¹⁶ A local rule requiring that grand jury service be tied to terms of court is invalid.¹⁷

The 18-month period begins with the impaneling¹⁸ and swearing in¹⁹ of the grand jury.

Special grand jury.

A special federal grand jury shall serve for a term of 18 months unless previously discharged, or unless the term is extended.²⁰

§ 69. Continuance beyond Term

- a. In general
- b. Federal grand jury

a. In General

Pursuant to statutory authorization, a grand jury, may be continued beyond the term for which it was summoned.

Library References

Grand Jury §§28-29.

In the absence of statutory authority it has been held that a grand jury may not be retained or continued beyond the term for which it was summoned,²¹ at least where a new grand jury has been impaneled and sworn for the next term.²² Howev-

er, it has also been held in the absence of statute that the action of a grand jury at the next term is valid where it has in fact been continued to the next term and where no other grand jury has been summoned for such term.²³

At any rate, where authorized by statute a grand jury may be retained or continued beyond the term or session for which it was summoned,²⁴ as, for example, where the statute authorizes the retention of the grand jury for service at a subsequent term.²⁵ Such statutes have been held valid.²⁶

Number and length of extensions.

Under some statutes, multiple extensions can be granted.²⁷ Some statutes place a limit on the length of an extension,²⁸ or on the total length of all extensions combined.²⁹ A grand jury is discharged by operation of law where the maximum permissible total length of time for all extensions has elapsed.³⁰

Grounds for extension.

It has been held that an extension requires good cause.³¹ Some authorities hold that a grand jury term may be extended only insofar as necessary to permit the completion of unfinished business,³² and that a grand jury whose terms has been extended due to unfinished business cannot consider entirely new matters during its extended term.³³

14. Fed. Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

15. U.S.—U.S. v. Armored Transport Inc., C.A.Cal., 629 F.2d 1313, certiorari denied 101 S.Ct. 1481, 450 U.S. 965, 67 L.Ed.2d 614.

16. U.S.—U.S. v. Armored Transport, Inc., C.A.Cal., 629 F.2d 1313, certiorari denied 101 S.Ct. 1481, 450 U.S. 965, 67 L.Ed.2d 614.

17. U.S.—U.S. v. Armored Transport, Inc., C.A.Cal., 629 F.2d 1313, certiorari denied 101 S.Ct. 1481, 450 U.S. 965, 67 L.Ed.2d 614.

18. U.S.—U.S. v. Armored Transport, Inc., C.A.Cal., 629 F.2d 1313, certiorari denied 101 S.Ct. 1481, 450 U.S. 965, 67 L.Ed.2d 614.

19. U.S.—U.S. v. Carver, 671 F.2d 577, 217 U.S.App.D.C. 71.

20. 18 U.S.C.A. § 3331(a).

21. Ala.—Richerson v. State, 162 So. 411, 26 Ala.App. 470.

Ill.—People v. Brautigan, 142 N.E. 208, 310 Ill. 472.

Miss.—Williams v. State, 126 So. 40, 156 Miss. 346.

N.D.—State ex rel. Jacobsen v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.

22. Ill.—People v. Brautigan, 142 N.E. 208, 310 Ill. 472.

N.J.—State v. Davis, 152 A. 782, 107 N.J.L. 199.

23. Recognized as de facto jury

Ill.—People v. Cochrane, 138 N.E. 291, 307 Ill. 126.

24. Ga.—Haden v. State, 168 S.E. 272, 116 Ga. 304.

N.C.—State v. Davis, 35 S.E. 464, 126 N.C. 1007.

Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

Wash.—State v. Fenter, 569 P.2d 67, 89 Wash.2d 57.

25. N.C.—State v. Battle, 35 S.E. 624, 126 N.C. 1036—State v. Davis, 35 S.E. 464, 126 N.C. 1007.

26. N.C.—State v. Battle, 35 S.E. 624, 126 N.C. 1036—State v. Davis, 35 S.E. 464, 126 N.C. 1007.

27. Wash.—State v. Fenter, 569 P.2d 67, 89 Wash.2d 57.

28. Wash.—State v. Fenter, 569 P.2d 67, 89 Wash.2d 57.

29. Tex.—Ex parte Wynne, Cr.App., 772 S.W.2d 132.

30. Tex.—Ex parte Wynne, Cr.App., 772 S.W.2d 132.

31. Wash.—State v. Fenter, 569 P.2d 67, 89 Wash.2d 57.

32. N.Y.—People v. Williams, 535 N.E.2d 275, 73 N.Y.2d 84, 538 N.Y.S.2d 222.

33. N.Y.—People v. Williams, 535 N.E.2d 275, 73 N.Y.2d 84, 538 N.Y.S.2d 222.

Different person

Grand jury was not prohibited from considering evidence concerning particular person during its extended term, even though it had not considered evidence concerning that person during its original term.

N.Y.—Kuriansky v. Seewald, 1 Dept., 544 N.Y.S.2d 336, 148 A.D.2d 238, appeal denied 549 N.E.2d 478, 74 N.Y.2d 616, 550 N.Y.S.2d 276.

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By whom extension sought.

Various officials may seek an extension.³⁴ Some authorities hold that an extension must be sought by the grand jury and the prosecutor.³⁵

Form and contention of extension order.

The extension order need not specify the matters being investigated.³⁶

Attack on validity of extension order.

Orders extending the life of a grand jury enjoy a presumption of regularity.³⁷ Where a court found good cause and granted an extension, accused has the burden of proving that good cause did not in fact exist.³⁸

b. Federal Grand Jury

The court may extend the service of a federal grand jury for a period of six months or less upon a determination that such extension is in the public interest.

A federal grand jury generally may not serve more than 18 months, as discussed supra § 68b. However, the court may extend the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest.³⁹ Some authorities hold that, while the extension order generally should precede the expiration of the term of service, a rigid bright line rule is improper.⁴⁰

Special grand jury.

If, at the end of the 18-month term of a special federal grand jury or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional

period of six months.⁴¹ Generally, no special grand jury term so extended shall exceed 36 months.⁴² However, a special grand jury term may be extended by the district court beyond 36 months where a grand jury report is defective in certain respects.⁴³

Once the special grand jury's term has expired, the court cannot grant an extension.⁴⁴ The court may grant an extension without entering a written order prior to the expiration of the term, as it is sufficient that there is a judicial determination that the business of the grand jury has not been completed.⁴⁵ However, there must be a public act, and not a mere internal mental act or unannounced determination, prior to the expiration of the term.⁴⁶

If a district court within any judicial circuit fails to extend the term of a special grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury, in which case the term shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order.⁴⁷ No special grand jury term so extended shall exceed 36 months,⁴⁸ except where a grand jury report is defective in certain respects.⁴⁹

§ 70. Suspension or Interruption of Sessions

The grand jury may adjourn or recess during the term.

Library References

Grand Jury ⇐28-31.

34. Attorney general

It is not only the state's attorney of a county who may petition the circuit court to continue a grand jury term and term of grand jury investigating medicaid fraud was properly extended at request of attorney general, who had been directed by governor to investigate alleged medicaid fraud.

Md.—In re Special Investigation No. 281, 473 A.2d 1, 299 Md. 181.

35. Chief prosecuting attorney

There is no requirement that application for extension of grand jury term be made by chief prosecuting attorney.

N.Y.—Coonan v. Roberts, 418 N.Y.S.2d 405, 71 A.D.2d 563, appeal denied 396 N.E.2d 486, 48 N.Y.2d 604, 421 N.Y.S.2d 1029.

36. N.Y.—Coonan v. Roberts, 418 N.Y.S.2d 405, 71 A.D.2d 563, appeal denied 396 N.E.2d 486, 48 N.Y.2d 604, 421 N.Y.S.2d 1029.

Tex.—Guerra v. State, App.—Corpus Christi, 760 S.W.2d 681, review refused.

37. N.Y.—Matter of Reports of Grand Jury of Montgomery County Empanelled on April 30, 1979, 452 N.Y.S.2d 755, 88 A.D.2d 1054, appeal dismissed 442 N.E.2d 1275, 57 N.Y.2d 924, 456 N.Y.S.2d 764, appeal after remand 474 N.Y.S.2d 627, 100 A.D.2d 692.

38. Wash.—State v. Fenter, 569 P.2d 67, 89 Wash.2d 57.

39. Fed.Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

40. U.S.—In re Grand Juries, D.Mass., 764 F.Supp. 692.

41. 18 U.S.C.A. § 3331(a).

42. 18 U.S.C.A. § 3331(a).

43. 18 U.S.C.A. § 3333(e).

44. U.S.—U.S. v. Daniels, C.A.7(Ill.), 902 F.2d 1238, rehearing denied, certiorari denied 111 S.Ct. 510, 498 U.S. 981, 112 L.Ed.2d 522.

45. U.S.—U.S. v. Taylor, C.A.7(Ill.), 841 F.2d 1300, 98 A.L.R.Fed. 884, certiorari denied *Rosenstein v. U.S.*, 108 S.Ct. 2904, 487 U.S. 1236, 101 L.Ed.2d 937, *Nigo-Martinez v. U.S.*, 108 S.Ct. 2904, 487 U.S. 1236, 101 L.Ed.2d 937 and *Wilson v. U.S.*, 108 S.Ct. 2905, 487 U.S. 1236, 101 L.Ed.2d 937.

46. U.S.—U.S. v. Daniels, C.A.7(Ill.), 902 F.2d 1238, rehearing denied, certiorari denied 111 S.Ct. 510, 498 U.S. 981, 112 L.Ed.2d 522.

47. 18 U.S.C.A. § 3331(b).

48. 18 U.S.C.A. § 3331(b).

49. 18 U.S.C.A. §§ 3331(b), 3333(e).

The grand jury may adjourn or recess during the term.⁵⁰ It necessarily has a discretion as to the continuity of its session, subject to any affirmative orders of the court.⁵¹

The court may adjourn, recess, or excuse the grand jury from attendance temporarily,⁵² and this authority is not limited by statutes directing that on the completion of the business of the grand jury it must be discharged.⁵³ Some statutes authorize the court to recess or adjourn the grand jury during the term.⁵⁴

Some authorities hold that a grand jury is considered recessed only when it has completed all of its business or when replaced by another grand jury.⁵⁵

Vacancy in office of prosecuting attorney.

The powers and duties of a grand jury do not cease because there may happen to be no district attorney either by reason of a vacancy in the office or of the attorney's temporary inability to act or for any other cause.⁵⁶

§ 71. — Discharge of Grand Jury

- a. In general
- b. Federal grand jury

a. In General

The grand jury may be discharged by the court, but it may not dissolve itself.

Library References

Grand Jury ⇨28, 29.

It has been held that a court may in virtue of its common-law powers dismiss the grand jury when-

ever it deems it proper to do so.⁵⁷ Some statutes expressly confer power on the court to discharge the grand jury,⁵⁸ as, for example, statutes providing that on completion of the business before it the grand jury must be discharged by the court.⁵⁹ A grand jury cannot, however, dissolve itself.⁶⁰

What constitutes discharge.

The fact that the grand jury is permitted by the court to disperse and go to their several homes does not discharge them as grand jurors,⁶¹ and the filing of a report by the grand jury as to the completion of business and its prayer for a discharge do not constitute a discharge where the court merely recesses it pending further developments.⁶² However, it has been held that an existing grand jury is discharged when the trial judge orders a special call or session of the court and a special grand jury for such call or session.⁶³

Effect of discharge.

After being duly discharged by the court, a grand jury may not on its own initiative or the suggestion of the sheriff or privately retained counsel reassemble and continue as a grand jury.⁶⁴

Setting aside discharge.

When an order of discharge is made by reason of mistake or misinformation and before the grand jury has finished its labors and while it is engaged in the performance thereof, the court has inherent power to set aside its order at any time during the term.⁶⁵

b. Federal Grand Jury

A federal grand jury may be discharged by the court.

50. Mo.—State v. Shawley, 67 S.W.2d 74, 334 Mo. 352.
State v. Brown, 194 S.W. 1069, 195 Mo.App. 590.
51. Ark.—Evers v. State, 20 S.W.2d 622, 179 Ark. 1123.
52. Ark.—Evers v. State, 20 S.W.2d 622, 179 Ark. 1123.
Iowa—State v. Phillips, 94 N.W. 229, 119 Iowa 652.
Miss.—Portis v. State, 23 Miss. 578.
Ohio—State v. Schwab, 143 N.E. 29, 109 Ohio St. 532, 2 Ohio Law Abs. 196, 21 Ohio Law Rep. 602.
53. Iowa—State v. Phillips, 94 N.W. 229, 119 Iowa 652.
54. Ala.—Petty v. State, 140 So. 585, 224 Ala. 451.
Miss.—Kyzar v. State, 87 So. 415, 125 Miss. 79.
55. N.Y.—People v. Swan, 4 Dept., 557 N.Y.S.2d 791, 158 A.D.2d 158, appeal denied 565 N.E.2d 529, 76 N.Y.2d 991, 563 N.Y.S.2d 780.
56. Tex.—State v. Gonzales, 26 Tex. 197.
57. Ind.—Baker v. State, 108 N.E. 7, 183 Ind. 1.
Miss.—Portis v. State, 23 Miss. 578.

Va.—Commonwealth v. Burton, 4 Leigh 645, 31 Va. 645.
58. N.M.—State v. Raulie, 290 P. 789, 35 N.M. 135.
59. Iowa—State v. Phillips, 94 N.W. 229, 119 Iowa 652.
N.M.—State v. Raulie, 290 P. 789, 35 N.M. 135.
Okl.—State v. Childers, 252 P. 6, 122 Okl. 64.
60. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.
N.D.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.
61. Ala.—Cochran v. State, 92 So. 524, 18 Ala.App. 403, certiorari denied 92 So. 920, 207 Ala. 710.
62. Ala.—Caldwell v. State, 84 So. 272, 203 Ala. 412.
N.M.—State v. Raulie, 290 P. 789, 35 N.M. 135.
63. Ala.—Petty v. State, 140 So. 585, 224 Ala. 451.
64. Fla.—Hicks v. State, 120 So. 330, 97 Fla. 199.
65. N.J.—State v. Newmark, 152 A. 206, 8 N.J.Misc. 803.

A federal grand jury may be discharged by the court.⁶⁶ A grand jury generally will not be dismissed due to improper disclosures⁶⁷ or preindictment publicity.⁶⁸

Special grand jury.

An order for the discharge of a special federal grand jury may be entered by the court upon a determination of the grand jury by majority vote that its business has been completed.⁶⁹

If a district court within any judicial circuit enters an order for the discharge of a special grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury, in which case the term shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order.⁷⁰ No special grand jury term so extended shall exceed 36 months,⁷¹ except where a grand jury report is defective in certain respects.⁷²

§ 72. — Recalling Dismissed Grand Jury

A grand jury which has been dismissed before the final adjournment of court may be summoned to reassemble at the same term of court, but not, in the absence of statutory authority, at a subsequent term.

Library References

Grand Jury ⇨28-31.

Under some statutes, when the grand jury is dismissed before the final adjournment of court the members may be summoned to reassemble at the same term if necessary.⁷³ Indeed, this power has been held to be inherent in courts of general original jurisdiction in criminal matters.⁷⁴

Some statutes provide authority for recalling the grand jury of the preceding term on the discharge of a new jury.⁷⁵ However, some authorities hold that the summoning of a grand jury, after the adjournment without day of the original term at which it had been convened, to attend at a special term is not authorized.⁷⁶

A grand jury recalled under a statute providing for its recall, before court adjourns, on any special occasion has power to investigate and present any matter given into its charge.⁷⁷

§ 73. — Effect of Adjournment of Court

The right of a grand jury to remain in session ordinarily does not extend beyond the final adjournment of court for the term.

Library References

Grand Jury ⇨31.

The right of a grand jury to remain in session does not as a general rule extend beyond the final adjournment of court for the term,⁷⁸ and statutes sometimes expressly declare that on final adjournment of the court the grand jury is discharged.⁷⁹ Such statutes have been held to be declaratory of the common law.⁸⁰ However, as shown supra § 69, in some jurisdictions a grand jury may be retained or continued beyond the term.

It is generally held that the actual presence of the court is not essential to the exercise of the functions of the grand jury, and that a grand jury when properly organized may lawfully proceed in the performance of its duties notwithstanding the temporary absence of the judge or the temporary adjournment of the court.⁸¹

A grand jury summoned to serve during a regular term is competent to serve at an adjournment

66. Fed.Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

67. U.S.—In re Grand Jury of Southern Dist. of Alabama, D.C.Ala., 508 F.Supp. 1210.

68. U.S.—In re Grand Jury of Southern Dist. of Alabama, D.C.Ala., 508 F.Supp. 1210.

69. 18 U.S.C.A. § 3331(a).

70. 18 U.S.C.A. § 3331(b).

71. 18 U.S.C.A. § 3331(b).

72. 18 U.S.C.A. §§ 3331(b), 3333(e).

73. Ala.—Petty v. State, 140 So. 585, 224 Ala. 451.

Fla.—Brannon v. State, 157 So. 336, 117 Fla. 164.

Ill.—People v. Bote, 33 N.E.2d 449, 376 Ill. 264.

Miss.—Pickle v. State, 345 So.2d 623.

Tenn.—Cheairs v. State, Cr.App., 543 S.W.2d 70.

74. N.J.—State v. Newmark, 152 A. 206, 8 N.J.Misc. 803.

75. N.C.—State v. Battle, 35 S.E. 624, 126 N.C. 1036.

76. Fla.—Lee v. State, 109 So. 634, 91 Fla. 1085.

77. Ill.—People v. McCauley, 100 N.E. 182, 256 Ill. 504.

78. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

79. N.M.—State v. Raulie, 290 P. 789, 35 N.M. 135.

N.D.—State ex rel. Jacobsen v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.

Okl.—State v. Childers, 252 P. 6, 122 Okl. 64.

80. N.D.—State ex rel. Jacobsen v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.

81. Ark.—Evers v. State, 20 S.W.2d 622, 179 Ark. 1123.

N.Y.—People v. Jackson, 199 N.Y.S. 870, 205 A.D. 202.

of that term, where it has not been discharged.⁸²

IV. CHARGE

§ 74. In General

Generally, the grand jury should be given appropriate instructions by the court or the prosecutor. However, it has also been held that there is no requirement of instructions.

Research Note

Charge or absence thereof as affecting validity of indictment is treated in C.J.S. Indictments and Informations §§ 20, 177.

Library References

Grand Jury ⇐23, 33, 34.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Generally, the grand jury should be given appropriate instructions⁸³ by the court⁸⁴ or the prosecu-

tor,⁸⁵ some statutes expressly impose on the court the duty of charging the grand jury.⁸⁶ The prosecutor may give legal advice to the grand jury.⁸⁷ Some authorities hold that the prosecutor cannot instruct the grand jury, but can only request the court to give instructions.⁸⁸ Under some constitutional or statutory provisions, an independent counsel is appointed to advise the grand jury, as discussed *infra* § 109.

However, it has also been held that there is no requirement of instructions.⁸⁹ Where grand jurors have been duly sworn they are legally charged with the performance of their duties, and, in the absence of a statute to the contrary, it is not essential to the

82. Mo.—State v. Brown, 194 S.W. 1069, 195 Mo.App. 590.

Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

83. Minn.—State v. Grose, App., 387 N.W.2d 182.

N.Y.—Hynes v. Shea, 1 Dept., 544 N.Y.S.2d 131, 152 A.D.2d 485.

Allocation of responsibility

Court generally instructs grand jury with respect to the law concerning its duties and advises grand jury when requested, while prosecutor generally gives instructions with respect to evidence; while law permits overlapping of these functions, it does not require that they be duplicated.

N.Y.—People v. Valenti, 399 N.Y.S.2d 363, 91 Misc.2d 669.

84. Ind.—State v. McCoy, 166 N.E. 547, 89 Ind.App. 330.

La.—State v. Nunez, 85 So. 52, 147 La. 394.

Miss.—Necaise v. Logan, 341 So.2d 91.

Prosecutorial abuse

If prosecutorial abuse is shown or substantial likelihood of its occurrence is demonstrated, a district court is well within its supervisory authority in insuring that a grand jury is properly instructed on the applicable criminal law; this is merely another facet of the court's duty to preserve the traditional independence of grand jury and should be done upon a proper showing that a statute is indistinct.

U.S.—In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.

85. Colo.—People ex rel. Losavio v. Gentry, 606 P.2d 57, 199 Colo. 153.

Minn.—State v. Inthavong, 402 N.W.2d 799.

N.Y.—People v. Petre, 573 N.Y.S.2d 834, 151 Misc.2d 543.

Prosecutor is legal advisor

N.Y.—Relin v. Maloy, 4 Dept., 583 N.Y.S.2d 103, 182 A.D.2d 1142.

86. Ill.—People v. Jordan, 127 N.E. 117, 292 Ill. 514.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Ohio—State v. Schwab, 143 N.E. 29, 109 Ohio St. 532, 2 Ohio Law Abs. 196, 21 Ohio Law Rep. 602.

87. U.S.—U.S. v. McKenzie, C.A.La., 678 F.2d 629, rehearing denied 685 F.2d 1386, certiorari denied 103 S.Ct. 450, 459 U.S. 1038, 74 L.Ed.2d 604.

U.S. v. Kilpatrick, D.C.N.C., 16 F. 765.

Ind.—Turpin v. State, 189 N.E. 403, 206 Ind. 345.

La.—State v. Richey, 196 So. 545, 195 La. 319—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Miss.—LeBarron v. State, 65 So. 648, 107 Miss. 663.

Nev.—Sheriff, Clark County v. Keeney, 791 P.2d 55, 106 Nev. 213.

N.Y.—People v. Tru-Sport Pub. Co., 291 N.Y.S. 449, 160 Misc. 628.

N.D.—State v. Rodman, 221 N.W. 25, 57 N.D. 230.

Ohio—Makley v. State, 197 N.E. 339, 49 Ohio App. 359, 17 Ohio Law Abs. 305, 3 O.O. 250, error dismissed 192 N.E. 738, 128 Ohio St. 571, 40 Ohio Law Rep. 651.

Pa.—Commonwealth v. Brownmiller, 14 A.2d 907, 141 Pa.Super. 107.

Va.—Draper v. Commonwealth, 111 S.E. 471, 132 Va. 648.

During deliberations

Grand jury's consultation of Commonwealth's attorney during deliberations to obtain advice on legal issue was proper.

Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

Court supervision

Any advice to grand jury by prosecutor is subject to court supervision.

W.Va.—State v. Pickens, 395 S.E.2d 505, 183 W.Va. 261.

88. Me.—State v. Haberski, 449 A.2d 373, certiorari denied 103 S.Ct. 823, 459 U.S. 1174, 74 L.Ed.2d 1019.

89. U.S.—U.S. v. Zangger, C.A.(Iowa), 848 F.2d 923—U.S. v. Kenny, C.A.Cal., 645 F.2d 1323, certiorari denied 101 S.Ct. 3059, 452 U.S. 920, 69 L.Ed.2d 425 and Parker v. U.S., 102 S.Ct. 121, 454 U.S. 828, 70 L.Ed.2d 104.

N.C.—State v. Treadwell, 394 S.E.2d 245, 99 N.C.App. 769, writ denied, temporary stay denied 395 S.E.2d 673, 327 N.C. 436, review denied, appeal dismissed 397 S.E.2d 235, 327 N.C. 487.

Prosecutor

It was not mandatory for prosecuting attorney to instruct grand jury on the law.

Nev.—Hyler v. Sheriff, Clark County, 571 P.2d 114, 93 Nev. 561.

legal existence and competency of the grand jury that formal instructions be given it.⁹⁰ It has been so held even where the duty to charge and instruct is expressly enjoined on the court by statute.⁹¹ Under a statute requiring the court to charge the grand jury, the legal existence and competency of that body is unaffected by the omission of the court to charge a new juror admitted after the grand jury was fully organized,⁹² or to recharge the grand jury as a whole after the admission of the new member.⁹³ It is not necessary that all the jurors should hear the full charge.⁹⁴ It has also been held to be immaterial that only some of the grand jury were, at their request, advised by the court as to the law applicable to a case on which the jury was then deliberating.⁹⁵

Under some statutes, the grand jury may receive legal advice only from the court or the prosecutor.⁹⁶ A witness cannot render legal advice⁹⁷ or supply a deficiency in instructions.⁹⁸ Both the court and the prosecutor are the grand jury's legal advisors,⁹⁹ and the court may not prohibit the grand jury from seeking advice from the prosecutor or prohibit the prosecutor from giving requested advice.¹ Some authorities hold that the prosecutor may bring in experts to inform the grand jury about legal issues.²

The prosecutor's practice of instructing the grand jury at the beginning of the term does not relieve him of the duty to reread appropriate charges in connection with particular cases.³

Open court requirement.

Instructions to the grand jury should usually be given in open court,⁴ although the mere fact that

the presiding judge entered the grand jury room and gave the grand jury instructions in secret will not vitiate the action of the jury.⁵

Additional charge.

The court after having once charged the grand jury may in its discretion call the grand jury before it at any time and give further charges as to matters arising after the first charge was given,⁶ and as to matters which may have been overlooked in the original charge.⁷ If a court believes a grand jury, reporting to have no further business, to have given no attention to the violation of laws concerning which they were instructed in the original charge, it is within its province again to call attention to such matters and order the grand jury to continue its deliberations.⁸

When the grand jury desires any further information than that offered in the general charge of the court, it may return to the court and make application therefor,⁹ as where in the course of an investigation knowledge comes to them of situations other than those submitted which they think should be investigated.¹⁰ If there should be any doubt as to the admissibility of evidence, the grand jury should submit the question to the court for its instructions and directions,¹¹ and it has been said that such inquiries should be made in writing and that the judge must determine whether the instructions should be by written communication or from the bench.¹²

Obligation to follow instructions.

It has been said that grand jurors are under legal obligation to follow and apply the law stated

90. Wis.—State v. Lawler, 267 N.W. 65, 221 Wis. 423, 105 A.L.R. 568.

91. Va.—Porterfield v. Commonwealth, 22 S.E. 352, 91 Va. 801.

92. Minn.—State v. Froiseth, 16 Minn. 313.

93. La.—State v. Furco, 25 So. 951, 51 La. Ann. 1082.

94. Mass.—In re Wadlin, 11 Mass. 142.

95. Iowa—State v. Edgerton, 69 N.W. 280, 100 Iowa 63.

96. N.Y.—People v. Richard, 561 N.Y.S.2d 351, 148 Misc.2d 573.

Matter of Report of Special Grand Jury of Monroe County, 433 N.Y.S.2d 300, 77 A.D.2d 199.

Strict construction

Strict construction is required of statute providing that grand jury may not seek or receive legal advice from any source other than court and district attorney.

N.Y.—Matter of October 1989 Grand Jury of Supreme Court of Ulster County, 3 Dept., 563 N.Y.S.2d 889, 168 A.D.2d 737.

97. N.Y.—People v. Darcy, Co.Ct., 449 N.Y.S.2d 626, 113 Misc.2d 580.

98. N.Y.—People v. Darcy, 449 N.Y.S.2d 626, 113 Misc.2d 580.

99. N.Y.—People v. DiFabio, 4 Dept., 566 N.Y.S.2d 172, 170 A.D.2d 1028, affirmed 588 N.E.2d 80, 79 N.Y.2d 836, 580 N.Y.S.2d 182.

1. N.Y.—Relin v. Maloy, 4 Dept., 583 N.Y.S.2d 103, 182 A.D.2d 1142.

2. Tex.—Carter v. State, App. 2 Dist., 691 S.W.2d 112.

3. N.Y.—People v. Guzman, 520 N.Y.S.2d 117, 137 Misc.2d 129.

4. Ill.—People v. Strauch, 153 Ill.App. 544, affirmed 93 N.E. 126, 247 Ill. 200.

5. Ark.—Yelvington v. State, 276 S.W. 353, 169 Ark. 498.

6. Iowa—State v. Will, 65 N.W. 1010, 97 Iowa 58.

7. Iowa—State v. Will, 65 N.W. 1010, 97 Iowa 58.

8. Iowa—State v. Will, 65 N.W. 1010, 97 Iowa 58.

9. Ark.—Yelvington v. State, 276 S.W. 353, 169 Ark. 498.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

10. Conn.—State v. Kemp, 9 A.2d 63, 126 Conn. 60.

11. U.S.—U.S. v. Kilpatrick, D.C.N.C., 16 F. 765.

Conn.—State v. Fasset, 16 Conn. 457.

12. U.S.—U.S. v. Kilpatrick, D.C.N.C., 16 F. 765.

in a charge,¹³ and that, if the grand jury has proceeded in violation of the court's instructions, the court may intervene and take remedial action.¹⁴ However, it has also been stated that the grand jury is not, as is the petit jury, bound to follow the instructions of the court as to the law,¹⁵ and that grand jurors are under no legal obligation either to follow or apply advice given to them at their request by the court.¹⁶

§ 75. Character of Charge

- a. In general
- b. Particular matters

a. In General

The extent to which the grand jury should be instructed ordinarily rests in the sound discretion of the presiding judge.

Library References

Grand Jury ⇄ 23, 33, 34.

As a general rule the extent to which the grand jury shall be instructed by the court rests in the discretion of the presiding judge.¹⁷ It is usual and proper for the court to call the attention of the grand jury to, and direct its investigations of, all matters of general public import.¹⁸

The grand jury must be supplied with enough information to enable it to decide whether a crime

has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime,¹⁹ and an adequate statement of law,²⁰ and must be informed of the essential elements of the crime.²¹ Instructions must be comprehensible,²² and must not be so misleading or incomplete as to substantially undermine the integrity of the proceedings.²³ Grand jury instructions need not be as detailed as petit jury instructions.²⁴ It is generally sufficient to read the applicable statutes.²⁵

The court in its charge may not invade the province of the grand jury.²⁶ It is a manifest abuse of discretion for the court in its charge to express an opinion as to the guilt or innocence of a person,²⁷ to express an opinion that there is evidence warranting the indictment of persons for violation of particular laws,²⁸ or specifically to direct the attention of the grand jury to any named person as a subject for investigation.²⁹ The court should not in its charge assume the function committed by law to the grand jury of determining that a crime has been committed.³⁰ However, it has been held that the court may limit the area of investigation by its charge, and may inquire to ascertain if its instructions are being followed, although such authority is restricted to limits set forth in a statute.³¹

- 13. N.Y.—In re Grand Jury, 135 N.Y.S. 103.
- 14. U.S.—U.S. v. O'Shea, D.C.Fla., 447 F.Supp. 330.
- 15. Wis.—State v. Lawler, 267 N.W. 65, 221 Wis. 423, 105 A.L.R. 568.
- 16. N.Y.—In re Grand Jury, 135 N.Y.S. 103.
- 17. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
- 18. Ala.—Carr v. State, 187 So. 252, 28 Ala.App. 466.
- 19. N.Y.—People v. Hagmann, 3 Dept., 553 N.Y.S.2d 908, 160 A.D.2d 1125.
- 20. N.Y.—People v. Ruggieri, 423 N.Y.S.2d 108, 102 Misc.2d 238.
- 21. N.Y.—People v. Guzman, 520 N.Y.S.2d 117, 137 Misc.2d 129.
- 22. N.Y.—People v. Nelson, 486 N.Y.S.2d 979, 127 Misc.2d 583.

Conflict in charge

Providing of written charge to grand jurors which did not contain same language as charge given orally by court was improper.

N.J.—In re Passaic County Grand Jury, 532 A.2d 757, 220 N.J.Super. 470.

23. N.Y.—People v. Caracciola, 581 N.E.2d 1329, 78 N.Y.2d 1021, 576 N.Y.S.2d 74.

Flagrantly

Prosecutor has no duty to outline all elements of conspiracy for grand jury, so long as instructions given are not flagrantly misleading or so long as elements are at least implied; defendant must show that conduct of prosecutor was so flagrant that it deceived grand jury in significant way, infringing on their ability to exercise independent judgment.

U.S.—U.S. v. Larrazolo, C.A.9(Ariz.), 869 F.2d 1354.

- 24. U.S.—U.S. v. Simon, D.C.Pa., 510 F.Supp. 232.
- N.Y.—People v. Caracciola, 581 N.E.2d 1329, 78 N.Y.2d 1021, 576 N.Y.S.2d 74.

Esoterica

Judge who impanels grand jury has no corresponding responsibility to delve into legal esoterica with hope of inculcating into every grand juror a capsulized law school education, for grand juries do not deliver indictments in microcosm devoid of legal understanding, but, to contrary, grand jurors, who drawn upon their collective common sense, experience and adscititious knowledge, also receive wealth of information describing grand jury function in federal criminal justice system.

- U.S.—U.S. v. Shober, D.C.Pa., 489 F.Supp. 393.
- 25. N.Y.—People v. Ehrlich, 518 N.Y.S.2d 742, 136 Misc.2d 514.
- 26. N.Y.—People v. Both, 193 N.Y.S. 591, 118 Misc. 414, 39 N.Y.Cr. 466.
- 27. Ala.—Carr v. State, 187 So. 252, 28 Ala.App. 466.
- Mo.—Conway v. Quinn, App., 168 S.W.2d 445.
- Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
- 28. N.Y.—People v. Both, 193 N.Y.S. 591, 118 Misc. 414, 39 N.Y.Cr. 466.
- 29. Miss.—Necaise v. Logan, 341 So.2d 91—Fuller v. State, 37 So. 749, 85 Miss. 199.
- 30. N.Y.—People v. Both, 193 N.Y.S. 591, 118 Misc. 414, 39 N.Y.Cr. 466.
- 31. Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

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170 Mont. 354.

The prosecutor, in instructing the grand jury, must not invade the province of the grand jury,³² state irrelevant facts,³³ or make statements in conflict with the charge given by the court.³⁴ It has been held that he may not express his own opinion,³⁵ or make arguments.³⁶

32. Nev.—*Sheriff, Clark County v. Keeney*, 791 P.2d 55, 106 Nev. 213.

33. Mass.—*Commonwealth v. Kelcourse*, 535 N.E.2d 1272, 404 Mass. 466.

34. N.M.—*State v. Hewitt*, App., 769 P.2d 92, 108 N.M. 179, certiorari quashed 765 P.2d 758, 107 N.M. 785.

35. Mass.—*Commonwealth v. Kelcourse*, 535 N.E.2d 1272, 404 Mass. 466.

36. Mass.—*Commonwealth v. Kelcourse*, 535 N.E.2d 1272, 404 Mass. 466.

37. Participation by grand juror

Court should charge jurors that those who join in indictment must have been present and have heard or otherwise have informed themselves of the evidence presented at each session.

N.J.—*State v. Del Fino*, 495 A.2d 60, 100 N.J. 154.

Subpoena power

(1) Prosecutor has statutory duty to advise grand jury of its right to subpoena anyone against whom state might seek an indictment.

Ill.—*People v. Creque*, 382 N.E.2d 793, 22 Ill.Dec. 403, 72 Ill.2d 515, certiorari denied *Creque v. Illinois*, 99 S.Ct. 2010, 441 U.S. 912, 60 L.Ed.2d 384.

(2) If government intends to avail itself of summary witness procedure, it is a better practice to remind the grand jury that it retains the option of calling percipient witnesses.

U.S.—*U.S. v. Al Mudarris, C.A.Cal.*, 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305.

Burden of proof

N.Y.—*Hynes v. Shea*, 1 Dept., 544 N.Y.S.2d 131, 152 A.D.2d 485.

People v. Tucker, 421 N.Y.S.2d 792, 101 Misc.2d 660.

Standard of proof

N.Y.—*Matter of Report of Special Grand Jury of Nassau County, New York, Panel 3, Second Term, 1982*, 2 Dept., 477 N.Y.S.2d 34, 102 A.D.2d 871.

Corroboration

Corroboration is requirement of "legally sufficient evidence" to support indictment, and thus, district attorney must inform grand jury of nature, degree, and extent of particular corroboration statute involved in criminal proceeding.

N.Y.—*People v. Sanchez*, 479 N.Y.S.2d 602, 125 Misc. 2d 394.

38. Accomplice testimony

N.Y.—*People v. Bomberry*, 4 Dept., 490 N.Y.S.2d 382, 112 A.D.2d 18, appeal denied 485 N.E.2d 240, 66 N.Y.2d 614, 494 N.Y.S.2d 1036.

Finding of probable cause by court

It is appropriate for grand jury to be told that probable cause has been found, so long as grand jurors are instructed that such a finding must not interfere with their independent evaluation of the facts.

Mass.—*Morrisette v. Commonwealth*, 402 N.E.2d 492, 380 Mass. 197.

b. Particular Matters

It has been held that in some circumstances the grand jury should be instructed as to a defense. The prosecutor generally need not instruct the grand jury as to a lesser included offense.

It has been held that the grand jury should be instructed on various matters,³⁷ or may be instructed,³⁸ or need not be instructed.³⁹ Various instructions have been held improper.⁴⁰

Presumption of intent

Conn.—*State v. Stepany*, 435 A.2d 701, 181 Conn. 268, certiorari denied 101 S.Ct. 856, 449 U.S. 1077, 66 L.Ed.2d 799.

What charge should be brought

Opinion of district attorney or his assistants to grand jury as to "what charge should be brought" in presentment against defendant was in nature of legal advice which district attorney can properly give grand jury.

Tenn.—*State v. Gonzales, Cr.App.*, 638 S.W.2d 841.

39. Accomplice testimony

N.Y.—*People v. Bomberry*, 4 Dept., 490 N.Y.S.2d 382, 112 A.D.2d 18, appeal denied 485 N.E.2d 240, 66 N.Y.2d 614, 494 N.Y.S.2d 1036.

Admissibility of evidence at trial

Colo.—*People v. Gable, App.*, 647 P.2d 246.

Circumstantial evidence

N.Y.—*People v. Borriello*, 587 N.Y.S.2d 518, 154 Misc.2d 261.

Expert testimony

N.Y.—*People v. Delaney*, 481 N.Y.S.2d 229, 125 Misc.2d 928.

Prior state prosecution

U.S.—*U.S. v. Hyder, C.A.Fla.*, 732 F.2d 841.

Proper evidence

Accused has no right to have grand jury instructed with regard to nature of evidence proper to be received by it, with reference to his particular case.

Mass.—*Anonymous*, 26 Mass. 495, 9 Pick. 495.

Silence

Even though better practice would have been for prosecutor to inform grand jury that no adverse inference was to be drawn from witness' invocation of his Fifth Amendment right, where grand jury was made aware that witness had right not to answer questions he thought would tend to incriminate him, mere absence of direction by prosecutor did not in and of itself amount to prosecutorial misconduct undermining fairness of grand jury proceeding.

U.S.—*U.S. v. Horowitz, D.C.N.Y.*, 452 F.Supp. 415.

Standard of proof at trial

N.Y.—*People v. Lopez*, 2 Dept., 497 N.Y.S.2d 32, 113 A.D.2d 475, appeal denied 494 N.E.2d 124, 67 N.Y.2d 946, 502 N.Y.S.2d 1039.

40. Sufficiency of evidence

Reserving to prosecutor question of whether evidence exists which, if true, would establish every element of crime and reserving exclusively for grand jurors question of whether evidence was sufficiently persuasive to warrant belief that defendant committed crime impermissibly removes from grand jury's exclusive province the fundamental factual question of whether there was evidence establishing each element of crime.

Defenses.

It has been held that in some circumstances the grand jury should be instructed as to a defense.⁴¹ An instruction on a defense is required only if the evidence supports such defense.⁴²

Some authorities hold that the grand jury should be instructed on a defense only if such defense has the potential for eliminating a needless or unfounded prosecution,⁴³ and that the grand jury generally must be instructed as to exculpatory defenses, but

need not be instructed as to mitigating defenses.⁴⁴ Various defenses have been held exculpatory⁴⁵ or mitigating.⁴⁶ However, it has been held that the grand jury need not be instructed as to all exculpatory defenses,⁴⁷ and need not be instructed as to the defense of mental disease or defect.⁴⁸

Lesser included offense.

The prosecutor generally need not instruct the grand jury as to a lesser included offense.⁴⁹

V. POWERS AND DUTIES

§ 76. In General

A grand jury has broad investigative power.

Library References

Grand Jury §24-26.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

A grand jury has broad investigative power,⁵⁰ and wide latitude in conducting an investigation,⁵¹

N.Y.—*People v. Batashure*, 552 N.E.2d 144, 75 N.Y.2d 306, 552 N.Y.S.2d 896.

41. Statute of limitations

Minn.—*State v. Grose, App.*, 387 N.W.2d 182.

42. Evidence must clearly establish defense

(1) In general.

Ariz.—*State v. Coconino County Superior Court, Div. II*, 678 P.2d 1386, 139 Ariz. 422.

(2) Self-defense.

Hawaii—*State v. Bell*, 589 P.2d 517, 60 Haw. 241.

Reasonable view of evidence

N.Y.—*People v. Petre*, 573 N.Y.S.2d 834, 151 Misc.2d 543.

43. N.Y.—*People v. Valles*, 464 N.E.2d 418, 62 N.Y.2d 36, 476 N.Y.S.2d 50.

44. N.Y.—*People v. Valles*, 464 N.E.2d 418, 62 N.Y.2d 36, 476 N.Y.S.2d 50.

No duty

Prosecutor is under no duty to instruct grand jury as to mitigating defenses.

U.S.—*People v. Lancaster*, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied *Lancaster v. New York*, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.

45. Agency

N.Y.—*People v. Jenkins*, 2 Dept., 550 N.Y.S.2d 736, 157 A.D.2d 854.

People v. Ali, 523 N.Y.S.2d 334, 137 Misc.2d 812.

Justification

N.Y.—*People v. Lancaster*, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied *Lancaster v. New York*, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.

46. Extreme emotional disturbance

N.Y.—*People v. Nezaj*, 528 N.Y.S.2d 491, 139 Misc.2d 366.

47. N.Y.—*People v. Lancaster*, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied *Lancaster v. New York*, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.

48. N.Y.—*People v. Lancaster*, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied *Lancaster v. New York*, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.

49. U.S.—*James v. Kelly*, E.D.N.Y., 648 F.Supp. 397.

Alaska—*Oxereok v. State*, 611 P.2d 913.

Ariz.—*State v. Coconino County Superior Court, Div. II*, 678 P.2d 1386, 139 Ariz. 422.

Hawaii—*State v. O'Daniel*, 616 P.2d 1383, 62 Haw. 518.

50. U.S.—*U.S. v. Dionisio, Ill.*, 93 S.Ct. 764, 410 U.S. 1, 35 L.Ed.2d 67, *Branzburg v. Hayes, Ky.*, 92 S.Ct. 2646, 408 U.S. 665, 33 L.Ed.2d 626, dissenting opinion *U.S. v. Caldwell*, 92 S.Ct. 2686, 408 U.S. 665, 33 L.Ed.2d 657.

In re Grand Jury Subpoenas Dated Dec. 10, 1987, C.A.9(Cal.), 926 F.2d 847, 109 A.L.R.Fed. 541—In re Grand Jury, C.A.3(Pa.), 821 F.2d 946, certiorari denied *Colafella v. U.S.*, 108 S.Ct. 749, 484 U.S. 1025, 98 L.Ed.2d 762—In re Grand Jury Subpoena Served Upon Doe, C.A.2(N.Y.), 781 F.2d 238, 83 A.L.R.Fed. 461, certiorari denied *Roe v. U.S.*, 106 S.Ct. 1515, 475 U.S. 1108, 89 L.Ed.2d 914—*U.S. v. Echols, C.A.La.*, 542 F.2d 948, certiorari denied 97 S.Ct. 1695, 431 U.S. 904, 52 L.Ed.2d 387.

Ariz.—*Franzi v. Superior Court of Arizona In and For Pima County*, 679 P.2d 1043, 139 Ariz. 556.

Ill.—*People v. Mileris*, 431 N.E.2d 1064, 59 Ill.Dec. 307, 103 Ill.App.3d 589.

Md.—In re Special Investigation No. 281, 473 A.2d 1, 299 Md. 181.

N.Y.—*New York State Dept. of Taxation and Finance v. New York State Dept. of Law, Statewide Organized Crime Task Force*, 378 N.E.2d 110, 44 N.Y.2d 575, 406 N.Y.S.2d 747, 1 A.L.R.4th 951.

Va.—*Vihko v. Commonwealth*, 393 S.E.2d 413, 10 Va.App. 498.

Wyo.—*Hopkinson v. State*, 664 P.2d 43, certiorari denied 104 S.Ct. 262, 464 U.S. 908, 78 L.Ed.2d 246.

Broadest possible scope

Power should be accorded broadest scope possible consistent with constitutional limitations.

Ill.—*People v. Florendo*, 447 N.E.2d 282, 69 Ill.Dec. 65, 95 Ill.2d 155.

Liberal construction of powers

U.S.—In re Grand Jury Proceedings, D.C.Fla., 73 F.R.D. 647.

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Following Preface.

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N.Y.2d 20, 511
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Div. II, 678 P.2d

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 665, 33 L.Ed.2d
 686, 408 U.S. 665,

987, C.A.9(Cal.),
 Jury, C.A.3(Pa.),
 08 S.Ct. 749, 484
 Subpoena Served
 ed. 461, certiorari
 89 L.Ed.2d 914—
 denied 97 S.Ct.

For Pima County,

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nce v. New York
 Task Force, 378
 1 A.L.R.4th 951.
 App. 498.

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65, 95 Ill.2d 155.

.D. 647.

and is the decision maker in exercising its powers.⁵² Broad powers are necessary to permit the grand jury to carry out both parts of its dual function.⁵³ Courts must ensure that a grand jury has adequate powers.⁵⁴ The exercise of its powers and duties involves all the powers and incidents necessary to a complete inquiry into the subject matter in charge.⁵⁵ The scope of its inquiries should not be limited narrowly by questions of propriety or forecasts of the probable results of the investigation, or by doubts as to whether any particular individual will be found properly subject to accusation of crime.⁵⁶

However, the power of a grand jury is not unlimited.⁵⁷ It is bound and limited by the proscription of the law under which it acts.⁵⁸ Grand juries are not licensed to engage in arbitrary fishing expeditions.⁵⁹ The grand jury is without power to employ persons to investigate crime and make their compensation a charge on the county,⁶⁰ or to employ persons other than public officers charged by law

with the performance of such duties to search for testimony and subpoena witnesses to be used before the grand jury in a matter under investigation by it.⁶¹ Grand jurors must be steered away from certain areas of inquiry.⁶²

Some authorities hold that the powers of a grand jury come from constitutional and statutory provisions,⁶³ and are not dependent upon the court⁶⁴ or the court's jurisdiction or actions.⁶⁵ However, it has also been held that the grand jury's power extends no further than that of the court of which it is an arm.⁶⁶

A grand jury's powers and duties cannot be delegated to any other agency,⁶⁷ nor can any other agency be authorized by law to supplement or supersede the activities of the official grand jury.⁶⁸ Delegation of clerical and preparatory tasks by a grand jury is proper.⁶⁹

Duties.

A grand jury has a responsibility to thoroughly investigate the matters before it.⁷⁰ The grand jury

Unfettered and uninterrupted investigation

There is a grave public need for a grand jury which may conduct an unfettered and uninterrupted investigation.

Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

51. U.S.—U.S. v. Malsom, C.A.7(III.), 779 F.2d 1228.

In re Grand Jury Subpoenas Duces Tecum Involving Charles Rice, D.C.Minn., 483 F.Supp. 1085.

N.J.—In re Grand Jury Subpoena Duces Tecum, 363 A.2d 936, 143 N.J.Super. 526.

N.Y.—Matter of Special Investigation 1198/82, 461 N.Y.S.2d 186, 118 Misc.2d 683—People v. Walker, 457 N.Y.S.2d 732, 117 Misc.2d 210.

52. Ariz.—State v. Young, App., 720 P.2d 965, 149 Ariz. 580.

53. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.

Dual function of grand jury see supra § 2.

54. U.S.—In re Grand Jury Proceedings, D.C.Fla., 73 F.R.D. 647.

N.J.—State v. Doliner, 475 A.2d 552, 96 N.J. 236.

55. Pa.—Petition of McNair, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

56. U.S.—Blair v. U.S., N.Y., 39 S.Ct. 468, 250 U.S. 273, 63 L.Ed. 979.

In re Soto—Davila, D.C.Puerto Rico, 96 F.R.D. 406.

N.Y.—Virag v. Hynes, 430 N.E.2d 1249, 54 N.Y.2d 437, 446 N.Y.S.2d 196.

57. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

Ealy v. Littlejohn, C.A.Miss., 569 F.2d 219.

Alaska—O'Leary v. Superior Court, Third Judicial Dist., 816 P.2d 163.

N.Y.—Matter of Special Grand Jury, 494 N.Y.S.2d 263, 129 Misc.2d 770.

58. Conn.—Connelly v. Doe, 566 A.2d 426, 213 Conn. 66.

Ga.—Howard v. State, 4 S.E.2d 418, 60 Ga.App. 229.

Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

Miss.—State v. Bates, 192 So. 832, 187 Miss. 172.

N.Y.—In re Grand Jurors Ass'n, Bronx County, 25 N.Y.S.2d 154.

Pa.—Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

Tex.—Ex parte Jennings, 240 S.W. 942, 91 Tex.Cr. 612, 22 A.L.R. 1351.

59. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

60. Cal.—Allen v. Payne, 36 P.2d 614, 1 C.2d 607.

61. Cal.—Woody v. Peairs, 170 P. 660, 35 C.A. 553.

62. Nev.—State v. Babayan, 787 P.2d 805, 106 Nev. 155.

63. N.Y.—People v. Cirillo, 419 N.Y.S.2d 820, 100 Misc.2d 502.

No common-law powers

Ind.—In re Grand Jury for Fourth Quarter, 1984, App. 3 Dist., 497 N.E.2d 1088.

District of Columbia

By statute, District of Columbia grand juries have powers comparable to federal grand juries.

D.C.—Christian v. U.S., App., 394 A.2d 1, certiorari denied Clark v. U.S., 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

64. U.S.—U.S. v. Zarattini, C.A.Ill., 552 F.2d 753, certiorari denied 97 S.Ct. 2661, 431 U.S. 942, 53 L.Ed.2d 262.

65. N.Y.—People v. Rodriguez, 411 N.Y.S.2d 526, 97 Misc.2d 379.

66. U.S.—Matter of Arawak Trust Co. (Cayman) Ltd., D.C.N.Y., 489 F.Supp. 162.

67. N.Y.—In re Grand Jurors Ass'n, Bronx County, 25 N.Y.S.2d 154.

68. N.Y.—In re Grand Jurors Ass'n, Bronx County, 25 N.Y.S.2d 154.

69. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

need not specify the particular crime or person to be investigated.⁷¹ A grand jury need not determine whether a crime is an infamous one.⁷²

Justification for investigation.

A grand jury need not demonstrate any reason for investigating anyone.⁷³ Probable cause is not required for an investigation.⁷⁴ The mere possibility that violations of federal law have occurred is sufficient authority for a federal grand jury investigation.⁷⁵

Challenge to authority.

The law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.⁷⁶ It has been held that a mere witness does not have standing to contend that a grand jury is exceeding its jurisdiction.⁷⁷

§ 77. Necessity or Effect of Preliminary Examination, Arrest, or Imprisonment

A grand jury may investigate and present offenses without any preliminary examination and commitment or binding over of the accused, in the absence of a statutory provision therefor.

Library References

Grand Jury §26.

In the absence of statutes to the contrary, it is within the power of a grand jury to investigate and present offenses although there has been no preliminary examination and commitment or binding

over of accused,⁷⁸ and this power of the grand jury is not affected by the fact that an examination of accused for substantially the same offense is pending before an inferior tribunal having jurisdiction of the matter under investigation,⁷⁹ or that such a tribunal has power to hold a preliminary examination.⁸⁰

A grand jury may investigate a person regardless of whether there has been a preliminary hearing⁸¹ or the person has been arraigned.⁸² Failure to comply with certain requirements concerning preliminary hearings does not affect the power of a grand jury.⁸³ Thus, failure to afford accused a prompt preliminary hearing does not affect the power of the grand jury.⁸⁴

A grand jury may investigate a person even though he has not been bound over,⁸⁵ and even though he has been recognized to appear at a subsequent term of court.⁸⁶ Generally, a grand jury has the power to investigate a person regardless of what has occurred before the magistrate and regardless of whether the magistrate has held or discharged the person or still has the matter pending.⁸⁷ A grand jury may investigate crimes not specified in the order of a magistrate binding accused over⁸⁸ or in the charges presented or determined at a probable cause hearing.⁸⁹

A person may be investigated by a grand jury even if he has not yet been arrested.⁹⁰

Under some statutes, the grand jury must inquire into the case of every person imprisoned on a

70. Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

71. Conn.—In re Investigation of Grand Juror into Cove Manor Convalescent Center, Inc., 495 A.2d 1098, 4 Conn.App. 544, appeal dismissed 522 A.2d 1228, 203 Conn. 1.

72. D.C.—Punch v. U.S., App., 377 A.2d 1353, certiorari denied 98 S.Ct. 1586, 435 U.S. 955, 55 L.Ed.2d 806.

73. N.Y.—Kuriansky v. Seewald, 1 Dept., 544 N.Y.S.2d 336, 148 A.D.2d 238, appeal denied 549 N.E.2d 478, 74 N.Y.2d 616, 550 N.Y.S.2d 276—People v. Rao, 425 N.Y.S.2d 122, 73 A.D.2d 88.

74. U.S.—U.S. v. Scott, C.A.7(Ill.), 784 F.2d 787, certiorari denied 106 S.Ct. 2257, 476 U.S. 1145, 90 L.Ed.2d 702.

75. U.S.—U.S. v. Williams, C.A.Mo., 552 F.2d 226.

76. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

77. Mont.—Kelly v. Grand Jury of Lewis and Clark County, 552 P.2d 1399, 170 Mont. 284.

78. Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435.

N.Y.—People ex rel. Reis v. Warden of Bronx County Jail of City of New York, 269 N.Y.S. 433, 150 Misc. 801, affirmed 264 N.Y.S. 948, 239 A.D. 891, appeal denied 265 N.Y.S. 956, 240 A.D. 761.

79. S.C.—State v. Brown, 40 S.E. 776, 62 S.C. 374.

80. N.Y.—People v. Steiger, 277 N.Y.S. 602, 154 Misc. 538.

81. N.Y.—People v. Peterson, 398 N.Y.S.2d 24, 91 Misc.2d 407.

82. N.Y.—Vega v. Bell, 393 N.E.2d 450, 47 N.Y.2d 543, 419 N.Y.S.2d 454.

83. N.Y.—People ex rel. Hunter v. Patterson, 388 N.Y.S.2d 724, 55 A.D.2d 693.

84. N.Y.—People v. Phillips, 450 N.Y.S.2d 925, 88 A.D.2d 672.

85. Miss.—Beard v. State, 369 So.2d 769.

86. Ind.—State v. Bindley, 52 N.E. 804, 152 Ind. 182.

87. N.Y.—People v. Edwards, 422 N.Y.S.2d 324, 101 Misc.2d 747—People v. Peterson, 398 N.Y.S.2d 24, 91 Misc.2d 407.

88. Ga.—Johnson v. State, 251 S.E.2d 563, 242 Ga. 822.

89. N.C.—State v. McGee, 267 S.E.2d 67, 47 N.C.App. 280, review denied 273 S.E.2d 306, 301 N.C. 101.

90. N.Y.—Vega v. Bell, 393 N.E.2d 450, 47 N.Y.2d 543, 419 N.Y.S.2d 454.

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criminal charge and not indicted.⁹¹ The purpose of such a requirement is to protect an accused from languishing in jail without a formal accusation ever being timely filed against him.⁹²

§ 78. Supervision by Court

The court has some supervisory authority over the grand jury.

Research Note

Relation of grand jury to court in general is considered supra § 3.

Library References

Grand Jury ⇨25, 33.

The court has some supervisory authority over the grand jury.⁹³ A grand jury acts in connection with,⁹⁴ and, under general instructions from,⁹⁵ the court to which it is attached, or at least it is under the control of the court to the extent that it is organized,⁹⁶ and the legality of its proceedings is determined,⁹⁷ by the court, and to the extent that the grand jurors are required to observe and obey the law.⁹⁸

91. Iowa—State v. Lint, 270 N.W.2d 598.

Any person held to answer

Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

92. Iowa—State v. Lint, 270 N.W.2d 598.

93. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561.

U.S. v. Pabian, C.A.Fla., 704 F.2d 1533—In re Grand Jury Proceedings, C.A.Pa., 632 F.2d 1033—U.S. v. Howard, C.A.Ind., 560 F.2d 281.

U.S. v. Vetere, S.D.N.Y., 663 F.Supp. 381.

Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197.

Ill.—In re Report of Grand Jury of Marshall County, 438 N.E.2d 1316, 63 Ill.Dec. 953, 108 Ill.App.3d 232.

Md.—Duckett v. Touhey, 373 A.2d 323, 36 Md.App. 238.

Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

Ohio—State v. Schwab, 143 N.E. 29, 109 Ohio St. 532, 2 Ohio Law Abs. 196, 21 Ohio Law Rep. 602.

State ex rel. Shoop v. Mitrovich, 448 N.E.2d 800, 4 Ohio St.3d 220, 4 O.B.R. 575.

Pa.—Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

Broad power

U.S.—In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.

94. Hawaii—Matter of Moe, 617 P.2d 1222, 62 Haw. 613.

Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

95. U.S.—Cobbledick v. U.S., Cal., 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783.

96. U.S.—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

97. U.S.—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

98. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

Courts must be alert to repress any abuses of the investigatory power exercised by a grand jury,⁹⁹ and must ensure that the grand jury's powers are not subverted to unauthorized ends.¹ Where a grand jury seeks to exercise powers in violation of the Fourth or Fifth Amendments, judicial supervision is properly exercised to prevent the wrong before it occurs.² Courts should be sensitive to the considerations making for wise exercise of the grand jury's investigatory power, not only where constitutional issues may be involved but also where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury.³ A court should prevent unfairness,⁴ improper influence,⁵ and the potential for prejudice,⁶ and ensure a fair and impartial proceeding,⁷ and will not brook behavior which degrades the grand jury into a rubber stamp.⁸

The court may, in appropriate circumstances, do various things,⁹ such as regulate the presentation of evidence,¹⁰ direct the presentation of certain evi-

99. U.S.—Hoffman v. U.S., Pa., 71 S.Ct. 814, 341 U.S. 479, 95 L.Ed. 1118.

In re Grand Jury Subpoena, M.D.Pa., 626 F.Supp. 1319—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.

1. N.J.—State v. Doliner, 475 A.2d 552, 96 N.J. 236.

2. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561.

3. U.S.—Hoffman v. U.S., Pa., 71 S.Ct. 814, 341 U.S. 479, 95 L.Ed. 1118.

4. N.Y.—People v. Howard, 579 N.Y.S.2d 316, 152 Misc.2d 956.

5. Miss.—Mosley v. State, 396 So.2d 1015.

6. N.Y.—People v. Gilbert, 565 N.Y.S.2d 690, 149 Misc.2d 411.

7. Hawaii—State v. Rodrigues, 629 P.2d 1111, 63 Haw. 412.

8. U.S.—U.S. v. Al Mudarris, C.A.Cal., 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305.

9. U.S.—In re Grand Jury for November, 1974 Term, D.C.N.Y., 415 F.Supp. 242.

10. U.S.—In re Grand Jury for November, 1974 Term, D.C.N.Y., 415 F.Supp. 242.

Extends beyond Constitution

Exercise of court's supervisory power to enforce appropriate performance of Government in presenting evidence to grand jury can extend beyond minimum requirements set by Constitution to encourage fair and uniform procedures in prosecution of criminal actions.

U.S.—U.S. v. Vetere, S.D.N.Y., 663 F.Supp. 381.

Sanctions

Courts' supervisory power can be exercised to impose "ad hoc sanction" to enforce appropriate performance of the Government in presenting evidence to grand jury.

U.S.—U.S. v. Vetere, S.D.N.Y., 663 F.Supp. 381.

dence,¹¹ direct the prosecutor to present witnesses in a particular order,¹² direct the prosecutor to discontinue proceedings,¹³ or direct that a matter be presented to another grand jury.¹⁴

However, the supervisory power of courts is limited,¹⁵ the grand jury is not under the control of the court to the same extent as a petit jury.¹⁶ The court generally will not interfere with the grand jury in the absence of a strong reason for doing so.¹⁷ The grand jury must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench on the legitimate rights of any witness called before it.¹⁸ The court generally cannot limit the grand jury¹⁹

in its legitimate investigation,²⁰ interfere with its investigatory function,²¹ control the nature of its investigation,²² prohibit consideration of offenses within any particular class of crimes,²³ stay its proceedings,²⁴ dismiss a matter,²⁵ or do various other things.²⁶ It has been held that the powers of the grand jury may not be curtailed in the absence of a clear constitutional or legislative expression,²⁷ and that the court may inquire into proceedings only to see that the grand jury stays within statutory provisions.²⁸ Courts are reluctant to interfere with or abort well-intentioned aims and efforts of a grand jury, but will require the grand jury to operate within statutory guidelines.²⁹

11. U.S.—In re Grand Jury 89-2, E.D.Va., 728 F.Supp. 1269.

12. N.Y.—People v. Gonzalez, 2 Dept., 573 N.Y.S.2d 291, 175 A.D.2d 810.

13. N.Y.—People v. Doe, 574 N.Y.S.2d 453, 151 Misc.2d 829.

14. N.Y.—People v. Doe, 574 N.Y.S.2d 453, 151 Misc.2d 829.

15. U.S.—In re Grand Jury Investigation of Hugle, C.A.9(Cal.), 754 F.2d 863—U.S. v. Pabian, C.A.Fla., 704 F.2d 1533.

In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.

16. Miss.—Allen v. State, 61 Miss. 627.

17. U.S.—In re Kiefaber, C.A.9(Nev.), 774 F.2d 969, opinion vacated, appeal dismissed 823 F.2d 383—U.S. v. (Under Seal), C.A.Va., 714 F.2d 347, certiorari dismissed Doe v. U.S., 104 S.Ct. 1019, 464 U.S. 978, 78 L.Ed.2d 354—In re Grand Jury Investigation, C.A.Ky., 696 F.2d 449—Matter of Special February 1975 Grand Jury, C.A.Ill., 565 F.2d 407.

Ill.—Matter of Swan, 415 N.E.2d 1354, 48 Ill.Dec. 70, 92 Ill.App.3d 856.

N.Y.—People v. Doe, 574 N.Y.S.2d 453, 151 Misc.2d 829.

Clear basis in fact and law

U.S.—U.S. v. Armstrong, C.A.9(Nev.), 781 F.2d 700.

Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

Irreparable harm

Courts may exercise supervisory power over grand jury where there is a clear potential for a violation of rights either of a witness or of a nonwitness, if the violation cannot be corrected at a later stage.

U.S.—In re Grand Jury Investigation of Hugle, C.A.9(Cal.), 754 F.2d 863.

Speculation insufficient

U.S.—U.S. v. Claiborne, C.A.9(Nev.), 765 F.2d 784, certiorari denied 106 S.Ct. 1636, 475 U.S. 1120, 90 L.Ed.2d 182.

U.S. v. J. Treffiletti & Sons, D.C.N.Y., 496 F.Supp. 53.

Scrutiny

Any restraints on grand jury investigation must be carefully scrutinized.

Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

Appellate courts

Appellate courts are particularly reluctant to intrude into grand jury proceedings.

U.S.—Matter of Fendler, C.A.Ariz., 597 F.2d 1314.

18. U.S.—U.S. v. Dionisio, Ill., 93 S.Ct. 764, 410 U.S. 1, 35 L.Ed.2d 67.

19. U.S.—In re Grand Jury Proceedings, D.C.Pa., 497 F.Supp. 979.

Ala.—State v. Knighton, 108 So. 85, 21 Ala.App. 330.

Ill.—People ex rel. Ferrill v. Graydon, 164 N.E. 832, 333 Ill. 429.

Mo.—State ex rel. Graves v. Southern, 124 S.W.2d 1176, 344 Mo. 14.

20. U.S.—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

21. N.Y.—People v. Estenson, 4 Dept., 476 N.Y.S.2d 39, 101 A.D.2d 687.

Nature of investigation

Judiciary must refrain from interfering unduly with the grand jury through any investigatory stage of its work, whether the investigation is reportorial or inquisitorial or both in nature.

Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

22. U.S.—In re 1979 Grand Jury Subpoena, D.C.La., 478 F.Supp. 59.

23. W.Va.—State ex rel. Hamstead v. Dostert, 313 S.E.2d 409, 173 W.Va. 133.

24. U.S.—In re Grand Jury Proceedings, D.C.Pa., 497 F.Supp. 979.

25. N.Y.—People v. Wright, 387 N.Y.S.2d 49, 88 Misc.2d 14.

26. Monitor proceedings

Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

Prosecutorial misconduct

(1) Federal courts' limited supervisory power over grand jury proceedings may not be used as means of prescribing standards of prosecutorial conduct in the first instance.

U.S.—U.S. v. Sitton, C.A.9(Cal.), 968 F.2d 947, certiorari denied Romero v. U.S., 113 S.Ct. 478, 506 U.S. 979, 121 L.Ed.2d 384 and 113 S.Ct. 1306, 507 U.S. 929, 122 L.Ed.2d 695.

(2) Federal district court had no supervisory powers over grand jury so as to require district court to make in camera inspection of grand jury proceedings to determine whether prosecutor's misconduct in grand jury violated defendant's right to due process.

U.S.—U.S. v. Stout, C.A.7(Ill.), 965 F.2d 340.

27. N.Y.—Kuriansky v. Seewald, 1 Dept., 544 N.Y.S.2d 336, 148 A.D.2d 238, appeal denied 549 N.E.2d 478, 74 N.Y.2d 616, 550 N.Y.S.2d 276.

People v. Ackrish, 400 N.Y.S.2d 684, 92 Misc.2d 431.

28. Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

29. N.Y.—Matter of Report of October 1975 Grand Jury of Supreme Court of Ulster County, 388 N.Y.S.2d 949, 55 A.D.2d 707.

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The supervisory power of a court does not extend to the conduct of grand juries in other jurisdictions.³⁰

A petition for a hearing concerning alleged irregularities in the grand jury process is addressed to the discretion of the court.³¹

§ 79. Source of Information

According to some authorities, grand jury's investigation is restricted to such offenses as are called to its attention and directed by the court or prosecuting attorney. According to others, a grand jury has plenary inquisitorial powers, and may, on its own motion, originate charges against offenders from whatever source it acquires its knowledge.

Research Note

Relation of grand jury to court and prosecutor in general is considered supra § 3. Access to grand jury by private complainant is discussed infra § 98.

Library References

Grand Jury ⇌ 26.

According to some authorities, the powers of the grand jury are inquisitorial to a limited extent only

and its investigations are restricted to such offenses as are called to its attention and directed by the court or submitted for its consideration by the prosecuting attorney,³² and matters related to those submitted,³³ or such as fall within their knowledge or observation,³⁴ or such as have already been presented before a magistrate.³⁵ Under some statutes, the grand jury may not investigate a matter without the prosecutor's involvement.³⁶

According to other authorities, a grand jury has plenary inquisitorial powers, without any instruction or authority from the court, and may, on its own motion, originate charges against offenders, regardless of how the information on which it acts is brought to its attention,³⁷ and may initiate an investigation³⁸ without court authorization³⁹ or a formal charge,⁴⁰ and may investigate crimes not specified by the prosecutor.⁴¹ A grand jury may act on information acquired from any source,⁴² including tips and rumors,⁴³ evidence offered by the prosecutor,⁴⁴ or the personal knowledge of its own members.⁴⁵

30. U.S.—*U.S. v. Fischbach and Moore, Inc.*, D.C.Pa., 576 F.Supp. 1384.

31. U.S.—*Matter of Special April 1977 Grand Jury*, C.A.Ill., 587 F.2d 889.

32. Ala.—*Carr v. State*, 187 So. 252, 28 Ala.App. 466.

Conn.—*State v. Kemp*, 9 A.2d 63, 126 Conn. 60.

Pa.—*Petition of McNair*, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373—*Commonwealth v. Hubbs*, 8 A.2d 611, 137 Pa.Super. 229.

33. Conn.—*State v. Kemp*, 9 A.2d 63, 126 Conn. 60.

34. Pa.—*Commonwealth v. Green*, 17 A. 878, 126 Pa. 531.

35. Pa.—*Commonwealth v. Green*, 17 A. 878, 126 Pa. 531.

36. N.Y.—*People ex rel. Doe v. Beaudoin*, 3 Dept., 478 N.Y.S.2d 84, 102 A.D.2d 359.

37. Cal.—*Samish v. Superior Court in and for Sacramento County*, 83 P.2d 305, 28 C.A.2d 685.

Ga.—*Groves v. State*, 73 Ga. 205.

Ill.—*People v. Sheridan*, 181 N.E. 617, 349 Ill. 202—*People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 333 Ill. 429.

People v. Conzo, 23 N.E.2d 210, 301 Ill.App. 524.

La.—*State v. Richey*, 196 So. 545, 195 La. 319—*State v. Johnson*, 41 So. 117, 116 La. 856.

Md.—*Hitzelberger v. State*, 196 A. 288, 173 Md. 435—*Coblentz v. State*, 166 A. 45, 164 Md. 558, 88 A.L.R. 886—*In re Report of Grand Jury of Baltimore City*, 137 A. 370, 152 Md. 616.

N.Y.—*In re Both*, 192 N.Y.S. 822, 200 A.D. 423, 39 N.Y.Cr. 446.

38. Cal.—*Ex parte Peart*, 43 P.2d 334, 5 C.A.2d 469.

N.Y.—*People v. Doe*, 286 N.Y.S. 343, 247 A.D. 324, affirmed 3 N.E.2d 875, 272 N.Y. 473.

39. U.S.—*U.S. v. Williams*, Okl., 112 S.Ct. 1735, 118 L.Ed.2d 352.

40. U.S.—*Hale v. Henkel*, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.

Matter of Special February 1975 Grand Jury, C.A.Ill., 565 F.2d 407—*U.S. v. McGovern*, C.C.A.N.Y., 60 F.2d 880, certiorari denied 53 S.Ct. 96, 287 U.S. 650, 77 L.Ed. 561.

In re National Window Glass Workers, D.C.Ohio, 287 F. 219, 1 Ohio Law Abs. 419.

Cal.—*Samish v. Superior Court in and for Sacramento County*, 83 P.2d 305, 28 C.A.2d 685.

Conn.—*State v. Kemp*, 9 A.2d 63, 126 Conn. 60.

N.J.—*Matter of Grand Jury Subpoena Duces Tecum*, 397 A.2d 1132, 165 N.J.Super. 211, affirmed 410 A.2d 63, 171 N.J.Super. 475.

41. Ga.—*Johnson v. State*, 251 S.E.2d 563, 242 Ga. 822.

La.—*State v. Johnson*, App. 4 Cir., 467 So.2d 47, writ denied *State v. Baham*, 474 So.2d 1302, writ denied 474 So.2d 1301.

42. U.S.—*U.S. v. Zarattini*, C.A.Ill., 552 F.2d 753, certiorari denied 97 S.Ct. 2661, 431 U.S. 942, 53 L.Ed.2d 262.

Ga.—*Isaacs v. State*, 386 S.E.2d 316, 259 Ga. 717, certiorari denied 110 S.Ct. 3297, 111 L.Ed.2d 805, rehearing denied 111 S.Ct. 19, 111 L.Ed.2d 832.

43. U.S.—*U.S. v. Dionisio*, Ill., 93 S.Ct. 764, 401 U.S. 1, 35 L.Ed.2d 67.

In re Grand Jury Proceedings, C.A.Tex., 558 F.2d 1177.

Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

44. U.S.—*U.S. v. Dionisio*, Ill., 93 S.Ct. 764, 410 U.S. 1, 35 L.Ed.2d 67.

In re Grand Jury Proceedings, C.A.Tex., 558 F.2d 1177.

Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

45. U.S.—*U.S. v. Dionisio*, Ill., 93 S.Ct. 764, 410 U.S. 1, 35 L.Ed.2d 67—*Hoffman v. U.S.*, Pa., 71 S.Ct. 814, 341 U.S. 479, 95 L.Ed. 1118—*Hale v. Henkel*, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed.2d 652.

In re Grand Jury Proceedings, C.A.Tex., 558 F.2d 1177—*U.S. v. Zarattini*, C.A.Ill., 552 F.2d 753, certiorari denied 97 S.Ct. 2661, 431 U.S. 942, 53 L.Ed.2d 262.

Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

Ky.—*Bowling v. Sinnette*, 666 S.W.2d 743.

§ 80. Matters Subject to Investigation

A grand jury generally may investigate only crimes, and only those crimes committed within certain territorial limits.

Library References

Grand Jury ⇐4, 26.

As a general rule the proceedings of a grand jury pertain exclusively to the investigation of crimes.⁴⁶ A grand jury cannot investigate and remedy practices which are merely unwise and not illegal.⁴⁷ It is the duty of a grand jury to inquire into all offenses within its jurisdiction,⁴⁸ such as all offenses committed or triable within its county.⁴⁹ A grand jury may investigate possible unlawful actions of all persons, private citizens and public officials alike.⁵⁰ A grand jury may not investigate criminal activities which are beyond its sphere of authority.⁵¹ Some authorities hold that the concept of jurisdiction is inapplicable to a grand jury.⁵²

As to criminal offenses, as a general rule the jurisdiction of a grand jury is coextensive with, and limited by, that of the court in which it is impaneled and for which it is to make inquiry.⁵³ This is true as to the character and kinds of offenses to be investigated.⁵⁴

A grand jury that begins the investigation of a matter opens up all the ramifications of the particular field of inquiry.⁵⁵ The scope of inquiry is not limited to events which themselves may result in a criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity.⁵⁶ A grand jury may inquire as to the whereabouts of an unlocated person⁵⁷ or witness,⁵⁸ even if such person is a fugitive from justice.⁵⁹

Offense against different sovereign.

A state grand jury generally can investigate only conduct proscribed by the law of the same state,⁶⁰ and cannot investigate conduct alleged to have occurred in another jurisdiction.⁶¹ A federal grand jury cannot investigate violations of state laws.⁶² A District of Columbia grand jury can return a federal indictment.⁶³

Territorial limits.

The territorial jurisdiction of a grand jury is generally coextensive with and limited by that of the court.⁶⁴ A grand jury generally can investigate only offenses committed within its county,⁶⁵ but can investigate events that occurred outside its territo-

46. U.S.—U.S. v. Direct Sales Co., D.C.S.C., 40 F.Supp. 917.
 Ill.—People v. Conzo, 23 N.E.2d 210, 301 Ill.App. 524.
 Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152 Md. 616.
 N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.
 Pa.—Petition of McNair, 187 A. 498, 324 Pa. 43, 106 A.L.R. 1373.
 Tex.—Ex parte Jennings, 240 S.W. 942, 91 Tex.Cr. 612, 22 A.L.R. 1351.
 47. Wis.—State ex rel. Town of Caledonia, Racine County v. County Court of Racine County, 254 N.W.2d 317, 78 Wis.2d 429.
 48. Ala.—King v. Second Nat. Bank & Trust Co. of Saginaw, Mich., 173 So. 498, 234 Ala. 106.
 Carr v. State, 187 So. 252, 28 Ala.App. 466.
 Cal.—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469.
 N.Y.—People ex rel. Reis v. Warden of Bronx County Jail of City of New York, 269 N.Y.S. 433, 150 Misc. 801, affirmed 264 N.Y.S. 948, 239 A.D. 891, appeal denied 265 N.Y.S. 956, 240 A.D. 761.
 49. Ark.—Bowie v. State, 49 S.W.2d 1049, 185 Ark. 834, 83 A.L.R. 426.
 Cal.—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.
 N.Y.—People v. Doe, 280 N.Y.S. 508, 156 Misc. 304.
 N.C.—State v. Mitchell, 163 S.E. 581, 202 N.C. 439.
 Pa.—In re Investigation by Dauphin County Grand Jury, June, 1938, 2 A.2d 783, 332 Pa. 289, 120 A.L.R. 414.
 50. Fla.—Kelly v. Sturgis, App. 5 Dist., 453 So.2d 1179.
 51. Colo.—Losavio v. Robb, 579 P.2d 1152, 195 Colo. 533.
 52. Ill.—People v. Gibson, 440 N.E.2d 339, 64 Ill.Dec. 787, 109 Ill.App.3d 316, habeas corpus dismissed in part, granted in part U.S. ex rel. Gibson v. McGinnis, 773 F.Supp. 126, habeas corpus denied 793 F.Supp. 173.

53. N.Y.—People v. Ruttles, 14 N.Y.S.2d 979, 172 Misc. 306—People v. International Nickel Co., 155 N.Y.S. 156, affirmed 153 N.Y.S. 295, 168 A.D. 245, 33 N.Y.Crim.R. 241 and 112 N.E. 1068, 218 N.Y. 644.
 Pa.—In re Investigation by Dauphin County Grand Jury, June, 1938, 2 A.2d 783, 332 Pa. 289, 120 A.L.R. 414.
 54. N.Y.—People ex rel. Morrison v. Pollack, 34 N.Y.S.2d 841, 264 A.D. 92, affirmed 43 N.E.2d 831, 289 N.Y. 600—People ex rel. Kawiecki v. Carhart, 13 N.Y.S.2d 293, 170 Misc. 894.
 55. U.S.—U.S. v. Johnson, III., 63 S.Ct. 1233, 319 U.S. 503, 87 L.Ed. 1546, rehearing denied 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488, rehearing denied U.S. v. Sommers, 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488.
 56. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.
 57. N.Y.—Matter of Doe, 456 N.Y.S.2d 312, 117 Misc.2d 197.
 58. U.S.—Matter of Special February 1975 Grand Jury, C.A.Ill., 565 F.2d 407.
 Matter of Archuleta, D.C.N.Y., 432 F.Supp. 583.
 59. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.
 N.Y.—Matter of Doe, 456 N.Y.S.2d 312, 117 Misc.2d 197.
 60. N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.
 61. N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.
 62. U.S.—Claiborne v. U.S., C.C.A.Mo., 77 F.2d 682.
 63. U.S.—U.S. v. Allen, D.D.C., 729 F.Supp. 120.
 D.C.—Hackney v. U.S., 389 A.2d 1336, certiorari denied 99 S.Ct. 1054, 439 U.S. 1132, 59 L.Ed.2d 95.
 64. N.Y.—People ex rel. Unger v. Kennedy, 101 N.E. 442, 207 N.Y. 533.
 65. N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.

ry if such investigation is reasonably calculated to result in information concerning activity for which the grand jury could return an indictment.⁶⁶ The grand jurors must act in good faith,⁶⁷ with reasonable cause to believe that they possess jurisdiction to inquire into the asserted offense.⁶⁸ The legislature may extend the grand jury's power beyond the territorial limitation imposed by common law.⁶⁹

Effect of authority of other bodies or officials.

The fact that an agency or department has authority to conduct administrative proceedings generally does not prevent a grand jury from proceeding under its general powers.⁷⁰ A statute conferring original jurisdiction of certain specific offenses on justices of the peace does not exclude the jurisdiction of the grand jury to inquire into all public offenses, where a statute declares all public offenses indictable;⁷¹ nor does a statute giving a specified commission permissive power to enforce the statute prevent enforcement thereof through the usual method of grand jury proceedings.⁷²

Any duly constituted federal grand jury can indict for any federal crime.⁷³ Thus, an indictment under the Racketeer Influenced and Corrupt Organizations Act can be returned even by an ordinary federal grand jury,⁷⁴ even if a special grand jury is in existence.⁷⁵

Time of offense.

In the absence of a statute to the contrary, a grand jury has jurisdiction of offenses committed after it has been impaneled and sworn.⁷⁶ A grand jury may investigate a course of conduct continuing during its inquiry.⁷⁷ However, some authorities

hold that the offense must precede the impaneling,⁷⁸ and that the grand jury to which an allegedly perjurious statement was made cannot indict for perjury.⁷⁹ The effect of the running of a statute of limitations is considered *infra* § 82.

Prior indictment, information, or investigation.

Some statutes prohibit a grand jury from investigating an offense for which an indictment or information has already been filed.⁸⁰ However, other statutes permit investigation of such an offense.⁸¹ Whether the use of a grand jury to prepare a pending indictment for trial is improper is discussed *supra* § 10. A grand jury may continue an investigation of another grand jury whose existence has terminated.⁸² Resubmission of charge rejected by grand jury is treated in C.J.S. Indictments and Informations § 22.

§ 81. — Public Interest, Officers, and Institutions

Some authorities hold that, apart from its power to investigate crimes, a grand jury may investigate conditions of public interest and public officers and institutions.

Library References

Grand Jury ⇨ 25, 27.

Some authorities hold that a grand jury may investigate conditions of public interest even if there is no violation of a criminal statute,⁸³ and may investigate conditions affecting morals, health, sanitation, or general welfare.⁸⁴ The grand jury can investigate only activities within the county.⁸⁵

Under some statutory or constitutional provisions a grand jury is charged with the duty of

66. Ariz.—Franzi v. Superior Court of Arizona In and For Pima County, 679 P.2d 1043, 139 Ariz. 556.

67. Cal.—Samish v. Superior Court in and for Sacramento County, 83 P.2d 305, 28 C.A.2d 685.

68. Cal.—Samish v. Superior Court in and for Sacramento County, 83 P.2d 305, 28 C.A.2d 685.

69. N.C.—State v. Gardner, 353 S.E.2d 662, 84 N.C.App. 616, affirmed 360 S.E.2d 695, 320 N.C. 789.

70. U.S.—U.S. v. Tonry, D.C.La., 433 F.Supp. 620.

71. Minn.—State v. Kobe, 1 N.W. 1054, 26 Minn. 148.

72. N.J.—State v. Larson, 160 A. 556, 10 N.J.Misc. 384.

73. U.S.—U.S. v. Forsythe, D.C.Pa., 429 F.Supp. 715, reversed 560 F.2d 1127.

74. U.S.—U.S. v. Forsythe, D.C.Pa., 429 F.Supp. 715, reversed 560 F.2d 1127.

75. U.S.—U.S. v. Forsythe, D.C.Pa., 429 F.Supp. 715, reversed 560 F.2d 1127.

76. Cal.—People v. Beatty, 14 C. 566.

77. U.S.—U.S. v. Johnson, Ill., 63 S.Ct. 1233, 319 U.S. 503, 87 L.Ed. 1546, rehearing denied 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488, rehearing denied U.S. v. Sommers, 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488.

78. N.Y.—People v. Hollis, 543 N.Y.S.2d 881, 144 Misc.2d 259.

79. N.Y.—People v. Hollis, 543 N.Y.S.2d 881, 144 Misc.2d 259.

80. N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.

81. Pa.—Commonwealth v. Lang, 537 A.2d 1361, 517 Pa. 390.

82. Pa.—Commonwealth v. Levinson, 362 A.2d 1080, 239 Pa.Super. 387, affirmed 389 A.2d 1062, 480 Pa. 273, 2 A.L.R.4th 964.

83. N.J.—Matter of Grand Jury Subpoena Duces Tecum, 397 A.2d 1132, 165 N.J.Super. 211, affirmed 410 A.2d 63, 171 N.J.Super. 475.

84. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

85. Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

investigating and reporting on the official acts and conduct of certain public officers,⁸⁶ bodies,⁸⁷ agencies,⁸⁸ and institutions,⁸⁹ and on certain governmental activities⁹⁰ and the use of public funds.⁹¹

§ 82. — Effect of Defense

A grand jury does not have a duty to pursue every possible defense.

Library References

Grand Jury ⇐26.

A grand jury does not have a duty to pursue or exhaust every possible defense which may be available to accused if his case ultimately goes to trial.⁹² However, it has been held that a grand jury may inquire into possible affirmative defenses and the like.⁹³

It has been held that a grand jury investigation is improper if the statute of limitations has run.⁹⁴ However, it has also been held that the running of a statute of limitations is not a matter concerned with the grand jury's jurisdiction.⁹⁵

It has been held that a grand jury need not inquire into an insanity defense, as insanity does not negate guilt.⁹⁶

86. Fla.—*Kelly v. Sturgis*, App. 5 Dist., 435 So.2d 1179.

Okl.—*Hinz v. Hunt*, 221 P. 1022, 96 Okl. 285.

Pa.—*Petition of McNair*, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

S.C.—*State v. Bramlett*, 164 S.E. 873, 166 S.C. 323.

Investigation of crime by public officer as aspect of general power to investigate crime see supra § 80.

Matters covered

Function of grand jury is to hear and examine evidence concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise.

N.Y.—*Matter of Doe*, 456 N.Y.S.2d 312, 117 Misc.2d 197.

Authority of other bodies

While power of state commission on judicial conduct may indirectly result in a diminution of scope of grand jury's inquiry, it does not deprive the grand jury of its power to investigate a judge or any other public official and therefore does not constitute a violation of the anti-impairment clause.

N.Y.—*Stern v. Morgenthau*, 465 N.E.2d 349, 62 N.Y.2d 331, 476 N.Y.S.2d 810.

87. Fla.—*Kelly v. Sturgis*, App. 5 Dist., 453 So.2d 1179.

88. Nev.—*Matter of Report of Washoe County Grand Jury*, 590 P.2d 622, 95 Nev. 121.

89. Fla.—*Appeal of Untreiner*, App., 391 So.2d 272.

N.J.—*In re Presentment of Bergen County Grand Jury*, 471 A.2d 1203, 193 N.J.Super. 2.

S.C.—*State v. Bramlett*, 164 S.E. 873, 166 S.C. 323.

90. Nev.—*Matter of Report of Washoe County Grand Jury*, 590 P.2d 622, 95 Nev. 121.

§ 83. Special Grand Juries

- a. In general
- b. Federal special grand jury

a. In General

Except as restricted by statute, a special grand jury is regarded as a valid grand jury for every purpose, and may generally investigate any offense committed within the jurisdiction of the court.

Library References

Grand Jury ⇐24, 26.

Except to the extent that its powers of investigation and presentment are limited and restricted by the statutes authorizing its organization,⁹⁷ a special grand jury when legally organized is generally regarded as a valid grand jury for every purpose the same as a regular one,⁹⁸ and may as a general rule investigate any offense committed within the jurisdiction of the court,⁹⁹ and is not restricted to the investigation of offenses committed after the regular grand jury has adjourned.¹ A special investigating grand jury has broad investigative power.²

The fact that a special grand jury is assembled to consider certain matters does not prevent it from

91. Fla.—*In re Grand Jury (Freeport School Project) Winter Term 1988*, 544 So.2d 1104, review denied *Chandler v. Hilton Development Co.*, App. 1 Dist., 553 So.2d 1164 and *In re Presentment of Grand Jury Winter Term 1988*, 553 So.2d 1166.

92. N.D.—*State v. Skjonsby*, 319 N.W.2d 764.

93. U.S.—*Port v. Heard*, D.C.Tex., 594 F.Supp. 1212, affirmed 764 F.2d 423.

94. Mich.—*In re Citizens Grand Jury Proceedings*, 259 N.W.2d 887, 78 Mich.App. 402.

N.M.—*Cook v. Smith*, 834 P.2d 418.

95. Mass.—*Commonwealth v. Steinberg*, 536 N.E.2d 606, 404 Mass. 602.

96. Cal.—*People v. Snow*, 140 Cal.Rptr. 427, 72 C.A.3d 950.

97. Ala.—*Oakley v. State*, 33 So. 23, 135 Ala. 15.

98. Cal.—*People v. McDonell*, 47 C. 134.

Mo.—*State v. Cunningham*, 32 S.W. 970, 130 Mo. 507.

Va.—*Lyles v. Commonwealth*, 13 S.E. 802, 88 Va. 396.

99. Ark.—*Dawson v. State*, 180 S.W. 761, 121 Ark. 211.

Ill.—*People v. Blumenfeld*, 161 N.E. 857, 330 Ill. 474.

Mo.—*State v. Overstreet*, 31 S.W. 35, 128 Mo. 470.

Ohio—*In re Commissioners of Franklin County*, 5 Ohio Dec. 691, 7 Ohio N.P. 450.

1. Ill.—*People v. Blumenfeld*, 161 N.E. 857, 330 Ill. 474.

Mo.—*State v. Overstreet*, 31 S.W. 35, 128 Mo. 470.

2. Pa.—*Commonwealth v. Brocco*, 396 A.2d 1371, 263 Pa.Super. 51.

investigating other matters.³ Under some statutes, the court may impanel a special grand jury without specifying the matters to be investigated.⁴ Even where a special grand jury is bound by the court's specification of matters to be investigated, the court may expand the initial scope of the investigation.⁵

It has been held that a special grand jury requires close scrutiny by the court.⁶

Under some statutes, a special grand jury is invested with much broader investigative powers than a regular grand jury, but no indicting power.⁷

Some statutes provide for a statewide grand jury which can investigate only offenses involving activity in multiple counties.⁸

b. Federal Special Grand Jury

It shall be the duty of each federal special grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district.

It shall be the duty of each federal special grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district.⁹ The offenses need not involve organized crime activities.¹⁰

Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States

for the presentation of evidence.¹¹ Any such attorney receiving information concerning such an alleged offense from any person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.¹²

§ 84. Disposition

A grand jury is not bound to indict in every case where a conviction can be obtained.

Library References

Grand Jury § 24-26.

The usual end of a grand jury investigation is either a report, a "no-bill," or an indictment.¹³

A grand jury is not bound to indict in every case where a conviction can be obtained.¹⁴ Just as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or a no bill as it deems fit, even though probable cause exists.¹⁵

The grand jury may dismiss a charge.¹⁶ Dismissal means that there has been a hearing by competent authority, examination of evidence, and a conclusion reached which would not warrant submission of any question to a trial jury.¹⁷ There is a dismissal only where some definite action has been taken by the grand jury.¹⁸

A grand jury may discontinue its consideration of a matter.¹⁹

3. Ind.—State v. Fields, App. 1 Dist., 527 N.E.2d 218.

N.M.—State ex rel. Deschamps v. Kase, 834 P.2d 415, 114 N.M. 38.

Ohio—In re Commissioners of Franklin County, 5 Ohio Dec. 691, 7 Ohio N.P. 450.

Pa.—Commonwealth v. McCauley, 588 A.2d 941, 403 Pa.Super. 262, appeal denied 604 A.2d 248, 529 Pa. 656.

Court cannot limit

Petition-initiated grand jury cannot suffer discretionary screening of scope, nature, or subject matter of inquiry.

N.M.—Cook v. Smith, 834 P.2d 418, 114 N.M. 41.

4. Pa.—In re County Investigating Grand Jury of Oct. 18, 1982, 460 A.2d 249, 501 Pa. 118.

Commonwealth v. Atwood, 601 A.2d 277, 411 Pa.Super. 137, app. denied 607 A.2d 249, 530 Pa. 638.

5. Nev.—Gier v. Ninth Judicial Dist. Court of State of Nev., In and For County of Douglas, 789 P.2d 1245, 106 Nev. 208.

6. Pa.—Commonwealth v. Hallman, 383 A.2d 537, 252 Pa.Super. 573.

7. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

8. Fla.—State v. Whiddon, 384 So.2d 1269.

Relationship between offenses

While statute relating to subject matter of statewide grand jury requires that offenses to be inquired into be related, it does not require

that they be part of single transaction nor does it require that offenses be committed by same person or persons.

Fla.—State v. Barnett, App., 339 So.2d 1159, appeal after remand 344 So.2d 863.

9. 18 U.S.C.A. § 3332(a).

10. U.S.—U.S. v. Koliboski, C.A.III., 732 F.2d 1328.

11. 18 U.S.C.A. § 3332(a).

12. 18 U.S.C.A. § 3332(a).

13. U.S.—In re Oliver, Mich., 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

14. U.S.—Vasquez v. Hillery, Cal., 106 S.Ct. 617, 474 U.S. 254, 88 L.Ed.2d 598.

15. U.S.—U.S. v. Asdrubal-Herrera, D.C.III., 470 F.Supp. 939.

16. N.Y.—People v. Davis, 452 N.Y.S.2d 169, 114 Misc.2d 645.

17. N.Y.—People v. Davis, 452 N.Y.S.2d 169, 114 Misc.2d 645.

18. N.Y.—People v. Davis, 452 N.Y.S.2d 169, 114 Misc.2d 645.

19. N.Y.—People v. Wilkins, 408 N.Y.S.2d 291, 95 Misc.2d 737, affirmed 488 N.Y.S.2d 942, 110 A.D.2d 1093, reversed 501 N.E.2d 542, 68 N.Y.2d 269, 508 N.Y.S.2d 893, amendment denied 503 N.E.2d 122, 68 N.Y.2d 996, 510 N.Y.S.2d 566.

Under some statutes, the grand jury may direct to prosecutor to file an information charging an offense other than a felony.²⁰

A statute empowering a grand jury to certify to the court that accused is insane has been held unconstitutional.²¹

VI. PRESENTMENT OR REPORT

§ 85. Presentment for Criminal Conduct

According to some authorities, a grand jury may make a presentment of an offense within its knowledge or which is of a public nature.

Research Note

Presentments are discussed generally in C.J.S. Indictments and Informations.

Library References

Grand Jury ⇐42.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

A "presentment" is an accusation initiated by the grand jury itself.²² The term has also been defined as an informal statement, in writing, by a grand jury, representing to the court that a public offense has been committed, and that there is reasonable ground for believing that a particular individual has committed it.²³ With a presentment, the grand jury recommends for prosecution charges it has initiated.²⁴ According to some authorities, a presentment does not institute a criminal proceeding, but is only a device by which the grand jury brings to the attention of the prosecutor a matter which requires investigation by the prosecutor and sub-

mission of a properly drawn indictment by him to the grand jury when the facts so warrant.²⁵

Under some statutory or constitutional provisions grand jurors are empowered to make presentments of offenses which are within their own knowledge or observation or are of public notoriety and injurious to the entire community;²⁶ and according to some authorities they have such power, as at common law independently of any statute.²⁷ According to other authorities they have no power to present for a crime except by indictment.²⁸

In its presentment, the grand jury may make recommendations;²⁹ but it has no authority to state therein its opinion as to the force and effect of the evidence which it has heard or collected in its investigations,³⁰ and should not express an opinion as to the guilt of accused.³¹

Unless otherwise provided by statute, an accusation in the nature of a presentment must have the concurrence of the same number of jurors that is required to find an indictment.³²

It has been held that the district prosecutor need not personally prepare the presentment or super-

20. N.Y.—*People v. Wilkins*, 408 N.Y.S.2d 291, 95 Misc.2d 737, affirmed 488 N.Y.S.2d 942, 110 A.D.2d 1093, reversed 501 N.E.2d 542, 68 N.Y.2d 269, 508 N.Y.S.2d 893, amendment denied 503 N.E.2d 122, 68 N.Y.2d 996, 510 N.Y.S.2d 566.
 21. N.H.—*Novosel v. Helgemoe*, 384 A.2d 124, 118 N.H. 115, overruling *State v. Novosel*, 115 N.H. 302, 339 A.2d 16.
 22. Ill.—*In re Report of Grand Jury of Marshall County*, 438 N.E.2d 1316, 63 Ill.Dec. 953, 108 Ill.App.3d 232.
 23. Minn.—*In re Grand Jury of Wabasha County, Charged by Court January 19, 1976*, 244 N.W.2d 253, 309 Minn. 148.
 24. U.S.—*Fields v. Soloff*, C.A.2(N.Y.), 920 F.2d 1114.
 25. N.C.—*State v. Cole*, 240 S.E.2d 355, 294 N.C. 304.
 26. Tenn.—*Tenpenny v. State*, 270 S.W. 989, 151 Tenn. 669.
 27. Ala.—*Carr v. State*, 187 So. 252, 28 Ala.App. 466.
 Ill.—*People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 333 Ill. 429.
 Md.—*In re Report of Grand Jury of Baltimore City*, 137 A. 370, 152 Md. 616.
 Mass.—*Klous v. Bolster*, 146 N.E. 783, 251 Mass. 292.
 Pa.—*Petition of McNair*, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373—*Commonwealth v. Green*, 17 A. 878, 126 Pa. 531.
 R.I.—*In re Opinion to the Governor*, 4 A.2d 487, 62 R.I. 200, 121 A.L.R. 806.

28. Fla.—*Skipper v. Schumacher*, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376.
 Iowa—*Maley v. District Court of Woodbury County*, 266 N.W. 815, 221 Iowa 732.
 Wis.—*In re Grand Jury Report*, 235 N.W. 789, 204 Wis. 409.
Purpose of abolition
 In abolishing presentments, aim was to avoid informal and haphazard charges and findings by grand juries and to focus jury's attention on whether an indictment should be found by applying standard specified in rule.
 Minn.—*In re Grand Jury of Wabasha County, Charged by Court January 19, 1976*, 244 N.W.2d 253, 309 Minn. 148.
 29. S.C.—*State v. Bramlett*, 164 S.E. 873, 166 S.C. 323.
 30. N.Y.—*In re Healy*, 293 N.Y.S. 584, 161 Misc. 582.
 S.C.—*State v. Bramlett*, 164 S.E. 873, 166 S.C. 323.
 31. S.C.—*State v. Bramlett*, 164 S.E. 873, 166 S.C. 323.
 32. Cal.—*Coffey v. Superior Court of Sacramento County*, 83 P. 580, 2 C.A. 453.
 La.—*State ex rel. De Armas v. Platt*, 192 So. 659, 679, 193 La. 928.
 N.Y.—*In re Woodbury Police Com'r*, 155 N.Y.S. 851.

wise an assistant in its preparation.³³

§ 86. Report

It is the duty of the grand jury to report its actions on matters investigated by it to the court or official authorized to receive it. Some authorities hold that a grand jury may not report the result of its investigation where there is no indictment.

Library References

Grand Jury ⇌42.

It is generally the duty of the grand jury to report its action on matters properly investigated by it³⁴ to the court or authority charged with a duty in connection with the matter reported³⁵ notwithstanding no indictment is returned,³⁶ and it has been held that it is the duty of the court and prosecuting attorney to see that such a report is made.³⁷ The grand jurors, however, must respect any limitation imposed by statute on the kinds of returns, findings, and reports that they may make and the manner in which they shall be made.³⁸ Some authorities hold that a grand jury may not report the result of its investigation where there is no indictment.³⁹

A hypertechnical interpretation of a statute concerning reports should not be allowed to defeat the ends of justice.⁴⁰

33. Tenn.—State v. Taylor, Cr.App., 653 S.W.2d 757.

34. Cal.—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.

Ky.—Rion v. Commonwealth, 62 Ky. 235, 1 Duv. 235.

La.—State v. Harris, 1 So. 446, 39 La. Ann. 228.

Wis.—In re Grand Jury Report, 235 N.W. 789, 204 Wis. 409.

Matters to be reported

The grand jury must report to the court in writing if there is an insufficient number of votes to indict a person held to answer and must report to the court in writing in a case in which the investigation of charges against the defendant are referred to the next grand jury.

Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

35. N.Y.—Application of Knight, 28 N.Y.S.2d 353, 176 Misc. 635.

Wis.—In re Grand Jury Report, 235 N.W. 789, 204 Wis. 409.

36. Cal.—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.

37. Ky.—Rion v. Commonwealth, 62 Ky. 235, 1 Duv. 235.

38. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

39. Mo.—Matter of Interim Report of Grand Jury for March Term of Seventh Judicial Circuit of Missouri 1976, 553 S.W.2d 479.

Public officer

Only action that grand jury can take after investigating conduct of public officer is to return presentment or indictment.

Miss.—Petition of Moore, 336 So.2d 736.

40. N.Y.—Matter of Special Grand Jury, 494 N.Y.S.2d 263, 129 Misc.2d 770.

41. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed 131 So. 147, 100 Fla. 373.

La.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.

A grand jury's finding or report is not a verdict or judgment,⁴¹ but amounts at most to an accusation.⁴² A report is not an appealable order.⁴³

Federal grand jury.

In some situations a federal grand jury may issue a report.⁴⁴

§ 87. — Subject Matter

Some authorities hold that a grand jury may report on various noncriminal matters concerning public affairs.

Library References

Grand Jury ⇌27, 42.

A grand jury cannot report on civil matters in the absence of specific statutory authority.⁴⁵ Under some statutes, a report on civil matters is proper only in the case of jail conditions.⁴⁶

According to some authorities, a grand jury may make a report on the state of public affairs, conditions of a particular area, or matters of general governmental interest;⁴⁷ evils affecting the public welfare;⁴⁸ conditions affecting morals, health, sani-

N.M.—McKenzie v. Fifth Judicial Dist. Court, App., 765 P.2d 194, 107 N.M. 778, certiorari denied 765 P.2d 758, 107 N.M. 785.

42. La.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.

43. N.M.—McKenzie v. Fifth Judicial Dist. Court, App., 765 P.2d 194, 107 N.M. 778, certiorari denied 765 P.2d 758, 107 N.M. 785.

44. U.S.—In re Grand Jury Sitting in Cedar Rapids, Iowa, N.D.Iowa, 734 F.Supp. 875.

Lack of concurrence in finding

In the case of a federal grand jury, if a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate judge in writing forthwith.

Fed.Rules Cr.Proc., Rule 6(f), 18 U.S.C.A.

45. Ohio—Simington v. Shimp, 398 N.E.2d 812, 60 Ohio App.2d 402, 14 O.O.3d 422.

46. Ohio—Simington v. Shimp, 398 N.E.2d 812, 60 Ohio App.2d 402, 14 O.O.3d 422.

47. N.J.—State v. Porro, 377 A.2d 909, 152 N.J.Super. 179, appeal dismissed 391 A.2d 517, 77 N.J. 504.

48. Ala.—Carr v. State, 187 So. 252, 28 Ala.App. 466.

Cal.—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.

D.C.—Poston v. Washington, A. & Mt. V.R. Co., 36 App.D.C. 359.

La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152 Md. 616.

N.Y.—In re Crosby, 213 N.Y.S. 86, 126 Misc. 250.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

tation, or general welfare;⁴⁹ or public officials,⁵⁰ institutions,⁵¹ or monies.⁵² It has been held that the term "presentment" includes a report condemning official misconduct not rising to the level of a criminal offense.⁵³

It has been held that the grand jury should not be used as a superlegislative body or for the purpose of expressing views on political issues,⁵⁴ and cannot issue a general social document.⁵⁵ However, it has also been held that a report may contain recommendations as to the public welfare and the general good.⁵⁶ Under some statutes, the report may propose recommendations for legislative, execu-

tive, or administrative action in the public interest based upon stated findings.⁵⁷

A report should not contain statements unnecessary to the purpose sought to be accomplished by the report,⁵⁸ and should not contain raw evidentiary materials.⁵⁹

Identifiable persons in general.

It has been held that, where no offense is charged, a report should not censure an identifiable person,⁶⁰ even in the case of a public official.⁶¹ Under some statutes, a report proposing recommendations for legislative, executive, or administrative action must not be critical of an identifiable person.⁶² However, it has also been held that a

49. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

50. Fla.—In re Grand Jury (Freeport School Project) Winter Term 1988, App. 1 Dist., 544 So.2d 1104, review denied Chandler v. Hilton Development Co., 553 So.2d 1164 and In re Presentment of Grand Jury Winter Term 1988, 553 So.2d 1166.

51. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

52. Fla.—In re Grand Jury (Freeport School Project) Winter Term 1988, App. 1 Dist., 544 So.2d 1104, review denied Chandler v. Hilton Development Co., 553 So.2d 1164 and In re Presentment of Grand Jury Winter Term 1988, 553 So.2d 1166.

53. U.S.—Fields v. Soloff, C.A.2(N.Y.), 920 F.2d 1114.

54. Colo.—Matter of 1976 Arapahoe County Statutory Grand Jury and Suppression of Grand Jury Report, 572 P.2d 147, 194 Colo. 308.

55. Ill.—In re Report of Grand Jury of Marshall County, 438 N.E.2d 1316, 63 Ill.Dec. 153, 108 Ill.App.3d 232.

56. Ga.—Howard v. State, 4 S.E.2d 418, 60 Ga.App. 229.

57. **Strict construction**

Power of grand jury to issue report proposing recommendations for legislative, executive or administrative action exists only as a result of an act of the legislature, and provisions thereof must be strictly construed.

N.Y.—Matter of Report of Grand Jury of Tompkins County Impaneled April 24, 1984, 3 Dept., 493 N.Y.S.2d 648, 110 A.D.2d 44.

When appropriate

Grand jury report proposing recommendations for legislative, executive or administrative action will be issued when governmental system or situation investigated is not so seriously flawed that indictment or individual disciplinary action is called for, but where, nonetheless, system is found to be less than perfect and public interest would be served by making corrective changes.

N.Y.—Matter of Report of August–September 1983 Grand Jury III, Term XI, Suffolk County, 2 Dept., 479 N.Y.S.2d 226, 103 A.D.2d 176.

Combination improper

Matter concerning misconduct by public servant should not be combined in one report with matter proposing recommendations for legislative, executive or administrative action.

N.Y.—Matter of Report of August "A" 1977 Grand Jury of Westchester County, 406 N.Y.S.2d 107, 63 A.D.2d 984.

58. Fla.—In re Grand Jury (Freeport School Project) Winter Term 1988, App. 1 Dist., 544 So.2d 1104, review denied Chandler v. Hilton Development Co., 553 So.2d 1164 and In re Presentment of Grand Jury Winter Term 1988, 553 So.2d 1166.

59. Cal.—McClatchy Newspapers v. Superior Court (1983–1984 Grand Jury for Fresno County), 751 P.2d 1329, 245 Cal.Rptr. 744, 44 C.3d 1162.

60. U.S.—Application of Jordan, D.C.W.Va., 439 F.Supp. 199.

Ala.—Ex parte Robinson, 165 So. 582, 231 Ala. 503.

Ark.—Simpson v. Langston, 664 S.W.2d 872, 281 Ark. 458.

Fla.—In re Report of Grand Jury, 11 So.2d 316, 152 Fla. 154.

Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152 Md. 616.

Minn.—In re Grand Jury of Hennepin County Impaneled on November 24, 1975, 271 N.W.2d 817—In re Grand Jury of Wabasha County, Charged by Court January 19, 1976, 244 N.W.2d 253, 309 Minn. 148.

Nev.—Biglieri v. Washoe County Grand Jury Report Dated March 15, 1976, 601 P.2d 703, 95 Nev. 696—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

Wis.—In re Grand Jury Report, 235 N.W. 789, 204 Wis. 409.

Even if not named

Ga.—In re Presentments of Lowndes County Grand Jury, March Term 1982, 304 S.E.2d 423, 166 Ga.App. 258.

61. Ala.—Ex parte Robinson, 165 So. 582, 231 Ala. 503.

Ga.—In re Hensley, 362 S.E.2d 432, 184 Ga.App. 625.

Ind.—In re Elkhart Grand Jury, June 20, 1980, App., 433 N.E.2d 835.

Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

Md.—In re Report of Grand Jury of Carroll County, November Term, 1976, 386 A.2d 1246, 39 Md.App. 472.

Mich.—Bennett v. Kalamazoo Cir. Judge, 150 N.W. 141, 183 Mich. 200.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

Wis.—In re Grand Jury Report, 235 N.W. 789, 204 Wis. 409.

62. N.Y.—Matter of Monroe County Grand Jury for February 1978 Term, 417 N.Y.S.2d 342, 70 A.D.2d 778.

Identifiable person

Mere reference to position or title will not necessarily cause person to be identifiable when there are many persons in that position or title.

N.Y.—Matter of Report of August–September 1983 Grand Jury III, Term XI, Suffolk County, 2 Dept., 479 N.Y.S.2d 226, 103 A.D.2d 176.

report can criticize a public official,⁶³ and that, while a report cannot criticize a private person where criminal activities or public affairs are not involved,⁶⁴ a report can criticize a person where public affairs are involved,⁶⁵ even in the case of a private person.⁶⁶

Under some statutes, the grand jury may submit a report concerning misconduct, nonfeasance, or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action,⁶⁷ but may not recommend a specific disciplinary measure.⁶⁸ The person must be a current and not merely a former public servant.⁶⁹ Some authorities hold that the grand jury may recommend removal of a public official.⁷⁰

Criminal conduct.

A report cannot accuse a person of an offense in the absence of an indictment or presentment.⁷¹ It has been held that a person may be censured only where his conduct does not constitute an indictable offense,⁷² however, it has also been held that a

report can allege criminal conduct on the part of a person.⁷³

§ 88. — Preparation

A grand jury report may be drafted by the prosecutor.

Library References

Grand Jury ⇐42.

A grand jury report may be drafted by the prosecutor.⁷⁴ A grand jury which arrives at its conclusions through untrammelled deliberations may then direct the prosecutor to draft its report.⁷⁵ A report drafted by the prosecutor becomes the report of the grand jury upon the grand jury's adoption of the report.⁷⁶

Before any report is prepared pursuant to a vote of the grand jury, the grand jury must vote upon whether or not a report should be issued at all and, if so, what type of report should be prepared.⁷⁷ A grand jury should not be presented with a report recommending the discipline or removal of a public servant before the grand jury has even voted to

Must involve misconduct

Report should be sealed only when criticism it contains is directed against personal misconduct as such, viz., individual official's misfeasance, malfeasance, or neglect of duty, rather than that criticism of person who acted in or managed existing system which is inherent in any such recommendation for change which carries with it certain degree of criticism of system as it exists.

N.Y.—Matter of Report of August–September 1983 Grand Jury III, Term XI, Suffolk County, 2 Dept., 479 N.Y.S.2d 226, 103 A.D.2d 176.

63. Even if unfair

Fla.—Kelly v. Sturgis, App. 5 Dist., 453 So.2d 1179.

Inextricable relationship

Censure of a public official is permissible only where it may be said that his connection with the condemned matter is such that its existence is inextricably related to noncriminal failure to discharge his public duty; the criticism of the individual is allowable only where it is integrally associated with the main purpose of the report, to draw critical attention to some undesirable condition in the affairs of the public.

N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

64. Fla.—In re Grand Jury (Freeport School Project) Winter Term 1988, App. 1 Dist., 544 So.2d 1104, review denied Chandler v. Hilton Development Co., 553 So.2d 1164 and In re Presentment of Grand Jury Winter Term 1988, 553 So.2d 1166—Kelly v. Sturgis, App. 5 Dist., 453 So.2d 1179.

65. Cal.—McClatchy Newspapers v. Superior Court (1983–1984 Grand Jury for Fresno County), 751 P.2d 1329, 245 Cal.Rptr. 774, 44 C.3d 1162.

66. Fla.—Malcolm Pirnie, Inc. v. Monroe County Grand Jury Report, Fall Term, 1987, App. 3 Dist., 558 So.2d 139.

67. N.Y.—Johnson v. Keenan, 396 N.Y.S.2d 232, 58 A.D.2d 755.

68. N.Y.—Matter of Report of May–June 1979 Grand Jury of Oneida County, 440 N.Y.S.2d 126, 81 A.D.2d 1032—Matter of Report of August "A" 1977 Grand Jury of Westchester County, 406 N.Y.S.2d 107, 63 A.D.2d 984.

69. N.Y.—Mansour v. Abrams, 4 Dept., 534 N.Y.S.2d 602, 144 A.D.2d 905—Matter of Report of April, 1979 Grand Jury of Montgomery County, 436 N.Y.S.2d 414, 80 A.D.2d 654, appeal after remand Matter of Reports of Grand Jury of Montgomery County Empanelled on April 30, 1979, 452 N.Y.S.2d 755, 88 A.D.2d 1054, appeal dismissed 442 N.E.2d 1275, 57 N.Y.2d 924, 456 N.Y.S.2d 764, appeal after remand 474 N.Y.S.2d 627, 100 A.D.2d 692.

70. Fla.—Appeal of Untreiner, App., 391 So.2d 272.

71. Nev.—Biglieri v. Washoe County Grand Jury Report Dated March 15, 1976, 601 P.2d 703, 95 Nev. 696—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

72. N.J.—State v. Porro, 377 A.2d 909, 152 N.J.Super. 179, appeal dismissed 391 A.2d 517, 77 N.J. 504.

Evidence must be insufficient

Prior to a presentment censuring a public official for abuse of his office, the grand jury must resolve that the evidence before it is insufficient or lacking for criminal indictment against him for the same wrongdoing.

N.J.—Matter of Investigation into Hamilton Tp. Bd. of Educ., 500 A.2d 744, 205 N.J.Super. 248.

73. Alaska—O'Leary v. Superior Court, Third Judicial Dist., 816 P.2d 163 (per Matthews, Chief Justice, with one Justice concurring and one Justice concurring in part).

74. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

75. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

76. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

77. N.Y.—Matter of Report of Special Grand Jury of Nassau County, New York, Panel 3, Second Term, 1982, 2 Dept., 477 N.Y.S.2d 34, 102 A.D.2d 871.

issue a report of that nature.⁷⁸ It has been said that it is the responsibility of the grand jury, not the prosecutor, to formulate reports.⁷⁹

A report must be based on an investigation by the entire grand jury.⁸⁰

A minority report that was never submitted to the full membership of the grand jury for approval by a majority of its members as a minority report or view on a matter investigated by the grand jury is not an authorized report.⁸¹

§ 89. — Judicial Review

- a. In general
- b. Evidentiary support for report
- c. Procedure

a. In General

A court may review a grand jury report and may, in appropriate circumstances, prevent the release to the public of all or part of the report.

Library References

Grand Jury ⇐42.

Statutes or rules providing for judicial review of grand jury reports and, in some circumstances, for repression of reports or parts thereof have been

upheld.⁸² Judicial review of a report to determine whether the grand jury acted in excess of legal limits may be implicit in legislation defining the grand jury's jurisdiction.⁸³ The court may in appropriate circumstances strike or expunge all⁸⁴ or part⁸⁵ of a report. The determination of whether a report should be made available to the public involves a balancing of interests.⁸⁶

The court may review a report to determine whether the grand jury has acted unlawfully,⁸⁷ or has gone beyond its authority,⁸⁸ and whether there has been compliance with statutory requirements.⁸⁹ The court should examine the record to determine if the report is false, based on partisan motives, or indulges in personalities without basis, or if other good cause for preventing release of the report appears.⁹⁰ A report should be sealed if it contains matter that must be kept confidential⁹¹ or the disclosure of which would be inimical to the public interest.⁹² Repression has been held not justified by the fact that the grand jury acted irresponsibly,⁹³ or unfairly.⁹⁴

Defects in a charge to the grand jury may justify the sealing of a report,⁹⁵ where improper instructions impair the grand jury's integrity or create a possibility of prejudice,⁹⁶ as where there is a failure

78. N.Y.—Matter of Report of Jan. III Special Grand Jury for January, 1979 Term, Suffolk County, 438 N.Y.S.2d 141, 81 A.D.2d 639.

79. N.Y.—Matter of June 1982 Grand Jury of Supreme Court of Rensselaer County, 3 Dept., 471 N.Y.S.2d 378, 98 A.D.2d 284.

80. Cal.—Unnamed Minority Members of the 1987–1988 Kern County Grand Jury v. Superior Court (Baca), 5 Dist., 256 Cal.Rptr. 727, 208 C.A.3d 1344, review denied.

81. Cal.—Unnamed Minority Members of the 1987–1988 Kern County Grand Jury v. Superior Court (Baca), 5 Dist., 256 Cal.Rptr. 727, 208 C.A.3d 1344, review denied.

82. Fla.—Miami Herald Pub. Co. v. Marko, 352 So.2d 518.

83. Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

84. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

85. Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

N.Y.—Matter of Saratoga County Grand Jury Reports for March, 1979 Term, 434 N.Y.S.2d 768, 77 A.D.2d 399.

Make readable

Power to strike whatever is inappropriate to the presentment must include the marginal power to make the presentment readable.

N.Y.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

86. U.S.—In re Grand Jury Sitting in Cedar Rapids, Iowa, N.D.Iowa, 734 F.Supp. 875.

Colo.—Matter of 1976 Arapahoe County Statutory Grand Jury and Suppression of Grand Jury Report, 572 P.2d 147, 194 Colo. 308.

87. Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

88. Fla.—Miami Herald Pub. Co. v. Marko, 352 So.2d 518.

Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

89. N.Y.—Matter of Report of May, 1982 Grand Jury of Columbia County, 3 Dept., 463 N.Y.S.2d 577, 94 A.D.2d 871.

90. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

91. N.Y.—Matter of Report of Jan. III Special Grand Jury for January 1979 Term, Suffolk County, 438 N.Y.S.2d 141, 81 A.D.2d 639.

92. N.Y.—Matter of Report of Jan. III Special Grand Jury for January, 1979 Term, Suffolk County, 438 N.Y.S.2d 141, 81 A.D.2d 639.

93. Nev.—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

94. Fla.—Miami Herald Pub. Co. v. Marko, 352 So.2d 518.

95. N.Y.—Matter of Reports of Grand Jury of Montgomery County Empanelled on April 30, 1979, 3 Dept., 474 N.Y.S.2d 627, 100 A.D.2d 692—Matter of Special Grand Jury Investigation, 434 N.Y.S.2d 504, 79 A.D.2d 847.

96. N.Y.—Matter of Special Grand Jury Investigation, 434 N.Y.S.2d 504, 79 A.D.2d 847.

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to instruct on the burden or standard of proof.⁹⁷ However, it has also been held that failure to charge the grand jury concerning the preponderance of the evidence standard does not justify the sealing of a report.⁹⁸

Effect of sealing.

Where a report is sealed, some authorities hold that the prosecutor may resubmit the evidence which is the subject of the report to a new grand jury,⁹⁹ while others hold that the prosecutor may not do so.¹

b. Evidentiary Support for Report

A statement in a grand jury report should be repressed if it lacks a factual foundation in the record.

A statement in a grand jury report should be repressed if it lacks a factual foundation in the record.² However, some authorities hold that it is sufficient that the statement has a factual foundation in the report itself, and that the court need not review the evidence presented to the grand jury.³ The mere fact that the accuracy of a finding is disputed does not justify repression.⁴

Some authorities hold that the name of a public official accused of misconduct in a report should be released only if the accusation is supported by substantial evidence.⁵ Other authorities hold that a public official should not be censured unless the evidence of official impropriety is conclusive,⁶ and

that, regardless of whether a public official is involved, a report must have a substantial foundation.⁷

Under some statutes, the court shall make an order accepting and filing the report as a public record only if the court is satisfied that the report is supported by the preponderance of the credible and legally admissible evidence,⁸ and that, in the case of a report concerning misconduct, nonfeasance, or neglect in public office by a public servant, each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report.⁹

c. Procedure

A person does not have standing to challenge the portion of a grand jury report dealing with other persons rather than himself. Under some statutes, where a report relates to an individual, the government must give such individual a copy of the report and a specified period of time to seek to repress or expunge the report.

A person does not have standing to challenge the portion of a grand jury report dealing with other persons rather than himself.¹⁰ It has been held that a public institution, as distinct from a public official, may not challenge a report.¹¹

It has been held that the court may review a report sua sponte.¹²

A motion may be made to expunge a report without serving notice of the motion on the grand

97. N.Y.—Hynes v. Shea, 1 Dept., 544 N.Y.S.2d 131, 152 A.D.2d 485—Matter of Report of Special Grand Jury of Nassau County, New York, Panel 3, Second Term, 1982; 2 Dept., 477 N.Y.S.2d 34, 102 A.D.2d 871.

98. N.Y.—Matter of Additional Grand Jury, Orange County, May-June 1990 Term, 2 Dept., 582 N.Y.S.2d 729, 182 A.D.2d 688.

99. N.Y.—Matter of Special Grand Jury, 494 N.Y.S.2d 263, 129 Misc.2d 770.

1. N.Y.—Matter of Reports of Grand Jury of Montgomery County Impaneled on April 30, 1979, 3 Dept., 489 N.Y.S.2d 385, 108 A.D.2d 482.

2. Fla.—Miami Herald Pub. Co. v. Marko, 352 So.2d 518.

3. Fla.—In re Grand Jury (Freeport School Project) Winter Term 1988, App. 1 Dist., 544 So.2d 1104, review denied Chandler v. Hilton Development Co., 553 So.2d 1164 and In re Presentment of Grand Jury Winter Term 1988, 553 So.2d 1166—Moore v. 1986 Grand Jury Report on Public Housing, App. 3 Dist., 532 So.2d 1103.

4. Fla.—State v. Grand Jury, Fall Term 1986, Presentment Dated July 29, 1987, App. 2 Dist., 535 So.2d 696.

5. Alaska—O'Leary v. Superior Court, Third Judicial Dist., 816 P.2d 163 (per Matthews, Chief Justice, with one Justice concurring and one Justice concurring in part).

6. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2—State v. Porro, 377 A.2d 909, 152 N.J.Super. 179, appeal dismissed 391 A.2d 517, 77 N.J. 504.

7. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

8. N.Y.—Matter of April 1983 Onondaga County Grand Jury, 4 Dept., 476 N.Y.S.2d 407, 101 A.D.2d 1023—Matter of Report of Special Grand Jury of Monroe County, 433 N.Y.S.2d 300, 77 A.D.2d 199.

Deference to grand jury

Sufficiency of evidence standard generally applicable in deciding civil cases governs review of grand jury reports submitted for judicial acceptance; hence, where there is a sharp conflict in the testimony so that resolution of the issues depends on the credibility of witnesses, the court will ordinarily not disturb the grand jury findings.

N.Y.—Matter of Report of October 1975 Grand Jury of Supreme Court of Ulster County, 388 N.Y.S.2d 949, 55 A.D.2d 707.

9. N.Y.—Matter of Report of Special Grand Jury of Monroe County, 433 N.Y.S.2d 300, 77 A.D.2d 199.

10. Nev.—Biglieri v. Washoe County Grand Jury Report Dated March 15, 1976, 601 P.2d 703, 95 Nev. 696—Matter of Report of Washoe County Grand Jury, 590 P.2d 622, 95 Nev. 121.

11. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

12. N.J.—In re Presentment of Bergen County Grand Jury, 471 A.2d 1203, 193 N.J.Super. 2.

jury.¹³ Under some statutes, where a report relates to an individual, the government must furnish such individual with a copy of the report, and give such individual a specified period of time to seek to repress or expunge the report.¹⁴ Failure to comply with these requirements justifies expungement of the report.¹⁵

Under some statutes, in the case of a report concerning misconduct, nonfeasance, or neglect in office by a public servant, after the court accepts the report such public servant may file an answer.¹⁶ It has been held that the purpose of the answer is to assist the court in deciding whether the report should be accepted for filing as a public record, that the answer may include additional facts which were not before the grand jury, and that the court should reconsider its decision to accept the report in light of any defense presented.¹⁷

Some authorities hold that an order barring the filing of a report is not appealable.¹⁸

§ 90. — Federal Special Grand Juries

- a. In general
- b. Procedure

a. In General

A federal special grand jury may submit a report concerning noncriminal conduct involving organized criminal activity by a public officer or employee, or regarding organized crime conditions in the district. The court shall make an order accepting and filing such report as a public record only if certain requirements are met.

Library References

Grand Jury ⇐42.

A federal special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report: concerning noncriminal misconduct, mal-

feasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or regarding organized crime conditions in the district.¹⁹

The court to which such report is submitted shall examine it and the minutes of the special grand jury and, with certain exceptions, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the foregoing provisions concerning subject matter²⁰ and that the report is based upon facts revealed in the course of an investigation authorized by statute²¹ and is supported by the preponderance of the evidence.²²

When the report involves a recommendation of removal or disciplinary action, the court must also be satisfied that each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman were afforded an opportunity to testify before the grand jury prior to the filing of such report.²³ Otherwise, the court must be satisfied that the report is not critical of an identified person.²⁴

Whenever the court to which a report recommending removal or disciplinary action is submitted is not satisfied that the report complies with statutory requirements, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpoena or otherwise be made public until such requirements are met.²⁵

Prejudice to consideration of pending criminal matter.

If the court finds that the filing of such report as a public record may prejudice fair consideration of

13. Mich.—Bennett v. Kalamazoo Cir. Judge, 150 N.W. 141, 183 Mich. 200.
 14. Fla.—Philpitt v. Weintraub, App., 377 So.2d 247.
 15. Fla.—Philpitt v. Weintraub, App., 377 So.2d 247.
 16. N.Y.—Matter of Report of Special Grand Jury of Monroe County, 433 N.Y.S.2d 300, 77 A.D.2d 199.
 17. N.Y.—Matter of Report of Special Grand Jury of Monroe County, 433 N.Y.S.2d 300, 77 A.D.2d 199.
 18. Ill.—In re Report of Grand Jury of Marshall County, 438 N.E.2d 1316, 63 Ill.Dec. 953, 108 Ill.App.3d 232.
 19. 18 U.S.C.A. § 3333(a).

Public officer or employee

“Public officer or employee” means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any

political subdivision, or any department, agency, or instrumentality thereof.
 18 U.S.C.A. § 3333(f).
 20. 18 U.S.C.A. § 3333(b).
 21. 18 U.S.C.A. § 3333(b)(1).
 22. 18 U.S.C.A. § 3333(b)(1).
 23. 18 U.S.C.A. § 3333(b)(2).
 24. 18 U.S.C.A. § 3333(b)(2).
 25. 18 U.S.C.A. § 3333(e).

a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.²⁶

b. Procedure

Where a federal special grand jury recommends removal of or disciplinary action against a public officer or employee, each public officer or employee named in the report is given an opportunity to file an answer.

An order accepting a report by a federal special grand jury recommending removal or disciplinary action and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpoena or otherwise made public until at least 31 days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or, if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report.²⁷ No order accepting such a report shall be entered until 30 days after the delivery of such report to each public officer or body having juris-

diction, responsibility, or authority over each public officer or employee named in the report.²⁸

The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report.²⁹ Unauthorized publication may be punished as a contempt of the court.³⁰

Such public officer or employee may file with the clerk a verified answer to such a report not later than 20 days after service of the order and report upon him.³¹ Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer.³² Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudicially, or unnecessarily, such answer shall become an appendix to the report.³³

Upon the expiration of the time to answer the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.³⁴

VII. CONDUCT OF PROCEEDINGS

§ 91. In General

Library References

Grand Jury ⇐33.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The manner of conducting a hearing before a grand jury depends in a large measure on the good

judgment of the grand jury.³⁵ Under some statutes the grand jury may fix the rules or methods of its procedure,³⁶ as far as they are discretionary and not violative of any statute or immemorial usage having the force of law.³⁷

In its proceedings the grand jury can function ordinarily only as a body, under and within the limitation of its legal authority, and while in official session in the grand jury room.³⁸ In the absence of

26. 18 U.S.C.A. § 3333(d).

27. 18 U.S.C.A. § 3333(c)(1).

28. 18 U.S.C.A. § 3333(c)(1).

29. 18 U.S.C.A. § 3333(c)(1).

30. 18 U.S.C.A. § 3333(c)(1).

31. 18 U.S.C.A. § 3333(c)(2).

32. 18 U.S.C.A. § 3333(c)(2).

33. 18 U.S.C.A. § 3333(c)(2).

34. 18 U.S.C.A. § 3333(c)(3).

35. N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

36. Cal.—Clinton v. Superior Court in and for Los Angeles County, 73 P.2d 252, 23 C.A.2d 342.

N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

37. N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

38. Cal.—Clinton v. Superior Court in and for Los Angeles County, 73 P.2d 252, 23 C.A.2d 342.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376.

Decision by grand jury as official body

Questions presented to grand jury are addressed to its judgment and discretion, and the law contemplates that such questions will be finally decided by the grand jury as an official body and not merely by one of its members.

Cal.—Clinton v. Superior Court in and for Los Angeles County, 73 P.2d 252, 23 C.A.2d 342.

a constitutional or statutory provision to the contrary the grand jury may meet outside the courthouse, with the consent and approval of the court.³⁹ An individual member of the grand jury is without authority to perform any act as a grand juror except those official duties imposed by law and at a regular and valid session of the grand jury.⁴⁰

A grand jury must act consistently with the oath of its members,⁴¹ and must act alone on the evidence before it, free from outside influences.⁴² It has been held that the introduction of former grand jurors into the grand jury process is presumptively prejudicial,⁴³ but that contact between a foreperson and a former foreperson concerning only administrative and procedural matters is harmless.⁴⁴ The grand jurors must not unreasonably delay action on cases before them.⁴⁵

If the evidence is clear and conclusive the grand jury may act at once, and is not required to discuss the evidence before voting an indictment.⁴⁶

Officers or personnel.

In the absence of statute, it is not necessary to the legal constitution of a grand jury or to the legal transaction of any business coming before it that any officer should be appointed to wait on it.⁴⁷ Under some statutes an officer must be designated to attend the sessions of the grand jury.⁴⁸ Pursuant to some statutes, at the request of a special grand jury the court may provide it with appropriate specialized personnel for investigative purposes.⁴⁹

Time for hearings.

Under some statutes, the grand jury must conduct its hearing during the usual business hours of the court.⁵⁰ A distinction must be made between the business hours of the judge who convenes the grand jury and the business hours of the court.⁵¹ The usual business hours of the court may include a time when such judge is unavailable.⁵²

§ 92. Presence of Grand Jurors

Library References

Grand Jury Ⓒ-3, 13, 33.

All of the grand jurors need not be present every time the grand jury meets⁵³ or present for the presentation of each piece of evidence.⁵⁴

It has been said that as long as at least 12 members hear the matter presented and vote to return an indictment against accused, the court has complied with the statutory requirements.⁵⁵ However, it has also been held that the lack of continuity in the presence of jurors voting on the indictment is not a viable claim,⁵⁶ and that it is not required that the 12 or more jurors voting to return an indictment be in attendance when all evidence is presented against accused.⁵⁷ If final action is taken by the entire body, the fact that the foreman or one or more members are not present when the jury convenes is immaterial.⁵⁸

Prosecutors can insure that perceptions of fairness are maintained by giving replacement and

39. Ind.—Reed v. State, 152 N.E. 273, 198 Ind. 338.

40. Cal.—Clinton v. Superior Court in and for Los Angeles County, 73 P.2d 252, 23 C.A.2d 342.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376.

41. Mass.—Com. v. McLeod, 477 N.E.2d 972, 394 Mass. 727, certiorari denied Aiello v. Massachusetts, 106 S.Ct. 248, 474 U.S. 919, 88 L.Ed.2d 256.

42. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

43. Minn.—State v. Johnson, 441 N.W.2d 460.

44. Minn.—State v. Johnson, 441 N.W.2d 460.

45. Mass.—Attorney General v. Pelletier, 134 N.E. 407, 420, 240 Mass. 264.

46. U.S.—U.S. v. Rintelen, D.C.N.Y., 235 F. 787.

47. N.C.—State v. Perry, 44 N.C. 330.

48. Ill.—People v. Gould, 178 N.E. 133, 345 Ill. 288.

49. Role

Role of special personnel appointed to assist special grand jury is not limited to educating grand jurors in areas of special personnel's

expertise so that grand jurors may successfully conduct their own investigation and examination and is not limited to simply providing documentary evidence and reports; special personnel may, and most often do, conduct the investigation.

Va.—Vihko v. Com., 393 S.E.2d 413, 10 Va.App. 498.

50. N.M.—State v. Weiss, App., 731 P.2d 979, 105 N.M. 283, certiorari denied 731 P.2d 1334, 105 N.M. 290.

51. N.M.—State v. Weiss, App., 731 P.2d 979, 105 N.M. 283, certiorari denied 731 P.2d 1334, 105 N.M. 290.

52. N.M.—State v. Weiss, App., 731 P.2d 979, 105 N.M. 283, certiorari denied 731 P.2d 1334, 105 N.M. 290.

53. Nev.—Johnston v. State, 822 P.2d 1118, 107 Nev. 944.

54. Pa.—Com. v. Levinson, 362 A.2d 1080, 239 Pa.Super. 387, affirmed 389 A.2d 1062, 480 Pa. 273, 2 A.L.R.4th 964.

55. Nev.—Johnston v. State, 822 P.2d 1118, 107 Nev. 944.

56. U.S.—U.S. v. Gordon, D.C.N.Y., 493 F.Supp. 814, affirmed 655 F.2d 478.

57. U.S.—U.S. v. Sugar, D.C.N.Y., 606 F.Supp. 1134.

58. La.—State v. Smith, 103 So. 534, 158 La. 129.

absent grand jurors an opportunity to review transcripts of missed sessions.⁵⁹ Giving them summaries is not recommended unless for some valid reason transcripts are not available.⁶⁰

Some statutes provide that a grand jury proceeding is defective when it is conducted before fewer than a specified number of grand jurors.⁶¹

§ 93. Voting

Only the legal members of the grand jury may vote on questions before it.

Research Note

Voting as affecting validity of indictment is treated in C.J.S. Indictments and Informations § 20.

Library References

Grand Jury ⇐33.

Only the legal members of the grand jury may vote on questions before it.⁶²

At common law, a grand jury can only act on the concurrence or agreement of 12 of their number.⁶³ Generally, the agreement of only 12 of the grand jurors is needed to return a true bill.⁶⁴ A request by at least 12 grand jurors is not required to permit the reading back of prior testimony.⁶⁵ In the case of a federal grand jury, an indictment may be found only upon the concurrence of 12 or more jurors.⁶⁶

The grand jury need not vote separately on each count of an indictment.⁶⁷

The grand jury is not limited to one vote on a proposed indictment,⁶⁸ and may vote on alternative proposed indictments.⁶⁹

§ 94. Limitations on Who May Participate

Statutes or rules frequently limit the persons who may be present at a grand jury proceeding.

Library References

Grand Jury ⇐39.

Statutes or rules frequently limit the persons who may be present at a grand jury proceeding.⁷⁰ The purpose of such a limitation is to exclude persons who have no authorized role,⁷¹ and to safeguard the secrecy of the proceedings and protect grand jurors from undue influence or intimidation.⁷² A witness may object to the presence of unauthorized persons during his testimony.⁷³ Some authorities hold that there is no rule prohibiting persons from appearing before the grand jury at times other than during deliberations.⁷⁴

A limitation on who may be present has been held applicable to an examination outside the presence of the grand jury, where a videotape of the examination will be presented to the grand jury.⁷⁵ However, it has also been held that the fact that a person takes a deposition does not mean that such person is "present" when the deposition is read to the grand jury,⁷⁶ and that, where a witness testifies by telephone, it need not be established for the record that no one is present with the witness.⁷⁷

Such a limitation must be read as accommodating the practical exigency of making all relevant infor-

59. U.S.—U.S. v. Provenzano, C.A.N.J., 688 F.2d 194, certiorari denied 103 S.Ct. 492, 459 U.S. 1071, 74 L.Ed.2d 634 and Cotler v. U.S., 103 S.Ct. 492, 459 U.S. 1071, 74 L.Ed.2d 634.

60. U.S.—U.S. v. Provenzano, C.A.N.J., 688 F.2d 194, certiorari denied 103 S.Ct. 492, 459 U.S. 1071, 74 L.Ed.2d 634 and Cotler v. U.S., 103 S.Ct. 492, 459 U.S. 1071, 74 L.Ed.2d 634.

61. Sixteen

N.Y.—People v. Smith, 496 N.Y.S.2d 635, 130 Misc.2d 294.

62. Del.—State v. Anderson, 166 A. 662, 5 W.W.Harr. 407, 35 Del. 407.

63. Cal.—Fitts v. Superior Court in and for Los Angeles County, 57 P.2d 510, 6 C.2d 230.

64. Conn.—State v. Gunning, 439 A.2d 339, 183 Conn. 299.

65. N.Y.—People v. Jackson, 561 N.Y.S.2d 398, 148 Misc.2d 886.

66. Fed.Rules Cr.Proc., Rule 6(f), 18 U.S.C.A.

67. U.S.—U.S. v. Felice, D.C. Ohio, 481 F.Supp. 79.

Me.—State v. Twist, 528 A.2d 1250, affirmed 617 A.2d 548.

68. U.S.—U.S. v. McKenzie, C.A.La., 678 F.2d 629, rehearing denied 685 F.2d 1386, certiorari denied 103 S.Ct. 450, 459 U.S. 1038, 74 L.Ed.2d 604.

69. U.S.—U.S. v. McKenzie, C.A.La., 678 F.2d 629, rehearing denied 685 F.2d 1386, certiorari denied 103 S.Ct. 450, 459 U.S. 1038, 74 L.Ed.2d 604.

70. Idaho—State v. Edmonson, 743 P.2d 459, 113 Idaho 230.

71. U.S.—U.S. v. Schell, C.A.4(W.Va.), 775 F.2d 559, certiorari denied 106 S.Ct. 1498, 475 U.S. 1098, 89 L.Ed.2d 898.

72. U.S.—U.S. v. Echols, C.A.La., 542 F.2d 948, certiorari denied 97 S.Ct. 1695, 431 U.S. 904, 52 L.Ed.2d 387.

Idaho—State v. Edmonson, 743 P.2d 459, 113 Idaho 230.

73. U.S.—In re Grand Jury Proceedings, C.A.10(Okl.), 797 F.2d 906.

74. Tex.—Carter v. State, App. 2 Dist., 691 S.W.2d 112.

Better practice

When grand jury is not deliberating, presence of peace officers, stenographers, and others, is not discountenanced; however, better practice is that only prosecutor, reporter and witnesses being interrogated should be present.

Tex.—Ex parte Rogers, Cr.App., 640 S.W.2d 921.

75. N.Y.—People v. Gilbert, 565 N.Y.S.2d 690, 149 Misc.2d 411.

76. N.M.—State v. Evans, App., 557 P.2d 1114, 89 N.M. 765, certiorari denied 558 P.2d 619, 90 N.M. 7.

77. Alaska—Bogges v. State, App., 783 P.2d 1173.

mation available to the grand jury in a meaningful and understandable manner.⁷⁸

§ 95. — Who May Participate in General

- a. In general
- b. Presence during deliberation and voting

a. In General

Some statutes or rules enumerate the persons, such as the witness under examination, who may be present at a grand jury proceeding.

Library References

Grand Jury ⇐ 82, 39.

It has been held that, in the absence of any imperative necessity therefor, the presence in the grand jury room at any time during the sessions of the grand jury of any person other than a witness undergoing examination, and the duly authorized prosecuting officer, is improper.⁷⁹ This rule is not applicable where some imperative compulsion requires the presence of other persons to prevent miscarriage of justice or failure of investigation.⁸⁰ It has been said that the only capacity in which an unauthorized person may be called before or attend a grand jury session is that of a witness during the actual taking of his own testimony.⁸¹ Under some statutes or rules provision is made as to what persons, other than the grand jurors and the witnesses being examined, may be present while the grand jury is examining a charge.⁸² In the case of

a federal grand jury, the only persons who may be present while the grand jury is in session are attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device.⁸³

Officers duly authorized to attend on grand juries may properly be present in the grand jury room when the performance of their duties makes their presence necessary, although the grand jury may be engaged at the time in the investigation of a charge.⁸⁴

The presence of various persons has been held proper,⁸⁵ such as an indispensable attendant for a sick or disabled witness.⁸⁶ The presence of various persons has been held improper,⁸⁷ such as an expert accountant engaged in assisting the prosecuting officer,⁸⁸ one not duly appointed or authorized to represent the state acting in the place and stead of the regular prosecuting officer,⁸⁹ or the grand jury's auditor.⁹⁰ A statute authorizing the presence of a police officer, who has prepared the case, during the examination of witnesses has been declared unconstitutional.⁹¹

Judge.

Under the rule, or a statute, forbidding the presence of any person other than the grand jurors, except as required or permitted by law, the presence of the trial judge during the investigation is improper;⁹² the court cannot interfere with or

78. U.S.—U.S. v. Echols, C.A.La., 542 F.2d 948, certiorari denied 97 S.Ct. 1695, 431 U.S. 904, 52 L.Ed.2d 387.

79. Cal.—People v. Brown, 253 P. 735, 81 C.A. 226.

Ill.—People v. Munson, 150 N.E. 280, 319 Ill. 596.

Miss.—State v. Owen, 126 So. 25, 156 Miss. 487.

80. Mass.—In re Lebowitch, 126 N.E. 831, 235 Mass. 357.

81. S.C.—State v. Capps, 275 S.E.2d 872, 276 S.C. 59.

82. N.D.—State ex rel. Miller v. District Court of Burleigh County, 124 N.W. 417, 19 N.D. 819.

Staff of district attorney or attorney general

"Staff" in context of statutes governing time and place for hearing and assistance for grand jury refers to legal staff of district attorney or Attorney General's office, e.g., assistant district attorneys or assistant attorneys general; thus, investigator for Attorney General's office who acted as bailiff was not authorized to be in grand jury room during hearing, on theory that he was member of Attorney General's staff.

N.M.—Davis v. Traub, 565 P.2d 1015, 90 N.M. 498.

83. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

84. Tex.—Tinker v. State, 253 S.W. 531, 95 Tex.Cr. 143.

85. Guard for witness

N.Y.—People v. Hyde, 445 N.Y.S.2d 800, 85 A.D.2d 745.

Victim-witness assistant

Mass.—Com. v. Conefrey, 570 N.E.2d 1384, 410 Mass. 1, appeal after remand 640 N.E.2d 116, 37 Mass.App.Ct. 290, appeal decided 650 N.E.2d 1268, 420 Mass. 508.

86. Ill.—People v. Arnold, 93 N.E. 786, 248 Ill. 169.

Mass.—In re Lebowitch, 126 N.E. 831, 235 Mass. 357.

87. Grand jury aide

Grand jury aides are not authorized to be in grand jury room during hearing by statutes governing time and place for hearing and assistance for grand jury unless they fall into specified categories.

N.M.—Davis v. Traub, 565 P.2d 1015, 90 N.M. 498.

Paralegal

Minn.—Dwire v. State, App., 381 N.W.2d 871, review denied.

88. U.S.—U.S. v. Heinze, C.C.N.Y., 177 F. 770.

89. U.S.—U.S. v. Virginia-Carolina Chemical Co., C.C.Tenn., 163 F. 66.

90. Cal.—Husband v. Superior Court in and for Los Angeles County, 17 P.2d 764, 128 C.A. 444.

91. Mass.—In re Opinion of Justices, 123 N.E. 100, 232 Mass. 601.

92. Iowa—State v. Bower, 183 N.W. 322, 191 Iowa 713.

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frustrate the proceedings and deliberations of the grand jury.⁹³ The judge, however, must be respected by the grand jury and be permitted to act in his official capacity,⁹⁴ and the participation of the presiding judge in activities pertaining to preliminary investigations, the employment of investigators, etc., has been held to be at most a mere irregularity.⁹⁵ Supervision of grand jury by the court is treated *supra* § 78.

Witness.

One witness cannot be present while another is undergoing examination,⁹⁶ although there is some authority to the contrary.⁹⁷ After a witness testifies, the witness cannot remain⁹⁸ and participate in the interrogation of other witnesses.⁹⁹ A law enforcement official serving as a witness cannot participate in the questioning of other witnesses.¹ In the case of a federal grand jury, a witness may be present only if the witness is under examination.²

When it is necessary to examine evidence which can only be presented through the use of complicated machinery, persons with the requisite skills to operate such machines and to give testimony concerning their operations may be present.³ Where a qualified projectionist is duly sworn as a witness available for grand jury questions, shows films as instructed, and is not present during the presentation of other evidence or during the deliberations, he is a witness under examination and may be present.⁴

93. Mo.—State ex rel. Graves v. Southern, 124 S.W.2d 1176, 344 Mo. 14.

94. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

95. Cal.—Fitts v. Superior Court in and for Los Angeles County, 51 P.2d 66, 4 C.2d 514, 102 A.L.R. 290.

96. U.S.—U.S. v. Edgerton, D.C.Mont., 80 F. 374.

Rationale

Exclusion of witnesses from grand jury proceedings, as with exclusion of unauthorized persons in general, is based on preservation of secrecy in grand jury proceedings.

Ill.—People v. Toolen, 5 Dist., 451 N.E.2d 1364, 72 Ill.Dec. 41, 116 Ill.App.3d 632.

97. Tex.—Hicks v. State, App. 1 Dist., 630 S.W.2d 829, review refused.

98. Minn.—Dwire v. State, App., 381 N.W.2d 871, review denied.

Dual role

If a witness remains in a grand jury room because of his dual roles of prosecuting attorney, while another witness testifies, he is an unauthorized person.

U.S.—Equal Employment Opportunity Commission v. Sears, Roebuck & Co., D.C.Ill., 504 F.Supp. 241.

Interpreter.

The presence of an interpreter and the employment of his services in the examination of witnesses whose testimony could not otherwise be made intelligible to the grand jury are not improper,⁵ provided the grand jury requests his assistance and he is sworn to keep the secrets of the grand jury room and to remain therein only during the performance of his duties.⁶ In the case of a federal grand jury, interpreters when needed may be present.⁷ Under some statutes an interpreter is permitted to be present,⁸ although he is a witness in the case,⁹ or although he arrested accused.¹⁰

b. Presence During Deliberation and Voting

Under some statutes or rules, the presence of any person not a member of the grand jury while that body is deliberating or voting is forbidden.

It has been held that officers duly authorized to attend on grand juries may properly be present in the grand jury room when the performance of their duties makes their presence necessary, although the grand jury may be engaged at the time in deliberations.¹¹

Under some statutes or rules the presence of any person not a member of the grand jury while that body is deliberating or voting on a charge is forbidden.¹² Such a provision must be strictly enforced.¹³ It has been held that a sign language interpreter may not be present so as to enable a profoundly hearing-impaired person to serve as a grand ju-

99. W.Va.—State v. Frazier, 252 S.E.2d 39, 162 W.Va. 602.

1. W.Va.—State v. Frazier, 252 S.E.2d 39, 162 W.Va. 602.

2. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

3. U.S.—U.S. v. Echols, C.A.La., 542 F.2d 948, certiorari denied 97 S.Ct. 1695, 431 U.S. 904, 52 L.Ed.2d 387.

4. U.S.—U.S. v. Echols, C.A.La., 542 F.2d 948, certiorari denied 97 S.Ct. 1695, 431 U.S. 904, 52 L.Ed.2d 387.

5. Conn.—State v. Chin Lung, 139 A. 91, 106 Conn. 701.

6. Conn.—State v. Chin Lung, 139 A. 91, 106 Conn. 701.

7. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

8. Cal.—People v. Lem Deo, 64 P. 265, 132 C. 199.

9. Cal.—People v. Ramirez, 56 C. 533.

10. Cal.—People v. Ramirez, 56 C. 533.

11. Miss.—State v. Bacon, 27 So. 563, 77 Miss. 366.

12. Ark.—Bennett v. State, 257 S.W. 372, 161 Ark. 496.

N.M.—Baird v. State, 568 P.2d 193, 90 N.M. 667.

N.Y.—Cooligan v. Celli, 4 Dept., 492 N.Y.S.2d 287, 112 A.D.2d 789.

Tex.—Tinker v. State, 253 S.W. 531, 95 Tex.Cr. 143.

13. N.M.—Baird v. State, 568 P.2d 193, 90 N.M. 667.

ror.¹⁴ A de facto grand juror may be present.¹⁵

In the case of a federal grand jury, no person other than the jurors may be present while the grand jury is deliberating or voting.¹⁶

The presence of alternates violates no constitutional right, where such alternates do not confer or participate with regular members.¹⁷

§ 96. — Stenographers and the Like

Under some statutes or rules, a stenographer or operator of a recording device may be present at a grand jury proceeding.

Research Note

Whether proceedings may or must be recorded is treated infra § 110.

Library References

Grand Jury ⇐38.

Under some statutes or rules a stenographer, duly appointed¹⁸ and sworn,¹⁹ may be present in the grand jury room for the purpose of taking down in shorthand for the use of the prosecution the evidence of witnesses examined before the grand jury.²⁰ Pursuant to some statutes or rules, the court in its discretion upon good cause being shown may authorize the presence of an official court reporter.²¹ Where a deputy clerk or court reporter is necessary to operate recording equipment, such person is authorized to be in the grand jury room.²² A person may be present and perform the function of a court reporter even if he does not bear the title of official court reporter.²³

Some authorities hold that the presence of a stenographer is improper,²⁴ even though he is present by order of court.²⁵ It has been held that a statute providing that the grand jury may appoint one of its members clerk to preserve the minutes of the testimony given before them excludes the right

to introduce any other person into the presence of the grand jury for the purpose of taking shorthand notes of the testimony.²⁶

In the case of a federal grand jury, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.²⁷

§ 97. — Effect of Presence of Unauthorized Persons

The presence of an unauthorized person before the grand jury during its investigation of a matter ordinarily will invalidate an indictment found by the grand jury, where such presence has influenced the grand jury and prejudiced the defendant, and particularly where such presence is during the grand jury's deliberations and voting.

Research Note

Presence of unauthorized person as ground for motion to quash, dismiss, or set aside indictment is discussed generally in C.J.S. Indictments and Informations § 177.

Library References

Grand Jury ⇐39.

It is well settled that an indictment will be set aside where in finding it the grand jury was influenced and defendant was prejudiced in his substantial rights by the presence of an unauthorized person in the grand jury room.²⁸ Even if the presence of an unauthorized person justifies dismissal of an indictment, it does not render the grand jury proceedings void ab initio.²⁹ It has been held that in some circumstances the presence of an unauthorized person can be cured by reexamination of a witness.³⁰

According to some authorities the mere presence of an unauthorized person in the grand jury room is held to be a matter of substance, sufficient to render invalid an indictment found under such cir-

14. N.Y.—Cooligan v. Celli, 4 Dept., 492 N.Y.S.2d 287, 112 A.D.2d 789.
 15. Tex.—Howard v. State, App. 9 Dist., 704 S.W.2d 575.
 16. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.
 17. Conn.—State v. McGann, 506 A.2d 109, 199 Conn. 163.
 18. N.Y.—People v. Coco, 128 N.Y.S. 409, 70 Misc. 195, 25 N.Y.Cr. 288.
 19. Cal.—People v. Arnold, 118 P. 729, 17 C.A. 68.
 20. Ky.—Burch v. Commonwealth, 42 S.W.2d 714, 240 Ky. 519—Alford v. Commonwealth, 42 S.W.2d 711, 240 Ky. 513.
 21. Me.—State v. Rich, 395 A.2d 1123, certiorari denied 100 S.Ct. 110, 444 U.S. 854, 62 L.Ed.2d 71.
 22. Idaho—State v. Edmonson, 743 P.2d 459, 113 Idaho 230.
 23. N.M.—State v. Baird, App., 568 P.2d 204, 90 N.M. 678, affirmed 568 P.2d 193, 90 N.M. 667.
 24. Me.—State v. Bowman, 38 A. 331, 90 Me. 363.

S.C.—Ex parte McLeod, 252 S.E.2d 126, 272 S.C. 373.
 Tex.—Sims v. State, Tex.Cr., 45 S.W. 705.
 25. Me.—State v. Bowman, 38 A. 331, 90 Me. 363.
 26. Mo.—State v. Salmon, 115 S.W. 1106, 216 Mo. 466.
 State v. Sullivan, 84 S.W. 105, 110 Mo.App. 75.
 27. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

Evidence

Evidence may include evidence necessary to challenge indictment, including colloquy between grand jurors and prosecutor.
 U.S.—Matter of Truax, D.C.Cal., 439 F.Supp. 1198.
 28. Ill.—People v. Munson, 150 N.E. 280, 319 Ill. 596.
 29. U.S.—U.S. v. Goldman, D.C.N.Y., 439 F.Supp. 337.
 30. U.S.—In re Grand Jury Nov. 1989, E.D.Ark., 735 F.Supp. 323.

cumstances.³¹ However, according to other authorities the presence of an unauthorized person is regarded as a mere irregularity, insufficient to render an indictment invalid unless it be made to appear that the grand jury was influenced thereby and accused was prejudiced in his substantial rights;³² and the presence of an unauthorized person will not affect the validity of an indictment where such person was not present during the time the jury was investigating or deliberating on a charge against accused.³³

Under some statutes the appearance of any person other than the grand jurors before the grand jury during the investigation of a charge, except those required or permitted by law, does not render the indictment returned invalid or deprive the court of jurisdiction to proceed,³⁴ but is a mere irregularity or defect to which timely objection may be made, as provided by the statute.³⁵

Under other statutes the fact that any person other than the grand jurors was present when the vote was taken on the finding of an indictment constitutes a ground for setting it aside.³⁶ Such a statute does not authorize the setting aside of an indictment on the ground that a person other than the grand jurors was present while testimony was being taken.³⁷

Under still other statutes the fact that a person not authorized by law was present while the grand jury were deliberating on the accusation constitutes

a ground for setting aside an indictment,³⁸ and defendant must show that such a person was present, not merely during the taking of testimony, but at a time when the grand jury were discussing and deliberating about finding the indictment.³⁹

It has been held that statutes authorizing the setting aside of indictments on the ground of the presence of unauthorized persons refer and apply only to persons who were not impaneled as grand jurors, and that they cannot be invoked for the purpose of presenting an objection to the qualification of a grand juror,⁴⁰ or the legality of the proceedings under which a grand juror was selected, summoned, or impaneled.⁴¹ A statute providing that no objection can be taken to an indictment on the ground that a grand juror was not legally qualified or that the grand jurors were not legally drawn, etc., does not save an indictment which is invalid because found by a grand jury while an unauthorized person was serving on the jury.⁴²

Under some statutes the power of a court to set aside indictments is restricted to certain enumerated grounds which do not include the presence of unauthorized persons before the grand jury.⁴³

False personation of grand juror.

The fact that a person, who was not drawn, selected, or impaneled as a grand juror, falsely personated an absent juror, and participated in the proceedings of the grand jury, voted with that

31. U.S.—Latham v. U.S., Tex., 226 F. 420, 141 C.C.A. 250.
Md.—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.
Minn.—Dwire v. State, App., 381 N.W.2d 871, review denied.
N.H.—State v. Vanderheyden, 567 A.2d 553, 132 N.H. 536, appeal after new trial 615 A.2d 1246, 136 N.H. 277.
N.M.—Davis v. Traub, 565 P.2d 1015, 90 N.M. 498.
32. Alaska—Soper v. State, App., 731 P.2d 587.
Ill.—People v. Hunter, 376 N.E.2d 1065, 17 Ill.Dec. 736, 61 Ill.App.3d 588.
Ind.—Robinson v. State, 477 N.E.2d 883—State v. Bates, 48 N.E. 2, 148 Ind. 610.
N.Y.—People v. DeRuggiero, 409 N.Y.S.2d 88, 96 Misc.2d 458, affirmed 429 N.Y.S.2d 340, 77 A.D.2d 821.

Case-by-case

Each situation involving unauthorized entry into grand jury room while grand jury is in session should be addressed on sui generis basis.
U.S.—U.S. v. Computer Sciences Corp., C.A.Va., 689 F.2d 1181, 68 A.L.R.Fed. 783, certiorari denied 103 S.Ct. 729, 459 U.S. 1105, 74 L.Ed.2d 953.

Question of fact

Whether or not prejudice has occurred from unauthorized presence of police investigator during grand jury proceedings is question of fact which trial court must decide.

- Ind.—Deardorf v. State, App. 1 Dist., 477 N.E.2d 934.

33. Ala.—King v. State, 93 So. 855, 208 Ala. 152.
Cal.—Fitts v. Superior Court in and for Los Angeles County, 51 P.2d 66, 4 C.2d 514, 102 A.L.R. 290.
Va.—Mullins v. Commonwealth, 79 S.E. 324, 115 Va. 945.
34. Cal.—Husband v. Superior Court in and for Los Angeles County, 17 P.2d 764, 128 C.A. 444.
Iowa—Uhl v. District Court in and for Monona County, 2 N.W.2d 741, 231 Iowa 1046.
N.Y.—People v. Dorsey, 29 N.Y.S.2d 637, 176 Misc. 932—People v. Buffalo Gravel Corp., 195 N.Y.S. 940.
35. Iowa—Uhl v. District Court in and for Monona County, 2 N.W.2d 741, 231 Iowa 1046.
36. La.—State v. Kifer, 173 So. 169, 186 La. 674, 110 A.L.R. 1017.
37. Okl.—Middleton v. State, 183 P. 626, 16 Okl.Cr. 320.
38. Tex.—Stuart v. State, 34 S.W. 118, 35 Tex.Cr. 440.
39. Tex.—Wilson v. State, 51 S.W. 916, 41 Tex.Cr. 115.
40. Idaho—Territory v. Staples, 26 P. 166, 3 Hasb. 35, 2 Idaho 778.
Tex.—Doss v. State, 13 S.W. 788, 28 Tex.App. 506.
41. Cal.—People v. Colby, 54 C. 37.
42. Ala.—Osborn v. State, 45 So. 666, 154 Ala. 44.
43. Or.—State v. Justus, 8 P. 337, 11 Or. 178—State v. Whitney, 7 Or. 386.

body, and was otherwise active in finding the indictment, will invalidate it.⁴⁴

§ 98. Access to Grand Jury by Private Complainant

Authorities differ as to the ability of a private complainant to bring a matter before a grand jury.

Research Note

Private person acting as prosecutor is discussed *infra* § 108.

Library References

Grand Jury ⇐33.

Some authorities hold that a private citizen may bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has in aid of the investigation,⁴⁵ and in doing so is not acting as a prosecutor.⁴⁶ Thus, it has been held that, by application to the court, any person may go to the grand jury and present a complaint to it,⁴⁷ or that a person having knowledge of a crime has the right to go before a grand jury and to disclose his knowledge without being summoned.⁴⁸

However, it has also been held that a private complainant cannot have access to the grand jury,⁴⁹ or has no right to communicate with the grand jury without the approval of the prosecutor or the court,⁵⁰ or has no right on his own motion to go before a grand jury for the purpose of communicating information and preferring charges,⁵¹ or generally cannot bring accusations before the grand jury unless invited to do so by the prosecutor or the

grand jury,⁵² or has no right to testify,⁵³ or has no right to present evidence⁵⁴ without court permission.⁵⁵ The court can authorize an individual to appear before the grand jury if it believes that circumstances so require,⁵⁶ or can authorize an individual to communicate with the grand jury.⁵⁷ Some authorities hold that, while a private citizen has no right to appear before a grand jury and persuade it to indict,⁵⁸ a citizen has a right to take a complaint directly to the grand jury,⁵⁹ which may then permit him to appear as a witness for the purpose of persuading the grand jury to indict.⁶⁰

Generally, a private individual cannot force the commencement of a grand jury investigation.⁶¹ Under some constitutional or statutory provision, a court must convene a grand jury or otherwise submit a matter to a grand jury upon the petition of a certain number of persons, as discussed *supra* § 7.

§ 99. Participation of Accused

At a grand jury proceeding, accused or the person under investigation generally does not have a right to be present, to appear in person or by counsel, to be heard, or to testify.

Research Note

Presentation of evidence by accused is discussed *infra* § 170, and cross-examination or confrontation by accused is treated *infra* § 166.

Library References

Grand Jury ⇐35.

44. Ala.—*Nixon v. State*, 68 Ala. 535.

45. Ala.—*King v. Second Nat. Bank & Trust Co. of Saginaw, Mich.*, 173 So. 498, 234 Ala. 106.

46. Ala.—*King v. Second Nat. Bank & Trust Co. of Saginaw, Mich.*, 173 So. 498, 499, 234 Ala. 106.

47. W.Va.—*State ex rel. Miller v. Smith*, 285 S.E.2d 500, 168 W.Va. 745.

48. Ga.—*In re Lester*, 77 Ga. 143.

La.—*State v. Stewart*, 14 So. 143, 45 La. Ann. 1164.

49. Ohio—*Walton v. Judge*, 597 N.E.2d 162, 64 Ohio St.3d 564.

50. U.S.—*In re New Haven Grand Jury*, D.C.Conn., 604 F.Supp. 453.

51. Ill.—*People v. Parker*, 30 N.E.2d 11, 374 Ill. 524, certiorari denied *Parker v. People of State of Illinois*, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520.

52. U.S.—*Application of Wood*, C.A.8(Neb.), 833 F.2d 113.

53. U.S.—*Clark v. Solem*, C.A.S.D., 628 F.2d 1120.

54. Ohio—*Walton v. Judge*, 597 N.E.2d 162, 64 Ohio St.3d 564.

55. Me.—*Petition of Thomas*, 434 A.2d 503, 24 A.L.R.4th 306.

56. U.S.—*Application of Wood*, C.A.8(Neb.), 833 F.2d 113.

57. Evaluation of application

(1) Judge confronted with application by private party to convey attached materials to grand jury must, at minimum, evaluate its bona fides and facial deficiency; without necessarily making final determination of merits or purpose of application, judge should make threshold judgment of whether correspondence is frivolous or vexatious, of whether it appears to be designed as instrument for gratification of private malice or for purpose of disrupting system for administration of justice, and whether applicant has sought relief from other appropriate law enforcement authorities.

U.S.—*In re New Haven Grand Jury*, D.C.Conn., 604 F.Supp. 453.

(2) Court must be satisfied that citizen's petition for permission to present evidence of criminal offense to grand jury alleges on its face sufficient facts to demonstrate probability, or at least substantial possibility, that grand jury will be persuaded to indict and must also be satisfied that public interest will be served by allowing citizen to present his case to grand jury.

Me.—*Petition of Thomas*, 434 A.2d 503, 24 A.L.R.4th 306.

58. Minn.—*State ex rel. Wild v. Otis*, 257 N.W.2d 361, certiorari denied *Wild v. Otis*, 98 S.Ct. 707, 434 U.S. 1003, 54 L.Ed.2d 746.

59. Minn.—*State ex rel. Wild v. Otis*, 257 N.W.2d 361, certiorari denied *Wild v. Otis*, 98 S.Ct. 707, 434 U.S. 1003, 54 L.Ed.2d 746.

60. Minn.—*State ex rel. Wild v. Otis*, 257 N.W.2d 361, certiorari denied *Wild v. Otis*, 98 S.Ct. 707, 434 U.S. 1003, 54 L.Ed.2d 746.

61. U.S.—*Frasier v. Hegeman*, D.C.N.Y., 607 F.Supp. 318.

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8.

At a grand jury proceeding, accused or the person under investigation generally has no right to be present,⁶² to appear⁶³ in person or by counsel,⁶⁴ to be heard,⁶⁵ or to testify.⁶⁶ Such person has no right to communicate with the grand jury without the approval of the prosecutor or the court.⁶⁷ Such person generally is not entitled to notice that the grand jury is investigating a charge⁶⁸ or that he is the target of a grand jury investigation.⁶⁹ Exceptional cases may justify a departure from these rules.⁷⁰

In some states, although accused has no absolute right to be present, accused is normally afforded the privilege of attending the grand jury proceedings.⁷¹ The court has discretion to exclude a potential accused.⁷² Accused should not be excluded merely because he is an attorney.⁷³ A grand jury has no authority, unless directed by the court, to allow accused,⁷⁴ or his counsel,⁷⁵ to come before it.

Where a juvenile accused is allowed to attend, he does not have the right to be accompanied by an adult.⁷⁶

§ 100. — Special Provisions for Participation

- a. In general
- b. Notice to accused

a. In General

Some statutes specifically give accused or the person subject to investigation a right to testify before the grand jury.

Library References

Grand Jury ⇐35.

Some statutes specifically give accused or the person subject to investigation a right to testify before the grand jury.⁷⁷ The right does not apply

62. Ala.—Rheuark v. State, Cr.App., 601 So.2d 135, certiorari denied.

63. U.S.—U.S. v. Fritz, C.A.9(Cal.), 852 F.2d 1175, certiorari denied Levy v. U.S., 109 S.Ct. 1156, 489 U.S. 1027, 103 L.Ed.2d 215, U.S. v. Pabian, C.A.Fla., 704 F.2d 1533.

U.S. v. Rodriguez, S.D.N.Y., 777 F.Supp. 297—In re New Haven Grand Jury, D.C.Conn., 604 F.Supp. 453—U.S. v. Dorfman, D.C.Ill., 532 F.Supp. 1118.

Ind.—Carroll v. State, 355 N.E.2d 408, 265 Ind. 423.

No constitutional right

Ga.—State v. Deason, 378 S.E.2d 120, 259 Ga. 183.

64. U.S.—U.S. v. Smith, C.A.Mo., 552 F.2d 257.

Cal.—Hawkins v. Superior Court of City and County of San Francisco, 586 P.2d 916, 150 Cal.Rptr. 435, 22 C.3d 584.

D.C.—Khaalil v. U.S., App., 408 A.2d 313, certiorari denied Adam v. U.S., 100 S.Ct. 1059, 444 U.S. 1092, 62 L.Ed.2d 781.

Tenn.—State v. Crane, Cr.App., 780 S.W.2d 375, rehearing denied.

Tex.—Rogers v. State, Cr.App., 774 S.W.2d 247, certiorari denied 110 S.Ct. 519, 493 U.S. 984, 107 L.Ed.2d 520, denial of habeas corpus affirmed Ex parte Rogers, 819 S.W.2d 533, rehearing denied, habeas corpus denied Rogers v. Director, 864 F.Supp. 584, affirmed Rogers v. Scott, 70 F.3d 340, certiorari denied 116 S.Ct. 1881, 135 L.Ed.2d 176.

W.Va.—State v. Miller, 336 S.E.2d 910, 175 W.Va. 616.

No constitutional right

Ill.—People v. Creque, 382 N.E.2d 793, 22 Ill.Dec. 403, 72 Ill.2d 515, certiorari denied Creque v. Illinois, 99 S.Ct. 2010, 441 U.S. 912, 60 L.Ed.2d 384.

65. U.S.—U.S. v. Bolles, D.C.Mo., 209 F. 682.

N.Y.—People v. Pryor, 11 N.Y.S.2d 393, affirmed 28 N.E.2d 31, 283 N.Y. 623.

66. U.S.—U.S. v. Leverage Funding Systems, Inc., C.A.Cal., 637 F.2d 645, certiorari denied 101 S.Ct. 3110, 452 U.S. 961, 69 L.Ed.2d 972.

Ariz.—State v. Jessen, 633 P.2d 410, 130 Ariz. 1, appeal after remand 657 P.2d 871, 134 Ariz. 458.

Conn.—State v. Couture, 482 A.2d 300, 194 Conn. 530, certiorari denied 105 S.Ct. 967, 469 U.S. 1192, 83 L.Ed.2d 971, appeal after remand 589 A.2d 343, 218 Conn. 309.

Ga.—Anderson v. State, 365 S.E.2d 421, 258 Ga. 70.

Mass.—Com. v. Bobilin, 519 N.E.2d 1349, 25 Mass.App.Ct. 410, review denied 523 N.E.2d 267, 402 Mass. 1102.

Mo.—State v. Meadows, App., 785 S.W.2d 635.

No constitutional right

Nev.—Gier v. Ninth Judicial Dist. Court of State of Nev., In and For County of Douglas, 789 P.2d 1245, 106 Nev. 208.

N.Y.—People v. Griffin, 517 N.Y.S.2d 366, 135 Misc.2d 775.

67. U.S.—In re New Haven Grand Jury, D.C.Conn., 604 F.Supp. 453.

68. Cal.—People v. Goldenson, 19 P. 161, 76 C. 328.

Tenn.—State v. Crane, Cr.App., 780 S.W.2d 375, rehearing denied 1989 WL 74944.

69. U.S.—In re Southeastern Equipment Co. Search Warrant, S.D.Ga., 746 F.Supp. 1563.

70. Mass.—Commonwealth v. McNary, 140 N.E. 255, 246 Mass. 46, 29 A.L.R. 483.

71. Conn.—State v. Morrill, 498 A.2d 76, 197 Conn. 507.

72. Conn.—State v. Morrill, 498 A.2d 76, 197 Conn. 507.

73. Conn.—State v. Avcollie, 453 A.2d 418, 188 Conn. 626, certiorari denied 103 S.Ct. 2088, 461 U.S. 928, 77 L.Ed.2d 299.

74. Conn.—State v. Hamlin, 47 Conn. 95.

75. Conn.—Lung's Case, 1 Conn. 428.

76. Conn.—State v. Villafane, 372 A.2d 82, 171 Conn. 644, certiorari denied 97 S.Ct. 1137, 429 U.S. 1106, 51 L.Ed.2d 558.

77. Nev.—Johnston v. State, 822 P.2d 1118, 107 Nev. 944.

Even if grand jury investigates on own initiative

N.M.—State v. Gonzales, App., 632 P.2d 748, 96 N.M. 513, certiorari denied 632 P.2d 1181, 96 N.M. 543.

Live testimony

Statute granting defendant right to testify before grand jury requires live witness testimony, not simply statements.

N.Y.—People v. Smalls, 1 Dept., 488 N.Y.S.2d 712, 111 A.D.2d 38, appeal denied 484 N.E.2d 687, 65 N.Y.2d 987, 494 N.Y.S.2d 1057.

Commitment for observation

Prosecutor is authorized to present case to grand jury while accused is committed pursuant to temporary order of observation and, in those circumstances, grand jury need not hear accused as it ordinarily must.

to a corporation.⁷⁸ Where the state undertakes to afford the right to appear before the grand jury to certain persons, it must do so in a constitutional manner.⁷⁹

Pursuant to some statutes, where accused exercises his right to testify, he must be afforded an opportunity to give his version of events prior to being examined by the prosecutor.⁸⁰

Government officers.

Under some statutes, certain government officers have a right to be served with the indictment against them before it goes to the grand jury, to be present during the presentation of the evidence to the grand jury, and to make sworn statements to the grand jury.⁸¹ Such statutes have been upheld as not denying equal protection even though they are limited to officers with broad governing power.⁸²

N.Y.—*People v. Lancaster*, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied *Lancaster v. New York*, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.

Forfeiture

Defendant's right to be present at grand jury proceeding may be forfeited where defendant is aware of court proceeding; defendant acts deliberately to frustrate process; and efforts to secure defendant's presence fail.

N.Y.—*People v. Jones*, 560 N.Y.S.2d 610, 148 Misc.2d 398.

Must waive immunity

N.Y.—*People v. Lyon*, 442 N.Y.S.2d 538, 82 A.D.2d 516.

People v. Hylton, 529 N.Y.S.2d 412, 139 Misc.2d 645.

Right to testify before vote

Individuals who give timely notice reasonably prior to prosecution's presentation of evidence and prior to Grand Jury vote on indictment are entitled to testify before vote.

N.Y.—*People v. Evans*, 592 N.E.2d 1362, 79 N.Y.2d 407, 583 N.Y.S.2d 358.

Prosecutor must present witnesses first

In grand jury proceeding, prosecution has burden of moving forward to present its accusatory witnesses against defendant, and then if defendant desires to avail himself of his statutory right to testify he can do so.

N.Y.—*People v. Futia*, 449 N.Y.S.2d 577, 113 Misc.2d 651.

78. N.Y.—*People v. Sterling Chevrolet, Inc.*, 398 N.Y.S.2d 496, 91 Misc.2d 641.

79. Ga.—*State v. Deason*, 378 S.E.2d 120, 259 Ga. 183.

80. N.Y.—*People v. Halm*, 3 Dept., 579 N.Y.S.2d 765, 180 A.D.2d 841, affirmed 611 N.E.2d 281, 81 N.Y.2d 819, 595 N.Y.S.2d 380.

People v. Dunbar, 419 N.Y.S.2d 432, 100 Misc.2d 389.

81. Ga.—*Wages v. State*, 302 S.E.2d 112, 165 Ga.App. 587.

82. Ga.—*State v. Deason*, 378 S.E.2d 120, 259 Ga. 183.

Notice to prosecutor.

Under some statutes, accused has the right to testify only if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the prosecutor a written notice making a request to testify.⁸³

b. Notice to Accused

Where accused or the target of an investigation has a right to testify before the grand jury, some statutes give him the right to notice of the grand jury proceedings.

Where accused or the target of an investigation has a right to testify before the grand jury, some statutes give him the right to notice of the grand jury proceedings⁸⁴ and of his status as a target.⁸⁵ The prosecutor must exercise reasonable diligence in giving notice.⁸⁶ The timing of the notice must be reasonable,⁸⁷ and the target must receive notice in sufficient time to exercise his right to appear.⁸⁸ Some statutes provide for a specific period of notice.⁸⁹ Some authorities hold that the notice may

83. N.Y.—*People v. Dillard*, 1 Dept., 554 N.Y.S.2d 31, 160 A.D.2d 472, appeal denied 559 N.E.2d 1291, 76 N.Y.2d 847, 560 N.Y.S.2d 132.

Form

To effectuate defendant's right to testify before a grand jury, defendant must activate it in affirmative manner by making unqualified, specific request to come before grand jury and testify.

N.Y.—*People v. Leggio*, 507 N.Y.S.2d 131, 133 Misc.2d 320.

Oral notice

(1) Insufficient.

N.Y.—*People v. Hunter*, 1 Dept., 564 N.Y.S.2d 391, 169 A.D.2d 538, appeal denied 572 N.E.2d 622, 77 N.Y.2d 907, two cases, 569 N.Y.S.2d 939.

(2) People could not require defendant who had served oral grand jury notice to testify before grand jury that had already voted an indictment, where prosecutor ignored defendant's oral expression of his desire to testify and obtained indictment before defendant's written confirmation could be delivered.

N.Y.—*People v. Spence*, 526 N.Y.S.2d 747, 139 Misc.2d 77.

Waiver

Statutory requirement of written request by defendant to testify before grand jury may be waived in appropriate circumstances.

N.Y.—*People v. Hunter*, 564 N.Y.S.2d 391, 169 A.D.2d 538, appeal denied 572 N.E.2d 622, two cases, 77 N.Y.2d 907, 569 N.Y.S.2d 939.

84. Nev.—*Sheriff, Clark County, Nev. v. Bright*, 835 P.2d 782, 108 Nev. 498—*Johnston v. State*, 822 P.2d 1118, 107 Nev. 944.

85. N.M.—*State v. Gonzales*, App., 632 P.2d 748, 96 N.M. 513, certiorari denied 632 P.2d 1181, 96 N.M. 543—*Rogers v. State*, App., 608 P.2d 530, 94 N.M. 218.

86. N.M.—*Rogers v. State*, App., 608 P.2d 530, 94 N.M. 218.

87. Nev.—*Sheriff, Humboldt County v. Marcum*, 783 P.2d 1389, 105 Nev. 824, opinion amended on other grounds 790 P.2d 497.

88. N.M.—*Rogers v. State*, App., 608 P.2d 530, 94 N.M. 218.

89. N.M.—*Rogers v. State*, App., 608 P.2d 530, 94 N.M. 218.

be oral.⁹⁰

Under some statutes, the prosecutor is not obliged to inform a person that a grand jury proceeding against him is pending, in progress, or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding.⁹¹ In such a case, the prosecutor must notify defendant or his attorney of the proceeding⁹² and accord defendant a reasonable time to exercise his right to appear as a witness.⁹³ The notice must be reasonably calculated to apprise defendant of the proceedings so as to permit him to exercise the right to testify,⁹⁴ and should give defendant some idea of the nature and scope of the inquiry,⁹⁵ but need not inform defendant of all possible charges the grand jury is likely to consider,⁹⁶ or give defendant a preview of the grand jury presentation.⁹⁷

Some statutes provide that, upon service by defendant upon the prosecutor of a notice requesting appearance, the prosecutor must serve upon defen-

dant a notice that he will be heard by the grand jury at a given time and place.⁹⁸ Actual notice is required,⁹⁹ and not merely technical notice.¹ The prosecutor must act in continuous² good faith.³

§ 101. Counsel for Accused or Witness

- a. In general
- b. Presence of counsel
- c. Consultation
- d. Choice of counsel; conflict of interest

a. In General

In a grand jury proceeding, there is generally no right to counsel, or at least no constitutional right to counsel.

Library References

Grand Jury § 35, 36.6.

In a grand jury proceeding, there is generally no right to counsel,⁴ or at least no constitutional right to counsel,⁵ and there is generally no right to appointment of counsel.⁶ A person's Sixth Amend-

90. N.M.—Rogers v. State, App., 608 P.2d 530, 94 N.M. 218.

91. N.Y.—People v. Ashford, 3 Dept., 585 N.Y.S.2d 612, 184 A.D.2d 972—People v. Simmons, 4 Dept., 579 N.Y.S.2d 499, 178 A.D.2d 972, appeal denied 594 N.E.2d 956, 79 N.Y.2d 1007, 584 N.Y.S.2d 462.

Delay in arraignment

Where arraignment is delayed, it may be improper for prosecutor to have grand jury indict defendant without giving notice.

N.Y.—People v. Salazar, 519 N.Y.S.2d 589, 136 Misc.2d 992.

92. Strictly adhere to statute

N.Y.—People v. Eiffel, 527 N.Y.S.2d 347, 139 Misc.2d 340.

Attorney

District attorney's decision to fulfill his statutory duty of providing notice of grand jury presentation by notifying exclusively defendant's attorney carries with it concomitant duty of reasonable care to assure that attorney notified is, in fact, attorney for defendant; when district attorney has sufficient information to suggest that "notice attorney" is not, in fact, defendant's attorney, he does not comply with law by ignoring that information and proceeding as if information did not exist or he was not aware of it.

N.Y.—People v. Goldsborough, 568 N.Y.S.2d 999, 150 Misc.2d 345.

93. N.Y.—People v. Taylor, 537 N.Y.S.2d 461, 142 Misc.2d 349.

94. N.Y.—People v. Jordan, 2 Dept., 550 N.Y.S.2d 917, 153 A.D.2d 263, appeal denied 555 N.E.2d 624, 75 N.Y.2d 967, 556 N.Y.S.2d 252.

95. N.Y.—People v. Hall, 568 N.Y.S.2d 869, 150 Misc.2d 551—People v. Martinez, 443 N.Y.S.2d 576, 111 Misc.2d 67.

More serious charges

Where prosecutor knows that more serious charges are to be presented and does not have good cause for not giving notice, defendant should be given notice of more serious charges in time to decide whether to appear as grand jury witness but, where prosecutor does not know of such charges from outset, and evidence is elicited during

course of grand jury proceeding, opposite outcome would not provide any problem.

N.Y.—People v. Suarez, 427 N.Y.S.2d 187, 103 Misc.2d 910.

96. N.Y.—People v. Simmons, 4 Dept., 579 N.Y.S.2d 499, 178 A.D.2d 972, appeal denied 594 N.E.2d 956, 79 N.Y.2d 1007, 584 N.Y.S.2d 462.

97. N.Y.—People v. Esposito, 545 N.Y.S.2d 468, 144 Misc.2d 919, affirmed 554 N.Y.S.2d 16, 160 A.D.2d 378, appeal denied 559 N.E.2d 686, 76 N.Y.2d 787, 559 N.Y.S.2d 992.

98. N.Y.—People v. Luna, 2 Dept., 514 N.Y.S.2d 806, 129 A.D.2d 816, appeal denied 512 N.E.2d 569, 70 N.Y.2d 650, 518 N.Y.S.2d 1043.

People v. Lattanzio, 511 N.Y.S.2d 521, 134 Misc.2d 469.

99. N.Y.—People v. Davis, 509 N.Y.S.2d 257, 133 Misc.2d 1031—People v. Martinez, 443 N.Y.S.2d 576, 111 Misc.2d 67.

1. N.Y.—People v. Jones, 560 N.Y.S.2d 610, 148 Misc.2d 398.

2. N.Y.—People v. Martinez, 443 N.Y.S.2d 576, 111 Misc.2d 67.

3. N.Y.—People v. Davis, 509 N.Y.S.2d 257, 133 Misc.2d 1031.

4. U.S.—U.S. v. Ramsey, C.A.7(Ill.), 785 F.2d 184, certiorari denied McCreary v. U.S., 106 S.Ct. 2924, 476 U.S. 1186, 91 L.Ed.2d 552.

Conn.—State v. Nardini, 447 A.2d 396, 187 Conn. 513—State v. Cosgrove, 442 A.2d 1320, 186 Conn. 476.

Ga.—Anderson v. State, 365 S.E.2d 421, 258 Ga. 70.

Nev.—Sheriff, Clark County, Nev. v. Bright, 835 P.2d 782, 108 Nev. 498.

5. U.S.—In re Taylor, C.A.N.Y., 567 F.2d 1183.

U.S. v. Paige, D.C.N.Y., 421 F.Supp. 1024.

Mass.—Commonwealth v. Griffin, 535 N.E.2d 594, 404 Mass. 372.

Mont.—State ex rel. Brackman v. District Court of First Judicial Dist. In and For Lewis and Clark County, 560 P.2d 523, 172 Mont. 24.

6. U.S.—U.S. v. Gillespie, N.D.Ind., 773 F.Supp. 1154, affirmed in part 974 F.2d 796, as amended on denial of rehearing—In re Grand

ment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him, as discussed in C.J.S. Criminal Law § 283, and generally does not apply to grand jury proceedings.⁷ Accused generally has no right to appear in person or by counsel, as discussed supra § 99.⁸ The Fifth Amendment privilege against self-incrimination does not provide a grand jury witness with a right to counsel.⁹

However, it has also been said that a target of a grand jury investigation has a right to legal counsel,¹⁰ and is to be advised of that right by the prosecutor or foreman and in the subpoena he receives.¹¹

Jury Matter No. 86-525-5, E.D.Pa., 689 F.Supp. 454—U.S. v. Konefal, D.C.N.Y., 566 F.Supp. 698.

No constitutional right

U.S.—U.S. v. Hershon, D.Mass., 625 F.Supp. 735.

Lineup directive

Defendant, who was subpoenaed to appear before grand jury to receive lineup directive, did not have right to appointed counsel upon receipt of the directive.

D.C.—Brown v. U.S., App., 518 A.2d 415, certiorari denied 108 S.Ct. 1274, 485 U.S. 978, 99 L.Ed.2d 485.

7. U.S.—U.S. v. Mandujano, Tex., 96 S.Ct. 1768, 425 U.S. 564, 48 L.Ed.2d 212, on remand 539 F.2d 106.

U.S. v. Vasquez, C.A.N.Y., 675 F.2d 16—In re Special September 1978 Grand Jury (II), C.A.Ill., 640 F.2d 49.

In re Grand Jury Proceedings (Doe), D.C. Ohio, 575 F.Supp. 197, affirmed 754 F.2d 154—U.S. v. Cohen, D.C.Pa., 444 F.Supp. 1314.

W.Va.—State v. Miller, 336 S.E.2d 910, 175 W.Va. 616.

8. Fifth Amendment right to counsel in general see C.J.S. Criminal Law § 915.

9. Because custodial interrogation not involved

U.S.—U.S. v. Soto, D.C.Conn., 574 F.Supp. 986.

Where witness has immunity

Fla.—Hope v. State, App. 2 Dist., 449 So.2d 1315.

10. Ind.—Robinson v. State, 453 N.E.2d 280.

11. Ind.—Robinson v. State, 453 N.E.2d 280.

12. U.S.—U.S. v. Mandujano, Tex., 96 S.Ct. 1768, 425 U.S. 564, 48 L.Ed.2d 212, on remand 539 F.2d 106.

In re Grand Jury Proceedings, C.A.Fla., 713 F.2d 616.

U.S. v. Gillespie, N.D.Ind., 773 F.Supp. 1154, affirmed in part 974 F.2d 796, as amended on denial of rehearing—In re Grand Jury Matter No. 86-525-5, E.D.Pa., 689 F.Supp. 454—U.S. v. Cohen, D.C.Pa., 444 F.Supp. 1314.

In re Earnest, D.C.Ga., 90 F.R.D. 698.

Colo.—People v. Downer, 557 P.2d 835, 192 Colo. 264.

La.—In re Grand Jury Subpoenas, 387 So.2d 1140.

Civil matter

Public official, subpoenaed to appear before civil session of grand jury, was not entitled to have his attorney present during his testimony.

b. Presence of Counsel

A grand jury witness generally has no right to have counsel present in the grand jury room, or at least no constitutional right. However, some statutes provide such a right.

A grand jury witness has no right to have counsel present in the grand jury room,¹² or at least no constitutional right.¹³ Even where the constitutional right to counsel has attached, the witness may not bring counsel into the room, where the witness has been granted immunity.¹⁴ Indeed, it has been held that counsel for accused is not allowed in the room,¹⁵ and that the court may not allow counsel for accused to be present.¹⁶

However, under some statutes a witness has the right to the presence in the room of an attorney,¹⁷

Cal.—Farnow v. Superior Court (San Mateo County Grand Jury), 1 Dist., 276 Cal.Rptr. 275, 226 C.A.3d 481, review denied.

13. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

Conn.—State v. Piskorski, 419 A.2d 866, 177 Conn. 677, certiorari denied 100 S.Ct. 283, 444 U.S. 935, 62 L.Ed.2d 194.

N.J.—Van Horn v. City of Trenton, 404 A.2d 615, 80 N.J. 528.

N.Y.—Lief v. Hynes, 414 N.Y.S.2d 855, 98 Misc.2d 817.

14. U.S.—U.S. v. Schwimmer, C.A.2(N.Y.), 882 F.2d 22, certiorari denied 110 S.Ct. 1114, 493 U.S. 1071, 107 L.Ed.2d 1021.

15. S.C.—Ex parte McLeod, 252 S.E.2d 126, 272 S.C. 373.

16. Conn.—State v. Canady, 445 A.2d 895, 187 Conn. 281.

17. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

Validity

Proposed bill authorizing presence of counsel for witness before grand jury but providing that no witness may refuse to appear for reason of unavailability of counsel for that witness would not violate equal protection of laws under State or Federal Constitution.

Mass.—Opinion of the Justices to the Governor, 371 N.E.2d 422, 373 Mass. 883, 90 A.L.R.3d 1333.

Must waive immunity

(1) In general.

N.Y.—People v. Ellwanger, 417 N.Y.S.2d 402, 99 Misc.2d 807.

(2) Statute granting right to representation by counsel in grand jury room to witness who waives immunity but denying that right to witness testifying under immunity, under application of "rational basis" test, did not deny due process of law to prospective witness who did not intend to waive immunity on ground that it protected witnesses who waived immunity against technical violations of law such as perjury or contempt and denied that protection to nonwaiver witnesses.

N.Y.—Lief v. Hynes, 414 N.Y.S.2d 855, 98 Misc.2d 817.

Notes

Attorney was entitled to take brief and reasonable notes during course of a witness' testimony.

N.Y.—Grand Jury ex rel. Riley, 414 N.Y.S.2d 441, 98 Misc.2d 454.

Silence

Defense counsel is required to maintain his silence before grand jury.

N.Y.—People v. Davis, 465 N.Y.S.2d 404, 119 Misc.2d 1013.

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at least where the witness is a target.¹⁸ Under some statutes, certain government officers who are targets have the right to the presence of counsel during the presentation of evidence to the grand jury.¹⁹ Some authorities hold, pursuant to the state constitution, that a witness who is a minor has a right to be accompanied by an attorney.²⁰

c. Consultation

A grand jury witness is entitled to consult with his counsel outside the grand jury room. However, it has been held that the witness does not have a constitutional right to consult with counsel.

A grand jury witness is entitled to consult with counsel,²¹ and is entitled to have his counsel outside the grand jury room and to consult with counsel outside the room.²² However, it has been held that the witness does not have a constitutional right to consult with counsel.²³

It has been held that only nonimmunized witnesses have a right of consultation,²⁴ or that only such witnesses should be allowed to consult freely.²⁵

A witness does not have the right to disrupt the proceedings by leaving the room to consult with his attorney after every question.²⁶ Under a statute giving the witness the right to have counsel present in the grand jury room, it has been held that

18. N.M.—State v. Hall, App., 704 P.2d 461, 103 N.M. 207.

19. Ga.—Wages v. State, 302 S.E.2d 112, 165 Ga.App. 587.

20. La.—In re Grand Jury Subpoenas, 387 So.2d 1140.

21. Jurisdiction

Whenever a witness before a grand jury believes that the question asked is not within jurisdiction of the grand jury to ask, witness has right to consult with counsel.

Ariz.—Franzi v. Superior Court of Arizona In and For Pima County, 679 P.2d 1043, 139 Ariz. 556.

Notes

(1) Grand jury's refusal to permit witness to take notes of his own testimony did not infringe witness' right to counsel.

N.Y.—People v. Doe, 406 N.Y.S.2d 650, 95 Misc.2d 175.

(2) Grand jury witness has no right to take notes of his testimony, particularly of the questions asked, when he has counsel within a few feet of the witness chair and may consult with his counsel within minutes of the alleged offensive question.

N.Y.—People v. Doe, 406 N.Y.S.2d 650, 95 Misc.2d 175.

22. U.S.—Matter of Grand Jury Subpoena, C.A.N.D., 739 F.2d 1354—In re Taylor, C.A.N.Y., 567 F.2d 1183.

Where constitutional right to counsel has attached

U.S.—U.S. v. Schwimmer, C.A.2(N.Y.), 882 F.2d 22, certiorari denied 110 S.Ct. 1114, 493 U.S. 1071, 107 L.Ed.2d 1021.

witnesses may not absent themselves during questioning to consult with counsel outside the room.²⁷

Under some statutes, a person who is called by the people as a witness and requested to waive immunity has a right to confer with counsel before deciding whether he will comply with such request, and must be afforded a reasonable time in which to obtain and confer with counsel for such purpose.²⁸

d. Choice of Counsel; Conflict of Interest

The court may in some circumstances limit the ability of grand jury witnesses to choose their counsel, as in certain cases involving multiple representation.

The right to select counsel of one's choice is not absolute in grand jury proceedings.²⁹ The court may regulate the professional conduct of attorneys.³⁰ However, the right of grand jury witnesses to counsel of their own choosing cannot be impaired without a clear demonstration of an overriding interest.³¹

The court has the power to bar an attorney's multiple representation where conflicts of interest exist and the representation would prevent the proper functioning of the grand jury.³² The government may obtain, in proper circumstances, judicial interference with private arrangements for multiple representation of witnesses.³³ The public's right to a thorough investigation must be considered as well as the client's right to conflict-

Concerning self-incrimination

U.S.—In re Grand Jury Proceedings Involving Berkley and Co., Inc., D.C.Minn., 466 F.Supp. 863, affirmed as qualified on other grounds in re Berkley and Co., Inc., 629 F.2d 548.

23. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

24. U.S.—In re Earnest, D.C.Ga., 90 F.R.D. 698.

25. U.S.—U.S. v. Soto, D.C.Conn., 574 F.Supp. 986.

26. U.S.—In re Grand Jury Proceedings, C.A.Fla., 713 F.2d 616.

Immunized witness

Witness, who was granted use immunity and was not target of investigation, would not be permitted to claim consultation privilege after each question or sequence of questions, nor to write down each question as asked or her answers thereto.

U.S.—U.S. v. Soto, D.C.Conn., 574 F.Supp. 986.

27. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

28. N.Y.—People v. Cooper, 526 N.Y.S.2d 910, 139 Misc.2d 44.

29. U.S.—In re Grand Jury, D.C.Tex., 446 F.Supp. 1132.

30. U.S.—In re Grand Jury, D.C.Tex., 446 F.Supp. 1132.

31. U.S.—Matter of Investigative Grand Jury Proceedings on April 6, 1977, D.C.Va., 432 F.Supp. 50.

32. U.S.—In re Investigation Before Feb., 1977, Lynchburg Grand Jury, C.A.Va., 563 F.2d 652.

N.Y.—Application of Abrams, 465 N.Y.S.2d 798, 120 Misc.2d 134.

33. U.S.—In re Grand Jury Investigation, D.C.Pa., 436 F.Supp. 818.

free representation.³⁴ Waiver of an actual conflict of interest due to multiple representation should not be permitted.³⁵ A statutory prohibition against multiple representation of grand jury witnesses is constitutionally permissible.³⁶

The showing that must be made in order to deny a grand jury witness his choice of counsel on the ground of multiple representation is no greater than the showing required under the Sixth Amendment in the case of criminal defendants.³⁷ There must be a direct link between the clients, or at least some concrete evidence that one client has information about another.³⁸ Joint representation of targets and nontargets creates a substantial danger that the interest of nontargets will be jeopardized.³⁹ The court may disqualify an attorney from representing multiple clients where there is a probability of conflicting or inconsistent defenses, where some of the clients and the attorney are targets, or where the attorney's continued representation may affect his ability to advise his clients or would prevent the proper functioning of the grand jury.⁴⁰

The prosecutor has standing to seek the disqualification of counsel for a witness on the ground of conflict of interest.⁴¹ An order disqualifying counsel for a grand jury witness has been held not appealable.⁴²

§ 102. Participation of Prosecutor

The practice concerning attendance by the prosecuting officer at the sittings of the grand jury is not uniform.

Library References

Grand Jury ⇐34.

The practice concerning attendance by the prosecuting officer at the sittings of the grand jury is not uniform.⁴³

It has been held that the prosecuting officer should not be allowed in the grand jury room⁴⁴ during the examination of witnesses,⁴⁵ or that the prosecutor may not appear before the grand jury for any purpose other than the giving of legal advice,⁴⁶ such as the examination of witnesses,⁴⁷ or the recording of testimony.⁴⁸ A rule or statute against the prosecuting officer appearing before the grand jury does not apply where he so appears merely as a witness.⁴⁹

On the other hand, under some statutes, the prosecuting officer is required to attend the grand jury,⁵⁰ or is permitted so to do.⁵¹ Under such statutes the prosecuting officer must be permitted to act before the grand jury, in his official capacity, so long as he is not disqualified.⁵² As a general rule, the prosecuting officer may, either of his own motion or by the request of the grand jury, be present before that body when it is not deliberating or voting on its finding.⁵³

Presence during deliberation or voting.

Some authorities hold that the prosecutor may be present even during deliberation or voting, with the consent of the grand jury,⁵⁴ and according to some decisions his mere presence at such times will not constitute such an irregularity as, in the absence of injury or prejudice to accused, will invali-

34. N.Y.—People v. Doe, 414 N.Y.S.2d 617, 98 Misc.2d 805.

35. N.Y.—Application of Abrams, 465 N.Y.S.2d 798, 120 Misc.2d 134.

36. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

37. U.S.—In re Grand Jury Proceedings, C.A.1(Mass.), 859 F.2d 1021.

Disqualification of counsel for accused for conflict despite opposition by accused see C.J.S. Criminal Law § 320.

38. U.S.—In re Grand Jury Proceedings, C.A.1(Mass.), 859 F.2d 1021.

39. U.S.—Matter of Investigative Grand Jury Proceedings on April 10, 1979 and continuing, D.C. Ohio, 480 F.Supp. 162, appeal dismissed 621 F.2d 813, certiorari denied Wittenburg v. U.S., 101 S.Ct. 940, 449 U.S. 1124, 67 L.Ed.2d 110.

40. N.Y.—People v. Doe, 414 N.Y.S.2d 617, 98 Misc.2d 805.

41. N.Y.—People v. Doe, 414 N.Y.S.2d 617, 98 Misc.2d 805.

42. U.S.—In re Benjamin, C.A.Mass., 582 F.2d 121.

43. N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130.

S.C.—State v. Addison, 2 S.C. 356.

W.Va.—State v. Baker, 10 S.E. 639, 33 W.Va. 319.

44. Conn.—Lung's Case, 1 Conn. 428.

N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130—Lewis v. Wake County Com'rs, 74 N.C. 194.

45. S.C.—Ex parte McLeod, 252 S.E.2d 126, 272 S.C. 373.

46. Tenn.—Tiller v. State, 600 S.W.2d 709.

47. Tenn.—Tiller v. State, 600 S.W.2d 709.

48. Tenn.—Tiller v. State, 600 S.W.2d 709.

49. Ala.—King v. State, 93 So. 855, 208 Ala. 152.

Va.—Draper v. Commonwealth, 111 S.E. 471, 132 Va. 648.

50. Colo.—People v. District Court of Second Judicial Dist., 225 P. 829, 75 Colo. 412.

La.—State v. Richey, 196 So. 545, 195 La. 319.

51. Idaho—State v. Taylor, 87 P.2d 454, 59 Idaho 724.

Ind.—Turpin v. State, 189 N.E. 403, 206 Ind. 345.

La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

Mo.—State ex rel. Graves v. Southern, 124 S.W.2d 1176, 344 Mo. 14.

52. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

53. Miss.—State v. Coulter, 61 So. 706, 104 Miss. 764.

54. Ind.—Shattuck v. State, 11 Ind. 473.

date the indictment.⁵⁵ However, it is the better practice,⁵⁶ and the grand jury has the undoubted right to require,⁵⁷ and it is sometimes required by law,⁵⁸ that the prosecuting officer shall retire from the room during its deliberations on the evidence or when a vote is taken. It is improper for the prosecutor to participate in deliberations.⁵⁹

Federal grand jury.

In the case of a federal grand jury, attorneys for the government may be present while the grand jury is in session,⁶⁰ but not while the grand jury is deliberating or voting.⁶¹ However, it has been held that the grand jury is not obliged to reach a decision to request a lineup by a vote outside the presence of the prosecutor.⁶²

§ 103. — Particular Persons

- a. State grand jury
- b. Federal grand jury

a. State Grand Jury

Where a prosecuting officer is allowed to participate in or be present at state grand jury proceedings, a person may do so

55. Pa.—Commonwealth v. Bradney, 17 A. 600, 126 Pa. 199.

56. Conn.—State v. Kemp, 9 A.2d 63, 126 Conn. 60.

Vote on indictment

Miss.—Hannah v. State, 336 So.2d 1317, certiorari denied 97 S.Ct. 1125, 429 U.S. 1101, 51 L.Ed.2d 551.

57. U.S.—U.S. v. Central Supply Ass'n, D.C. Ohio, 34 F.Supp. 241.

58. U.S.—U.S. v. Central Supply Ass'n, D.C. Ohio, 34 F.Supp. 241.

Ind.—Turpin v. State, 189 N.E. 403, 206 Ind. 345.
La.—State v. Richey, 196 So. 545, 195 La. 319—State v. Kifer, 173 So. 169, 186 La. 674, 110 A.L.R. 1017.

N.M.—Baird v. State, 568 P.2d 193, 90 N.M. 667.

Tex.—Moody v. State, 121 S.W. 1117, 57 Tex.Cr. 76.

Va.—Draper v. Commonwealth, 111 S.E. 471, 132 Va. 648.

W.Va.—State ex rel. Knotts v. Watt, 413 S.E.2d 173, 186 W.Va. 518.

59. Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Mo.—State ex rel. Graves v. Southern, 124 S.W.2d 1176, 344 Mo. 14.

Pa.—Commonwealth v. Brownmiller, 14 A.2d 907, 141 Pa.Super. 107.

60. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

61. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

62. U.S.—In re Pantojas, C.A. Puerto Rico, 639 F.2d 822.

63. Bar admission

(1) Fact that assistant district attorney was not admitted to practice law in the State did not deny defendant due process of law absent any prejudice to defendant apparent on record.

N.Y.—People v. Linares, 550 N.Y.S.2d 703, 158 A.D.2d 296, appeal denied 554 N.E.2d 76, 75 N.Y.2d 921, 555 N.Y.S.2d 39, reconsideration denied 559 N.E.2d 690, 76 N.Y.2d 791, 559 N.Y.S.2d 996, appeal denied 568 N.E.2d 658, 77 N.Y.2d 840, 567 N.Y.S.2d 209, habeas corpus denied Munoz v. Keane, 777 F.Supp. 282, affirmed

notwithstanding certain defects in connection with his appointment. Even assistant or deputy prosecuting officers may do so.

Library References

Grand Jury ⇨34, 39.

Where a prosecuting officer is allowed to participate in or be present at state grand jury proceedings, various defects in connection with a person's appointment as a prosecuting officer have been held not to preclude his participation or presence.⁶³

Where a prosecutor is unauthorized in the sense that he lacks jurisdiction concerning the particular matter, it has been held that the likelihood of prejudice is sufficient to justify dismissal of the indictment.⁶⁴

The presence of a prosecuting officer is proper even if he is subsequently disqualified.⁶⁵

Assistant or deputy prosecuting officers and special assistants to the regular prosecuting officer, duly authorized to assist the latter in the discharge of his duties, are invested with the same rights and subject to the same restrictions, with respect to appearing before the grand jury and participating in the proceedings before that body as the regular prosecuting officer,⁶⁶ provided they have been prop-

Linares v. Senkowski, 964 F.2d 1295, certiorari denied 113 S.Ct. 494, 506 U.S. 986, 121 L.Ed.2d 432.

(2) Case to grand jury by assistant district attorney who, it was subsequently learned, was not admitted to practice of law did not render grand jury proceedings defective; while such practice would not be condoned, in present case it did not per se impair integrity of proceedings, causing risk of prejudice to defendants.

N.Y.—People v. Munoz, 550 N.Y.S.2d 691, 153 A.D.2d 281, appeal denied 554 N.E.2d 78, 75 N.Y.2d 922, 555 N.Y.S.2d 41, appeal denied People v. Sanchez-Medina, 554 N.E.2d 80, 75 N.Y.2d 924, 555 N.Y.S.2d 43, appeal denied 571 N.E.2d 93, 77 N.Y.2d 880, 568 N.Y.S.2d 923, habeas corpus denied 777 F.Supp. 282, affirmed Linares v. Senkowski, 964 F.2d 1295, certiorari denied 113 S.Ct. 494, 506 U.S. 986, 121 L.Ed.2d 432.

Unlicensed states

N.Y.—People v. Carter, 566 N.E.2d 119, 77 N.Y.2d 95, 564 N.Y.S.2d 992, certiorari denied 111 S.Ct. 1599, 499 U.S. 967, 113 L.Ed.2d 662.

Nonresidence

Or.—State v. Brumfield, 209 P. 120, 104 Or. 506.

Failure to obtain waiver of nonresidence

N.Y.—People v. Dunbar, 423 N.E.2d 36, 53 N.Y.2d 868, 440 N.Y.S.2d 613.

Failure to register oath

N.M.—State v. Gilbert, 650 P.2d 814, 98 N.M. 530.

64. N.Y.—People v. Di Falco, 377 N.E.2d 732, 44 N.Y.2d 482, 406 N.Y.S.2d 279.

65. Md.—Lykins v. State, 415 A.2d 1113, 288 Md. 71.

66. Cal.—People v. Kempely, 271 P. 478, 205 C. 441.

Ind.—Williams v. State, 123 N.E. 209, 188 Ind. 283.

erly appointed and qualified;⁶⁷ and the same is true of a duly authorized substitute prosecuting officer.⁶⁸

Attorney general and assistants.

An attorney general, when authorized and empowered to supplant or to assist the regular prosecuting officer in the prosecution of offenses, has the same right to be present before the grand jury and to participate in the proceeding before that body as the regular prosecuting officer,⁶⁹ subject to the limitation that where such power is conferred by statute it may be exercised within the limits designated by the statute,⁷⁰ and subject to the further limitation that it may be exercised only in relation to offenses which the attorney general is authorized to investigate and prosecute.⁷¹

b. Federal Grand Jury

In the case of a federal grand jury, the prosecuting officers who may be present while a grand jury is in session are attorneys for the government.

In the case of a federal grand jury, the prosecuting officers who may be present while the grand jury is in session are attorneys for the government.⁷² A state officer who has been appointed as a special assistant to the United States Attorney General may be present.⁷³

A letter of authorization is not essential to the validity of the appointment of an attorney specially appointed by the Attorney General.⁷⁴ An attorney appointed to assist a United States attorney may appear before the grand jury without having been specifically directed by the Attorney General to conduct grand jury proceedings.⁷⁵

A government attorney must take the oath of office before appearing before the grand jury,⁷⁶ and a violation is not cured by a subsequent taking of the oath.⁷⁷

§ 104. — — Disqualification or Conflict of Interest

A prosecuting officer may be disqualified from participation in a grand jury proceeding under various circumstances.

Library References

Grand Jury ⇐34.

In a grand jury proceeding, the court may order the disqualification of a prosecuting attorney.⁷⁸ A prosecuting attorney cannot appear before the grand jury where he has disqualified himself from participating in the investigation,⁷⁹ or where he is disqualified by reason of his having been attorney for the person charged in respect of the very matter under investigation,⁸⁰ or by reason of his

Iowa—State v. Coleman, 285 N.W. 269, 226 Iowa 968.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

N.D.—State v. Rodman, 221 N.W. 25, 57 N.D. 230.

Ohio—State ex rel. Thomas v. Henderson, 175 N.E. 865, 123 Ohio St. 474, 10 Ohio Law Abs. 158.

Okl.—Shoemaker v. State, 53 P.2d 1133, 58 Okl.Cr. 394.

Pa.—Commonwealth v. Kirk, 17 A.2d 195, 340 Pa. 346.

Commonwealth v. Brownmiller, 14 A.2d 907, 141 Pa.Super. 107.

Wash.—State v. Guthrie, 56 P.2d 160, 185 Wash. 464.

67. Idaho—State v. Taylor, 87 P.2d 454, 59 Idaho 724.

Pa.—Commonwealth v. Kirk, 17 A.2d 195, 340 Pa. 346.

68. Fla.—Taylor v. State, 38 So. 380, 49 Fla. 69.

Idaho—State v. Corcoran, 61 P. 1034, 7 Idaho 220.

69. Idaho—State v. Edmonson, 743 P.2d 459, 113 Idaho 230.

Ill.—People v. Billburg, 145 N.E. 373, 314 Ill. 182.

People v. Massarella, 382 N.E.2d 262, 21 Ill.Dec. 898, 72 Ill.2d 531, on remand 400 N.E.2d 436, 36 Ill.Dec. 16, 80 Ill.App.3d 552, certiorari denied Massarella v. Illinois, 101 S.Ct. 855, 449 U.S. 1077, 66 L.Ed.2d 799.

Md.—In re a Special Investigation No. 258, 461 A.2d 34, 55 Md.App. 119.

Mo.—State v. Sullivan, 84 S.W. 105, 110 Mo.App. 75.

Mont.—State ex rel. Nolan v. District Court of First Judicial District, 55 P. 916, 22 Mont. 25.

N.Y.—Application of Cranford Material Corp., 20 N.Y.S.2d 865, 174 Misc. 154.

People v. Brennan, 127 N.Y.S. 958, 69 Misc. 548, 25 N.Y.Crim.R. 204.

Pa.—Commonwealth ex rel. Miner v. Margiotti, 188 A. 524, 325 Pa. 17.

Commonwealth v. Ryan, 188 A. 764, 126 Pa.Super. 306.

70. Idaho—State v. Taylor, 87 P.2d 454, 59 Idaho 724.

Mass.—Commonwealth v. Kozlowsky, 131 N.E. 207, 238 Mass. 379.

N.D.—State v. Heaton, 217 N.W. 531, 56 N.D. 357.

71. N.Y.—People v. Dorsey, 29 N.Y.S.2d 637, 176 Misc. 932.

72. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

73. U.S.—U.S. v. Bestway Disposal Corp., W.D.N.Y., 681 F.Supp. 1027.

74. U.S.—U.S. v. Balistreri, C.A.7(Wis.), 779 F.2d 1191, certiorari denied DiSalvo v. U.S., 106 S.Ct. 1490, 475 U.S. 1095, 89 L.Ed.2d 892.

75. U.S.—U.S. v. Hawthorne, D.C.Cal., 449 F.Supp. 1048.

76. U.S.—U.S. v. Pignatiello, D.C.Colo., 582 F.Supp. 251.

77. U.S.—U.S. v. Pignatiello, D.C.Colo., 582 F.Supp. 251.

78. Hawaii—Amemiya v. Sapienza, 629 P.2d 1126, 63 Haw. 424.

79. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

80. Iowa—State v. Bower, 183 N.W. 322, 191 Iowa 713—State v. Rucker, 106 N.W. 645, 130 Iowa 239.

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acceptance of compensation for his services, con-
trary to statute.⁸¹

A prosecuting attorney is not disqualified by
reason of interest to represent the state in obtain-
ing an indictment merely because he is local coun-
sel in civil matters for the prosecutor,⁸² or because
his children own stock in the corporation under
investigation.⁸³ Where a prosecutor limits himself
to only one role, his having observed part of the
police investigation will not disqualify him from
appearing before the grand jury in the role of
prosecutor.⁸⁴

Under the rule authorizing attorneys for the
government to be present while a federal grand
jury is in session,⁸⁵ it has been held that a prosecu-
tor who displays a conflict of interest constitutes an
unauthorized person in the grand jury room.⁸⁶
However, it has also been held that the rule does
not itself prohibit the presence of a government
attorney with a conflict of interest.⁸⁷

It has been held that where the prosecuting
attorney is disqualified to advise the grand jury,
the court should appoint a prosecuting attorney pro
tempore to go before them and advise them in the
matter.⁸⁸

It has been held that an order denying the
disqualification of a prosecuting officer is not ap-
pealable.⁸⁹

Agency attorney.

There is no inherent conflict of interest or other
impropriety in the appointment of an agency attor-
ney to assist in criminal proceedings before a grand
jury.⁹⁰ There is no per se rule that bars a govern-
ment attorney from serving before a grand jury

merely because he is from the agency which origi-
nated the criminal charges.⁹¹ No per se appear-
ance of impropriety sufficient to taint a grand jury
and require its termination results merely because
the agency attorney referring a criminal matter to
the grand jury is appointed a special attorney to
assist in the grand jury investigation.⁹² To demon-
strate a conflict of interest where an attorney for a
government agency acts as a special assistant pros-
ecuting attorney during a grand jury investigation,
there must be an affirmative showing that the
special assistant conducted himself in such manner
as to demonstrate actual bias or conflict of inter-
est.⁹³

Investigation of prosecutor.

A prosecuting attorney cannot appear before the
grand jury where he is disqualified by reason of the
charge under investigation being against himself.⁹⁴
Some statutes provide that neither the district
attorney nor an assistant district attorney may
participate during an investigation of the district
attorney's office or of any person officially associat-
ed with such office.⁹⁵ A violation of such a statute
is presumed to be prejudicial.⁹⁶

§ 105. — — Prosecutor as Witness

It is improper for a government attorney to act as both
prosecutor and witness as to material facts before a grand jury.

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Grand Jury ⇐34.

It is improper for a government attorney to act
as both prosecutor and witness as to material facts
before a grand jury.⁹⁷ An appearance before a
grand jury by a government attorney as a prosecu-

81. Iowa—Maley v. District Court of Woodbury County, 266 N.W.
815, 221 Iowa 732.

82. Ga.—Casper v. State, 95 S.E. 534, 22 Ga.App. 126.

83. Ga.—Scott v. State, 185 S.E. 131, 53 Ga.App. 61, affirmed 190
S.E. 582, 184 Ga. 164.

84. Ariz.—State v. Gretzler, 612 P.2d 1023, 126 Ariz. 60, appeal after
remand State v. Superior Court of State of Ariz., In and For Pima
County, 627 P.2d 1081, 128 Ariz. 583 and State v. Gretler, 659 P.2d
1, 135 Ariz. 42, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77
L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77
L.Ed.2d 1452.

85. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.

86. U.S.—U.S. v. Gold, D.C.Ill., 470 F.Supp. 1336.

87. U.S.—U.S. v. Schell, C.A.4(W.Va.), 775 F.2d 559, certiorari de-
nied 106 S.Ct. 1498, 475 U.S. 1098, 89 L.Ed.2d 899.

88. Ga.—Nichols v. State, 87 S.E. 817, 17 Ga.App. 593.

89. U.S.—In re April 1977 Grand Jury Subpoenas, C.A.Mich., 584
F.2d 1366, certiorari denied General Motors Corp. v. U.S., 99 S.Ct.
1277, 440 U.S. 934, 59 L.Ed.2d 492.

90. U.S.—U.S. v. Birdman, C.A.Pa., 602 F.2d 547, certiorari denied
100 S.Ct. 703, 444 U.S. 1032, 62 L.Ed.2d 668 and Richman v. U.S.,
100 S.Ct. 1084, 445 U.S. 906, 63 L.Ed.2d 322.

91. U.S.—U.S. v. Gold, D.C.Ill., 470 F.Supp. 1336.

92. U.S.—In re Perlin, C.A.Ill., 589 F.2d 260, 58 A.L.R.Fed. 680.

93. Ohio—State v. Ross, 452 N.E.2d 339, 6 Ohio App.3d 25, 6 O.B.R.
76.

94. Ky.—Northcutt v. Howard, 130 S.W.2d 70, 279 Ky. 219.

95. Okl.—State ex rel. Grand Jury of Sequoyah County v. Thornton,
653 P.2d 936.

Assistant attorney general may participate

Okl.—Grand Jury of Seminole County v. Dye, 571 P.2d 1200.

96. Okl.—State ex rel. Grand Jury of Sequoyah County v. Thornton,
653 P.2d 936.

97. U.S.—U.S. v. Treadway, D.C.Tex., 445 F.Supp. 959.

tor and a witness has been held to violate the rule⁹⁸ which authorizes the presence of government attorneys at federal grand jury proceedings.⁹⁹

A government attorney's explanation of the elements of an offense does not make him a witness.¹

Where the prosecuting officer is to be a witness before the grand jury, the court should appoint a special prosecuting officer before the matter is presented to the grand jury;² but a failure to do so is not fatal to an indictment returned without active participation on the part of the prosecuting officer, except as a witness.³

The fact that counsel for the state was called before the grand jury will not affect the validity of an indictment, where the testimony which he gave as a witness before the grand jury related to another indictment.⁴

§ 106. — Nature of Role

Where a prosecutor is allowed to participate in grand jury proceedings, he performs a dual role of advocate and public officer, and has wide discretion or latitude.

Research Note

Whether prosecutor may participate in grand jury proceedings is discussed supra § 102. Charges by prosecutor are treated supra §§ 74, 75. Presentation of evidence by prosecutor is considered infra § 168.

Library References

Grand Jury Ⓒ-34.

Where a prosecutor is allowed to participate in grand jury proceedings, he performs a dual role of advocate and public officer, and is charged with a duty not only to secure indictments but also to see that justice is done.⁵ The prosecutor must protect both the public's interests and the rights of accused.⁶ As an officer of the state, the prosecutor must be an advocate, and exert his best efforts to prosecute successfully those who have violated the criminal law; as an officer of the court, he is required to act as the grand jury's legal advisor, and to aid but not to interfere in its determination as to probable cause.⁷

The prosecutor must act fairly,⁸ with completely impartial judgment and discretion,⁹ and must maintain the legality and fairness integral to all criminal justice proceedings¹⁰ and be scrupulously fair in selecting and preparing witnesses.¹¹ Prosecutors must be alert to repress any abuses of the investigatory power exercised by a grand jury.¹² They should deal with the grand jury in a manner that promotes the wise exercise of such power,¹³ and should be sensitive to the considerations making for a wise exercise of such power, not only where constitutional issues may be involved, but also where the noncoercive assistance of other federal agencies might render it unnecessary to invoke the compulsive process of the grand jury.¹⁴

The prosecutor has wide discretion or latitude.¹⁵

- 98. Fed.Rules Cr.Proc., Rule 6(d), 18 U.S.C.A.
- 99. U.S.—U.S. v. Singer, C.A.Mo., 660 F.2d 1295, certiorari denied 102 S.Ct. 1030, 454 U.S. 1156, 71 L.Ed.2d 314.
- 1. U.S.—U.S. v. Singer, C.A.Mo., 660 F.2d 1295, certiorari denied 102 S.Ct. 1030, 454 U.S. 1156, 71 L.Ed.2d 314.
- 2. Ill.—People v. Strauch, 93 N.E. 126, 247 Ill. 220.
- 3. Ill.—People v. Strauch, 93 N.E. 126, 247 Ill. 220.
- 4. Ill.—People v. Nall, 89 N.E. 1012, 242 Ill. 284.
- 5. N.Y.—People v. Lancaster, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied Lancaster v. New York, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697.
People v. Curry, 579 N.Y.S.2d 1000, 153 Misc.2d 61.
- 6. N.M.—State v. Cruz, 662 P.2d 1357, 99 N.M. 690.
- 7. Alaska—Coleman v. State, 553 P.2d 40.
- 8. N.Y.—People v. Russo, 491 N.Y.S.2d 951, 128 Misc.2d 876.
- 9. N.Y.—People v. Di Falco, 377 N.E.2d 732, 44 N.Y.2d 482, 406 N.Y.S.2d 279.
- 10. N.Y.—People v. Elmhurst Milk & Cream Co., Inc., 455 N.Y.S.2d 473, 116 Misc.2d 140.
- 11. U.S.—U.S. v. Sears, Roebuck & Co., Inc., C.A.Cal., 719 F.2d 1386, on remand 579 F.Supp. 1055, certiorari denied 104 S.Ct. 1441, 465 U.S. 1079, 79 L.Ed.2d 762.
- 12. U.S.—Hoffman v. U.S., Pa., 71 S.Ct. 814, 341 U.S. 479, 95 L.Ed. 1118.

- 13. U.S.—U.S. v. Sears, Roebuck & Co., Inc., C.A.Cal., 719 F.2d 1386, on remand 579 F.Supp. 1055, certiorari denied 104 S.Ct. 1441, 465 U.S. 1079, 79 L.Ed.2d 762.
- 14. U.S.—Hoffman v. U.S., Pa., 71 S.Ct. 814, 341 U.S. 479, 95 L.Ed. 1118.
- 15. U.S.—U.S. v. Al Mudarris, C.A.Cal., 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305—U.S. v. Santucci, C.A.Ill., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.
Ariz.—Gershon v. Broomfield, 642 P.2d 852, 131 Ariz. 507.
Ind.—State v. Fields, App. 1 Dist., 527 N.E.2d 218.
N.Y.—People v. Nezaj, 528 N.Y.S.2d 491, 139 Misc.2d 366.

Purpose

This freedom is not given to accommodate prosecutor, but to assist grand jury in carrying out its investigations.

Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

Investigation

The measure of the prosecutor's discretion or judgment in grand jury proceeding extends to the grand jury's responsibility for investigation of crime as well as the return of indictments.

N.J.—Matter of Tuso, 376 A.2d 895, 73 N.J. 575.

Resubmission

Decision to resubmit case to another grand jury is a matter of prosecutorial discretion not generally subject to judicial scrutiny,

However, such discretion is not absolute,¹⁶ and the exercise of such discretion may not be arbitrary and capricious.¹⁷

The prosecutor has various duties.¹⁸ Grand jurors are entitled to ask the prosecutor for an explanation as to why indictments are necessary and what the consequences of an indictment would be.¹⁹ The prosecutor need not inform grand jurors of preliminary findings of probable cause or the absence thereof,²⁰ and need not tell accused which crimes the grand jury is investigating when accused is called to testify,²¹ or supply accused with evidence sought for the purpose of rebutting the prosecution's presentation.²² The prosecutor must bring to the attention of the court any evidence of partiality or bias that could affect the impartial deliberation of the grand jury.²³

The prosecutor performs the leadership role in gathering evidence for eventual presentation to a

grand jury.²⁴ When before the grand jury, the prosecuting officer may properly assist in the investigation and examination of witnesses;²⁵ review the evidence;²⁶ and explain the significance of evidence.²⁷ The prosecutor has various other powers.²⁸

§ 107. — Misconduct

- a. In general
- b. Particular matters

a. In General

The prosecutor should not unduly influence or invade the province of the grand jury.

Library References

Grand Jury §34.

The prosecutor should not unduly influence,²⁹

though this discretion exists only within constitutional constraints of equal protection and cannot be exercised with actual or apparent vindictiveness.

U.S.—U.S. v. Pabian, C.A.Fla., 704 F.2d 1533.

16. N.Y.—People v. Neza, 528 N.Y.S.2d 491, 139 Misc.2d 366.

17. U.S.—U.S. v. De Rosa, C.A.9(Cal.), 783 F.2d 1401, certiorari denied 106 S.Ct. 3282, 477 U.S. 908, 91 L.Ed.2d 571.

18. Screening out unreliable witnesses

U.S.—U.S. v. Chanen, C.A.Ariz., 549 F.2d 1306, certiorari denied 98 S.Ct. 72, 434 U.S. 825, 54 L.Ed.2d 83.

19. U.S.—U.S. v. Venegas, C.A.9(Cal.), 800 F.2d 868, certiorari denied 107 S.Ct. 1325, 479 U.S. 1100, 94 L.Ed.2d 177 and Vindiola v. U.S., 107 S.Ct. 1326, 479 U.S. 1100, 94 L.Ed.2d 177.

20. Ill.—People v. Bacon, 415 N.E.2d 678, 47 Ill.Dec. 673, 91 Ill. App.3d 673.

21. U.S. v. Busher, C.A.9(Hawaii), 817 F.2d 1409, appeal after remand 872 F.2d 431.

22. N.Y.—People v. Russo, 491 N.Y.S.2d 951, 128 Misc.2d 876.

23. N.J.—State v. Murphy, 538 A.2d 1235, 110 N.J. 20.

24. U.S.—In re Immunity Order Dated April 21, D.C.N.Y., 1982, 543 F.Supp. 1075.

25. U.S.—U.S. v. Central Supply Ass'n, D.C. Ohio, 34 F.Supp. 241.

Ill.—People v. Munson, 150 N.E. 280, 319 Ill. 596.

Ind.—Turpin v. State, 189 N.E. 403, 206 Ind. 345.

Ky.—Northcutt v. Howard, 130 S.W.2d 70, 279 Ky. 219.

La.—State v. Richey, 196 So. 545, 195 La. 319.

N.D.—State v. Rödman, 221 N.W. 25, 57 N.D. 230.

Pa.—Commonwealth v. Brownmiller, 14 A.2d 907, 141 Pa.Super. 107.

26. U.S.—U.S. v. Rintelen, D.C.N.Y., 235 F. 787—U.S. v. Cobban, C.C.Mont., 127 F. 713.

27. U.S.—U.S. v. Rintelen, D.C.N.Y., 235 F. 787—U.S. v. Mitchell, C.C.Or., 136 F. 896—U.S. v. Cobban, C.C.Mont., 127 F. 713.

N.J.—State v. Childs, 576 A.2d 42, 242 N.J.Super. 121, certification denied 604 A.2d 596, 127 N.J. 321.

28. Cooperation agreements

Power of the district attorney to present witnesses to the grand jury includes, by implication, authority to enter into cooperation agreements.

N.Y.—People v. Gallman, 579 N.Y.S.2d 561, 152 Misc.2d 1033.

Physical evidence

After witness appears before grand jury, he may be required to leave with grand jury any physical evidence which was produced; and, prosecutor may take custody of such evidence for grand jury and inspect and review it.

Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

Screening witnesses

As the official charged with the orderly presentation of evidence to grand jury, it is sound practice for prosecutor to interview and, when appropriate, dismiss prospective witnesses in order to eliminate unnecessary or equivocal material so that grand jurors' time can be conserved.

N.Y.—People v. Friedgood, 448 N.E.2d 1317, 58 N.Y.2d 467, 462 N.Y.S.2d 406.

Securing experts

Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

Suggesting lineup

U.S.—In re Pantojas, C.A.Puerto Rico, 639 F.2d 822.

29. U.S.—U.S. v. Cederquist, G.A.Ariz., 641 F.2d 1347.

In re Balistrieri, D.C.Wis., 503 F.Supp. 1112.

Ariz.—State v. Hocker, 556 P.2d 784, 113 Ariz. 450.

Colo.—People v. Meyers, 617 P.2d 808.

Ind.—Williams v. State, 123 N.E. 209, 188 Ind. 283.

Mass.—Commonwealth v. Seminara, 483 N.E.2d 92, 29 Mass.App.Ct. 789.

N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130.

Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.

W.Va.—State v. Pickens, 395 S.E.2d 505, 183 W.Va. 261.

Trial standard

When presenting a case to a grand jury, the prosecutor should not make statements or arguments which would influence the grand jury in a manner which would be impermissible at trial.

invade the province of,³⁰ exercise dominion over,³¹ or impinge on the autonomy of³² the grand jury. He must insure that the grand jury retains its independent role.³³ However, it has been said that the prosecutor need not limit his participation to an innocuous presentation.³⁴ Even unintentional behavior can cause improper influence and usurpation of the grand jury's role.³⁵

High ethical standards are required of prosecutors.³⁶ In defining the boundaries of proper prosecutorial conduct before a grand jury, courts have looked to American Bar Association standards relating to the prosecution function.³⁷

Court supervision.

There is a need for the court to exercise some control over the prosecutor's conduct before the grand jury.³⁸ The court may intervene to ensure that the purpose of the grand jury is not imperiled by prosecutorial misconduct.³⁹

Effect.

Prosecutorial misconduct is generally curable,⁴⁰ but is sometimes incurable.⁴¹ Misconduct results in

constitutional error where the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing a presumption of prejudice.⁴² A constitutional violation may also be found if there is a history of misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceedings or if the independence of the grand jury is substantially infringed.⁴³

b. Particular Matters

The prosecutor should not express to the grand opinions on questions of fact, or knowingly present perjured testimony to the grand jury.

Research Note

Duty to present exculpatory evidence is treated *infra* § 169.

Various particular forms of prosecutorial conduct in a grand jury proceeding have been held improper,⁴⁴ such as stating irrelevant facts.⁴⁵ The prosecutor generally should not express opinions on questions of fact,⁴⁶ or make arguments.⁴⁷ Various forms of conduct have been held proper.⁴⁸

Alaska—Putnam v. State, 629 P.2d 35.

Prejudicial remarks

U.S.—U.S. v. Al Mudarris, C.A.Cal., 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305.
30. Ariz.—State v. Hocker, 556 P.2d 784, 113 Ariz. 450.
Mass.—Commonwealth v. Seminara, 483 N.E.2d 92, 20 Mass.App.Ct. 789.

Credibility

Prosecutor may not deprive a grand jury of the opportunity to evaluate the credibility of witnesses.

U.S.—U.S. v. Al Mudarris, C.A.Cal., 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305.
31. Ariz.—State v. Doolittle, App., 746 P.2d 924, 155 Ariz. 352.
32. U.S.—U.S. v. De Rosa, C.A.9(Cal.), 783 F.2d 1401, certiorari denied 106 S.Ct. 3282, 477 U.S. 908, 91 L.Ed.2d 571.
33. Minn.—State v. Johnson, 441 N.W.2d 460.
34. N.J.—State v. Schamberg, 370 A.2d 482, 146 N.J.Super. 559, certification denied 379 A.2d 241, 75 N.J. 10.
35. U.S.—U.S. v. Samango, C.A.Hawaii, 607 F.2d 877.
36. U.S.—U.S. v. Goldman, D.C.N.Y., 439 F.Supp. 337.
37. U.S.—U.S. v. Crisconi, D.C.Del., 520 F.Supp. 915.
38. U.S.—Matter of Truax, D.C.Cal., 439 F.Supp. 1198.
39. U.S.—In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.
40. U.S.—U.S. v. Lawson, D.C.Md., 502 F.Supp. 158.
41. U.S.—U.S. v. Lawson, D.C.Md., 502 F.Supp. 158.
42. U.S.—U.S. v. Larrazolo, C.A.9(Ariz.), 869 F.2d 1354.
43. U.S.—U.S. v. Larrazolo, C.A.9(Ariz.), 869 F.2d 1354.
44. **Prior grand jury**

(1) Where there is reason to suspect reliability of testimony before prior grand jury, prosecutor seeking reindictment should not use transcripts of that testimony after informing new grand jury that

evidence being presented had once before been considered sufficient to support indictment for, by doing so, he knowingly dissuades grand jury from considering sufficiency of evidence and deprives it of opportunity to assess credibility independently.

U.S.—U.S. v. Samango, D.C.Hawaii, 450 F.Supp. 1097, affirmed 607 F.2d 877.

(2) Divulging to grand jury fact that prior grand jury had voted indictment in the same case was improper and prejudicial.

N.Y.—People v. Richard, 561 N.Y.S.2d 351, 148 Misc.2d 573.

Testimonial communication

(1) Providing unsworn testimony.
W.Va.—State v. Pickens, 395 S.E.2d 505, 183 W.Va. 261.
(2) Prosecutor's statement to grand jury that transcript was part of evidence and summary of what she believed transcript stated constituted improper testimonial communication by prosecutor.
Minn.—State v. Grose, App., 387 N.W.2d 182.

Reference to unrepresented evidence

In a close case, the prosecutor may not imply that there is more evidence than he has presented to the grand jury.
N.Y.—People v. Monroe, 480 N.Y.S.2d 259, 125 Misc.2d 550.

Vouching for witness

U.S.—U.S. v. Al Mudarris, C.A.Cal., 695 F.2d 1182, certiorari denied 103 S.Ct. 2097, 461 U.S. 932, 77 L.Ed.2d 305.
45. Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.
46. U.S.—U.S. v. Wells, D.C.Idaho, 163 F. 313.
Ariz.—State v. Burr, 615 P.2d 635, 126 Ariz. 338.
Iowa—State v. Paulsen, 286 N.W.2d 157.
Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.
N.J.—State v. Porro, 417 A.2d 573, 175 N.J.Super. 49.

The prosecutor is answerable for the utterances of a witness only if the prosecutor knew or should have known that the response by the witness to a question would contain improper evidence.⁴⁹

Misleading grand jury.

The prosecutor must not mislead the grand jurors,⁵⁰ or knowingly present perjured testimony,⁵¹ or erroneous testimony.⁵²

Perjury trap.

The prosecutor may not call a witness with the sole purpose of eliciting perjured testimony to secure a perjury indictment.⁵³ However, where the prosecutor is aware that a witness may commit perjury he need not refrain from questioning the witness so long as the purpose of the examination is for something other than securing a perjury indictment.⁵⁴

Calling attention to exercise of rights.

It is improper for the prosecutor to question or comment on the exercise of a constitutional right.⁵⁵ Thus, it is improper to urge against a person the time and circumstances of his retention of an attorney,⁵⁶ or to allude to accused's failure to testify.⁵⁷ However, some authorities hold that the rule making it impermissible to comment on accused's decision to remain silent is inapplicable to grand jury proceedings.⁵⁸ It is not misconduct to call a witness with the knowledge that he might invoke the Fifth Amendment,⁵⁹ or to examine a witness knowing that he will rely on the Fifth Amendment,⁶⁰ at least where the purpose of calling the witness is to lay a foundation for immunizing the witness.⁶¹

Showing grand jury copy of indictment.

It is not impermissible for a grand jury to have before it, when it votes, a copy of a government-prepared indictment.⁶² Showing a signed indictment to the grand jury may result in undue influ-

W.Va.—State ex rel. Knotts v. Watt, 413 S.E.2d 173, 186 W.Va. 518.

47. Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

48. Description of expected testimony

Brief descriptions of testimony expected to be given by witnesses before grand jury, which was printed on witness list provided grand jurors, were not improper or harmful to defendant.

Conn.—State v. Morrill, 498 A.2d 76, 197 Conn. 507.

Reference to court's finding of probable cause

Mass.—Morrissette v. Commonwealth, 402 N.E.2d 492, 380 Mass. 197.

49. Alaska—Putnam v. State, 629 P.2d 35.

50. U.S.—U.S. v. Smith, C.A.Mo., 552 F.2d 257.

51. U.S.—U.S. v. Claiborne, C.A.9(Nev.), 765 F.2d 784, certiorari denied 106 S.Ct. 1636, 475 U.S. 1120, 90 L.Ed.2d 182 U.S. v. Adamo, C.A. Ohio, 742 F.2d 927, certiorari denied Freeman v. U.S., 105 S.Ct. 971, 469 U.S. 1193, 83 L.Ed.2d 975 U.S. v. Smith, C.A.Mo., 552 F.2d 257.

Learning of perjury

(1) Prosecutor who discovers that tainted evidence has been presented to grand jury must personally weigh untainted evidence supporting government's case and decide if evidence is such that jury of 12 is likely to unanimously find that evidence establishes guilt beyond a reasonable doubt and if prosecutor is doubtful of that result, untainted evidence may be resubmitted to grand jury to determine if 13 grand jurors are prepared to find that crime was committed and that there is probable cause to believe that one or more of the original defendants committed that crime; prosecutor also has option of deciding that untainted evidence is insufficient to warrant pursuing prosecution further and moving to dismiss indictment.

U.S.—U.S. v. Adamo, C.A. Ohio, 742 F.2d 927, certiorari denied Freeman v. U.S., 105 S.Ct. 971, 469 U.S. 1193, 83 L.Ed.2d 975.

(2) Where Government knows that perjured testimony has been given to grand jury and that this testimony is material to grand jury's deliberations, due process requires that prosecutor take such steps as are necessary to correct any possible injustice.

U.S.—U.S. v. Patiwana, E.D.N.Y., 723 F.Supp. 888.

52. Reason for rule

Prosecutor was required to inform court and grand jury that testimony was erroneous to insure that defendant would not be tried on indictment based on erroneous testimony.

Ariz.—Escobar v. Superior Court of State of Ariz. In and For Maricopa County, App., 746 P.2d 39, 155 Ariz. 298.

53. U.S.—In re Poutre, C.A.Mass., 602 F.2d 1004.

Pa.—Commonwealth v. Williams, 565 A.2d 160, 388 Pa.Super. 153.

54. Pa.—Commonwealth v. Williams, 565 A.2d 160, 388 Pa.Super. 153.

55. U.S.—U.S. v. Gold, D.C.Ill., 470 F.Supp. 1336.

56. U.S.—U.S. v. Gold, D.C.Ill., 470 F.Supp. 1336.

57. N.Y.—People v. Scott, 416 N.Y.S.2d 83, 70 A.D.2d 601.

People v. Colban, 571 N.Y.S.2d 873, 151 Misc.2d 32, affirmed 586 N.Y.S.2d 802, 186 A.D.2d 8.

58. Colo.—People v. Board, App., 656 P.2d 712.

59. U.S.—U.S. v. Duff, D.C.Ill., 529 F.Supp. 148.

60. U.S.—U.S. v. Martino, C.A.Fla., 648 F.2d 367, reconsidered in part U.S. v. Holt, 650 F.2d 651, certiorari denied Lazzara v. U.S., 102 S.Ct. 2006, 456 U.S. 943, 72 L.Ed.2d 465, Farina v. U.S., 102 S.Ct. 2006, 456 U.S. 943, 72 L.Ed.2d 465, Russello v. U.S., 102 S.Ct. 2007, 456 U.S. 943, 72 L.Ed.2d 465, Scionti v. U.S., 102 S.Ct. 2007, 456 U.S. 943, 72 L.Ed.2d 465, Morgado v. U.S., 102 S.Ct. 2007, 456 U.S. 943, 72 L.Ed.2d 465, Fisher v. U.S., 102 U.S. 2007, 456 U.S. 943, 72 L.Ed.2d 465, Young v. U.S., 102 S.Ct. 2007, 456 U.S. 943, 72 L.Ed.2d 465, Palermo v. U.S., 102 S.Ct. 2007, 456 U.S. 949, 72 L.Ed.2d 465, Martino v. U.S., 102 S.Ct. 2020, 456 U.S. 949, 72 L.Ed.2d 474, on rehearing 681 F.2d 952, affirmed 104 S.Ct. 296, 464 U.S. 16, 78 L.Ed.2d 17.

U.S. v. Duff, D.C.Ill., 529 F.Supp. 148 U.S. v. Samango, D.C.Hawaii, 450 F.Supp. 1097, affirmed 607 F.2d 877.

61. U.S.—U.S. v. Kouba, D.N.D., 632 F.Supp. 937.

62. U.S.—U.S. v. Olin Corp., D.C.N.Y., 465 F.Supp. 1120.

ence,⁶³ but does not necessarily result in undue influence.⁶⁴

Action after vote.

It has been held that, after the grand jury votes, the prosecutor cannot take additional action in an attempt to change the result,⁶⁵ and cannot ask that the vote be withdrawn,⁶⁶ submit additional criminal charges,⁶⁷ supplement the original presentation without court approval,⁶⁸ or request that the grand jury hear additional evidence⁶⁹ or instructions.⁷⁰

§ 108. Private Prosecutor

A private prosecutor ordinarily cannot appear before the grand jury except as a witness.

Research Note

Access to grand jury by private complainant in general is discussed supra § 98.

Library References

Grand Jury ⇨34.

A private prosecutor cannot participate in a grand jury proceeding,⁷¹ and may not appear before the grand jury.⁷² The presence and participation of a private prosecutor in any other capacity than that of a witness is improper,⁷³ and it is immaterial that his participation was at the request of the grand jury,⁷⁴ as the grand jurors may not supplant the prosecuting attorney by accepting the advice and counsel of members of the bar of their own selection,⁷⁵ particularly when this is done by some of the grand jurors on their own initiative.⁷⁶ The grand jury cannot permit the presence of privately employed counsel in its room and cannot act under his direction,⁷⁷ and it is improper to permit such an attorney to go before the grand jury with the witnesses and there act for the

regular prosecuting officer in framing the indictment;⁷⁸ and it is immaterial that he acts under an order, or with the permission, of the court in charge of the grand jury.⁷⁹

Under a statute forbidding the presence of any other persons than the regular prosecuting officer and the witnesses undergoing examination, the presence before the grand jury of an attorney employed by private parties and his participation in the examination of witnesses is improper,⁸⁰ nor can a special counsel who took no official oath appear as representative of the prosecuting attorney and examine witnesses and advise the grand jury.⁸¹ On the other hand it has been held, under such a statute, that an indictment is not invalidated by the fact that an attorney, who was neither prosecuting attorney nor deputy prosecuting attorney, was present in the grand jury room examining witnesses by consent of the prosecuting attorney but was not present when the grand jury were deliberating or voting on the charge, and said nothing to influence the finding of the grand jury.⁸²

Under some constitutional or statutory provisions, an independent counsel is appointed to advise the grand jury, as discussed infra § 109.

§ 109. Independent Counsel for Grand Jury

Under some constitutional or statutory provisions, an independent counsel shall be appointed to advise the members of the grand jury regarding matters brought before it.

Library References

Grand Jury ⇨34.

Under some constitutional or statutory provisions, an independent counsel shall be appointed to

63. U.S.—U.S. v. Civella, C.A.Mo., 666 F.2d 1122.

64. U.S.—U.S. v. Civella, C.A.Mo., 666 F.2d 1122.

U.S. v. Gakoumis, E.D.Pa., 624 F.Supp. 655, affirmed 802 F.2d 449, two cases.

65. N.Y.—People v. Del Toro, 544 N.Y.S.2d 461, 144 Misc.2d 386.

66. N.Y.—People v. Hamilton, 537 N.Y.S.2d 780, 142 Misc.2d 554.

67. N.Y.—People v. LeGrand, 536 N.Y.S.2d 660, 142 Misc.2d 151.

68. N.Y.—People v. Chirico, 544 N.Y.S.2d 451, 144 Misc.2d 380.

69. N.Y.—People v. Del Toro, 544 N.Y.S.2d 461, 144 Misc.2d 386.

70. N.Y.—People v. Del Toro, 544 N.Y.S.2d 461, 144 Misc.2d 386.

71. W.Va.—Kerns v. Wolverton, 381 S.E.2d 258, 181 W.Va. 143.

72. Va.—Cantrell v. Com., 329 S.E.2d 22, 229 Va. 387, appeal after remand 373 S.E.2d 328, 7 Va.App. 269, habeas corpus denied Cantrell v. Kelley, 896 F.2d 545, certiorari denied 110 S.Ct. 2600, 496 U.S. 911, 110 L.Ed.2d 280.

73. Miss.—Collier v. State, 61 So. 689, 104 Miss. 602.

74. N.Y.—In re Gardiner, 64 N.Y.S. 760, 31 Misc. 364, 14 N.Y.Crim.R. 519.

75. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

76. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

77. Fla.—Hicks v. State, 120 So. 330, 97 Fla. 199.

Md.—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

78. Miss.—Staté v. Barnett, 54 So. 313, 98 Miss. 812—Durr v. State, 53 Miss. 425.

79. Md.—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

Miss.—Durr v. State, 53 Miss. 425.

80. Okl.—Hartgraves v. State, 114 P. 343, 5 Okl.Cr. 266.

81. N.Y.—People v. Scannell, 72 N.Y.S. 449, 36 Misc. 40.

Okl.—State v. Maben, 114 P. 1122, 5 Okl.Cr. 581.

82. Ark.—Bennett v. State, 36 S.W. 947, 62 Ark. 516.

the indictment under an order of the court in

presence of any prosecuting officer or attorney, the independent counsel need not be physically present throughout the grand jury proceeding.⁸⁶ However, the counsel must instruct grand jurors on the procedures to summon counsel for consultation.⁸⁷ The counsel should be in close proximity to the grand jury, preferably in a separate room next to the grand jury, but at the very least in the same building.⁸⁸ Of course, the independent counsel is not prohibited from being in the grand jury room if desired.⁸⁹

Attorney provided to advise

Grand Jury

Members of the

Attorney provided to

Misc. 364, 14

193 La. 928.

193 La. 928.

L.R. 886.

—Durr v. State,

88 A.L.R. 886.

66.

.40.

advise the members of the grand jury regarding matters brought before it.⁸³ The purpose of such a provision is to ensure the independence of the grand jury, by separating the role of the prosecutor presenting evidence in support of an indictment from the role of the attorney advising the grand jury as to the law.⁸⁴ The independent counsel does not serve as an advocate on behalf of an accused.⁸⁵

The independent counsel need not be physically present throughout the grand jury proceeding.⁸⁶ However, the counsel must instruct grand jurors on the procedures to summon counsel for consultation.⁸⁷ The counsel should be in close proximity to the grand jury, preferably in a separate room next to the grand jury, but at the very least in the same building.⁸⁸ Of course, the independent counsel is not prohibited from being in the grand jury room if desired.⁸⁹

Accused has the burden of showing prejudice resulting from the absence of the independent counsel.⁹⁰

83. Hawaii—State v. Rodrigues, 629 P.2d 1111, 63 Haw. 412.

84. Hawaii—State v. Rodrigues, 629 P.2d 1111, 63 Haw. 412.

85. Hawaii—State v. Rodrigues, 629 P.2d 1111, 63 Haw. 412.

86. Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197.

87. Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197.

88. Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197.

89. Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197.

90. Hawaii—State v. Sadino, 642 P.2d 534, 64 Haw. 427.

91. Ala.—Sommerville v. State, Cr.App., 361 So.2d 386, writ denied Ex parte Sommerville, 361 So.2d 389, certiorari denied 99 S.Ct. 1027, 439 U.S. 1118, 59 L.Ed.2d 78, rehearing denied 99 S.Ct. 1434, 440 U.S. 951, 59 L.Ed.2d 641.

Conn.—State v. Derrico, 434 A.2d 356, 181 Conn. 151, certiorari denied 101 S.Ct. 789, 449 U.S. 1064, 66 L.Ed.2d 607.

Fla.—Thompson v. State, 565 So.2d 1311.

In re Report of the Grand Jury, Jefferson County, Florida Spring Term 1987, App. 1 Dist., 533 So.2d 873, appeal after remand 559 So.2d 248, review denied 570 So.2d 1306.

Ga.—Frazier v. State, 362 S.E.2d 351, 257 Ga. 690, certiorari denied 108 S.Ct. 1755, 486 U.S. 1017, 100 L.Ed.2d 217, rehearing denied 108 S.Ct. 2920, 487 U.S. 1243, 101 L.Ed.2d 951.

Or.—State ex rel. Drew v. Steinbock, 595 P.2d 1234, 286 Or. 461.

Tex.—Perez v. State, Cr.App., 590 S.W.2d 474, certiorari denied 100 S.Ct. 2157, 446 U.S. 937, 64 L.Ed.2d 790.

Wiltz v. State, App.—Hous. [14 Dist.], 749 S.W.2d 519, appeal after remand 827 S.W.2d 372, reversed 863 S.W.2d 463, rehearing on petition for discretionary review denied.

Davis v. State, App. 1 Dist., 692 S.W.2d 185.

Wis.—State v. Waste Management of Wisconsin, Inc., 261 N.W.2d 147, 81 Wis.2d 555, certiorari denied 99 S.Ct. 189, 439 U.S. 865, 58 L.Ed.2d 175.

Wyo.—Hennigan v. State, 746 P.2d 360.

§ 110. Minutes or Record of Proceedings

Generally, grand jury proceedings need not be recorded or transcribed. However, some statutes or rules require that such proceedings be recorded or transcribed.

Research Note

Whether stenographers and the like may be present is treated supra § 96. Secrecy of minutes or record is considered infra § 179.

Library References

Grand Jury § 38, 40.

Generally, grand jury proceedings need not be recorded or transcribed,⁹¹ and there is no constitutional requirement that they be recorded or transcribed.⁹² Indeed, it has been held that transcription is improper.⁹³ However, it has also been held that the court has discretion as to whether to order that proceedings be recorded or transcribed,⁹⁴ and that the better practice is to record proceedings.⁹⁵ In some circumstances, where a particular need for preservation is shown, the court must order recording.⁹⁶ Some statutes or rules require that proceedings be recorded or transcribed.⁹⁷ Under some

Minutes

Applicable statutes do not contain positive command that grand juries shall keep minutes of their proceedings.

Mo.—State v. Shives, App., 601 S.W.2d 22.

92. U.S.—U.S. v. Head, C.A.Fla., 586 F.2d 508—U.S. v. Bresley, C.A.Iowa, 548 F.2d 223.

Conn.—State v. Piskorski, 419 A.2d 866, 177 Conn. 677, certiorari denied 100 S.Ct. 283, 444 U.S. 935, 62 L.Ed.2d 194.

Ohio—State v. Grewell, 543 N.E.2d 93, 45 Ohio St.3d 4.

Or.—State ex rel. Smith v. Murchison, 595 P.2d 1237, 286 Or. 469—State ex rel. Johnson v. Roth, 557 P.2d 230, 276 Or. 883.

S.D.—State v. Bad Heart Bull, 257 N.W.2d 715, appeal dismissed 98 S.Ct. 708, 434 U.S. 1004, 54 L.Ed.2d 747.

93. N.H.—State v. Purrington, 446 A.2d 451, 122 N.H. 458.

94. Mo.—State v. Garcia, App., 682 S.W.2d 12.

Good cause required

Me.—State v. Huff, 469 A.2d 1251—State v. Rich, 395 A.2d 1123, certiorari denied 100 S.Ct. 110, 444 U.S. 854, 62 L.Ed.2d 71.

Ultimately for judge

Whether to require transcription of recorded grand jury testimony in particular case is a matter for discretion of grand jury or the state's attorney and ultimately for the jury judge.

Md.—Jones v. State, 464 A.2d 977, 297 Md. 7.

95. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

96. Fla.—Thompson v. State, 565 So.2d 1311.

97. N.Y.—Matter of Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 144 Misc.2d 1012, affirmed as modified on other grounds 548 N.Y.S.2d 679, 156 A.D.2d 294, appeal dismissed 556 N.E.2d 1119, 75 N.Y.2d 1005, 557 N.Y.S.2d 312, appeal withdrawn 565 N.E.2d 513, 76 N.Y.2d 948, 563 N.Y.S.2d 764—In re Attorney General of U.S., 291 N.Y.S. 5, 160 Misc. 533.

S.D.—State v. Gardner, 429 N.W.2d 60.

statutes, recording is proper only if sought by the prosecutor.⁹⁸

The primary purpose of preserving a record of grand jury proceedings is to aid the courts and the prosecuting attorney.⁹⁹ It has been held that the primary function of recording proceedings is to maintain a record and transcript for the use, benefit, and convenience of grand juries, and that the record is not maintained to provide those under investigation with a record to assure that all formalities have been followed.¹

Where recording is required, various particular matters should be recorded.² Under some statutes or rules, all proceedings should be recorded except for deliberations³ or except for deliberations and voting.⁴ There should be no off-the-record conversations between grand jurors and witnesses⁵ or the prosecutor,⁶ but recording is not required during a

formal recess which is actually a hiatus in the proceedings in which the jurors do not discuss the case with each other, witnesses, or the prosecutor.⁷ Some statutes require a transcript of all questions asked of and answers given by the witnesses.⁸ It has been held that recording of the finding of a grand jury is as essential as the recording of the verdict of a petit jury.⁹

Right of witness to obtain transcript.

A grand jury witness has no general right to a transcript of his testimony.¹⁰ A court is not required to assure a witness a copy of a transcript of his own testimony as a condition precedent to his testifying before the grand jury.¹¹

Effect of improper failure to record.

Improper failure to record proceedings does not necessarily result in prejudice so as to invalidate

Felony cases

Ohio—State v. Grewell, 543 N.E.2d 93, 45 Ohio St.3d 4.

Federal grand jury

Fed.Rules Cr.Proc., Rule 6(e)(1), 18 U.S.C.A.

98. Or.—State ex rel. Johnson v. Roth, 557 P.2d 230, 276 Or. 883.

State ex rel. Woodel v. Wallace, 750 P.2d 178, 89 Or.App. 478, review denied 753 P.2d 1381, 305 Or. 467.

All or none

In event that defendant testified before grand jury and asked that, if his testimony be recorded or reported, all testimony before grand jury in case would be required to be recorded or reported, and in event that district attorney then sought an order for recording or reporting of grand jury testimony in case, trial court would be required to either order recording or reporting of testimony of all witnesses appearing before grand jury or that none of such testimony be recorded or reported.

Or.—State ex rel. Drew v. Steinbook, 595 P.2d 1234, 286 Or. 461.

99. N.Y.—In re Attorney General of U.S., 291 N.Y.S. 5, 160 Misc. 533.

1. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

2. Instructions

N.Y.—People v. Kennedy, 487 N.Y.S.2d 662, 127 Misc.2d 712.

Votes of individual jurors

N.J.—State v. Del Fino, 495 A.2d 60, 100 N.J. 154.

Coconspirator

If a grand jury determines that a known individual was a coconspirator but decides not to indict him or her, the grand jury minutes should reflect that jury has determined that the individual was a coconspirator but decided, for reasons which need not be stated, not to indict.

N.J.—State v. Porro, 377 A.2d 909, 152 N.J.Super. 179, appeal dismissed 391 A.2d 517, 77 N.J. 504.

3. Ariz.—Wilkey v. Superior Court, App., 566 P.2d 327, 115 Ariz. 526.

4. Federal grand jury

In the case of a federal grand jury, all proceedings, except when the grand jury is deliberating or voting, shall be recorded.

Fed.Rules Cr.Proc., Rule 6(e)(1), 18 U.S.C.A.

Local rule

Rule requiring recording of evidence and of proceedings while a witness is present did not preclude adoption of local rule requiring recording of all proceedings except deliberation and voting.

Minn.—State v. Hejl, 315 N.W.2d 592.

5. Ariz.—Wilkey v. Superior Court, App., 566 P.2d 327, 115 Ariz. 526.

6. Regarding case

No off-the-record conversation is to be allowed between grand jurors and prosecutor regarding case or any legal aspect of it.

Ariz.—Wilkey v. Superior Court, App., 566 P.2d 327, 115 Ariz. 526.

7. Ariz.—Wilkey v. Superior Court, App., 566 P.2d 327, 115 Ariz. 526.

8. Ill.—People v. Miller, 426 N.E.2d 609, 55 Ill.Dec. 463, 100 Ill. App.3d 122.

Other matters not covered

(1) There is no statutory requirement that record be kept and transcribed of State's attorney's advising grand jury of its right to subpoena defendant, the deliberations of grand jury, or any other discussion or commentary which might take place in grand jury proceedings.

Ill.—People v. Haag, 399 N.E.2d 284, 35 Ill.Dec. 450, 80 Ill.App.3d 135.

(2) There is no statutory requirement that a docket entry be made or a record kept and transcribed on requests by the state for grand jury subpoenas.

Ill.—People v. Jackson, 1 Dist., 452 N.E.2d 85, 72 Ill.Dec. 153, 116 Ill.App.3d 430.

9. N.C.—State v. Brown, 81 N.C. 568.

W.Va.—State v. Heaton, 23 W.Va. 773.

10. U.S.—In re Bianchi, C.A.Mass., 542 F.2d 98.

In re Grand Jury Proceedings, D.C.Fla., 73 F.R.D. 647.

11. U.S.—In re Grand Jury Investigation, D.C.Pa., 424 F.Supp. 802.

proceedings.¹²

Manner of recording.

Some authorities hold that proceedings must be stenographically recorded, and that it is insufficient that they are tape-recorded.¹³ Other authorities hold that a tape recording is adequate.¹⁴ In the case of a federal grand jury, proceedings shall be recorded stenographically or by an electronic recording device.¹⁵ Some authorities hold that a reporter or stenographer directed by a court or prosecutor to take down evidence must also transcribe such evidence.¹⁶ Where a statute requires the grand jury to take the minutes of the evidence, it is not necessary that the evidence should be written down in full,¹⁷ nor need such minutes be signed by the witnesses who testify.¹⁸

Disposition of record.

Under some statutes or rules, the transcript and minutes must be filed with the court.¹⁹ Minutes of the evidence when properly returned and filed become a part of the records of the court and are to

remain in its custody,²⁰ although the custody thereof is sometimes confided to the prosecuting officer.²¹ Grand jury minutes are not the property of attorneys or agents of the government, but are records of the court.²² The court may in a proper situation review the minutes of its grand jury in camera.²³

Effect of record.

Unless made so by statute, the minutes of the testimony taken before the grand jury are not conclusive,²⁴ and are not ordinarily to be considered or used as evidence save for the purpose of impeachment.²⁵ However, while they are sometimes made conclusive as to what names are or should be indorsed on the indictment,²⁶ such fact does not preclude the use of evidence other than the minutes on the trial in order to determine whether a certain witness was in fact examined before the grand jury.²⁷ The evidentiary record of a grand jury may not be supplemented by an affidavit of the prosecutor.²⁸

VIII. WITNESSES AND EVIDENCE

A. IN GENERAL

§ 111. General Considerations

Evidentiary rules applicable at trial are generally inapplicable in grand jury proceedings, although there is some authority to the contrary.

Library References

Grand Jury ⇨36, 36.1.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Evidentiary rules applicable at trial are generally inapplicable in grand jury proceedings.²⁹ The Federal Rules of Evidence (other than with respect to privileges) do not apply to proceedings before

12. U.S.—U.S. v. Diaz, C.A.2(N.Y.), 922 F.2d 998, certiorari denied 111 S.Ct. 2035, 500 U.S. 925, 114 L.Ed.2d 119.

Ariz.—State v. Clovis, App., 618 P.2d 245, 127 Ariz. 75.

N.M.—State v. Bigler, App., 652 P.2d 754, 98 N.M. 732, certiorari denied 652 P.2d 1213, 98 N.M. 762, appeal after remand 673 P.2d 140, 100 N.M. 515, certiorari quashed 672 P.2d 1136, 100 N.M. 505.

N.Y.—People v. Erceg, 440 N.Y.S.2d 726, 82 A.D.2d 947.

13. N.Y.—People v. Lawrence, 434 N.Y.S.2d 311, 106 Misc.2d 482.

14. N.M.—State v. Aaron, App., 692 P.2d 1336, 102 N.M. 187.

15. Fed.Rules Cr.Proc., Rule 6(e)(1), 18 U.S.C.A.

16. Mo.—State ex rel. Dunlap v. Hanna, App., 561 S.W.2d 411.

17. Iowa—State v. Martin, 228 N.W. 1, 210 Iowa 376.

18. Ind.—Hinshaw v. State, 47 N.E. 157, 147 Ind. 334.

19. Photograph

There is no requirement that photographs should be made part of the grand jury "record;" only the transcript and minutes of the grand jury proceedings are required to be filed.

Ariz.—State v. Superior Court, In and For Pima County, App., 577 P.2d 743, 118 Ariz. 457.

20. Iowa—Ford v. Dille, 156 N.W. 513, 174 Iowa 243.

21. N.Y.—In re Osborne, 117 N.Y.S. 169, 62 Misc. 575, 23 N.Y.Crim.R. 294.

22. U.S.—U.S. v. Penrod, C.A.Va., 609 F.2d 1092, certiorari denied 100 S.Ct. 1850, 446 U.S. 917, 64 L.Ed.2d 271.

23. U.S.—U.S. v. O'Shea, D.C.Fla., 447 F.Supp. 330.

24. Iowa—State v. Ottley, 126 N.W. 334, 147 Iowa 329.

25. Iowa—Orr v. Cornell, 156 N.W. 296.

26. Iowa—State v. Miller, 64 N.W. 288, 95 Iowa 368.

27. Iowa—State v. Marshall, 74 N.W. 763, 105 Iowa 38.

28. Utah—Strehl v. District Court of Salt Lake County, 558 P.2d 597.

29. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320.

U.S. v. McKenzie, C.A.La., 678 F.2d 629, rehearing denied 685 F.2d 1386, certiorari denied 103 S.Ct. 450, 459 U.S. 1038, 74 L.Ed.2d 604.

U.S. v. Samango, D.C.Hawaii, 450 F.Supp. 1097, affirmed 607 F.2d 877.

R.I.—State v. Acquisto, 463 A.2d 122, affirmed 619 A.2d 428.

grand juries.³⁰

However, some authorities hold that grand jury investigations should be made in accordance with the well established rules of evidence.³¹ It has also been said that evidentiary rules are more liberally construed in grand jury proceedings.³²

§ 112. Witnesses in General

The right to call witnesses before the grand jury is recognized both at common law and under statute.

Library References

Grand Jury ⇨36-36.2.

The right to call witnesses before the grand jury is recognized both at common law and under statute.³³

The examination of witnesses by a grand jury need not be preceded by a presentment or indictment formally drawn up.³⁴ The grand jury may proceed, on the examination of witnesses to inquire for itself whether a crime cognizable by the court has been committed.³⁵ However, some authorities hold that, in the absence of a statute to the contrary, the grand jury cannot on its own initiative examine witnesses.³⁶

The power of the grand jury to call persons to appear and testify is exceedingly broad.³⁷ The

grand jury has complete discretion as to who will be called as a witness.³⁸ The court generally cannot control the nature of the witnesses whom the grand jury calls.³⁹

Accused cannot object to the voluntary appearance of a witness.⁴⁰

Witnesses before the grand jury are subject to the authority and control of that body.⁴¹

Likely refusal to testify.

The grand jury's right to call a witness is not defeated by knowledge of the probability that the witness will refuse to comply with a legitimate request.⁴² A grand jury need not accept a witness' announcement that he will not testify,⁴³ but may call him and put him to the test of whether he will testify, assert his rights under the Fifth Amendment, or refuse to testify.⁴⁴

Compensation for witnesses.

A party commanded to appear before a grand jury generally should not expect reimbursement for the expense of testifying.⁴⁵ A person who performs the public duties of giving testimony before a grand jury or attending upon a grand jury in order to testify is entitled to no further compensation than that which a statute provides.⁴⁶

B. OBLIGATION AND COMPULSION TO APPEAR, TESTIFY, OR PRODUCE EVIDENCE IN GENERAL

§ 113. Obligation in General

The principle that the public has the right to every man's evidence applies to grand jury proceedings.

Library References

Grand Jury ⇨36-36.2.

- 30. Fed.Rules Evid.Rule 1101(d)(2), 28 U.S.C.A.
- 31. Ky.—Gordon v. Tracy, 238 S.W. 395, 194 Ky. 166.
N.Y.—People v. La Barbera, 287 N.Y.S. 257, 159 Misc. 177.
People v. Pryor, 11 N.Y.S.2d 393, affirmed 28 N.E.2d 31, 283 N.Y. 623.
- 32. Minn.—State v. Stewart, App., 486 N.W.2d 444.
- 33. U.S.—U.S. v. Invader Oil Corp., D.C.Cal., 5 F.2d 715.
Application of Texas Co., D.C.Ill., 27 F.Supp. 847.
Fla.—State ex rel. Hemmings v. Coleman, 187 So. 793, 137 Fla. 80.
- 34. U.S.—Hale v. Henkel, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.
- 35. U.S.—Hale v. Henkel, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.
- Tex.—Barnes v. State, 116 S.W.2d 408, 134 Tex.Cr. 461.
- 36. Tenn.—State v. Wilson, 91 S.W. 195, 115 Tenn. 725.
- 37. N.Y.—Matter of Grand Jury Subpoenas Duces Tecum, 395 N.Y.S.2d 645, 58 A.D.2d 1.

- 38. N.Y.—People v. Moore, 3 Dept., 517 N.Y.S.2d 584, 132 A.D.2d 776, appeal denied 516 N.E.2d 1233, 70 N.Y.2d 802, 522 N.Y.S.2d 119.
- 39. U.S.—In re 1979 Grand Jury Subpoena, D.C.La., 478 F.Supp. 59.
- 40. Tenn.—State v. Parish, 27 Tenn. 80, 8 Humphr. 80.
- 41. Fla.—State ex rel. Hemmings v. Coleman, 187 So. 793, 137 Fla. 80.
- 42. **Second grand jury**
Just as a grand jury's right to call any witness is not defeated by knowledge of the probability that the witness will refuse to comply with a legitimate request, so too a second grand jury's right to call a witness called by a predecessor grand jury is not defeated by the same kind of anticipation.
U.S.—In re Pantojas, C.A.Puerto Rico, 639 F.2d 822.
- 43. U.S.—Matter of Archuleta, D.C.N.Y., 432 F.Supp. 583.
- 44. U.S.—Matter of Archuleta, D.C.N.Y., 432 F.Supp. 583.
- 45. U.S.—In re Grand Jury Investigation, D.C.Pa., 459 F.Supp. 1335.
- 46. Neb.—Cochran v. Lincoln County, 280 N.W.2d 897, 203 Neb. 818.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The principle that the public has the right to every man's evidence applies to grand jury proceedings.⁴⁷ There is a right to every man's evidence except for those persons protected by a constitutional, common-law, or statutory privilege.⁴⁸ A witness called by the grand jury has a duty to testify.⁴⁹ Every citizen⁵⁰ or person⁵¹ has a duty to testify. No person has a justifiable expectation of immunity from a subpoena.⁵² Every person owes society his testimony, unless some recognized privilege is asserted.⁵³

In balancing the private interest in not testifying against the public interest in obtaining testimony, the weight is in favor of the public.⁵⁴

Since some privileges exist, the duty to give evidence is conditional rather than absolute.⁵⁵ The rule that the grand jury has the right to procure the evidence of every person is qualified by the court's supervisory powers.⁵⁶

47. U.S.—*Branzburg v. Hayes*, Ky., 92 S.Ct. 2646, 408 U.S. 665, 33 L.Ed.2d 626, dissenting opinion U.S. v. Caldwell, 92 S.Ct. 2686, 408 U.S. 665, 33 L.Ed.2d 657.

In re Grand Jury Matter, C.A.3(Pa.), 906 F.2d 78, certiorari denied *Backiel v. U.S.*, 111 S.Ct. 509, 498 U.S. 980, 112 L.Ed.2d 521. D.C.—*U.S. v. Coachman*, 752 F.2d 685, 243 U.S.App.D.C. 228.

N.Y.—*People ex rel. Santucci v. Cappetta*, 392 N.Y.S.2d 992, 89 Misc.2d 937.

48. U.S.—*Branzburg v. Hayes*, Ky., 92 S.Ct. 2646, 408 U.S. 665, 33 L.Ed.2d 626, dissenting opinion U.S. v. Caldwell, 92 S.Ct. 2686, 408 U.S. 665, 33 L.Ed.2d 657.

In re Grand Jury Subpoena for Attorney Representing Criminal Defendant *Reyes-Requena*, 913 F.2d 1118, on remand In re *Reyes Requena*, 752 F.Supp. 239, affirmed 926 F.2d 1423, rehearing denied 946 F.2d 893, certiorari denied *DeGeurin v. U.S.*, 111 S.Ct. 1581, 499 U.S. 959, 113 L.Ed.2d 646.

In re Grand Jury Subpoenas *Duces Tecum Special Grand Jury*, Sept., 1986 Term, D.Md., 659 F.Supp. 628.

Ariz.—*Franzi v. Superior Court of Arizona In and For Pima County*, 679 P.2d 1043, 139 Ariz. 556.

Colo.—*Pignatiello v. District Court In and For Second Judicial Dist., State of Colorado*, 659 P.2d 683.

49. U.S.—*U.S. v. Gaddy*, C.A.11(Ga.), 894 F.2d 1307.

La.—In re Grand Jury Subpoenas, 387 So.2d 1140.

50. U.S.—*U.S. v. Calandra*, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320.

U.S. v. Bell, C.A.7(III.), 902 F.2d 563.

51. U.S.—In re Grand Jury Subpoena Served Upon *Doe*, C.A.2(N.Y.), 781 F.2d 238, 83 A.L.R.Fed. 461, certiorari denied *Roe v. U.S.*, 106 S.Ct. 1515, 475 U.S. 1108, 89 L.Ed.2d 914.

N.Y.—*Application of Rodriguez*, 468 N.Y.S.2d 833, 121 Misc.2d 694.

52. U.S.—*U.S. v. Dionisio*, Ill., 93 S.Ct. 764, 410 U.S. 1, 35 L.Ed.2d 67.

Not only individuals, but also entities are required to give testimony and attend upon the grand jury as a public duty.⁵⁷

There is no requirement that the witness know the purpose of the investigation.⁵⁸

§ 114. Compulsion in General

With the aid of the court, the grand jury may compel the production of evidence and the testimony of witnesses. However, the grand jury cannot itself compel such production or testimony, and must rely upon the court when such compulsion is required.

Library References

Grand Jury § 36.4, 36.4(1).

The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate.⁵⁹ It is vested with broad subpoena powers.⁶⁰

Witnesses may be subpoenaed to appear before the grand jury.⁶¹ The grand jury has the power to compel an individual to appear and testify.⁶² A compelled appearance does not constitute an unreasonable seizure under the Fourth Amendment.⁶³ Even the target of an investigation may be com-

Port v. Heard, D.C.Tex., 594 F.Supp. 1212, affirmed 764 F.2d 423—*Matter of Wood*, D.C.N.Y., 430 F.Supp. 41.

53. U.S.—*U.S. v. Mandujano*, Tex., 96 S.Ct. 1768, 425 U.S. 564, 48 L.Ed.2d 212, on remand 539 F.2d 106 (per Mr. Chief Justice Burger with three Justices concurring and four Justices concurring in the judgment).

N.J.—*Matter of L.Q.*, 545 A.2d 792, 227 N.J.Super. 41.

54. N.J.—*Matter of L.Q.*, 545 A.2d 792, 227 N.J.Super. 41.

55. U.S.—*U.S. v. Mandujano*, Tex., 96 S.Ct. 1768, 425 U.S. 564, 48 L.Ed.2d 212, on remand 539 F.2d 106 (per Mr. Chief Justice Burger with three Justices concurring and four Justices concurring in the judgment).

56. U.S.—In re Grand Jury Subpoena (*Legal Services Center*), D.C.Mass., 615 F.Supp. 958.

57. U.S.—In re Subpoenas to Local 478, Intern. Union of Operating Engineers and Ben. Funds, C.A.Conn., 708 F.2d 65.

58. U.S.—In re Special November 1975 Grand Jury (Subpoena *Duces Tecum* Issued to Peat, Marwick, Mitchell & Co.), D.C.Ill., 433 F.Supp. 1094.

59. U.S.—*U.S. v. R. Enterprises, Inc.*, Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena *Duces Tecum*, 955 F.2d 229.

U.S. v. Davis, C.A.N.Y., 702 F.2d 418, certiorari denied 103 S.Ct. 3554, 463 U.S. 1215, 77 L.Ed.2d 1400 and *Veliotis v. U.S.*, 103 S.Ct. 3554, 463 U.S. 1215, 77 L.Ed.2d 1400.

60. U.S.—*Matter of Grand Jury Investigation* (Detroit Police Dept. Special Cash Fund), C.A.6(Mich.), 922 F.2d 1266, rehearing denied.

Colo.—*Losavio v. Robb*, 579 P.2d 1152, 195 Colo. 533.

61. Miss.—*McCroly v. State*, 342 So.2d 897.

62. Ariz.—*State v. Superior Court In and For Pima County*, App., 609 P.2d 1070, 125 Ariz. 370.

63. U.S.—*Henry v. Ryan*, N.D.Ill., 775 F.Supp. 247.

pelled to appear.⁶⁴ The power to compel testimony from a witness subpoenaed to appear before the grand jury resides in the grand jury rather than in the prosecutor.⁶⁵

Apart from its power to compel testimony, the grand jury may compel the production of evidence,⁶⁶ such as documents,⁶⁷ or may order a person to sign a directive for the release of documents,⁶⁸ and can require handwriting exemplars,⁶⁹ voice exemplars,⁷⁰ fingerprints,⁷¹ photographs,⁷² or participation in a lineup.⁷³ However, some authorities hold that the grand jury may not require nontestimonial identification evidence.⁷⁴

The subpoena power of the grand jury is not unlimited.⁷⁵ However, it has also been said that, when a grand jury is acting pursuant to its investigatory and accusatory power, its right to obtain testimony by issuance of a subpoena ad testificandum, which on its face informs a witness of the time and place of his appearance, is absolute and unlimited.⁷⁶

The grand jury cannot itself compel the production of evidence or the testimony of witnesses, and must rely upon the court when such compulsion is required.⁷⁷ Grand jury subpoenas are not self-executing orders.⁷⁸ It is the court which must compel a witness to testify if, after appearing, such witness refuses to do so.⁷⁹

§ 115. Process in General

Process to secure the appearance of witnesses before the grand jury is authorized or permitted under various statutes.

Library References

Grand Jury ⇐36.4, 36.4(1).

Process to secure the appearance of witnesses before the grand jury is authorized or permitted under various statutes.⁸⁰ According to some authorities, the service of a subpoena in order to compel one to testify before the grand jury is the sole and exclusive process by which attendance may be required.⁸¹

A subpoena duces tecum may be issued in a

64. U.S.—U.S. v. Doe, C.A.Tex., 541 F.2d 490.

U.S. v. Horowitz, D.C.N.Y., 452 F.Supp. 415.

65. Or.—State ex rel. Frohnmayer v. Sams, 648 P.2d 364, 293 Or. 385.

66. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

Fourth Amendment

Grand jury subpoenas duces tecum are not per se violations of Fourth Amendment.

U.S.—U.S. v. Susskind, C.A.6(Mich.), 965 F.2d 80, opinion adopted in part on rehearing en banc 4 F.3d 1400, certiorari denied Rumler v. U.S., 114 S.Ct. 1098, 127 L.Ed.2d 411, certiorari denied 114 S.Ct. 1114, 127 L.Ed.2d 424, certiorari denied 114 S.Ct. 1296, 127 L.Ed.2d 649, on rehearing 7 F.3d 236.

67. Ohio—In re Brink, 536 N.E.2d 1202, 42 Ohio Misc.2d 5.

68. U.S.—In re Doe, C.A.2(N.Y.), 860 F.2d 40.

69. U.S.—U.S. v. Santucci, C.A.Ill., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.

D.C.—Christian v. U.S., App., 394 A.2d 1, certiorari denied Clark v. U.S., 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

70. U.S.—In re Grand Jury Proceedings, Hellmann, C.A.6(Ky.), 756 F.2d 428.

71. U.S.—U.S. v. Santucci, C.A.Ill., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.

D.C.—Christian v. U.S., App., 394 A.2d 1, certiorari denied Clark v. U.S., 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

Fourth Amendment not violated

U.S.—U.S. v. Boykins, C.A.8(Ark.), 966 F.2d 1240, rehearing denied.

72. U.S.—U.S. v. Santucci, C.A.Ill., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.

Fourth Amendment not violated

U.S.—U.S. v. Boykins, C.A.8(Ark.), 966 F.2d 1240, rehearing denied.

73. U.S.—Appeal of Maguire, C.A.Mass., 571 F.2d 675, certiorari denied Maguire v. U.S., 98 S.Ct. 2249, 436 U.S. 911, 56 L.Ed.2d 411—In re Melvin, C.A.Mass., 550 F.2d 674.

N.J.—State v. Schweitzer, 407 A.2d 1276, 171 N.J.Super. 82.

Successor grand jury

There was no inherent abuse in successor grand jury's resubmitting appellant to the same lineup request as predecessor grand jury.

U.S.—In re Pantojas, C.A.Puerto Rico, 639 F.2d 822.

74. N.Y.—District Attorney of Erie County v. Corlett, 530 N.Y.S.2d 462, 140 Misc.2d 162.

75. Ariz.—State v. Superior Court In and For Pima County, App., 609 P.2d 1070, 125 Ariz. 370.

N.Y.—Stern v. Morgenthau, 465 N.E.2d 349, 62 N.Y.2d 331, 476 N.Y.S.2d 810.

Matter of Doe, 456 N.Y.S.2d 312, 117 Misc.2d 197.

76. N.Y.—Dwyer v. Wilcox, 459 N.Y.S.2d 923, 92 A.D.2d 646.

77. U.S.—U.S. v. Williams, Okl., 112 S.Ct. 1735, 504 U.S. 36, 118 L.Ed.2d 352—U.S. v. Calandra, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320—Brown v. U.S., N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d 609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.

Tex.—Ex parte Wynne, Cr.App., 772 S.W.2d 132.

Va.—Sikle v. Commonwealth, 112 S.E. 605, 133 Va. 789, 27 A.L.R. 135.

78. U.S.—In re Grand Jury Subpoena, D.Vt., 118 F.R.D. 558.

79. U.S.—Brown v. U.S., N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d 609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.

U.S. v. Chanen, C.A.Ariz., 549 F.2d 1306, certiorari denied 98 S.Ct. 72, 434 U.S. 825, 54 L.Ed.2d 83.

80. Ky.—Miller v. Price, 86 S.W.2d 152, 260 Ky. 488.

Tex.—Barnes v. State, 116 S.W.2d 408, 134 Tex.Cr. 461.

81. N.Y.—Application of Mullen, 31 N.Y.S.2d 710, 177 Misc. 734.

proper case.⁸² Such a subpoena does not give the process server the right to seize the subpoenaed items,⁸³ or to demand their immediate surrender under threats of contempt,⁸⁴ or to compel the person served to accompany the process server.⁸⁵

Subpoenas may be issued requiring persons to appear and produce their records although the grand jury has not entered on an investigation of some particular or specific charge.⁸⁶

It has been held that a grand jury subpoena is a mandate of the court,⁸⁷ and that it is the court's process which summons a witness to attend and give testimony,⁸⁸ and not that of the grand jury or of the district attorney.⁸⁹ However, it has also been said that a grand jury subpoena, although described as "court's process," is functionally a tool of the prosecutor.⁹⁰ Under statutes prohibiting the disclosure of certain records but containing an exception for disclosure pursuant to a court order, some authorities hold that a grand jury subpoena is a court order,⁹¹ while others hold that it is not a court order.⁹²

Neither an oral direction by the district attorney nor an oral clarification by the foreman of a grand jury can change or enlarge the command of a subpoena.⁹³ Moreover, when a subpoena has been complied with, new terms may not be subsequently imposed or added,⁹⁴ and if further attendance of the witness is required, another subpoena must be issued and served.⁹⁵

Habeas corpus ad testificandum.

Where a witness is a prisoner, a writ of habeas corpus ad testificandum is an appropriate means by which his presence may be secured.⁹⁶

Letters rogatory.

The grand jury may use letters rogatory to obtain documents in the possession of a foreign entity.⁹⁷ However, this is not necessarily the only method by which such documents may be obtained.⁹⁸

§ 116. — Issuance

- a. In general
- b. Federal grand jury

a. In General

Authorities differ as to whether a grand jury subpoena may be issued by the prosecutor rather than the court and, if so, whether the prior consent of the grand jury is required.

Library References

Grand Jury ⇐36.4, 36.4(1).

A criminal court may direct that a subpoena issue to a grand jury witness.⁹⁹ Some authorities hold that only the court, and not the prosecutor or the grand jury, may issue a subpoena.¹

However, some authorities hold that the prosecutor may issue a subpoena,² as for example a subpoena duces tecum.³ A very usual practice is that the prosecuting attorney should have such witnesses summoned as he believes necessary to support the bills to be laid before the grand jury.⁴

82. N.Y.—*People v. Doe*, 286 N.Y.S. 343, 247 A.D. 324, affirmed 3 N.E.2d 875, 272 N.Y. 473.

People v. Doe, 29 N.Y.S.2d 648, 176 Misc. 943.

83. U.S.—*U.S. v. Barr*, D.C.N.Y., 605 F.Supp. 114—In re *Nwamu*, D.C.N.Y., 421 F.Supp. 1361.

84. U.S.—In re *Nwamu*, D.C.N.Y., 421 F.Supp. 1361.

85. U.S.—In re *Nwamu*, D.C.N.Y., 421 F.Supp. 1361.

86. U.S.—*U.S. v. Invader Oil Corporation*, D.C.Cal., 5 F.2d 715.

87. N.Y.—*Kuriansky v. Azam*, 573 N.Y.S.2d 369, 151 Misc.2d 176.

88. U.S.—*Brown v. U.S.*, N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d 609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.

89. U.S.—In re *National Window Glass Workers*, D.C.Ohio, 287 F.219, 1 Ohio Law Abs. 419.

90. U.S.—*Application of Credit Information Corp. of New York*, D.C.N.Y., 457 F.Supp. 969.

91. U.S.—*U.S. v. Retail Credit Men's Ass'n of Jacksonville*, D.C.Fla., 501 F.Supp. 21.

92. U.S.—In re *Gren*, C.A.Cal., 633 F.2d 825.

In re *Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc. of Georgia*, D.C.Ga., 498 F.Supp. 1174—In re *Vaughn*,

D.C.Ga., 496 F.Supp. 1080—*Application of Credit Information Corp. of New York*, D.C.N.Y., 457 F.Supp. 969.

In re *Grand Jury Subpoena*, D.Vt., 118 F.R.D. 558.

Colo.—*Losavio v. Robb*, 579 P.2d 1152, 195 Colo. 533.

93. N.Y.—*Application of Mullen*, 31 N.Y.S.2d 710, 177 Misc. 734.

94. N.Y.—*Application of Mullen*, 31 N.Y.S.2d 710, 177 Misc. 734.

95. N.Y.—*Application of Mullen*, 31 N.Y.S.2d 710, 177 Misc. 734.

96. U.S.—*U.S. v. Lach*, C.A.11(Fla.), 874 F.2d 1543.

Carmona v. Warden of Ossining Correctional Facility, D.C.N.Y., 549 F.Supp. 621.

D.C.—*Christian v. U.S.*, App., 394 A.2d 1, certiorari denied *Clark v. U.S.*, 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

97. U.S.—In re *Grand Jury 81-2*, D.C.Mich., 550 F.Supp. 24.

98. U.S.—In re *Grand Jury 81-2*, D.C.Mich., 550 F.Supp. 24.

99. Pa.—In re *Klein*, 40 Pa.Super. 360—*Commonwealth v. Klein*, 40 Pa.Super. 352.

1. La.—In re *Grand Jury Subpoenas*, 363 So.2d 651.

2. Ariz.—*Marston's, Inc. v. Strand*, 560 P.2d 778, 114 Ariz. 260.

3. Ariz.—*Marston's, Inc. v. Strand*, 560 P.2d 778, 114 Ariz. 260.

4. Conn.—*State v. Wolcott*, 21 Conn. 272.

Some authorities hold that the prosecutor may not issue a subpoena without the prior consent of the grand jury.⁵ While the grand jury is in session, some statutes have been held to contemplate that witnesses desired will be summoned by the order of the foreman of the grand jury.⁶ It has also been held that the prosecutor may issue a subpoena before the grand jury is in session,⁷ or that the clerk of the court may, in vacation, on the request of the prosecuting attorney, issue subpoenas for witnesses to appear before the next session of the grand jury.⁸ Some authorities hold that, while the prosecutor may issue a subpoena duces tecum without prior authorization by the grand jury, the prosecutor must provide the witness with an opportunity to go before the grand jury,⁹ so that a grand jury need only be sitting on the return date and not on the date of issuance.¹⁰

b. Federal Grand Jury

A subpoena for the attendance of a witness before a federal grand jury shall be issued by the clerk, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.

A subpoena for the attendance of a witness before a federal grand jury shall be issued by the clerk under the seal of the court.¹¹ The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.¹² A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.¹³

Thus, the court's actual involvement in the issuance of a grand jury subpoena is limited to issuing a blank subpoena bearing the seal of the court.¹⁴ Although grand jury subpoenas are issued in the name of the court, they are issued pro forma and in blank to anyone requesting them without prior

court approval or control,¹⁵ and are almost universally instrumentalities of the United States Attorney's Office or of some other department of the executive branch.¹⁶

The United States Attorney may fill in blank subpoenas so as to require identification material, without actual prior grand jury authorization.¹⁷ The grand jury need not reach a decision to request a lineup by a formal vote.¹⁸

§ 117. — Personal Jurisdiction and Service

- a. In general
- b. Federal grand jury

a. In General

Under some statutes, a corporation which does business in the state may be subject to a grand jury subpoena.

Research Note

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceeding is treated infra § 121.

Library References

Grand Jury ⇐36.4, 36.4(1).

Under some statutes, a corporation which does business in the state may be subject to a grand jury subpoena,¹⁹ in which case it may be required to produce documents even if such documents are not themselves located in the state.²⁰

Under a District of Columbia statute, in a felony case a grand jury subpoena may be served at any place within the United States.²¹

b. Federal Grand Jury

In the case of a federal grand jury, a subpoena may be served by any person who is not a party and who is not less than 18 years of age, and may be served at any place within the United States.

In the case of a federal grand jury, a subpoena may be served by the marshal, by a deputy mar-

5. Ariz.—Gershon v. Broomfield, 642 P.2d 852, 131 Ariz. 507.
 Cal.—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469.
 6. Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.
 7. N.J.—State v. Stelzner, 608 A.2d 386, 257 N.J.Super. 219, certification denied 614 A.2d 619, 130 N.J. 396.
 8. Ill.—O'Hair v. People, 32 Ill.App. 277.
 Ky.—Miller v. Price, 86 S.W.2d 152, 260 Ky. 488.
 9. N.J.—State v. Hilltop Private Nursing Home, Inc., 426 A.2d 1041, 177 N.J.Super. 377.
 10. N.J.—State v. Hilltop Private Nursing Home, Inc., 426 A.2d 1041, 177 N.J.Super. 377.
 11. Fed.Rules Cr.Proc., Rule 17(a), 18 U.S.C.A.
 12. Fed.Rules Cr.Proc., Rule 17(a), 18 U.S.C.A.

13. Fed.Rules Cr.Proc., Rule 17(c), 18 U.S.C.A.
 14. U.S.—U.S. v. Martino, C.A.3(Pa.), 825 F.2d 754, on remand 1988 WL 41468, affirmed 869 F.2d 592.
 15. U.S.—In re Grand Jury Matters, C.A.N.H., 751 F.2d 13.
 16. U.S.—In re Grand Jury Matters, C.A.N.H., 751 F.2d 13.
 17. U.S.—U.S. v. Santucci, C.A.III., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.
 18. U.S.—In re Pantojas, C.A.Puerto Rico, 639 F.2d 822.
 19. N.Y.—Matter of Grand Jury Subpoenas Dated June 26, 1986, 513 N.E.2d 239, 70 N.Y.2d 700, 519 N.Y.S.2d 353.
 20. N.Y.—Matter of Grand Jury Subpoenas Dated June 26, 1986, 513 N.E.2d 239, 70 N.Y.2d 700, 519 N.Y.S.2d 353.
 21. D.C.—Christian v. U.S., App., 394 A.2d 1, certiorari denied Clark v. U.S., 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

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shal or by any other person who is not a party and who is not less than 18 years of age.²² Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for one day's attendance and the mileage allowed by law, but fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.²³

A subpoena requiring the attendance of a witness at a hearing may be served at any place within the United States.²⁴ A corporation may be in the United States and may be served in the United States even if the corporation is also in another country,²⁵ and even if the corporation is organized or has its main place of business in another country.²⁶ A witness may be subject to personal jurisdiction if he has certain minimum contacts with the United States, regardless of whether he has such contacts with the state in which the federal court sits.²⁷ A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the statute²⁸ concerning the subpoena of a person in a foreign country.²⁹

So long as the court which must enforce the grand jury process can obtain personal jurisdiction of a witness, the witness may be required to produce documents which the witness controls even if such documents are located abroad.³⁰

§ 118. — Form and Contents

A grand jury subpoena need not state the nature of the investigation.

22. Fed.Rules Cr.Proc., Rule 17(d), 18 U.S.C.A.
23. Fed.Rules Cr.Proc., Rule 17(d), 18 U.S.C.A.
24. Fed.Rules Cr.Proc., Rule 17(e)(1), 18 U.S.C.A.
25. U.S.—Matter of Arawak Trust Co. (Cayman) Ltd., D.C.N.Y., 489 F.Supp. 162.
26. U.S.—Matter of Arawak Trust Co. (Cayman) Ltd., D.C.N.Y., 489 F.Supp. 162.
27. U.S.—Matter of Marc Rich & Co., A.G., C.A.N.Y., 707 F.2d 663, certiorari denied Marc Rich & Co., A.G. v. U.S., 103 S.Ct. 3555, 463 U.S. 1215, 77 L.Ed.2d 1400.
28. 28 U.S.C.A. § 1783.
29. Fed.Rules Cr.Proc., Rule 17(e)(2), 18 U.S.C.A.
30. U.S.—Matter of Marc Rich & Co., A.G., C.A.N.Y., 707 F.2d 663, certiorari denied Marc Rich & Co., A.G. v. U.S., 103 S.Ct. 3555, 463 U.S. 1215, 77 L.Ed.2d 1400.
31. U.S.—In re Grand Jury Proceedings, D.C.Pa., 514 F.Supp. 90.
32. N.Y.—Dwyer v. Wilcox, 459 N.Y.S.2d 923, 92 A.D.2d 646.
33. U.S.—In re Subpoena to Testify Before Grand Jury Numbered S286-4-7, N.D.Ind., 630 F.Supp. 235.

Library References

Grand Jury ⇨36.4, 36.4(1).

A grand jury subpoena need not state the nature of the investigation,³¹ or specify the areas of inquiry,³² or the grand jury's objectives,³³ or the nature of the charge,³⁴ or bear a facial allegation of a crime,³⁵ or state the name of the target,³⁶ or assure that the alleged violations occurred within the territorial jurisdiction of the court.³⁷

The subpoena should direct the witness to appear not before the grand jury but before the court, and to give evidence before the grand jury.³⁸

A federal grand jury subpoena for the attendance of witnesses shall be issued under the seal of the court, shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.³⁹ A federal grand jury subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.⁴⁰ The subpoena may provide that it can be satisfied by delivery of documents to government agents,⁴¹ and may give the witness the option of presenting statements⁴² or documents⁴³ to government agents rather than the grand jury, or the option of presenting identification evidence outside the actual presence of the grand jury.⁴⁴

§ 119. — Definiteness of Description

A grand jury subpoena duces tecum must identify the documents demanded sufficiently clearly to permit compliance.

34. U.S.—Hale v. Henkel, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.
35. Pa.—Robert Hawthorne, Inc. v. County Investigating Grand Jury, 412 A.2d 556, 488 Pa. 373.
36. U.S.—In re National Window Glass Workers, D.C. Ohio, 287 F. 219, 1 Ohio Law Abs. 419.
In re Subpoena to Testify Before Grand Jury Numbered S286-4-7, N.D.Ind., 630 F.Supp. 235.
37. U.S.—In re Grand Jury Proceedings, D.C.Pa., 514 F.Supp. 90.
38. Ill.—O'Hair v. People, 32 Ill.App. 277.
39. Fed.Rules Cr.Proc., Rule 17(a), 18 U.S.C.A.
40. Fed.Rules Cr.Proc., Rule 17(c), 18 U.S.C.A.
41. U.S.—U.S. v. Duncan, C.A.N.C., 598 F.2d 839, certiorari denied 100 S.Ct. 148, 444 U.S. 871, 62 L.Ed.2d 96.
In re Castiglione, D.C.Cal., 587 F.Supp. 1210.
42. U.S.—U.S. v. Kouba, D.N.D., 632 F.Supp. 937.
43. U.S.—U.S. v. Kouba, D.N.D., 632 F.Supp. 937.
44. U.S.—U.S. v. Santucci, C.A.Ill., 674 F.2d 624, certiorari denied 103 S.Ct. 737, 459 U.S. 1109, 74 L.Ed.2d 959.

Library References

Grand Jury ⇨36.4(2).

A grand jury subpoena duces tecum must identify the documents demanded sufficiently clearly to permit compliance.⁴⁵ There must be a particularity of description so that a person attempting to comply with the subpoena may in good faith know what he is being asked to produce.⁴⁶ While a subpoena duces tecum must specify with as much precision and particularity as is possible the books, papers, or documents desired,⁴⁷ the description need not be exact and full in all particulars, but is sufficient if the books and papers are designated with reasonable certainty, so that the witness may know what is required of him.⁴⁸

The use of phrases such as "related to" and "associated with" in a subpoena is not fatal.⁴⁹

Where a subpoena imparts an unclear direction, it must be construed against the drafter.⁵⁰

§ 120. — Termination of Obligation

A grand jury may continue the appearance of a subpoenaed witness until his testimony has been completed or the need for his presence has terminated.

Library References

Grand Jury ⇨36.4, 36.4(1).

It is implicit within a subpoena directing a witness to testify before a grand jury that the grand jury may continue the appearance and questioning of the witness until his testimony has been completed or the need for his presence has been terminated.⁵¹

Expiration of grand jury.

A grand jury subpoena does not have any viability beyond the term of the grand jury,⁵² even if it authorizes the delivery of material to the prosecutor.⁵³ However, it has also been held that subpoenaed documents may be obtained for a grand jury other than the one in whose name they were first demanded.⁵⁴ The transfer of documents obtained by one grand jury to a successor grand jury is treated infra § 123.

Dissolution of corporation.

Some authorities hold that a dissolved corporation has a continuing obligation to respond to subpoenas relating to predissolution conduct.⁵⁵

§ 121. Witnesses from Without State

The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which applies to grand jury proceedings, has been adopted in all 50 states and the District of Columbia.

Research Note

Personal jurisdiction over and service upon witness from without the state is discussed generally supra § 117.

Library References

Grand Jury ⇨36.4, 36.4(1).

There is no federal constitutional provision granting a person relief from the obligation to testify in a grand jury proceeding, even though he must travel to another state to do so.⁵⁶

The National Conference of Commissioners on Uniform State Laws has drafted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.⁵⁷ The Act has been adopted in all 50 states and the District of Columbia.⁵⁸

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in the adopting state certifies under the seal of such court that a grand jury investigation has commenced or is about to commence, that a person

45. U.S.—In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc., E.D.N.C., 630 F.Supp. 614—In re Rabbinical Seminary Netzach Israel Ramailis, D.C.N.Y., 450 F.Supp. 1078.

46. N.J.—In re Grand Jury Subpoena Duces Tecum, 363 A.2d 936, 143 N.J.Super. 526.

47. U.S.—In re Motions to Quash Subpoenas Duces Tecum Returnable Before Second Grand Jury, D.C.Cal., 30 F.Supp. 527.

48. U.S.—In re Motions to Quash Subpoenas Duces Tecum Returnable Before Second Grand Jury, D.C.Cal., 30 F.Supp. 527.

49. U.S.—U.S. v. Tropp, D.Wyo., 725 F.Supp. 482.

50. U.S.—In re Grand Jury Subpoenas Duces Tecum, Aug. 1986, D.Md., 658 F.Supp. 474.

51. La.—In re Grand Jury Subpoenas, 363 So.2d 651.

52. Md.—In re Special Investigation No. 249, 461 A.2d 1082, 296 Md. 201—In re Special Investigation No. 195, 454 A.2d 843, 295 Md. 276.

53. Md.—In re Special Investigation No. 195, 454 A.2d 843, 295 Md. 276.

54. U.S.—In re Immunity Order Dated April 21, 1982, D.C.N.Y., 543 F.Supp. 1075.

55. U.S.—In re Grand Jury Subpoenas Issued to Thirteen Corporations, C.A.2(N.Y.), 775 F.2d 43, certiorari denied Roe v. U.S., 106 S.Ct. 1459, 475 U.S. 1081, 89 L.Ed.2d 716.

56. U.S.—People of State of New York v. O'Neill, Fla., 79 S.Ct. 564, 359 U.S. 1, 3 L.Ed.2d 585, on remand 112 So.2d 837.

57. Uniform Act to Secure Attendance of Witnesses (U.L.A.) § 1 et seq.

58. Uniform Act to Secure Attendance of Witnesses (U.L.A.), Table of Jurisdictions Wherein Act Has Been Adopted.

being within the adopting state is a material witness in such grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.⁵⁹

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in a grand jury investigation in the other state, and that the laws of the state in which the grand jury investigation has commenced or is about to commence [and of any other state through which the witness may be required to pass by ordinary course of travel], will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons.⁶⁰

In any such hearing, the certificate shall be prima facie evidence of all the facts stated therein.⁶¹

§ 122. Banks

A grand jury need not obtain records pertaining to the accounts of bank customers from the customers themselves, and may obtain such records from the bank.

59. Uniform Act to Secure Attendance of Witnesses (U.L.A.) § 2.

60. Uniform Act to Secure Attendance of Witnesses (U.L.A.) § 2.

Balancing

In determining whether to issue summons pursuant to request under the Uniform Act to Secure Witnesses, right of requesting state's grand jury to hear testimony of witness whose presence is compelled must be balanced against right of the witness.

Vt.—In re Stoddard, 470 A.2d 1185, 144 Vt. 6.

Independent finding

Court, in determining to issue summons pursuant to request under the Uniform Act to Secure Witnesses, erred in failing to make its own independent findings on whether attendance of the witness before the out-of-state proceeding was material and necessary and would not cause that witness undue hardship.

Vt.—In re Stoddard, 470 A.2d 185, 144 Vt. 6.

61. Uniform Act to Secure Attendance of Witnesses (U.L.A.) § 2.

Witness

It was not incumbent upon demanding state to produce witness to attest to facts in certification of individual as material and necessary witness required to appear before grand jury.

Research Note

Right to Financial Privacy Act is treated *infra* § 124.

Library References

Grand Jury ⇨36.4, 36.4(1).

A grand jury need not obtain records pertaining to the accounts of bank customers from the customers themselves, and may obtain such records from the bank.⁶²

The government need not provide notice to bank customers of the issuance of a grand jury subpoena duces tecum requiring the bank to produce records pertaining to their accounts.⁶³ State law requiring such notice is inapplicable to a federal grand jury.⁶⁴

§ 123. Disposition of Physical Evidence

The grand jury or the prosecutor may retain documents subpoenaed by the grand jury, at least for a limited period of time.

Library References

Grand Jury ⇨36, 36.1, 36.6.

The grand jury has the power to retain documents presented to it pursuant to a subpoena duces tecum,⁶⁵ and may review such documents itself⁶⁶ or have others review them.⁶⁷ After a witness appears before the grand jury, he may be required to leave with the grand jury any physical evidence which was produced.⁶⁸ The prosecutor may take custody of such evidence for the grand jury,⁶⁹ and inspect and review it.⁷⁰ The prosecutor may possess and retain material received pursuant to a

N.Y.—Matter of Failla, 454 N.Y.S.2d 25, 89 A.D.2d 923.

62. U.S.—In re Seiffert, D.C.N.Y., 446 F.Supp. 1153.

63. U.S.—In re Seiffert, D.C.N.Y., 446 F.Supp. 1153.

64. U.S.—In re Grand Jury Subpoena (Connecticut Sav. Bank), D.C.Conn., 481 F.Supp. 833.

65. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

N.Y.—Hynes v. Moskowitz, 377 N.E.2d 446, 44 N.Y.2d 383, 406 N.Y.S.2d 1, appeal dismissed Lerner v. Hynes, 99 S.Ct. 243, 439 U.S. 888, 58 L.Ed.2d 234, appeal dismissed 99 S.Ct. 302, 439 U.S. 921, 58 L.Ed.2d 315.

66. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

67. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

68. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

69. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

70. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

subpoena,⁷¹ and review them,⁷² and may make copies and use them for any proper purpose.⁷³ It is the burden of the subpoenaed party to raise a challenge as to the extent of possession to which the issuer of the subpoena is entitled.⁷⁴

Documents produced pursuant to a subpoena remain the property of the person producing them.⁷⁵ Persons other than the grand jury or prosecuting attorneys may not inspect the documents without the owner's consent or a court order based on independent legal authority for permitting the inspection.⁷⁶

The prosecutor can retain documents only for a reasonable period of time.⁷⁷ Upon the completion of the grand jury's task, documents normally should be returned to the owner.⁷⁸ The government may not retain subpoenaed documents beyond the life of the criminal investigatory proceedings for which the disclosure was authorized, without court authorization.⁷⁹ When an indictment is returned, the prosecutor's right to retain documents generally ends if they are not needed as part of a continuing investigation,⁸⁰ but the court retains control over them.⁸¹ Documents need not be returned where they are needed for trial preparation.⁸²

Where the term of a grand jury expires, documents may be transferred to a second grand jury,⁸³

and need not be returned where a second grand jury continues the investigation.⁸⁴ Where a grand jury whose term has expired improperly subpoenas documents, and such documents are transferred to a second grand jury, the second grand jury may retain such documents without the formality of issuing another subpoena.⁸⁵

§ 124. Right to Financial Privacy Act

Under the Right to Financial Privacy Act, financial records about a customer obtained from a financial institution pursuant to a federal grand jury subpoena generally shall be returned and actually presented to the grand jury.

Library References

Grand Jury ⇨36.4, 36.4(1).

Under the Right to Financial Privacy Act,⁸⁶ financial records about a customer obtained from a financial institution pursuant to a federal grand jury subpoena shall be returned and actually presented to the grand jury, unless the volume of such records makes such return and actual presentation impractical, in which case the grand jury shall be provided with a description of the contents of the records.⁸⁷ Representatives of the institution need not personally deliver the records to the grand jury,⁸⁸ although there is some authority to the contrary.⁸⁹ No examination of the records may be made except for the purposes of, and by direction

71. N.Y.—Brunswick Hosp. Center, Inc. v. Hynes, 420 N.E.2d 51, 52 N.Y.2d 333, 438 N.Y.S.2d 253.

Kuriansky v. Seewald, 1 Dept., 544 N.Y.S.2d 336, 148 A.D.2d 238, appeal denied 549 N.E.2d 478, 74 N.Y.2d 616, 550 N.Y.S.2d 276.

Must be presented to grand jury

Subpoenaed documents, which had been available for grand jury use but which had not been submitted to grand jury, could not be impounded on ground that such documents were relevant and should be preserved for use at trial; however, special prosecutor would be permitted to photostat any documents before returning them.

N.Y.—People v. Fairview Nursing Home, 401 N.Y.S.2d 390, 92 Misc.2d 694.

72. Assistance

Materials subpoenaed by grand jury may be analyzed and summarized by government counsel with assistance of investigative personnel of government law enforcement agency for presentation to grand jury.

U.S.—U.S. v. Phelps, D.C.Okl., 526 F.Supp. 686.

73. N.Y.—Brunswick Hosp. Center, Inc. v. Hynes, 420 N.E.2d 51, 52 N.Y.2d 333, 438 N.Y.S.2d 253.

74. N.Y.—Brunswick Hosp. Center, Inc. v. Hynes, 420 N.E.2d 51, 52 N.Y.2d 333, 438 N.Y.S.2d 253.

75. U.S.—In re Grand Jury Matter, E.D.Pa., 640 F.Supp. 63—In re Doe, D.C.R.I., 537 F.Supp. 1038.

76. U.S.—In re Grand Jury Matter, E.D.Pa., 640 F.Supp. 63.

77. N.Y.—Hynes v. Lerner, 376 N.E.2d 1294, 44 N.Y.2d 329, 405 N.Y.S.2d 649, reargument denied 380 N.E.2d 350, 44 N.Y.2d 950,

408 N.Y.S.2d 1027, certiorari denied 99 S.Ct. 243, 439 U.S. 888, 58 L.Ed.2d 234.

78. U.S.—U.S. ex rel. Woodard v. Tynan, C.A.10(Colo.), 776 F.2d 250.

In re Doe, D.C.R.I., 537 F.Supp. 1038.

79. U.S.—Tarnopol v. U.S., 18 Cl.Ct. 89, affirmed 904 F.2d 46, rehearing denied.

80. N.Y.—People v. Fairview Nursing Home, 401 N.Y.S.2d 390, 92 Misc.2d 694.

81. N.Y.—People v. Fairview Nursing Home, 401 N.Y.S.2d 390, 92 Misc.2d 694.

82. U.S.—U.S. v. Kosovsky, 506 F.Supp. 43.

83. U.S.—In re Grand Jury Proceedings, C.A.Okl., 658 F.2d 782.

84. U.S.—U.S. v. Halper, D.C.N.Y., 470 F.Supp. 103.

85. U.S.—U.S. v. Davis, N.D.Ill., 673 F.Supp. 252.

86. 12 U.S.C.A. § 3401 et seq.

87. 12 U.S.C.A. § 3420(a)(1).

88. U.S.—U.S. v. A Residence Located at 218 Third Street, New Glarus, Wisconsin, C.A.7(Wis.), 805 F.2d 256—U.S. v. Kington, C.A.5(Tex.), 801 F.2d 733, rehearing denied 806 F.2d 261, certiorari denied 107 S.Ct. 1888, 481 U.S. 1014, 95 L.Ed.2d 495, appeal after remand 835 F.2d 106, on subsequent remand 715 F.Supp. 781, on subsequent appeal 875 F.2d 1091, rehearing denied 878 F.2d 815.

89. U.S.—In re Castiglione, E.D.Cal., 587 F.Supp. 1210.

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of, the grand jury.⁹⁰

The records shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by certain provisions of the Federal Rules of Criminal Procedure.⁹¹ The records shall be destroyed or returned

to the institution if not used for one of these purposes.⁹² The records or a description of their contents shall not be maintained by any government authority other than in the sealed records of the grand jury, unless a record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by certain provisions of the Federal Rules of Criminal Procedure.⁹³

C. ENFORCEMENT OF PROCESS BY COURT IN GENERAL

§ 125. In General

Courts are empowered to take actions necessary to enforce grand jury subpoenas.

Research Note

Inability of grand jury itself to compel testimony or production of evidence is treated supra § 114. Whether court should compel compliance is discussed infra §§ 128-151, 153.

Library References

Grand Jury ⇐36.4, 36.4(1).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Courts are empowered to take actions necessary to enforce grand jury subpoenas.⁹⁴ A federal court may compel appearance and testimony before a federal grand jury.⁹⁵ A court may compel a person to sign a directive authorizing the release of documents.⁹⁶

It is a preferable practice, after a witness refuses to testify before a grand jury, to have the witness brought before the court so that the court may determine if an order to compel his testimony should be entered.⁹⁷ The witness should be warned

of the consequences of a failure to testify before being ordered to do so.⁹⁸ If he still refuses to testify and gives no lawful reason for such refusal, and if circumstances otherwise warrant, a specific unequivocal order should be entered requiring the witness to answer questions posed before the grand jury, after which the witness should be physically returned to the grand jury room.⁹⁹

A witness has no right to have the general public present while the court puts to him the grand jury's questions.¹

Contempt is discussed infra §§ 155-163.

Personal jurisdiction.

In order to obtain a directive for compliance with a subpoena, the government must show that there is a reasonable probability that ultimately it will succeed in establishing facts necessary for the exercise of personal jurisdiction over the witness.²

Recognizance.

A court, having the power belonging to a court of oyer and terminer or of general jail delivery, has

90. U.S.—U.S. v. Kington, C.A.5(Tex.), 801 F.2d 733, rehearing denied 806 F.2d 261, certiorari denied 107 S.Ct. 1888, 481 U.S. 1014, 95 L.Ed.2d 495, appeal after remand 835 F.2d 106, on subsequent remand 715 F.Supp. 781, on subsequent appeal 875 F.2d 1091, rehearing denied 878 F.2d 815.

91. 12 U.S.C.A. § 3420(a)(2).

92. 12 U.S.C.A. § 3420(a)(3).

93. 12 U.S.C.A. § 3420(a)(4).

94. Ill.—People v. I.W.I., Inc., 1 Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

Physical force

While contempt order is normally effective weapon against grand jury witness who refuses to comply with grand jury order to appear in line-up and be fingerprinted, contempt order is drastically blunted when defiant witness is already incarcerated for long period, and thus in such a case court may order use of such reasonable force as may be necessary.

U.S.—Appeal of Maguire, C.A.Mass., 571 F.2d 675, certiorari denied Maguire v. U.S., 98 S.Ct. 2249, 436 U.S. 911, 56 L.Ed.2d 411.

95. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 6 O.O.2d 320.

Appeal of Maguire, C.A.Mass., 571 F.2d 675, certiorari denied Maguire v. U.S., 98 S.Ct. 2249, 436 U.S. 911, 56 L.Ed.2d 411.

96. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 873 F.2d 238—In re Doe, C.A.2(N.Y.), 860 F.2d 40.

97. U.S.—In re Grand Jury Proceedings, Ortloff, C.A.Cal., 708 F.2d 1455, certiorari denied Conley v. U.S., 104 S.Ct. 506, 464 U.S. 1001, 78 L.Ed.2d 696.

98. U.S.—In re Grand Jury Proceedings, Ortloff, C.A.Cal., 708 F.2d 1455, certiorari denied Conley v. U.S., 104 S.Ct. 506, 464 U.S. 1001, 78 L.Ed.2d 696.

99. U.S.—In re Grand Jury Proceedings, Ortloff, C.A.Cal., 708 F.2d 1455, certiorari denied Conley v. U.S., 104 S.Ct. 506, 464 U.S. 1001, 78 L.Ed.2d 696.

1. U.S.—In re Bongiorno, C.A.N.Y., 694 F.2d 917.

2. U.S.—Matter of Marc Rich & Co., A.G., C.A.N.Y., 707 F.2d 663, certiorari denied Marc Rich & Co., A.G. v. U.S., 103 S.Ct. 3555, 463 U.S. 1215, 77 L.Ed.2d 1400.

power to require a witness who has been subpoenaed to testify before a grand jury to enter into a recognizance to appear before such grand jury, either at a present or a future term of court.³

§ 126. Grand Jury Action as Prerequisite to Compulsion by Court

Action by the grand jury itself, as distinct from the prosecutor may be a prerequisite to compulsion of a witness by the court.

Library References

Grand Jury Ⓒ36.4, 36.4(1).

The prosecutor cannot seek a court order for the compulsion of a grand jury witness in the absence of a grand jury directive addressed to such witness.⁴

There are occasions when it is appropriate for the court to insist that the grand jury expressly authorize the action that the prosecutor seeks to undertake on its behalf.⁵ In the absence of a demand by the grand jury that a witness answer questions before it, a court has no duty to order a witness to give testimony demanded by the prosecutor.⁶

It is not sufficient that an individual has been subpoenaed before the grand jury in order for the prosecutor to obtain a court order for nontestamentary evidence such as handwriting exemplars, as the grand jury itself must direct the furnishing of such nontestamentary evidence, and, without such

a directive, the court cannot compel the production of such evidence.⁷

§ 127. Arrest

In the case of a federal grand jury, if it appears from an affidavit that the testimony of a person is material, and if it is shown that it may be impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person.

Library References

Grand Jury Ⓒ36.4, 36.4(1).

In the case of a federal grand jury, if it appears from an affidavit filed by a party that the testimony of a person is material, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person.⁸ A representation of materiality by a responsible official of the United States Attorney's office is sufficient, and an articulation of the factual basis for materiality is unnecessary.⁹ The subject of the warrant may challenge the propriety of the issuance of the warrant on the ground that the prosecutor knowingly presented a false representation of materiality.¹⁰

No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.¹¹ Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken.¹²

D. GROUNDS FOR NONCOMPLIANCE WITH, AND JUDICIAL REVIEW OF, PROCESS

§ 128. In General

In some circumstances a court may quash or modify a grand jury subpoena.

Library References

Grand Jury Ⓒ36.4-36.4(2), 36.9, 36.9(1).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

A person subpoenaed or ordered to appear before a grand jury to testify may seek the protection of the court by moving to modify or quash the subpoena.¹³ The court has a supervisory duty of

3. Miss.—Gwynn v. State, 1 So. 237, 64 Miss. 324.

Wis.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

4. U.S.—In re Melvin, C.A.1, 546 F.2d 1, application denied 97 S.Ct. 1323, 430 U.S. 913, 51 L.Ed.2d 591.

5. U.S.—In re Grand Jury Proceedings (Doe), E.D.N.Y., 790 F.Supp. 422.

6. Or.—State ex rel. Frohnmayer v. Sams, 648 P.2d 364, 293 Or. 385.

7. U.S.—U.S. v. O'Kane, D.C.Fla., 439 F.Supp. 211.

8. 18 U.S.C.A. § 3144.

9. U.S.—U.S. v. Oliver, C.A.III., 683 F.2d 224.

10. U.S.—U.S. v. Oliver, C.A.III., 683 F.2d 224.

11. 18 U.S.C.A. § 3144.

12. 18 U.S.C.A. § 3144.

13. La.—In re Grand Jury Subpoenas, 363 So.2d 651.

Balancing

In considering whether to order compliance with grand jury subpoena duces tecum, court must balance competing interests of the individual's right to keep his personal affairs confidential with the grand jury's right to investigate criminal activity.

Colo.—Losavio v. Robb, 579 P.2d 1152, 195 Colo. 533.

seeing that its grand jury and its processes are not abused, or used for purposes of oppression and injustice.¹⁴ The power to quash a federal grand jury subpoena exists in the district court for the district where the grand jury sits, by reason of its inherent authority to prevent misuse of its own process.¹⁵ Discretionary authority to quash a subpoena is not absolute.¹⁶

It has been held that a subpoena will not be enforced unless it is reasonable,¹⁷ and requests documents with sufficient specificity¹⁸ and reasonable particularity,¹⁹ and is not overbroad.²⁰

The requirements for the enforcement of a federal trial subpoena are inapplicable to a federal grand jury subpoena.²¹ The court may quash or modify a federal grand jury subpoena duces tecum if compliance would be unreasonable or oppressive,²² and has considerable discretion in this respect.²³ The reasonableness of the requirements of a subpoena duces tecum is a concrete matter and depends on the specific situation that is the subject of inquiry.²⁴

The grand jury is without power to invade a legitimate privacy interest protected by the Fourth Amendment.²⁵ A subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be

regarded as reasonable under the Fourth Amendment.²⁶

Habeas corpus ad testificandum.

The issuance of a writ of habeas corpus ad testificandum by a court created by Act of Congress, for the purpose of producing a prisoner before the grand jury, is discretionary, and the court must first satisfy itself that the writ is in necessary aid of the court's jurisdiction.²⁷

§ 129. Proceedings in General

A full evidentiary hearing is not necessarily required on a motion to quash a grand jury subpoena.

Library References

Grand Jury ⇨36.9-36.9(2).

Judicial review of a grand jury subpoena or of the grounds for noncompliance therewith may occur in the context of a proceeding to quash or modify the subpoena,²⁸ or a proceeding to compel compliance with the subpoena,²⁹ or, as discussed infra §§ 155-163, a contempt proceeding. A recalcitrant grand jury witness is entitled to an opportunity to demonstrate just cause for refusing to com-

14. U.S.—In re National Window Glass Workers, D.C.Ohio, 287 F. 219, 1 Ohio Law Abs. 419.

15. U.S.—U.S. v. (Under Seal), C.A.Va., 714 F.2d 347, certiorari dismissed Doe v. U.S., 104 S.Ct. 1019, 464 U.S. 978, 78 L.Ed.2d 354.

16. Colo.—Losavio v. Robb, 579 P.2d 1152, 195 Colo. 533.

17. Colo.—People v. Corr, 682 P.2d 20, certiorari denied Colorado v. Corr, 105 S.Ct. 181, 469 U.S. 855, 83 L.Ed.2d 115.

Md.—In re Special Investigation No. 281, 473 A.2d 1, 299 Md. 181.

Mass.—Commonwealth v. Doe, 563 N.E.2d 1349, 408 Mass. 764.

Case-by-case determination

N.J.—In re Grand Jury Subpoena Duces Tecum, 363 A.2d 936, 143 N.J.Super. 526.

Lineup

Standard of reasonableness should guide judge in deciding whether, in his discretion, to direct person to appear at lineup ordered by grand jury.

Mass.—Commonwealth v. Doe, 563 N.E.2d 1349, 408 Mass. 764.

18. Colo.—Benson v. People, 703 P.2d 1274.

19. Colo.—Pignatiello v. District Court In and For Second Judicial Dist., State of Colorado, 659 P.2d 683.

N.J.—In re Grand Jury Subpoena Duces Tecum, 363 A.2d 936, 143 N.J.Super. 526.

20. Colo.—Pignatiello v. District Court In and For Second Judicial Dist., State of Colorado, 659 P.2d 683.

D.C.—U.S. v. Medical Soc. of District of Columbia, D.C., 26 F.Supp. 55.

Ill.—People v. I.W.I., Inc., 1 Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

N.Y.—Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Broth. of Carpenters and Joiners of America, AFL-CIO, 528 N.E.2d 1195, 72 N.Y.2d 307, 532 N.Y.S.2d 722, certiorari denied Local 17 of United Broth. of Carpenters and Joiners of America, AFL-CIO v. New York, 109 S.Ct. 492, 488 U.S. 966, 102 L.Ed.2d 529.

Definiteness of description see supra § 119.

Oppressiveness see infra § 136.

Relevancy see infra § 132.

21. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

22. Fed.Rules Cr.Proc., Rule 17(c), 18 U.S.C.A.

U.S.—In re Grand Jury Subpoena, M.D.Pa., 626 F.Supp. 1319.

23. U.S.—Matter of Klein, C.A.7(Ind.), 776 F.2d 628.

24. U.S.—In re Motions to Quash Subpoenas Duces Tecum Returnable Before Second Grand Jury, D.C.Cal., 30 F.Supp. 527.

25. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320.

26. U.S.—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320.

In re Eight Grand Jury Subpoenae Duces Tecum, S.D.N.Y., 701 F.Supp. 53.

Mont.—Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 170 Mont. 354.

27. D.C.—Christian v. U.S., App., 394 A.2d 1, certiorari denied Clark v. U.S., 99 S.Ct. 2889, 442 U.S. 944, 61 L.Ed.2d 315.

28. Ga.—Morris v. State, 272 S.E.2d 254, 246 Ga. 510.

29. U.S.—Matter of Schmidt, C.A.7(Ill.), 775 F.2d 822.