

ply with a subpoena³⁰ and a reasonable time to prepare a defense.³¹ However, a grand jury investigation generally must not be frustrated or impeded by a requirement of minitrials or preliminary showings.³²

A mere assertion by a witness does not necessitate further proceedings.³³ If the witness makes a preliminary showing of impropriety, the court may grant appropriate relief and may require further proceedings.³⁴

Some authorities hold that, where a person moves to quash a grand jury subpoena as being unreasonable, the party who caused the subpoena to issue has the initial burden of going forward with evidence.³⁵ It has also been held that a prosecutor who seeks judicial enforcement of a grand jury directive for a lineup must make a preliminary showing.³⁶ In the case of a federal grand jury, a court may be justified in a case where unreasonableness is alleged in requiring the government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion.³⁷

A full evidentiary hearing is not necessarily required on a motion to quash a subpoena.³⁸ The court need not necessarily hold an evidentiary hearing on the grand jury's request for an order directing a person to appear at a lineup, and may decide the issue solely on the basis of evidence presented to the grand jury.³⁹

The court may in some circumstances conduct the hearing on a motion to quash a subpoena in camera, without participation by the movant.⁴⁰ Though in camera submissions of affidavits are not to be routinely accepted in seeking enforcement of a subpoena, an exception may be made where there is an ongoing interest in grand jury secrecy.⁴¹ In the case of a federal grand jury, the court may require that the government reveal the subject of the investigation to the court in camera, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.⁴²

Forum.

A motion to quash or modify a subpoena should be made in the court which empaneled the grand jury.⁴³

Time for proceedings.

A motion to quash or modify a subpoena duces tecum should be made promptly,⁴⁴ and, in any case, prior to the return date of the subpoena.⁴⁵

Waiver of defenses.

In responding to a motion to compel testimony, a witness must present all available defenses, and any defense omitted is lost.⁴⁶

§ 130. Presumption of Validity of Process

A grand jury subpoena is presumptively valid, and the burden is on the unwilling witness to show that the subpoena should be quashed.

30. U.S.—Matter of Fula, C.A.N.Y., 672 F.2d 279, on remand 558 F.Supp. 50.
 31. U.S.—Matter of Fula, C.A.N.Y., 672 F.2d 279, on remand 558 F.Supp. 50.
 32. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.
 33. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.
 34. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.
 35. Ga.—Morris v. State, 272 S.E.2d 254, 246 Ga. 510.

36. Minimal factual showing

To insure that prosecutor and grand jury are acting in good faith and not arbitrarily or to harass putative defendants, under inherent supervisory power of Court of Appeals over superior court, prosecutor seeking judicial enforcement of grand jury directive for individual who is neither under arrest nor charged with crime to appear in lineup must, by affidavit of law enforcement officer or formal representation of assistant United States attorney, make a minimal factual showing sufficient to permit judge to conclude that there is reason for lineup which is consistent with legitimate function of grand jury.

D.C.—Matter of Kelley, App., 433 A.2d 704.

37. 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.

In re PHE, Inc., W.D.Ky., 790 F.Supp. 1310.

38. D.C.—Brooks v. U.S., App., 448 A.2d 253.

39. Mass.—Commonwealth v. Doe, 563 N.E.2d 1349, 408 Mass. 764.

40. 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.

41. 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.

42. 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.

43. N.Y.—Matter of Onondaga County Grand Jury Investigation, 452 N.Y.S.2d 838, 114 Misc.2d 923.

44. N.Y.—Hynes v. Doe, 420 N.Y.S.2d 978, 101 Misc.2d 350.

Federal grand jury

A motion to quash or modify a federal grand jury subpoena on the ground that compliance would be unreasonable or oppressive must be made promptly.

Fed.Rules Cr.Proc., Rule 17(c), 18 U.S.C.A.

45. N.Y.—Hynes v. Doe, 420 N.Y.S.2d 978, 101 Misc.2d 350.

46. U.S.—Matter of Schmidt, C.A.7(Ill.), 775 F.2d 822.

Library References

Grand Jury ⇐36.4, 36.4(1), 36.9(2).

A grand jury subpoena is presumptively valid.⁴⁷ There is a presumption that an inquiry by a grand jury was carried on in good faith,⁴⁸ and that the grand jury or attorney general will be guided in their acts by court decisions defining their power and authority.⁴⁹ The burden is on the unwilling witness to show that the subpoena should be quashed.⁵⁰ The person moving to quash a subpoena as being unreasonable has the ultimate burden of persuasion.⁵¹

A presumption of regularity attaches to a federal grand jury subpoena, and the party challenging its regularity has the burden of showing some irregularity.⁵² Thus, a federal grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness is on the recipient who seeks to avoid compliance.⁵³ The party seeking to quash such a subpoena has the burden of showing that there is a

clear basis in fact and law for doing so.⁵⁴ The court must exercise its power to quash with great caution.⁵⁵

§ 131. Objections to Jurisdiction or Scope of Investigation

It has been said that a grand jury witness is not entitled to challenge the authority of the court or of the grand jury or to set limits to the investigation that the grand jury may conduct.

Library References

Grand Jury ⇐36.3, 36.3(1), 36.9, 36.9(1).

It has been said that a grand jury witness is not entitled to challenge the authority of the court⁵⁶ or of the grand jury,⁵⁷ to challenge the authority of a grand jury which has a de facto organization and existence,⁵⁸ to object to the jurisdiction of the grand jury,⁵⁹ to take exception to the jurisdiction of the grand jury over the particular subject matter that is under investigation,⁶⁰ or to set limits to the investigation that the grand jury may conduct.⁶¹

47. 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.

48. N.Y.—In re Greenleaf, 28 N.Y.S.2d 28, 176 Misc. 566.

49. N.Y.—People v. Doe, 29 N.Y.S.2d 648, 176 Misc. 943.

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

Mass.—Matter of John Doe Grand Jury Investigation, 574 N.E.2d 373, 410 Mass. 596.

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 In re Stewart, 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. 948, 563 N.Y.S.2d 764.

Description

Burden is upon the movant seeking to quash a subpoena duces tecum issued by a grand jury to show that the subpoena's description of documents to be produced is unreasonably vague and not specific.

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

51. Ga.—Morris v. State, 272 S.E.2d 254, 246 Ga. 510.

52. U.S.—National Commodity and Barter Ass'n v. U.S., C.A.10(Colo.), 951 F.2d 1172—In re Grand Jury Subpoena, C.A.4(Md.), 920 F.2d 235—In re Grand Jury Matter, C.A.3(Pa.), 770 F.2d 36, certiorari denied District Council 33, American Federation of State, County and Municipal Employees, AFL-CIO v. U.S., 106 S.Ct. 574, 474 U.S. 1022, 88 L.Ed.2d 558.

53. 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. 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.

54. U.S.—Matter of Chinske, D.Mont., 785 F.Supp. 130.

55. U.S.—Matter of Chinske, D.Mont., 785 F.Supp. 130.

56. 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.

57. 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.

Md.—In re Special Investigation No. 237, 458 A.2d 450, 54 Md.App. 201.

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

Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

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.

59. U.S.—Matter of Grand Jury Subpoenas of Clay, D.C.N.Y., 603 F.Supp. 197.

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

Territorial jurisdiction

Md.—In re Special Investigation No. 224, 458 A.2d 454, 54 Md.App. 137, decision supplemented 458 A.2d 450, 54 Md.App. 201.

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

Matter of Fula, C.A.N.Y., 672 F.2d 279, on remand 558 F.Supp. 50.

Port v. Heard, D.C.Tex., 594 F.Supp. 1212, affirmed 764 F.2d 423.

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

In re Grand Jury, D.C.Tex., 446 F.Supp. 1132.

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

Minn.—State v. Kasherman, 224 N.W. 838, 177 Minn. 200, certiorari denied Kasherman v. State of Minnesota, 50 S.Ct. 85, 280 U.S. 602, 74 L.Ed. 647.

Even assuming that a witness is free to contest the grand jury's jurisdiction, the proper method of doing so is to file a motion to quash the subpoena rather than to ignore the subpoena.⁶²

§ 132. Relevancy of Evidence Sought

A motion to quash a federal grand jury subpoena duces tecum on relevancy grounds must be denied unless there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation.

Library References

Grand Jury ⇐36.2, 36.4-36.4(2), 36.9(2).

It has been said that a grand jury witness is not entitled to urge objections of incompetency or irrelevancy.⁶³ However, it has also been held that a grand jury subpoena will be enforced only if the evidence sought is relevant.⁶⁴

The evidence sought is relevant so long as it bears some possible relationship to the investigation,⁶⁵ or a relationship exists between the evidence and the purposes of the inquiry.⁶⁶ The evidence need not be highly relevant,⁶⁷ and is relevant unless

the category of documents sought can have no conceivable relevance to any legitimate object of investigation by the grand jury,⁶⁸ or the grand jury has gone so far afield from the area of its original investigation that the court, by not quashing the subpoena, would be permitting a gross abuse of process.⁶⁹ It is sufficient that the general category of subpoenaed documents bears some possible relationship to the investigation.⁷⁰ Questions by the grand jury are relevant if their bearing on the investigation is susceptible of intelligent estimate or if there is a justifiable suspicion that they are related to the investigation.⁷¹

Where a federal grand jury subpoena duces tecum is challenged on relevancy grounds, the motion to quash must be denied unless the court determines that there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation.⁷²

Some authorities hold that a subpoena will be enforced only if the prosecutor makes a preliminary showing of relevancy.⁷³ Other authorities

62. U.S.—U.S. v. Partin, C.A.Ga., 552 F.2d 621, certiorari denied 98 S.Ct. 298, 434 U.S. 903, 54 L.Ed.2d 189.

63. 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 Pantojas, C.A.Puerto Rico, 628 F.2d 701—U.S. v. McGovern, C.C.A.N.Y., 60 F.2d 880, certiorari denied McGovern v. U.S., 53 S.Ct. 96, 287 U.S. 650, 77 L.Ed. 561.

U.S. v. Weiner, D.C.Pa., 418 F.Supp. 941, affirmed U.S. v. Shinick, 546 F.2d 420 and 546 F.2d 421, certiorari denied 97 S.Ct. 1135, two cases, 429 U.S. 1105, 51 L.Ed.2d 557.

64. U.S.—In re 1980 U.S. Grand Jury Subpoena Duces Tecum, D.C.La., 502 F.Supp. 576.

Colo.—Benson v. People, 703 P.2d 1274.

Ill.—People v. I.W.I., Inc., 1 Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

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

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

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.

Financial records

Though common-law right of privacy over financial records does not in any way restrict grand jury's access to records for which government can make minimal finding of general relevance, district court may consider policy concerns evidenced by common law in determining whether subpoena takes in too much irrelevant material to withstand challenge to subpoena's reasonableness.

U.S.—In re Grand Jury Proceedings: Subpoenas Duces Tecum, C.A.8(Mo.), 827 F.2d 301.

65. N.J.—In re Grand Jury Subpoena Duces Tecum, 401 A.2d 258, 167 N.J.Super. 471.

66. Colo.—Pignatiello v. District Court In and For Second Judicial Dist., State of Colorado, 659 P.2d 683.

67. N.Y.—New York State Com'n on Government Integrity v. Congel, 1 Dept., 548 N.Y.S.2d 663, 156 A.D.2d 274, appeal dismissed 552 N.E.2d 170, 75 N.Y.2d 836, 552 N.Y.S.2d 922.

68. 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.

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

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

71. N.Y.—Additional January 1979 Grand Jury of Albany Supreme Court v. Doe, 405 N.E.2d 194, 50 N.Y.2d 14, 427 N.Y.S.2d 950 (per Jasen, J., with two Judges concurring and one Judge concurring in the result).

72. 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.

73. Ga.—Morris v. State, 272 S.E.2d 254, 246 Ga. 510.

N.Y.—Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders—December 1988 Term, 536 N.Y.S.2d 939, 142 Misc.2d 241.

Pa.—In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 490 Pa. 143, 10 A.L.R.4th 542.

Where reasonable suspicion exists

In situation wherein witness or his attorney harbors reasonable suspicion that line of questioning has no bearing on subject of the investigation, witness can invoke assistance of the court to insure

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hold that a preliminary showing of relevancy is unnecessary.⁷⁴ In determining relevancy, the decision to proceed with an in camera inspection of documents sought by the subpoena is within the court's discretion.⁷⁵

In the case of a federal grand jury subpoena duces tecum, the recipient alleging irrelevancy has the burden of proof.⁷⁶ Self-serving assertions of those who may have committed criminal acts may be insufficient.⁷⁷ A court may be justified in requiring the government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of

questions' relevancy; at that point, it is incumbent on special prosecutor to demonstrate relevancy.

N.Y.—Additional January 1979 Grand Jury of Albany Supreme Court v. Doe, 405 N.E.2d 194, 50 N.Y.2d 14, 427 N.Y.S.2d 950 (per Jasen, J., with two Judges concurring and one Judge concurring in the result).

Credit reports

Although credit reports frequently contain financial information about targets of investigations which may conceivably be relevant to any grand jury investigation, that general possibility is not sufficient to support issuance of court order for credit reports; rather, facts set forth should be sufficient to allow court to make an "intelligent estimate" of specific relevance of specific reports sought to particular investigation.

N.Y.—Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders—December 1988 Term, 536 N.Y.S.2d 939, 142 Misc.2d 241.

Showing required

(1) Required prima facie showing by grand jury of relevancy of subpoenaed documents to legitimate grand jury investigation entails proof of: (1) existence of a grand jury investigation; (2) general characterization of the subject matter and purpose of investigation; and (3) fact that each general category of subpoenaed documents bears some relevance to investigation being pursued.

Ga.—Morris v. State, 272 S.E.2d 254, 246 Ga. 510.

(2) To establish that documents enumerated in a grand jury subpoena duces tecum bears some general relevance to a grand jury investigation, it is necessary for the State to establish the existence of a grand jury investigation, the nature and subject matter of the investigation, and a substantial nexus between the subpoenaed documents and the investigation.

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

(3) Existence of grand jury investigation and nature of subject matter of that investigation, as conditions for issuance of grand jury's subpoena duces tecum, need not be established by affidavit or other formal proofs but can be satisfied by simple representation by counsel that grand jury investigation has been commenced.

N.J.—State v. Hilltop Private Nursing Home, Inc., 426 A.2d 1041, 177 N.J.Super. 377.

74. U.S.—In re Grand Jury Investigation, C.A.11(Ga.), 769 F.2d 1485—In re Grand Jury Proceeding, C.A.Hawaii, 721 F.2d 1221—In re Slaughter, C.A.Fla., 694 F.2d 1258.

Matter of Chinske, D.Mont., 785 F.Supp. 130—In re Grand Jury Subpoena Duces Tecum to John Doe Corp., D.C.N.Y., 570 F.Supp. 1476.

Md.—In re Special Investigation No. 249, 461 A.2d 1082, 296 Md. 201.

persuasion.⁷⁸ The court may require that the government reveal the subject of the investigation to the court in camera, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.⁷⁹

The government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause.⁸⁰ The grand jury's belief that a person possesses information may be based on rumor, tips, and prosecutorial suggestion.⁸¹ The reliability of such

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

Facial allegation of crime

There is no requirement that a grand jury subpoena bear a facial allegation of a crime.

Pa.—Robert Hawthorne, Inc. v. County Investigating Grand Jury, 412 A.2d 556, 488 Pa. 373.

Reasons for issuance

A grand jury subpoena is presumptively valid and even on a motion to quash, there is no burden on grand jury, through prosecutor, its legal advisor, to set forth reasons for its issuance.

N.Y.—Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders—December 1988 Term, 536 N.Y.S.2d 939, 142 Misc.2d 241.

75. Colo.—Pignatiello v. District Court In and For Second Judicial Dist., State of Colorado, 659 P.2d 683.

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. 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.

78. 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.

79. 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.

80. 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.

In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc., E.D.N.C., 630 F.Supp. 614—In re Grand Jury Proceedings, D.C.S.D., 443 F.Supp. 1273.

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.

People v. Doe, 445 N.Y.S.2d 768, 84 A.D.2d 182, stay denied 432 N.E.2d 597, 55 N.Y.2d 839, 447 N.Y.S.2d 704.

Lineup

Mass.—Commonwealth v. Doe, 563 N.E.2d 1349, 408 Mass. 764.

81. U.S.—U.S. v. Doe, C.A.Tex., 541 F.2d 490.

rumor, tips, or suggestion is not relevant.⁸² It has been held that an order for a person to appear at a lineup must be based on reasonable suspicion,⁸³ and that a subpoena for physical evidence must be based on individualized suspicion,⁸⁴ at least in the case of a bodily intrusion.⁸⁵

§ 133. — Time Period

A grand jury subpoena duces tecum may require the production of documents covering only a reasonable period of time.

Library References

Grand Jury ⇐36.4(2).

A grand jury subpoena duces tecum must span only a reasonable period of time,⁸⁶ and may require the production of documents covering only a reasonable period of time.⁸⁷

A time period is reasonable if it bears some relation to the subject of the investigation.⁸⁸ No magic figure limits the vintage of documents subject to a subpoena.⁸⁹ There is no specific time period which will be reasonable in all cases, and each case must be determined on its own unique facts.⁹⁰

A document may be relevant even if it relates to a period beyond the statute of limitations.⁹¹ The statute of limitations does not furnish an excuse for the refusal of a witness to give evidence before the grand jury.⁹²

§ 134. Existence of Alternative Source of Information

A court generally will compel a grand jury witness to provide evidence even if the prosecutor has an alternative source from which such information can be obtained, or such information is already in the possession of the prosecutor or the grand jury.

Library References

Grand Jury ⇐36.3, 36.3(1), 36.4-36.4(2).

A court generally will compel a grand jury witness to provide evidence even if the prosecutor has an alternative source from which such information can be obtained,⁹³ as where such information is in the possession of the government but not the prosecutor.⁹⁴

Indeed, a court will compel a witness to provide evidence even if such information is already in the possession of the prosecutor⁹⁵ or the grand jury,⁹⁶ or is merely cumulative.⁹⁷

§ 135. Multiple Requests to Same Witness

A grand jury may subpoena the same witness on more than once occasion.

Library References

Grand Jury ⇐36.3, 36.3(1), 36.4-36.4(2).

A grand jury may subpoena the same witness on more than one occasion.⁹⁸ Compliance with prior subpoenas will not automatically insulate a witness from successive subpoenas.⁹⁹ Prior document production does not render a proper grand jury sub-

82. U.S.—*U.S. v. Doe*, C.A.Tex., 541 F.2d 490.
 83. Mass.—*Commonwealth v. Doe*, 563 N.E.2d 1349, 408 Mass. 764.
 84. U.S.—*Henry v. Ryan*, N.D.Ill., 775 F.Supp. 247.
 85. U.S.—*Henry v. Ryan*, N.D.Ill., 775 F.Supp. 247.
 86. Colo.—*Benson v. People*, 703 P.2d 1274.
 87. N.J.—*In re Grand Jury Subpoena Duces Tecum*, 363 A.2d 936, 143 N.J.Super. 526.
 88. U.S.—*In re Rabbinical Seminary Netzach Israel Ramailis*, D.C.N.Y., 450 F.Supp. 1078.
 N.J.—*In re Grand Jury Subpoena Duces Tecum*, 363 A.2d 936, 143 N.J.Super. 526.
 89. U.S.—*In re Rabbinical Seminary Netzach Israel Ramailis*, D.C.N.Y., 450 F.Supp. 1078.
 90. N.J.—*In re Grand Jury Subpoena Duces Tecum*, 363 A.2d 936, 143 N.J.Super. 526.
 91. U.S.—*In re Rabbinical Seminary Netzach Israel Ramailis*, D.C.N.Y., 450 F.Supp. 1078.
 Ill.—*In re January*, 1986 Grand Jury, No. 217, 1 Dist., 508 N.E.2d 277, 108 Ill.Dec. 116, 155 Ill.App.3d 445, appeal denied 515 N.E.2d 109, 113 Ill.Dec. 300, 116 Ill.2d 555, certiorari denied *Bernstein v. Illinois*, 108 S.Ct. 1023, 484 U.S. 1064, 98 L.Ed.2d 988.
 92. N.Y.—*Johnson v. Keenan*, 396 N.Y.S.2d 232, 58 A.D.2d 755.
 93. U.S.—*In re Liberatore*, C.A.Conn., 574 F.2d 78.

N.Y.—*Keenan v. Gigante*, 390 N.E.2d 1151, 47 N.Y.2d 160, 417 N.Y.S.2d 226, certiorari denied *Gigante v. Lankler*, 100 S.Ct. 181, 444 U.S. 887, 62 L.Ed.2d 118.
People v. Doe, 455 N.Y.S.2d 945, 116 Misc.2d 626.
 94. U.S.—*U.S. v. Weimer*, D.C.Pa., 418 F.Supp. 941, affirmed 546 F.2d 421, certiorari denied 97 S.Ct. 1135, 429 U.S. 1105, 51 L.Ed.2d 557.
 95. U.S.—*U.S. v. Bell*, C.A.7(Ill.), 902 F.2d 563—*U.S. v. Ryan*, C.A.7(Ill.), 810 F.2d 650—*Matter of Sinadinos*, C.A.7(Ill.), 760 F.2d 167.
 N.Y.—*Keenan v. Gigante*, 390 N.E.2d 1151, 47 N.Y.2d 160, 417 N.Y.S.2d 226, certiorari denied *Gigante v. Lankler*, 100 S.Ct. 181, 444 U.S. 887, 62 L.Ed.2d 118.
 96. U.S.—*U.S. v. Davis*, C.A.Tenn., 636 F.2d 1028, rehearing denied *U.S. v. Orr*, 645 F.2d 71, two cases, certiorari denied 102 S.Ct. 320, 454 U.S. 862, 70 L.Ed.2d 162.
 97. U.S.—*In re Grand Jury*, C.A.1(Mass.), 851 F.2d 499—*U.S. v. Lench*, C.A.9(Cal.), 806 F.2d 1443.
 Ind.—*Hueck v. State*, App. 1 Dist., 590 N.E.2d 581, rehearing denied, transfer denied.
 98. U.S.—*In re Pantojas*, C.A.Puerto Rico, 639 F.2d 822.
 99. U.S.—*In re Grand Jury Investigation*, D.C.Pa., 459 F.Supp. 1335.

poena unreasonable.¹ A successor grand jury has the power to subpoena a witness who was called by a previous grand jury.²

The fact that the documents requested in a subpoena have also been requested by another grand jury in a different jurisdiction does not preclude enforcement of the subpoena.³

§ 136. Oppressiveness

A court will not enforce a grand jury subpoena if compliance would be oppressive.

Library References

Grand Jury ⇨36.4-36.4(2).

A court will not enforce a grand jury subpoena if compliance would be oppressive,⁴ or unreasonably burdensome,⁵ or would cause an unreasonable business detriment.⁶ A subpoena should not be so broad that a person is harassed or oppressed to the point that he experiences an unreasonable business detriment.⁷

What is unduly oppressive in a given case will depend upon the circumstances presented therein.⁸ The mere fact that some burden is imposed does not invalidate a subpoena, and only an excessive burden will invalidate the subpoena.⁹ A subpoena is not necessarily invalid because it causes inconvenience,¹⁰ disruption,¹¹ or irreparable harm,¹² or because of the large volume of matter sought,¹³ or the

fact that the subpoena is served during a pending criminal proceeding.¹⁴

While the cost of compliance with a subpoena will bear on the validity of the subpoena, the obligation to provide evidence persists in the face of all but genuine financial oppression.¹⁵ The court may in some circumstances compel the government to bear the costs of compliance.¹⁶ This is proper only if such costs exceed those which the custodian of documents may reasonably be expected to bear as a cost of doing business.¹⁷ When the documents are available from another source, it is oppressive to place on the subpoenaed party the costs of searching for the documents.¹⁸ Reproduction costs may be considered a necessary consequence of compliance only if production of the original documents is a practical impossibility.¹⁹

§ 137. Improper Purpose

A court will not enforce a grand jury subpoena where it is issued for the sole or dominant purpose of gathering evidence for civil enforcement or of preparing a pending indictment for trial.

Research Note

Use of grand jury proceedings for improper purpose is discussed generally supra § 10.

Library References

Grand Jury ⇨36.2, 36.4-36.4(2), 36.9(2).

A court will not enforce a grand jury subpoena unless evidence is sought for a lawfully authorized

1. U.S.—In re Rabbinical Seminary Netzach Israel Ramailis, D.C.N.Y., 450 F.Supp. 1078.

2. U.S.—In re Pantojas, C.A.Puerto Rico, 639 F.2d 822.

3. U.S.—In re Grand Jury Investigation, D.C.Pa., 459 F.Supp. 1335.

4. 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.

Federal grand jury

In the case of a federal grand jury, the court may quash or modify a subpoena duces tecum if compliance would be oppressive.

Fed.Rules Cr.Proc., Rule 17(c), 18 U.S.C.A.

5. 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.

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

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

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

9. U.S.—In re Grand Jury Investigation, John Doe 1078, E.D.Va., 690 F.Supp. 489.

10. Pa.—Robert Hawthorne, Inc. v. County Investigating Grand Jury, 412 A.2d 556, 488 Pa. 373.

11. U.S.—Matter of Special April 1977 Grand Jury, C.A.Ill., 581 F.2d 589, certiorari denied Scott v. U.S., 99 S.Ct. 721, 439 U.S. 1046, 58 L.Ed.2d 705.

12. 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.

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

14. U.S.—U.S. v. Grand Jury Matter (Special Grand Jury, June Term, 1990), D.Md., 789 F.Supp. 693.

15. U.S.—In re Grand Jury Subpoena Duces Tecum Issued to First Nat. Bank of Maryland Dated November 4, 1976, D.C.Md., 436 F.Supp. 46.

16. U.S.—In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, C.A.Fla., 555 F.2d 1306.

In re Grand Jury Investigation, D.C.Pa., 459 F.Supp. 1335.

17. Mass.—Matter of Grand Jury Subpoena, 583 N.E.2d 241, 411 Mass. 489.

18. U.S.—Matter of Special April 1977 Grand Jury, C.A.Ill., 581 F.2d 589, certiorari denied Scott v. U.S., 99 S.Ct. 721, 439 U.S. 1046, 58 L.Ed.2d 705.

19. U.S.—In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, C.A.Fla., 555 F.2d 1306.

purpose.²⁰ However, there appears to be some authority for the view that a witness may not assert that a subpoena is being used for an improper purpose.²¹

A grand jury subpoena may not be used for the sole or dominant purpose of gathering evidence for civil enforcement,²² or of preparing a pending indictment for trial.²³ A subpoena may not be used to coerce a plea bargain when that use has no relation to a proper purpose of the grand jury,²⁴ or for the purpose of disrupting the relationship between the target and counsel.²⁵ A question designed to produce a perjury entrapment is improper.²⁶ However, where obtaining evidence for purposes unrelated to the grand jury's function is not the sole or dominant purpose, a subpoena is not invalid even though it may incidentally produce evidence which may be used for a purpose unrelated to the grand jury's function.²⁷ Thus, where preparing a pending indictment for trial is not the sole or dominant purpose, subpoenas may be used for the purpose of investigating additional individuals,²⁸ or of investigating whether a superseding indictment should be returned.²⁹

The prosecutor should limit the use of grand jury subpoenas to situations which further the grand jury's function,³⁰ and should not use the subpoena power as part of the prosecutor's own investigative

process,³¹ or as a ploy for the facilitation of office interrogation without the grand jury.³² The mere fact that a subpoenaed individual is not ultimately called before the grand jury does not result in a per se violation.³³ The prosecutor may interview witnesses before taking them to the grand jury in order to eliminate unnecessary materials before the grand jury and save the time of the grand jurors.³⁴ A subpoena is not being used improperly merely because the grand jury is not in session at the time the subpoena is served, where the subpoena requires the return of materials on a date when the grand jury will be in session.³⁵

It has been held that the court should enforce a subpoena only if the prosecutor makes a preliminary showing that information is not sought primarily for a purpose unrelated to the grand jury's function.³⁶ However, it has also been held that a preliminary showing of a proper purpose is unnecessary,³⁷ and that, if the party seeking to quash a subpoena charges an improper purpose, the government need only refute those charges to the extent that the witness supplies evidence to support them.³⁸ Where there are special circumstances tending to show that the grand jury is not acting within its general investigatory function but for some other purpose, judicial examination of its subpoenas requires substantially greater scrutiny than is usually required.³⁹ In some circumstances

- 20. Colo.—Benson v. People, 703 P.2d 1274.
- 21. U.S.—Matter of Jabbar, D.C.N.Y., 560 F.Supp. 186.
- 22. U.S.—In re Grand Jury Subpoenas, April, 1978, at Baltimore, C.A.Md., 581 F.2d 1103, certiorari denied Fairchild Industries, Inc. v. Harvey, 99 S.Ct. 1533, 440 U.S. 971, 59 L.Ed.2d 787.
- 23. U.S.—U.S. v. Moss, C.A.4(Va.), 756 F.2d 329.
Port v. Heard, D.C.Tex., 594 F.Supp. 1212, affirmed 764 F.2d 423—U.S. v. Boggs, D.C.Mont., 493 F.Supp. 1050.
- 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.
People v. Crean, 454 N.Y.S.2d 231, 115 Misc.2d 526—Dellwood Foods, Inc. v. Abrams, 439 N.Y.S.2d 1008, 109 Misc.2d 263.
- 24. 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.
- 25. U.S.—Matter of Klein, C.A.7(Ind.), 776 F.2d 628.
- 26. N.Y.—People v. Doe, 406 N.Y.S.2d 650, 95 Misc.2d 175.
- 27. U.S.—U.S. v. Moss, C.A.4(Va.), 756 F.2d 329—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 Subpoenas Duces Tecum, Aug. 1986, D.Md., 658 F.Supp. 474.
- Fla.—Agrella v. Rivkind, App., 404 So.2d 1113.
- N.Y.—People v. Doe, 445 N.Y.S.2d 768, 84 A.D.2d 182, stay denied 432 N.E.2d 597, 55 N.Y.2d 839, 447 N.Y.S.2d 704.
People v. Heller, 472 N.Y.S.2d 824, 122 Misc.2d 991.
- Wyo.—Hopkinson v. State, 664 P.2d 43, certiorari denied 104 S.Ct. 262, 464 U.S. 908, 78 L.Ed.2d 246.
- 28. U.S.—U.S. v. Moss, C.A.4(Va.), 756 F.2d 329.
- 29. U.S.—In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990, S.D.N.Y., 741 F.Supp. 1059, affirmed In re Grand Jury, 956 F.2d 1160.
- 30. Mass.—Commonwealth v. Cote, 556 N.E.2d 45, 407 Mass. 827.
- 31. U.S.—U.S. v. Elliott, C.A.11(Ga.), 849 F.2d 554.
- 32. U.S.—U.S. v. DiGilio, C.A.N.J., 538 F.2d 972, certiorari denied Lupo v. U.S., 97 S.Ct. 733, 429 U.S. 1038, 50 L.Ed.2d 749.
- 33. U.S.—U.S. v. Elliott, C.A.11(Ga.), 849 F.2d 554.
U.S. v. Mandel, D.C.Md., 415 F.Supp. 1033.
- 34. U.S.—U.S. v. Mandel, D.C.Md., 415 F.Supp. 1033.
- 35. U.S.—U.S. v. Tropp, D.Wyo., 725 F.Supp. 482.
- 36. Pa.—In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 490 Pa. 143, 10 A.L.R.4th 542.
- 37. U.S.—In re U.S. Grand Jury Proceedings, Western Dist. of Louisiana, Cid, C.A.5(La.), 767 F.2d 1131—In re Grand Jury Proceeding, C.A.Hawaii, 721 F.2d 1221.
Matter of Chinske, D.Mont., 785 F.Supp. 130.
- Md.—In re Special Investigation No. 249, 461 A.2d 1082, 296 Md. 201.
- 38. U.S.—Matter of Chinske, D.Mont., 785 F.Supp. 130.
- 39. N.Y.—Harlem Teams for Self-Help, Inc. v. Department of Investigation of City of New York, 472 N.Y.S.2d 967, 122 Misc.2d 1066.

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an evidentiary hearing concerning purpose is required.⁴⁰ In resolving the issue of purpose, the court need not necessarily inspect the grand jury minutes, and may in some cases rely upon representations by the prosecutor.⁴¹

§ 138. First Amendment Considerations

Authorities differ as to whether a special burden should be placed on the government where a grand jury subpoena potentially implicates First Amendment freedoms.

Research Note

Journalist privilege is treated *infra* § 146.

Library References

Grand Jury ⇐36.3, 36.3(1), 36.4-36.4(2).

It has been held that, if a grand jury subpoena potentially implicates First Amendment freedoms, the court should apply with special sensitivity the rule that grand juries may not engage in arbitrary fishing expeditions or select targets out of malice or an intent to harass.⁴² Some authorities hold that the government must show a compelling interest and a substantial relationship between the subpoena and such compelling interest.⁴³ However, other authorities reject this requirement, and hold that the court must balance the possibility of a constitutional infringement against the government's need for the evidence on a case-by-case basis, without putting any special burden on the government.⁴⁴

A subpoena for sexually explicit material need not be supported by a probable cause showing of obscenity.⁴⁵

40. U.S.—In re Grand Jury Subpoenas, April, 1978, at Baltimore, C.A.Md., 581 F.2d 1103, certiorari denied Fairchild Industries, Inc. v. Harvey, 99 S.Ct. 1533, 440 U.S. 971, 59 L.Ed.2d 787.

41. 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.

42. U.S.—In re Grand Jury 87-3 Subpoena Duces Tecum, C.A.4(Va.), 955 F.2d 229.

43. U.S.—National Commodity and Barter Ass'n v. U.S., C.A.10(Colo.), 951 F.2d 1172.

44. U.S.—In re Grand Jury 87-3 Subpoena Duces Tecum, C.A.4(Va.), 955 F.2d 229.

45. U.S.—In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc., E.D.N.C., 630 F.Supp. 614.

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

47. U.S.—Piemonte v. U.S., III., 81 S.Ct. 1720, 367 U.S. 556, 6 L.Ed.2d 1028.

U.S. v. Banks, C.A.11(Ala.), 942 F.2d 1576, appeal after new trial 988 F.2d 1106—Matter of Grand Jury Investigation (Detroit Police Dept. Special Cash Fund), C.A.6(Mich.), 922 F.2d 1266, rehearing denied.

The threshold showing which must be made by a witness to require a hearing on a motion to quash a subpoena on First Amendment grounds is substantial.⁴⁶

§ 139. Miscellaneous Grounds for Noncompliance

A grand jury witness must provide evidence notwithstanding his fear for his safety or that of his family, and notwithstanding that doing so may result in an unwelcome disclosure of his private affairs or in embarrassment.

Library References

Grand Jury ⇐36.1, 36.3, 36.3(1), 36.4, 36.4(1), 36.9, 36.9(1).

A grand jury witness is not excused from testifying because of his fear for his safety⁴⁷ or that of his family.⁴⁸ This is true at least where the witness rejects an offer by the government to remove or minimize the danger.⁴⁹ The grand jury should not be deprived of the testimony of a witness merely because something occurs which might allow someone to infer that the person is a witness,⁵⁰ or because somebody knows that the person has been called as a witness.⁵¹ However, it has also been held that in some circumstances fear may justify a refusal to testify,⁵² and that, while a speculative fear of reprisals does not justify refusal to testify, an actual showing that the secrecy of the proceeding has been impaired may constitute just cause for such a refusal.⁵³ The witness' fears must be subjectively and objectively valid.⁵⁴

Ordinarily, a witness has no right of privacy before a grand jury,⁵⁵ and there is no general right of privacy before a grand jury.⁵⁶ A witness must

48. U.S.—Piemonte v. U.S., III., 81 S.Ct. 1720, 367 U.S. 556, 6 L.Ed.2d 1028.

U.S. v. Gomez, C.A.Tex., 553 F.2d 958.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

49. U.S.—In re Grand Jury Proceedings, C.A.La., 605 F.2d 750.

50. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 914 F.2d 1372.

51. U.S.—In re Grand Jury Proceedings, C.A.1(Mass.), 943 F.2d 132—In re Grand Jury Proceedings, C.A.9(Cal.), 914 F.2d 1372.

52. N.Y.—People v. Joy, 508 N.Y.S.2d 147, 133 Misc.2d 779.

53. U.S.—In re Grand Jury Proceedings, C.A.10(Okl.), 797 F.2d 906.

54. U.S.—Matter of Grand Jury Proceedings of Dec., C.A.7(Ill.), 1989, 903 F.2d 1167.

55. 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.

56. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 867 F.2d 562, certiorari denied Doe v. U.S., 110 S.Ct. 265, 493 U.S. 906, 107 L.Ed.2d 214, rehearing denied 110 S.Ct. 523, 493 U.S. 985, 107 L.Ed.2d 524.

provide evidence even if this may result in an unwelcome disclosure of his personal affairs,⁵⁷ or an embarrassment.⁵⁸ However, some authorities hold, under a state constitutional right to privacy, that where the government attempts to compel the disclosure of private records the court must balance the person's privacy interest in nondisclosure against the interest of the public in having effective grand jury investigative powers.⁵⁹

Various matters do not justify refusal to enforce or to comply with a subpoena,⁶⁰ such as the invalidity of a waiver of immunity,⁶¹ the confidential and proprietary nature of documents,⁶² or the fact that a witness subject to personal jurisdiction is a non-resident alien,⁶³ that fees or expenses have not yet been paid to the witness,⁶⁴ that the witness believes that his perception of the truth differs from that of the grand jury,⁶⁵ that his version of events has previously been adjudged to be false,⁶⁶ or that the witness has a tendency to remember things that did not in fact occur.⁶⁷ Prosecutorial misconduct does not justify the quashing of a subpoena unless the powers of the grand jury have been flagrantly abused.⁶⁸ Department of Justice guidelines create no rights in favor of witnesses,⁶⁹ so that their

breach does not justify refusal to enforce a subpoena.⁷⁰

Various matters justify refusal to enforce or comply with a subpoena.⁷¹ A subpoena will not be enforced to require a party to disclose information which is the subject of an otherwise valid protective order, absent a showing of improvidence in the grant of the order or some extraordinary circumstances or compelling need.⁷²

A subpoena may be quashed if the mental, physical, or emotional health of a witness will otherwise be substantially impaired.⁷³ The witness must prove this by clear and convincing evidence.⁷⁴ In order to obtain a hearing on the issue, the witness must first make a prima facie showing.⁷⁵

§ 140. Standing

A person generally does not have standing to seek to quash a grand jury subpoena directed to another person. However, in some circumstances a person does have such standing.

Library References

Grand Jury ⇐36.4, 36.4(1), 36.9, 36.9(1).

A person generally does not have standing to seek to quash a grand jury subpoena directed to another person.⁷⁶ However, a person claiming a

57. 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.

58. 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 Grand Jury Investigation, D.C.Pa., 459 F.Supp. 1335.

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

59. Ill.—People v. I.W.I., Inc., 1 Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

60. Desire not to harm family

While immunized witness was entitled to his moral beliefs, which purportedly precluded him from making statements to grand jury which would hurt members of his family, such beliefs did not alter or provide a defense to his duty to testify before the grand jury.

U.S.—Matter of Crededio, C.A.7(Ill.), 759 F.2d 589.

Fear of loss of job

N.Y.—Fuhrer v. Hynes, 421 N.Y.S.2d 906, 72 A.D.2d 813, appeal denied 401 N.E.2d 920, 48 N.Y.2d 611, 425 N.Y.S.2d 1027.

Compromise

Federal Rule of Evidence 408 precluding introduction of compromise and offers to compromise at trial could not be applied by analogy to grand jury proceeding and provide basis for granting petition to quash grand jury subpoena.

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.

61. U.S.—Regan v. People of State of N.Y., N.Y., 75 S.Ct. 585, 349 U.S. 58, 99 L.Ed. 883.

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

63. 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.

64. N.Y.—People v. Ruggiano, 401 N.Y.S.2d 729, 92 Misc.2d 876.

Documents

Deputy Attorney General was not required to tender payment for reproduction and transportation expenses before there had to be compliance with grand jury subpoenas duces tecum.

N.Y.—Kuriansky v. Ali, 2 Dept., 574 N.Y.S.2d 805, 176 A.D.2d 728, appeal dismissed 588 N.E.2d 93, 79 N.Y.2d 848, 580 N.Y.S.2d 195.

65. U.S.—In re Poutre, C.A.Mass., 602 F.2d 1004.

66. U.S.—In re Poutre, C.A.Mass., 602 F.2d 1004.

67. U.S.—Matter of Sinadinos, C.A.7(Ill.), 760 F.2d 167.

68. U.S.—In re Kiefaber, C.A.9(Nev.), 774 F.2d 969, appeal dismissed 823 F.2d 383.

69. U.S.—In re Grand Jury Subpoenas, C.A.10(Okl.), 906 F.2d 1485.

70. U.S.—Holifield v. U.S., C.A.7(Wis.), 909 F.2d 201.

71. Presence of unauthorized person

U.S.—In re Grand Jury Investigation, D.C.Pa., 424 F.Supp. 802.

72. U.S.—In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, C.A.2(N.Y.), 945 F.2d 1221.

73. N.J.—Matter of L.Q., 545 A.2d 792, 227 N.J.Super. 41.

74. N.J.—Matter of L.Q., 545 A.2d 792, 227 N.J.Super. 41.

75. N.J.—Matter of L.Q., 545 A.2d 792, 227 N.J.Super. 41.

76. U.S.—In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990, S.D.N.Y., 741 F.Supp. 1059, affirmed In re Grand Jury, 956 F.2d 1160.

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property right or privilege in the subpoenaed documents has standing to seek to quash the subpoena.⁷⁷ A person may intervene in a grand jury proceeding to challenge a subpoena if the person can demonstrate a sufficient interest.⁷⁸

Whether the witness himself may raise the issue of jurisdiction is discussed supra § 131, and whether he may raise the issue of relevancy is considered supra § 132. Standing to assert various privileges is treated infra §§ 142-151, and standing to raise the issue of illegal wiretapping or interception is discussed infra § 154.

Person who is subject of records.

It has been held that a bank's customer cannot challenge a subpoena directed to the bank for the customer's bank records.⁷⁹ However, it has also been held that, under the Right to Financial Privacy Act,⁸⁰ the customer of a financial institution may challenge a subpoena directed to the institution on the ground of violation the Act.⁸¹

A telephone company customer cannot challenge a subpoena directed to the company for his telephone records.⁸²

An employee cannot challenge a subpoena directed to his employer for his employment records.⁸³

Pursuant to a federal statute concerning student records,⁸⁴ it has been held that a student may

challenge a subpoena directed to his school for his school records.⁸⁵

Employer.

An employer generally cannot challenge subpoenas directed to its employees.⁸⁶ However, the employer may challenge the subpoenas on the ground that the prosecutor is attempting to harass the employer,⁸⁷ that the employer is being deprived of the time and efforts of its employees,⁸⁸ or that the subpoenas will disrupt the employer's business.⁸⁹

§ 141. Appeal

A mere order to provide evidence to a grand jury, as distinct from a contempt order, is generally not appealable, although there is authority to the contrary. However, where the subpoena is directed to a third party, a person claiming a protected interest with respect to the evidence sought may appeal, although there is authority to the contrary.

Library References

Grand Jury ⇐36.9, 36.9(1).

A witness generally can contest a grand jury subpoena on appeal only if he refused to comply and was held in contempt.⁹⁰ Thus, while a contempt order is appealable, as discussed infra § 163, there is generally no appeal from an order to provide evidence,⁹¹ such as an order to testify⁹² or to produce documents,⁹³ or an order denying a motion to quash a subpoena⁹⁴ or denying a claim of

77. U.S.—In re Grand Jury Matter, C.A.3(Pa.), 770 F.2d 36, certiorari denied District Council 33, American Federation of State County and Municipal Employees, AFL-CIO v. U.S., 106 S.Ct. 574, 474 U.S. 1022, 88 L.Ed.2d 558.

78. U.S.—In re Grand Jury Proceedings (PHE, Inc.), E.D.N.C., 640 F.Supp. 149.

79. U.S.—In re Grand Jury Subpoena Duces Tecum, C.A.Cal., 549 F.2d 1317, certiorari denied Privitera v. U.S., 97 S.Ct. 2634, 431 U.S. 930, 53 L.Ed.2d 245.

Md.—In re a Special Investigation No. 258, 461 A.2d 34, 55 Md.App. 119—In re Special Investigation No. 242, 452 A.2d 1319, 53 Md. App. 360.

Minn.—State v. Milliman, 346 N.W.2d 128.

N.Y.—Congregation B'Nai Jonah v. Kuriansky, 3 Dept., 576 N.Y.S.2d 934, 172 A.D.2d 35, appeal dismissed 590 N.E.2d 244, 79 N.Y.2d 895, 581 N.Y.S.2d 659—People v. Doe, 1 Dept., 467 N.Y.S.2d 45, 96 A.D.2d 1018.

80. 12 U.S.C.A. §§ 3401 et seq.

81. U.S.—In re Castiglione, D.C.Cal., 587 F.Supp. 1210.

82. N.Y.—People v. Doe, 1 Dept., 467 N.Y.S.2d 45, 96 A.D.2d 1018.

Tex.—Smith v. State, App. 1 Dist., 708 S.W.2d 518, review refused, certiorari denied 107 S.Ct. 2182, 481 U.S. 1050, 95 L.Ed.2d 839.

83. Minn.—State v. Milliman, 346 N.W.2d 128.

84. 20 U.S.C.A. § 1232g(b)(2).

85. U.S.—In re Grand Jury Subpoena Served Upon New York Law School, D.C.N.Y., 448 F.Supp. 822.

86. U.S.—In re Grand Jury Proceedings, C.A.Pa., 604 F.2d 804.

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

87. U.S.—In re Grand Jury, C.A.Pa., 619 F.2d 1022.

88. U.S.—In re Grand Jury, C.A.Pa., 619 F.2d 1022.

89. U.S.—In re Grand Jury Proceedings (PHE, Inc.), E.D.N.C., 640 F.Supp. 149.

90. U.S.—Matter of Klein, C.A.7(Ind.), 776 F.2d 628—In re Grand Jury Subpoena, May, 1978 at Baltimore, C.A.Md., 596 F.2d 630.

91. U.S.—In re Grand Jury Proceedings, C.A.Pa., 604 F.2d 798—In re Benjamin, C.A.Mass., 582 F.2d 121.

92. Or.—State v. Threet, 653 P.2d 960, 294 Or. 1.

93. U.S.—In re Doe, C.A.Md., 662 F.2d 1073, 64 A.L.R.Fed. 457, certiorari denied Doe v. U.S., 102 S.Ct. 1632, 455 U.S. 1000, 71 L.Ed.2d 867.

94. U.S.—U.S. v. Ryan, Cal., 91 S.Ct. 1580, 402 U.S. 530, 29 L.Ed.2d 85, mandate conformed to Matter of Ryan, 444 F.2d 1095.

Matter of a Witness Before Special Oct. 1981 Grand Jury, C.A.Ill., 722 F.2d 349—In re Grand Jury Matter Impounded, C.A.Pa., 703 F.2d 56—Securities and Exchange Commission v. ESM Government Securities, Inc., C.A.Fla., 645 F.2d 310—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548.

Me.—State v. Grover, 387 A.2d 21.

Mass.—Commonwealth v. Winer, 404 N.E.2d 654, 380 Mass. 934.

Pa.—Petition of Shelley, 5 A.2d 613, 135 Pa.Super. 376.

privilege.⁹⁵ However, there is some authority to the contrary,⁹⁶ and it has been held that an order denying a motion to quash a subpoena is appealable.⁹⁷

In some special circumstances, where review at a later time could not provide an adequate remedy, an order denying a motion to quash a subpoena is appealable.⁹⁸

Subpoena directed to third party rather than appellant.

Where a person claims a privilege or other protected interest with respect to the evidence sought by a subpoena, but the subpoena is directed not to

such person but to a third party, the person claiming such interest may appeal from an order directing the third party to provide the evidence or refusing to quash the subpoena.⁹⁹ However, there is some authority to the contrary.¹

Questions of law and fact.

The question of the grand jury's dominant purpose in issuing a subpoena involves application of a legal standard to ensure that the grand jury is not misused, so that the appellate court will give more scrutiny to such issue than would be appropriate under the "clearly erroneous" standard of review.²

E. PRIVILEGE

§ 142. In General

A grand jury subpoena may not be used to violate a valid privilege arising under a constitution, a statute, or the common law. In the case of a federal grand jury, privilege is governed largely by federal common law.

Research Note

Privilege is discussed generally in C.J.S., Witnesses §§ 252-314. Privilege against self-incrimination, including its applicability to investigation for purpose of instigating prosecution, is treated in C.J.S. Witnesses §§ 431-457.

Library References

Grand Jury ⇐36.3(2).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

A grand jury subpoena may not be used to violate a valid privilege,³ and privileged material is exempt from disclosure to the grand jury.⁴ The grand jury may not compel the production of docu-

ments that are protected by a testimonial privilege.⁵ The court may quash a subpoena if it violates a privilege.⁶

A privilege may arise under a constitution, a statute, or the common law.⁷ A state constitutional prohibition against the impairment of grand jury powers concerning public officers does not prevent the legislature from creating evidentiary privileges that have an incidental impact on grand jury investigations.⁸ There are only a very limited number of recognized privileges.⁹ A privilege must be firmly anchored in a constitution, a statute, or the common law.¹⁰ New privileges should be adopted with extreme caution.¹¹ It has been said that judges may not, in the guise of exercising supervisory power over subpoenas, create new privileges or enlarge or distort existing ones.¹²

A provision of the Federal Rules of Evidence concerning privileges¹³ applies to federal grand

95. U.S.—In re Grand Jury Proceedings, C.A.Pa., 563 F.2d 577.

96. Md.—In re Special Investigation No. 249, 461 A.2d 1082, 296 Md. 201.

97. Md.—In re Special Investigation No. 249, 461 A.2d 1082, 296 Md. 201.

98. U.S.—In re November 1979 Grand Jury, C.A.Ill., 616 F.2d 1021.

99. U.S.—In re Grand Jury Subpoenas Dated Dec. 10, 1987, C.A.9(Cal.), 926 F.2d 847, 109 A.L.R.Fed. 541—U.S. v. Jones, C.A.N.C., 696 F.2d 1069—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548—In re Grand Jury Proceedings, C.A.Pa., 604 F.2d 798—In re Grand Jury Proceedings, C.A.Pa., 563 F.2d 577.

1. U.S.—In re Oberkoetter, C.A.Mass., 612 F.2d 15.

2. U.S.—In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels), C.A.2(N.Y.), 767 F.2d 26.

3. U.S.—In re Zuniga, C.A.Mich., 714 F.2d 632, 72 A.L.R.Fed. 380, certiorari denied Zuniga v. U.S., 104 S.Ct. 426, 464 U.S. 983, 78 L.Ed.2d 361.

4. Ohio—In re Brink, 536 N.E.2d 1202, 42 Ohio Misc.2d 5.

5. Colo.—Losavio v. Robb, 579 P.2d 1152, 195 Colo. 533.

6. Colo.—Pignatiello v. District Court In and For Second Judicial Dist., State of Colo., 659 P.2d 683.

7. U.S.—In re Zuniga, C.A.Mich., 714 F.2d 632, 72 A.L.R.Fed. 380, certiorari denied Zuniga v. U.S., 104 S.Ct. 426, 464 U.S. 983, 78 L.Ed.2d 361.

8. N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

9. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

10. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

11. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

12. U.S.—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 Matters, C.A.N.H., 751 F.2d 13.

13. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

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jury proceedings.¹⁴ Under this provision, except as otherwise required by the Constitution or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.¹⁵ Thus, in a federal grand jury proceeding privilege is governed by federal common law and not by state law,¹⁶ and a state law privilege will not be applied unless it is intrinsically meritorious in the independent judgment of the federal court.¹⁷

Privileges must be narrowly construed.¹⁸ A privilege may be applied only to the extent necessary to effectuate its purpose.¹⁹ Under the doctrine of exception, a privilege does not apply where the privileged relationship is used to further crime, fraud, or other fundamental misconduct,²⁰ or was entered into or used for corrupt purposes.²¹ Under the doctrine of implied waiver, a prior disclosure by the witness may defeat a privilege,²² where an objective consideration of fairness requires disclosure to the grand jury to prevent undue manipulation of the privilege.²³

Blanket assertions of privilege are extremely disfavored.²⁴ In the case of a subpoena seeking testimony, generally there is no privilege to refuse to appear altogether,²⁵ and the subpoena should not be quashed on the ground of privilege,²⁶ as the issue of privilege cannot be raised until the witness appears and is questioned,²⁷ and the person claiming the privilege must establish the privilege with

respect to each particular question rather than making a blanket assertion.²⁸ A subpoena duces tecum may be attacked by a motion to quash or modify the subpoena before production is made or the witness appears before the grand jury,²⁹ but the person claiming the privilege must establish the privilege with respect to each particular document rather than making a blanket assertion.³⁰

§ 143. Proceedings in General

The party asserting a privilege with respect to evidence sought by a grand jury has the burden of demonstrating its applicability.

Library References

Grand Jury ◊=36.3(2), 36.9-36.9(2).

A challenge to a grand jury subpoena duces tecum on the ground of privilege should be raised by a motion to quash the subpoena.³¹ While the witness may inform the grand jury that he is asserting a privilege or, at most, give a simple statement as to the nature of the privilege, he has no right to present a factual basis for the privilege to the grand jury.³²

Some authorities hold that, upon a clear assertion by a witness of a valid privilege, the better practice is for the prosecutor to bring the matter to the foreman's attention so that the foreman can properly state the refusal to the court.³³

In ruling on a claim of privilege, the court may conduct an in camera inspection of material submitted by the grand jury.³⁴

14. Fed.Rules Evid.Rule 1101(c), 28 U.S.C.A.

U.S.—In re Grand Jury Investigation, C.A.3(Pa.), 918 F.2d 374, 118 A.L.R.Fed. 725.

In re Grand Jury Empanelled January 21, 1981, D.C.N.J., 535 F.Supp. 537, 64 A.L.R.Fed. 892.

15. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

16. U.S.—U.S. v. Blasi, D.C.Ala., 462 F.Supp. 373.

17. U.S.—In re Grand Jury Subpoena, D.Vt., 118 F.R.D. 558.

18. U.S.—In re Grand Jury Subpoena Duces Tecum Dated March 24, 1983, D.C.N.Y., 566 F.Supp. 883—In re Ms. X, D.C.Cal., 562 F.Supp. 486.

D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

19. U.S.—Matter of Grand Jury Investigation (Detroit Police Dept. Special Cash Fund), C.A.6(Mich.), 922 F.2d 1266, rehearing denied.

N.Y.—Matter of Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings, 437 N.E.2d 1118, 56 N.Y.2d 348, 452 N.Y.S.2d 361.

20. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

21. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

22. D.C.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

23. C.A.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

24. U.S.—In re Grand Jury Matters, C.A.N.H., 751 F.2d 13.

25. U.S.—In re Special, D.C.Ind., Sept. 1983, Grand Jury, 608 F.Supp. 538.

26. N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

27. N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

Matter of Grand Jury Subpoena No. 2573/85, 2 Dept., 491 N.Y.S.2d 29, 111 A.D.2d 891, appeal denied 483 N.E.2d 134, 65 N.Y.2d 606, 493 N.Y.S.2d 1028.

28. U.S.—In re Grand Jury Matters, C.A.N.H., 751 F.2d 13.

29. N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

30. U.S.—In re Grand Jury Matters, C.A.N.H., 751 F.2d 13.

31. N.Y.—Hynes v. Doe, 420 N.Y.S.2d 978, 101 Misc.2d 350.

32. N.Y.—Hynes v. Doe, 420 N.Y.S.2d 978, 101 Misc.2d 350.

33. Ky.—Dean v. Commonwealth, 777 S.W.2d 900.

34. Ga.—In re Hall County Grand Jury Proceedings, 333 S.E.2d 389, 175 Ga.App. 349, certiorari vacated on other grounds 338 S.E.2d 864, 255 Ga. 241.

Whether the issue of privilege can be raised prior to the appearance of the witness is discussed supra § 142. Whether a person claiming a privilege may appeal with respect to a subpoena directed to a third party is considered supra § 141.

Burden of proof.

The party asserting a privilege has the burden of demonstrating its applicability.³⁵

§ 144. Family Relationship

Authorities differ regarding the existence of a parent-child privilege in grand jury proceedings.

Library References

Grand Jury ⇐36.3(2).

It has been held that there is no general privilege not to testify against a family member in a grand jury proceeding.³⁶

Thus, it has been held that no sibling privilege exists.³⁷

The existence of a parent-child privilege in a grand jury proceeding has been rejected.³⁸ However, some authorities recognize a parent-child privilege,³⁹ under the constitutional right of privacy.⁴⁰ It has been held that the privilege is not limited to confidential communications, and provides protection against being compelled to testi-

fy.⁴¹ However, some authorities who recognize or suggest the existence of the privilege hold that a parent or child must appear and assert the privilege with respect to specific questions.⁴²

§ 145. — Spouse

Some authorities recognize in grand jury proceedings a privilege against adverse spousal testimony or a privilege for confidential marital communications.

Library References

Grand Jury ⇐36.3(2).

Some authorities recognize a marital privilege in grand jury proceedings.⁴³

Thus, it has been held that a witness has a privilege not to testify against his or her spouse,⁴⁴ and that a witness should not be compelled to choose among perjury, contempt, or disloyalty to his or her spouse.⁴⁵ Some authorities hold that only the witness may assert the privilege.⁴⁶ The privilege does not apply to nontestimonial evidence.⁴⁷ Some authorities held that the privilege is inapplicable where the spouses are alleged to be joint participants in crime.⁴⁸

The privilege not to testify is defeated by the government's promise not to use the evidence either directly or indirectly against the nonwitness spouse,⁴⁹ but not by a promise not to bring an

35. U.S.—In re Grand Jury Subpoena (Legal Services Center), D.C.Mass., 615 F.Supp. 958.

N.Y.—Matter of Grand Jury Subpoenas Served Upon Doe, 536 N.Y.S.2d 926, 142 Misc.2d 229.

36. U.S.—Grand Jury Proceedings of John Doe v. U.S., C.A.10(Utah), 842 F.2d 244, certiorari denied Doe v. U.S., 109 S.Ct. 233, 488 U.S. 894, 102 L.Ed.2d 223.

37. U.S.—In re Grand Jury Proceedings (Sealed), D.C.N.Y., 607 F.Supp. 1002.

38. U.S.—Grand Jury Proceedings of John Doe v. U.S., C.A.10(Utah), 842 F.2d 244, certiorari denied Doe v. U.S., 109 S.Ct. 233, 488 U.S. 894, 102 L.Ed.2d 223—In re Grand Jury Subpoena of Santarelli, C.A.Fla., 740 F.2d 816, rehearing denied 749 F.2d 733—In re Grand Jury Proceedings, C.A.Tex., 647 F.2d 511.

39. U.S.—In re Agosto, D.C.Nev., 553 F.Supp. 1298.

40. U.S.—In re Agosto, D.C.Nev., 553 F.Supp. 1298.

N.Y.—People v. Fitzgerald, 422 N.Y.S.2d 309, 101 Misc.2d 712.

41. U.S.—In re Agosto, D.C.Nev., 553 F.Supp. 1298.

42. N.Y.—Application of A and M, 403 N.Y.S.2d 375, 61 A.D.2d 426, 6 A.L.R.4th 532.

Matter of Gloria L., 475 N.Y.S.2d 1000, 124 Misc.2d 50.

43. U.S.—In re Grand Jury Proceedings, D.C.S.D., 443 F.Supp. 1273.

44. U.S.—In re Grand Jury Subpoena Koecher, D.C.N.Y., 601 F.Supp. 385.

Competency and privilege as affecting testimony by one spouse against the other in general see C.J.S. Witnesses §§ 75-104.

45. U.S.—In re Grand Jury Investigation, C.A.Cal., 603 F.2d 786.

46. U.S.—U.S. v. Kapnison, C.A.N.M., 743 F.2d 1450, certiorari denied 105 S.Ct. 2017, 471 U.S. 1015, 85 L.Ed.2d 299.

U.S. v. Pignatiello, D.Colo., 628 F.Supp. 68.

Failure to warn

Even if failure to apprise defendant's wife of spousal privilege before she testified to grand jury was error, defendant had no standing to contest alleged infringement of privilege.

Mass.—Commonwealth v. Paszko, 461 N.E.2d 222, 391 Mass. 164, 40 A.L.R.4th 350.

47. U.S.—In re Grand Jury 85-1, D.Colo., 666 F.Supp. 196, appeal dismissed U.S. v. Shelleda, 848 F.2d 200.

Exemplars

U.S.—In re Clark, D.C.N.Y., 461 F.Supp. 1149.

48. U.S.—In re Grand Jury Subpoena Koecher, D.C.N.Y., 601 F.Supp. 385.

49. U.S.—Grand Jury Subpoena of Ford v. U.S., C.A.2(N.Y.), 756 F.2d 249, 82 A.L.R.Fed. 589.

Chinese Wall

Procedure by which "Chinese Wall" was erected for purpose of eliciting defendant's husband's testimony with respect to defendant's alleged coconspirators, by arranging for husband to be questioned by assistant United States attorney other than one who was principal prosecutor in charge of grand jury investigation of defendant, and before grand jury other than one conducting principal investigation, was permissible, despite lack of express statutory authority.

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indictment against the nonwitness spouse before the same grand jury,⁵⁰ or by the fact that the nonwitness spouse is not the focus of the investigation.⁵¹

The privilege not to testify against a spouse has been held inapplicable in the case of a nonformalized relationship,⁵² at least where common-law marriages are not recognized under state law.⁵³

Communications.

A privilege for confidential marital communications has been held applicable in grand jury proceedings,⁵⁴ which applies even if the evidence will not be used against the nonwitness spouse.⁵⁵ The privilege may be raised by a spouse who is not the witness.⁵⁶ Only those communications which are confidential in character are protected.⁵⁷ The privilege survives the marriage.⁵⁸

§ 146. Journalist

Some authorities recognize a privilege for newsmen in grand jury proceedings.

Research Note

Journalist privilege is discussed generally in C.J.S. Witnesses § 259. First Amendment as affecting journalist privilege is considered generally in C.J.S. Constitutional Law § 552.

Library References

Grand Jury ⇐36.3(2).

Requiring newsmen to appear and testify before grand juries does not abridge the freedom of speech and press guaranteed by the First Amend-

ment.⁵⁹ The First Amendment does not grant newsmen a testimonial privilege that other citizens do not enjoy,⁶⁰ or affect the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer relevant questions put to them in the course of a valid grand jury investigation,⁶¹ or protect a newsmen's agreement to conceal the criminal conduct of his source or evidence thereof⁶² or the identity of the source,⁶³ or require the prosecutor to make a preliminary showing that a crime has been committed and that a newsmen possesses relevant information not available from other sources,⁶⁴ or a preliminary showing of some compelling need for the newsmen's testimony.⁶⁵

However, it has also been said that, under the First Amendment, if a newsmen is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates a confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and that the asserted claim to privilege should be judged by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony.⁶⁶ A grand jury may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources, as discussed supra § 10.

Newspersons are not exempt from the duty of appearing before grand juries and answering rele-

U.S.—Grand Jury Subpoena of Ford v. U.S., C.A.2(N.Y.), 756 F.2d 249, 82 A.L.R.Fed. 589.

50. U.S.—In re Grand Jury Matter, 673, C.A.Pa., F.2d 688, certiorari denied U.S. v. Doe, 103 S.Ct. 375, 459 U.S. 1015, 74 L.Ed.2d 509.

51. Ga.—State v. Smith, 229 S.E.2d 433, 237 Ga. 647.

52. U.S.—In re Ms. X, D.C.Cal., 562 F.Supp. 486.

53. U.S.—In re Perry, S.D.Fla., 651 F.Supp. 292.

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

U.S. v. Estes, D.C.Vt., 609 F.Supp. 564.

Confidential marital communications privilege in general see C.J.S. Witnesses §§ 266-275.

55. U.S.—In re Grand Jury Investigation, C.A.Cal., 603 F.2d 786.

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

57. N.Y.—Matter of Doe, 396 N.Y.S.2d 145, 90 Misc.2d 812.

58. U.S.—U.S. v. Estes, D.C.Vt., 609 F.Supp. 564.

59. 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.

CBS, Inc. v. F.C.C., 629 F.2d 1, 202 U.S.App.D.C. 369, affirmed 101 S.Ct. 2813, 453 U.S. 367, 69 L.Ed.2d 706.

60. 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.

Md.—Tofani v. State, 465 A.2d 413, 297 Md. 165.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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 (per Mr. Justice Powell, concurring).

vant questions.⁶⁷ It has been held that a reporter must divulge confidential information unless the grand jury is not being conducted in good faith, the relationship between the material sought and the investigation is remote and tenuous, or the investigation does not implicate a legitimate need of law enforcement.⁶⁸ Some authorities recognize a privilege for newsmen,⁶⁹ under common law,⁷⁰ a statute,⁷¹ or the First Amendment.⁷²

§ 147. Attorney

- a. In general
- b. Effect of constitutional right to counsel

a. In General

An attorney-client privilege applies in grand jury proceedings. The privilege is inapplicable where the relationship is used to further crime or fraud.

67. Ohio—Matter of McAuley, 408 N.E.2d 697, 63 Ohio App.2d 5, 17 O.O.3d 222.

68. Mich.—In re Contempt of Stone, 397 N.W.2d 244, 154 Mich.App. 121, appeal denied.

69. Qualified privilege

Fla.—Waterman Broadcasting of Florida, Inc. v. Reese, App. 2 Dist., 523 So.2d 1161.

Persons covered

News gathering agency, as well as news gathering person, may raise news gatherer's privilege against compelled disclosure of sources in grand jury proceeding.

U.S.—In re Williams, W.D.Pa., 766 F.Supp. 358, affirmed 963 F.2d 567.

70. U.S.—In re Williams, W.D.Pa., 766 F.Supp. 358, affirmed 963 F.2d 567.

Test

(1) First inquiry in determining whether grand jury can compel testimony of unwilling witness who has asserted common-law reporter's privilege is whether witness has made some showing that asserted damage to free flow of information is more than speculative or theoretical; if so, trial judge then undertakes balancing test, available against public interest in free flow of information.

Mass.—Matter of John Doe Grand Jury Investigation, 574 N.E.2d 373, 410 Mass. 596.

(2) Standard to be applied in determining whether grand jury summons issued to news reporter should be denied normally calls for more clearly defined protection against intrusive discovery than discretionary supervision.

Mass.—Matter of John Doe Grand Jury Investigation, 574 N.E.2d 373, 410 Mass. 596.

71. Statute upheld

Shield Law does not run afoul of constitutional proscription against laws that suspend or impair grand jury's power to inquire into willful misconduct by public officer.

N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

Absolute privilege

N.Y.—Matter of Grand Jury Investigation, 460 N.Y.S.2d 227, 118 Misc.2d 195.

Research Note

Attorney-client privilege is discussed generally in C.J.S. Witnesses §§ 276-292.

Library References

Grand Jury ⇐ 36.3(2), 36.4-36.4(2), 36.9-36.9(2).

An attorney-client privilege applies in grand jury proceedings.⁷³ The attorney may assert the privilege on behalf of his client.⁷⁴ The privilege survives the client's death.⁷⁵ The fact that the alleged client did not pay the attorney is not controlling as to the existence of an attorney-client relationship.⁷⁶ The expectation of confidentiality must be viewed in the context of the factual realities of the case.⁷⁷

Some authorities hold that a rule of professional conduct concerning attorney-client confidentiality is inapplicable in determining whether to enforce a

Even if disclosure to newsmen was criminal conduct

N.Y.—Beach v. Shanley, 465 N.E.2d 304, 62 N.Y.2d 241, 476 N.Y.S.2d 765.

72. Test

Unless a reporter has witnessed criminal activity or has physical evidence of a crime, reporter can assert a qualified privilege in refusing to answer questions before a grand jury; party seeking information must then show that disclosure is necessary to protection of public interest, and once such a showing has been made, trial judge should balance public interest in having all relevant testimony with possible chilling effect that disclosure will have on freedom of press and ability to gather news.

La.—In re Grand Jury Proceedings (Ridenhour), 520 So.2d 372.

73. U.S.—In re Berkley and Co., Inc., C.A.Min., 629 F.2d 548—In re Grand Jury Subpoena, C.A.N.Y., 599 F.2d 504.

Md.—In re Criminal Investigation No. 1/242Q, 602 A.2d 1220, 326 Md. 1.

Scrutiny

District courts possess considerable discretion in deciding whether grand jury subpoenas are vague, overbroad or oppressive and in exercise of their discretion the courts should scrutinize carefully subpoenas to attorneys to protect fully the legitimate confidentiality of the attorney-client relationship.

U.S.—Matter of Klein, C.A.7(Ind.), 776 F.2d 628.

74. U.S.—In re Grand Jury Proceedings, C.A.4, 727 F.2d 1352.

Intervention

Attorney, defending a target of a grand jury investigation, was entitled to intervene in district court proceedings seeking quashal of a grand jury subpoena duces tecum issued to a private investigator hired by the attorney, so that the attorney might raise claims based on the attorney-client privilege.

U.S.—Appeal of Hughes, C.A.N.J., 633 F.2d 282.

75. Mass.—Matter of John Doe Grand Jury Investigation, 562 N.E.2d 69, 408 Mass. 480.

76. Ind.—Comer v. State, App., 438 N.E.2d 1037.

77. Mo.—State ex rel. Friedman v. Provaznik, 668 S.W.2d 76.

subpoena.⁷⁸ However, it has also been held that an ethical rule concerning confidentiality is applicable.⁷⁹

The target's attorney is not exempted from the duty to appear before the grand jury,⁸⁰ and cannot broadly assert that the privilege applies to all communications and refuse to appear altogether.⁸¹ Department of Justice guidelines for subpoenas to attorneys are not controlling in a proceeding to enforce or quash a subpoena.⁸² The prosecutor need not make a preliminary showing before subpoenaing an attorney.⁸³ Prior judicial approval is not required for a subpoena for the appearance of the target's attorney.⁸⁴ However, under some rules it is unprofessional conduct for the prosecutor to issue a subpoena to the target's attorney without prior judicial approval.⁸⁵ State attorney disciplinary rules which prohibit a prosecutor, without prior judicial approval, from subpoenaing an attorney to provide evidence concerning a client, have been held both applicable⁸⁶ and inapplicable⁸⁷ in federal proceedings.

A communication made in the presence of a third party generally is not subject to the privilege.⁸⁸ However, a joint defense exception to this rule applies in the case of corespondents in a grand jury investigation.⁸⁹

All that is required, after the attorney or the client asserts the privilege, is a reasonable opportunity to be heard and prompt appellate review if the court orders the attorney to testify.⁹⁰

Information concerning fee arrangements.

Generally, the attorney-client privilege does not apply to information concerning fee arrangements.⁹¹ However, in some circumstances a fee arrangement is privileged because disclosure would reveal a confidential communication,⁹² and it has also been held that a fee arrangement is privileged.⁹³ A subpoena for fee arrangement information does not create a per se obligation to conduct a hearing.⁹⁴

Burden of proof.

The party invoking the attorney-client privilege

78. Md.—In re Criminal Investigation No. 1/242Q, 602 A.2d 1220, 325 Md. 740, 326 Md. 1.

79. Ohio—In re Burns, 536 N.E.2d 1206, 42 Ohio Misc.2d 12.

80. U.S.—In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, C.A.5(Tex.), 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 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.

81. U.S.—In re Special, Sept. 1983, Grand Jury, D.C.Ind., 608 F.Supp. 538.

82. U.S.—Matter of Klein, C.A.7(Ind.), 776 F.2d 628.

83. U.S.—In re Grand Jury Subpoenas, C.A.10(Okl.), 906 F.2d 1485—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—Matter of Klein, C.A.7(Ind.), 776 F.2d 628—In re Grand Jury Proceedings, C.A. Ohio, John Doe (Arnold Weiner, Doe's Attorney), 754 F.2d 154—Matter of Walsh, C.A.Ill., 623 F.2d 489, certiorari denied Walsh v. U.S., 101 S.Ct. 531, 449 U.S. 994, 66 L.Ed.2d 291.

84. N.J.—Matter of Nackson, 534 A.2d 65, 221 N.J.Super. 187, affirmed 555 A.2d 1101, 114 N.J. 527.

85. Investigator

Rule applied also to subpoenas of private investigator hired by attorney to conduct investigation of matter.

Mass.—Matter of Grand Jury Investigation, 556 N.E.2d 363, 407 Mass. 916.

Remedy

Trial court determining that prosecution has improperly subpoenaed employee of attorney representing client who is apparent target of grand jury inquiry is not required to quash subpoena; judge may use any of "full panoply" of remedies available, as are appropriate to particular case.

Mass.—Matter of Grand Jury Investigation, 556 N.E.2d 363, 407 Mass. 916.

86. U.S.—U.S. v. Klubock, D.Mass., 639 F.Supp. 117, affirmed 832 F.2d 649, on rehearing 832 F.2d 664.

87. U.S.—Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania, E.D.Pa., 764 F.Supp. 328, affirmed 975 F.2d 102, certiorari denied 113 S.Ct. 1578, 507 U.S. 984, 123 L.Ed.2d 147.

88. U.S.—In re LTV Securities Litigation, D.C.Tex., 89 F.R.D. 595.

89. U.S.—In re LTV Securities Litigation, D.C.Tex., 89 F.R.D. 595.

90. U.S.—In re Grand Jury Proceedings in Matter of Freeman, C.A.Fla., 708 F.2d 1571.

91. U.S.—In re Grand Jury Matter (Special Grand Jury Narcotics Dec. Term, 1988, Motion to Quash Subpoena), C.A.4(Md.), 926 F.2d 348—In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, C.A.5(Tex.), 913 F.2d 1118, on remand 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, 113 L.Ed.2d 646—In re Slaughter, C.A.Fla., 694 F.2d 1258.

Md.—In re Criminal Investigation No. 1/242Q, 602 A.2d 1220, 326 Md. 1.

N.Y.—Priest v. Hennessy, 409 N.E.2d 983, 51 N.Y.2d 62, 431 N.Y.S.2d 511.

In re Stewart, 1 Dept., 548 N.Y.S.2d 679, 156 A.D.2d 294, appeal dismissed Grand Jury Subpoena (Stewart), Matter of, 556 N.E.2d 1119, 775 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.

92. U.S.—In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, C.A.5(Tex.), 926 F.2d 1423, rehearing denied 946 F.2d 893.

93. Fla.—Corry v. Meggs, App. 1 Dist., 498 So.2d 508, review denied 506 So.2d 1042.

94. U.S.—In re Grand Jury Matter (Special Grand Jury Narcotics Dec. Term, 1988, Motion to Quash Subpoena), C.A.4(Md.), 926 F.2d 348.

has the burden of proving its applicability.⁹⁵

Relationship used to further crime or fraud.

The attorney-client privilege is inapplicable where the relationship is used to further crime or fraud.⁹⁶ The prosecutor can rely on this exception only if he makes a prima facie showing of crime or fraud,⁹⁷ but the prosecutor need make only a prima facie showing.⁹⁸ The determination of whether such a showing has been made is within the discretion of the court.⁹⁹ The court may examine materials submitted by the prosecutor in camera,¹ and employ an ex parte proceeding.² Where such a showing is made, the court need inspect the subpoenaed documents only if there is some possibility that some of the documents might fall outside the scope of the exception to the privilege.³

b. Effect of Constitutional Right to Counsel

Where adversary proceedings against a person have commenced, so that his Sixth Amendment right to counsel has attached, a grand jury subpoena to his attorney may in some circumstances improperly interfere with this right.

Where adversary proceedings against a person have commenced, so that his Sixth Amendment right to counsel has attached, a grand jury subpoena to his attorney may in some circumstances improperly interfere with this right.⁴

A subpoena should be quashed on the ground that it violates the right to counsel by creating a conflict of interest only in the case of an actual

conflict and not where disqualification of counsel is merely speculative.⁵ Requiring disclosure of information concerning fee arrangements generally does not violate the right to counsel,⁶ where there is no actual conflict of interest.⁷

The Sixth Amendment does not require the government to make a preliminary showing of relevance and need before an attorney can be compelled to appear before a grand jury.⁸ However, it has also been held that, where the prosecutor seeks to compel the appearance of an attorney for an accused whose Sixth Amendment right has attached, the prosecutor must show reasonable grounds to believe that the material sought is relevant; the absence of a reasonable, legally sufficient alternative source for the information; and good faith.⁹ It has been held that, when there are less intrusive means for obtaining information, those means must be pursued to avoid an infringement on the Sixth Amendment or state constitutional right to counsel.¹⁰

§ 148. Work Product

The work product doctrine, which limits the discoverability of material prepared in anticipation of litigation, has been held applicable to grand jury proceedings, although there is some authority to the contrary.

Research Note

Work product doctrine in civil discovery in general is discussed in C.J.S. Discovery § 72. Work product doctrine in federal civil discovery is considered in C.J.S. Federal Civil Procedure §§ 623, 682, 711, 727.

95. U.S.—In re Grand Jury Subpoena, C.A.11(Fla.), 788 F.2d 1511.

96. U.S.—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548.

97. U.S.—In re Vargas, C.A.N.M., 723 F.2d 1461, appeal after remand In re Grand Jury Proceedings, 727 F.2d 941, certiorari denied Vargas v. U.S., 105 S.Ct. 90, 469 U.S. 819, 83 L.Ed.2d 37—In re Special September 1978 Grand Jury (II), C.A.Ill., 640 F.2d 49.

In re Grand Jury Subpoena (Legal Services Center), D.C.Mass., 615 F.Supp. 958.

98. U.S.—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548.

99. U.S.—In re Special September 1978 Grand Jury (II), C.A.Ill., 640 F.2d 49—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548.

1. U.S.—In re Grand Jury Proceedings—Gordon, C.A.9(Cal.), 867 F.2d 539—In re Grand Jury Proceedings—Doe v. U.S., 104 S.Ct. 3524, 467 U.S. 1246, 82 L.Ed.2d 831.

2. U.S.—In re Vargas, C.A.N.M., 723 F.2d 1461, appeal after remand In re Grand Jury Proceedings, 727 F.2d 941, certiorari denied Vargas v. U.S., 105 S.Ct. 90, 469 U.S. 819, 83 L.Ed.2d 37.

3. U.S.—In re Vargas, C.A.N.M., 723 F.2d 1461, appeal after remand In re Grand Jury Proceedings, 727 F.2d 941, certiorari denied Vargas v. U.S., 105 S.Ct. 90, 469 U.S. 819, 83 L.Ed.2d 37.

4. U.S.—In re Grand Jury Matter (Special Grand Jury Narcotics Dec. Term, 1988, Motion to Quash Subpoena), C.A.4(Md.), 926 F.2d 348.

5. U.S.—In re Grand Jury Matter (Special Grand Jury Narcotics Dec. Term, 1988, Motion to Quash Subpoena), C.A.4(Md.), 926 F.2d 348.

6. Md.—In re Criminal Investigation No. 1/242Q, 602 A.2d 1220, 326 Md. 1.

7. U.S.—In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes—Requena, C.A.5(Tex.), 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, C.A.10(Okl.), 906 F.2d 1485.

8. U.S.—In re Grand Jury Proceedings 88-9 (MIA), C.A.11(Fla.), 899 F.2d 1039.

Where right has not yet attached

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.

9. 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 In re Stewart, 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.

10. N.J.—Matter of Nackson, 534 A.2d 65, 221 N.J.Super. 187, affirmed 555 A.2d 1101, 114 N.J. 527.

Library References

Grand Jury § 36.3(2).

The work product doctrine, which limits the discoverability of material prepared in anticipation of litigation, has been held applicable to grand jury proceedings.¹¹ The doctrine has been described as a "privilege,"¹² although it has been said that, even if the work product rule is not strictly a privilege, it has been applied to grand jury proceedings.¹³ However, some authorities hold that the doctrine is inapplicable to grand jury proceedings.¹⁴

The privilege protects both the attorney-client relationship and the complex of individual interests particular to attorneys that their clients may not share.¹⁵ To the extent that interests do not conflict, attorneys should be entitled to claim the privilege even if their clients have relinquished their claims.¹⁶ An attorney may intervene in a proceeding to quash a subpoena to his investigator, in order to assert the privilege.¹⁷

Under the doctrine, an attorney generally is not required to divulge facts developed by his efforts in the preparation of a case or opinions he has formed about any phase of litigation, even if they have been reduced to writing.¹⁸ The privilege is not limited to communications and, at the very least, applies to material obtained or prepared by counsel in the course of his legal duties, provided that the work was done with an eye toward litigation.¹⁹ In applying the rule to an internal corporate investigation, the issue is whether a communication to a corporate attorney by a corporate employee is in furtherance of the attorney's duty to investigate

facts in order to advise the corporate client in anticipation of litigation.²⁰

Disclosure to third party.

Because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the privilege is not automatically waived by any disclosure to a third party.²¹

Overcoming privilege.

The privilege is a qualified one, and can be overcome by a showing of good cause,²² in the case of facts.²³ However, to the extent that the work product reveals opinions, judgments, and thought processes of counsel, it receives a higher level of protection, and the prosecutor must show some extraordinary justification.²⁴ While opinion work product is not absolutely privileged,²⁵ it may be obtained only in very rare and extraordinary circumstances.²⁶

Misconduct.

The doctrine is inapplicable where the attorney-client relationship is used in furtherance of crime or fraud.²⁷ The prosecutor can rely on this exception only where he makes a prima facie showing.²⁸ The court may examine materials submitted by the prosecutor in camera.²⁹

However, it has also been held that, before the government can justify interrogation of attorneys or their agents with respect to matters that are prima facie work product, on the ground that the work product involved misconduct, it must demon-

11. U.S.—In re Doe, C.A.Md., 662 F.2d 1073, 64 A.L.R.Fed. 457, certiorari denied Doe v. U.S., 102 S.Ct. 1632, 455 U.S. 1000, 71 L.Ed.2d 867.

In re Grand Jury Subpoena Dated November 9, 1979, D.C.N.Y., 484 F.Supp. 1099.

Ariz.—State, ex rel. Corbin v. Ybarra, 777 P.2d 686, 161 Ariz. 188.

12. U.S.—In re Grand Jury Subpoena Dated November 8, 1979, C.A.Mich., 622 F.2d 933.

13. U.S.—In re Grand Jury Subpoena, C.A.N.Y., 599 F.2d 504.

14. N.Y.—Matter of Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings, 437 N.E.2d 1118, 56 N.Y.2d 348, 452 N.Y.S.2d 361.

15. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

16. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

17. U.S.—Appeal of Huges, C.A.N.J., 633 F.2d 282.

Matter of Grand Jury Subpoena Duces Tecum Dated Feb. 18, 1988, S.D.N.Y., 685 F.Supp. 49.

18. U.S.—In re Doe, C.A.Md., 662 F.2d 1073, 64 A.L.R.Fed. 457, certiorari denied Doe v. U.S. 102 S.Ct. 1632, 455 U.S. 1000, 71 L.Ed.2d 867.

19. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

20. U.S.—In re Grand Jury Subpoena, C.A.N.Y., 599 F.2d 504.

21. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

22. U.S.—Appeal of Huges, C.A.N.J., 633 F.2d 282.

Interview memoranda

Interview memoranda are entitled to only qualified protection.

U.S.—In re Grand Jury Investigation, C.A.Pa., 599 F.2d 1224.

23. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

In re Grand Jury Subpoena, D.C.Md., 524 F.Supp. 357.

24. U.S.—In re Sealed Case, 676 F.2d 793, 219 U.S.App.D.C. 195.

25. U.S.—In re Grand Jury Subpoena, D.C.Md., 524 F.Supp. 357.

26. U.S.—In re Grand Jury Subpoena, D.C.Md., 524 F.Supp. 357.

27. U.S.—In re Grand Jury Subpoena (Legal Services Center), D.C.Mass., 615 F.Supp. 958.

28. U.S.—In re Grand Rule Subpoena (Legal Services Center), D.C.Mass., 615 F.Supp. 958.

29. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 867 F.2d 539.

strate a reasonable basis for such a belief,³⁰ and the opposing attorney must be afforded an opportunity to respond to the government's allegations.³¹ When the examination of an attorney's agent with respect to inquiries he has carried out in that capacity is sought on the ground that the agent, or the attorney, may have engaged in misconduct, something more is required to substantiate the reasonableness of the government's assertions than an *ex parte* affidavit.³² The speculative possibility that attorneys or their agents might attempt to obstruct justice by influencing or threatening witnesses or violate the law by posing as government employees cannot justify endangering protected work product.³³

§ 149. Physician or Health-Care Provider

Some authorities recognize a physician-patient or psychotherapist-patient privilege in grand jury proceedings.

Research Note

Physician-patient privilege is discussed generally in C.J.S. Witnesses §§ 293-301.

Library References

Grand Jury ⇐36.3(2).

Some authorities hold that in grand jury proceedings there exists a physician-patient privilege with respect to certain communications to or information obtained by a physician or, in some cases,

certain other health-care providers.³⁴ However, other authorities reject the physician-patient privilege,³⁵ or hold that the physician-patient privilege does not extend to medical records subpoenaed pursuant to a grand jury investigation.³⁶ Requiring the production of medical records does not violate the federal constitutional right of privacy.³⁷

Some authorities hold that the privilege is inapplicable in the case of a homicide investigation,³⁸ while other hold that it applies even in the case of a homicide investigation.³⁹ Federal statutory law has been held in some circumstances to preempt application of the privilege in the case of a Medicaid fraud investigation.⁴⁰

The privilege has been held applicable⁴¹ or inapplicable⁴² to various persons.

The privilege belongs to the patient,⁴³ and cannot be asserted by the physician where the patient has waived it.⁴⁴ The physician may in some circumstances assert the privilege on behalf of the patient.⁴⁵ However, the physician cannot assert the privilege on behalf of the patient where the proceeding involves an alleged crime by the physician against the patient.⁴⁶

Some authorities recognize a psychotherapist-patient privilege,⁴⁷ while others do not.⁴⁸ In the case of a Medicaid fraud investigation, federal statutory law preempts the privilege only with respect

30. U.S.—Appeal of Hugnes, C.A.N.J., 633 F.2d 282.
31. U.S.—Appeal of Hughes, C.A.N.J., 633 F.2d 282.
32. U.S.—Appeal of Hughes, C.A.N.J., 633 F.2d 282.
33. U.S.—Appeal of Hughes, C.A.N.J., 633 F.2d 282.
34. N.Y.—Hughson v. St. Francis Hosp. of Port Jervis, 2 Dept., 463 N.Y.S.2d 224, 93 A.D.2d 491.
People v. Hawkrigg, 525 N.Y.S.2d 752, 138 Misc.2d 764.
35. U.S.—In re Grand Jury Subpoena, D.C.Mo., 460 F.Supp. 150.
36. Ohio—In re Brink, 536 N.E.2d 1202, 42 Ohio Misc.2d 5.
37. U.S.—In re Grand Jury Subpoena, D.C.Mo., 460 F.Supp. 150.
38. Ill.—Sisters of Third Order of St. Francis v. State ex rel. Barra, 3 Dist., 503 N.E.2d 1069, 105 Ill.Dec. 63, 151 Ill.App.3d 875, appeal denied 511 N.E.2d 437, 110 Ill.Dec. 465, 115 Ill.2d 551.
39. N.Y.—Matter of Grand Jury Investigation of Onondaga County, 450 N.E.2d 678, 59 N.Y.2d 130, 463 N.Y.S. 78.
40. R.I.—In re Grand Jury Investigation, 441 A.2d 525.

41. Psychiatrist

N.Y.—In re Grand Jury Subpoena Duces Tecum dated Dec. 14, 1984, 1 Dept., 495 N.Y.S.2d 365, 113 A.D.2d 49, appeal dismissed, 490 N.E.2d 1233, two cases, 67 N.Y.2d 756, 500 N.Y.S.2d 1027, affirmed Grand Jury Subpoena Duces Tecum Dated Dec. 14, 1984, P.C. v. Kuriansky, 505 N.E.2d 925, 69 N.Y.2d 232, 513 N.Y.S.2d 359, certiorari denied Y and X v. Kuriansky, 107 S.Ct. 3211, 482 U.S. 928, 96 L.Ed.2d 698, certiorari denied Y & X v. Kuriansky, 107 S.Ct. 3211, 482 U.S. 928, 96 L.Ed.2d 698.

42. Pharmacist

N.Y.—Application of John Doe, Inc., 466 N.Y.S.2d 202, 120 Misc.2d 508.

Supplier of medical equipment

N.Y.—Matter of Progressive Labs, 505 N.Y.S.2d 787, 132 Misc.2d 695.

43. Ill.—People v. Bickham, 414 N.E.2d 37, 46 Ill.Dec. 315, 90 Ill.App.3d 897, affirmed 431 N.E.2d 365, 59 Ill.Dec. 80, 89 Ill.2d 1.
44. Ill.—People v. Bickham, 414 N.E.2d 37, 46 Ill.Dec. 315, 90 Ill.App.3d 897, affirmed 431 N.E.2d 365, 59 Ill.Dec. 80, 89 Ill.2d 1.
45. N.Y.—Grand Jury Subpoena Duces Tecum Dated Dec. 14, 1984, Y., M.D., P.C. v. Kuriansky, 505 N.E.2d 925, 69 N.Y.2d 232, 513 N.Y.S.2d 359, certiorari denied Y and X v. Kuriansky, 107 S.Ct. 3211, 482 U.S. 928, 96 L.Ed.2d 698.
- Pa.—In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 490 Pa. 143, 10 A.L.R.4th 542.
46. N.Y.—Matter of Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings, 437 N.E.2d 1118, 56 N.Y.2d 348, 452 N.Y.S.2d 361.

47. U.S.—In re Grand Jury Subpoena (Psychological Treatment Records), D.N.J., 710 F.Supp. 999, affirmed Appeal of Witness Pex, 879 F.2d 861 and Appeal of Witness Psychologist, 879 F.2d 861.

Mass.—Commonwealth v. Kobrin, 479 N.E.2d 674, 395 Mass. 284.

48. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 867 F.2d 562, certiorari denied Doe v. U.S., 110 S.Ct. 265, 493 U.S. 906, 107 L.Ed.2d 214, rehearing denied 110 S.Ct. 523, 493 U.S. 985, 107 L.Ed.2d 524.

However, patient privilege is inapplicable to a subpoenaed therapist.³⁷ Requirement of privacy.³⁷ Investigation,³⁸ case of a law has no application to a medicare

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and cannot patient has the circum- of the pa- assert the re the pro- e physician

therapist-⁴⁸ In the federal stat- with respect

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N.Y.2d 232, 513

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Grand Jury, 415

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Treatment Rec-

Witness Pex, 879

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, 867 F.2d 562,

U.S. 906, 107

U.S. 985, 107

to those records necessary to a determination of medicare fraud.⁴⁹ It has been held that, in a federal proceeding, the privilege should be no more extensive than the privilege available under the state law under which the psychotherapist is licensed.⁵⁰ The psychotherapist may in some circumstances assert the privilege on behalf of the patient.⁵¹

§ 150. Tax Records

Some authorities recognize a privilege for tax records in grand jury proceedings.

Research Note

Privilege concerning tax and revenue matters is discussed generally in C.J.S. Witnesses § 264.

Library References

Grand Jury § 36.3(2).

Some authorities recognize a privilege for tax records in grand jury proceedings.⁵² A federal court may adopt a state law privilege concerning tax records.⁵³ Some authorities adopt, as a matter of federal common law, a privilege regarding state tax returns patterned on the federal statute concerning disclosure of federal tax returns.⁵⁴

The privilege is a qualified one.⁵⁵ The prosecutor must make a preliminary showing of relevance or need.⁵⁶

It has also been held that a statutory policy of confidentiality of tax returns, although not amount-

ing to a testimonial privilege, should carry great weight in deciding whether a subpoena duces tecum is unreasonable or oppressive.⁵⁷

§ 151. Miscellaneous Privileges

Various privileges have been recognized in grand jury proceedings, such as a privilege for certain communications to a clergyman.

Research Note

Privilege is discussed generally in C.J.S. Witnesses §§ 252-314. Privilege against self-incrimination, including its applicability to investigation for purpose of instigating prosecution, is treated in C.J.S. Witnesses §§ 431-457.

Library References

Grand Jury § 36.3(2).

Various privileges have been recognized in grand jury proceedings,⁵⁸ such as a privilege for certain communications to a clergyman,⁵⁹ accountant,⁶⁰ or social worker.⁶¹ The Constitution provides that United States senators and representatives, for any speech or debate in either house, shall not be questioned in any other place;⁶² and this provision not only creates a privilege in grand jury proceedings,⁶³ but prohibits the prosecutor from even asking certain questions, so as to force the congressman to choose whether to assert the privilege.⁶⁴

Various privileges have been rejected,⁶⁵ such as a privilege for communications with an accountant⁶⁶ or social worker,⁶⁷ an informer's privilege,⁶⁸ or a

49. Mass.—Commonwealth v. Kobrin, 479 N.E.2d 674, 395 Mass. 284.

50. U.S.—In re Grand Jury Subpoena (Psychological Treatment Records, D.N.J.), 710 F.Supp. 999, affirmed Appeal of Witness Pex, 879 F.2d 861 and Appeal of Witness Psychologist, 879 F.2d 861.

51. Mass.—Commonwealth v. Kobrin, 479 N.E.2d 674, 395 Mass. 284.

52. 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.

53. U.S.—In re Grand Jury Subpoena, D.Vt., 118 F.R.D. 558.

54. U.S.—In re Grand Jury Empanelled January 21, 1981, D.C.N.J., 535 F.Supp. 537, 64 A.L.R.Fed. 892.

55. U.S.—In re Hampers, C.A.Mass., 651 F.2d 19.

In re Cruz, D.C.Conn., 561 F.Supp. 1042.

56. U.S.—In re Grand Jury Subpoena, D.Vt., 118 F.R.D. 558.

57. Colo.—Losavio v. Robb, 579 P.2d 1152, 195 Colo. 533.

58. N.Y.—Keenan v. Gigante, 407 N.Y.S.2d 163, 64 A.D.2d 585, affirmed 390 N.E.2d 1151, 47 N.Y.2d 160, 417 N.Y.S.2d 226, certiorari denied Gigante v. Lankler, 100 S.Ct. 181, 444 U.S. 887, 62 L.Ed.2d 118.

59. Scope

Clergyman had not privilege not to answer questions before grand jury where inquiries did not seek disclosure of confidential communications or confessions made by penitent to clergyman.

N.Y.—Keenan v. Gigante, 407 N.Y.S.2d 163, 64 A.D.2d 585, affirmed 390 N.E.2d 1151, 47 N.Y.2d 160, 417 N.Y.S.2d 226, certiorari denied Gigante v. Lankler, 100 S.Ct. 181, 444 U.S. 887, 62 L.Ed.2d 118.

60. Ga.—In re Hall County Grand Jury Proceedings, 333 S.E.2d 389, 175 Ga.App. 349, certiorari granted, certiorari vacated on other grounds 338 S.E.2d 864, 255 Ga. 241.

61. Qualified privilege

U.S.—In re Production of Records to Grand Jury, D.C.Mass., 618 F.Supp. 440.

62. U.S.C.A. Const. Art. 1, § 6, cl. 1.

63. U.S.—U.S. v. Swindall, C.A.11(Ga.), 971 F.2d 1531, rehearing denied 980 F.2d 1449, certiorari denied 114 S.Ct. 683, 510 U.S. 1040, 126 L.Ed.2d 650, appeal after remand 38 F.3d 574.

64. U.S.—U.S. v. Swindall, C.A.11(Ga.), 971 F.2d 1531, rehearing denied 980 F.2d 1449, certiorari denied 114 S.Ct. 683, 510 U.S. 1040, 126 L.Ed.2d 650, appeal after remand 38 F.3d 574.

65. U.S.—In re Subpoena To Testify Before Grand Jury, E.D.Mich., 787 F.Supp. 722.

66. U.S.—In re Subpoena To Testify Before Grand Jury, E.D.Mich., 787 F.Supp. 722—In re Grand Jury Proceedings Witness Bardier, D.C.Nev., 486 F.Supp. 1203.

Md.—In re Special Investigation No. 236, 458 A.2d 75, 295 Md. 573.

67. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.

68. U.S.—Matter of Grand Jury Investigation (Detroit Police Dept. Special Cash Fund), C.A.6(Mich.), 922 F.2d 1266, rehearing denied.

privilege for adoption records,⁶⁹ competitively sensitive information,⁷⁰ or financial institution records.⁷¹ In a federal grand jury proceeding, it has been held that there is no privilege for records required to be filed by state law under an assur-

ance of confidentiality,⁷² or for records of testimony previously given before a state grand jury,⁷³ and that the Constitution does not immunize any exclusive domain of the state from the reach of a federal grand jury.⁷⁴

F. RELATION OF INQUIRY TO ILLEGALLY OBTAINED EVIDENCE

§ 152. In General

A grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search or seizure.

Research Note

Admissibility of illegally obtained evidence is treated infra § 172.

Library References

Grand Jury ⇨36.3(3).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface

A grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search or seizure.⁷⁵ Thus, an unlawful search or seizure is not a basis for quashing a subpoena ad testificandum.⁷⁶

Similarly, a subpoena duces tecum is not subject to attack on the ground that it is based on evidence obtained from an unlawful search or seizure.⁷⁷

§ 153. Wiretapping or Other Interception

A grand jury witness may refuse to testify on the ground that questions are based on information obtained in violation of a

federal statute concerning wire, electronic, and oral communication interception.

Research Note

Admissibility of evidence obtained through illegal interception is discussed generally infra § 172.

Library References

Grand Jury ⇨36.3(3).

Congress, in Title III of the Omnibus Crime Control and Safe Streets Act, has enacted certain provisions concerning wire, electronic, and oral communication interception.⁷⁸ Pursuant to a provision that, whenever any wire or oral communication has been intercepted, no evidence derived from the contents of such communication may be received in evidence in any federal or state grand jury proceeding if the disclosure of that information would be in violation of the statute,⁷⁹ a grand jury witness may refuse to testify on the ground that questions are based on information obtained in violation of the statute,⁸⁰ and a subpoena for nontestimonial evidence based on information obtained through unlawful interception should not be enforced.⁸¹

Similarly, under some state statutes, a witness may refuse to testify on the ground that questions

69. N.Y.—Matter of Grand Jury Subpoenas Duces Tecum, 395 N.Y.S.2d 645, 58 A.D.2d 1.

70. U.S.—Matter of Midland Asphalt Corp., D.C.N.Y., 616 F.Supp. 223.

71. U.S.—U.S. v. Nelson, D.C.Mich., 486 F.Supp. 464—U.S. v. Grand Jury Investigation, D.C.Pa., 417 F.Supp. 389.

72. U.S.—Matter of Grand Jury Impaneled January 21, 1975, C.A.N.J., 541 F.2d 373.

73. U.S.—In re Grand Jury Proceedings, C.A.11(Fla.), 832 F.2d 554, rehearing denied 835 F.2d 291.

74. U.S.—Matter of Special April 1977 Grand Jury, C.A.Ill., 581 F.2d 589, certiorari denied Scott v. U.S., 99 S.Ct. 721, 439 U.S. 1046, 58 L.Ed.2d 705.

75. 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 Grand Jury Proceedings, C.A.Fla., 559 F.2d 234, certiorari denied Chitty v. U.S., 98 S.Ct. 1234, 434 U.S. 1062, 55 L.Ed.2d 762—In re Grand Jury Proceedings, C.A.Pa., 550 F.2d 1240.

Ill.—People v. McCarty, 407 N.E.2d 971, 41 Ill.Dec. 473, 86 Ill.App.3d 130.

N.Y.—In re Kronberg, 1 Dept., 464 N.Y.S.2d 466, 95 A.D.2d 714, appeal dismissed National Committee v. People, 454 N.E.2d 1314, 60

N.Y.2d 652, 467 N.Y.S.2d 571, reargument denied 460 N.E.2d 232, 61 N.Y.2d 670, 472 N.Y.S.2d 1028, affirmed 466 N.E.2d 165, 62 N.Y.2d 853, 477 N.Y.S.2d 625.

76. U.S.—Matter of Archuleta, D.C.N.Y., 434 F.Supp. 325.

N.Y.—In re Kronberg, 464 N.Y.S.2d 466, 95 A.D.2d 714, appeal dismissed National Committee v. People, 454 N.E.2d 1314, 60 N.Y.2d 652, 467 N.Y.S.2d 571, reargument denied 460 N.E.2d 232, 61 N.Y.2d 670, 472 N.Y.S.2d 1028, affirmed 466 N.E.2d 165, 62 N.Y.2d 853, 477 N.Y.S.2d 625.

77. Md.—In re Special Investigation No. 227, 466 A.2d 48, 55 Md. App. 650.

78. 18 U.S.C.A. §§ 2510–2521.

79. 18 U.S.C.A. § 2515.

80. U.S.—Gelbard v. U.S., Cal., 92 S.Ct. 2357, 408 U.S. 41, 33 L.Ed.2d 179.

In re Grand Jury Proceedings, C.A.9(Or.), 889 F.2d 220—In re Grand Jury Proceedings, 613 F.2d 1171, 198 U.S.App.D.C., 438.

Ill.—In re Cook County Grand Jury, 1 Dist., 447 N.E.2d 862, 69 Ill.Dec. 427, 113 Ill.App.3d 639.

81. U.S.—In re Proceedings to Enforce Grand Jury Subpoenas, D.C.Pa., 430 F.Supp. 1071.

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57, 408 U.S. 41, 33

889 F.2d 220—In re
3 U.S.App.D.C., 438

447 N.E.2d 862, 69

and Jury Subpoenas

are based on information obtained through unlaw-
ful interception.⁸²

Even where unlawful interception has occurred,
a witness may not refuse to answer questions
where the questions are derived from an indepen-
dent source, or the connection with the primary
taint is so attenuated as to dissipate the taint.⁸³

Unlawful interception justifies a refusal even if
the witness has been granted immunity.⁸⁴

Unlawful interception does not justify the refusal
of a witness to be sworn, as distinct from the
refusal to answer particular questions,⁸⁵ and does
not justify testifying in an evasive, equivocal, and
patently false manner.⁸⁶

§ 154. — Procedure

- a. In general
- b. Federal grand jury

a. In General

Where a grand jury witness refuses to testify on the ground
that questions are based on information obtained through unlaw-
ful interception, the court rather than the grand jury must resolve
the issues raised by such refusal.

Library References

Grand Jury ⇨ 36.3(3), 36.9-36.9(2).

Where a grand jury witness refuses to testify on
the ground that questions are based on information
obtained through unlawful interception, the court
rather than the grand jury must resolve the issues
raised by such refusal.⁸⁷

The prosecutor must respond adequately to the
witness' claim.⁸⁸ The specificity of the prosecutor's
denial and the comprehensiveness of the search on
which the denial is predicated must be measured
against the specificity of the witness' allegations

and the strength of the support for those allega-
tions.⁸⁹ The witness is entitled to know which of
the questions were derived from interception and
which were not.⁹⁰

Some authorities hold that the court's inquiry is
limited to determining whether there is an absence
of a court order permitting the interception or the
government concedes the illegality of the intercep-
tion or there has been a prior adjudication of
illegality.⁹¹

Where an illegality occurred, and the prosecutor
contends that questions were derived from an inde-
pendent source or that the connection with the
primary taint is so attenuated as to dissipate the
taint, the prosecutor has the burden of proof.⁹²

Time to raise claim.

Some authorities hold that the witness must raise
his claim before he appears before the grand jury.⁹³
Other authorities hold that the witness must raise
his claim before the grand jury, and that if he fails
to do so he cannot raise the claim thereafter.⁹⁴

b. Federal Grand Jury

Where a federal grand jury witness claims that questions
are based on information obtained through unlawful interception,
the government must affirm or deny the occurrence of the alleged
unlawful act.

A federal statute provides that, in any federal
grand jury proceeding, upon a claim by a party
aggrieved that evidence is inadmissible because it
was obtained by exploitation of an unlawful act
concerning wire, electronic, or oral communication
interception, the government shall affirm or deny
the occurrence of the alleged unlawful act.⁹⁵

82. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

Ill.—In re Cook County Grand Jury, 1 Dist., 447 N.E.2d 862, 69 Ill.Dec. 427, 113 Ill.App.3d 639.

N.Y.—People v. McGrath, 385 N.E.2d 541, 46 N.Y.2d 12, 412 N.Y.S.2d 801, certiorari denied McGrath v. New York, 99 S.Ct. 1535, 440 U.S. 972, 59 L.Ed.2d 788.

People v. Casalini, 483 N.Y.S.2d 899, 126 Misc.2d 665.

83. N.Y.—People v. DeMartino, 422 N.Y.S.2d 949, 71 A.D.2d 477.

People v. DiMaria, 481 N.Y.S.2d 244, 126 Misc.2d 1.

84. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

85. N.Y.—People v. Di Maria, 481 N.Y.S.2d 244, 126 Misc.2d 1.

86. N.Y.—People v. McGrath, 385 N.E.2d 541, 46 N.Y.2d 12, 412 N.Y.S.2d 801, certiorari denied McGrath v. New York, 99 S.Ct. 1535, 440 U.S. 972, 59 L.Ed.2d 788.

People v. Lombardozzi, 423 N.Y.S.2d 225, 73 A.D.2d 695—People v. DeMartino, 422 N.Y.S.2d 949, 71 A.D.2d 477.

87. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

88. Ill.—In re Cook County Grand Jury, 1 Dist., 447 N.E.2d 862, 69 Ill.Dec. 427, 113 Ill.App.3d 639.

89. Ill.—In re Cook County Grand Jury, 1 Dist., 447 N.E.2d 862, 69 Ill.Dec. 427, 113 Ill.App.3d 639.

90. N.Y.—People v. Leo, 441 N.Y.S.2d 169, 109 Misc.2d 933.

91. N.Y.—People v. Di Maria, 481 N.Y.S.2d 244, 126 Misc.2d 1.

92. N.Y.—People v. DeMartino, 422 N.Y.S.2d 949, 71 A.D.2d 477.

People v. Di Maria, 481 N.Y.S.2d 244, 126 Misc.2d 1.

93. Fla.—Rizzieri v. State, App. 3 Dist., 443 So.2d 310.

94. N.Y.—People v. Tantleff, 356 N.E.2d 477, 40 N.Y.2d 862, 387 N.Y.S.2d 1005.

95. 18 U.S.C.A. § 3504(a)(1), (b).

Where a federal grand jury witness claims that questions are based on information obtained through unlawful interception, the government must affirm or deny the occurrence of the alleged unlawful act.⁹⁶ The government must respond only if the witness makes a positive statement of unlawful interception rather than a suggestion of the possibility of such interception,⁹⁷ and only if there is a colorable basis for the witness' claim.⁹⁸ However, it has also been held that the government must respond even to a conclusory claim,⁹⁹ but only if the witness participated in the allegedly intercepted conversation.¹ In the case of a subpoena for fingerprints or handwriting samples, the witness must make a showing of a causal connection between the unlawful interception and the subpoena.² The court need not search for evidence to support the witness' claim.³

The government must respond adequately to the witness' claim,⁴ and its failure to do so justifies the witness' failure to provide evidence sought by the grand jury.⁵ The requisite specificity of the government's denial and the comprehensiveness of the search upon which it is based are measured against the specificity of the witness' allegations and the

strength and support for those allegations.⁶ General allegations may be answered with a general denial, but the government's affirmation or denial must be factual, unambiguous, and unequivocal once the witness' allegations are specific enough for a *prima facie* showing.⁷

Three interests must be accommodated: the witness' interest in not answering questions based on illegal interception, the government's interest in effective grand jury investigations, and the government's further interest in protecting the secrecy of sensitive information.⁸ There are no absolute requirements to be applied rigidly in every case in which a witness claims that the government has not adequately denied illegal interception.⁹

Some authorities hold that an *in camera* inspection by the court of the order authorizing the interception is sufficient.¹⁰ However, it has also been held that the witness generally has the right to examine the court order authorizing the interception, the application and affidavit supporting the order, and the government affidavit indicating the length of time of surveillance.¹¹ If the government interposes an objection on secrecy grounds, the court must determine whether secret information

96. U.S.—*In re Grand Jury Proceedings*, C.A.9 (Or.), 889 F.2d 220.

97. U.S.—*In re Baker*, C.A.Ga., 680 F.2d 721, rehearing denied 688 F.2d 852—*In re Grand Jury Proceedings*, C.A.Fla., 664 F.2d 423, certiorari denied *Vannier v. U.S.*, 102 S.Ct. 1630, 455 U.S. 1000, 71 L.Ed.2d 866 and *Hermann v. U.S.*, 102 S.Ct. 1631, 455 U.S. 1000, 71 L.Ed.2d 866.

98. U.S.—*U.S. v. Pacella*, C.A.N.Y., 622 F.2d 640, 70 A.L.R.Fed. 60.

Inquiry by court

Absent colorable basis for claim, no inquiry by court into claim is required.

U.S.—*In re Rosahn*, C.A.N.Y., 671 F.2d 690.

99. U.S.—*In re Grand Jury Proceedings Witness Bardier*, D.C.Nev., 486 F.Supp. 1203.

1. U.S.—*In re Grand Jury Proceedings Witness Bardier*, D.C.Nev., 486 F.Supp. 1203.

2. U.S.—*Whitnack v. U.S.*, C.A.Wash., 544 F.2d 1245.

3. U.S.—*In re Grand Jury Proceedings Dzikowich*, D.C.Wis., 620 F.Supp. 521.

4. Form

(1) Government's denial may be in form of an affidavit indicating that a check had been made of various agencies and asserting that witness had not been subjected to electronic surveillance.

U.S.—*In re Grand Jury Matter*, C.A.Pa., 683 F.2d 66.

(2) Where questions asked of grand jury witness are narrow in scope, affidavit by assistant United States attorney in charge of grand jury proceeding to effect that questions to be asked witness were not developed through illegal electronic surveillance will suffice to refute claim that questions were developed through such surveillance.

U.S.—*U.S. v. Yanagita*, C.A.N.Y., 552 F.2d 940.

Search

Where grand jury witness claims that he has been subjected to illegal wiretap, it is appropriate for governmental agency closest to investigation to scrupulously search its files and submit affidavits affirming or denying validity of such claims and indicating which agencies had been checked.

U.S.—*U.S. v. Weiner*, D.C.Pa., 418 F.Supp. 941, affirmed *U.S. v. Shinnick*, 546 F.2d 420 and 546 F.2d 421, certiorari denied 97 S.Ct. 1135, two cases, 429 U.S. 1105, 51 L.Ed.2d 557.

5. U.S.—*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.

6. U.S.—*In re Grand Jury Proceedings*, C.A.9 (Or.), 889 F.2d 220—*In re Grand Jury Proceedings*, C.A.Fla., 664 F.2d 423, certiorari denied *Vannier v. U.S.*, 102 S.Ct. 1630, 455 U.S. 1000, 71 L.Ed.2d 866 and *Hermann v. U.S.*, 102 S.Ct. 1631, 455 U.S. 1000, 71 L.Ed.2d 866—*In re Brummitt*, C.A.Tex., 613 F.2d 62, certiorari denied *Brummitt v. U.S.*, 100 S.Ct. 2990, 447 U.S. 907, 64 L.Ed.2d 856 and *Scarborough v. U.S.*, 100 S.Ct. 3038, 447 U.S. 935, 65 L.Ed.2d 1130.

In re Grand Jury Proceedings (Macklen), D.C.S.C., 525 F.Supp. 831.

7. U.S.—*In re Grand Jury 11-84*, C.A.9 (Wash.), 799 F.2d 1321.

8. U.S.—*In re Harkins*, C.A.Pa., 624 F.2d 1160.

9. U.S.—*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.

10. U.S.—*U.S. v. Pacella*, C.A.N.Y., 622 F.2d 640, 70 A.L.R.Fed. 60.

Even for criminal contempt

U.S.—*U.S. v. Morales*, C.A.N.Y., 566 F.2d 402.

11. U.S.—*In re Grand Jury Proceedings*, C.A.Colo., 735 F.2d 1230—*In re Harkins*, C.A.Pa., 624 F.2d 1160—*In re Grand Jury Proceedings*, C.A., 613 F.2d 1171, 198 U.S.App.D.C. 438.

legations.⁶ General with a general performance or denial and unequivocal specific enough for

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906 F.2d 78, certiorari 980, 112 L.Ed.2d 521.

(Or.), 889 F.2d 220— 4 F.2d 423, certiorari U.S. 1000, 71 L.Ed.2d U.S. 1000, 71 L.Ed.2d 62, certiorari denied 7, 64 L.Ed.2d 856 and 935, 65 L.Ed.2d 1130.

D.C.S.C., 525 F.Supp.

, 799 F.2d 1321.

906 F.2d 78, certiorari 980, 112 L.Ed.2d 521.

40, 70 A.L.R.Fed. 60.

olo., 735 F.2d 1230— Grand Jury Proceed- 8.

can be deleted or summarized.¹² Conclusory allegations by the government are insufficient, and the government must make a minimal showing before the witness' right to inspect can be denied.¹³ Where sensitive material cannot be deleted or summarized, the court must conduct an in camera review of the materials.¹⁴ An in camera review may be made by the same judge who issued the interception order.¹⁵

The witness is not entitled to a full adversary hearing.¹⁶ At least in the absence of evidence contravening that of the government, an evidentiary hearing is not required.¹⁷ No evidence need be produced or provided by the government for the purpose of litigating the truth of affidavits or statements.¹⁸ Even those authorities who hold that the witness has a right of access to materials hold that

the witness does not have the right to introduce his own evidence testing the factual sufficiency of the evidence contained in documents furnished by the government,¹⁹ and that the witness may contest only the facial sufficiency of the court order authorizing interception, the affidavit and application submitted by the government in support of the order, and the government affidavit indicating the length of time surveillance was conducted.²⁰

Standing.

It has been held that a witness is a party aggrieved who may raise a claim of unlawful interception only if the witness' own conversations were monitored or the monitoring was directed against such witness.²¹

G. CONTEMPT

§ 155. In General

Violation of a court order to provide evidence to a grand jury constitutes contempt of court.

Library References

Grand Jury §36.5, 36.5(1).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Violation of a court order to provide evidence to a grand jury constitutes contempt of court.²² Thus,

where the court orders a witness to answer questions, and the witness returns to the grand jury room and refuses to answer such questions, there is a contempt.²³

It has been held that contempt may consist of evasion of service of a subpoena,²⁴ failure to obey a subpoena,²⁵ failure to appear in obedience to a subpoena,²⁶ refusal to be sworn²⁷ or to testify²⁸ or

12. U.S.—In re Harkins, C.A.Pa., 624 F.2d 1160.

Identity of informant

The government can seek to prevent disclosure of information to recalcitrant grand jury witness which, while supporting veracity, reliability or basis of knowledge of confidential informants, may also be useful in identifying those individuals.

U.S.—In re Grand Jury, C.A.1 (Mass.), 851 F.2d 499.

13. U.S.—Melickian v. U.S., C.A.Mo., 547 F.2d 416, certiorari denied 97 S.Ct. 1684, 430 U.S. 986, 52 L.Ed.2d 381.

14. U.S.—In re Grand Jury Proceedings, C.A.Colo., 735 F.2d 1230— In re Harkins, C.A.Pa., 624 F.2d 1160.

15. U.S.—Matter of Special February, 1977 Grand Jury, C.A.Ill., 570 F.2d 674, certiorari denied Pavone v. U.S., 98 S.Ct. 3089, 437 U.S. 904, 57 L.Ed.2d 1133.

16. U.S.—U.S. v. Pacella, C.A.N.Y., 622 F.2d 640, 70 A.L.R.Fed. 60.

17. U.S.—In re Grand Jury Proceedings, C.A.Fla., 554 F.2d 712, rehearing denied Grand Jury Proceedings v. Rotundo, 558 F.2d 605, certiorari denied Rotundo v. U.S., 98 S.Ct. 269, 434 U.S. 892, 54 L.Ed.2d 178.

18. U.S.—In re Grand Jury Proceedings, C.A.Colo., 735 F.2d 1230.

19. U.S.—In re Grand Jury Proceedings, C.A.Colo., 735 F.2d 1230.— In re Harkins, C.A.Pa., 624 F.2d 1160.

20. U.S.—In re Grand Jury Matter (Doe), C.A.3 (Pa.), 798 F.2d 91.

21. U.S.—U.S. v. Weiner, D.C.Pa., 418 F.Supp. 941, affirmed U.S. v. Shinick, 546 F.2d 420 and 546 F.2d 421, certiorari denied 97 S.Ct. 1135, two cases, 429 U.S. 1105, 51 L.Ed.2d 557.

22. Tex.—Ex parte Edone, Cr.App., 740 S.W.2d 446, overruling Ex parte Port, 674 S.W.2d 772.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

23. 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.

24. Ark.—Spight v. State, 243 S.W. 860, 155 Ark. 26.

25. Federal proceedings

Failure by any person without adequate excuse to obey a federal subpoena served upon that person may be deemed a contempt of court.

Fed.Rules Cr.Proc., Rule 17(g), 18 U.S.C.A.

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

N.Y.—Application of Mullen, 31 N.Y.S.2d 710, 177 Misc. 734.

Pa.—Commonwealth v. Klein, 40 Pa.Super. 352—In re Klein, 40 Pa.Super. 360.

27. Cal.—In re Gannon, 11 P. 240, 69 C. 541—Kelly v. Wilson, 11 P. 244, 2 C.Unrep.Cas. 655.

Before whom articulated

Refusal to be sworn as witness before grand jury may be articulated before judge who impanels that jury and before whom relevant motions were heard and need not be repeated before grand jury.

N.Y.—People v. Ruggiano, 401 N.Y.S.2d 729, 92 Misc.2d 876.

to answer questions properly put to the witness,²⁹ or refusal to produce books or documents called for by a subpoena duces tecum.³⁰ An agreement or promise of a person to appear as a witness is not a lawful mandate the violation of which is a contempt.³¹

However, it has also been held that there is no contempt until the court orders a person to provide evidence and the person refuses to do so,³² and that mere refusal to answer questions propounded by the grand jury is not contempt.³³ The order must come from the court and not the prosecutor.³⁴ Violation of a court order constitutes contempt even if an appellate court has not yet ruled on the merits of the reason for a person's refusal to obey.³⁵ Some authorities hold that, while a contempt need not involve violation of a court order, the court, upon finding a person in contempt, should give such person permission to purge himself of the contempt by testifying before the grand jury.³⁶

Conduct may constitute a contempt even if it is also punishable as a specific crime.³⁷

It has been held that there is no contempt if the organization of the grand jury was void and it was without jurisdiction,³⁸ or the subpoena or notice was invalid.³⁹

Mental state.

It has been held that violation of a court order constitutes contempt only if it is willful.⁴⁰ Reckless disregard is equivalent to willfulness.⁴¹ However, it has also been held that a person may commit a contempt even if he does not have an intent to obstruct an investigation,⁴² and even if he believes that the subpoena is unlawful,⁴³ or acts on the advice of counsel.⁴⁴

§ 156. Evasive Answers and the Like

Even where a grand jury witness makes a formal answer, the answer may in some circumstances be tantamount to a refusal to answer and constitute a contempt.

Library References.

Grand Jury ⇨36.5, 36.5(1).

Although a grand jury witness makes formal answer, withholding the truth may constitute an

Presence

Defendant's physical presence before the Grand Jury was not a condition precedent to prosecution for contempt as a felony for refusing to be sworn, in light of court's directive that he appear and testify before the Grand Jury.

- N.Y.—People v. Di Maria, 481 N.Y.S.2d 244, 126 Misc.2d 1.
- 28. U.S.—Camarota v. U.S., C.C.A.N.J., 111 F.2d 243, certiorari denied 61 S.Ct. 16, 311 U.S. 651, 85 L.Ed. 416.
- Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.
- N.Y.—People ex rel. Vogelstein v. Warden of County Jail of New York County, 270 N.Y.S. 362, 150 Misc. 714, affirmed 271 N.Y.S. 1059, 242 A.D. 611.
- 29. U.S.—Camarota v. U.S., C.C.A.N.J., 111 F.2d 243, certiorari denied 61 S.Ct. 16, 311 U.S. 651, 85 L.Ed. 416—Lang v. U.S., C.C.A.N.Y., 55 F.2d 922, certiorari dismissed 52 S.Ct. 495, 286 U.S. 523, 76 L.Ed. 1267.
- Cal.—Ex parte McDonough, 68 P.2d 1020, 21 C.A.2d 287—Ex parte Bruns, 58 P.2d 1318, 15 C.A.2d 1.
- Conn.—McCarthy v. Clancy, 148 A. 551, 110 Conn. 482.
- N.Y.—In re Greenleaf, 28 N.Y.S.2d 28, 176 Misc. 566.
- Tex.—Ex parte Miller, 240 S.W. 944, 91 Tex.Cr. 607.
- 30. U.S.—Corretjer v. Draughon, C.C.A.Puerto Rico, 88 F.2d 116.
- Ga.—Nichols v. State, 16 S.E.2d 162, 65 Ga.App. 569.
- N.Y.—Spector v. Allen, 22 N.E.2d 360, 281 N.Y. 251.
- Okl.—Blanton v. State, 239 P. 698, 31 Okl.Cr. 419.
- 31. N.Y.—Application of Mullen, 31 N.Y.S.2d 710, 177 Misc. 734.
- 32. 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. LaPage, D.C.N.Y., 441 F.Supp. 824.
- Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.
- Ga.—Baker v. State, 292 S.E.2d 451, 162 Ga.App. 606.

- Or.—State ex rel. Grand Jury for Douglas County v. Bernier, 668 P.2d 455, 64 Or.App. 378.
- 33. Tex.—Ex parte Edone, Cr.App., 740 S.W.2d 446.
- 34. N.Y.—People v. Moschelle, 410 N.Y.S.2d 764, 96 Misc.2d 1030.
- 35. U.S.—U.S. v. Nightingale, C.A.R.I., 703 F.2d 17.
- 36. N.Y.—Additional January 1979 Grand Jury of Albany Supreme Court v. Doe, 444 N.Y.S.2d 201, 84 A.D.2d 588.
- Purging of contempt as terminating civil sanction see infra § 161.
- 37. U.S.—In re Presentment by Grand Jury of Ellison, D.C.Del., 44 F.Supp. 375, affirmed 133 F.2d 903, certiorari denied Matter of Ellison, 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.
- 38. Ill.—People v. Brady, 142 N.E. 212, 310 Ill. 514—People v. Koch, 142 N.E. 212, 310 Ill. 557—People v. Brautigan, 142 N.E. 208, 310 Ill. 472.
- 39. Cal.—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469.
- N.Y.—Spector v. Allen, 22 N.E.2d 360, 281 N.Y. 251.
- Application of Mullen, 31 N.Y.S.2d 710, 177 Misc. 734.
- 40. Ill.—Matter of Swan, 415 N.E.2d 1354, 48 Ill.Dec. 70, 92 Ill. App.3d 856.
- 41. U.S.—U.S. v. Metropolitan Disposal Corp., D.C.Or., 622 F.Supp. 1262, affirmed 798 F.2d 1273.
- 42. N.Y.—People v. Tantleff, 356 N.E.2d 477, 40 N.Y.2d 862, 387 N.Y.S.2d 1005.
- 43. U.S.—Matter of Grand Jury Subpoena of June 12, 1986, D.M.D., 690 F.Supp. 1451.
- Fla.—Hope v. State, App.2 Dist., 449 So.2d 1315.
- 44. N.Y.—Additional January 1979 Grand Jury of Albany Supreme Court v. Doe, 444 N.Y.S.2d 201, 84 A.D.2d 588.
- Pa.—In re Grand Jury, April Term, 1977, Wayne County, 379 A.2d 323, 251 Pa.Super. 43.

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obstruction of justice punishable as contempt.⁴⁵ A witness may be committed for contempt in making evasive, perjurious, or contumacious answers.⁴⁶

Testimony may constitute contempt where it is equivocal, evasive, or conspicuously unbelievable and patently false.⁴⁷ The response must be intended as no answer at all and must be tantamount to a refusal to answer, and it is insufficient that the answer is evasive or equivocal.⁴⁸ It has been held that an answer which, if false, would constitute perjury does not constitute contempt.⁴⁹ An evasive answer may constitute contempt regardless of whether the event, conversation, or other fact referred to in the questions did in fact occur.⁵⁰ Hopelessly contradictory responses repeatedly changed or altered may constitute contempt.⁵¹

An evasive answer may constitute a contempt even in the absence of a court directive to testify responsively.⁵²

A false assertion of an inability to recall facts may in some circumstances constitute a refusal to answer and a contempt.⁵³ The pivotal inquiry is whether the events to be recalled were significant and therefore memorable.⁵⁴ However, it has also

been held that an assertion of an inability to recall facts cannot constitute a contempt.⁵⁵

Perjury cannot constitute a contempt unless there is an obstruction of the investigation.⁵⁶ Thus, some authorities hold that the question must be relevant.⁵⁷

§ 157. Civil and Criminal Contempt in General

A grand jury witness may be held in civil contempt, criminal contempt, or both. A civil contempt sanction is designed to coerce future compliance and can be terminated by such compliance, while a criminal contempt sanction is designed to punish past disobedience and is not automatically terminated by compliance.

Library References

Grand Jury § 36.5, 36.5(1).

A grand jury witness may be held in civil contempt,⁵⁸ criminal contempt,⁵⁹ or both.⁶⁰ Pursuant to federal statutes, a recalcitrant federal grand jury witness who refuses without just cause to comply with a court order may be held in civil contempt,⁶¹ and disobedience or resistance to a federal court's lawful writ, process, order, rule, decree, or command may be punished as a criminal contempt.⁶²

The purpose of civil contempt is to coerce future

45. U.S.—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—O'Connell v. U.S., C.C.A.N.Y., 40 F.2d 201, certiorari dismissed 51 S.Ct. 658, 296 U.S. 667, 75 L.Ed. 1472.

46. U.S.—Schleier v. U.S., 72 F.2d 414, certiorari denied 55 S.Ct. 123, 293 U.S. 607, 79 L.Ed. 697—Loubriel v. U.S., C.C.A.N.Y., 9 F.2d 807

In re Presentment by Grand Jury of Ellison, D.C.Del., 44 F.Supp. 375, affirmed 133 F.2d 903, certiorari denied Matter of Ellison, 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

Ill.—People v. Sheridan, 181 N.E. 617, 349 Ill. 202.

Mich.—People v. Doe, 196 N.W. 757, 226 Mich. 5.

N.Y.—Finkel v. McCook, 286 N.Y.S. 755, 247 A.D. 57, affirmed 3 N.E.2d 460, 271 N.Y. 636

People v. Finkel, 284 N.Y.S. 725, 157 Misc. 781.

47. N.Y.—People v. Roseman, 433 N.Y.S.2d 174, 78 A.D.2d 878.

48. N.Y.—People v. Fischer, 423 N.E.2d 349, 53 N.Y.2d 178, 440 N.Y.S.2d 872.

Followup

A clearly unresponsive answer to question before grand jury, with no effective followup inquiry which could have elicited responsive and substantially binding answer, will not support finding of contumacious evasion.

N.Y.—People v. Marinaccio, 393 N.Y.S.2d 904, 90 Misc.2d 128.

49. N.Y.—People v. Phillips, 4 Dept., 524 N.Y.S.2d 907, 136 A.D.2d 930, appeal denied 524 N.E.2d 437, 71 N.Y.2d 972, 529 N.Y.S.2d 83—People v. Yacovelli, 1 Dept., 493 N.Y.S.2d 473, 113 A.D.2d 718, appeal denied 489 N.E.2d 784, 66 N.Y.2d 924, 498 N.Y.S.2d 1039.

50. N.Y.—People v. Fischer, 423 N.E.2d 349, 53 N.Y.2d 178, 440 N.Y.S.2d 872.

51. N.Y.—People v. Schenkman, 385 N.E.2d 1214, 46 N.Y.2d 232, 413 N.Y.S.2d 284.

52. N.Y.—People v. Paperno, 413 N.Y.S.2d 975, 98 Misc.2d 99.

53. U.S.—Matter of Battaglia, C.A.Ariz., 653 F.2d 419.

N.Y.—People v. Gottfried, 459 N.E.2d 1281, 61 N.Y.2d 617, 471 N.Y.S.2d 844—People v. Schenkman, 385 N.E.2d 1214, 46 N.Y.2d 232, 413 N.Y.S.2d 284.

People v. Ignatow, 2 Dept., 510 N.Y.S.2d 685, 126 A.D.2d 566, appeal denied 505 N.E.2d 249, 69 N.Y.2d 746, 512 N.Y.S.2d 1050.

54. N.Y.—People v. Roseman, 433 N.Y.S.2d 174, 78 A.D.2d 878.

55. Pa.—In re Investigating Grand Jury of Chester County, Subpoena No. 91, 544 A.2d 924, 518 Pa. 485.

56. Ind.—C.F. v. State, App. 4 Dist., 521 N.E.2d 1338, transfer denied.

57. Ind.—C.F. v. State, App. 4 Dist., 521 N.E.2d 1338, transfer denied.

58. U.S.—U.S. v. Bell, C.A.7(Ill.), 902 F.2d 563.

Fla.—In re Before Third Statewide Grand Jury, App., 360 So.2d 4.

59. Fla.—In re Before Third Statewide Grand Jury, App., 360 So.2d 4.

60. U.S.—U.S. v. Esposito, S.D.N.Y., 633 F.Supp. 544.

Fla.—In re Before Third Statewide Grand Jury, App., 360 So.2d 4.

Pa.—In re November, 1975 Special Investigating Grand Jury, 379 A.2d 1313, 475 Pa. 123, certiorari denied O'Brien v. Pennsylvania, 98 S.Ct. 2274, 436 U.S. 922, 56 L.Ed.2d 765 (per Roberts, J., with one Justice concurring).

61. 28 U.S.C.A. § 1826(a).

62. 18 U.S.C.A. § 401(3).

compliance,⁶³ while the purpose of criminal contempt is to punish prior disobedience.⁶⁴ A sanction which can be avoided or terminated by compliance is civil in nature,⁶⁵ although there appears to be some authority to the contrary.⁶⁶ A flat sentence which cannot be avoided or terminated by compliance is criminal in nature.⁶⁷ An order confining a witness which does not condition itself on the witness' refusal to testify, but only provides for potential review of the order if the witness testifies, is criminal in nature.⁶⁸

Since the purpose of civil contempt is to coerce compliance, a civil sanction must terminate when the witness complies or when compliance has become impossible because the grand jury has ceased to function, and should not be imposed or continued where there is no realistic possibility that it will result in compliance, as discussed *infra* § 161.

Before resorting to criminal sanctions, the court must first consider the feasibility of coercing testimony through the imposition of civil contempt; the court should resort to criminal sanctions only after determining, for good reasons, that the civil remedy would be inappropriate.⁶⁹ However, it has been held that such consideration need not be made expressly.⁷⁰ When the potential duration of civil coercive confinement is severely limited, the court may consider civil contempt a futile sanction, and this is a factor in favor of the use of criminal contempt.⁷¹

A witness may be held in criminal contempt even if he believed that he would face only civil contempt,⁷² or was not warned of the possibility of criminal contempt,⁷³ or was not warned at a civil

contempt proceeding that he might also be prosecuted criminally.⁷⁴

Trapping a grand jury witness into contempt vitiates any subsequent contempt prosecution.⁷⁵

§ 158. Necessity That Question Be Proper

Refusal by a grand jury witness to answer a question constitutes contempt only in the case of a legal and proper interrogatory.

Library References

Grand Jury § 36.5, 36.5(1).

Refusal by a grand jury witness to answer a question constitutes contempt only in the case of a legal and proper interrogatory.⁷⁶ The question must be free from ambiguity and so plain as to call for either a direct answer or a refusal to answer on the grounds of privilege.⁷⁷

Authorities differ regarding the extent to which a grand jury witness may refuse to provide evidence on the ground of relevancy, as discussed *supra* § 132. Some authorities, who hold that a witness may raise the issue of relevancy, hold, in the context of a criminal contempt, that the question must be relevant,⁷⁸ that there must be the reality and not merely the appearance of the pursuit of evidence of an antecedent crime,⁷⁹ and that, in the contempt proceeding, the prosecutor, although not obliged to establish relevancy conclusively, must at least come forward with a factual showing of the nature of the evidence demanded and its relation to the subject of the investigation sufficient to enable the court to make an intelligent estimate of relevancy.⁸⁰

63. Fla.—*In re Before Third Statewide Grand Jury*, App., 360 So.2d 4.

64. Fla.—*In re Before Third Statewide Grand Jury*, App., 360 So.2d 4.

65. U.S.—*Shillitani v. U.S.*, N.Y., 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622.

U.S. v. Jones, C.A.7(Ill.), 880 F.2d 987.

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Ill.—*People v. I.W.I., Inc.*, 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

66. N.Y.—*Additional January 1979 Grand Jury of Albany Supreme Court v. Doe*, 444 N.Y.S.2d 201, 84 A.D.2d 588.

67. U.S.—*Menna v. New York*, N.Y., 96 S.Ct. 241, 423 U.S. 61, 46 L.Ed.2d 195.

68. Mo.—*State ex rel. Imboden v. Romines*, App., 760 S.W.2d 130.

69. U.S.—*Shillitani v. U.S.*, N.Y., 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622.

70. U.S.—*In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, C.A.Pa., 658 F.2d 211.

71. U.S.—*U.S. v. Drum*, D.C.Pa., 569 F.Supp. 605, affirmed Appeal of Drum, 735 F.2d 1348 and *In re Grand Jury No. 81-252*, 735 F.2d 1348.

72. U.S.—*U.S. v. Drum*, D.C.Pa., 569 F.Supp. 605, affirmed Appeal of Drum, 735 F.2d 1348 and *In re Grand Jury No. 81-252*, 735 F.2d 1348.

73. N.Y.—*People v. Didio*, 401 N.Y.S.2d 640, 60 A.D.2d 978.

74. U.S.—*U.S. v. Petito*, D.C.N.Y., 519 F.Supp. 838, affirmed 671 F.2d 68, certiorari denied 103 S.Ct. 56, 459 U.S. 824, 74 L.Ed.2d 60.

75. N.Y.—*People v. Leo*, 441 N.Y.S.2d 169, 109 Misc.2d 933.

76. N.Y.—*People v. Paperno*, 413 N.Y.S.2d 975, 98 Misc.2d 99.

77. N.Y.—*People v. Paperno*, 413 N.Y.S.2d 975, 98 Misc.2d 99.

78. N.Y.—*People v. Paperno*, 413 N.Y.S.2d 975, 98 Misc.2d 99.

79. N.Y.—*People v. Schenkman*, 385 N.E.2d 1214, 46 N.Y.2d 232, 413 N.Y.S.2d 284.

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

§ 159. Proceedings

- a. In general
- b. Particular matters

a. In General

Only the court, and not the grand jury, may adjudicate a contempt by a grand jury witness.

Library References

Grand Jury ⇐36.5, 36.5(1).

Where a witness refuses to answer, the grand jury decides whether a contempt proceeding should be commenced.⁸¹

The grand jury cannot itself adjudicate⁸² or punish⁸³ a contempt by a grand jury witness. Where a witness is recalcitrant, the right and duty of the grand jury is to report the witness to the court.⁸⁴ Whether a refusal to answer is an unjustified act for which the witness may be adjudicated in contempt is a determination to be made by the court, not by the prosecutor or the grand jury.⁸⁵ Where the witness is motivated by fear, the grand jury rather than the prosecutor must make the decision to commence a contempt proceeding.⁸⁶ A criminal contempt may be prosecuted by indictment even if the court has not referred the alleged act of contempt to the grand jury.⁸⁷ Some authorities hold

that the court may initiate a contempt proceeding even without a request by the grand jury.⁸⁸

A criminal contempt proceeding is a form of criminal proceeding.⁸⁹

It has been held that a contempt by a grand jury witness is an indirect contempt,⁹⁰ even if the witness reiterated his refusal in the presence of the court,⁹¹ and that a summary criminal contempt proceeding is improper.⁹² However, it has also been held that a contempt by a grand jury witness may be direct,⁹³ where the witness persists before the court in his refusal,⁹⁴ or the court is personally aware of the circumstances,⁹⁵ and that in the case of a direct contempt a summary civil contempt proceeding is proper.⁹⁶ Summary civil contempt proceedings are proper in the case of a federal grand jury witness.⁹⁷

The witness is entitled to certain procedural rights.⁹⁸ In a civil contempt proceeding, the witness is not entitled to all the rights applicable in a criminal trial⁹⁹ or a criminal contempt proceeding,¹ or to meaningless formalities that would only serve to delay the proceedings.²

b. Particular Matters

In a contempt proceeding, a grand jury witness is entitled to notice, a reasonable opportunity to prepare and present defenses, and a hearing.

81. Or.—State ex rel. Grand Jury for Douglas County v. Bernier, 668 P.2d 455, 64 Or.App. 378.

82. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

83. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

84. Va.—Sikle v. Commonwealth, 112 S.E. 605, 133 Va. 789, 27 A.L.R. 135.

85. U.S.—In re Grand Jury Proceedings (Doe), E.D.N.Y., 790 F.Supp. 422.

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

87. U.S.—U.S. v. Morales, C.A.N.Y., 566 F.2d 402.

88. Pa.—In re Investigating Grand Jury of Philadelphia County, 433 A.2d 5, 495 Pa. 186.

89. N.Y.—Kuriansky v. Azam, 573 N.Y.S.2d 369, 151 Misc.2d 176.

90. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

Fla.—Pendley v. State, App., 392 So.2d 321.

91. U.S.—Harris v. U.S., N.Y., 86 S.Ct. 352, 382 U.S. 162, 15 L.Ed.2d 240.

92. U.S.—Harris v. U.S., N.Y., 86 S.Ct. 352, 382 U.S. 162, 15 L.Ed.2d 240.

Fla.—Pendley v. State, App., 392 So.2d 321.

N.M.—State v. Chavez, App., 673 P.2d 1345, 100 N.M. 612.

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

Okl.—Clem v. State, Cr., 701 P.2d 770.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

94. Colo.—People v. Lucero, 584 P.2d 1208, 196 Colo. 276.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

95. Ill.—People v. I.W.I., Inc., Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

96. Colo.—People v. Lucero, 584 P.2d 1208, 196 Colo. 276.

Ill.—People v. I.W.I., Inc., 1 Dist., 531 N.E.2d 1001, 126 Ill.Dec. 374, 176 Ill.App.3d 951.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

97. 28 U.S.C.A. § 1826(a).

98. Full panoply

Witness is entitled to full panoply of procedural due process rights that accompany any indirect contempt hearing.

Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

Federal grand jury

A federal grand jury witness subjected to a civil contempt proceeding is entitled to the procedural regularities prescribed by the Federal Rules of Criminal Procedure for a nonsummary criminal contempt proceeding.

U.S.—In re Rosahn, C.A.N.Y., 671 F.2d 690.

99. U.S.—In re Grand Jury Proceedings, Hellmann, C.A.6(Ky.), 756 F.2d 428.

1. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

2. U.S.—In re Farrell, C.A.N.H., 611 F.2d 923.

In a contempt proceeding, a grand jury witness is entitled to notice,³ a reasonable opportunity to prepare⁴ and present⁵ defenses, and a full and impartial⁶ hearing.⁷

Where a witness is ordered to testify, and is returned to the grand jury room, and again refuses to testify, he should be returned to the court and given notice that he is being cited for contempt, and a time should be set for trial on the contempt citation.⁸

Counsel.

At a hearing to determine whether to issue an order to show cause why the witness should not be held in criminal contempt, there is no right to counsel, as adversary criminal procedures have not yet been initiated.⁹ In a contempt proceeding, the

witness is entitled to counsel,¹⁰ and to the effective assistance of counsel.¹¹

Public hearing.

A contempt hearing generally should be public.¹² The witness has a right to insist that his actual contempt, meaning his adherence to a refusal (as distinct from the putting to him of the grand jury's questions by the court), occur in public,¹³ and that the final adjudication of contempt occur in public.¹⁴ The proceeding may be closed to the public only to the extent that substantive grand jury matters are being considered,¹⁵ or only upon an express finding that a public hearing would create a clear and present danger to investigatory matters pending before the grand jury and that the prejudicial effect could not be avoided by less drastic reason-

3. U.S.—In re Grand Jury Proceedings, C.A.Cal., 633 F.2d 754—Matter of Grand Jury Subpoena, C.A.N.D., 739 F.2d 1354.

Order to show cause

District court's order to show cause why defendant should not be held in criminal contempt for failure to answer grand jury questions after defendant had been granted immunity gave defendant more than adequate notice that he would be held in criminal contempt for such failure; thus Government was not required to indict defendant to charge him with criminal contempt.

U.S.—U.S. v. Drum, 569 F.Supp. 605, affirmed Appeal of Drum, 735 F.2d 1348 and In re Grand Jury No. 81-252, D.C.Pa., 735 F.2d 1348.

Allegations

Petition need not allege that witness' refusal was unjustified, as justification is matter of defense.

U.S.—In re Bianchi, C.A.Mass., 542 F.2d 98.

Federal criminal contempt proceeding

A federal criminal contempt proceeding shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or an attorney appointed for that purpose, by an order to show cause or an order of arrest.

Fed.Rules Cr.Proc., Rule 42(b), 18 U.S.C.A.

4. U.S.—In re Grand Jury Proceedings, C.A.Fla., 643 F.2d 226—In re Grand Jury Proceedings, C.A.Cal., 633 F.2d 754.

Discretion

One cited for contempt because of refusal to obey order to testify before grand jury is entitled to reasonable time to prepare his defense; determination of what constitutes reasonable time is committed to sound discretion of district court.

U.S.—In re Grand Jury Proceedings, C.A.Pa., 550 F.2d 1240.

5. U.S.—Matter of Grand Jury Subpoena, C.A.N.D., 739 F.2d 1354—In re Harkins, C.A.Pa., 624 F.2d 1160—Camarota v. U.S., C.C.A.N.J., 111 F.2d 243, certiorari denied 61 S.Ct. 16, 311 U.S. 651, 85 L.Ed. 416—O'Connell v. U.S., C.C.A.N.Y., 40 F.2d 201, certiorari dismissed 51 S.Ct. 658, 296 U.S. 667, 75 L.Ed. 1472.

In re Stetser, D.C.Del., 44 F.Supp. 459.

Ill.—People v. Spain, 138 N.E. 614, 307 Ill. 283.

6. Ill.—People v. Spain, 138 N.E. 614, 307 Ill. 283.

7. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

In re Grand Jury Investigation, D.C.Pa., 424 F.Supp. 802.

Fear

Grand jury witness who refused to testify under grant of immunity for fear of retaliation against himself or his family was entitled to hearing to explore gravity and sincerity of his fears and measures available to mitigate them, before being held in civil contempt.

U.S.—Matter of Grand Jury Proceedings Empanelled May 1988, C.A.7(Ill.), 894 F.2d 881, appeal after remand Matter of Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167.

Sanction

Even if grand jury witness was in contempt of the district court for refusing to testify under grant of immunity, he was entitled, before being sanctioned, to present to district judge facts material to scope and severity of the sanction.

U.S.—Matter of Grand Jury Proceedings Empanelled May 1988, C.A.7(Ill.), 894 F.2d 881, appeal after remand Matter of Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167.

8. 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.

9. 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.

10. U.S.—In re Rosahn, C.A.N.Y., 671 F.2d 690.

Matter of Rosado, D.C.N.Y., 441 F.Supp. 1081.

11. U.S.—Matter of Grand Jury Subpoena, C.A.N.D., 739 F.2d 1354.

12. U.S.—In re Grand Jury Investigation, D.C.Pa., 424 F.Supp. 802.

13. U.S.—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.

Putting of questions to witness by court see supra § 125.

14. U.S.—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—In re Bongiorno, C.A.N.Y., 694 F.2d 917.

15. U.S.—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.

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able alternatives.¹⁶

Prior adjudication or opportunity to raise issue.

The witness cannot raise a defense which could reasonably have been included in his prior motion to quash the subpoena duces tecum.¹⁷ If the witness did not raise the issue of his lack of possession of the subpoenaed documents at a prior hearing concerning enforcement of the subpoena, he cannot argue that he did not have the documents at the time he received the subpoena.¹⁸ In responding to a motion to have him held in contempt, a witness must present all available defenses, and any defense omitted is lost.¹⁹ At a trial for criminal contempt, the witness may litigate the validity of the prior order compelling the witness to testify.²⁰

Findings and order.

An order committing for contempt should set forth facts showing the contempt and authority to make the order.²¹ A civil contempt order need not recite every question the witness is required to answer in order to purge himself of the contempt.²²

§ 160. — Evidence

In a grand jury witness contempt proceeding, under the general rules of evidence, any relevant and material evidence otherwise competent is admissible.

Library References

Grand Jury § 36.5, 36.5(1), 36.9-36.9(2).

In a grand jury witness contempt proceeding, under the general rules of evidence, any relevant and material evidence otherwise competent is admissible.²³ In a criminal contempt proceeding, it has been held that the witness may seek the sup-

pression of evidence obtained through an illegal wiretap or interception in violation of statute, if the witness raised the objection before the grand jury and at that time sought instruction from the court.²⁴

The witness generally may examine all documentary evidence considered by the court.²⁵ Where the witness claims not to remember the information sought by the grand jury, he has the right to confront all of the government's evidence, both documentary and testimonial,²⁶ unless particular and compelling reasons peculiar to the grand jury's function require some curtailment of this right.²⁷ However, it has also been held that, in a civil contempt proceeding, the right of confrontation is not fully applicable,²⁸ and that the witness is not entitled to discover the full range of evidence pertinent to each element of his defense.²⁹

If the witness, in a prior proceeding concerning enforcement of a subpoena duces tecum, did not contend that he lacked possession of the subpoenaed materials, there is a presumption that the witness remains in possession of such materials, and the witness has the burden of overcoming this presumption.³⁰

Where the witness claims not to remember the information sought by the grand jury, the government has the burden of proving that the witness' answer is false and deliberately evasive.³¹ Some authorities hold that, where the prosecutor contends that an answer is evasive and equivalent to a refusal to answer, there may be no examination of extrinsic evidence, but the proof must be found to lie within the confines of the alleged evasive testi-

16. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

17. U.S.—Matter of Fula, C.A.N.Y., 672 F.2d 279, on remand 558 F.Supp. 50.

18. U.S.—Grand Jury Subpoena Duces Tecum v. U.S., C.A.8(S.D.), 868 F.2d 1014, rehearing denied.

19. U.S.—Matter of Schmidt, C.A.7(Ill.), 775 F.2d 822.

20. U.S.—U.S. v. Pearce, C.A.3(Pa.), 792 F.2d 397, appeal after remand 829 F.2d 33.

21. Examination by appellate court

An order committing a witness for contempt should be so complete that an appellate court may, by examination thereof, determine whether refusal to answer was justified.

Ill.—People v. Conzo, 23 N.E.2d 210, 310 Ill.App. 524.

22. Pa.—In re Grand Jury, April Term, 1977, Wayne County, 379 A.2d 323, 251 Pa.Super. 43.

23. Transcript before grand jury

In proceeding against grand jury witness for contempt, district attorney's reading of transcript before grand jury was held competent proof, in the absence of proper objection.

U.S.—O'Connell v. U.S., C.C.A.N.Y., 40 F.2d 201, certiorari dismissed 51 S.Ct. 658, 296 U.S. 667, 75 L.Ed. 1472.

24. N.Y.—People v. McGrath, 385 N.E.2d 541, 46 N.Y.2d 12, 412 N.Y.S.2d 801, certiorari denied McGrath v. New York, 99 S.Ct. 1535, 440 U.S. 972, 59 L.Ed.2d 788.

25. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

26. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

27. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

28. U.S.—In re Grand Jury Proceedings, C.A.1(Mass.), 786 F.2d 3.

29. U.S.—In re Grand Jury Proceedings, Hellmann, C.A.6(Ky.), 756 F.2d 428.

30. U.S.—Grand Jury Subpoena Duces Tecum v. U.S., C.A.8(S.D.), 868 F.2d 1014, rehearing denied.

31. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266—Matter of Battaglia, C.A.Ariz., 653 F.2d 419.

mony itself.³²

Standard of proof.

In a civil contempt proceeding, the case against the witness must be proven by clear and convincing evidence.³³ In the case of a criminal contempt, the court must be convinced of the guilt of accused beyond a reasonable doubt.³⁴

§ 161. Civil Sanctions

- a. In general
- b. Duration of sanction
- c. Requirement that sanction be potentially effective

a. In General

In a civil contempt proceeding concerning a grand jury witness, the court may order the confinement of the witness.

Library References

Grand Jury ⇐36.5-36.5(2).

In a civil contempt proceeding concerning a grand jury witness, the court may order the confinement of the witness.³⁵ A statute concerning federal civil contempt proceedings authorizes the court to order confinement.³⁶ The statute has been upheld.³⁷ Under some statutes, incarceration is improper in the case of a subpoena duces tecum.³⁸ Where incarceration is authorized, the court has wide latitude in determining whether to order such coercive incarceration.³⁹

It has been held that good faith is not a mitigating factor to be considered in determining the civil sanction to be imposed.⁴⁰

When the court is asked to exercise its discretion concerning civil sanctions, it has been held that the court may request a showing that the testimony sought is significant and unavailable from other sources, particularly where the showing can be made easily and expeditiously with an in camera letter and without compromising grand jury sources.⁴¹

Witness already serving sentence.

Where the court orders the incarceration of a person who is already confined pursuant to a criminal sentence, the court may suspend the running of such sentence.⁴² In the case of a federal court and a state sentence, the court may order that the state prisoner be placed in federal custody,⁴³ but cannot suspend the running of the state sentence.⁴⁴

Fine.

The court may impose a coercive fine,⁴⁵ as for example in the case of a corporation.⁴⁶

Compensation.

The witness is liable for a compensatory award in the amount of the actual losses demonstrated by the government.⁴⁷ In some circumstances, the government is entitled to an award of attorney fees based on the efforts necessarily expended to secure compliance with the court's order and to obtain compensation for the damages done,⁴⁸ or where a fine would have a more coercive effect than continued incarceration.⁴⁹

b. Duration of Sanction

In a civil contempt proceeding concerning a grand jury witness, the witness generally can be confined until and only until

32. N.Y.—People v. Marinaccio, 393 N.Y.S.2d 904, 90 Misc.2d 128.
 33. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.
 34. U.S.—U.S. v. Brown, C.C.A.Ill., 116 F.2d 455.
 35. U.S.—Shillitani v. U.S., N.Y., 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622.
 U.S. v. Bell, C.A.7(Ill.), 902 F.2d 563.
 36. 28 U.S.C.A. § 1826(a).
 37. U.S.—In re Grand Jury Investigation, C.A.Pa., 542 F.2d 166, certiorari denied In re Hartzell, 97 S.Ct. 755, 429 U.S. 1047, 50 L.Ed.2d 762.
 38. Tex.—Ex parte Marek, Cr.App., 653 S.W.2d 35.
 39. U.S.—In re Cueto, D.C.N.Y., 443 F.Supp. 857.
 40. Colo.—People v. Lucero, 584 P.2d 1208, 196 Colo. 276.
 41. U.S.—In re Grand Jury Proceedings (Doe), E.D.N.Y., 790 F.Supp. 422.
 42. U.S.—U.S. v. Chacon, C.A.S.C., 663 F.2d 494—In re Grand Jury Investigation, C.A.Pa., 542 F.2d 166, certiorari denied In re Hartzell, 97 S.Ct. 755, 429 U.S. 1047, 50 L.Ed.2d 762.

Pa.—Commonwealth v. Simon, 584 A.2d 895, 526 Pa. 69.
 43. U.S.—U.S. v. Richardson, C.A.Or., 638 F.2d 1189.
 44. U.S.—In re Liberatore, C.A.Conn., 574 F.2d 78.
 45. U.S.—In re Grand Jury Proceedings Bank of Nova Scotia, C.A.Fla., 740 F.2d 817, certiorari denied Bank of Nova Scotia v. U.S., 105 S.Ct. 778, 469 U.S. 1106, 83 L.Ed.2d 774.
 Tex.—Ex parte Marek, Cr.App., 653 S.W.2d 35.
 46. 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.
 47. U.S.—Matter of Grand Jury Subpoena of June 12, 1986, D.Md., 690 F.Supp. 1451.
 48. U.S.—Matter of Grand Jury Subpoena of June 12, 1986, D.Md., 690 F.Supp. 1451—In re Grand Jury Subpoenas Duces Tecum Served Upon 22nd Ave. Drugs, Inc., D.C.Fla., 633 F.Supp. 419.
 49. U.S.—Matter of Dickinson, C.A.2(N.Y.), 763 F.2d 84.

its discretion held that the testimony from other witnesses can be taken in camera grand jury

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he purges himself by compliance, but cannot be confined beyond the term of the grand jury. In a federal civil contempt proceeding, confinement cannot exceed 18 months.

In a civil contempt proceeding concerning a grand jury witness, where the court decides to order coercive incarceration, the length of incarceration is within the discretion of the court.⁵⁰

The witness generally can be confined until compliance.⁵¹ Thus, in a federal civil contempt proceeding, the court may order his confinement until such time as the witness is willing to give the required testimony or provide the required information.⁵² A civil contempt sentence must cease when the witness purges himself by testifying.⁵³ To purge himself of contempt, the contemnor must be willing to testify before and answer questions propounded by someone authorized by the grand jury.⁵⁴

Once the grand jury has ceased to function, the witness must be released from civil coercive confinement.⁵⁵ Thus, in a federal civil contempt proceeding, no period of confinement shall exceed the life of the term of the grand jury, including extensions.⁵⁶ Similarly, daily coercive fines cannot extend beyond the existence of the grand jury.⁵⁷ However, under some statutes, coercive confinement can be continued even after the dissolution of the grand jury, in which case the witness may purge himself by testifying before the court, thereby permitting the court to make a record that can be used if another grand jury is convened.⁵⁸

50. U.S.—In re Cueto, D.C.N.Y., 443 F.Supp. 857.

51. U.S.—Shillitani v. U.S., N.Y., 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622.

Alaska—E.L.L. v. State, 572 P.2d 786.

52. 28 U.S.C.A. § 1826(a).

53. W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

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

55. U.S.—Shillitani v. U.S., N.Y., 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622.

In re Grand Jury Witness, C.A.2(N.Y.), 835 F.2d 437, certiorari denied Arambulo v. U.S., 108 S.Ct. 1602, 485 U.S. 1039, 99 L.Ed.2d 917—In re Grand Jury Proceedings, C.A.Ga., 541 F.2d 464.

Alaska—E.L.L. v. State, Alaska, 572 P.2d 786.

Md.—Ex parte Maulsby, 13 Md. 625 appendix.

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

Tex.—Ex parte Wynne, Cr.App., 772 S.W.2d 132—Ex parte Port, Cr.App., 674 S.W.2d 772—Ex parte Jackson, 253 S.W. 287, 95 Tex.Cr. 200, 20 A.L.R. 1360.

W.Va.—In re Yoho, 301 S.E.2d 581, 171 W.Va. 625.

56. 28 U.S.C.A. § 1826(a)(2).

Maximum limit.

In the case of a federal civil contempt proceeding, in no event shall confinement exceed 18 months.⁵⁹ This is a limit on the total time that a witness may be held in custody for refusing to testify as to one subject,⁶⁰ regardless of the number of grand juries involved.⁶¹

c. Requirement That Sanction Be Potentially Effective

In a civil contempt proceeding concerning a grand jury witness, confinement should not be imposed or continued unless there is a realistic possibility that confinement may cause the witness to testify.

In a civil contempt proceeding concerning a grand jury witness, confinement should not be imposed or continued unless there is a realistic possibility that confinement may cause the witness to testify.⁶² Where no such realistic possibility exists, confinement becomes punitive.⁶³ In a federal civil contempt proceeding, the court has broad discretion to determine that confinement has lost its coercive effect at some point short of the 18-month maximum limit,⁶⁴ and unusual circumstances need not exist.⁶⁵

The fact that the witness is motivated by fear in refusing to testify is a factor to be considered in determining whether there is a realistic possibility that a civil sanction will be effective.⁶⁶ The witness' fears must actually prevent his testifying.⁶⁷

Disclosure

Person who was found in civil contempt for failure to testify before grand jury is entitled to disclosure of grand jury's commencement and termination dates.

U.S.—In re Grand Jury Investigation, C.A.3(Pa.), 903 F.2d 180.

57. U.S.—In re Grand Jury Proceedings, C.A.1(Mass.), 871 F.2d 156, rehearing denied, certiorari denied National Democratic Policy Committee v. U.S., 110 S.Ct. 280, 493 U.S. 918, 107 L.Ed.2d 260.

58. Pa.—Commonwealth v. Simon, 584 A.2d 895, 526 Pa. 69.

59. 28 U.S.C.A. § 1826(a).

60. U.S.—In re Andrews, D.C.Mich., 469 F.Supp. 171.

61. U.S.—In re Andrews, D.C.Mich., 469 F.Supp. 171.

62. U.S.—In re Grand Jury Subpoena 87-2 (MIA) Served Upon Constant, S.D.Fla., 691 F.Supp. 1400.

63. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29.

64. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29—Simkin v. U.S., C.A.N.Y., 715 F.2d 34.

65. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29.

66. U.S.—In re Grand Jury Proceedings, C.A.2(Vt.), 862 F.2d 430.

In re Grand Jury Proceedings (Doe), E.D.N.Y., 790 F.Supp. 422.

67. U.S.—Matter of Grand Jury Proceedings of Dec., C.A.7(III), 1989, 903 F.2d 1167.

The witness does not necessarily prove that a civil sanction will be ineffective by his mere assertion.⁶⁸ The court need not accept as conclusive the contemnor's avowed intention never to testify.⁶⁹ However, the court is not precluded from accepting such an avowal, and the contemnor need not necessarily prove circumstances which would prevent him from changing his mind.⁷⁰ The contemnor need not risk the use of physical force on his person or risk incurring a self-inflicted injury in order to demonstrate that continued confinement will not alter his determination not to testify.⁷¹ The mere fact that confinement has not yet resulted in testimony does not prove that it will not do so in the future.⁷²

Standard of proof.

The witness must show by a preponderance of the evidence that he is unlikely to be coerced by continued confinement.⁷³

§ 162. Criminal Sanctions

In a criminal contempt proceeding concerning a grand jury witness, the fact that the witness is motivated by fear is a factor in mitigation of punishment.

Library References

Grand Jury ⇐36.5(2).

In a criminal contempt proceeding concerning a grand jury witness, the fact that the witness is motivated by fear is a factor in mitigation of punishment.⁷⁴

An indeterminate sentence may be imposed for contempt.⁷⁵

The 18-month limit on confinement imposed in a federal civil contempt proceeding⁷⁶ is inapplicable to a nonsummary criminal contempt proceeding.⁷⁷

The sentence imposed for contempt should not exceed the maximum sentence which could have

been imposed if the witness has committed perjury.⁷⁸

Multiple violations.

It has been held that, ordinarily, each succeeding refusal to answer the same questions constitutes a new offense.⁷⁹ However, it has also been held that, once the witness makes clear that he will not answer any questions, the prosecutor cannot multiply the punishment by simply continuing to ask questions on the same subject matter,⁸⁰ and that refusal to answer multiple questions on the same subject justifies only a single count of contempt.⁸¹ In the case of separate refusals to testify before different grand juries, it has been held that the combined penalties may exceed the statutory maximum penalty for a refusal.⁸²

Witness already serving another sentence.

In a federal contempt proceeding, where the witness is already serving a state sentence, the court may coerce testimony by adjudicating a criminal contempt but postponing imposition of sentence,⁸³ or by imposing a criminal sentence coupled with a promise to consider subsequent compliance in ruling on any motion for a reduction of sentence.⁸⁴

§ 163. Appeal

In a civil contempt proceeding concerning a grand jury witness, an order holding the witness in contempt is appealable, at least where the witness is committed for contempt.

Library References

Grand Jury ⇐36.5, 36.5(2), 36.9, 36.9(1).

In a civil contempt proceeding concerning a grand jury witness, an order holding the witness in contempt is appealable.⁸⁵ An appeal may be taken

68. U.S.—In re Grand Jury Proceedings, C.A.2(Vt.), 862 F.2d 430—Simkin v. U.S., C.A.N.Y., 715 F.2d 34—U.S. v. Dien, C.A.N.Y., 598 F.2d 743.

In re Pantojas, D.C.Puerto Rico, 496 F.Supp. 344.

69. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29.

70. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29.

71. U.S.—Sanchez v. U.S., C.A.N.Y., 725 F.2d 29.

72. U.S.—In re Pantojas, D.C.Puerto Rico, 496 F.Supp. 344.

73. U.S.—Matter of Ford, D.C.N.Y., 615 F.Supp. 259.

74. U.S.—U.S. v. Gomez, C.A.Tex., 553 F.2d 958.

U.S. v. Esposito, S.D.N.Y., 633 F.Supp. 544.

75. D.C.—Matter of Neal, App., 475 A.2d 390.

76. 28 U.S.C.A. § 1826(a).

77. D.C.—Matter of Neal, App., 475 A.2d 390.

78. U.S.—U.S. v. Gracia, C.A.N.Y., 755 F.2d 984.

79. Minn.—State v. Kasherman, 224 N.W. 838, 177 Minn. 200, certiorari denied Kasherman v. State of Minnesota, 50 S.Ct. 85, 280 U.S. 602, 74 L.Ed. 647.

80. N.Y.—People v. Casalini, 483 N.Y.S.2d 899, 126 Misc.2d 665.

81. N.Y.—People v. DeMartino, 422 N.Y.S.2d 949, 71 A.D.2d 477.

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

83. U.S.—In re Liberatore, C.A.Conn., 574 F.2d 78.

84. U.S.—In re Liberatore, C.A.Conn., 574 F.2d 78.

85. U.S.—Matter of a Witness Before Special Oct. 1981 Grand Jury, C.A.Ill., 722 F.2d 349—Lowthian v. U.S., C.A.Or., 575 F.2d 1292.

from an adjudication of contempt and a commitment thereunder.⁸⁶

An appeal generally cannot be taken where the witness complies with the order to provide evidence and purges his contempt, and generally can be taken only if the witness chooses to disobey and is committed for contempt.⁸⁷ Exceptions to this rule are allowed only in the limited class of cases where denial of immediate review would render impossible any review whatsoever.⁸⁸

An argument not raised below generally cannot be raised on appeal.⁸⁹

In a federal civil contempt proceeding, any appeal from an order of confinement shall be disposed of as soon as practicable, but not later than 30 days from the filing of such appeal.⁹⁰ The 30-day requirement does not apply where the witness is not incarcerated,⁹¹ or remains at liberty during the pendency of the appeal.⁹²

H. EXAMINATION OF WITNESS

§ 164. In General

For all ordinary purposes of procuring evidence, a grand jury is clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules.

Library References

Grand Jury ⇨36.6, 36.7.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

For all ordinary purposes of procuring evidence, a grand jury is clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules.⁹³ As long as a correct sense of justice is maintained throughout the hearing and a fair opportunity is furnished for an explanation, mere irregularities of procedure in the examination of a witness cannot be made the basis for reopening the grand jury inquiry.⁹⁴ The grand jurors may conduct the examination of witnesses and are not obliged to call in the prosecuting attorney.⁹⁵

Witnesses before the grand jury do not, as do the witnesses before a trial jury, testify in the presence and under the eye of the court;⁹⁶ and when and in

what order they may be called is a matter within the discretion of the grand jury.⁹⁷

The prosecutor may ask leading questions,⁹⁸ at least where the proceedings are lengthy and deal with complex factual situations.⁹⁹ However, it has been held that a witness ought to be given a fair opportunity to respond fully to questions, and ought not to be limited to the "yes" or "no" that typifies answers to leading questions.¹ The prosecutor may question a witness about his relationships with others who may be the subject of inquiry.² One who testifies that he never did a certain act can have the credibility of such testimony attacked by being asked whether he at another time and on a different occasion stated that he had done the act.³

The grand jury must protect a witness from an overzealous prosecutor to prevent a manipulated perjury entrapment.⁴

Examination of accused exercising right of participation.

Under a statute giving accused or the person subject to investigation a right to testify, after

86. Pa.—Petition of Shelley, 5 A.2d 613, 135 Pa.Super. 376.

87. Mass.—Commonwealth v. Winer, 404 N.E.2d 654, 380 Mass. 934. Pa.—Petition of Shelley, 5 A.2d 613, 135 Pa.Super. 376.

88. Mass.—Commonwealth v. Winer, 404 N.E.2d 654, 380 Mass. 934.

89. U.S.—In re Rosahn, C.A.N.Y., 671 F.2d 690—In re Bianchi, C.A.Mass., 542 F.2d 98.

Pa.—Robert Hawthorne, Inc. v. County Investigating Grand Jury, 412 A.2d 556, 488 Pa. 373.

90. 28 U.S.C.A. § 1826(b).

91. U.S.—Matter of Kitchen, C.A.N.Y., 706 F.2d 1266.

92. U.S.—In re Grand Jury Proceedings (GJ90-2), C.A.11(Ga.), 946 F.2d 746, rehearing denied 954 F.2d 731—In re Sealed Case, 829 F.2d 189, 264 U.S.App.D.C. 404.

93. N.Y.—People v. Sexton, 80 N.E. 396, 187 N.Y. 495.

94. N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

95. N.Y.—People v. Grout, 147 N.Y.S. 591, 85 Misc. 570, 30 N.Y.Crim.R. 264.

96. U.S.—In re Kittle, C.C.N.Y., 180 F. 946.

97. N.Y.—People v. Sexton, 80 N.E. 396, 187 N.Y. 495.

98. U.S.—U.S. v. Weiss, C.A.N.Y., 752 F.2d 777, certiorari denied 106 S.Ct. 308, 474 U.S. 944, 88 L.Ed.2d 285.

99. Ariz.—Baines v. Superior Court In and For Pima County, App., 688 P.2d 1037, 142 Ariz. 145.

1. U.S.—U.S. v. Boberg, C.A.Mo., 565 F.2d 1059.

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

3. U.S.—U.S. v. O'Connor, W.D.N.Y., 750 F.Supp. 90.

4. N.Y.—People v. Doe, 406 N.Y.S.2d 650, 95 Misc.2d 175.

testifying such person is subject to cross-examination by the prosecutor.⁵ Questioning into prior acts of misconduct for impeachment purposes must be in good faith and have a reasonable basis in fact.⁶

Interpreter.

In some circumstances an interpreter must be provided for a witness,⁷ as where the witness is deaf.⁸ The interpreter must be qualified,⁹ and should generally be a disinterested person.¹⁰

§ 165. Oath

Ordinarily, a witness must be sworn before he may be examined before the grand jury.

Library References

Grand Jury ⇨36.6.

Except where the reception of unsworn testimony is authorized by statute,¹¹ it is a general rule that a witness must be sworn before he may be examined before the grand jury.¹² Under some statutes, a child or person with a mental disease or defect who cannot understand the nature of an oath may give unsworn evidence if the prosecutor is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.¹³

By whom administered.

Some authorities hold that the oath may be administered only by the prosecutor or the foreman.¹⁴ Others hold that the oath may be administered only by a grand juror,¹⁵ but that where testimony is submitted by means of videotape the oath may be administered by the prosecutor.¹⁶

Where administered.

Some authorities hold that the oath may be administered in the grand jury room,¹⁷ while others hold that it must be administered in open court.¹⁸

Form.

Where the form of oath to be administered to witnesses before the grand jury is prescribed by statute, there must be substantial compliance therewith.¹⁹ Under some statutes, the oath must state the offense being investigated²⁰ and whether the prosecutor is seeking an indictment or a presentment.²¹

§ 166. Cross-Examination or Confrontation By Accused

In a grand jury proceeding, accused or the person under investigation generally has no right to cross-examine or confront the prosecutor's witnesses.

Library References

Grand Jury ⇨35, 36.6.

In a grand jury proceeding, accused or the person under investigation generally has no right to cross-examine²² or confront²³ the prosecutor's witnesses.

However, some authorities, although holding that accused has no absolute right even to be present during grand jury proceedings, normally afford accused the privilege of cross-examining witnesses.²⁴

§ 167. Warnings, Advice, or Disclosure to Witness

Authorities differ as to whether grand jury witnesses should be given certain warnings.

5. N.Y.—People v. Dunbar, 419 N.Y.S.2d 432, 100 Misc.2d 389.
 6. N.Y.—People v. Loizides, 479 N.Y.S.2d 663, 125 Misc.2d 537.
 7. N.Y.—People v. Rodriguez, 546 N.Y.S.2d 769, 145 Misc.2d 105.
 8. N.Y.—People v. Rodriguez, 546 N.Y.S.2d 769, 145 Misc.2d 105.
 9. N.Y.—People v. Rodriguez, 546 N.Y.S.2d 769, 145 Misc.2d 105.
 10. N.J.—State v. Lee, 512 A.2d 525, 211 N.J.Super. 590.
 11. N.Y.—People v. Sexton, 80 N.E. 396, 187 N.Y. 495.
 12. N.Y.—People v. Vasquez, 464 N.Y.S.2d 685, 119 Misc.2d 896.
 Ohio—Duke v. State, 20 Ohio St. 225.
 13. N.Y.—People v. Groff, 518 N.E.2d 908, 71 N.Y.2d 101, 524 N.Y.S.2d 13.
 14. Ala.—Bogle v. State, Cr.App., 477 So.2d 507.
 15. N.Y.—People v. Rivers, 1 Dept., 534 N.Y.S.2d 986, 145 A.D.2d 319, appeal denied 538 N.E.2d 367, 73 N.Y.2d 981, 540 N.Y.S.2d 1015.
 16. N.Y.—People v. Cooper, 1 Dept., 566 N.Y.S.2d 267, 170 A.D.2d 374, appeal denied 577 N.E.2d 1065, 78 N.Y.2d 921, 573 N.Y.S.2d 473.

17. Conn.—State v. Fasset, 16 Conn. 457.
 Ga.—Johnson v. State, 171 S.E. 699, 177 Ga. 881.
 18. Ill.—Boone v. People, 36 N.E. 99, 148 Ill. 440.
 19. Ga.—Switzer v. State, 65 S.E. 1079, 7 Ga.App. 7.
 20. Ga.—State v. Williams, 351 S.E.2d 727, 181 Ga.App. 204.
 21. Ga.—State v. Williams, 351 S.E.2d 727, 181 Ga.App. 204.
 22. 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.
 U.S. v. Deerfield Speciality Papers, Inc., D.C.Pa., 501 F.Supp. 796.
 Ga.—In re Hall County Grand Jury Proceedings, 333 S.E.2d 389, 175 Ga.App. 349, certiorari vacated 338 S.E.2d 864, 255 Ga. 241.
 N.Y.—People v. Scalise, 421 N.Y.S.2d 637, 70 A.D.2d 346.
 23. Alaska—State v. Nollner, App., 749 P.2d 905.
 24. Conn.—State v. Morrill, 498 A.2d 76, 197 Conn. 507.

Library References

Grand Jury § 36.7, 37.

It has been held that a grand jury witness need not be given "Miranda" warnings,²⁵ or warned of various matters,²⁶ such as his constitutional rights,²⁷ the privilege against self-incrimination,²⁸ his status as a target,²⁹ the possibility of perjury charges,³⁰ or the fact that the government or the grand jury

25. U.S.—U.S. v. Bednar, C.A.Mo., 728 F.2d 1043, certiorari denied 105 S.Ct. 110, 469 U.S. 827, 83 L.Ed.2d 54—U.S. v. Long, C.A.Wash., 706 F.2d 1044.

U.S. v. Gillespie, N.D.Ind., 773 F.Supp. 1154, affirmed in part 974 F.2d 796, amended on denial of rehearing—U.S. v. Countryside Farms, Inc., D.C.Utah, 428 F.Supp. 1150—Moynahan v. Manson, D.C.Conn., 419 F.Supp. 1139, affirmed 559 F.2d 1204, certiorari denied 98 S.Ct. 430, 434 U.S. 939, 54 L.Ed.2d 299.

R.I.—State v. Driscoll, 360 A.2d 857, 116 R.I. 749.

Miranda warnings in general see C.J.S. Criminal Law § 918. Grand jury proceeding as not constituting custodial interrogation requiring procedural safeguards as prerequisite to admissibility of evidence at subsequent criminal trial see C.J.S. Criminal Law § 903.

Not constitutionally required

Ohio—State v. Cook, 464 N.E.2d 577, 11 Ohio App.3d 237, 11 O.B.R. 362.

26. Mass.—Commonwealth v. Weed, 459 N.E.2d 144, 17 Mass.App. Ct. 463.

27. Mass.—Commonwealth v. Weed, 459 N.E.2d 144, 17 Mass.App. Ct. 463.

28. Ga.—State v. Butler, 340 S.E.2d 214, 177 Ga.App. 594, certiorari denied.

Caution to witness concerning privilege against self-incrimination in general see C.J.S. Witnesses § 449.

Prior notice

Defendant received adequate notice of his Fifth Amendment rights where they were outlined in material enclosed with his grand jury subpoena.

U.S.—U.S. v. Torcasio, C.A.4(W.Va.), 959 F.2d 503, certiorari denied 113 S.Ct. 1253, 507 U.S. 909, 122 L.Ed.2d 652, amended, mandate recalled 993 F.2d 368.

29. U.S.—U.S. v. Burke, C.A.7(Ill.), 781 F.2d 1234—U.S. v. Kelly, C.A.Cal., 540 F.2d 990, certiorari denied 97 S.Ct. 738, 429 U.S. 1040, 50 L.Ed.2d 751.

U.S. v. Gillespie, N.D.Ind., 773 F.Supp. 1154, affirmed in part 974 F.2d 796, amended on denial of rehearing—U.S. v. Shearson Lehman Bros., Inc., E.D.Pa., 650 F.Supp. 490—U.S. v. Weiner, D.C.Pa., 418 F.Supp. 941, affirmed U.S. v. Shinnick, 546 F.2d 420 and 546 F.2d 421, certiorari denied 97 S.Ct. 1135, two cases, 429 U.S. 1105, 51 L.Ed.2d 557.

Pa.—Commonwealth v. Williams, 565 A.2d 160, 388 Pa.Super. 153.

Warning not prerequisite to admissibility of evidence at subsequent criminal trial see C.J.S. Criminal Law § 918.

Not constitutionally required

U.S.—U.S. v. D'Auria, C.A.N.Y., 672 F.2d 1085—U.S. v. Scrimgeour, C.A.Fla., 636 F.2d 1019, rehearing denied 642 F.2d 1210, certiorari denied 102 S.Ct. 359, 454 U.S. 878, 70 L.Ed.2d 188.

30. U.S.—U.S. v. Long, C.A.Wash., 706 F.2d 1044.

31. U.S.—U.S. v. Goguen, C.A.Mass., 723 F.2d 1012.

have information contrary to his testimony or suspect that he is lying.³¹

However, it has also been held that a witness should be warned of certain matters,³² such as his constitutional rights,³³ the privilege against self-incrimination,³⁴ a right to counsel,³⁵ and his status as a target.³⁶

32. Lineup

No one may be subpoenaed to appear before the grand jury to receive lineup directive without being informed that prosecutor must make "minimal factual showing" that reason for lineup directive is consistent with legitimate function of grand jury; recipient must also be informed of right to challenge directive in court.

D.C.—Brown v. U.S., 518 A.2d 415, certiorari denied 108 S.Ct. 1274, 485 U.S. 978, 99 L.Ed.2d 485.

Face of subpoena

(1) If prosecuting attorney makes threshold decision that witness to be subpoenaed to appear before grand jury is a putative, focused-on suspect in the criminal conduct being investigated by grand jury advisement of rights on face of grand jury subpoena is necessary.

Colo.—People ex rel. Gallagher v. District Court In and For Eighteenth Judicial Dist., Arapahoe County, 601 P.2d 1380, 198 Colo. 468.

(2) Oral advisement of rights, in presence of grand jury, to a witness who was a suspect in the matter under investigation did not meet requirements of statute requiring that witness be served with a subpoena containing an advisement of rights.

Colo.—People ex rel. Gallagher v. District Court In and For Eighteenth Judicial Dist., Arapahoe County, 601 P.2d 1380, 198 Colo. 468.

33. Warnings sometimes necessary

Ohio—State v. Childress, 2 Dist., 585 N.E.2d 567, 66 Ohio App.3d 491.

34. Ohio—State v. Childress, 2 Dist., 585 N.E.2d 567, 66 Ohio App.3d 491.

Better practice

U.S.—U.S. v. Torcasio, C.A.4(W.Va.), 959 F.2d 503, certiorari denied 113 S.Ct. 1253, 507 U.S. 909, 122 L.Ed.2d 652, amended, mandate recalled 993 F.2d 368—U.S. v. Whitaker, C.A.Fla., 619 F.2d 1142.

Right to remain silent

Target should be warned of state law right to remain silent.

Ariz.—State v. Doolittle, App., 746 P.2d 924, 155 Ariz. 352.

35. Target gets warning

Ariz.—State v. Doolittle, App., 746 P.2d 924, 155 Ariz. 352.

Ind.—Robinson v. State, 453 N.E.2d 280.

Consultation

Ohio—State v. Childress, 2 Dist., 585 N.E.2d 567, 66 Ohio App.3d 491.

Lineup

No one may be subpoenaed to receive lineup directive without being informed of right to consult with counsel before complying with subpoena or 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.

36. N.J.—State v. Hollander, 493 A.2d 563, 201 N.J.Super. 453, certification denied 501 A.2d 983, 101 N.J. 335.

The witness has a right not to be misinformed or led astray concerning his constitutional rights.³⁷

A witness has no right to inquire into the sources underlying questions asked of the witness,³⁸ or to inspect other evidence presently before the panel.³⁹

A witness is not entitled to a copy of his prior statement.⁴⁰ However, under some statutes, a witness is entitled to examine and copy a prior statement of the witness before testifying.⁴¹

I. PRESENTATION OF EVIDENCE

§ 168. Presentation of Evidence By Prosecutor

In a grand jury proceeding, the prosecutor has wide discretion in determining what evidence or witnesses will be presented.

Library References

Grand Jury ¶34, 36.8.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

In a grand jury proceeding, the prosecutor has wide discretion in presenting his case to the grand jury,⁴² and in determining what evidence⁴³ or witnesses⁴⁴ will be presented. The prosecutor need not present all the incriminatory evidence he has,⁴⁵ or call his best available witnesses,⁴⁶ or inform the grand jury of the existence of additional or more direct evidence.⁴⁷

However, prosecutorial discretion as to the evidence to be presented is not unlimited.⁴⁸ It has been held that the prosecutor's presentation must be fair and impartial.⁴⁹

The prosecutor may schedule witnesses without thereby violating the duty to conduct himself in a fair and impartial manner.⁵⁰ However, the prosecutor may not juggle witnesses in order to keep out relevant testimony.⁵¹

The prosecutor generally should honor a grand jury request for additional evidence if such evidence is admissible.⁵² However, it has been held that the prosecutor need not honor a request for evidence concerning mental illness on the part of accused.⁵³

§ 169. Duty to Present or Obtain Evidence Favorable to Accused

- a. In general
- b. Type of evidence covered

a. In General

While it has been held that, in a grand jury proceeding, the prosecutor need not present exculpatory evidence, it has also been held that the prosecutor must present exculpatory evidence or

Required by supervisory power of court

U.S.—U.S. v. Jacobs, C.A.N.Y., 547 F.2d 772, certiorari dismissed 98 S.Ct. 1873, 436 U.S. 31, 56 L.Ed.2d 53.

Better practice

U.S.—U.S. v. Whitaker, C.A.Fla., 619 F.2d 1142.

When required

(1) Target warning must be given to any witness appearing before grand jury whom state already has probable cause to arrest, whom state is either actively investigating or planning to investigate, or whom, during course of examination, clearly becomes the subject of future investigation.

Alaska—Pinkerton v. State, App., 784 P.2d 671.

(2) Target warning need not be given to witness appearing before grand jury, unless it is foreseeable to prosecution that matter for which witness is under investigation will be brought out during his testimony.

Alaska—Pinkerton v. State, App., 784 P.2d 671.

(3) Target warning need not be given to potential defendant appearing before grand jury, if state has made policy decision not to prosecute witness prior to the time that witness is subpoenaed to testify.

Alaska—Pinkerton v. State, App., 784 P.2d 671.

37. Mass.—Commonwealth v. Weed, 459 N.E.2d 144, 17 Mass.App. Ct. 463.

38. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.

39. U.S.—Matter of Wood, D.C.N.Y., 430 F.Supp. 41.

40. N.Y.—Application of Rodriguez, 468 N.Y.S.2d 833, 121 Misc.2d 694.

41. Colo.—People ex rel. Gallagher v. District Court In and For Eighteenth Judicial Dist., Arapahoe County, 601 P.2d 1380, 198 Colo. 468.

42. N.Y.—People v. Martucci, 2 Dept., 545 N.Y.S.2d 385, 153 A.D.2d 866, appeal denied 549 N.E.2d 487, 74 N.Y.2d 950, 550 N.Y.S.2d 285.

43. D.C.—Miles v. U.S., App., 483 A.2d 649.

44. N.Y.—People v. Futia, 449 N.Y.S.2d 577, 113 Misc.2d 651.

45. 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.

N.Y.—People v. Filis, 386 N.Y.S.2d 988, 87 Misc.2d 1067.

46. U.S.—U.S. v. Head, C.A.Fla., 586 F.2d 508.

47. 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.

48. Ill.—People v. Willie, 388 N.E.2d 102, 26 Ill.Dec. 478, 69 Ill. App.3d 964.

49. Ariz.—Crimmins v. Superior Court, In and For Maricopa County, 668 P.2d 882, 137 Ariz. 39.

N.Y.—People v. Manfro, 571 N.Y.S.2d 986, 150 Misc.2d 1080.

50. N.M.—State v. Cruz, 662 P.2d 1357, 99 N.M. 690.

51. N.M.—State v. Cruz, 662 P.2d 1357, 99 N.M. 690.

52. Minn.—State v. Wollan, 303 N.W.2d 253.

53. Minn.—State v. Wollan, 303 N.W.2d 253.

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that the grand jury must order the production of such evidence if it has reason to believe that such evidence is in reach.

Library References

Grand Jury § 34, 36.8.

It has been held that, in a grand jury proceeding, the prosecutor need not present exculpatory evidence,⁵⁴ even if such evidence is substantial,⁵⁵ and need not present evidence impeaching the credibility of his witness.⁵⁶

However, it has also been held that the prosecutor must present exculpatory evidence,⁵⁷ or that the grand jury must order the production of exculpatory evidence if it has reason to believe that such evidence is within reach.⁵⁸ The prosecutor need not actually present the evidence, and need only inform the grand jury of its existence and give the grand jury an opportunity to order its production.⁵⁹

Only a knowing withholding of exculpatory evidence is improper.⁶⁰ The prosecutor need inform the grand jury only of evidence of which he is aware,⁶¹ and need not seek out evidence,⁶² or develop evidence,⁶³ or report investigatory steps or procedures not taken.⁶⁴ However, it has been held that the prosecutor cannot posture the handling of

the case to avoid knowing of exculpatory evidence,⁶⁵ and may be deemed to know of matters which he should know about.⁶⁶

The prosecutor need not present evidence which is merely possibly favorable to accused,⁶⁷ or leads that might prove favorable to accused if pursued at trial.⁶⁸ The mere fact that evidence is inconsistent with inculpatory evidence does not mean that it must be presented.⁶⁹ While the prosecutor generally must present evidence regarding an exculpatory defense,⁷⁰ he need not present evidence regarding a mitigating defense.⁷¹ The prosecutor need not present evidence of insanity⁷² or of mental disease or defect.⁷³

Credibility.

Some authorities who require the presentation of exculpatory evidence hold that the prosecutor need not present evidence concerning credibility.⁷⁴ However, it has also been held that the prosecutor must present evidence impeaching the credibility of his witness,⁷⁵ where the evidence would greatly undermine the credibility of an important witness⁷⁶ or of evidence likely to affect the decision to indict.⁷⁷ The prosecutor need not present all evi-

Evidence Fa-

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Ill.Dec. 478, 69 Ill.

For Maricopa County,

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54. U.S.—U.S. v. Williams, Okl., 112 S.Ct. 1735, 504 U.S. 36, 118 L.Ed.2d 352.

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

Mo.—State v. Easter, App., 661 S.W.2d 644.

55. U.S.—U.S. v. Williams, Okl., 112 S.Ct. 1735, 504 U.S. 36, 118 L.Ed.2d 352.

56. U.S.—U.S. v. Jones, C.A.6(Ky.), 766 F.2d 994, certiorari denied 106 S.Ct. 526, 474 U.S. 1006, 88 L.Ed.2d 458.

U.S. v. Smith, C.A.Mo., 552 F.2d 257.

57. Alaska—Sheldon v. State, App., 796 P.2d 831.

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

N.M.—Matter of Grand Jury Sandoval County, App., 750 P.2d 464, 106 N.M. 764.

58. Minn.—State v. Lane, 263 N.W. 608, 195 Minn. 587.

N.Y.—In re Grand Jury, 135 N.Y.S. 103.

Utah—Strehl v. District Court of Salt Lake County, 558 P.2d 597.

59. Alaska—Esmailka v. State, App., 740 P.2d 466.

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

Mass.—Com. v. Connor, 467 N.E.2d 1340, 392 Mass. 838.

60. N.M.—State v. Gonzales, App., 624 P.2d 1033, 95 N.M. 636.

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

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

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.

63. Alaska—Blume v. State, App., 797 P.2d 664.

64. Alaska—Gieffels v. State, 590 P.2d 55.

65. N.M.—State v. Payne, App., 630 P.2d 299, 96 N.M. 347.

66. N.M.—State v. Payne, App., 630 P.2d 299, 96 N.M. 347.

67. Alaska—Konrad v. State, App., 763 P.2d 1369.

68. Alaska—Blume v. State, App., 797 P.2d 664.

69. Alaska—Abruska v. State, App., 705 P.2d 1261.

70. N.Y.—People v. Haggmann, 3 Dept., 553 N.Y.S.2d 908, 160 A.D.2d 1125.

71. N.Y.—People v. Haggmann, 3 Dept., 553 N.Y.S.2d 908, 160 A.D.2d 1125.

What constitutes

If defense is one that is offered for purposes of lessening criminal charges, it is mitigating defense and presentation of that defense at grand jury proceeding is not mandated.

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

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

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

73. 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.

74. N.M.—Buzbee v. Donnelly, 634 P.2d 1244, 96 N.M. 692.

75. Conflict of interest

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

Cooperation agreement

N.Y.—People v. Gallman, 579 N.Y.S.2d 561, 152 Misc.2d 1033.

76. Mass.—Commonwealth v. Daye, 587 N.E.2d 194, 411 Mass. 719.

77. Mass.—Commonwealth v. McGahee, 473 N.E.2d 1077, 393 Mass. 743.

dence concerning credibility.⁷⁸

Evidence otherwise inadmissible.

Some authorities hold that only evidence admissible at trial need be presented,⁷⁹ and that inadmissible hearsay need not be presented.⁸⁰ Others, who hold that hearsay is generally inadmissible before the grand jury, nevertheless hold that even hearsay exculpatory evidence must be presented.⁸¹

b. Type of Evidence Covered

Authorities who hold that exculpatory evidence must be presented in a grand jury proceeding nevertheless hold that the prosecutor need not present all evidence favorable to accused.

Authorities who hold that exculpatory evidence must be presented or ordered to be produced in a grand jury proceeding nevertheless hold that the prosecutor need not present all evidence favorable to accused,⁸² or all exculpatory evidence,⁸³ and that the grand jury need not consider all exculpatory evidence.⁸⁴ There is no precise formula to determine under what circumstances the prosecutor must present exculpatory evidence.⁸⁵ The court must balance the prosecutor's right to exercise his

discretion as to what material should be presented with the grand jury's right to hear the full story and make an independent decision.⁸⁶

It has been held that evidence must be presented only if it substantially⁸⁷ or directly⁸⁸ and in and of itself⁸⁹ negates guilt,⁹⁰ or precludes indictment,⁹¹ or objectively refutes the facts as they appear from the state's evidence,⁹² or would deter the grand jury from finding probable cause,⁹³ or would possibly cause the grand jury to change its findings,⁹⁴ or is clearly exculpatory,⁹⁵ or substantially favorable to accused.⁹⁶

§ 170. Presentation of Evidence By Accused

In a grand jury proceeding, accused or the person under investigation has no right to present evidence or to have witnesses heard.

Library References

Grand Jury ¶¶ 35, 36.8.

In a grand jury proceeding, accused or the person under investigation has no right to present evidence,⁹⁷ or to have witnesses heard.⁹⁸ Whether accused may testify is treated supra §§ 99, 100.

78. N.Y.—*People v. Suarez*, 2 Dept., 505 N.Y.S.2d 728, 122 A.D.2d 861, appeal denied 499 N.E.2d 885, 68 N.Y.2d 817, 507 N.Y.S.2d 1036.

79. N.M.—*Buzbee v. Donnelly*, 634 P.2d 1244, 96 N.M. 692.

80. N.Y.—*People v. Dean*, 2 Dept., 562 N.Y.S.2d 521, 167 A.D.2d 480.

81. Alaska—*Esmailka v. State*, App., 740 P.2d 466.

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.

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

Mass.—*Commonwealth v. McGahee*, 473 N.E.2d 1077, 393 Mass. 743.

No initial obligation to present exculpatory evidence

N.Y.—*People v. Scott*, 568 N.Y.S.2d 857, 150 Misc.2d 297—*People v. Monroe*, 480 N.Y.S.2d 259, 125 Misc.2d 550—*People v. Filis*, 386 N.Y.S.2d 988, 87 Misc.2d 1067.

84. Ariz.—*State v. Baumann*, 610 P.2d 38, 125 Ariz. 404.

85. N.Y.—*People v. Monroe*, 480 N.Y.S.2d 259, 125 Misc.2d 550.

86. N.Y.—*People v. Scott*, 568 N.Y.S.2d 857, 150 Misc.2d 297.

87. Alaska—*Abruska v. State*, App., 705 P.2d 1261.

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.

88. N.M.—*State v. Lara*, App., 797 P.2d 296, 110 N.M. 507, certiorari denied 795 P.2d 1022, 110 N.M. 330.

89. Alaska—*York v. State*, App., 757 P.2d 68.

Without inference or presumption

N.M.—*State v. Lara*, App., 797 P.2d 296, 110 N.M. 507, certiorari denied 795 P.2d 1022, 110 N.M. 330.

90. Alaska—*Wilkie v. State*, App., 715 P.2d 1199.

N.M.—*State v. Gonzales*, App., 624 P.2d 1033, 95 N.M. 636.

Wholly exculpates

N.Y.—*People v. Curry*, 579 N.Y.S.2d 1000, 153 Misc.2d 61.

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

92. Or.—*State v. Harwood*, 609 P.2d 1312, 45 Or.App. 931, review denied 289 Or. 337.

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

94. N.Y.—*People v. Scott*, 568 N.Y.S.2d 857, 150 Misc.2d 297—*People v. Abbatiello*, 494 N.Y.S.2d 625, 129 Misc.2d 831—*People v. Monroe*, 480 N.Y.S.2d 259, 125 Misc.2d 550—*People v. Filis*, 386 N.Y.S.2d 988, 87 Misc.2d 1067.

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

Hawaii—*State v. Hall*, 660 P.2d 33, 66 Haw. 300.

96. Alaska—*Lipscomb v. State*, App., 700 P.2d 1298—*Tookak v. State*, App., 648 P.2d 1018, appeal after remand 680 P.2d 509.

97. 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.

U.S. v. *Deerfield Speciality Papers, Inc.*, D.C.Pa., 501 F.Supp. 796.

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.—*In re Hall County Grand Jury Proceedings*, 333 S.E.2d 389, 175 Ga.App. 349, certiorari vacated 338 S.E.2d 864, 255 Ga. 241.

N.Y.—*People v. Griffin*, 517 N.Y.S.2d 366, 135 Misc.2d 775—*People v. Perez*, 433 N.Y.S.2d 541, 105 Misc.2d 845.

98. U.S.—*Stevens v. State*, W.D.N.C., 638 F.Supp. 1255.

U.S. v. *Bolles*, D.C.Mo., 209 F. 682.

La.—*State v. Harvey*, 106 So. 28, 159 La. 674, error dismissed *Harvey v. State*, 47 S.Ct. 20, 273 U.S. 635, 71 L.Ed. 815.

It has been held that a grand jury has no authority, unless directed by the court, to swear and examine witnesses on behalf of accused, not required on the part of the prosecution.⁹⁹

Some authorities hold that accused may request the grand jury to hear a witness, and that the

grand jury may as a matter of discretion grant such request.¹ The prosecutor may demand that the witness waive immunity, in which case the witness may testify only if he waives immunity.² The prosecutor has broad discretion as to whether to demand a waiver of immunity,³ and such discretion is not unconstitutional.⁴

J. ADMISSIBILITY OF EVIDENCE

§ 171. In General

Authorities differ as to whether evidence inadmissible at trial is admissible in a grand jury proceeding.

Library References

Grand Jury § 36.8.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Minn.—State v. Lane, 263 N.W. 608, 195 Minn. 587.

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.

Tenn.—State v. Crane, Cr.App., 780 S.W.2d 375, rehearing denied 1989 WL 74944.

99. Pa.—Respublica v. Schaffer, 1 U.S. 236, 1 Dall. 236, 1 L.Ed. 116.

1. 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.

2. N.Y.—People v. Buzak, 4 Dept., 587 N.Y.S.2d 52, 185 A.D.2d 621.

3. N.Y.—People v. Buzak, 4 Dept., 587 N.Y.S.2d 52, 185 A.D.2d 621.

4. N.Y.—People v. Hylton, 529 N.Y.S.2d 412, 139 Misc.2d 645.

5. U.S.—Bracy v. U.S., Cal., 98 S.Ct. 1171, 435 U.S. 1301, 55 L.Ed.2d 489, rehearing denied 98 S.Ct. 1603, 435 U.S. 965, 56 L.Ed.2d 57 (per Mr. Justice Rehnquist, as Circuit Justice).

U.S. v. Flaherty, C.A.Mass., 668 F.2d 566.

U.S. v. Mahoney, D.C.Pa., 508 F.Supp. 263.

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

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

Ind.—Maddox v. State, 12 N.E.2d 947, 213 Ind. 537.

6. U.S.—U.S. v. Buffington, C.A.9(Cal.), 815 F.2d 1292—U.S. v. Bari, C.A.N.Y., 750 F.2d 1169, certiorari denied Benfield v. U.S., 105 S.Ct. 3482, 472 U.S. 1019, 87 L.Ed.2d 617—U.S. v. Flomenhoft, C.A.III., 714 F.2d 708, certiorari denied 104 S.Ct. 1420, 465 U.S. 1068, 79 L.Ed.2d 745—U.S. v. Rossbach, C.A.Minn., 701 F.2d 713, certiorari denied 111 S.Ct. 83, 498 U.S. 827, 112 L.Ed.2d 56.

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

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

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.

Mass.—Commonwealth v. Pina, 549 N.E.2d 106, 406 Mass. 540, certiorari denied Pina v. Massachusetts, 111 S.Ct. 96, 498 U.S. 832, 112 L.Ed.2d 67.

Ohio—State v. Brown, 528 N.E.2d 523, 38 Ohio St.3d 305, rehearing denied 534 N.E.2d 93, 39 Ohio St.3d 710, certiorari denied Brown v. Ohio, 109 S.Ct. 1177, 489 U.S. 1040, 103 L.Ed.2d 239, rehearing denied 109 S.Ct. 1774, 490 U.S. 1032, 104 L.Ed.2d 208.

Wyo.—Hennigan v. State, 746 P.2d 360.

Preference for nonhearsay

(1) Preferable practice would be for prosecution to present witnesses to grand jury who are able to testify from firsthand knowledge whenever possible.

Hawaii—State v. Corpuz, 690 P.2d 282, 67 Hawaii 438.

(2) Hearsay is admissible for grand jury if not deliberately used in place of better evidence to improve case for indictment.

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

Misleading

(1) While the government may use hearsay, it may not mislead the jury into thinking it is receiving firsthand testimony.

U.S.—U.S. v. Ruggiero, C.A.2(N.Y.), 934 F.2d 440.

(2) Presentation to grand jury of hearsay is not per se prohibited, at least so long as reliance upon it is not so extensive as to mislead grand jury as to strength of evidence.

U.S.—U.S. v. Bein, C.A.N.Y., 728 F.2d 107, certiorari denied DeAngelis v. U.S., 105 S.Ct. 135, 469 U.S. 837, 83 L.Ed.2d 75.

7. Fla.—In re Spring Term (1977), Pinellas County Grand Jury, App., 357 So.2d 770, certiorari denied 361 So.2d 835 and In re State Investigation, 361 So.2d 836.

8. Fla.—In re Spring Term (1977), Pinellas County Grand Jury, App., 357 So.2d 770, certiorari denied 361 So.2d 835 and In re State Investigation, 361 So.2d 836.

9. 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.

10. Lie detector test

U.S.—In re Grand Jury Investigation, S.D. Ohio, 791 F.Supp. 192.

Statement made in connection with plea

U.S.—U.S. v. Ocanas, C.A.Tex., 628 F.2d 353, rehearing denied 633 F.2d 582, certiorari denied 101 S.Ct. 2316, 451 U.S. 984, 68 L.Ed.2d 840.

Testimony of witness who failed lie detector test

Ohio—State v. Crouse, 528 N.E.2d 1283, 39 Ohio App.3d 18, post-conviction relief denied 1990 WL 131849.

mary evidence,¹¹ tips or rumors,¹² uncorroborated statements by an accomplice,¹³ or prior convictions.¹⁴

However, some authorities hold that evidence is admissible only if it would be admissible at trial,¹⁵

and that only competent and relevant evidence is admissible.¹⁶ It has been held that, unless an exception to the rule against hearsay applies,¹⁷ hearsay is inadmissible,¹⁸ or is admissible only if a compelling justification is shown.¹⁹ Various evi-

11. U.S.—U.S. v. Law Firm of Zimmerman & Schwartz, P.C., D.Colo., 738 F.Supp. 407—U.S. v. Gordon, D.C.N.Y., 493 F.Supp. 814, affirmed 655 F.2d 478.

Limitations

(1) Use of summary evidence before a grand jury, in and of itself, is proper; however, grand jury cannot be deceived into believing it is receiving direct, rather than hearsay, summary evidence.

U.S.—U.S. v. Linton, D.C.Nev., 502 F.Supp. 861.

(2) Test should be that summary should not in substantial way mistake relevant and crucial evidence to extent that grand jury is so misled that in reviewing the summary, it cannot be deemed the fair and impartial body to which accused is entitled.

U.S.—U.S. v. Linton, D.C.Nev., 502 F.Supp. 861.

12. U.S.—In re Sealed Case, 737 F.2d 94, 237 U.S.App.D.C. 312.

13. Alaska—Miller v. State, App., 629 P.2d 546.

Conn.—State v. Higgins, 518 A.2d 631, 201 Conn. 462.

14. U.S.—U.S. v. Levine, C.A.Mo., 700 F.2d 1176.

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

Minn.—State v. Stewart, App., 486 N.W.2d 444.

Miss.—Washington v. State, 478 So.2d 1028.

At least for impeachment

Ill.—People v. Pinjoli, 581 N.E.2d 693, 3 Dist., 163 Ill.Dec. 539, 221 Ill.App.3d 254.

15. Cal.—People v. Skelton, 167 Cal.Rptr. 636, 109 C.A.3d 691, certiorari denied Curtin v. California, 101 S.Ct. 1361, 450 U.S. 917, 67 L.Ed.2d 343.

Nev.—Phillips v. Sheriff, Clark County, 565 P.2d 330, 93 Nev. 309.

N.Y.—People v. Budzinski, 289 N.Y.S. 656, 159 Misc. 566.

Where indictment laid before grand jury

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

Duty of prosecutor

Duty of a prosecutor to present to the grand jury only that evidence which he believes would be admissible at trial includes an obligation to phrase questions in such a way as to minimize the possibility that the response will contain improper evidence.

Alaska—Putnam v. State, 629 P.2d 35.

16. N.Y.—People v. Schweain, 471 N.Y.S.2d 759, 122 Misc.2d 712.

Competent on face

It is sufficient that the evidence is competent on its face.

N.Y.—People v. DeMartino, 422 N.Y.S.2d 949, 71 A.D.2d 477.

Ability to understand oath

A child or person with a mental disease or defect who cannot understand the nature of an oath cannot give evidence unless he possesses sufficient intelligence and capacity to justify the reception thereof.

N.Y.—People v. Zigles, 463 N.Y.S.2d 352, 119 Misc.2d 417.

Relevancy

(1) Concept of relevancy in grand jury proceedings applies, and embraces, a broader spectrum of evidence than that envisioned at trial level.

N.Y.—In re Vanderbilt, 448 N.Y.S.2d 3, 87 A.D.2d 528, modified on other grounds 439 N.E.2d 378, 57 N.Y.2d 66, 453 N.Y.S.2d 661.

(2) Evidence may be relevant to investigation even if it also relates to a crime for which the statute of limitations has run.

N.Y.—People v. Jacobs, 492 N.Y.S.2d 859, 129 Misc.2d 21.

Wide range

Notwithstanding a statute providing that a grand jury can receive none but legal evidence, it has been held that a wide range must necessarily be given to the investigations of the grand jury, for the means to which it must resort to discover crime are bound to be in main inquisitorial.

Ky.—Gordon v. Tracy, 238 S.W. 395, 194 Ky. 166.

Developing leads

It has been said that, although only competent legal evidence may be considered, evidence usually inadmissible may be elicited in an effort to develop leads to other evidence.

N.Y.—People v. Cunningham, 390 N.Y.S.2d 547, 88 Misc.2d 1065.

17. Autopsy report

(1) Autopsy reports are properly admissible before a grand jury.

N.Y.—People v. Abney, 516 N.Y.S.2d 578, 135 Misc.2d 797.

(2) Although it is error to permit an autopsy report to be admitted at trial without first redacting opinion as to cause of death, submission of autopsy reports to grand jury without redacting such opinions is not necessarily error, considering that submission of such opinions in autopsy reports at trial denies defendant right to confront and to cross-examine witnesses against him, rights which are not applicable before the grand jury.

N.Y.—People v. Abney, 516 N.Y.S.2d 578, 135 Misc.2d 797.

Child victim of sexual offense

(1) Statutory exception to rule against hearsay upheld.

Alaska—Murray v. State, App., 770 P.2d 1131.

(2) Evidence of reliability of hearsay statements of child victims of sexual offenses and evidence corroborating statements should be submitted to grand jury.

Alaska—Murray v. State, App., 770 P.2d 1131.

18. Cal.—People v. Skelton, 167 Cal.Rptr. 636, 109 C.A.3d 691, certiorari denied Curtin v. California, 101 S.Ct. 1361, 450 U.S. 917, 67 L.Ed.2d 343.

Nev.—Phillips v. Sheriff, Clark County, 565 P.2d 330, 93 Nev. 309.

N.Y.—People v. Mitchell, 1 Dept., 583 N.Y.S.2d 432, 183 A.D.2d 503, affirmed 626 N.E.2d 630, 82 N.Y.2d 509, 605 N.Y.S.2d 655.

People v. Jackson, 561 N.Y.S.2d 398, 148 Misc.2d 886—People v. Ehrlich, 518 N.Y.S.2d 742, 136 Misc.2d 514.

19. Alaska—Putnam v. State, 629 P.2d 35.

Mudge v. State, App., 760 P.2d 1046.

dence has been held inadmissible,²⁰ such as uncorroborated statements by an accomplice,²¹ or prior convictions not used solely on the issue of credibility.²²

Prior testimony.

Transcripts of testimony before a prior grand jury are admissible.²³ Under some statutes, the use of minutes of testimony taken before a magistrate is equivalent to the examination of the witnesses before the grand jury, the written examination taking the place of the oral.²⁴

Immunity.

Where a person is given immunity and forced to testify or provide information in a federal proceeding pursuant to a federal statute,²⁵ no testimony or information so compelled (or any information directly or indirectly derived from such testimony or information) may be used against the person in a subsequent grand jury proceeding.²⁶

Inspection of premises.

Although there is authority to the contrary,²⁷ it has been held that a grand jury has no right of its own motion to visit the premises where a crime is alleged to have been committed.²⁸ However, the court may, under proper limitations, authorize such a visit.²⁹

Silence of accused.

The failure of accused to exercise a right to testify is not a factor from which inference

unfavorable to him may be drawn.³⁰ However, it has also been held that evidence of accused's refusal to talk with law enforcement officers is admissible.³¹

Videotaped examination.

Under some statutes, a videotaped examination of a witness is admissible in certain circumstances.³² Such statutes have been upheld.³³ Whenever a complainant is able to testify personally he should, even though an order authorizing the playing of a videotape has been obtained.³⁴

§ 172. Illegally Obtained Evidence

- a. In general
- b. Wiretapping or other interception

a. In General

Evidence is admissible in a grand jury proceeding even though it was obtained as a result of an illegal search or seizure.

Research Note

Whether witness may refuse to answer questions based on evidence obtained through unlawful search or seizure is treated supra § 152.

Library References

Grand Jury ⇨ 36.8.

Evidence is admissible in a grand jury proceeding even though it was obtained as a result of an

Privilege

A codefendant's invocation of privilege against self-incrimination is a sufficiently compelling justification for admission of his hearsay statement against another codefendant during grand jury proceedings. Alaska—Preston v. State, 615 P.2d 594.

20. Lie detector test

N.Y.—People v. Frank, 422 N.Y.S.2d 317, 101 Misc.2d 736.

21. Who is accomplice

Participant in one crime may be accomplice with respect to related second crime notwithstanding lack of mens rea, where he became an informant to avoid or mitigate prosecution for his own participation. N.Y.—People v. Thomas, 515 N.Y.S.2d 987, 135 Misc.2d 434.

Form of corroboration

An accomplice may not corroborate another accomplice if the crimes are related.

N.Y.—People v. Ehrlich, 518 N.Y.S.2d 742, 136 Misc.2d 514.

22. N.Y.—People v. Thompson, 2 Dept., 501 N.Y.S.2d 381, 116 A.D.2d 377.

23. U.S.—U.S. v. Wander, C.A.Pa., 601 F.2d 1251.

U.S. v. Donohue, D.C.Md., 574 F.Supp. 1263—U.S. v. Schlesinger, D.C.N.Y., 457 F.Supp. 812, affirmed 598 F.2d 722, certiorari denied 100 S.Ct. 168, 444 U.S. 880, 62 L.Ed.2d 109, mandamus denied In re Schlesinger, 636 F.2d 1204.

D.C.—Miles v. U.S., 483 A.2d 649.

Black book

Presentation to grand jury of "Black Book" which contained synopses of testimony of witnesses before prior grand jury as to altercation for which prior grand jury had returned "no true bill" and statement of scheduling of witnesses to appear before prior grand jury was proper. Ill.—People v. Jackson, 381 N.E.2d 316, 21 Ill.Dec. 238, 64 Ill.App.3d 307.

24. Iowa—State v. Marshall, 74 N.W. 763, 105 Iowa 38.

25. 18 U.S.C.A. § 6002.

26. 18 U.S.C.A. § 6002.

U.S.—U.S. v. Byrd, C.A.11(Ga.), 765 F.2d 1524—U.S. v. Gregory, C.A.Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied Spurlock v. U.S., 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321.

27. La.—State v. Johnson, 41 So. 117, 116 La. 856.

28. Cal.—People v. Brown, 253 P. 735, 81 C.A. 226.

29. Colo.—Wyatt v. People, 28 P. 961, 17 Colo. 252.

30. N.Y.—People v. Scott, 416 N.Y.S.2d 83, 70 A.D.2d 601.

31. U.S.—U.S. v. Levine, C.A.Mo., 700 F.2d 1176.

32. N.Y.—People v. Rich, 520 N.Y.S.2d 911, 137 Misc.2d 474.

33. N.Y.—People v. Rich, 520 N.Y.S.2d 911, 137 Misc.2d 474.

34. N.Y.—People v. Lenahan, 533 N.Y.S.2d 664, 141 Misc.2d 538.

illegal search or seizure.³⁵ The only exception to this rule is where legislation expressly provides that such evidence may not be considered by a grand jury.³⁶

Evidence previously obtained in violation of the privilege against self-incrimination is admissible.³⁷

It has been held that evidence obtained in violation of the right to counsel is inadmissible,³⁸ at least in the case of a blatant violation.³⁹

b. Wiretapping or Other Interception

While a federal statute concerning wire, electronic, and oral communication interception precludes the admission in a grand jury proceeding of evidence obtained in violation of the statute, a person cannot use the statute to obtain the suppression of evidence in a grand jury proceeding, as distinct from using the statute as a ground for refusing to answer questions.

Congress, in Title III of the Omnibus Crime Control and Safe Streets Act, has enacted certain provisions concerning wire, electronic, and oral communication interception.⁴⁰ Whenever any wire or oral communication has been intercepted, no evidence derived from the contents of such communication may be received in evidence in any federal or state grand jury proceeding if the disclosure of that information would be in violation of the stat-

ute.⁴¹ A disclosure violates the statute where the person making the disclosure knows or has reason to know that the information was obtained through an interception violating the statute.⁴²

A provision of the statute concerning suppression motions⁴³ does not authorize a suppression motion in a grand jury proceeding.⁴⁴ Thus, the target of the grand jury investigation cannot obtain the suppression of evidence in the grand jury proceeding for violation of the statute.⁴⁵ A provision applicable in federal proceedings which requires the government to respond to a claim by a party aggrieved that evidence is inadmissible under the statute⁴⁶ does not require the government to respond to the target, as only a witness can be a party aggrieved in a grand jury proceeding.⁴⁷ However, a witness may refuse to answer questions on the ground that they are based on evidence obtained in violation of the statute, as discussed supra §§ 153, 154.

A provision of the statute precluding the admission of evidence derived from an interception in a proceeding unless each party has been furnished in advance with a copy of the interception order and application⁴⁸ does not apply to grand jury proceedings.⁴⁹

35. U.S.—*Stone v. Powell*, Cal., 96 S.Ct. 3037, 428 U.S. 465, 49 L.Ed.2d 1067, on remand 539 F.2d 693, rehearing denied 97 S.Ct. 197, 429 U.S. 874, 50 L.Ed.2d 158 and *Wolf v. Rice*, 97 S.Ct. 197, 429 U.S. 874, 50 L.Ed.2d 158—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561.

In re *Berkley and Co., Inc.*, C.A.Minn., 629 F.2d 548.

U.S. v. Hardy, D.Hawaii, 762 F.Supp. 1403.

Ill.—*People v. J.H.*, 554 N.E.2d 961, 143 Ill.Dec. 889, 136 Ill.2d 1, certiorari denied *Humphrey v. Illinois*, 111 S.Ct. 351, 498 U.S. 942, 112 L.Ed.2d 315.

Ill.—*People v. Pierce*, 411 N.E.2d 295, 44 Ill.Dec. 326, 88 Ill. App.3d 1095.

Md.—In re *Special Investigation No. 228*, 458 A.2d 820, 54 Md.App. 149.

N.J.—*Van Horn v. City of Trenton*, 404 A.2d 615, 80 N.J. 528.

Application of *Mahler*, 426 A.2d 1021, 177 N.J.Super. 337, certification denied In re *Mahler*, 434 A.2d 93, 87 N.J. 349, In re *Reilly*, 434 A.2d 93, 87 N.J. 349, In re *Hudson Oil Refining Corp.*, 434 A.2d 94, 87 N.J. 350 and In re *Edgewater Terminals, Inc.*, 434 A.2d 94, 87 N.J. 350.

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

Tex.—*Alejandro v. State*, App.—Hous. [1 Dist.], 725 S.W.2d 510.

At least where suppression order not previously entered

U.S.—*U.S. v. Busk*, C.A.Pa., 730 F.2d 129.

36. Fla.—In re *Spring Term (1977)*, Pinellas County Grand Jury, App., 357 So.2d 770, certiorari denied 361 So.2d 835 and In re *State Investigation*, 361 So.2d 836.

37. U.S.—*U.S. v. North*, 920 F.2d 940, 287 U.S.App.D.C. 146, certiorari denied 111 S.Ct. 2235, two cases, 114 L.Ed.2d 477.

38. N.Y.—*People v. Seaman*, 427 N.Y.S.2d 567, 104 Misc.2d 10.

39. N.J.—*State v. Sugar*, 417 A.2d 474, 84 N.J. 1, appeal after remand 495 A.2d 90, 100 N.J. 214, appeal after remand 527 A.2d 1377, 108 N.J. 151, appeal after remand 572 A.2d 1170, 240 N.J.Super. 148, certification denied 584 A.2d 247, 122 N.J. 187.

40. 18 U.S.C.A. §§ 2510–2521.

41. 18 U.S.C.A. § 2515.

42. 18 U.S.C.A. § 2511(1)(c).

43. 18 U.S.C.A. § 2518(10)(a).

44. U.S.—*U.S. v. Woods*, C.A.Mich., 544 F.2d 242, certiorari denied *Hurt v. U.S.*, 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, *Blair v. U.S.*, 97 S.Ct. 1652, two cases, 430 U.S. 969, 52 L.Ed.2d 361, *Kilpatrick v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270 and *Jackson v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279.

45. U.S.—*U.S. v. Woods*, C.A.Mich., 544 F.2d 242, certiorari denied *Hurt v. U.S.*, 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, *Blair v. U.S.*, 97 S.Ct. 1652, two cases, 430 U.S. 969, 52 L.Ed.2d 361, *Kilpatrick v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270 and *Jackson v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279.

46. 17 U.S.C.A. § 3504(a)(1).

47. U.S.—*U.S. v. Woods*, C.A.Mich., 544 F.2d 242, certiorari denied *Hurt v. U.S.*, 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, *Blair v. U.S.*, 97 S.Ct. 1652, two cases, 430 U.S. 969, 52 L.Ed.2d 361, *Kilpatrick v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270 and *Jackson v. U.S.*, 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279.

48. 18 U.S.C.A. § 2518(9).

49. U.S.—*U.S. v. Woods*, C.A.Mich., 544 F.2d 242, certiorari denied *Hurt v. U.S.*, 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, *Blair v.*

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L.2d 778, Blair v.

Under a state statute similar to the federal statute, a person cannot obtain the suppression of evidence in a grand jury proceeding.⁵⁰

§ 173. Who Determines Admissibility

Some authorities hold that the grand jury is the judge of the competency of evidence in grand jury proceedings. Some statutes permit the prosecutor to rule on the competency of witnesses or the admissibility of evidence.

Library References

Grand Jury ⇨33.

K. SUFFICIENCY OF EVIDENCE

§ 174. In General

The grand jury is the judge of the sufficiency of the evidence before it.

Research Note

Evidence supporting indictment is discussed generally in C.J.S. Indictments and Informations §§ 21 and 178.

Library References

Grand Jury ⇨33, 36.8.

WESTLAW ELECTRIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The grand jury is the judge of the sufficiency of the evidence before it.⁵⁴

Since the presumption of innocence attends accused while his case is being considered by the grand jury, even prior to finding of indictment and while the grand jury is receiving evidence,⁵⁵ the evidence before a grand jury must be such as clearly to overcome the presumption of innocence before an indictment can properly be found.⁵⁶

U.S., 97 S.Ct. 1652, two cases, 430 U.S. 969, 52 L.Ed.2d 361, Kilpatrick v. U.S., 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270 and Jackson v. U.S., 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279.

50. N.Y.—People v. McGrath, 385 N.E.2d 541, 46 N.Y.2d 12, 412 N.Y.S.2d 801, certiorari denied McGrath v. New York, 99 S.Ct. 1535, 440 U.S. 972, 59 L.Ed.2d 788.

51. Mo.—State v. Brown, App., 588 S.W.2d 745.

Tex.—Ex parte Port, Cr.App., 674 S.W.2d 772.

52. N.Y.—People v. DiFabio, 588 N.E.2d 80, 79 N.Y.2d 836, 580 N.Y.S.2d 182.

53. N.Y.—People v. DiFabio, 588 N.E.2d 80, 79 N.Y.2d 836, 580 N.Y.S.2d 182.

54. Mo.—State v. Brown, App., 588 S.W.2d 745.

Tex.—Ex parte Port, Cr.App., 674 S.W.2d 772.

Some authorities hold that the grand jury is the judge of the competency of evidence in grand jury proceedings.⁵¹

Some statutes provide that, wherever it is provided that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may in an equivalent situation in a grand jury proceeding be made by the prosecutor.⁵² Such a statute does not preclude the court from ruling on competency or admissibility.⁵³

It has been held, sometimes by virtue of statutory provision that grand jurors should not find a bill on evidence merely sufficient to render the truth of the charge probable, but they should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a trial jury.⁵⁷ However, it has also been held that it is not necessary for the evidence to be sufficient that it should satisfy the grand jurors of the guilt of accused beyond a reasonable doubt,⁵⁸ and that the evidence need only be sufficient to establish the probability of guilt.⁵⁹

The testimony of an investigative officer, standing alone, may be sufficient.⁶⁰

A statute requiring corroboration of accomplice testimony to warrant conviction has been held to extend to proceedings before a grand jury which found the indictment.⁶¹

The grand jury's decision to return a second indictment need not be based on additional live testimony, and may be based entirely on evidence

55. N.Y.—People v. Nicosia, 298 N.Y.S. 591, 164 Misc. 152—People v. Acritelli, 110 N.Y.S. 430, 57 Misc. 574—People v. Lindenborn, 52 N.Y.S. 101, 23 Misc. 426, 13 N.Y.Crim.R. 195—People v. Martinez, 26 N.Y.S.2d 537.

56. N.Y.—People v. Nicosia, 298 N.Y.S. 591, 164 Misc. 152—People v. Acritelli, 110 N.Y.S. 430, 57 Misc. 574—People v. Lindenborn, 52 N.Y.S. 101, 23 Misc. 426, 13 N.Y.Crim.R. 195.

57. N.Y.—People v. Nicosia, 298 N.Y.S. 591, 164 Misc. 152.

58. Alaska—Sheldon v. State, App., 796 P.2d 831.

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

Pa.—Maginnis' Case, 112 A. 555, 269 Pa. 186.

59. Alaska—Sheldon v. State, App., 796 P.2d 831.

60. S.C.—State v. Whitted, 305 S.E.2d 245, 279 S.C. 260.

61. N.Y.—People v. Vollero, 178 N.Y.S. 787, 108 Misc. 635, 38 N.Y.Crim.R. 50.

previously taken.⁶²

§ 175. Hearsay

Some authorities hold that a grand jury's determination may rest exclusively on hearsay.

Research Note

Evidence supporting indictment is discussed generally in C.J.S. Indictments and Informations §§ 21 and 178.

Library References

Grand Jury ⇐36.8.

Some authorities hold that hearsay may properly constitute the bulk of the evidence before the grand jury,⁶³ and that the grand jury's determination may rest exclusively on hearsay.⁶⁴

According to other authorities, hearsay is sufficient to support an indictment only if the evidence presents a sufficiently detailed account of accused's activity and the hearsay declarant is sufficiently reliable.⁶⁵ The reliability of a citizen informant is presumed and need not be shown.⁶⁶

It has been said that the use of hearsay before a grand jury may render an indictment invalid if there is a high probability that accused would not have been indicted had only nonhearsay evidence been used.⁶⁷

The admissibility of hearsay is discussed supra § 171.

IX. SECRECY AS TO PROCEEDINGS

A. IN GENERAL

§ 176. General Considerations

Grand jury proceedings are conducted in secret, and generally must remain or be kept secret.

Library References

Grand Jury ⇐41, 41.10.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Grand jury proceedings need not be open,⁶⁸ and the public has no right to attend such proceed-

ings⁶⁹ or to obtain grand jury records.⁷⁰ However, a court should grant disclosure of documents related to a grand jury investigation if the records sought are not of the type properly considered confidential grand jury materials.⁷¹

Grand jury proceedings are secret,⁷² and are conducted in secret,⁷³ and generally must remain or be kept secret.⁷⁴ Grand jury testimony is ordinarily confidential.⁷⁵ The proper functioning of the grand jury system depends upon the secrecy of

62. U.S.—U.S. v. Lytle, N.D.Ill., 677 F.Supp. 1370.

Iowa—State v. Clapper, 13 N.W. 294, 59 Iowa 279.

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

64. Wyo.—Hennigan v. State, 746 P.2d 360.

65. Alaska—Metler v. State, 581 P.2d 669.

66. Alaska—Metler v. State, 581 P.2d 669.

67. U.S.—U.S. v. Ruggiero, C.A.2(N.Y.), 934 F.2d 440.

68. U.S.—Stevens v. State, W.D.N.C., 638 F.Supp. 1255.

69. U.S.—Globe Newspaper Co. v. Pokaski, C.A.1(Mass.), 868 F.2d 497.

70. U.S.—Globe Newspaper Co. v. Pokaski, C.A.1(Mass.), 868 F.2d 497.

Cal.—McClatchy Newspapers v. Superior Court (1983-1984 Grand Jury for Fresno County), 245 Cal.Rptr. 774, 751 P.2d 1329, 44 C.3d 1162.

71. U.S.—U.S. ex rel. Woodard v. Tynan, C.A.10(Colo.), 757 F.2d 1085, on rehearing 776 F.2d 250.

72. N.Y.—Nelson v. Mollen, 3 Dept., 573 N.Y.S.2d 99, 175 A.D.2d 518.

Strong presumption of confidentiality

N.Y.—Roberson v. City of New York, 2 Dept., 557 N.Y.S.2d 431, 163 A.D.2d 291.

Limits of flexibility

Limits of flexibility in grand jury proceedings are reached where a proposed change, expeditious as it may appear to be, impinges on the fundamental considerations behind the secrecy requirement.

Mass.—Commonwealth v. Pezzano, 438 N.E.2d 841, 387 Mass. 69.

73. Colo.—P.R. v. District Court In and For Denver County, 637 P.2d 346.

S.C.—State v. Whitted, 305 S.E.2d 245, 279 S.C. 260.

74. U.S.—Application of Storer Communications, Inc., C.A.6(Ohio), 828 F.2d 330.

La.—State v. Ates, 418 So.2d 1326, appeal after remand 429 So.2d 176 and 429 So.2d 177.

Mo.—State v. McGee, App., 757 S.W.2d 321, denial of post-conviction relief affirmed 821 S.W.2d 897.

N.J.—Matter of Allegations of Official Misconduct in City of Elizabeth Contained in The Citizen on 6/11/88, 558 A.2d 1387, 233 N.J.Super. 426.

Pa.—In re November, 1975 Special Investigating Grand Jury, 445 A.2d 1260, 299 Pa.Super. 539.

S.C.—State v. Whitted, 305 S.E.2d 245, 279 S.C. 260.

75. U.S.—U.S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, two cases, 310 U.S. 658, 84 L.Ed. 1421.

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grand jury proceedings.⁷⁶ Long-established policy maintains the secrecy of grand jury proceedings in federal courts.⁷⁷ The courts must preserve the secrecy of grand jury proceedings and the privacy of jurors,⁷⁸ and must respect the autonomy of grand jury proceedings in regard to secrecy.⁷⁹

From earliest times it has been the policy of the law to shield the proceedings of grand juries from public scrutiny.⁸⁰ The policy of grand jury secrecy is entrenched in the common law,⁸¹ and is a product of the common law.⁸² The policy is sometimes codified by statute or rule.⁸³ In the case of federal grand juries, there is a rule concerning secrecy,⁸⁴

The need to preserve the secrecy of an ongoing grand jury investigation⁸⁵ or of grand jury minutes⁸⁶ is of paramount importance. Absent a clear indication in a statute or rule, a court must always be reluctant to conclude that a breach of secrecy has been authorized.⁸⁷ Statutes or rules codifying the secrecy requirement must be strictly construed,⁸⁸ and the rule concerning federal grand jury secrecy should be enforced rigidly to carry out its purposes,⁸⁹ and read broadly.⁹⁰ However, it has

also been held that such statutes should be given a reasonable and liberal construction which will result in the accomplishment of the purposes for which they were enacted.⁹¹

Effect of prior disclosure.

The obligation of secrecy does not end once public disclosure occurs.⁹² The government is obligated to stand silent regardless of what is reported, accurate or not, by the press.⁹³ However, it has also been said that the secrecy rule does not apply to documents which are already a part of the public record,⁹⁴ or which have already been presented at a criminal trial.⁹⁵

What constitutes disclosure.

Under the rule restricting disclosures in the case of a federal grand jury,⁹⁶ only the revealing of materials to others constitutes a disclosure,⁹⁷ and the solitary re-examination of materials by an attorney does not constitute a disclosure,⁹⁸ even in the case of a government attorney who participated in a criminal proceeding and is now preparing for

76. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

N.Y.—Matter of Grand Jury, New York County, 480 N.Y.S.2d 998, 125 Misc.2d 918.

77. U.S.—Dennis v. U.S., Colo., 86 S.Ct. 1840, 384 U.S. 855, 16 L.Ed.2d 973—U.S. v. Procter & Gamble Co., N.J., 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077.

78. U.S.—Petition of Tribune Co., C.A.11(Fla.), 784 F.2d 1518.

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

80. U.S.—Goodman v. U.S., C.C.A.Cal., 108 F.2d 516, 127 A.L.R. 265—In re National Window Glass Workers, D.C. Ohio, 287 F. 219, 1 Ohio Law Abs. 419.

Ark.—Collins v. State, 143 S.W.2d 1, 200 Ark. 1027.

Cal.—People v. Foster, 243 P. 667, 198 C. 112.

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

La.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938—State v. Perry, 90 So. 406, 149 La. 1065.

Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

N.J.—State v. Borg, 150 A. 189, 8 N.J.Misc. 349.

N.Y.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 A.D. 723.

In re Attorney General of U.S., 291 N.Y.S. 5, 160 Misc. 533—People v. Kresel, 254 N.Y.S. 193, 142 Misc. 88—In re Martin, 11 N.Y.S.2d 607, 170 Misc. 919—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212.

81. 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.

82. Md.—Jones v. State, 464 A.2d 977, 297 Md. 7.

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

84. Fed.Rules Cr.Proc., Rule 6(e), 18 U.S.C.A.

85. U.S.—In re Grand Jury Investigation of Hugle, C.A.9(Cal.), 754 F.2d 863—In re Grand Jury Proceedings in Matter of Freeman, C.A.Fla., 708 F.2d 1571.

86. N.Y.—Ruggiero v. Fahey, 2 Dept., 478 N.Y.S.2d 337, 103 A.D.2d 65.

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

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

89. U.S.—Malizia v. U.S. Dept. of Justice, D.C.N.Y., 519 F.Supp. 338.

90. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

91. Tex.—Huntress v. State ex rel. Todd, Civ.App., 88 S.W.2d 636, error dismissed.

92. U.S.—Barry v. U.S., D.C., 740 F.Supp. 888.

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

93. U.S.—Barry v. U.S., D.C., 740 F.Supp. 888.

94. U.S.—U.S. v. Sutton, Em.App., 795 F.2d 1040, certiorari denied 107 S.Ct. 873, 479 U.S. 1030, 93 L.Ed.2d 828.

95. U.S.—Sisk v. C.I.R., C.A.6, 791 F.2d 58.

96. Fed.Rules Crim.Proc., Rule 6(e)(2), 18 U.S.C.A.

97. U.S.—U.S. v. John Doe, Inc. I, N.Y., 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94.

98. U.S.—U.S. v. John Doe, Inc. I, N.Y., 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94.

the civil phase of the same dispute.⁹⁹ An attorney's recollection of facts learned from his prior grand jury participation does not constitute disclosure.¹ A government attorney's filing of a civil complaint does not inevitably disclose grand jury materials from the criminal phase of the same dispute.²

Under state law, improper disclosure does not occur where an attorney, previously involved in the grand jury proceeding and now involved in a civil matter, recollects facts learned in the grand jury proceeding,³ and the same rule has been applied where such attorney has continued access to material.⁴ However, under state law some authorities treat an attorney's continued access to materials for use in a parallel civil investigation or litigation in a manner similar to a disclosure.⁵

§ 177. Purpose

Reasons for grand jury secrecy include to prevent escape; to insure freedom of deliberations and prevent the importuning of grand jurors, to prevent subornation of perjury or witness tampering; to encourage disclosures by witnesses; and to protect the innocent accused from disclosure of the fact that he has been under investigation.

Library References

Grand Juries ⇨41, 41.10.

Grand jury secrecy is intended to protect both institutional interests and personal interests,⁶ and is as important for the protection of the innocent as

for the pursuit of the guilty.⁷ It is designed to protect not only witnesses who give evidence, but also accuseds concerning whom evidence is given.⁸

The reasons for grand jury secrecy are to prevent the escape of those whose indictments may be contemplated; to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; to encourage free and untrampled disclosures by persons who have information with respect to the commission of crimes; and to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation⁹ and from the expense of standing trial where there was no probability of guilt.¹⁰

It has also been said that the purposes of grand jury secrecy are to protect the sanctity of the proceedings¹¹ and the integrity of the investigation,¹² to protect the grand jury from outside interference or pressure,¹³ to protect the participants from detrimental publicity,¹⁴ to encourage witness cooperation,¹⁵ to protect the innocent accused from the disclosure of accusations made against him before the grand jury,¹⁶ and to prevent the misuse

99. U.S.—U.S. v. John Doe, Inc. I, N.Y., 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94.

1. U.S.—U.S. v. Archer—Daniels—Midland Co., C.A.8(Iowa), 785 F.2d 206, certiorari denied 107 S.Ct. 1952, 481 U.S. 1028, 95 L.Ed.2d 525.

2. U.S.—U.S. v. John Doe, Inc. I, 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94.

3. N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

4. U.S.—State of New York v. Cedar Park Concrete Corp., S.D.N.Y., 665 F.Supp. 238.

5. N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

6. U.S.—Matter of Special March 1981 Grand Jury, C.A.11, 753 F.2d 575.

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

8. Conn.—State v. Waterman, 509 A.2d 518, 7 Conn.App. 326, certification denied 512 A.2d 231, 200 Conn. 807.

N.Y.—Matter of Dist. Atty. of Suffolk County, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

9. U.S.—U.S. v. John Doe, Inc. I, N.Y., 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94—U.S. v. Procter & Gamble Co., N.J., 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077.

In re Grand Jury Matter, 906 F.2d 78, C.A.3(Pa.), certiorari denied Backiel v. U.S., 111 S.Ct. 509, 498 U.S. 980, 112 L.Ed.2d 521.

Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.

Ill.—People v. Toolen, 5 Dist., 451 N.E.2d 1364, 72 Ill.Dec. 41, 116 Ill.App.3d 632.

N.Y.—Matter of Grand Jury, New York County, 480 N.Y.S.2d 998, 125 Misc.2d 918.

Pa.—In re Investigating Grand Jury of Philadelphia County, 437 A.2d 1128, 496 Pa. 452.

10. U.S.—U.S. v. John Doe, Inc. I, N.Y., 107 S.Ct. 1656, 481 U.S. 102, 95 L.Ed.2d 94—U.S. v. Procter & Gamble Co., N.J., 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077.

Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.

Pa.—In re Investigating Grand Jury of Philadelphia County, 437 A.2d 1128, 496 Pa. 452.

11. U.S.—Anaya v. U.S., C.A.10(N.M.), 815 F.2d 1373.

12. U.S.—In re Charlotte Observer (A Div. of Knight Pub. Co. and Herald Pub. Co.), C.A.4(S.C.), 921 F.2d 47.

13. Md.—Jones v. State, 464 A.2d 977, 297 Md. 7.

14. U.S.—Anaya v. U.S., C.A.10(N.M.), 815 F.2d 1373.

15. N.Y.—Ruggiero v. Fahey, 2 Dept., 478 N.Y.S.2d 337, 103 A.D.2d 65.

Primary policy

The prevention of coercion, meaning the encouraging of truthful disclosures without coercion, is the primary policy behind the secrecy requirement, which is designed to protect defendants who are ultimately indicted.

Ill.—People v. Toolen, 5 Dist., 451 N.E.2d 1364, 72 Ill.Dec. 41, 116 Ill.App.3d 632.

16. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol

of the grand jury to enforce noncriminal laws.¹⁷

§ 178. Persons Subject to Secrecy Requirements; Oath

- a. In general
- b. Federal grand jury

a. In General

The prohibition on disclosure of information concerning grand jury proceedings applies to grand jurors, and may apply to certain other persons.

Library References

Grand Juries §41.20.

Grand jurors are generally prohibited from disclosing information concerning grand jury proceedings.¹⁸ The oath administered to grand jurors usually binds them to secrecy.¹⁹ However, it seems that the obligation of secrecy does not arise alone from the form of the oath and may exist where no oath of secrecy is required.²⁰

The rule has been laid down by some authorities that the principle which would prevent disclosure by a grand juror extends to all persons required or permitted by law to be present, such as the prosecuting attorney,²¹ interpreters,²² the clerk of the grand jury,²³ and the officer in attendance on it.²⁴ However, a distinction has been made between grand jurors and others present before the grand jury.²⁵

The prohibition on disclosure does not apply to members of the media.²⁶

Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied *Conoco Inc. v. Petrol Stops Northwest*, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Charlotte Observer (A Div. of Knight Pub. Co. and Herald Pub. Co.), C.A.4(S.C.), 921 F.2d 47.

17. U.S.—In re Doe, D.C.R.I., 537 F.Supp. 1038.

18. Cal.—McClatchy Newspapers v. Superior Court (1983–1984 Grand Jury for Fresno County), 245 Cal.Rptr. 774, 751 P.2d 1329, 44 C.3d 1162.

19. U.S.—Goodman v. U.S., C.C.A.Cal., 108 F.2d 516, 127 A.L.R. 265.

Ark.—Collins v. State, 143 S.W.2d 1, 200 Ark. 1027.

N.Y.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 A.D. 723.

20. U.S.—Goodman v. U.S., C.C.A.Cal., 108 F.2d 516, 127 A.L.R. 265.

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

22. Conn.—State v. Chin Lung, 139 A. 91, 106 Conn. 701.

23. N.Y.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 A.D. 723.

24. La.—State v. Britton, 60 So. 379, 131 La. 877.

Witness.

It has been held that the prohibition on disclosure of information concerning grand jury proceedings applies to a witness,²⁷ and that the court may admonish a witness against disclosure.²⁸ However, it has also been held that the prohibition does not apply to a witness,²⁹ and that it is unlawful to administer a secrecy oath to a witness.³⁰

Counsel for accused or witness.

A statute requiring an attorney for accused or for a witness present in the grand jury room to take an oath of secrecy has been upheld.³¹

b. Federal Grand Jury

In the case of a federal grand jury, certain enumerated persons generally shall not disclose matters occurring before the grand jury, but witnesses are not under the prohibition on disclosure.

In the case of a federal grand jury, pursuant to a rule, certain persons generally shall not disclose matters occurring before the grand jury.³² The persons include a grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, and an attorney for the government.³³ Also included are any government personnel to whom disclosure is made on the ground that such personnel are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of his duty to enforce federal criminal law.³⁴ The rule covers only persons who are privy to information by virtue of their position in the criminal justice system.³⁵

25. Minn.—Loveland v. Cooley, 61 N.W. 138, 59 Minn. 259.

26. N.Y.—Hays v. Marano, 2 Dept., 493 N.Y.S.2d 904, 114 A.D.2d 387.

27. Conn.—State v. Kemp, 1 A.2d 761, 124 Conn. 639.

Miss.—In re Knapp, 536 So.2d 1330.

28. 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.

29. N.Y.—Melendez v. City of New York, 1 Dept., 489 N.Y.S.2d 741, 109 A.D.2d 13.

People v. Doe, 406 N.Y.S.2d 650, 95 Misc.2d 175.

30. U.S.—Beacon Journal Pub. Co. v. Unger, D.C. Ohio, 532 F.Supp. 55.

31. Colo.—People ex rel. Losavio v. J.L., 580 P.2d 23, 195 Colo. 494.

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

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

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

35. U.S.—U.S. v. Jeter, C.A.6(Ky.), 775 F.2d 670, certiorari denied 106 S.Ct. 1796, 475 U.S. 1142, 90 L.Ed.2d 341.

The rule states that no obligation of secrecy may be imposed on any person except in accordance with the rule.³⁶ Thus, such an obligation generally may not be imposed on persons not listed in the rule.³⁷ However, there appears to be some authority for the view that the rule does not forbid the punishment of unlisted persons under other statutory rules.³⁸ Some authorities who hold that a secrecy obligation generally should not be imposed on unlisted persons nevertheless hold that a court may do so under some circumstances,³⁹ in which case it need not employ the least restrictive means available to protect secrecy.⁴⁰

An oath of secrecy is not mandated.⁴¹

Witness.

Witnesses are not under the prohibition on disclosure⁴² unless they also happen to fit into one of the enumerated classes.⁴³ Thus, witnesses may disclose information,⁴⁴ at least in the absence of any specific restraint,⁴⁵ and a financial institution may notify its customer of a subpoena.⁴⁶ However, it has also been held that a witness generally may not disclose documents created by a grand jury or at a grand jury's request.⁴⁷ Some authorities hold that, upon a proper showing in an appropriate case, the

court may direct a witness to keep information secret for an appropriate period of time.⁴⁸

The prosecutor may not tell the recipient of a subpoena not to disclose the existence of the subpoena.⁴⁹ However, the prosecutor may tell a witness that, while the witness has a right to disclose information, he also has a right to refuse to do so,⁵⁰ and may state a preference that the witness refuse to do so.⁵¹

The fact that a witness may disclose information does not mean that the witness may effect the release of a transcript in the possession of the court.⁵²

§ 179. Matters Subject to Secrecy Requirements

The requirement of grand jury secrecy applies to anything which might reveal what occurred before the grand jury.

Library References

Grand Juries ⇨41.30, 41.50(2, 4).

The requirement of grand jury secrecy applies to anything which might reveal what occurred before the grand jury,⁵³ or in the grand jury room,⁵⁴ or

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

37. U.S.—In re Grand Jury Proceedings, C.A.1(Puerto Rico), 814 F.2d 61—In re Grand Jury Subpoena Duces Tecum, C.A.8(Ark.), 797 F.2d 676, certiorari dismissed Merchants National Bank of Fort Smith v. U.S., 107 S.Ct. 661, 479 U.S. 1013, 93 L.Ed.2d 714.

In re East Nat. Bank of Denver, D.C.Colo., 517 F.Supp. 1061.

In re Sunrise Securities Litigation, E.D.Pa., 130 F.R.D. 560, decision clarified on denial of reconsideration 109 B.R. 658.

Whether unlisted person has privilege to refuse to disclose information see *infra* § 185.

38. U.S.—U.S. v. Jeter, C.A.6(Ky.), 775 F.2d 670, certiorari denied 106 S.Ct. 1796, 475 U.S. 1142, 90 L.Ed.2d 341.

39. U.S.—In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, C.A.11(Fla.), 864 F.2d 1559—In re Grand Jury Subpoena Duces Tecum, C.A.8(Ark.), 797 F.2d 676, certiorari dismissed Merchants National Bank of Fort Smith v. U.S., 107 S.Ct. 661, 479 U.S. 1013, 93 L.Ed.2d 714.

40. U.S.—In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, C.A.11(Fla.), 864 F.2d 1559.

41. U.S.—U.S. v. Barker, D.C.Colo., 623 F.Supp. 823.

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

Matter of Grand Jury Investigation, E.D.Mich., 748 F.Supp. 1188.

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

44. U.S.—Application of Eisenberg, C.A.Fla., 654 F.2d 1107, 60 A.L.R.Fed. 915.

Matter of Grand Jury Investigation, E.D.Mich., 748 F.Supp. 1188—U.S. v. Lovocchio, D.C.Pa., 561 F.Supp. 221—In re Doe, D.C.R.I., 537 F.Supp. 1038.

Halperin v. Berlandi, D.Mass., 114 F.R.D. 8.

45. U.S.—White v. Mapco Gas Products, Inc., E.D.Ark., 116 F.R.D. 498.

46. U.S.—In re Castiglione, D.C.Cal., 587 F.Supp. 1210—In re Grand Jury Subpoena, D.C.N.Y., 574 F.Supp. 85—In re East Nat. Bank of Denver, D.C.Colo., 517 F.Supp. 1061.

47. U.S.—In re Wirebound Boxes Antitrust Litigation, D.Minn., 126 F.R.D. 554.

48. U.S.—In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, C.A.11(Fla.), 864 F.2d 1559—In re Grand Jury Subpoena Duces Tecum, C.A.8(Ark.), 797 F.2d 676, certiorari dismissed Merchants National Bank of Fort Smith v. U.S., 107 S.Ct. 661, 479 U.S. 1013, 93 L.Ed.2d 714.

Who may challenge

Subjects of grand jury investigations have no standing to challenge validity of *ex parte* court orders prohibiting witnesses from disclosing certain information to them.

U.S.—In re Grand Jury Proceedings, D.C.Va., 558 F.Supp. 532.

49. U.S.—In re Grand Jury Proceedings, C.A.1(Puerto Rico), 814 F.2d 61.

In re Castiglione, D.C.Cal., 587 F.Supp. 1210.

50. U.S.—In re Grand Jury Proceedings, D.C.Va., 558 F.Supp. 532.

51. U.S.—In re Grand Jury Proceedings, D.C.Va., 558 F.Supp. 532.

52. U.S.—Application of Executive Securities Corp., C.A.N.Y., 702 F.2d 406, certiorari denied *Doe v. Executive Securities Corp.*, 104 S.Ct. 78, 464 U.S. 818, 78 L.Ed.2d 89.

53. U.S.—Martin v. Consultants & Administrators, Inc., C.A.7(Ill.), 966 F.2d 1078, rehearing denied—U.S. v. Eastern Air Lines, Inc., C.A.2(N.Y.), 923 F.2d 241—In re Grand Jury Subpoena, C.A.4(Md.), 920 F.2d 235—In re Grand Jury Matter, C.A.Pa., 682 F.2d 61.

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which might reveal the scope or direction of the investigation,⁵⁵ or the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, deliberations or questions of jurors, or the like.⁵⁶

The secrecy requirement applies only to matters occurring before the grand jury,⁵⁷ or in the grand jury room,⁵⁸ or only to the essence of what takes place in the grand jury room.⁵⁹ Some authorities hold that the line of secrecy is drawn at the door of the grand jury room, and that the secrecy requirement does not apply outside of the room.⁶⁰ The mere fact that a judge is present at a proceeding does not mean that it is exempt from the secrecy requirement.⁶¹

The mere fact that information is presented to the grand jury does not preclude disclosure of such

information,⁶² as by answering questions on the same subject matter,⁶³ where the same information is obtained from a source independent of the grand jury,⁶⁴ and the mere fact that evidence is considered by the grand jury does not preclude disclosure of such evidence.⁶⁵ It is not the information itself, but the fact that the grand jury considered the information, which is protected from disclosure.⁶⁶ Only information that reveals what transpired in the grand jury room is protected.⁶⁷ The mere fact that a document is presented to or sought by a grand jury does not preclude disclosure of the document,⁶⁸ where the document was created for purposes other than the grand jury investigation⁶⁹ and is sought for its own sake, for its intrinsic value in furtherance of a lawful investigation,⁷⁰ as a document is protected only if it might reveal what

- In re Grand Jury Proceedings, (Daewoo) D.C.Or., 613 F.Supp. 672.
54. U.S.—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.
55. U.S.—In re Doe, D.C.R.I., 537 F.Supp. 1038.
 U.S. v. DeGroote, W.D.N.Y., 122 F.R.D. 131—Urseth v. City of Dayton, S.D.Ohio, 110 F.R.D. 245.
56. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188—Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 211 U.S.App.D.C. 267—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.
57. U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.
 Cumis Ins. Soc., Inc. v. South-Coast Bank, D.C.Ind., 610 F.Supp. 193.
58. Colo.—People v. Rickard, 761 P.2d 188.
59. Conn.—State v. Kemp, 1 A.2d 761, 124 Conn. 639.
60. U.S.—In re Grand Jury Subpoena, C.A.4(Md.), 920 F.2d 235.
61. Fla.—Fiumara v. Higgins, D.C.N.H., 572 F.Supp. 1093.
62. Fla.—Palm Beach Newspapers, Inc. v. Doe, App. 4 Dist., 460 So.2d 406.
63. U.S.—Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Committee v. U.S. Dept. of Justice, 823 F.2d 574, 262 U.S.App.D.C. 166—In re Grand Jury Matter, C.A.Pa., 682 F.2d 61.
 Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188—In re Search Warrant for Northwest EnviroServices, Inc., W.D.Wash., 736 F.Supp. 238.
64. Miss.—In re Knapp, 536 So.2d 1330.
65. U.S.—Blalock v. U.S., C.A.11(Ga.), 844 F.2d 1546, rehearing denied 856 F.2d 200.
 In re Search Warrant for Northwest EnviroServices, Inc., W.D.Wash., 736 F.Supp. 238—In re Grand Jury Matter, E.D.Pa., 640 F.Supp. 63.
 U.S. v. Premises Known as 25 Coligni Ave., New Rochelle, New York, S.D.N.Y., 120 F.R.D. 465—McArthur v. Robinson, D.C.Ark., 98 F.R.D. 672.
66. U.S.—U.S. v. DiBona, D.C.Pa., 601 F.Supp. 1162—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.
67. Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.
68. U.S.—Anaya v. U.S., C.A.10(N.M.), 815 F.2d 1373.

67. U.S.—Larson v. U.S., C.A.8(Minn.), 833 F.2d 758, certiorari denied 108 S.Ct. 1736, 486 U.S. 1008, 100 L.Ed.2d 200.

68. U.S.—U.S. v. Phillips, C.A.11(Fla.), 843 F.2d 438—Matter of Special March 1981 Grand Jury, C.A.III., 753 F.2d 575—In re Grand Jury Matter, C.A.Pa., 682 F.2d 61.

Matter of Harrisburg Grand Jury—83-2, M.D.Pa., 638 F.Supp. 43—Matter of Petitions for Disclosure of Documents Subpoenaed by Grand Jury from Sack, D.C.Fla., 617 F.Supp. 630—Jos. Schlitz Brewing Co. v. S.E.C., D.C., 548 F.Supp. 6.

In re Sunrise Securities Litigation, E.D.Pa., 130 F.R.D. 560, decision clarified on denial of reconsideration 109 B.R. 658.

Fla.—In re Grand Jury Investigation Spring Term 1988, App. 2 Dist., 543 So.2d 757, review denied Spicola v. Tribune Co., 547 So.2d 1210 and 547 So.2d 1210.

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

Mass.—WBZ-TV4 v. District Atty. for Suffolk Dist., 562 N.E.2d 817, 408 Mass. 595.

69. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188—In re Grand Jury Matter, E.D.Pa., 640 F.Supp. 63—U.S. v. McRae, D.C., 580 F.Supp. 1560.

N.Y.—People v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 519 N.Y.S.2d 106, 136 Misc.2d 612.

Secrecy imposed by court

Where court imposes secrecy requirement on witness (who is not subject to general requirement of secrecy), court cannot prohibit disclosure of documents prepared and assembled independent of grand jury proceedings.

U.S.—In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, C.A.11(Fla.), 864 F.2d 1559.

70. U.S.—DiLeo v. C.I.R., C.A.2, 959 F.2d 16, certiorari denied 113 S.Ct. 197, 506 U.S. 868, 121 L.Ed.2d 140—U.S. ex rel. Woodard v. Tynan, C.A.10(Colo.), 757 F.2d 1085, on rehearing 776 F.2d 250—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

In re Grand Jury Matter, E.D.Pa., 640 F.Supp. 63—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672—Cumis Ins. Soc., Inc. v. South-Coast Bank, D.C.Ind., 610 F.Supp. 193.

U.S. v. Theron, D.Kan., 116 F.R.D. 58—McArthur v. Robinson, D.C.Ark., 98 F.R.D. 672.

occurred before the grand jury;⁷¹ the court has wide discretion in determining whether a document is protected.⁷²

However, there is some authority for the view that the secrecy requirement applies generally to subpoenaed documents,⁷³ and applies even to documents created independently of the grand jury proceeding.⁷⁴ It has also been held that confidential documentary information not otherwise public obtained by the grand jury by coercive means is generally subject to the secrecy requirement,⁷⁵ but that information is not protected if it is public or was not obtained through coercive means, or if disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry.⁷⁶ It has also

been held that a request for the production of all documents in the possession of the grand jury should be treated as requiring disclosure of matters occurring before the grand jury,⁷⁷ but that a request for the production of specific documents identified independent of any reference to the grand jury normally should be considered as not requesting disclosure of matters occurring before the grand jury.⁷⁸

Various matters have been held subject to the secrecy requirement,⁷⁹ such as documents generated by the grand jury proceedings,⁸⁰ minutes,⁸¹ transcripts,⁸² internal governmental memoranda that reflect what transpired before the grand jury,⁸³ subpoenas,⁸⁴ the identity of witnesses⁸⁵ or docu-

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

71. U.S.—Anaya v. U.S., C.A.10(N.M.), 815 F.2d 1373—In re Special February, 1975 Grand Jury, C.A.Ill., 662 F.2d 1232, affirmed U.S. v. Baggot, 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

In re Regular Grand Jury of Friday, Oct. 3, 1986, E.D.N.Y., 741 F.Supp. 1027, clarified 1990 WL 179741 and 1991 WL 180353—U.S. v. Liberman, E.D.N.Y., 687 F.Supp. 775—Matter of Harrisburg Grand Jury—83-2, M.D.Pa., 638 F.Supp. 43—U.S. v. McRae, D.C., 580 F.Supp. 1560.

72. U.S.—In re Special February, 1975 Grand Jury, C.A.Ill., 662 F.2d 1232, affirmed U.S. v. Baggot, 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672—Cumis Ins. Soc., Inc. v. South-Coast Bank, D.C.Ind., 610 F.Supp. 193.

73. U.S.—In re Grand Jury Disclosure, D.C.Va., 550 F.Supp. 1171.

74. U.S.—In re Grand Jury Proceedings Relative to Perl, C.A.8(Minn.), 838 F.2d 304—U.S. v. Sutton, Em.App., 795 F.2d 1040, certiorari denied 107 S.Ct. 873, 479 U.S. 1030, 93 L.Ed.2d 828.

Colo.—People v. Tynan, App., 701 P.2d 80.

75. U.S.—In re Grand Jury Proceedings, C.A.6(Mich.), 851 F.2d 860.

76. U.S.—In re Grand Jury Proceedings, C.A.6(Mich.), 851 F.2d 860.

77. U.S.—In re Doe, D.C.R.I., 537 F.Supp. 1038.

78. U.S.—In re Doe, D.C.R.I., 537 F.Supp. 1038.

79. Consistency

Whether information provided by person is consistent with his prior grand jury testimony is subject to secrecy requirement.

Miss.—In re Knapp, 536 So.2d 1330.

Documents akin to testimony

Documents akin to testimony, such as a witness' prepared statement to be read to the grand jury, and an attorney's file memorandum on which the statement is based, are subject to the secrecy requirement.

U.S.—Pontarelli Limousine, Inc. v. City of Chicago, N.D.Ill., 652 F.Supp. 1428.

FBI report

While Federal Bureau of Investigation (FBI) reports do not automatically fall within scope of rule prescribing disclosure of grand jury material, such reports can fall within rule's protection under appropriate circumstances, such as where they are closely related to grand jury's investigation itself and where disclosure would reveal identities of targets and other witnesses.

U.S.—Martin v. Consultants & Administrators, Inc., C.A.7(Ill.), 966 F.2d 1078, rehearing denied.

Motion papers

Motions, responses to motions, and briefs that tend to reveal substance of grand jury subpoenas, orders, and records must be sealed.

U.S.—In re Grand Jury Empanelled March 8, 1983, D.C.Tenn., 579 F.Supp. 189.

Notification of disclosure

Notification of names of persons to whom disclosure of grand jury materials has been made and certification that attorney has advised those persons of their obligation of secrecy is protected from disclosure by general rule of grand jury secrecy.

U.S.—U.S. v. DeGroote, W.D.N.Y., 122 F.R.D. 131.

80. U.S.—Jos. Schlitz Brewing Co. v. S.E.C., D.C., 548 F.Supp. 6.

81. U.S.—U.S. v. Premises Knows as 25 Coligni Ave., New Rochelle, New York, S.D.N.Y., 120 F.R.D. 465.

Minutes recording individual votes

Nev.—State v. Boueri, 672 P.2d 33, 99 Nev. 790.

82. U.S.—Standley v. Department of Justice, C.A.9(Ariz.), 835 F.2d 216—In re Grand Jury Matter, C.A.Pa., 697 F.2d 511.

Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

83. U.S.—Standley v. Department of Justice, C.A.9(Ariz.), 835 F.2d 216.

Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

84. U.S.—Cumis Ins. Soc., Inc. v. South-Coast Bank, D.C.Ind., 610 F.Supp. 193.

Ind.—Pigman v. Evansville Press, App. 1 Dist., 537 N.E.2d 547, transfer denied.

85. U.S.—In re Grand Jury Proceedings, C.A.9(Cal.), 914 F.2d 1372.

U.S. v. North, D., 708 F.Supp. 370.

U.S. v. Premises Known as 25 Coligni Ave., New Rochelle, N.Y., S.D.N.Y., 120 F.R.D. 465.

Fact that particular person was witness

Miss.—In re Knapp, 536 So.2d 1330.

ments⁸⁶ presented to the grand jury, and material prepared for the grand jury.⁸⁷

Various particular matters have been held not subject to the secrecy requirement.⁸⁸ Thus, the secrecy of the proceedings of the grand jury is not unduly invaded by a report to the court of the refusal of a witness to testify,⁸⁹ or by a report that the charges were unwarranted and that the prosecuting attorney be permitted to transmit the min-

utes of the proceedings to the presiding justice for appropriate action against the complaining witness.⁹⁰ Also, general statements by the grand jury which were published in newspapers to the effect that it was investigating a crime situation which had become deplorable, and which were in the nature of general presentments or recommendations, have been held not to violate the requirement of secrecy.⁹¹

B. AUTHORIZED DISCLOSURE OF PROTECTED MATERIALS

§ 180. In General

The principle of grand jury secrecy is not absolute, and disclosure is proper in some circumstances.

Library References

Grand Juries §41.50, 41.50(1, 3).

86. U.S.—Greenspun v. C.I.R., D.C., 622 F.Supp. 551—Jos. Schlitz Brewing Co. v. S.E.C., D.C., 548 F.Supp. 6.

U.S. v. Premises Known as 25 Coligni Ave., New Rochelle, New York, S.D.N.Y., 120 F.R.D. 465.

87. Handwriting exemplars

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

Interviews

(1) Witness interviews conducted outside grand jury's presence but presented to it were governed by rule providing for grand jury secrecy.

U.S.—In re Grand Jury Matter, C.A.Pa., 697 F.2d 511.

(2) Interviews occurring after institution of grand jury proceedings but before return of the indictment may be "matters occurring before the grand jury," within meaning of disclosure rule, if they are closely related to the grand jury; where interviewer was designated as the grand jury agent, any interviews conducted by him were "matters occurring before the grand jury," within meaning of disclosure rule.

U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

Photograph

Photograph to be taken of witness would be covered where photograph was ordered taken by grand jury to be shown by government agents to other persons who may be able to identify witness as having participated in alleged criminal conduct under investigation, and only basis for enforcement of order was that grand jury had requested such enforcement.

U.S.—In re Doe, N.D.Ill., 678 F.Supp. 186.

Videotape

Mass.—WBZ-TV4 v. District Atty. for Suffolk Dist., 562 N.E.2d 817, 408 Mass. 595.

88. Commencement and termination dates of grand jury term

U.S.—In re Grand Jury Investigation, C.A.3(Pa.), 903 F.2d 180.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The principle of grand jury secrecy is not absolute.⁹² Disclosure is proper in some circumstances.⁹³

Ministerial records

Movants, although unindicted parties, had a right as members of the public, subject to rule of grand jury secrecy, of access to ministerial records in the files of the district court having jurisdiction of grand jury, and, absent specific and substantial reasons for a refusal, such access was not to be denied.

U.S.—In re Special Grand Jury (for Anchorage, Alaska), C.A.Alaska, 674 F.2d 778.

Opinion as to potential criminal liability

U.S.—McArthur v. Robinson, D.C.Ark., 98 F.R.D. 672.

Statement outside grand jury room

Memorandum of what person told investigator outside grand jury room is not subject to secrecy requirement.

U.S.—Anaya v. U.S., C.A.10(N.M.), 815 F.2d 1373.

Material created before institution of proceedings

(1) Affidavits filed before institution of grand jury proceedings are not necessarily subject to secrecy requirement.

U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

(2) Content of any interviews conducted before institution of grand jury proceedings is not subject to secrecy requirement.

U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

Material created after indictment

Witness interviews conducted after the indictment are, in general, not "matters occurring before the grand jury" within meaning of disclosure rule.

U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

89. Mich.—In re Archer, 96 N.W. 442, 134 Mich. 408.

N.Y.—People ex rel. Hackley v. Kelly, 12 Abb.Pr. 150, 21 How.Pr. 54, affirmed 24 N.Y. 74.

90. N.Y.—Application of Knight, 28 N.Y.S.2d 353, 176 Misc. 635.

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

Disclosure of protected material is proper only if it is authorized by a statute or rule of court, or by a court order.⁹⁴ In the absence of a statute or rule of court providing for automatic disclosure, disclosure can be authorized only by the court,⁹⁵ and not by the members or foreman of the grand jury.⁹⁶ While it has been held that the common-law rule as to secrecy is modified only to the extent indicated by statute,⁹⁷ a statute expressing an exception to the rule has been held not to show that the rule should be applied when the reason therefor fails.⁹⁸

Some authorities hold that a grand jury witness has a general right to a transcript of his own testimony, unless the government demonstrates countervailing interests which outweigh the right to release of a transcript.⁹⁹

It has been held that testimony before one grand jury generally cannot be made known to a separate grand jury.¹ However, a government attorney may disclose matters occurring before a federal grand jury to another federal grand jury without court approval, as discussed *infra* § 181.

Violation of state criminal law.

Disclosure otherwise prohibited of matters occurring before a federal grand jury may be made when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the the purpose of enforcing such law.²

92. N.J.—Matter of Allegations of Official Misconduct in City of Elizabeth Contained in The Citizen on 6/11/88, 558 A.2d 1387, 233 N.J.Super. 426.

N.Y.—Brandt v. Cohn, 300 N.Y.S. 732, 252 A.D. 649.

93. U.S.—U.S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, two cases, 310 U.S. 658, 84 L.Ed. 1421.

Schmidt v. U.S., C.C.A.Ohio, 115 F.2d 394—Metzler v. U.S., C.C.A.Cal., 64 F.2d 203.

La.—State v. Kifer, 173 So. 169, 186 La. 674, 110 A.L.R. 1017.

N.Y.—People ex rel. Hirschberg v. Board of Sup'rs of Orange County, 167 N.E. 204, 251 N.Y. 156.

94. N.Y.—Larry W. v. Corporation Counsel of City of New York, 433 N.E.2d 517, 55 N.Y.2d 244, 448 N.Y.S.2d 452.

95. Conn.—State v. Canady, 445 A.2d 895, 187 Conn. 281.

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

Continued access

(1) Some authorities hold that an attorney who presents a matter to the grand jury may not have continued access to grand jury materials without obtaining a court order.

§ 181. Automatic Disclosure

- a. In general
- b. Federal grand jury

a. In General

Some statutes or rules of court authorize disclosure of grand jury material without a court order in certain circumstances.

Library References

Grand Juries ⇨41.50(3, 5-7).

Some statutes or rules of court authorize disclosure of grand jury material without a court order in certain circumstances.³

Under a statute authorizing disclosure by the state's attorney in the performance of his duties, disclosure for use in a civil or administrative proceeding is not in the performance of his duties.⁴

Under a statute authorizing disclosure when a law so directs, a subpoena is not a "law."⁵

Provision must be made, as a matter of practical necessity, for disclosure by prosecutors appearing before the grand jury to other members of the prosecuting staff.⁶

There is generally no right of disclosure without court approval to attorneys other than prosecutors.⁷

b. Federal Grand Jury

Disclosure of matters occurring before a federal grand jury generally may be made, without court approval, to a government

N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

(2) Continued access as not constituting disclosure under federal law see *supra* § 176.

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

97. Mo.—State v. McDonald, 119 S.W.2d 286, 342 Mo. 998.

98. N.Y.—People ex rel. Hirschberg v. Board of Sup'rs of Orange County, 167 N.E. 204, 251 N.Y. 156.

99. U.S.—In re Sealed Motion, 880 F.2d 1367, 279 U.S.App.D.C. 294.

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

2. Fed.Rules Cr.Proc., Rule 6(e)(3)(C)(iv), 18 U.S.C.A.

3. Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

4. Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

5. Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000.

6. Colo.—People v. Rickard, 761 P.2d 188.

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

attorney for use in the conduct of the same criminal matters; to government personnel assisting a government attorney in enforcing federal criminal law; or to another federal grand jury.

Disclosure otherwise prohibited of matters occurring before a federal grand jury, other than its deliberations and the vote of any grand juror, may be made to an attorney for the government for use in the performance of such attorney's duty.⁸ This provision applies to an attorney conducting a criminal matter even if he is assigned to the civil division or his usual duties involve only civil cases.⁹ It is not limited to those prosecutors who actually appear before the grand jury, and every attorney (including a supervisor) who is working on a prosecution may have access to grand jury materials.¹⁰ However, this provision for disclosure without court order is limited to those attorneys who conduct the criminal matters to which the materials pertain,¹¹ as the performance of duty does not include preparation and litigation of a civil suit by an attorney who had no part in conducting the related prosecution.¹² Any disclosure to attorneys other than prosecutors should be judicially supervised and should not be automatic.¹³

Disclosure otherwise prohibited of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by¹⁴ an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.¹⁵ Any person to whom matters are disclosed under this provision shall not utilize the grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law.¹⁶ An attorney for the government shall promptly provide the district court,

before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy.¹⁷

It has been held that court approval is not required for a nonpublic disclosure of material to a court in connection with a government attorney's conduct of the criminal case to which those materials pertain.¹⁸ While it has been held that court approval is required for a government attorney's public disclosure of material in a criminal proceeding,¹⁹ it has also been held that court approval is not required.²⁰

Disclosure to another federal grand jury.

Disclosure otherwise prohibited of matters occurring before the grand jury may be made when the disclosure is made by an attorney for the government to another federal grand jury.²¹ The other federal grand jury need not be in the same district.²²

§ 182. Disclosure Related to Proceeding in General

- a. In general
- b. Federal grand jury

a. In General

Under some statutes or rules of court, disclosure of grand jury material may be made when the court, preliminary to or in connection with a judicial proceeding, directs such disclosure.

Research Note

Discovery and inspection of grand jury minutes in criminal proceeding is discussed in C.J.S. Criminal Law §§ 524-531. Competency of grand juror as witness is considered in C.J.S. Witnesses § 107, and competency of prosecutor as witness is treated in C.J.S. Witnesses § 113.

8. Fed.Rules Cr.Proc., Rule 6(e)(3)(A)(i), 18 U.S.C.A.
 9. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.
 10. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.
 11. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.
 12. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.
- Re-examination of materials by same attorney as not constituting disclosure see supra § 176.
13. U.S.—U.S. v. Sells Engineering, Inc., Cal. 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.
 14. Fed.Rules Cr.Proc., Rule 6(e)(3)(A)(ii), 18 U.S.C.A.

15. Government personnel

A person need not be a permanent civil service employee in order to constitute government personnel.

- U.S.—U.S. v. Lartey, C.A.N.Y., 716 F.2d 955.
16. Fed.Rules Cr.Proc., Rule 6(e)(3)(B), 18 U.S.C.A.
 17. Fed.Rules Cr.Proc., Rule 6(e)(3)(B), 18 U.S.C.A.
 18. U.S.—U.S. v. Regan, S.D.N.Y., 706 F.Supp. 1102.

19. Sentencing proceeding

U.S.—U.S. v. Alexander, C.A.2(N.Y.), 860 F.2d 508.

20. Plea hearing

U.S.—U.S. v. Manglitz, C.A.4(Md.), 773 F.2d 1463.

21. Fed.Rules Cr.Proc., Rule 6(e)(3)(C)(iii), 18 U.S.C.A.

22. U.S.—In re Grand Jury Subpoenas Duces Tecum, Aug. 1986, D.Md., 658 F.Supp. 474.

Library References

Grand Juries ◊41.50(5-7).

Under some statutes or rules of court, disclosure of grand jury material may be made when the court, preliminary to or in connection with a judicial proceeding, directs such disclosure.²³ Various proceedings have been held preliminary to a judicial proceeding.²⁴

It has been held that release of grand jury material should only sparingly be granted to an administrative agency.²⁵

Some authorities hold that statements made by a witness before the grand jury cannot be used at a trial even in the conduct of cross-examination.²⁶ The purpose of this rule is to encourage full disclosure of information about crimes.²⁷

A rule of evidence concerning the admissibility of prior statements by a witness has been held to authorize the disclosure at a trial of certain prior statements which a trial witness made before a grand jury.²⁸

b. Federal Grand Jury

Disclosure otherwise prohibited of matters occurring before a federal grand jury may be made when so directed by a court preliminary to or in connection with a judicial proceeding.

Research Note

Discovery and inspection of federal grand jury minutes in criminal proceeding is considered in C.J.S. Criminal Law §§ 528-531.

Under a provision of the Federal Rules of Criminal Procedure, disclosure otherwise prohibited of matters occurring before a federal grand jury may

be made when so directed by a court preliminarily to or in connection with a judicial proceeding.²⁹

This provision contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated.³⁰ It is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge, as the focus is on the actual use to be made of the material.³¹ The primary purpose of disclosure must be to assist in the preparation or conduct of a judicial proceeding.³²

The mere fact that a citizen may resist or challenge a government action in court does not mean that the action is preliminary to a judicial proceeding.³³ Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding.³⁴ The mere fact that agency action is subject to automatic review by a judicial body does not make such action preliminary to a judicial proceeding.³⁵ However, disclosure to an administrative body may be considered preliminary to a judicial proceeding where a significant judicial role exists in the operation of the regulatory or statutory scheme.³⁶

The proceeding instituted for the purpose of obtaining disclosure cannot itself constitute the proceeding in connection with which disclosure is sought.³⁷

Particular proceedings.

Disclosure for use in an Internal Revenue Service audit is not appropriate, as the purpose of such an audit is to assess the amount of tax liability

23. Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

24. Teacher disciplinary proceeding

Ill.—Board of Educ. v. Verisario, 2 Dist. 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000.

25. 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.

26. La.—State v. Ates, 418 So.2d 1326, appeal after remand 429 So.2d 176 and 429 So.2d 177.

27. La.—State v. Ates, 418 So.2d 1326, appeal after remand 429 So.2d 176 and 429 So.2d 177.

28. Or.—State v. Dickerson, 827 P.2d 1354, 112 Or.App. 51, review denied 835 P.2d 916, 313 Or. 627.

29. Fed.Rules Cr.Proc., Rule 6(e)(3)(C)(i), 18 U.S.C.A.

30. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

31. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

32. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

In re Sealed Motion, 880 F.2d 1367, 279 U.S.App.D.C. 294.

33. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

In re Grand Jury 89-4-72, C.A.6 Mich., 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

34. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

35. U.S.—In re Grand Jury 89-4-72, C.A.6(Mich.), 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

36. U.S.—In re Grand Jury 89-4-72, C.A.6(Mich.), 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

37. U.S.—American Friends Service Committee v. Webster, 720 F.2d 29, 231 U.S.App.D.C. 265.

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64, 463 U.S. 476, 77

S.App.D.C. 294.

64, 463 U.S. 476, 77

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(Mich.), 932 F.2d 481,
in Attorney Grievance
958, 116 L.Ed.2d 438.

ce v. Webster, 720 F.2d

through administrative channels, and the Service may collect the tax by nonjudicial means.³⁸

Various proceedings have been held to constitute judicial proceedings,³⁹ or proceedings preliminary to a judicial proceeding.⁴⁰ Disclosures to a state grand jury have been held to be encompassed by the provision.⁴¹ Various proceedings have been held not to constitute judicial proceedings,⁴² or proceedings preliminary to a judicial proceeding.⁴³

Inherent power.

Apart from the provision of the Federal Rules of Criminal Procedure, it has been held that the court has the inherent power to permit the release of grand jury materials for use in certain proceedings.⁴⁴

Constitutional provisions.

Apart from the provision of the Federal Rules of Criminal Procedure, it has been held that disclosure may be justified in the context of a congressional investigation pursuant to the speech and debate clause of the Constitution,⁴⁵ and may be justified in the context of an impeachment investi-

gation pursuant to the constitutional impeachment power granted to the House of Representatives.⁴⁶ The court should not order disclosure to the subject of an impeachment investigation, as control over the timing and extent of discovery in impeachment proceedings is ancillary to Congress' impeachment powers.⁴⁷

§ 183. Standards in General

Parties seeking protected grand jury material generally must show that the material is needed to avoid a possible injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material needed.

Library References

Grand Juries ⇨41.50, 41.50(1, 4-7, 10).

In the absence of a statute or rule of court providing for automatic disclosure, parties seeking protected grand jury material generally must show that the material is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material needed.⁴⁸

38. U.S.—U.S. v. Baggot, Ill., 103 S.Ct. 3164, 463 U.S. 476, 77 L.Ed.2d 785.

39. Comments on independent counsel's report

U.S.—In re Sealed Motion, 880 F.2d 1367, 279 U.S.App.D.C. 294.

Attorney disciplinary proceeding

U.S.—Matter of Federal Grand Jury Proceedings, C.A.2(N.Y.), 760 F.2d 436.

Impeachment trial by Senate

U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), S.D.Fla., 669 F.Supp. 1072.

Tax Court proceeding

U.S.—Patton v. C.I.R., C.A.5, 799 F.2d 166.

40. Attorney disciplinary investigation

U.S.—In re Barker, C.A.Or., 741 F.2d 250.

House impeachment investigation

U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F.Supp. 1072.

41. U.S.—In re Disclosure of Evidence Taken Before Special Grand Jury Convened on May 8, 1978, C.A.Al., 650 F.2d 599, amended on other grounds 662 F.2d 362.

42. Attorney disciplinary proceeding

U.S.—In re Grand Jury 89-4-72, C.A.6(Mich.), 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

Deportation proceeding

U.S.—In re December 1988 Term Grand Jury Investigation, W.D.N.C., 714 F.Supp. 782.

43. Attorney disciplinary proceeding

U.S.—In re Grand Jury 89-4-72, C.A.6(Mich.), 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

Deportation proceeding

U.S.—In re December 1988 Term Grand Jury Investigation, W.D.N.C., 714 F.Supp. 782.

44. Judicial investigation

Federal Rule of Criminal Procedure providing for nondisclosure of grand jury records, except under listed exceptions, does not preclude district court, in its inherent power as supervisor of grand jury, from permitting release of such records on request of committee conducting judicial investigation under Judicial Councils Reform and Judicial Conduct and Disability Act.

U.S.—In re Petition to Inspect and Copy Grand Jury Materials, C.A.Fla., 735 F.2d 1261, certiorari denied Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 S.Ct. 254, 469 U.S. 884, 83 L.Ed.2d 191, rehearing denied 105 S.Ct. 406, 469 U.S. 1001, 83 L.Ed.2d 341.

45. U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), S.D.Fla., 669 F.Supp. 1072.

46. U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), S.D.Fla., 669 F.Supp. 1072.

47. U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), S.D.Fla., 669 F.Supp. 1072.

48. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco, Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

Matter of Grand Jury Proceedings, Special Sept. 1986, C.A.7(III.), 942 F.2d 1195—U.S. v. Plummer, C.A.9(Ariz.), 941 F.2d 799.

Md.—In re Criminal Investigation No. 437 in Circuit Court for Baltimore City, 557 A.2d 235, 316 Md. 66.

The party seeking disclosure must make a strong showing of particularized need,⁴⁹ and this standard applies not only to private parties but also to public parties.⁵⁰ The need must be shown with particularity.⁵¹ Secrecy must not be broken except where there is a compelling necessity.⁵² The party must show that without the material he would be greatly prejudiced or an injustice would be done.⁵³

The court must balance the need for disclosure against the need for secrecy.⁵⁴ Disclosure is appro-

priate only if the need for disclosure outweighs the public interest in secrecy.⁵⁵ As the considerations justifying secrecy become less relevant, a party asserting a need for disclosure will have a lesser burden in showing justification.⁵⁶ The strength or weakness of the need for secrecy determines how strong or minimal must be the justification for disclosure.⁵⁷

In determining whether to authorize disclosure,

Privilege in federal proceeding to refuse to disclose state grand jury materials see *infra* § 185.

Harmonization

State standards for disclosure of grand jury materials to government departments should be harmonized with federal standards where possible.

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

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

U.S. v. Warren, C.A.Kan., 747 F.2d 1339.

Colo.—*People v. Tynan*, App., 701 P.2d 80.

Conn.—*In re Grand Jury Investigation by Alexander*, 540 A.2d 49, 207 Conn. 98.

La.—*State v. Farris*, App. 3 Cir., 491 So.2d 464.

Md.—*In re Criminal Investigation No. 437 in Circuit Court for Baltimore City*, 557 A.2d 235, 316 Md. 66.

Ohio—*State v. Tenbrook*, 517 N.E.2d 1046, 34 Ohio Misc.2d 14.

Independently generated materials

(1) Party seeking disclosure of grand jury materials generated independently of grand jury investigation must show particularized need for documents but is not required to demonstrate large compelling need.

U.S.—*In re Grand Jury Proceedings Relative to Perl*, C.A.8(Minn.), 838 F.2d 304.

(2) Whether independently created materials are subject to secrecy requirement see *supra* § 179.

Continued access

(1) Some authorities hold that an attorney who presents a matter to a grand jury may not have continued access to grand jury materials without a showing of particularized need.

N.J.—*State v. Arace Bros.*, 552 A.2d 628, 230 N.J.Super. 22.

(2) Continued access as not constituting disclosure under federal law see *supra* § 176.

Compelling and particularized need

N.Y.—*Matter of Dist. Atty. of Suffolk County*, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

Requirement strictly enforced

U.S.—*U.S. v. Lovecchio*, D.C.Pa., 561 F.Supp. 221.

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

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

N.Y.—*Matter of Dist. Atty. of Suffolk County*, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

51. U.S.—*U.S. v. Procter & Gamble Co.*, N.J., 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077.

In re Grand Jury 89-4-72, C.A.6(Mich.), 932 F.2d 481, rehearing denied, certiorari denied Michigan Attorney Grievance Commission v. Doe, 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

52. U.S.—*U.S. v. Procter & Gamble Co.*, N.J., 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077.

U.S. v. McDowell, C.A.3(Del.), 888 F.2d 285.

La.—*State v. Trosclair*, 443 So.2d 1098, certiorari dismissed 104 S.Ct. 3593, 468 U.S. 1205, 82 L.Ed.2d 889.

53. U.S.—*Federal Deposit Ins. Corp. v. Ernst & Whinney*, C.A.6(Tenn.), 921 F.2d 83—*Hernly v. U.S.*, C.A.7(Ind.), 832 F.2d 980.

La.—*State v. Farris*, App. 3 Cir., 491 So.2d 464.

Disclosure must serve interests of fairness and justice

U.S.—*In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, C.A.4(Va.), 800 F.2d 1293.

54. U.S.—*Matter of Federal Grand Jury Proceedings*, C.A.2(N.Y.), 760 F.2d 436.

Stump v. Gates, D.Colo., 777 F.Supp. 796.

Halperin v. Berlandi, D.Mass., 114 F.R.D. 8.

La.—*State v. Trosclair*, 443 So.2d 1098, certiorari dismissed 104 S.Ct. 3593, 468 U.S. 1205, 82 L.Ed.2d 889.

N.Y.—*Nelson v. Mollen*, 3 Dept., 573 N.Y.S.2d 99, 175 A.D.2d 518.

55. U.S.—*Douglas Oil Co. of California v. Petrol Stops Northwest*, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand *Petrol Stops Northwest v. U.S.*, 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied *Conoco Inc. v. Petrol Stops Northwest*, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Lynde, C.A.10(Colo.), 922 F.2d 1448.

Conn.—*In re Final Grand Jury Report Concerning Torrington Police Dept.*, 501 A.2d 377, 197 Conn. 698.

La.—*State v. Doss*, App. 5 Cir., 522, So.2d 1274, writ denied 530 So.2d 563.

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

N.Y.—*Matter of Dist. Atty. of Suffolk County*, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

Ohio—*State, ex rel. Collins v. O'Farrell*, 573 N.E.2d 113, 61 Ohio St.3d 142.

56. U.S.—*Douglas Oil Co. of California v. Petrol Stops Northwest*, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand *Petrol Stops Northwest v. U.S.*, 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied *Conoco Inc. v. Petrol Stops Northwest*, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

57. U.S.—*In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, C.A.4(Va.), 800 F.2d 1293.

the court has discretion.⁵⁸ Decisions should be made on a case-by-case basis.⁵⁹

§ 184. Particular Factors

A particularized need for disclosure of grand jury material does not exist merely because such material is rationally related to litigation. In considering the effects of disclosure, the court must consider the possible effect upon the functioning of future grand juries.

Library References

Grand Juries ⇨41.50, 41.50 (1, 4-7, 10).

A particularized need for disclosure of grand jury material does not exist merely because such material is rationally related to litigation,⁶⁰ or is relevant to such litigation.⁶¹ The material must be necessary⁶² rather than merely beneficial.⁶³ A particularized need is not established by a conclusory assertion⁶⁴ or a generalized assertion.⁶⁵

The typical showing of particularized need for grand jury material arises when a litigant seeks to

use such material at trial to impeach a witness, to refresh his recollection, or to test his credibility and the like.⁶⁶ There is no absolute right to the grand jury testimony of a witness who later testifies in a different judicial proceeding.⁶⁷

In determining whether to authorize disclosure, the court should examine whether disclosure would conflict with the policies underlying the secrecy rule.⁶⁸ However, a particularized need for disclosure does not exist merely because of the absence of the traditional reasons for secrecy⁶⁹ or the weakness of the considerations in favor of secrecy.⁷⁰ In considering the effects of disclosure, the court must consider not only the immediate effects upon the particular grand jury, but also the possible effect upon the functioning of future grand juries.⁷¹

Where disclosure is sought by a government agency, the court may consider any relevant considerations peculiar to government movants that

58. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Grand Jury Subpoenas Duces Tecum, C.A.8(Minn.), 904 F.2d 466.

Conn.—State v. Maldonado, 478 A.2d 581, 193 Conn. 350.

D.C.—Law v. U.S., App., 488 A.2d 914.

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

N.Y.—Matter of Dist. Atty. of Suffolk County, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

Ohio—State v. Murrell, 12 Dist., 595 N.E.2d 982, 72 Ohio App.3d 668, dismissed, jurisdictional motion overruled 574 N.E.2d 1090, 61 Ohio St.3d 1419.

Discretion not absolute

U.S.—U.S. v. Short, C.A. Ohio, 671 F.2d 178, certiorari denied 102 S.Ct. 2932, 457 U.S. 1119, 73 L.Ed.2d 1332.

Continued access

Wide discretion must be afforded to trial court in determining whether attorney making application for access to grand jury materials, having been involved in grand jury investigation, should be granted continued access to or use of grand jury materials.

N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

59. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

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

61. U.S.—Hernly v. U.S., C.A.7(Ind.), 832 F.2d 980.

Urseth v. City of Dayton, S.D. Ohio, 110 F.R.D. 245.

N.Y.—Application of U.S. Air for Disclosure of Grand Jury Testimony with Respect to Salanger, 4 Dept., 469 N.Y.S.2d 39, 97 A.D.2d 961.

62. U.S.—Stump v. Gates, D.Colo., 777 F.Supp. 796.

Absolutely necessary

U.S.—Sun Dun Inc. of Washington v. U.S., E.D.Va., 766 F.Supp. 463.

63. Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

64. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

N.Y.—Melendez v. City of New York, 1 Dept., 489 N.Y.S.2d 741, 109 A.D.2d 13.

65. U.S.—In re Grocery Products Grand Jury Proceedings of 1983, D.Conn., 637 F.Supp. 1171.

66. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

67. U.S.—Matter of Federal Grand Jury Proceedings, C.A.2(N.Y.), 760 F.2d 436.

68. U.S.—In re Grand Jury Matter, C.A.Pa., 697 F.2d 511.

Encouraging witness

Where state law provides for automatic disclosure of grand jury material to accused, encouragement of witness cooperation is not strongly implicated as factor to be balanced against state's need for disclosure.

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

69. N.J.—Matter of Allegations of Official Misconduct in City of Elizabeth Contained in The Citizen on 6/11/88, 558 A.2d 1387, 233 N.J.Super. 426.

70. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

71. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

N.Y.—Ruggiero v. Fahey, 2 Dept., 478 N.Y.S.2d 337, 103 A.D.2d 65.

weigh for or against disclosure in a given case,⁷² and may weigh the public interest, if any, served by disclosure to a government body,⁷³ and may, in appropriate cases, consider that disclosure to government attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public.⁷⁴

In determining whether to authorize disclosure, various factors may be considered.⁷⁵ Various matters have been held to constitute a particularized need.⁷⁶ Various factors do not necessarily mandate disclosure.⁷⁷

Existence of alternative source of information.

It has been held that there is a need for disclosure of grand jury material only if the same infor-

mation cannot be obtained by other means.⁷⁸ However, it has also been held that, while the possibility of obtaining information from other sources is a factor to be considered,⁷⁹ there is no per se rule against disclosure even if the information is obtainable by other means.⁸⁰ Where a government agency seeks disclosure, the court may take into account any alternative discovery tools available to the agency.⁸¹

Time, effort, and expense.

The mere fact that disclosure of material would save time, effort, or expense does not constitute a particularized need.⁸² However, it has been held that cost considerations, although not sufficient to

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

73. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743—Illinois v. Abbott & Associates, Inc., Ill., 103 S.Ct. 1356, 460 U.S. 557, 75 L.Ed.2d 281.

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

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

In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

75. Character of materials

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

Consent of prosecutor

District attorney's consent to disclosure of grand jury minutes is not alone dispositive but is factor to be taken into consideration.

N.Y.—Application of FOJP Service Corp., 463 N.Y.S.2d 681, 119 Misc.2d 287.

Property of target

Principle of secrecy is not involved in state's request for disclosure of grand jury materials to government departments for use in civil prosecution, where materials which are sought are property of target of investigation.

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

Status of party

Securities Investor Protection Corporation trustee does not, merely because of his status, have right to release of grand jury testimony, but it is factor to be weighed in determining whether testimony should be revealed.

U.S.—Application of Executive Securities Corp., C.A.N.Y., 702 F.2d 406, certiorari denied Doe v. Executive Securities Corp., 104 S.Ct. 78, 464 U.S. 818, 78 L.Ed.2d 89.

Statutory policy

In passing on propriety of an exercise of inherent power, as supervisor of grand jury, to permit release of grand jury records, courts may take into account a specific statutory policy favoring disclosure in particular circumstances.

U.S.—In re Petition to Inspect and Copy Grand Jury Materials, C.A.Fla., 735 F.2d 1261, certiorari denied Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 S.Ct. 254, 469 U.S. 884, 83 L.Ed.2d 191, rehearing denied 105 S.Ct. 406, 469 U.S. 1001, 83 L.Ed.2d 341.

76. Unavailability of testimony

Present unavailability of a witness' testimony because of an assertion of privilege will establish requisite particularized need.

U.S.—Grumman Aerospace Corp. v. Titanium Metals Corp. of America, D.C.N.Y., 554 F.Supp. 771.

77. Access by government pursuing similar claims

Access by government as a civil litigant to materials does not mandate disclosure to private plaintiff in separate proceeding, even though government and private plaintiff are pursuing similar claims.

U.S.—Grumman Aerospace Corp. v. Titanium Metals Corp. of America, D.C.N.Y., 554 F.Supp. 771.

78. U.S.—In re Sealed Case, 801 F.2d 1379, 255 U.S.App.D.C. 340.

Stump v. Gates, D.Colo., 777 F.Supp. 796—Sun Dun Inc. of Washington v. U.S., E.D.Va., 766 F.Supp. 463—U.S. v. Stanton, S.D.Fla., 689 F.Supp. 1103—Matter of May 18, 1981 Grand Jury, D.C.N.Y., 602 F.Supp. 772.

Ill.—Board of Educ. v. Verisario, 2 Dist., 493 N.E.2d 355, 97 Ill.Dec. 692, 143 Ill.App.3d 1000, appeal denied.

N.J.—Matter of Grand Jury Testimony, 591 A.2d 614, 124 N.J. 443.

N.Y.—People v. Lester, 514 N.Y.S.2d 861, 135 Misc.2d 205.

79. U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 717 F.2d 1136.

Eng v. Coughlin, W.D.N.Y., 726 F.Supp. 40.

Conn.—State v. Maldonado, 478 A.2d 581, 193 Conn. 350.

80. U.S.—Eng v. Coughlin, W.D.N.Y., 726 F.Supp. 40.

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

In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

82. U.S.—Cullen v. Margiotta, C.A.2(N.Y.), 811 F.2d 698, certiorari denied Nassau County Republican Committee v. Cullen, 107 S.Ct. 3266, 483 U.S. 1021, 97 L.Ed.2d 764—In re Sells, C.A.Cal., 719 F.2d 985—In re Grand Jury Matter, C.A.Pa., 697 F.2d 511.

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.

Cost

U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

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require disclosure,⁸³ are relevant factors to be con- sidered.⁸⁴

Access by opposing party.

The fact that one party in litigation has access to material does not necessarily establish that the opposing party has a particularized need for such material,⁸⁵ and does not necessarily mandate disclo- sure,⁸⁶ but is a factor in favor of disclosure.⁸⁷

Abuse of grand jury process.

Where the government seeks disclosure of mate- rial for use in noncriminal proceedings, the court should consider allegations of abuse of the grand jury process,⁸⁸ and require the government to dem- onstrate the absence of such abuse,⁸⁹ especially where the grand jury fails to return an indict- ment,⁹⁰ although such allegations should be consid- ered even if an indictment is returned.⁹¹ When the concerns for secrecy are not implicated, the most relevant factor in the court's decision concerning disclosure is whether there has been an abuse of the grand jury.⁹²

§ 185. Privilege

Authorities differ regarding the existence of a privilege to refuse to disclose matters occurring before a grand jury.

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

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

85. U.S.—Grumman Aerospace Corp. v. Titanium Metals Corp. of America, D.C.N.Y., 554 F.Supp. 771.

Halperin v. Berlandi, D.Mass., 114 F.R.D. 8—Pakistan Intern. Airlines Corp. v. McDonnell Douglas Corp., D.C., 94 F.R.D. 566.

86. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293—U.S. v. Fischbach and Moore, Inc., C.A.9(Wash.), 776 F.2d 839.

87. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293—U.S. v. Fischbach and Moore, Inc., C.A.9(Wash.), 776 F.2d 839.

88. U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

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

Factors considered

In ruling on state's request for disclosure of grand jury materials to government departments for use in civil prosecutions, there must be objective standards for ascertaining presence or absence of investiga- tive abuse, including stated purpose of grand jury investigation, wheth- er indictment was returned, degree of civil agency involvement in grand jury investigation, whether agency is seeking access to evidence to which it would not be entitled under its own investigative powers, and whether grand jury investigation was instituted at agency's behest.

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

Continued access

Where attorney making application for access to grand jury materials was the individual who conducted grand jury investigation, the access issue presented was not one of disclosure, but rather related to continued access to or use of grand jury materials, and to that extent, court in determining question of particularized need for access should

Library References

Grand Juries §41-41.20, 41.50, 41.50(1.4-7).

It has been held that any communication made to a grand jury in the regular performance of its duties is absolutely privileged.⁹³ However, some state statutes or rules of court imposing a grand jury secrecy requirement have been held not to create an evidentiary privilege.⁹⁴

Some authorities hold that, in a federal proceed- ing, there is a privilege to refuse to disclose state grand jury materials, and that the test for deter- mining whether to compel disclosure of such mate- rial is the same as the test used to determine whether to authorize and compel the disclosure of federal grand jury material.⁹⁵

In the case of a federal grand jury, some authori- ties hold that a person not subject to the secrecy requirement does not have a privilege to refuse to disclose matters occurring before the grand jury.⁹⁶ It has also been held that a person who submitted independently created documents to a grand jury does not have a privilege to refuse to produce such documents in a subsequent proceeding.⁹⁷

be less concerned with interests of grand jury secrecy and should focus upon whether grand jury process had been or was being abused to gather evidence for use in civil or administrative proceedings; all that would generally be necessary would be showing that grand jury's investigative powers were not being improperly employed to generate additional evidence useful in civil suit or administrative proceeding.

N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

89. U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

N.J.—Matter of Allegations of Official Misconduct in City of Elizabeth Contained in The Citizen on 6/11/88, 558 A.2d 1387, 233 N.J.Super. 426.

90. U.S.—In re Grand Jury Subpoenas, April, 1978, at Baltimore, C.A.Md., 581 F.2d 1103, certiorari denied Fairchild Industries, Inc. v. Harvey, 99 S.Ct. 1533, 440 U.S. 971, 59 L.Ed.2d 787.

91. U.S.—In re Grand Jury Proceedings (Daewoo), D.C.Or., 613 F.Supp. 672.

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

93. Tex.—Ex parte Port, Cr.App., 674 S.W.2d 772.

94. U.S.—In re Grand Jury Proceedings, C.A.11(Fla.), 832 F.2d 554, rehearing denied 835 F.2d 291.

95. U.S.—Shell v. Wall, W.D.N.C., 760 F.Supp. 545—Simpson v. Hines, E.D.Tex., 729 F.Supp. 526.

Puricelli v. Borough of Morrisville, E.D.Pa., 136 F.R.D. 393.

Standards in general see supra § 183.

96. U.S.—In re Sunrise Securities Litigation, E.D.Pa., 130 F.R.D. 560, decision clarified on denial of reconsideration 109 B.R. 658.

97. U.S.—In re Wirebound Boxes Antitrust Litigation, D.Minn., 126 F.R.D. 554.

§ 186. Effect of Termination of Grand Jury Activities

The interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities. A grand jury witness may not be prohibited from disclosing his own testimony after the grand jury's term has ended.

Library References

Grand Juries ⇨41.50(8).

The interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.⁹⁸ Thus, the showing required to justify a court in authorizing disclosure must be made even if the grand jury has ended its activities.⁹⁹

The reasons for secrecy are primarily related to the work of an ongoing grand jury investigation rather than the work of a grand jury that has concluded its deliberations.¹ The purposes of preventing escape, of insuring freedom to the particular grand jury in its deliberations, of preventing persons from importuning grand jurors, and of preventing subornation of perjury or tampering with witnesses who may testify before the grand jury do not apply where the grand jury has completed its investigation.² However, not all of the policies underlying the need for secrecy are eliminated because the grand jury has ended its activities.³ Thus, for example, the necessity for shielding an innocent suspect from disclosure of materials relating to accusations of guilt continues.⁴ However, it has been held that this purpose of the secrecy requirement does not apply where the grand jury has returned an indictment.⁵

In determining whether to authorize disclosure, the fact that the grand jury has terminated its investigation is a factor to be considered,⁶ as is the

lapse of time between the grand jury proceedings and the motion for disclosure.⁷

It is a violation of the First Amendment to prohibit a grand jury witness from disclosing his own testimony after the grand jury's term has ended.⁸

§ 187. Showing Irregularity of Grand Jury Proceeding

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

Pursuant to the requirement of grand jury secrecy, some authorities hold that accused cannot examine a grand jury witness or a grand juror in order to show the nature and character of the evidence on which an indictment was based.

Research Note

Discovery and inspection of grand jury minutes in criminal proceeding for purpose of showing irregularity in grand jury proceeding is discussed in C.J.S. Criminal Law §§ 525, 527, and 530. Motion to dismiss indictment on ground of irregularity in grand jury proceeding is discussed in C.J.S. Indictments and Informations §§ 176-178.

Library References

Grand Juries ⇨41.50(5, 9, 10).

Pursuant to the requirement of grand jury secrecy, some authorities hold that accused cannot examine a grand jury witness⁹ or a grand juror¹⁰ in order to show the nature and character of the evidence on which an indictment was based.

Similarly, it has been held that, since grand jurors are prohibited from giving evidence under their oath of secrecy, an evidentiary hearing to determine the effect of improper influence on grand jurors is barred.¹¹

98. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petro Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

Shell v. Wall, W.D.N.C., 760 F.Supp. 545.

99. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petro Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Lynde, C.A.10(Colo.), 922 F.2d 1448.

1. N.J.—State v. Doliner, 475 A.2d 552, 96 N.J. 236.
 2. U.S.—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.
 3. U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

4. N.J.—State v. Doliner, 475 A.2d 552, 96 N.J. 236.
 5. U.S.—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.
 6. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.
 7. U.S.—In re Grand Jury Proceedings, GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.
 8. U.S.—Butterworth v. Smith, Fla., 110 S.Ct. 1376, 494 U.S. 624, 108 L.Ed.2d 572.
 9. N.C.—State v. Phillips, 256 S.E.2d 212, 297 N.C. 600.
 10. N.C.—State v. Beam, 319 S.E.2d 616, 70 N.C.App. 181, stay denied 321 S.E.2d 223, 312 N.C. 86, review denied 322 S.E.2d 561, 312 N.C. 496.
 11. Miss.—Hood v. State, 523 So.2d 302.

b. Federal Grand Jury

Disclosure of matters occurring before a federal grand jury may be made when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Disclosure otherwise prohibited of matters occurring before a federal grand jury may be made when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.¹²

There must be a showing of impropriety¹³ and of a particularized need¹⁴ or similar compelling necessity¹⁵ for disclosure. Mere speculation is insufficient.¹⁶

§ 188. Extent of, and Conditions Upon, Disclosure

When disclosure of grand jury proceedings is permitted, it is to be done discreetly and limitedly. The court may impose protective limitations on the use of the disclosed material.

Library References

Grand Juries ⇨41.50, 41.50(1, 5-7, 10).

If the court orders disclosure of matters occurring before a federal grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.¹⁷

When disclosure of grand jury proceedings is permitted, it is to be done discreetly and limitedly.¹⁸ Only those materials actually needed should be disclosed.¹⁹ Where a litigant seeks to use grand

jury material to impeach a witness, to refresh his recollection, to test his credibility, or for like purposes, disclosure can be limited strictly to those portions of a particular witness' testimony that bear upon some aspect of his direct testimony at trial.²⁰

A court may impose conditions on the release and use of grand jury material.²¹ If a court orders disclosure, the court may impose protective limitations on the use of the disclosed material.²² Where disclosure is made to a committee of the House of Representatives conducting an impeachment investigation, the court should not place restrictions on subsequent disclosure by the committee, as the House, ancillary to its impeachment power, has the power to disclose evidence.²³

§ 189. Proceedings for Disclosure

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

The burden of proof is upon the party seeking disclosure of protected grand jury material to justify such disclosure.

Library References

Grand Juries ⇨41.50(10).

It has been held that only the court in charge of the grand jury may authorize the disclosure of grand jury material.²⁴ However, if such court cannot assess the need for disclosure of material for use in a proceeding, such court may call upon the

12. Fed.Rules Cr.Proc., Rule 6(e)(3)(C)(ii), 18 U.S.C.A.

13. U.S.—U.S. v. Lovecchio, D.C.Pa., 561 F.Supp. 221.

14. U.S.—U.S. v. Canino, C.A.7(Ill.), 949 F.2d 928, rehearing denied, certiorari denied Flynn v. U.S., 112 S.Ct. 1701, 503 U.S. 996, 118 L.Ed.2d 410, 112 S.Ct. 1940, 504 U.S. 910, 118 L.Ed.2d 546 and Marcum v. U.S., 112 S.Ct. 1954, 504 U.S. 915, 118 L.Ed.2d 558, rehearing denied 112 S.Ct. 3058, 505 U.S. 1231, 120 L.Ed.2d 923.

U.S. v. Ruiz, S.D.N.Y., 702 F.Supp. 1066, affirmed in part 894 F.2d 501.

15. U.S.—U.S. v. Chimurenga, D.C.N.Y., 609 F.Supp. 1070, affirmed U.S. v. Pean, 800 F.2d 1129.

16. U.S.—U.S. v. Canino, C.A.7(Ill.), 949 F.2d 928, rehearing denied, certiorari denied Flynn v. U.S., 112 S.Ct. 1701, 503 U.S. 996, 118 L.Ed.2d 546, 112 S.Ct. 1940, 504 U.S. 910, 110 L.Ed.2d 546 and Marcum v. U.S., 112 S.Ct. 1954, 504 U.S. 915, 118 L.Ed.2d 558, rehearing denied 112 S.Ct. 3058, 505 U.S. 1231, 120 L.Ed.2d 923.

U.S. v. Rastelli, E.D.N.Y., 653 F.Supp. 1034—U.S. v. Zuluaga, E.D.N.Y., 651 F.Supp. 746—U.S. v. Duff, D.C.Ill., 529 F.Supp. 148—In re Hunter, D.C.Mo., 520 F.Supp. 1020, affirmed 673 F.2d 211.

17. Fed.Rules Cr.Proc., Rule 6(e)(3)(C), 18 U.S.C.A.

18. U.S.—Dennis v. U.S., Colo., 86 S.Ct. 1840, 384 U.S. 855, 16 L.Ed.2d 973.

Lucas v. Turner, C.A.Ill., 725 F.2d 1095.

19. U.S.—In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, C.A.11(Fla.), 864 F.2d 1559.

20. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

21. Conn.—State v. Canady, 445 A.2d 895, 187 Conn. 281.

22. U.S.—Douglas Oil Co. of California v. Petrol Stops Northwest, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand Petrol Stops Northwest v. U.S., 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied Conoco Inc. v. Petrol Stops Northwest, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

U.S. v. Gallo, E.D.N.Y., 653 F.Supp. 320.

23. U.S.—In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), S.D.Fla., 669 F.Supp. 1072.

24. N.Y.—Ivey v. State, 4 Dept., 526 N.Y.S.2d 867, 138 A.D.2d 962.

court in which the proceeding is pending to take part in the decision.²⁵ The federal court in which a proceeding is pending should request the state court under whose auspices a state grand jury was impaneled to transmit material to the federal court for a determination of whether there is a particularized need for disclosure.²⁶ It has also been held that the court in which a proceeding is pending may determine that material the disclosure of which is sought is subject to the requirement of grand jury secrecy.²⁷

The target of the grand jury investigation has standing to oppose the disclosure of grand jury material, in a proceeding to obtain such disclosure.²⁸

The target of a civil investigation should receive notice of the state's application to turn over grand jury materials to government departments for use in a civil proceeding.²⁹

The party seeking disclosure is generally entitled to a hearing.³⁰

Burden of proof.

The burden of proof is upon the party seeking disclosure of protected material to justify such disclosure.³¹

Appeal.

The action of the court in proceedings to set aside the seal of privacy is subject to review in an

orderly manner by a tribunal of superior jurisdiction.³²

b. Federal Grand Jury

A petition for a court order directing disclosure of matters occurring before a federal grand jury preliminarily to or in connection with a judicial proceeding shall be filed in the district where the grand jury convened.

A petition for a court order directing disclosure of matters occurring before a federal grand jury preliminarily to or in connection with a judicial proceeding shall be filed in the district where the grand jury convened.³³ Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon the attorney for the government, the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and such other persons as the court may direct.³⁴ The court shall afford those persons a reasonable opportunity to appear and be heard.³⁵

If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can obtain sufficient knowledge of the proceeding to determine whether disclosure is proper.³⁶ The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy.³⁷ The court to which the matter is transferred shall afford the aforementioned persons a

Ohio—State, ex rel. Collins, v. O'Farrell, 573 N.E.2d 113, 61 Ohio St.3d 142.

25. Ohio—State, ex rel. Collins, v. O'Farrell, 573 N.E.2d 113, 61 Ohio St.3d 142.

26. U.S.—Stump v. Gates, D.Colo., 777 F.Supp. 796.

27. Colo.—People v. Tynan, App., 701 P.2d 80.

28. N.Y.—Matter of Dist. Atty. of Suffolk County, 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

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

Continued use

Where grand jury proceedings are ongoing, state may make ex parte application to court for turnover order permitting deputy attorney general involved in both civil and grand jury investigations to have continued access to grand jury materials for use in parallel civil investigation or litigation, so that confidentiality of criminal investigation may be preserved, but otherwise, notice of application for use of grand jury materials should be given to appropriate parties.

N.J.—State v. Arace Bros., 552 A.2d 628, 230 N.J.Super. 22.

30. Conn.—In re Grand Jury Investigation by Curran, 561 A.2d 974, 19 Conn.App. 230.

31. Conn.—In re Grand Jury Investigation by Curran, 561 A.2d 974, 19 Conn.App. 230.

N.Y.—Matter of Dist. Atty. of Suffolk County, 449 N.Y.S.2d 1004, 86 A.D.2d 294, affirmed 448 N.E.2d 440, 58 N.Y.2d 436, 461 N.Y.S.2d 773.

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

33. Fed.Rules Cr.Proc., Rule 6(e)(3)(D), 18 U.S.C.A.

Multiple grand juries

In the case of multiple grand juries, the petition need not be filed in the district where the first grand jury convened.

U.S.—U.S. v. Fischbach and Moore, Inc., C.A.9(Wash.), 776 F.2d 839.

Independent Counsel Act

Provision of Independent Counsel Act empowering Court of Appeals for the District of Columbia to make orders appropriate to protect rights of individual named in independent counsel's report supersede general rule.

U.S.—In re Sealed Motion, 880 F.2d 1367, 279 U.S.App.D.C. 294.

34. Fed.Rules Cr.Proc., Rule 6(e)(3)(D), 18 U.S.C.A.

35. Fed.Rules Cr.Proc., Rule 6(e)(3)(D), 18 U.S.C.A.

36. Fed.Rules Cr.Proc., Rule 6(e)(3)(E), 18 U.S.C.A.

37. Fed.Rules Cr.Proc., Rule 6(e)(3)(E), 18 U.S.C.A.

Must make evaluation

U.S.—Petition of Moore, C.A.7(Ill.), 776 F.2d 136.

reasonable opportunity to appear and be heard.³⁸

In a proceeding to obtain disclosure, the acquitted target of a grand jury investigation has standing to oppose disclosure.³⁹ A grand jury witness may intervene in another judicial proceeding to request protection from disclosure.⁴⁰

An adversary proceeding is not always required.⁴¹ Where the target of the grand jury investigation seeks disclosure, the court should generally examine the materials sought to be disclosed in camera.⁴²

Burden of proof and presumptions.

The party seeking disclosure of protected material has the burden of proof in justifying such disclosure.⁴³ Some authorities hold that confidential documentary information, not otherwise public, obtained by the grand jury by coercive means is presumed to be protected, but that the movant may rebut this presumption by showing that the information is public or was not obtained through coercive means or that disclosure would be otherwise

available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry.⁴⁴ The party opposing disclosure has the burden of proving that the material is protected.⁴⁵

Curing improper disclosure order.

If the court erroneously orders disclosure, the injured person may complain by filing a petition with the court that ordered disclosure, and such court may issue an appropriate curative order, including an order preventing the person to whom disclosure was made from using the information.⁴⁶

Appeal.

It has been held that an order denying disclosure is not appealable where the grand jury proceeding remains in progress.⁴⁷ It has also been held that, where the target seeks disclosure prior to indictment, an order denying disclosure is appealable.⁴⁸ An order authorizing disclosure should be reviewed for abuse of discretion,⁴⁹ or clear error.⁵⁰

C. REMEDY OR SANCTION FOR VIOLATION OF SECRECY REQUIREMENTS

§ 190. In General

A violation of the grand jury secrecy requirement may be treated as a contempt.

Library References

Grand Juries ⇨41.60-41.60(2).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

A violation of the grand jury secrecy requirement may be treated as a contempt.⁵¹ Reporters

may be held in contempt for inducing a violation of the secrecy requirement even in the absence of a compelling state interest, as such conduct is not protected by the First Amendment.⁵²

It has been held that the usual remedy for a grand juror's breaking of the oath of secrecy is to discharge him from the grand jury panel.⁵³ However, there may be occasions where the breaking of the oath so impedes the administration of justice

38. Fed.Rules Cr.Proc., Rule 6(e)(3)(E), 18 U.S.C.A.

39. U.S.—In re Petition to Inspect and Copy Grand Jury Materials, D.C.Fla., 576 F.Supp. 1275, affirmed 735 F.2d 1261, certiorari denied *Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit*, 105 S.Ct. 254, 469 U.S. 884, 83 L.Ed.2d 191, rehearing denied 105 S.Ct. 406, 469 U.S. 1001, 83 L.Ed.2d 341.

40. U.S.—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

41. U.S.—Matter of Grand Jury Proceedings, *Miller Brewing Co.*, C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

42. U.S.—In re Antitrust Grand Jury, C.A.6(Ohio), 805 F.2d 155.

43. U.S.—*Douglas Oil Co. of California v. Petrol Stops Northwest*, Cal., 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156, on remand *Petrol Stops Northwest v. U.S.*, 605 F.2d 494, appeal after remand 647 F.2d 1005, certiorari denied *Conoco Inc. v. Petrol Stops Northwest*, 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

In re Grand Jury Testimony, C.A.5(La.), 832 F.2d 60—In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4(Va.), 800 F.2d 1293.

44. U.S.—In re Grand Jury Proceedings, C.A.6(Mich.), 851 F.2d 860.

45. U.S.—Matter of Electronic Surveillance, D.C.Mich., 596 F.Supp. 991.

46. U.S.—Matter of Special March 1981 Grand Jury, C.A.Ill., 753 F.2d 575.

47. U.S.—In re Grand Jury Proceedings, C.A.R.I., 580 F.2d 13.

48. U.S.—In re Special Grand Jury (for Anchorage, Alaska), C.A.Alaska, 674 F.2d 778.

49. U.S.—In re Corrugated Container Antitrust Litigation, C.A.Tex., 687 F.2d 52.

50. U.S.—*Stump v. Gates*, D.Colo., 777 F.Supp. 796.

51. Fla.—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.

Ind.—*State v. Heltzel*, 552 N.E.2d 31.

52. Ind.—*State v. Heltzel*, 552 N.E.2d 31.

53. Ind.—*State v. Heltzel*, 552 N.E.2d 31.

that it rises to the level of contempt.⁵⁴

The suppression of grand jury materials is sometimes an appropriate remedy for improper disclosure by the government.⁵⁵ However, suppression is an extreme remedy and is generally unwarranted.⁵⁶

Anciently, a grand juror who disclosed to the indicated person the evidence that had been given against him was held to be an accessory to the crime, if the crime was a felony, and a principal if the crime was treason; later such conduct appears to have been denounced as a high misdemeanor.⁵⁷ Under some statutes, the disclosure of the secrets of the grand jury, under certain circumstances, is an indictable offense.⁵⁸ The recipient of the disclosure is guilty of no offense under a statute making the disclosure of the secrets of the grand jury by a grand juror, witness, or officer of the court an offense.⁵⁹ Under some statutes, misdemeanor liability is imposed for willful disclosure by a grand juror of evidence,⁶⁰ but not for disclosure by a grand juror of information about deliberations.⁶¹

§ 191. Federal Grand Jury

Remedies for violation of federal grand jury secrecy may include equitable relief or a curative order to prevent the use of improperly disclosed material.

54. Ind.—*State v. Heltzel*, 552 N.E.2d 31.

55. Fla.—In re Report of the Grand Jury, Jefferson County, Fla., Spring Term 1987, App. 1 Dist., 533 So.2d 873, appeal after remand 559 So.2d 248, review denied 570 So.2d 1306.

56. Fla.—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.

57. U.S.—*Schmidt v. U.S.*, C.C.A. Ohio, 115 F.2d 394, 21 O.O. 78—*Goodman v. U.S.*, C.C.A. Cal., 108 F.2d 516, 127 A.L.R. 265.

58. Tex.—*Addison v. State*, 211 S.W. 225, 85 Tex. Cr. 181.

59. Mo.—*Ex parte Holliday*, 199 S.W. 412, 272 Mo. 108.

60. Cal.—*McClatchy Newspapers v. Superior Court* (1983–1984 Grand Jury for Fresno County), 245 Cal.Rptr. 774, 751 P.2d 1329, 44 C.3d 1162.

61. Cal.—*McClatchy Newspapers v. Superior Court* (1983–1984 Grand Jury for Fresno County), 245 Cal.Rptr. 774, 751 P.2d 1329, 44 C.3d 1162.

62. Fed. Rules Cr. Proc., Rule 6(e), 18 U.S.C.A.

63. U.S.—*Matter of Grand Jury Investigation* (90–3–2), E.D. Mich., 748 F.Supp. 1188.

64. U.S.—*Barry v. U.S.*, 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

65. U.S.—*Barry v. U.S.*, 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888—*Blalock v. U.S.*, C.A.11(Ga.), 844 F.2d 1546, rehearing denied 856 F.2d 200.

Research Note

Whether court may impose secrecy requirement on person otherwise not subject to such a requirement is treated *supra* § 178.

Library References

Grand Juries ⇨ 41.40, 41.60, 41.60(1).

The provision of the Federal Rules of Criminal Procedure concerning federal grand jury secrecy⁶² should be vigorously enforced and alleged violations vigorously investigated.⁶³

It has been held that a civil cause of action is cognizable under the provision, for violation of the provision,⁶⁴ such as an action for injunctive relief.⁶⁵ However, it has also been held that the provision does not authorize a civil cause of action,⁶⁶ such as an action for injunctive relief.⁶⁷ Even authorities who do not recognize a civil cause of action nevertheless hold that the court has the inherent power to provide certain civil remedies.⁶⁸

Remedies for violation of federal grand jury secrecy may include equitable relief,⁶⁹ a curative order to prevent the use of improperly disclosed material,⁷⁰ the removal of the offending parties from involvement with the investigation or the grand jury proceedings,⁷¹ or the dismissal of a civil action by the government.⁷² The quashing of a subpoena may be an appropriate remedy,⁷³ although there is authority to the contrary.⁷⁴ In

66. U.S.—*Matter of Grand Jury Investigation* (90–3–2), E.D. Mich., 748 F.Supp. 1188.

67. U.S.—*Matter of Grand Jury Investigation* (90–3–2), E.D. Mich., 748 F.Supp. 1188.

68. U.S.—*Matter of Grand Jury Investigation* (90–3–2), E.D. Mich., 748 F.Supp. 1188.

69. U.S.—*Barry v. U.S.*, 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

70. U.S.—In re *Charlotte Observer* (A Div. of Knight Pub. Co. and Herald Pub. Co.), C.A.4(S.C.), 921 F.2d 47.

71. Inherent power

District court has authority, under its inherent and supervisory powers, if not under grand jury secrecy rule itself to remove parties who offend rule from continuing their involvement with investigation or grand jury proceedings.

U.S.—*Matter of Grand Jury Investigation* (90–3–2), E.D. Mich., 748 F.Supp. 1188.

72. When justified

Merely because plaintiff is in possession of grand jury materials does not mandate that complaint be dismissed; defendants must prove that this information was used by Government, and that it was essential evidence to aid them in stating claim.

U.S.—*U.S. v. DiBona*, D.C. Pa., 601 F.Supp. 1162.

73. U.S.—In re *Kiefaber*, C.A.9(Nev.), 774 F.2d 969, vacated, appeal dismissed 823 F.2d 383.

74. U.S.—*Matter of Archuleta*, D.C. N.Y., 434 F.Supp. 325.

some circumstances, a violation of the secrecy requirement may be treated as a violation of the criminal statute⁷⁵ concerning obstruction of justice.⁷⁶

The suppression of grand jury material may be an appropriate remedy for improper disclosure by the government.⁷⁷ However, suppression is not necessarily required in a civil action by the government, as full disclosure to defendant may be an adequate remedy.⁷⁸

§ 192. — Contempt

A knowing violation of the provision of the Federal Rules of Criminal Procedure concerning federal grand jury secrecy may be punished as a contempt of court.

Library References

Grand Juries ⇐41.60, 41.60(1).

A knowing violation of the provision of the Federal Rules of Criminal Procedure concerning federal grand jury secrecy⁷⁹ may be punished as a contempt of court.⁸⁰ The court has some discretion, and need not punish all violations.⁸¹ The general remedy for a violation is contempt.⁸²

A violation is punishable as a contempt only if it is knowing in the sense that it involves criminal intent.⁸³ However, it has been held that a violation need not be willful.⁸⁴

Monetary sanctions may be imposed pursuant to the court's criminal contempt powers.⁸⁵

It has been held that, under the secrecy provision, a person may bring an action for civil contempt sanctions,⁸⁶ or invoke the court's contempt

power to coerce compliance with any injunction granted by the court.⁸⁷ However, it has also been held that the provision does not authorize an action for civil contempt sanctions,⁸⁸ but that the court is nevertheless entitled to impose civil contempt sanctions.⁸⁹ Where the relief sought is prospective, a contempt proceeding is civil in nature.⁹⁰

§ 193. — Proceedings

A prima facie showing of a violation of the federal grand jury secrecy requirement is made when media reports contain information about matters occurring before the grand jury and indicate that the sources of information include persons subject to the secrecy requirement.

Library References

Grand Juries ⇐41.40, 41.60-41.60(2).

The court may order an investigation of the government's alleged violations of the federal grand jury secrecy requirement,⁹¹ and may conduct an external investigation,⁹² order an internal investigation,⁹³ or appoint a special master/prosecutor to pursue violations.⁹⁴ Even authorities who hold that there is no private right of action for violation of the secrecy requirement nevertheless hold that persons have a right to bring alleged violations to the attention of the court.⁹⁵

The movant charging a violation has the burden of supporting his charges.⁹⁶

Authorities who recognize a civil cause of action for violation of the secrecy requirement hold that the person seeking relief must make a prima facie showing.⁹⁷ Thus, a person seeking an injunction must make a prima facie showing of a violation of

75. 18 U.S.C.A. § 1503.

76. U.S.—U.S. v. Peasley, D.Me., 741 F.Supp. 18.

77. U.S.—U.S. v. Coughlan, C.A.4(Md.), 842 F.2d 737.

Donovan v. Smith, D.C.Pa., 552 F.Supp. 389.

78. U.S.—LTV Educ. Systems, Inc. v. Bell, C.A.5(Tex.), 862 F.2d 1168, rehearing denied.

79. Fed.Rules Cr.Proc., Rule 6(e), 18 U.S.C.A.

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

81. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

82. U.S.—U.S. v. Kouba, D.N.D., 632 F.Supp. 937.

83. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

84. U.S.—U.S. v. Smith, C.A.6(Mich.), 815 F.2d 24.

85. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

86. U.S.—Barry v. U.S., 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

87. U.S.—Blalock v. U.S., C.A.11(Ga.), 844 F.2d 1546, rehearing denied 856 F.2d 200.

88. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

89. U.S.—Matter of Grand Jury Investigation, E.D.Mich., 748 F.Supp. 1188.

90. U.S.—Barry v. U.S., 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

91. U.S.—U.S. v. Eisenberg, C.A.Ga., 711 F.2d 959, 73 A.L.R.Fed. 101.

92. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

93. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

94. U.S.—Matter of Grand Jury Investigation, (90-3-2), E.D.Mich., 748 F.Supp. 1188.

95. U.S.—Matter of Grand Jury Investigation, (90-3-2), E.D.Mich., 748 F.Supp. 1188.

96. U.S.—In re Hunter, D.C.Mo., 520 F.Supp. 1020, affirmed 673 F.2d 211.

97. U.S.—In re Antitrust Grand Jury, C.A.6(Ohio), 805 F.2d 155.

the secrecy requirement⁹⁸ and of the fact that information has been improperly disclosed.⁹⁹ Even authorities who do not recognize a civil cause of action hold that a prima facie showing is generally required to justify further investigation.¹ A prima facie case is made when media reports contain information about matters occurring before the grand jury and indicate that the sources of the information include persons subject to the secrecy requirement.² The reports need not identify the precise sources.³

After a prima facie showing is made, the court should conduct a hearing,⁴ and entertain the petition for relief,⁵ and order the government to take

steps to stop any publicity emanating from its employees.⁶ Once the court determines that the requirement has been violated, the court may inform the target's counsel of the names of the violators.⁷

In ruling on a motion to dismiss an injunction suit, the court must consider whether there is a clear indication that a disclosure involved protected matters; whether the disclosure was made by a person subject to the secrecy requirement; whether the relief requested will interfere with grand jury proceedings; and whether the government has sufficiently rebutted the prima facie showing of a violation.⁸

X. LIABILITIES

§ 194. Liabilities of Jurors

While grand jurors are protected in the discharge of their duties, they are subject to the supervision and control of the court for any violation of such duties.

Research Note

Sanction for violation of secrecy requirements is treated supra §§ 190-198. Grand jury report as being absolutely privileged for purposes of liability for defamation is discussed in C.J.S. Libel and Slander; Injurious Falsehood § 75.

Library References

Grand Jurors ⇨43.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Grand jurors are protected in the discharge of their duties during the whole of their proceedings.⁹ They are entitled to absolute immunity where the claims against them are based upon acts performed

in their official capacities.¹⁰ The grand jury is absolutely immune when it speaks officially through the medium of the indictment.¹¹ Generally, a person cannot be held to answer in an action for malicious prosecution for what he said or did, as a member of the grand jury, however malicious or destitute of probable foundation his action may have been.¹²

It has been held, however, that, where process is issued on the complaint of a grand juror for an offense which he has no authority to prosecute, he is liable in an action for trespass by the person injured.¹³ A grand juror who defames an individual by discussing grand jury investigations in a private conversation with outside third parties is not immune from liability.¹⁴ Under some statutes, if a grand jury, in a report concerning certain

98. U.S.—In re Antitrust Grand Jury, C.A.6(Ohio), 805 F.2d 155.

99. U.S.—Blalock v. U.S., C.A.11(Ga.), 844 F.2d 1546, rehearing denied 856 F.2d 200.

1. U.S.—Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

2. U.S.—Barry v. U.S., 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

Matter of Grand Jury Investigation (90-3-2), E.D.Mich., 748 F.Supp. 1188.

3. Inferences

To find that news reports warranted further investigation for possible violations of grand jury secrecy rule, news articles did not have to identify precise source of information; inferences must be drawn from phrases such as "people familiar with the federal probe", "federal officials", "an official familiar with the probe", "officials close to the jury's activities", "government officials familiar with the federal probe", and "law enforcement officials".

U.S.—Matter of Grand Jury Investigation, E.D.Mich., 748 F.Supp. 1188.

4. U.S.—Barry v. U.S., 865 F.2d 1317, 275 U.S.App.D.C. 218, on remand 740 F.Supp. 888.

5. U.S.—U.S. v. Eisenberg, C.A.Ga., 711 F.2d 959, 73 A.L.R.Fed. 101.

6. U.S.—U.S. v. Eisenberg, C.A.Ga., 711 F.2d 959, 73 A.L.R.Fed. 101.

7. U.S.—U.S. v. Eisenberg, C.A.Ga., 711 F.2d 959, 73 A.L.R.Fed. 101.

8. U.S.—Blalock v. U.S., C.A.11(Ga.), 844 F.2d 1546, rehearing denied 856 F.2d 200.

9. Ind.—Griffith v. Slinkard, 44 N.E. 1001, 146 Ind. 117.

10. Ala.—Almon v. Gibbs, 545 So.2d 18.

11. U.S.—Application of Jordan, D.C.W.Va., 439 F.Supp. 199.

12. Tex.—Bailey v. Victoria Bank & Trust Co., Civ.App., 114 S.W.2d 920.

13. Conn.—Allen v. Gray, 11 Conn. 95.

14. U.S.—Application of Jordan, D.C.W.Va., 439 F.Supp. 199.

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public affairs, comments upon a person who has not been indicted, such comments are not privileged, and individual grand jurors may be liable for defamation.¹⁵

The members of a grand jury are subject to the supervision and control of the court for any violation of their duties,¹⁶ and are liable to punishment both at common law and under statute for various violations of the duties of their office.¹⁷

§ 195. Liabilities for Interference with Jury

Attempts to influence the action of grand jurors in matters before them or likely to come before them constitutes an offense under some statutes.

Research Note

Sanction for violation of secrecy requirements is treated supra §§ 190-193. Holding of witness in contempt is considered supra §§ 155-163.

Library References

Grand Juries ⇨44.

Communications on the part of private individuals with grand jurors and solicitations for the purpose of influencing their action in matters before

them or likely to come before them constitute an offense under some statutes.¹⁸

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand juror of any court of the United States in the discharge of his duty, or injures any such grand juror in his person or property on account of any indictment assented to by him, or on account of his having been such juror, shall be criminally liable.¹⁹

Whoever attempts to influence the action or decision of any grand juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be criminally liable.²⁰ This provision does not prohibit the communication of a request to appear before the grand jury.²¹ The provision does not prohibit a grand jury from directly receiving confidential communications where the grand jury has solicited or indicated a willingness to receive such communications.²²

15. Cal.—*McClatchy Newspapers v. Superior Court* (1983-1984 Grand Jury for Fresno County), 245 Cal.Rptr. 774, 751 P.2d 1329, 44 C.3d 1162.

Statute upheld

Cal.—*Gillett-Harris-Duranceau & Associates, Inc. v. Kemple*, 147 Cal.Rptr. 616, 83 C.A.3d 214.

Reports covered

Statutory provisions limiting grand jury immunity where grand jury comments upon person or official in its report applied both to grand jury reports on county officers and reports on special districts.

Cal.—*Gillett-Harris-Duranceau & Associates, Inc. v. Kemple*, 147 Cal.Rptr. 616, 83 C.A.3d 214.

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

17. Conn.—*Watson v. Hall*, 46 Conn. 204.

18. U.S.—*Duke v. U.S.*, C.C.A.Va., 90 F.2d 840, 112 A.L.R. 317, certiorari denied 58 S.Ct. 33, 302 U.S. 685, 82 L.Ed. 528, motion denied 58 S.Ct. 135, 302 U.S. 649, 82 L.Ed. 503, rehearing denied 58 S.Ct. 135, 302 U.S. 775, 82 L.Ed. 600, motion denied 58 S.Ct. 261, 302 U.S. 650, 82 L.Ed. 504.

19. 18 U.S.C.A. § 1503.

20. 18 U.S.C.A. § 1504.

21. 18 U.S.C.A. § 1504.

22. U.S.—*In re New Haven Grand Jury*, D.C.Conn., 604 F.Supp. 453.

INDEX TO GRAND JURIES

See General Index

GROUND RENTS

The title Ground Rents has been omitted from this volume. The substance of the material is now treated in the C.J.S. title Estates.

See also General Index

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