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Criminal Division

Federal Grand Jury Practice

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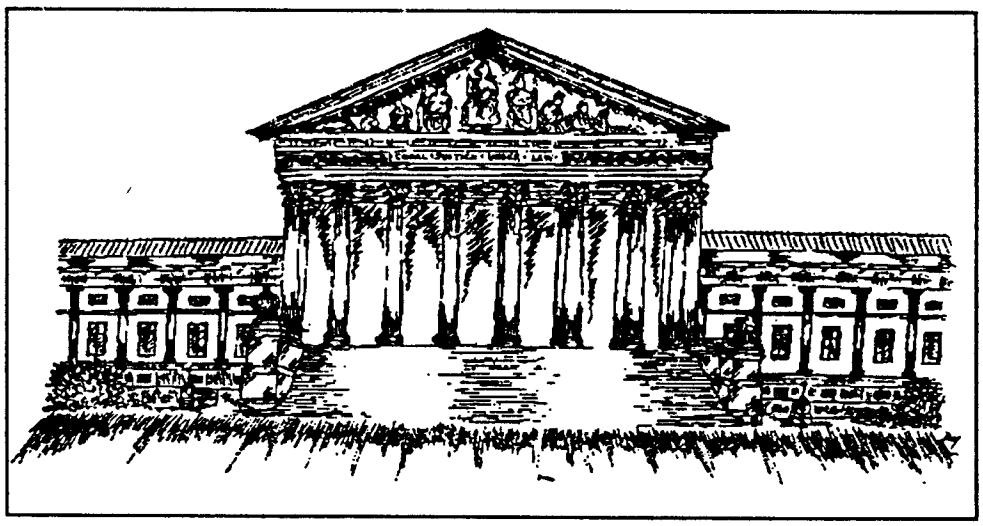

FOREWORD

There are few areas of federal criminal law that have been affected to a greater extent by litigation in the past several years than the area of federal grand jury practice. From defendants' challenges to the array to the government's challenges to the exercise of supervisory power by the federal courts, defendants and the government have litigated issues that have had a significant impact on federal grand jury practice. It is critical that federal prosecutors who practice before the federal grand jury be conversant not only with these developments but with the policies of the Department of Justice as well. In several areas, the standards of the Department of Justice applicable to federal grand jury practice are higher than the courts require. In certain instances, approval of the Department of Justice is required before a federal prosecutor may proceed on a federal grand jury matter. Adherence to these policies in federal grand jury practice is not only required by the Department and expected by the courts but assures effective representation of the United States in federal grand jury practice.

It was with these thoughts in mind that the idea for this text was born. We have attempted to cover developments in the law in the entire area of federal grand jury practice. Where an area is affected by policy of the Department of Justice, we have noted that. Where areas are particularly affected by local practice, we have attempted to note those as well. Our objective has been to provide federal prosecutors with a useful text that includes a discussion of the law, Department of Justice policy, and suggestions for the preferred practice. It is our hope that this text will be a positive contribution to prosecutors throughout the United States in federal grand jury practice.

This effort was the result of a team of individuals from U. S. Attorneys' Offices and the Department of Justice. The text was drafted by the end of the Summer of 1992. We have included several cases decided after the text was drafted. The authors of the various chapters were:

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We are indebted to those individuals who kindly consented to review this text either in part or, in several instances, in its entirety. Several reviewers made a substantial contribution with rewrite or drafting of additional text. We express our appreciation to Ray and LeRoy Jahn, Assistant United States Attorneys, who served in the past year as Special Assistants in the Office of the Director of the FBI; from the Department of Justice in Washington, Civil Rights Division, Linda Davis; from the Antitrust Division, Leo D. Neshkes; from the Tax Division, Robert Lindsay; from the Civil Division, Daniel Metcalf; from the Executive Office for United States Attorneys, Devon Gosnell; from the Criminal Division, Jane Weaver (for Chapter 2), Barbara Corprew, Michael J. Shepard, Edgar Brown, George Proctor, Robert Sharp, David Simonson, Deborah Watson, Patty Stemler and Steven E. Zipperstein. Several Assistant United States Attorneys reviewed the text in part, including AUSA Rhonda Fields of the District of Columbia and AUSA Jonathan Chiel of Boston. We are particularly indebted to AUSA William H. Browder, Jr. from Maine, who, with a team of Assistant United States Attorneys from that office, reviewed the entire text. We express appreciation to Julia Simmonds of the U. S. Attorney's Office in Alexandria, Virginia, for her contribution to the forms in the Appendix. Finally, we express our thanks and appreciation to Debra Crawford of the Criminal Division's Office of Professional Development and Training who did a wonderful job typing and producing the entire manual on the computer.

When this project got underway, we asked the Antitrust Division to permit us to draw on their fine text on grand jury practice. They generously consented and their effort, particularly the effort of Leo Neshkes, has played a material part in this text.

This has been a project of the Office of Professional Development and Training of the Criminal Division, Thomas G. Schrup, Director. It was their idea to put a team together to write it, and they asked that I serve as editor. That office will retain the responsibility for this text. We welcome any suggestions practitioners may have that will serve to improve this text in subsequent editions.

During the entirety of this project, James R. Silverwood, a senior trial lawyer with the Criminal Division's Office of Professional Development and Training, had the responsibility to manage this project and keep it on track. He has served as author, editor, and producer and has done a superb job. If one individual on the team is out in front of all of us, it is he. In addition, Donald R. MacPherson, a special assistant in the Office of Professional Development and Training has worked closely with Jim Silverwood and with me on the entire project. He has done truly fine work and it has been our pleasure to have had the opportunity to work with him.

Finally, all of us are indebted most of all to the authors. It has been my pleasure to be associated with them throughout the past year on this project.

William J. Corcoran
Criminal Division
Editor

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

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Chapter One

THE FEDERAL GRAND JURY: AN INTRODUCTION

I. What is a Federal Grand Jury?

The grand jury is an essential component of the enforcement of the criminal laws of the United States. Its nature and role derive principally from three sources: the United States Constitution, pre-constitutional history, and Rule 6 of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.).

A. Function

1. Deciding Whether to Return an Indictment

The principal function of the modern federal grand jury is to decide whether to approve, or "return," an indictment proposed by a federal prosecutor charging federal felony violations.[1] To make that decision, the grand jury must determine whether a crime has been committed and if the individual charged in the indictment, the proposed defendant, or "target," committed it. Fed. R. Crim. P. Rule 6(f) provides that the "indictment may be found only upon the concurrence of 12 or more jurors."

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[1] Of course indictments containing felony charges may contain misdemeanor charges as well.

The modern federal grand jury has no power to return indictments on its own. Although grand juries at common law had such powers,[2] federal courts have held that under Fed. R. Crim. P. Rule 7(c),[3] Congress made the prosecutor's concurrence a prerequisite to a valid indictment.[4] Moreover, while common law grand juries had the power to issue presentments and reports, there is serious question whether federal grand juries, other than "Special Grand Juries," have such powers.[5]

In furtherance of its principal function of deciding whether to approve indictments, the grand jury may also perform an investigative function, for which its powers are broad. It can compel the testimony of witnesses and the production of documentary and other physical evidence, subject to very few limitations.[6]

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[2] At common law, such accusations were called "presentments," and could be "brought on the grand jurors' own initiative, based on facts already known to them or discovered by their investigation." See Beale & Bryson, Grand Jury Law and Practice, § 1.08, at 1-37 (1986 and 1991 Cum. Supp.).

[3] Rule 7(c) provides that an indictment "shall be signed by the attorney for the government."

[4] Fed. R. Crim. P. 7(c); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 985 (1965). Apart from Rule 7(c), the necessity for concurrence of the prosecutor in federal prosecutions may have constitutional underpinnings. See, e.g., Luna v. Beto 395 F.2d 35, 42 (5th Cir. 1968), cert. denied 394 U.S. 966 (1969); United States v. Ream, 491 F.2d 1243, 1246 (5th Cir. 1974); Fields v. Soloff, 920 F.2d 1114, 1118 (2d Cir. 1980); accord United States Attorneys' Manual (USAM) § 9-11.123. Although it is common practice for the United States Attorney to sign all indictments, an indictment may be validly signed by any "attorney for the government." Fed. R. Crim. P. 7(c); see USAM § 9-11.123.

[5] See In re United Electrical, Radio and Machine Workers of America, 111 F. Supp. 858, 864, 869 (S.D.N.Y. 1953); United States v. Briggs, 514 F.2d 794, 802-03 (5th Cir. 1975); But see In re Grand Jury 315 F. Supp. 662 (D.C. Md. 1970); Application of Johnson, 484 F.2d 791 (7th Cir. 1973); In re Grand Jury Proceedings (Woodard), 479 F.2d 458 (5th Cir. 1973); Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222-27 (D.D.C. 1974). For a discussion of "Special Grand Juries," see Section VI of this Chapter.

[6] In Branzburg v. Hayes, 408 U.S. 665, 688 (1972), the Supreme Court stated that because the grand jury's "task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." Id. at 688. See also United States v. Dionisio, 410 U.S. 1, 15 (1973). For further discussion of the breadth of the grand jury's powers to obtain evidence, see Chapter Six of this Manual.

The United States Attorneys' Manual ("USAM") takes the position that:

> While it is a very effective instrument of law enforcement, the grand jury is regarded primarily as a protection for the individual. It has been said that the grand jury stands between the accuser and the accused as "a primary security to the innocent against hasty, malicious, and oppressive persecution." See Wood v. Georgia, 370 U.S. 375, 390 (1962). The grand jury functions to determine whether there is probable cause to believe that a certain person committed a certain offense and, thus, to protect individuals against the lodging of unfounded criminal charges. See United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 391 U.S. 935 (1965).

USAM § 9-11.010. Furthermore:

> [I]t has been said that a grand jury has but two functions --to indict or, in the alternative, to return a "no-bill," see Wright, Federal Practice and Procedure, Criminal § 110. It is useful to look upon the functions of a grand jury in this way because, in general, a grand jury may not perform any different function. The investigative grand jury works toward such an end, although some investigations are never brought to fruition.

USAM § 9-11.101.

In most routine cases, the grand jury's role is only accusatory, not investigative. Federal investigative agencies in such cases usually gather all the evidence, which the prosecutor then presents to the grand jury for review together with a proposed indictment.[7] The grand jury then decides whether probable cause exists to support the prosecutor's proposed charges. In practice, federal grand juries do not draw up their own proposed indictments.

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[7] In this Manual, such presentations are called "one-agent summary presentations." See Section III of this Chapter for more discussion of such presentations.

In more complex cases, the grand jury's investigative role is essential. Although a prosecutor, working together with an investigative agency, generally directs such investigation, the prosecutor and investigative agency alone cannot compel the testimony of witnesses and the production of documentary and other physical evidence. They must work together with the grand jury to secure evidence that would not otherwise be available.

2. *Necessity of Indictment for Federal Prosecution*

The grand jury's veto power over indictments springs from the Fifth Amendment to the United States Constitution, which provides:

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

The Supreme Court has held that all crimes punishable by imprisonment in a penitentiary are "infamous."[8] Since all federal felonies are punishable in that fashion,[9] they are "infamous crimes" which, absent a defendant's waiver, may be constitutionally prosecuted only by grand jury indictment.[10] The Supreme Court has stated that the purpose of the Grand Jury Clause of the Fifth Amendment was to protect citizens "against unfounded criminal prosecutions."[11]

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[8] Mackin v. United States, 117 U.S. 348, 350-52 (1886); Ex Parte Wilson, 114 U.S. 417, 426 (1985); see Beale & Bryson, supra, § 2.01, at 2-2.

[9] 18 U.S.C. § 4083.

[10] Prosecutions for contempt are an exception to the constitutional requirement. Green v. United States, 356 U.S. 165, 187 (1958) (because of "unique character," contempt prosecution may be initiated by information even if defendant is sentenced to imprisonment in a penitentiary for more than a year); see Beale & Bryson, supra, § 2.01, at 2-3. Some jurisdictions do utilize the grand jury for contempt prosecutions in order to avoid constitutional objections and allegations that the contempt action is a personal vendetta by the United States Attorney.

[11] Branzburg v. Hayes, 408 U.S. 665, 686-87; see also United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983); United States v. Calandra, 414 U.S. 338, 343 (1974).

The Federal Rules of Criminal Procedure have implemented and further refined these constitutional requirements. Rule 7(a) provides that an offense punishable by death must be prosecuted by indictment in all instances, while an offense punishable by imprisonment for more than one year must be prosecuted by indictment unless the defendant waives that right.

Whether a corporation may be prosecuted on felony charges without a grand jury indictment is an unresolved legal question. In two cases decided in 1980, the Ninth Circuit held that neither the Constitution nor Rule 7(a) requires the government to obtain grand jury indictments to prosecute corporations for certain felony violations. United States v. Yellow Freight Systems, Inc., 637 F.2d 1248, 1253-55 (9th Cir. 1980), cert. denied, 454 U.S. 815 (1981); United States v. Armored Transport, Inc., 629 F.2d 1313, 1317-20 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). Yellow Freight involved a prosecution under the Elkins Act, 49 U.S.C. § 41(a), which provides for imprisonment and fines for individual defendants, but only fines of up to $1,000,000 for a corporation. The Armored Transport case involved Section 1 of the Sherman Act, 15 U.S.C. § 1, which authorizes similar punishment. Commentators, however, have questioned the validity and general applicability of these decisions.[12]

The Department has no express policy as to whether felony prosecutions of corporations may be by information. However, notwithstanding the support for the view that indictments are unnecessary against corporations, it has been a consistent practice throughout the Department of Justice to seek grand jury indictments for all felony charges against a corporation.

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[12] See, e.g., Beale & Bryson, supra, § 2.01, at 2-3 to 2-4; Note, Recognizing a Corporation's Rights Under the Indictment Clause, 1983 U. Ill. L. Rev. 477, 495-96.

B. Composition

1. Number of Grand Jurors

Fed. R. Crim. P. 6(a)(1) provides that a grand jury shall consist of at least 16, but no more than 23, grand jurors summoned by the district court.[13] Each juror must be a "legally qualified" natural person.[14]

Rule 6(a)(2) also authorizes the district court to designate "alternate" grand jurors "at the time a grand jury is selected." Thereafter, in the event the court excuses one of the initially selected jurors, it may then "impanel" the alternate. Fed. R. Crim. P. 6(g).[15]

Courts in every federal judicial district empanel grand juries of 23 persons. Many courts also exercise their authority to designate alternates. Because the designation of alternates at the time the initial jurors are selected makes it easier to empanel alternates later should the need arise, all United States Attorneys' Offices should encourage the judges in their district to adopt the practice of designating alternates.

2. Foreperson and Deputy

From those selected to be members of the grand jury the district court must appoint one to be "foreperson," and another to be "deputy foreperson." Fed. R.

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[13] Some district courts delegate the task of grand jury empanelment to United States Magistrate Judges, a practice upheld in United States v. Diaz, 922 F.2d 998 (2d Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991).

[14] Federal grand jurors must be citizens who are at least 18 years of age, and who have lived for a period of one year within the judicial district. Jurors must be functionally literate English speakers, free from mental infirmities and felony convictions (or pending felony charges), and drawn "at random" from a "fair cross section" of the community. 28 U.S.C. §§ 1861, 1865.

[15] For a discussion of excusing grand jurors, see Section IV of this Chapter.

Crim. P. 6(c). Only the foreperson, and in his absence the deputy foreperson,[16] have the power to swear witnesses, interpreters and stenographers, and to sign indictments.[17] Id. Rule 6(c) also assigns to the foreperson and deputy the duties of keeping and filing with the clerk of the court a "record of the number of jurors concurring in the finding of every indictment." If twelve persons do not concur in finding an indictment Rule 6(f) provides that the foreperson shall so report to a federal magistrate.

Furthermore, to be enforceable by the district court, a directive to a witness must come from the foreperson.[18] Examples of such directives include requiring the witness to answer a question when no legally valid privilege exists, to provide physical evidence, and to return another day.

Besides performing the duties specified in Rule 6, the foreperson generally serves as the "chairperson" of the grand jury sessions. Thus, it generally should be the foreperson, and not the Assistant United States Attorney (hereinafter AUSA), who instructs witnesses as to whether they are excused, whether they may speak with counsel, and whether they must perform any other lawful grand jury directive. The foreperson and deputy also usually take responsibility for having a sufficient number of jurors present at each session, and for supervising all necessary record-keeping.

In addition, the foreperson tends to serve as grand jury spokesperson in dealings with the district court and United States Attorney's Office. In some districts, grand jurors must contact the foreperson to be excused from attendance.

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[16] Although no law provides for a second deputy foreperson, courts in some districts have appointed an alternate deputy on rare occasions when the foreperson and deputy are both absent.

[17] So long as at least twelve jurors vote in favor of returning an indictment, courts have held the foreperson's failure to sign the indictment to be a ministerial defect that does not undermine the indictment's validity. See Frisbie v. United States, 157 U.S. 160, 163-64 (1895); Hobby v. United States, 468 U.S. 339, 345 (1984); Jones v. Pescor, 169 F.2d 853, 855 (8th Cir. 1948); White v. Sanford, 142 F.2d 429, 430 (5th. Cir. 1943); United States v. Marshall, 910 F.2d 1241, 1243 (5th Cir. 1990), cert. denied 111 S. Ct. 976.

[18] See, e.g., United States v. Germann, 370 F.2d 1019, 1022 (2d Cir. 1966), vacated on other grounds 386 U.S. 329 (1967). But see In re Grand Jury Proceedings, 872 F.2d 5 (1st Cir. 1989) (foreman "communicated" immunity order to witness by acquiescing in prosecutor's reading of it).

3. Secretary

Neither Rule 6, Fed. R. Crim. P., nor any other law provides for a grand jury "secretary."

Nonetheless, the practice in many districts is to designate a grand jury secretary, usually by allowing the jurors to make the choice. In such districts, the secretary receives a roster of the grand jurors with their business and home addresses and telephone numbers, and serves as liaison with the grand jurors for scheduling changes. The secretary also keeps records of grand jury proceedings, which usually reflect juror attendance, matters presented, appearances of attorneys for the government, witnesses called, indictments presented, and the voting results.[19]

Generally, the secretary gives these records to an authorized person for safekeeping when the grand jury is not in session. Practices vary from district to district, but usually the guardian is a clerk in the United States Attorney's Office or the District Court Clerk's Office.

II. How Does the Federal Grand Jury Operate? Legal Requirements

A. Quorum

Neither Fed. R. Crim. P. Rule 6 nor any statute imposes a quorum requirement on a federal grand jury. Courts, however, have interpreted Rule

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[19] In districts without a secretary, the foreperson or deputy may perform these duties; alternatively, in some districts a clerical employee of the United States Attorney's Office keeps such records. Attendance and voting records must be available in the event that questions arise regarding the grand jury proceedings. See, e.g., United States v. Bullock, 448 F.2d 728, 729 (5th Cir. 1971).

6(a)'s provision for a minimum of 16 jurors as establishing just such a requirement.[20] Consequently, the Handbook for Federal Grand Jurors states:

> Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop.[21]

Moreover, of the sixteen grand jurors present, one must be the foreperson or deputy foreperson if the grand jury is to do anything meaningful. As noted, only they can swear and instruct witnesses, and sign indictments.

Obtaining the attendance of a quorum usually requires developing a good working relationship with the grand jury. Grand jurors tend to be punctual and very responsible when they are treated respectfully and considerately.

Prosecutors should avoid routinely scheduling time only to cancel it. Conveying a cavalier attitude to the grand jurors will undermine their sense of responsibility and is often the root cause of quorum problems that develop later in a grand jury's term.

Where it is necessary to cancel, the prosecutor should be as considerate of the grand jurors' time as possible, and take all reasonable measures to avoid having them appear unnecessarily. If unavoidable circumstances force a cancellation after the jury has actually convened for a session, the prosecutor should personally apologize to the jurors for their inconvenience, and explain the reason for the cancellation to the extent permissible.

Furthermore, in lengthy investigations, prosecutors should share with the grand jury plans for upcoming sessions, including a list of anticipated witnesses. Viewing the grand jurors as important components of the investigation will not only maximize their value, but will serve to reinforce the importance of their attendance.

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[20] See, e.g., United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 648 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); Beale & Bryson, Supra, § 5.05, at 5-22.

[21] Judicial Conference of the United States, Handbook for Federal Grand Jurors 10 ("Handbook").

In the unanticipated absence of a quorum, some United States Attorney's Offices have employed a practice of allowing sworn statements of witnesses to be stenographically recorded in the presence of those grand jurors attending the session, and allowing the transcript of the statement to be read to the others at a later session. Although not illegal, federal prosecutors should avoid such a practice, principally because it raises many unresolved questions. For example, is the deposition transcript a "matter occurring before the grand jury" required to be kept secret under Rule 6(e)? Moreover, fewer than a quorum have first-hand knowledge of the witness's testimony and demeanor, thus arguably undermining the quorum's purpose of having all evidence presented to at least 16 jurors.

B. Term of the Grand Jury; Days of Service

Federal grand juries generally serve for 18 months,[22] except that: (1) the district court may discharge the jury earlier;[23] (2) the district court may extend the jury's service six more months, for a total term of 24 months, if it finds the extension to be "in the public interest;"[24] and (3) "Special Grand Juries," which are discussed separately below,[25] may be repeatedly extended to a total term of 36 months.[26]

Prosecutors must familiarize themselves with the local practice of the districts in which they appear, since terms of service for grand juries vary considerably from district to district. In one district, for example, the district court empanels the grand jury on the first business day of January, routinely

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[22] Fed. R. Crim. P. 6(g). The eighteen months begin to run from the date of empanelment. United States v. Armored Transport, Inc., 629 F.2d 1313, 1316 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

[23] Fed. R. Crim. P. 6(g).

[24] Id.

[25] See Section VI of this Chapter.

[26] 18 U.S.C. § 3331. The court may extend a Special Grand Jury's term beyond even 36 months if the jury issues a report that fails to comply with the statute. 18 U.S.C. § 3333(e).

discharges it at the end of December, and rarely grants extensions past the 12-month term. In other districts, courts routinely convene grand juries for a full eighteen months, and extensions are commonplace.

The scheduled days for grand jury sessions also vary widely. In some smaller districts, the grand jury is called into session for at most a single period of one to five consecutive days each month. In some larger districts, there are several grand juries operating simultaneously every day.[27]

C. Role of the Prosecutor

By rule, the prosecutor has authority to attend grand jury sessions. By tradition and case law, the prosecutor is not merely an advocate, but is the grand jury's legal advisor.[28] The prosecutor also has responsibility for the presentation of evidence, and discretion as to the manner and organization of the presentation.[29]

The USAM provides:

> In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions

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[27] In the Southern District of New York, for example, the District Court empanels a "regular" grand jury at the start of every month. That jury sits every business day for that month, generally hears short presentations, and thereafter is called back only in extreme necessity.

Besides the monthly "regular" grand jury, the Court in the Southern District of New York from time to time empanels longer-term grand juries, which in that District are called "Additional Grand Juries." Such grand juries usually hear long-term investigations and consequently sit for two scheduled days each week for a full 18 months.

[28] See, e.g., United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1393-94 (9th Cir.), cert. denied, 465 U.S. 1079 (1984).

[29] See, e.g., United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979).

> include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

USAM § 9-11.020.

D. Secrecy; Restrictions On Who May Be Present[30]

The federal grand jury conducts its proceedings in secret. While the grand jury is deliberating and voting, only the grand jurors may be present. During all other grand jury proceedings, only the following persons may be present: the grand jurors, "[a]ttorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device." Fed. R. Crim. P. 6(d).

The USAM provides:

> Federal Rule of Criminal Procedure 6(d) does not admit any exception under which persons not usually authorized to be present are allowed to attend a grand jury session under extraordinary circumstances. . . . Thus, a parent may not accompany a child who is to testify, nor may a marshal be present to control a potentially unruly witness.

USAM § 9-11.245 (citations omitted).[31]

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[30] See Chapter Four of this Manual for a more detailed discussion of secrecy requirements of the Federal Rules of Criminal Procedure.

[31] The USAM also states: "Indeed, the presence of any unauthorized person during a grand jury (continued...)

1. Attorneys for the Government

Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorneys for the government" to include the United States Attorney, as well as Assistant United States Attorneys, Special Assistant United States Attorneys, and Special Assistants to the Attorney General authorized to conduct grand jury proceedings. See 28 U.S.C. § 547 (authority of United States Attorneys); 28 U.S.C. § 542 (Assistant United States Attorneys); 28 U.S.C. § 515(a) (Special Assistants to the Attorney General); 28 U.S.C. § 544 (Special Assistants to the United States Attorney). Agency attorneys assisting with an investigation may not be present unless they are appointed as Special Assistants.

The USAM provides:

> When a U.S. Attorney or Assistant U.S. Attorney needs to appear before a grand jury in a district other than the district in which he/she is appointed, the U.S. Attorney for either the district of appointment or the district of the grand jury should submit a request to the Executive Office for U.S. Attorneys for appointment as a Special Assistant U.S. Attorney. The request should identify the attorney, and the reasons therefor. The Executive Office will send the notice of appointment to the U.S. Attorney in the district in which the grand jury is sitting.
>
> Departmental attorneys, other than U.S. Attorney and Assistant U.S. Attorneys, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegee pursuant to 28 U.S.C. § 515(a). The Attorney General has delegated this authority . . . to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters supervised by them. (Order No. 725-77.)

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[31](...continued)
session may be grounds for dismissal of the indictment." USAM § 9-11.245. In light of the recent Supreme Court opinions in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and United States v. Mechanik, 475 U.S. 66 (1986), however, this statement may no longer be accurate.

USAM § 9-11.241. In addition:

> An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. § 515, or a Special Assistant to a U.S. Attorney, pursuant to 28 U.S.C. § 543, in order to appear before the grand jury in the district of appointment.

USAM § 9-11.242.[32]

USAM § 9-11.242 also provides that the United States Attorney or Department attorney responsible for the case retains responsibility for the conduct of the Special Assistant. Furthermore, agency attorneys appointed as Special Assistants must be accompanied in the grand jury by the United States Attorney or an experienced Assistant or Department of Justice attorney.

Appointments of Special Assistants usually terminate after a year. Special Assistants working on long-term investigations should be sure to have their appointments renewed if necessary.

2. *The Witness Under Examination*

Only one witness may appear at a time.[33] The witness's lawyer may not accompany the witness,[34] nor may the parent of a minor witness.[35] And

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[32] For a discussion of Department of Justice procedures regarding appointments as Special Assistants, consult USAM § 9-11.242. Generally, requests for such appointments must be made in writing through the Executive Office for United States Attorneys. Id.

[33] See United States v. Mechanik, 475 U.S. 66 (1986); United States v. Birdman, 602 F.2d 547, 558 (3rd Cir. 1979), cert. denied, 445 U.S. 906 (1980).

[34] United States v. Mandujano, 425 U.S. 564, 581 (1976), citing In re Groban, 352 U.S. 330, 333 (1957); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), cert. denied, 412 U.S. 954 (1973); United States v. Corallo, 413 F.2d 1306, 1330 (2d

(continued...)

even if the witness is unruly or creates a security risk, a Deputy United States Marshal is not permitted to remain in the room to control him or her.[36]

In the case of a prisoner witness who poses a security threat, the Deputy Marshal may be asked to cuff the witness to a table, or otherwise secure the witness to minimize any risk of flight or danger.

3. Stenographer or Operator of a Recording Device

An operator of a tape recorder may be present instead of a stenographer if necessary to record the proceedings. The operator of a recorder used to present evidence, however, is not covered by Rule 6. Such a person may be present as a witness, but as such may not be present with any other witness in the room.[37]

Although the rule refers only to a single stenographer, it is customary for stenographers to relieve one another during lengthy sessions. To allow for a coherent transcript, the second stenographer will usually enter and begin taking notes while the first is still in the room. Such a practice is commonplace and, although there are no reported cases on point, in the opinion of this Manual's authors, does not violate Rule 6(d).

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[34](...continued)
Cir.), cert denied, 396 U.S. 958 (1969); Directory Services, Inc. v. United States, 353 F. 2d 299, 301 (8th Cir. 1965).

[35] United States v. Borys, 169 F. Supp. 366, 368 (D. Alaska 1959).

[36] United States v. Carper, 116 F. Supp. 817, 819 (D.D.C. 1953).

[37] See United States v. Echols, 542 F.2d 948, 951 (5th Cir.), cert. denied, 431 U.S. 904 (1976) (FBI projectionist).

4. Interpreters When Needed

The USAM states that: "Interpreters should be obtained in accordance with 28 U.S.C. § 1827 and Rule 28." USAM § 9-11.244. "Attorneys for the government should make sure that any interpreter used in a grand jury proceeding is aware of his/her secrecy obligation." Id.

Generally, the prosecutor has discretion to determine whether an interpreter is needed.

5. Effect of Unauthorized Intrusions

Although courts at one time dismissed indictments because of the presence of unauthorized persons in the grand jury room,[38] the Supreme Court in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), disapproved of such an automatic remedy. In that case, the prosecutor allowed two agents to read prior recorded testimony in tandem in the grand jury. Since both agents were present only as witnesses, their simultaneous presence violated Rule 6(d). The Court nevertheless rejected dismissal as an automatic remedy, stating:

> [D]ismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations.

487 U.S. at 256 (citations omitted). Federal courts continue to read Rule 6(d) strictly, but hesitate to remedy violations by dismissing indictments.[39] Courts

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[38] See, e.g., United States v. Heinze, 177 F. 770 (2d Cir. 1910).

[39] See also United States v. Mechanik, 475 U.S. 66 (1986) (assuming that simultaneous testimony by two agents violated Rule 6(d) subsequent guilty verdict rendered violation immaterial). See also United States v. Computer Sciences Corp., 689 F. 2d 1181 (4th Cir.), cert. denied 459 U.S. 1105 (1982).

do have the power to refer a matter to the Office of Professional Responsibility as a sanction against government attorneys who fail to comply with Rule 6(d).

Notwithstanding the Supreme Court's decision in Bank of Nova Scotia, prosecutors are advised to adhere strictly to Rule 6(d). Student interns, paralegals, and other government personnel should not be brought into the grand jury room, except in the unlikely event that one of them is a witness. And, of course, never present more than one witness at a time.

If an unauthorized person enters the grand jury room while it is in session, prosecutors should immediately halt the proceedings. If a witness is testifying, the prosecutor should clearly instruct him or her to stop. The intruder should be escorted out of the grand jury room and asked for identification. An explanation for the intrusion should be obtained. The prosecutor should then return to the grand jury room and state for the record what occurred. Also note for the record that no proceedings continued while the intruder was present.

E. Secrecy: Prohibitions of the Department of Justice On Disclosure

In order to maintain the secrecy of grand jury proceedings, Fed. R. Crim. P. 6(e)(2) generally prohibits disclosure of matters occurring before the grand jury. Witnesses, however, are generally free to disclose what they know about the grand jury session.

The secrecy requirements and the rules permitting disclosure in certain defined circumstances are covered in detail below.[40]

The Department of Justice generally prohibits public comment from the Department on the existence and nature of grand jury investigations. Section 1-7.001 of the United States Attorneys' Manual provides:

> Because charges that result in indictment or arrest should be argued and proved in court, and not in a newspaper or public broadcast, public comment from the Department on such

[40] See Chapter Four of this Manual.

> charges should be limited. . . . Generally, even the existence of particular criminal investigations should not be acknowledged or commented on.

In rare instances where some public comment is necessary, it should come from the Department's Office of Public Affairs. All inquiries regarding grand jury investigations should be referred to that office.

Prosecutors are advised to keep a written record of all contacts with outside counsel and third parties regarding the grand jury investigation. The record should include the date and substance of the conversation. In lengthy investigations, such a record may be kept in a grand jury notebook. Although not legally required, such a record will help protect the government in the unlikely event of an unauthorized disclosure.

F. Recording Requirement

Rule 6(e)(1) provides as follows:

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

This rule is mandatory, and prosecutors are responsible for assuring that it is strictly followed. It applies to all witness testimony, including questions asked by grand jurors, as well as to colloquy between the prosecutor and the grand jurors outside the presence of any witness. The rule requires only recording, not transcription.

Moreover, the rule appears to apply even when the prosecutor or a witness reads an exhibit, such as a document or a transcript of prior testimony. Although a verbatim record of the reading of exhibits is rarely made in court

proceedings, Rule 6(e)(1) contains no such exception for the grand jury and a verbatim record must be made.

"Government attorneys should not have any conversations, even of a casual nature, with grand jurors unless they are being recorded." USAM § 9-11.243.

A good general rule to follow is that a federal prosecutor should never be in the grand jury unless a stenographer is present, or a tape recorder is present and running. Virtually all districts employ grand jury stenographers, and do not rely on tape recorders. However, some stenographers utilize tape recorders as a backup to their stenography machines. Usually the court reporters maintain the tapes after they have transcribed the proceedings. As such, they are recorded statements of the witness and discoverable under Rule 16 of the Federal Rules of Criminal Procedure. In a perjury prosecution such tapes are often more useful than transcripts to demonstrate the demeanor of the witness.

Another general rule is that federal prosecutors should never "go off the record." Occasionally, during a break a grand juror may attempt to make a remark to the prosecutor or ask him or her a question. In such circumstances, the prosecutor should politely remind the grand juror of the recording requirement, and ask him or her to hold the comment or question until the grand jury is back in session and on the record. As soon as that occurs, the prosecutor should describe the contact for the record, pursue it if the grand juror wishes, and remind the grand jury generally of the recording requirement.

Every federal prosecutor should also keep in mind that there will be a permanent record of everything he or she says in the grand jury. No statement should ever be made which would be difficult to explain to a district judge.[41]

With respect to the reading of lengthy documents, tape recorders should be used whenever practical. It is unclear whether it is sufficient to have a stenographer simply listen to the reading, follow along with a copy of the exhibit, and verify on the record that the exhibit has been accurately read. Under no circumstances should a prosecutor or witness be allowed to read a

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[41] For discussions of improper comments and conduct in the grand jury, see Chapter Two and Chapter Ten of this Manual.

document to the grand jury unless either: (i) a stenographer is present; or (ii) the reading of the document is recorded electronically.

G. Transcription of Recorded Proceedings

As noted above, Rule 6(e)(1) requires only "recording," not transcription. Whether matters are transcribed generally remains in the discretion of the prosecutor, subject to supervision by the district court.

Department policy is that "transcripts should not be prepared unless there is a specific need for them." USAM § 9-11.243.

Transcription practices vary considerably from district to district. Prosecutors should familiarize themselves with the practices of the United States Attorney's Office and the grand jury reporters in the district or districts in which they handle cases, as to which proceedings are routinely transcribed, the length of time it usually takes to receive a transcript, and what supervisory approvals, if any, are necessary to order transcripts.

It is the general policy of most United States Attorney's Offices to order transcripts only for witness testimony, and not for colloquy between the prosecutor and the grand jurors, unless an issue arises in litigation regarding such colloquy. In many United States Attorneys' Offices, it is also the general practice not to order transcription of routine one-agent summary presentations.[42]

Every prosecutor should be sure to arrange for the transcription of whatever testimony he or she will need for trial or otherwise. Transcription of a case agent's testimony is essential if the agent is to testify at trial. Such case agent testimony is Jencks material that is discoverable by the defense. Ordering an expedited transcript usually requires supervisory approval.

Prosecutors should review all grand jury transcripts for accuracy and completeness. If the prosecutor believes that a transcript contains an error, he or she should advise the grand jury stenographer and ask the stenographer to

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[42] For a discussion of such presentations, see Section III of this Chapter.

check his or her stenographic notes. If the stenographer agrees, he or she will prepare a corrected transcript or erratum sheet. If the stenographer disagrees, then the prosecutor's only recourse is to recall the witness to clarify the record.

H. Voting And Filing of Indictments And No True Bills

As noted above, "[a]n indictment may be found only upon the concurrence of twelve or more jurors," Fed. R. Crim. P. 6(f), and no one except the grand jurors may be present when the grand jury deliberates and votes. Fed. R. Crim. P. 6(d). If it votes in favor of indictment, the foreperson, or in his absence the deputy foreperson, must sign the indictment and complete the record of the number of jurors concurring. Fed. R. Crim. P. 6(c), (f). The indictment may be filed before a federal district judge or magistrate judge, and absent a reason for sealing, must be filed in open court. Fed. R. Crim. P. 6(f). The foreperson must file the record of concurring jurors with the clerk, who must keep it secret unless the court orders disclosure.

When fewer than twelve jurors vote in favor of a proposed indictment, the result is called returning a "no true bill" or a "no bill." If the grand jury returns a no true bill as to a defendant against whom a complaint or information is pending, the foreperson is required to report that action "to a federal magistrate in writing forthwith." Fed. R. Crim. P. 6(f). The prosecutor should assist the foreperson in performing this duty.

Practices for returning indictments vary from district to district. Prosecutors should familiarize themselves with the practice of the district or districts in which they handle cases.

III. How Should Matters Be Brought Before The Grand Jury? One-Agent Summary Presentations

A. One-Agent Summary Presentations

No law prohibits a federal prosecutor from presenting a case to a grand jury entirely through the testimony of a single case agent who simply recounts to the jury the evidence he or she has gathered, including hearsay statements of witnesses interviewed. Because the Federal Rules of Evidence, with the exception of those rules relating to privileges, are generally inapplicable in grand jury proceedings,[43] the grand jury may consider hearsay and other evidence that for one reason or another would be inadmissible at trial.[44] Even a presentation consisting entirely of hearsay evidence constitutes a legally sufficient basis for a valid indictment.[45]

The USAM advises federal prosecutors as follows:

> There has been considerable criticism voiced that hearsay evidence is relied upon too much in grand jury proceedings. From the perspective, however, that a grand jury is a layman's inquiry, conducted ex parte to determine probable cause rather than guilt or innocence, and that in

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[43] Fed. R. Evid. 1101(d)(2); see United States v. Calandra, 414 U.S. 338, 343; Costello v. United States, 350 U.S. 359, 363 (1974).

[44] See United States v. Ginsburg, 758 F.2d 823 (2d Cir. 1985) (hearsay); United States v. Bein, 728 F.2d 107, 113 (2d Cir.), cert. denied, 469 U.S. 837 (1984) (hearsay and information privileged by attorney/client relationship); United States v. Wander, 601 F.2d 1251, 1260 (3rd Cir. 1979); United States v. McKenzie, 678 F.2d 629, 631 (5th Cir. 1982) (prosecutorial misconduct); United States v. Wilson, 732 F.2d 404, 409 (5th Cir.), cert. denied, 469 U.S. 1099 (1984) (evidence from previous grand juries); United States v. Powers, 482 F.2d 941, 943 (8th Cir. 1973), cert. denied, 415 U.S. 23 (1974) (hearsay); Travestad v. United States, 418 F.2d 1043, 1048 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970) (evidence otherwise subject to exclusionary rule); United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983)(information about prior convictions); United States v. Harris, 521 F.2d 1089, 1091 (7th Cir. 1975); United States v. Gardner, 663 F.2d 834, 840 (9th Cir. 1981), cert. denied, 456 U.S. 905 (1982).

[45] Costello v. United States, 350 U.S. 359, 361 (1974).

> certain forms hearsay is highly creditable evidence, there is a justification for using hearsay in grand jury proceedings. Each U.S. Attorney should be accountable to himself/herself in this regard and to the grand jurors. Worthy of consideration are guidelines on the use of hearsay in grand jury proceedings set out in A.B.A. Standards For Criminal Justice, Standards Relating To The Prosecutorial Function 3.6(a) (Approved Draft, 1971). Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. See United States v. Liebowitz, 420 F.2d 39 (2d Cir. 1969); but see United States v. Trass, 644 F.2d 791 (9th Cir. 1981). The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment. Government attorneys are charged with a high duty in presenting matters to grand juries but are also entitled to a constitutionally based independence. See United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977).

USAM § 9-11.232.

As noted above, investigative agencies usually conduct and complete most routine federal felony investigations, and the grand jury's role with respect to them is limited to reviewing the evidence and deciding whether probable cause exists to support the charges in a proposed indictment. In such cases, federal prosecutors routinely present the evidence gathered by the agency through the summary testimony of the case agent, without calling any of the first-hand witnesses.

For a routine case, a one-agent presentation is entirely appropriate since it serves valid governmental purposes. It conserves both prosecutorial and grand jury resources, expedites the filing of charges, and reduces the burden of the criminal justice system on victims and witnesses.

Nevertheless, despite the legal validity of the one-agent presentation, federal prosecutors should not allow the practice to lead to carelessness. The prosecutor should make sure that he or she has enough evidence that will be admissible at trial to prove the defendant guilty beyond a reasonable doubt.

Moreover, for some types of crime, prosecutors are advised to call eyewitnesses to the grand jury. One example of such crimes is assault, where the testimony of the victim is usually crucial at trial. Such appearances should be coordinated with the victim-witness coordinator to ensure compliance with the Victim Witness Protection Act.

Of course, a prosecutor should never mislead the grand jury as to the nature of the evidence it is receiving. If the evidence is hearsay, the prosecutor may not present it in a manner that may cause the jury to believe that it is receiving first-hand information.[46] Nor may summaries be used to increase the legitimacy of information from a disreputable witness.[47] As a general rule, prosecutors should elicit testimony in the grand jury in a manner that clarifies the sources of information. Besides avoiding inadvertent misleading, such a practice will force prosecutors to think carefully about the reliability of the information.[48]

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[46] The leading case on this issue is United States v. Estepa, 471 F.2d 1132, 1135 (2d Cir. 1972). See also United States v. Liebowitz, 420 F.2d 39, 42 (2d Cir. 1969). But see United States v. Brown, 872 F.2d 385, 387-88 (11th Cir.), cert. denied, 493 U.S. 898 (1989).

[47] See, e.g., United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); United States v. Al Mudarris 695 F.2d 1182, 1185 (9th Cir. 1982), cert. denied 461 U.S. 932 (1983).

[48] Some districts, especially in the Second Circuit where the Estepa decision is still valid, have a practice of advising the grand jury of the nature of hearsay evidence when it is presented. The following is a sample of such advice:

Ladies and gentlemen, the testimony (or parts of the testimony) you have just heard contains what is known as "hearsay" -- meaning that Agent Jones just testified to events that he neither saw nor heard firsthand, but rather learned about from other persons. For example, Agent Jones was not present at the bank robbery he told you about, and thus has no firsthand knowledge of it. What he has told you is information told to him by other agents and bank employees, such as Agent Smith and Ms. Jackson. You have the right to request that the persons with firsthand knowledge come before you and testify, and if you do so, we will attempt to make them available. You should also realize, however, that hearsay is evidence that you are permitted to consider in your deliberations.

(continued...)

B. Opening Statements

No rule or judicial opinion expressly permits or prohibits opening statements in the grand jury.

Longstanding practice supports the view that opening statements are proper as part of the prosecutor's discretion regarding the presentation of evidence and role as the jury's legal advisor.

Before a one-agent presentation, the prosecutor should routinely give the jury a brief opening statement describing the nature of the matter he or she is presenting, the name of the witness to be called, and a brief description of that witness's anticipated testimony. The prosecutor should also inform the jury whether he or she intends to present a proposed indictment at the end of the presentation. In addition, the prosecutor should caution the jury that his or her remarks are not evidence.

In situations where the prosecutor anticipates that a witness may commit perjury in his testimony before the grand jury, it is advisable to lay a predicate to establish materiality. This can be done either in an opening statement or through some type of introductory testimony. Although materiality in such cases is a question of law, it must be established through a transcript of grand jury proceedings, testimony of an agent, testimony of a prosecutor, or testimony of the grand jury foreman.

C. Voir dire

Although there is no specific authority authorizing voir dire, this procedure is similarly supported by longstanding practice.

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[48](...continued)
Because colloquy between the prosecutor and grand jury outside the presence of a witness is not routinely transcribed, prosecutors in such districts usually provide such advice while the witness is in the room, so that it appears in the transcript. All prosecutors appearing in a grand jury in an unfamiliar district should take care to determine whether the United States Attorney's Office in that district prescribes giving grand jurors such advice.

At the end of the brief opening statement, the prosecutor should ask whether any grand juror personally knows the witness or any person connected with the case. If so, the prosecutor should ask that juror on the record whether he or she can put aside any personal bias or prejudice and decide the matter fairly and objectively. If the juror is unable to do so, the prosecutor should ask the juror whether he or she wishes to be recused from the case.[49] See Chapter Two, Section I of this Manual for a further discussion of this area.

D. Legal Instructions

The prosecutor may give the grand jury legal instructions,[50] but is not required to do so.[51] An indictment remains valid even if the prosecutor mistakenly gives the grand jury erroneous legal instructions.[52]

For most routine cases, prosecutors should simply read the relevant statute or statutes to the grand jury. If further instructions are necessary, or routinely given in a particular district, the prosecutor should read them verbatim from the source most widely used in the district, such as the Circuit's

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[49] Even if a juror knows a witness, or even the defendant, recusal is not automatic. At common law, grand jurors were permitted to bring their personal knowledge into the grand jury and consider it as part of their decision-making. See Beale & Bryson, supra, § 1:02, at 1-4 to -7. For procedures on the removal and replacement of grand jurors, see Section VI, D of this Chapter ("Miscellaneous Matters Relating to the Grand Jury" - "Removal and Replacement").

[50] See, e.g., United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); see also, United States v. Sears Roebuck & Co., Inc., 719 F.2d 1386, 1393-94; United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987) (citing District Court memorandum opinion at 14); United States v. Int'l Paper Co., 457 F. Supp. 571, 576 (S.D. Tex. 1978).

[51] United States v. Kenny, 645 F.2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988).

[52] See United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976); United States v. Slepicoff, 524 F.2d 1244, 1247 (5th Cir. 1975), cert. denied, 425 U.S. 998 (1976); United States v. Busic, 472 F. Supp. 880 (E.D.N.Y. 1977), rev'd on other grounds, 549 F.2d 252 (2d Cir. 1978); United States v. Shober, 489 F. Supp. 393, 407 (E.D. Pa. 1979). Some courts have held that if a prosecutor intentionally, or in bad faith, misleads the jury with erroneous legal instructions or advice, the district court may dismiss an indictment in the exercise of its supervisory powers. See, e.g., United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982).

pattern jury instructions, if any, with the only modifications being the substitution of a "probable cause" standard for the requirement of proof beyond a reasonable doubt.

Although prosecutors customarily read the relevant statutes and provide legal instructions, if any, at the end of a one-agent presentation, it may at times be a good idea to do so as part of the opening statement. At that point, the jurors will be able to relate the law to the description of the anticipated testimony. Moreover, a brief statement of the law will help them focus on the most important parts of the testimony. If a statute is complex in form, the prosecutor may want to give each juror a photocopy of the law for them to follow and to use as a reference during deliberation. In addition, the prosecutor can ask the jurors at that time if they have any questions about the applicable law. If they do, the prosecutor will have time to consult accepted sources for instructions on the uncertain point.

A good general rule to follow is never to provide legal instructions *ad hoc*. Many United States Attorney's Offices keep copies of pattern instructions in a place easily accessible to prosecutors in the grand jury, such as the grand jury clerk's office.

General legal instructions that are not related to the elements of any particular crime, such as the definition of probable cause, are usually provided to the grand jury by the district judge at empanelment. In addition, in most districts the court provides each grand juror a copy of the Handbook For Federal Grand Jurors, a pamphlet published by the Committee on the Operation of the Jury System of the Judicial Conference of the United States.

Prosecutors should never provide general instructions, such as a definition of probable cause, that differ from either the district court's charge at empanelment or from the Handbook, if utilized. Rather, each prosecutor should become familiar with the contents of the empanelment charge and the Handbook, and refer to and even quote them as the need arises.

E. Questioning the Summary Witness

Since the Federal Rules of Evidence are inapplicable, the prosecutor may present the case by asking the summary witness a series of leading questions.[53]

Some federal prosecutors make one-agent presentations to the grand jury through a series of leading questions. Such a practice facilitates speedy, efficient presentations, and has the value of limiting potential inconsistencies that often creep into a transcript when prosecutors ask open-ended questions.

Prosecutors should never view leading questions, however, as a substitute for careful preparation. Without careful review of the facts and thorough preparation, inadvertent mistakes and inconsistencies will occur even if all the questions are leading. If the case goes to trial, and the agent is to testify at trial, the prosecutor will have to disclose the one-agent presentation to the defense counsel as Jencks Act material pursuant to 18 U.S.C. § 3500. And although the great majority of cases presented to grand juries result in guilty pleas, it is foolish to assume at the grand jury stage that the case will not have to be tried.[54]

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[53] United States v. Weiss, 752 F.2d 777, 786 (2d Cir. 1985); United States v. Jacobsen, 691 F.2d 110, 115-16 (2d Cir. 1982). Three Circuits considering the question have ruled that the use of leading questions does not affect the government's ability to introduce grand jury testimony at trial to impeach a witness who has changed his or her testimony. United States v. Williams, 737 F.2d 594, 608, n.7 (7th Cir.), cert. denied, 470 U.S. 1003 (1984); United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980); United States v. Champion International, Inc., 557 F.2d 1270, 1274 (9th Cir.), cert. denied, 434 U.S. 938 (1977).

[54] In addition, the following two questions are useful at the conclusion of the summary witness presentation:

(1) Am I correct, Mr. Smith, that you have not narrated everything you know regarding this investigation, but have simply responded to the questions I have asked? (2) And am I also correct that you are prepared to return and answer, to the best of your ability, any additional questions that I or the grand jurors may have?

These questions will make it more difficult for opposing counsel to use the grand jury transcripts to impeach the witness with details included during trial testimony but not mentioned in the grand jury.

F. Making An Intelligible Record

Prosecutors should keep in mind that stenographers cannot record two or more persons speaking simultaneously. Nor can they accurately record: (i) a person speaking at a faster than normal pace; (ii) the nod of a head; (iii) hand gestures; (iv) mumbling; or (v) the lowering of a voice. Prosecutors should always be sure to describe for the record any significant hand or body gestures by a witness.

Prosecutors should also mark all exhibits with a view towards being able to identify them later. Whenever possible, the prosecutor should mark documents by writing exhibit numbers directly on them, on the reverse side or on a copy if necessary. Each exhibit should be described on the record. Documents should be described, for example, by type, number of pages, and any other important features, and have the witness acknowledge the accuracy of the description. Thereafter, the prosecutor and the witness should refer to every exhibit by its number for clarity of the record. In large document cases, the structure for organizing documents should be decided before grand jury sessions open.

G. Grand Juror Questions

According to long-standing tradition and practice, grand jurors are permitted to ask questions and seek additional or clarifying information.

It is Department policy to dissuade grand jurors from seeking inflammatory or unfairly prejudicial information such as a target's prior criminal record, drug use, race or the exercise of a testimonial privilege, unless that information is relevant to the investigation.

Some federal districts encourage prosecutors to ask the grand jurors to hold their questions until the prosecutor reaches the end of his or her planned presentation. At that point, the prosecutor asks the foreperson to excuse the witness temporarily while the grand jurors identify the additional information they would like. The witness then returns and the prosecutor asks questions designed to elicit that information.

Such a practice generally facilitates the development of a clear, more intelligible record, since the prosecutor, and not the jurors, phrases the questions for the witness. It also permits the prosecutor to identify improper questions and to attempt to dissuade the grand jury from asking them.

If a grand juror's question seeks inflammatory or otherwise improper information, the prosecutor should explain to the jurors that such information is usually deemed irrelevant and inadmissible at a trial. If the juror persists nevertheless, the prosecutor should ask the jurors collectively to consider the question and vote among themselves, with no one else present, whether they want the information. Ordinarily, this technique will stop an unreasonably persistent juror. If, however, a majority of the jurors want the information, the question should be posed to the witness, since the grand jury is not bound by the rules of evidence applicable to trials. The prosecutor should nevertheless instruct the jury as to the limited value of such evidence and the danger of unfair prejudice.

H. Closing Statements And Presenting The Proposed Indictment

Federal courts have held that before presenting a proposed indictment for a vote to a federal grand jury, a prosecutor may make a closing statement that summarizes the evidence and comments on its strength.[55]

In most districts, prosecutors forego summarizing and commenting on the evidence. It usually suffices, especially in one-agent presentations, for the prosecutor simply to read the proposed indictment and to ask the jurors whether they have any questions about it. If they do, the prosecutor can remind them of evidence they have heard, while advising them that the prosecutor's remarks are not evidence. Such advice is also appropriate whenever a prosecutor chooses to make a closing statement.

After reading the proposed indictment, the prosecutor should advise the jurors that he or she and the agent will be available outside the grand jury room during deliberations in case any problems arise or the jurors decide that they

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[55] See United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957).

need more evidence. This procedure should prevent a "No True Bill" based upon a misunderstanding of the law or the failure to present readily available evidence.

IV. How Should Matters Be Brought Before the Grand Jury? Long-term Investigations

A. Long-Term Investigations

As already noted, the grand jury possesses broad investigative powers. Moreover, it may continue its investigation even after gathering enough evidence to establish probable cause.[56]

The USAM states:

> The grand jury has always been accorded the broadest latitude in conducting its investigations. Thus the grand jury may conduct the broadest kind of investigation before stopping to determine whether an indictment should be found.

USAM § 9-11.110.

Unlike routine cases, most complex federal crimes are investigated by a team consisting of the prosecutors, agents, and technical support personnel. The grand jury is invaluable in such investigations.

The grand jury presents the best opportunity a prosecutor will probably have to discover and develop evidence. Through it, the prosecutor can learn of possible defenses, examine and assess the credibility of potential defense witnesses, compel hostile witnesses, and develop rebuttal evidence. For example, the subject of an investigation may choose to testify. A carefully prepared and thorough examination of his or her version of the events is essential -- as an aid to further investigation and the development of rebuttal

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[56] See Chapter Six of this Manual for an expanded discussion of this issue.

evidence, a source of admissions, and potential impeachment material if he or she decides to testify at trial.

Prosecutors should use the grand jury in cases that are not routine to gather as much evidence as possible.[57] In addition to an ethical duty to be fair in the presentation of all evidence potential defense witnesses should be called to help develop rebuttal evidence and to make it more difficult for the witness later, either to fabricate a defense or to conform his testimony to the defense case.

The prosecutor should also use the grand jury to "lock in" certain witnesses. These would include reluctant or uncooperative witnesses, cooperating defendants who may eventually become uncooperative, and employees of target employers. The prosecutor should also use the grand jury to obtain the testimony of witnesses who may not be available to testify at trial, such as witnesses in failing health. Because the transcript of the testimony may be sought to be introduced in a future proceeding, the question should be posed in different fashions in anticipation of objections which might be lodged at trial, such as leading or assuming a fact not in evidence.

If a witness's credibility is crucial, the prosecutor can test it in the grand jury. Grand jurors often provide an excellent preview of how trial jurors will react to a witness.[58]

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[57] Pretrial discovery is limited in criminal proceedings. Moreover, after the return of an indictment, it is generally an abuse of the grand jury to use it for the sole or dominant purpose of preparing for trial. The district court can enjoin such use and, in appropriate cases, dismiss an indictment. See, e.g., USAM § 9-11.120 and cases cited therein. Consequently, the opportunities for developing additional evidence greatly diminish once the indictment is returned.

[58] There will obviously be many cases that warrant neither summary presentations nor long-term investigations, but fall somewhere in between. Prosecutors must use their best judgment and the collective experience of their offices to decide just how much of an investigation and presentation is necessary in any particular case.

B. Preparation and Organization; Marking of Exhibits and Subpoenas

Careful preparation and attention to organization are crucial in a long-term investigation. One method that has proven successful is to use a grand jury notebook, somewhat akin to a trial notebook, where important matters relating to the investigation can be recorded and organized. Maintaining the grand jury notebook is often an appropriate task for an experienced paralegal.

Although intelligible marking of exhibits is necessary in all cases, it is essential in a complex investigation involving several different days of grand jury proceedings. Failure to establish a clear, consistent marking system at the outset of a lengthy investigation, and to stick to it thereafter, can easily result in chaos with exhibits.[59]

In such cases, the prosecutor or paralegal should pre-mark all the exhibits according to some consistent system of organization. Then, when the exhibit is described on the record, the stenographer can simply initial it next to its exhibit number. Subpoenas should also be marked on the record, so that the grand jurors are kept advised of them. The grand jury notebook should contain an exhibit list, including a list of subpoenas, as well as a record of the documents received in response to subpoenas duces tecum.

C. Opening Statements, Summary of Investigation To Date, and Voir Dire

As in a one-agent presentation, the prosecutor should make an opening statement. In it, he or she should advise the grand jury of the nature of the investigation, identify the possible violations involved and the subjects, describe an investigative plan, and estimate the length of time that it will take to complete. Of course, he or she should also remind the grand jurors that his or her statements are not evidence.

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[59] For a discussion of a recommended exhibit marking and control system, see Chapter Two of this Manual.

It is often good practice to call the case agent as the first witness to summarize the status of the investigation to date.

The prosecutor should also identify all subjects and likely witnesses and ask the jurors whether they possess any personal knowledge regarding the investigation that might interfere with their ability to make objective decisions in the case. Jurors with personal biases can ask to be recused, if necessary.

Besides the opening statement at the inception of an investigation, it is also good practice at the beginning of each session to identify the witnesses to be called that session and to summarize the evidence to date to refresh the jurors' recollections, while repeating that the prosecutor's statements are not themselves evidence. Also, sometime during each session, the prosecutor should inquire of the grand jurors whether they have questions about the evidence to date, and may also seek their recommendations of additional witnesses to call.

D. Questioning of Witnesses

Although the prosecutor may use leading questions and rely on hearsay, he or she should make a judgment on how to question each witness. In many cases, questions should be non-leading to elicit the witness's own recollection of events as openly as possible and to develop additional investigative leads. With each witness, the prosecutor should also probe the witness's source of knowledge, both to determine whether evidence will be admissible at trial and also to develop leads.[60]

E. Closing Statements and Summarizing Evidence

At the conclusion of a lengthy investigation, some type of closing statement is usually necessary. Its principal purpose should not be to persuade

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[60] Advice of rights and warnings, and procedures applicable to special classes of witnesses are discussed in Chapter Two of this Manual.

the jurors of the correctness of the government's view, as in a closing statement at trial,[61] but simply to correlate evidence that the jurors have heard to the particular charges in the proposed indictment.

One particularly effective method for correlating evidence to particular charges is to use a summary witness, usually the case agent. The prosecutor may have a summary witness read the proposed indictment aloud to the jurors. It is often helpful to allow each juror to have his or her own copy to follow along to use as a reference during deliberations. The prosecutor may then ask the summary witness to pause at various points and identify evidence supporting particular allegations. The prosecutor should also advise the grand jurors to rely on their own recollections of the evidence and not that of the agent. If the prosecutor summarizes any evidence, he or she should again remind the jury that his or her statements are not themselves evidence.

F. Transferring to a New Panel

Occasionally, a long-term investigation will continue beyond the term of a particular grand jury, in which case the prosecutor will have to transfer it to a new grand jury. Ordinarily in such circumstances, the prosecutor should have all transcripts of testimony read to the new grand jury and should also present all documents that were previously presented to the original grand jury. It may be sufficient, however, to present summaries of at least some of the testimony and documents to the new grand jury.[62]

In the event the prosecutor decides to present summaries instead of all of the testimony, the prosecutor should note for the record that the complete transcripts are available for use by the grand jurors during their deliberations.

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[61] As already noted, delivering an argumentative closing is not legally improper. See United States v. United States District Court, 238 F.2d 713, 721 (4th Cir 1956), cert. denied, 352 U.S. 981 (1957) (prosecutor may summarize evidence and urge grand jury to indict).

[62] For a discussion of the options for presenting evidence to the new grand jury, see Chapter Two of this Manual.

G. Effect of Grand Juror Absences

A grand juror who missed some of the sessions at which evidence was presented may nevertheless cast a vote to approve or disapprove a proposed indictment. A court may not dismiss an indictment, therefore, on the ground that fewer than twelve grand jurors who voted in favor of it heard all the evidence presented.[63]

Nonetheless, prosecutors should ask previously absent grand jurors to read the transcripts and accompanying exhibits pertaining to any missed sessions. This will allow them an opportunity to participate more meaningfully thereafter.

V. How Should Matters Be Brought? Superseding Indictments[64]

Following the return of an indictment, the prosecutor may present, and the grand jury may return, a superseding indictment that modifies the initial indictment. For example, the superseding indictment may contain additional counts or defendants.

The term "superseding" is something of a misnomer, because it does not supplant the initial indictment. If a grand jury returns both an initial and superseding indictment, both remain outstanding unless and until the court dismisses one of them. Superseding indictments can include previously indicted charges as to which the statute of limitations has run.

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[63] United States v. Provenzano, 688 F.2d 194, 202-03 (3rd Cir.), cert. denied, 459 U.S. 1071 (1982) (indictment valid even though only three of the twelve grand jurors who voted in favor of it attended every session); United States v. Godoy, 678 F.2d 84, 86 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 649 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir. 1944) ("If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote.").

[64] See Chapter Three, Section V, for additional discussion of the matter of superseding indictments.

If possible, a prosecutor should present a superseding indictment to the same grand jury that returned the initial indictment to avoid extensive re-presentation of evidence. The prosecutor should advise the jury of the nature of the superseding indictment, and the differences between it and the initial indictment. The prosecutor may point out the evidence that the grand jurors have heard that relates to the superseding indictment, while again reminding them that his or her statements are themselves not evidence.

It is advisable to present a superseding indictment as a whole rather than to do so piecemeal. At trial confusion may arise concerning which count was in the original indictment and which count was a superseding indictment count. It is also advisable to wait until sentencing before moving the court to dismiss the original indictment in the event there is a potential statute of limitations problem if the underlying indictment is dismissed.

If the original grand jury is unavailable, the prosecutor may present the superseding indictment to a new grand jury. In that case, the prosecutor should follow the procedures discussed above for presentation of evidence to a new grand jury.

VI. Miscellaneous Matters Relating To The Grand Jury

A. Empanelment

Rule 6(a) of the Federal Rules of Criminal Procedure provides: "The court shall order one or more grand juries to be summoned as the public interest requires." Empanelment should occur in open court unless extremely unusual circumstances require exclusion of the public.[65]

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[65] See In re Impaneling of Grand Jury, 4 F.R.D. 382, 384 (S.D.N.Y. 1945).

B. Qualifications and Selection

The requirements for grand juror selection are contained in the Jury Selection and Service Act, 28 U.S.C. § 1861, et seq. ("JSSA"). Grand jurors must be "selected at random from a fair cross-section of the community in the District or Division wherein the court convenes."[66] The JSSA does not require that the resulting grand jury be a statistical mirror of the community but only that grand jurors be selected from a source that is reasonably representative of the community.[67] In addition, each grand jury must also satisfy certain criteria, including United States citizenship, age, English language proficiency, absence of physical or mental infirmity and lack of felony convictions.[68]

Each judicial district has a written plan for random juror selection that has been reviewed and approved by the chief judge and the judicial conference for the circuit.[69] The JSSA specifically prohibits any exclusion based on race, color, religion, gender, national origin or economic status.[70] The court has the power to excuse summoned jurors "upon a showing of undue hardship or extreme inconvenience, for such period as the Court deems necessary, at the conclusion of which such person shall be summoned again for jury service." 28 U.S.C. § 1866(c).

Under the usual procedure, the clerk sends out "juror qualification forms" under 28 U.S.C. § 1864. Based upon the responses, prospective jurors are either deemed qualified or automatically excused. The names of qualified

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[66] 28 U.S.C. § 1861.

[67] See United States v. Potter, 552 F.2d 901, 903 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Marcello, 423 F.2d 993, 999 (5th Cir.), cert. denied, 398 U.S. 959 (1970); United States v. DiTommaso, 405 F.2d 385, 389 (4th Cir. 1968), cert. denied, 394 U.S. 934 (1969).

[68] 28 U.S.C. § 1865.

[69] 28 U.S.C. § 1863.

[70] 28 U.S.C. § 1862.

jurors are then placed in a master jury wheel from which names are drawn randomly for petit and grand jury panels when either type of jury is to be empaneled. The court then summons the prospective jurors for jury duty.

When the prospective jurors are assembled, the judge or clerk explains the demands of grand jury service and inquires whether such service would be an undue hardship for any of them. The criteria for excusing jurors -- e.g., long-term illness, care of a sick family member, acute business problems -- vary, but most judges excuse only for very severe hardship.

C. Challenges To Individual Jurors and to the Array

Rule 6(b)(1) of the Federal Rules of Criminal Procedure provides:

> The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

Rule 6(b)(2) specifically provides that a motion to dismiss the indictment may be made, based on objections to the array or on the lack of legal qualification of an indvidual juror. The rule requires that the motion be made pursuant to the procedures set forth in 28 U.S.C. Section 1867(e) and shall be granted under the conditions prescribed in that statute. Rule 6(b)(2). The motion to dismiss the indictment, or to stay the proceedings, may be made by the defendant (28 U.S.C. 1867 (a)) or by the government (28 U.S.C. 1867 (b)), in criminal and civil cases, challenging compliance with the provisions of 28 U.S.C. Sction 1861, et seq., in the selection of the grand or petit jury. The procedures applicable to a motion to dismiss the indictment challenging the array are specifically set forth in 28 U.S.C. Section 1867 (d). Those procedures are the exclusive means by which the defendant or the government may challenge the array alleging that the selection did not comply with the provisions of 28 U.S.C. Section 1861 et seq. 28 U.S.C. Section 1867 (e).

D. Removal and Replacement

Rule 6(g) of the Federal Rules of Criminal Procedure states:

> At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

If the prosecutor learns that a grand juror has a serious conflict of interest concerning a matter under investigation, he or she may move to excuse that juror for cause. Jurors may also be excused because of illness, relocation or extreme hardship. Prosecutors are advised to closely monitor the number of jurors who have not been dismissed so as to avoid a quorum problem. [71]

E. Special Grand Juries

Sections 3331 through 3334 of Title 18, United States Code, provide for special grand juries. In each district of more than four million inhabitants, and in every other district in which the Attorney General or his designee certifies a particular need, the district court must summon a special grand jury at least once in each period of 18 months, unless a previously empaneled special grand jury is still sitting. The district court may extend the term of each special grand jury to a total of 36 months.[72]

Special grand juries operate much as regular grand juries do, see 18 U.S.C. § 3334, but they also have powers that regular grand juries do not have. In particular, section 3333(a) empowers special grand juries to submit to their empaneling court reports:

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[71] If the court empaneled alternate grand jurors, the prosecutor should alert the supervising judge, or the clerk, depending on local practice, and the clerk will simply summon the required number of alternates.

[72] The special grand jury may continue even beyond 36 months if it issues a report, and if the district judge determines that additional testimony is necessary, or that the report needs to be rewritten to comply with the governing statute. 18 U.S.C. § 3333(e).

> (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or
>
> (2) regarding organized crime conditions in the district.

18 U.S.C. § 3333(a). If a special grand jury submits such a report, the district court must thereafter follow certain notice and hearing procedures before making it public. 18 U.S.C. § 3333(b), (c).

The United States Attorneys' Manual states:

> The wording and legislative history of 18 U.S.C. §§ 3332(a) and 3333(b)(1) indicate that a special grand jury should not investigate for the sole purpose of writing a report; the report must emanate from the criminal investigation. At bottom, then, a special grand jury functions essentially like a regular grand jury. It is only after the "completion" of the criminal investigation, when the time is near for discharging the jury, that a report may be submitted to the court under 18 U.S.C. § 3333(a).

USAM § 9-11.330. In addition:

> If a special grand jury will be considering the issuance of a report at the culmination of its service, U.S. Attorneys are requested to notify the Chief of the Organized Crime and Racketeering Section promptly of the fact and explain why an indictment cannot be found to obviate the issuance of a grand jury report. It should also be explained how the facts developed during a criminal investigation support one of the authorized types of reports. Before any draft report is furnished to the grand jury, it must be submitted to the Chief of the Organized Crime and Racketeering Section for approval.
>
> USAM § 9-11.331.

Chapter Two

PRESENTATION OF EVIDENCE

I. Initial Session

At the first grand jury session, the prosecutor will begin establishing a working relationship with the grand jury, whether the case is routine and expected to be completed within the session or if the investigation is expected to take months or years.[73] Setting forth the working procedures at this session is especially important if the grand jury has been recently empaneled or the investigation has extended or is expected to extend over many sessions.

In most cases, the judge or magistrate who has empaneled the grand jury has informed the grand jurors of their roles and some procedures used by grand juries in the district. Many judges also distribute copies of the Handbook for

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[73] This assumes the attorney has received appropriate authorization for the investigation and for his own presence before the grand jury. Some districts require special assistant AUSAs, as well as Department of Justice attorneys, to file letters of appointment or authorization with the clerk of court before the attorney's initial appearance before the grand jury. Late compliance with this procedural requirement will generally not cause severe sanctions. United States v. Symms, 960 F.2d 847, 848-849 (9th Cir. 1992); United States v. Balistrieri, 779 F.2d 1191, 1207 (7th Cir. 1985); United States v. Mitchell, 397 F.Supp. 166, 170 (D.C. D.C. 1974). But see United States v. Durham, 941 F.2d 886, 891-892 (9th Cir. 1991) (improper appointment of district attorney as special AUSA warranted remand for factfinding); United States v. Pignatiello, 582 F.Supp. 251, 253-255 (D. Colo. 1984) (indictment dismissed because SEC attorney failed to timely take oath as special AUSA).

Federal Grand Jurors. Members of more experienced grand juries will also be familiar with the procedures for recordation, note-taking and the asking of questions in that district, for example, as well as for conducting deliberations and returning an indictment. Thus, the detail in which the following procedures are discussed will vary at the prosecutor's discretion. Exhibiting familiarity with these procedures will in any event enhance the prosecutor's appearance of professionalism with the grand jurors.

A. Opening and Voir Dire

As the first session concerning any case begins, the grand jurors will want to know some background about the case. The prosecutor also has an interest in learning whether any of the grand jurors cannot fairly and impartially consider the evidence presented in the particular investigation because of personal conflicts.

Therefore, a brief general summary or preview of the evidence is usually given at the outset of an investigation to introduce a case to the grand jury. A prosecutor deciding to give such a statement must treat this as carefully as an opening statement at trial. Do not overstate the evidence. Briefly describe the matter being presented, name the witness or witnesses expected to be called and briefly describe the expected testimony. In the opening, the prosecutor also usually explains the nature of the investigation and the applicable laws (as briefly or thoroughly as discretion suggests) and identifies the targets, subjects and likely key witnesses. The prosecutor should caution the grand jury periodically that the prosecutor expects they will hear certain evidence and that what the attorney says is not evidence and should not be considered by the grand jury in any subsequent voting on a proposed indictment.

A *voir dire*-like procedure is then used to screen the grand jurors for conflicts in considering the specific investigation. The actual practice for conducting the investigation-specific *voir dire* varies among the districts. The prosecutor generally asks whether any grand juror knows any of the anticipated subjects, is employed by a subject company, has knowledge of any previous investigation or has any other interest which would prevent the witness from rendering a fair, impartial and just decision based solely upon the evidence

presented.[74] In some districts, this questioning occurs outside the presence of the rest of the jury to minimize any embarrassment to the potential juror. Also, in some districts, the foreperson or the supervising judge will do the questioning. Any juror who indicates any interest that may interfere with a fair, impartial or just decision concerning indictment should be asked on the record whether he or she can put aside any personal bias or prejudice and decide the matter fairly and objectively. If the juror is unable to do so, or if the prosecutor is convinced a juror should be removed, the appropriate steps should be taken.[75] On occasion, a grand juror will remove himself or herself from a particular case or from the panel if the panel will only consider one case.

B. Procedures within Grand Jury Sessions

The procedures for questions by the grand jurors, secrecy, recordation of the grand jury sessions, note-taking by grand jurors and the indictment process should also be discussed at the initial session. The thoroughness of the discussion varies depending on the experience of the grand jurors and the procedures in the particular district.

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[74] In a long-term investigation involving white collar crime, the prosecutor may also wish to identify law firms which have been or may be involved in the investigation, since grand jurors who are clients of such firms may also have conflicts of interest.

[75] Even if a juror knows a witness, or even the defendant, recusal is not automatic. At common law, grand jurors were permitted to bring their personal knowledge into the grand jury and consider it in their decision-making. See Beale & Bryson, supra §1:02, at 1-4 to -7. See also §§ 4:08, 5:10 concerning a defendant's claims concerning a biased grand juror and the procedures for removal and replacement of grand jurors.

1. Questions by the Grand Jurors

The grand jurors will want to know when and how they may ask questions. The practice varies not only among districts but also among attorneys, and so is best discussed at this session. The best practice is to request that the grand jurors hold their questions until after the attorney's examination has been completed. The witness should be excused, questions collected by the prosecutor from the juror, and, upon return of the witness, the questions are asked of the witness. Sometimes, however, especially during long examinations, questions are handled after particular subject areas.

This procedure permits the prosecutor to dissuade grand jurors from seeking inflammatory or unfairly prejudicial information such as a target's prior criminal record, drug use, race, or exercise of a testimonial privilege, unless that information is relevant to the investigation. If a grand juror seeks inflammatory or otherwise improper information, the prosecutor should explain to the grand jury that such information is usually deemed irrelevant and inadmissible at trial. If the juror persists, the prosecutor should ask the jurors to collectively consider the question and vote among themselves (without the prosecutor present) whether they want the information. This technique generally stops unreasonably persistent jurors. If a majority of the grand jurors want the information, the question should then be posed to the witness and the prosecutor should also instruct the grand jury on the record as to the limited value of such evidence and the danger of unfair prejudice. Holding grand juror questions until set intervals also generally facilitates the development of a clearer, more intelligible record.

The prosecutor can also make clear at the initial session his or her availability to answer grand juror questions, as well as the limitations on questions asked of the prosecutor. Questions by grand jurors are often invaluable sounding boards for questions in the minds of trial jurors. However, the attorney's responses are limited by professional ethics and the rules of criminal procedure, discussed below.

2. Secrecy and Recordation Procedures

The grand jurors and court reporter should be cautioned at the initial session and periodically that all matters occurring before the grand jury are secret. They also can be advised at the initial session of the role of the court reporter and further that Rule 6(e)(1) requires that all proceedings and statements made in the presence of the grand jury, whether or not a witness is present, be recorded once the grand jury room door is closed and the foreperson of the grand jury has called the grand jury into session.[76] The grand jurors may also be informed that all proceedings will be recorded until the time of their deliberation or voting on the proposed indictment.[77]

The grand jurors should be advised that the rules concerning grand jury secrecy and recordation as well as professional ethics restrict the prosecutor from engaging in any conversation or answering any questions of grand jurors relating to the investigation until the grand jury session is called to order and the conversations and questions can be recorded. If a grand juror asks a question before a session begins or after a session has been concluded, the attorney should politely advise the grand juror that it is not proper for the

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[76] Rule 6(e)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

Rule 6(e)(1) also specifically provides that:

> An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution.

Therefore, an unintentional failure to record a "grand jury proceeding" would be a Rule 6(e)(1) violation but should not result in the dismissal of an indictment. United States v. Diaz, 922 F.2d 998, 1005 (2nd Cir. 1990) (failure to transcribe); United States v. Ciambrone, 601 F.2d 616, 626 (2d Cir. 1979) (failure to record).

[77] 18 U.S.C. § 1508(a) forbids the recording of the proceedings of a grand jury while it is deliberating or voting.

attorney to answer the question until the session is properly being recorded and to ask the question on the record.[78] Therefore, attorneys should not state that they are going "off the record" on non-case-related matters, such as lunch schedules, much less for colloquies with the grand jurors concerning legal matters. Doing so only invites abuse motions by defense counsel. Instead, the court reporter should be instructed at the outset not to transcribe colloquy with the grand jurors, although the colloquy must be recorded.

3. Note-taking and Transcript Inspection by the Grand Jurors

Grand jurors also commonly wish to take personal notes of the evidence presented. The applicable statute does not expressly provide that grand jurors have a right to take notes during a session; it only provides that the statute shall not be construed to say that they cannot do so.[79] Note-taking by grand jurors enhances the opportunities for a violation of grand jury secrecy[80] and might lead some jurors to rely more on the notes than on their own recollection of the evidence. On the other hand, note-taking can help jurors follow the testimony

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[78] Attorneys should be cordial with grand jurors both inside and outside the grand jury room. However, conversations concerning the case outside the grand jury room could potentially be considered a violation of Rule 6(e)'s general rule of secrecy and Rule 6(e)(1)'s requirement that all proceedings, except deliberations, shall be recorded. If an attorney inadvertently makes off-the-record comments to a grand juror concerning the matter under investigation, the off-the-record conversations should be repeated for the record. See United States v. Venegas, 800 F.2d 868, 870-871 (9th Cir. 1986), cert. denied, 479 U.S. 1100 (1987).

[79] 18 U.S.C. §1508 states that "nothing ... in this section shall be construed to prohibit the taking of notes by a grand or petit juror in any court of the United States in connection with and solely for the purpose of assisting him in the performance of his duties as such juror."

[80] A grand juror taking notes and deliberately releasing them would violate grand jury secrecy and be subject to punishment by contempt or for violation of 18 U.S.C. § 1503 (obstruction of justice). Cf. United States v. Peasley, 741 F.Supp. 18 (D. Maine 1990). Generally, grand jury personnel cannot be punished both by contempt for violating Rule 6(e) and for obstructing justice unless they possess a sufficiently purposeful corrupt intent. See United States v. Jeter, 775 F.2d 670, 679 n.9 (6th Cir. 1985). See Chapter Four of this Manual for a discussion of the grand jury secrecy requirements. However, such a breach of secrecy should not invalidate any subsequent indictment.

and formulate their questions, particularly in complicated or lengthy investigations.

The court, in the exercise of its general supervisory power over the grand jury, has the authority to regulate note-taking. Actual practice varies among the districts. Any established note-taking procedures in a particular district should be followed. If there are no set procedures or policies and the grand jurors want to take notes, then the following procedure is recommended: note-taking materials should be provided to the jurors at the beginning of each daily session and collected at the end of the session, by either the foreman or the attorney conducting the investigation. Procedures for safekeeping the notes also vary among the districts. Recommended procedure is to seal the notes in envelopes between sessions and deposit them under lock with the court or grand jury clerk or in the U.S. Attorney's office, destroying them when no longer necessary. If the prosecutor is unable to lock the grand jury room over the lunch hour, grand juror notes must be collected and delivered to the clerk before the room is vacated. The grand jurors should be instructed that their notes cannot be removed from the grand jury room, except for daily transportation to and from the clerk's office. Upon expiration of the term of service of the grand jury, all notes should be turned in to the clerk or other appropriate official for prompt destruction.

Finally, the grand jurors should be informed at the initial session and periodically of their right to inspect transcripts of the sessions.[81] This is especially important for jurors who miss sessions in a long investigation, or if summaries or transcripts of sessions involving other grand juries are presented before presentation of an indictment.[82] The grand jurors may also be advised concerning the procedures for transcript availability at the initial session.

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[81] Many United States Attorneys' offices have authorized the court reporter who reports grand jury proceedings to act as an agent of the office in maintaining custody and control of all grand jury stenographic notes, electronic tape recordings, and transcripts. In other districts the practice is to obtain the transcripts as soon as they are ready after a session.

[82] United States v. Land, 644 F.2d 1232, 1237-1239 (7th Cir. 1981) (opportunity for grand jurors to review transcripts suffices); But see United States v. Provenzano, 688 F.2d 194, 201-203 (3rd Cir.) cert. denied 459 U.S. 1071 (1982) (grand jurors should be instructed to review transcripts).

C. One-Agent Summary Presentations

Oftentimes, simple cases are presented to the grand jury in one session and entirely through the testimony of one witness, the case agent. The agent simply recounts the evidence he or she has gathered, including describing witness interviews. The grand jurors then review the evidence and decide whether probable cause exists to support the charges in the proposed indictment. For a routine case, the one-agent presentation conserves both prosecutorial and grand jury resources, expedites the filing of charges, and reduces the burden of the criminal justice system on victims and witnesses.

This type of presentation is possible because, as is discussed in more detail below, the Federal Rules of Evidence do not apply before the grand jury (with the exception of certain rules relating to privileges).[83] Therefore, the grand jury may consider hearsay (such as summaries of witness interviews) and other evidence which may be inadmissible at trial. Please note: Departmental policy requires all hearsay evidence to be presented on its merits, and some courts are particularly sensitive to the potential abuse of the grand jury process caused by excessive reliance on hearsay.[84] Therefore, care must be taken to elicit testimony in a summary presentation in a way that does not mislead the grand jurors into thinking that they are receiving first-hand information, or that they cannot request more evidence before deciding whether to indict. Hearsay should also not be used to increase the legitimacy of information from a disreputable witness. Finally, a one-agent summary presentation is inappropriate where eyewitness testimony is critical at trial, such as victim testimony in cases involving assaults.[85]

Some districts train Assistant United States Attorneys to make one-agent presentations to the grand jury through a series of leading questions.[86] This practice facilitates speedy, efficient presentations and also limits potential

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[83] Fed. R. Evid. 1101(d)(2). See Section III, A of this Chapter.

[84] See USAM § 9-11.232 and Section III, C of this Chapter.

[85] Victim appearances should be coordinated with the victim-witness coordinator to ensure compliance with the Victim Witness Protection Act.

[86] United States v. Weiss, 752 F.2d 777, 786 (2d Cir. 1985), cert. denied 474 U.S. 44 (1985).

inconsistencies that often creep into a transcript when prosecutors ask open-ended questions. Prosecutors should never view leading questions, however, as a substitute for careful preparation. Without careful review of the facts and thorough preparation with the agent, inadvertent mistakes and inconsistencies will occur even if all questions are leading. This is particularly important since if the case goes to trial and the agent testifies. Then the prosecutor will be required to disclose the one-agent presentation to defense counsel pursuant to the Jencks Act.[87] The testifying agent could therefore be impeached by the careless testimony before the grand jury.

D. Investigative Status and Procedures

If the investigation is expected to extend beyond a single grand jury session, or has already commenced, the grand jurors should be informed of its status at the initial session. They should also be advised of the procedures which will be followed in the investigation until presentation of the indictment. Most grand jurors appreciate estimates of how long the investigation is expected to continue before they will be presented with an indictment. They may also want to know when they will be instructed about the applicable law.

The grand jurors should be informed at this early stage that the evidence which will be presented to them may consist of both testimony and documents. They should also be informed of any actions by previous grand juries,

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[87] 18 U.S.C. §3500. Obviously, it is foolish to assume at the grand jury stage that the case will necessarily result in a guilty plea. Thus the following two questions are useful at the conclusion of the summary witness presentation:

> (1) Am I correct, Mr. _____, that you have not narrated everything you know regarding this investigation, but have simply responded to the questions I have asked?
>
> (2) And am I also correct that you are prepared to return and answer, to the best of your ability, any additional questions that I or the grand jurors may have?

These questions will make it more difficult for opposing counsel to use the grand jury transcripts to impeach the witness with details included during the trial testimony but which were not mentioned before the grand jury.

especially if transcripts will be read or made available, as discussed below.[88] Many prosecutors also advise the grand jurors at this stage of actions already taken in the investigation, such as the issuance of subpoenas duces tecum or ad testificandum. A copy of the subpoenas issued may be provided and the types of documents requested may be discussed at this time.[89] The grand jurors should also be advised that they can review any documents they wish and may request that additional documents be obtained. The grand jurors may also be advised that some documents may have been acquired through ongoing administrative subpoenas, while other documents may have been acquired by grand jury subpoena issued by a grand jury whose term has expired. This may also be a good time to explain that some witnesses have been interviewed and will appear, that other witness leads are being developed and that the grand jurors may request that other witnesses be called. The prosecutor may also chose to explain that one or more witnesses may be granted immunity, explaining what immunity is, why it is necessary, the process used for obtaining it, and its significance.

By the end of the initial session, the grand jurors should also know that the prosecutor will have several roles before them: investigator; advocate in presenting evidence; and legal advisor. The grand jurors should also be advised that the prosecutor is not a witness, and that statements by the prosecutor are not facts. Rather, in their deliberations the grand jurors will be guided of by their own recollection, notes, documents and their review transcripts of witness testimony.

The parameters of the prosecutor's roles, including indictment presentation procedures, are explained in more detail below, followed by explanations of permissible evidence before the grand jury, presentation of witness testimony, and procedures for document control.

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[88] See Section III, B of this Chapter.

[89] Department of Justice attorneys must be familiar with local practices regarding the issuance of subpoenas and document returns. For example, in some districts the grand jury foreman must initial a copy of each subpoena issued, signifying his approval of its issuance. In some districts, the prosecutor handling the first witness in a grand jury session handles the document returns for all investigations within that grand jury's jurisdiction. The attorney questions an agent or analyst to elicit the status of all subpoenas duces tecum with return dates for that session (most of which may be in the process of compliance.

II. Statements by the Prosecutor Before the Grand Jury

The prosecutor is "to advise the grand jury on the law and to present evidence for its consideration."[90] This section defines the parameters of permissible conduct by a prosecutor before the grand jury.

A. Legal Advice

Although the purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate independently of either prosecuting attorney or judge,[91] the prosecutor is authorized to assist the grand jury in conducting its inquiry by advising the grand jury on the applicable law.[92] By advising the grand jury on the law and the elements of the offense alleged in the proposed indictment, a prosecutor does not become an improper witness before the grand jury.[93]

The prosecutor's dispensation of legal advice is ongoing. It may be given in the context of responding to specific questions by grand jurors. It may also be given as legal issues arise through witness testimony, such as a witness's assertion of his constitutional right to counsel or against self incrimination. At the time the prosecutor presents a proposed indictment to the grand jury, he or she generally instructs the jury on the applicable laws, including the elements of each offense charged.

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[90] USAM 9-11.020.

[91] Stirone v. United States, 361 U.S. 212, 218 (1960).

[92] United States v. Sells Engineering,Inc., 463 U.S. 418, 430 (1983).

[93] See United States v. Sears Roebuck & Co., Inc., 719 F.2d 1386, 1393-1394 (9th Cir. 1983); United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987); United States v. Singer, 660 F.2d 1295, 1302-1303 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

1. Responses to Grand Jurors' Questions

Time should be set aside, either at the beginning or the end of each day, to permit the grand jurors to ask questions of the prosecutor and to make observations. This may also be done at the conclusion of each witness's testimony. The attorney should be fully prepared to answer questions from the grand jurors concerning legal and factual matters.

Responding to grand jurors' questions is clearly a permissible practice by the prosecutor.[94] The prosecutor may explain the law and necessary burden of proof and weight of evidence issues.[95] The prosecutor may respond to questions by stating facts that are already part of the record.[96] If facts responsive to the juror's question are not yet a matter of record but are likely to be introduced at a later time, the juror should be so informed and the question deferred. The attorney must avoid a response that is, in effect, new testimony. If the question calls for an opinion, the attorney should politely decline to respond to the question, explaining that the attorney's personal opinion is not relevant to their consideration of the evidence.[97]

Occasionally, grand jurors will ask questions calling for irrelevant and possibly prejudicial information. While jurors normally should be allowed the widest latitude in receiving evidence, the prosecutor must also recognize his or her responsibility to prevent the introduction of irrelevant and prejudicial information. In responding to such questions, attorneys should either respond

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[94] United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1394 (9th Cir. 1983); United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983); United States v. Ciambrone, 601 F.2d 616, 623-624 (2d Cir. 1979). See also Section I.B.1 supra.

[95] United States v. Linton, 502 F. Supp. 861, 867-869 (D. Nev. 1980).

[96] United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983).

[97] If a response is given, the attorney should make it clear that the answer is only his personal opinion based on evidence in the record and in no way binding on the grand jury. United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1393 (9th Cir. 1983) (warnings obviated prosecutor's personal expression of belief in target's guilt); United States v. Ciambrone, 601 F.2d 616, 623-624 (2d Cir. 1979) (though warning should have been given, harmless error found).

to the inquiry and explain the limited value of the response or should tactfully decline to respond, explaining that the material is not relevant and its introduction could result in a claim of grand jury abuse.

2. Assertions of Constitutional Rights and other Ongoing Legal Issues

As the investigation proceeds, legal issues often arise that require a prosecutor to give instructions to the grand jury. Most often this arises when hearsay or other evidence, which may not be admissible at trial, is presented.

Other legal issues arise where a witness asserts his or her Fifth Amendment privilege before the grand jury, or is granted immunity. If the target of an investigation is given the opportunity to testify before the grand jury but does not do so because of his or her Fifth Amendment privilege against self-incrimination, and grand juror asks why the target has not appeared to the testify, the grand juror should be advised that the witness has chosen not to appear and that the grand jury should make no inferences with regard to guilt from this act.[98]

Courts acknowledge a prosecutor's ongoing role in giving legal advice. The attorney should always be careful to give legally correct advice and not mislead the grand jury.[99] Usually, the best practice is to become familiar with

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[98] See United States v. Law Firm of Zimmerman & Schwartz, 738 F.Supp. 407, 412 (D.Colo. 1990) (prosecutor's subsequent advice concerning no adverse inferences to be drawn from witness' exercise of Fifth Amendment privilege ameliorated poor judgment exercised in conversation with witness and counsel within the grand jury's hearing). For further discussion of the consequences of the definitions of targets and subjects, see Section V, D infra and USAM 9-11.151 through 9-11.154. For discussions of the legal procedures and issues created by a witness' assertion of his or her Fifth Amendment rights see Chapter Six of this Manual.

[99] United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir. 1986) (prosecutor could advise the grand juror's that tax protester/witness' legal theories were incorrect); United States v. Bettencourt, 614 F.2d 214, 216 (9th Cir. 1980) (allegations of "slanted" legal advice, while not condoned, insufficient to warrant judicial scrutiny of facially valid indictment).

the pattern jury instructions in the district, and refer to that formulation rather than *ad hoc* responses.

3. Presentation of Indictment and Closing Statements

The prosecutor may also properly instruct the grand jury concerning the offenses enumerated in the indictment.[100] In routine cases, the prosecutor may read the relevant statute or statutes to the grand jury and foregoe summarizing and commenting on the evidence. It usually suffices, especially in one-agent presentations, for the prosecutor to read the proposed indictment and then ask the grand jurors whether they have any questions. If they do, the prosecutor can remind them of evidence they have heard while advising them that the prosecutor's remarks are not evidence. Photocopies of the relevant statutes may also be given to the grand jurors.

In some districts and in more complicated cases, the prosecutor reads verbatim the form jury instructions used in the district or circuit, substituting of a "probable cause" standard for the petit jury's standard of proof beyond a reasonable doubt. General legal instructions, such as the definition of probable cause, are usually provided to the grand jury by the district judge at empanelment. Prosecutors should never provide general instructions, such as the definition of probable cause, that differ from either the district court's charge at empanelment or from the Handbook for Federal Grand Jurors. A good rule to follow is never to provide legal instructions *ad hoc*. Become familiar with the contents of the empanelment charge, the Handbook, and pattern jury instructions in the district, and refer to and quote from them as needed.

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[100] The attorney before the grand jury may explain the relation of the testimony to the law of the case. United States v. Rintalen, 235 F. 787, 791-793 (S.D. N.Y. 1916)(A. Hand, J.). See also United States v. DeRosa, 783 F.2d 1401, 1405 (9th Cir.), cert. denied 477 U.S. 908 (1986); United States v. Ogden, 703 F.2d 629, 636-637 (1st Cir. 1983); United States v. Heffington, 682 F.2d 1075, 1080 (5th Cir. 1982), cert. denied 459 U.S. 1108 (1983); United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957).

The prosecutor is not required to give legal instructions.[101] An indictment generally remains valid if improper instructions are given. Courts have held, especially since Bank of Nova Scotia, 487 U.S. 250 (1988), that if an indictment is valid on its face, there is no need to examine grand jury minutes to determine if the prosecutor improperly instructed the grand jury.[102] Nonetheless, prosecutors should be careful to give accurate instructions.

In more complex cases, where considerable documentary and testimonial evidence has been presented, a summary is often necessary. In most cases, the best practice is to summarize through the testimony of a summary witness. One method for correlating evidence to a particular charge is for the prosecutor to distribute copies of the proposed indictment prior to the testimony of the summary witness, for each juror to follow along and to use during deliberations. The prosecutor may request the summary witness to pause at various points to identify evidence supporting particular allegations. This method is generally not suggested, however, for one-agent presentations, for it may create an appearance of exercising undue influence over the grand jury's decisionmaking process.[103]

Where a prosecutor decides to make a closing statement, its principal purpose should be to correlate the evidence that the jurors have heard with the particular charges in the proposed indictment and not to persuade the grand jurors of the correctness of the government's view. Attorneys should be careful

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[101] United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988); United States v. Kenny, 645 F.2d 1323, 1347 (9th Cir.) cert. denied 452 U.S. 920 (1981).

[102] See United States v. Overmyer, 899 F.2d 457, 465 (6th Cir. 1990); United States v. Linetsky, 533 F.2d 192, 200-201 (5th Cir. 1976); United States v. Busic, 472 F. Supp. 880 (E.D.N.Y.), rev'd on other grounds, 549 F.2d 252 (2d Cir. 1977). At least one court, prior to the Supreme Court's Bank of Nova Scotia v. United States decision concerning prosecutorial misconduct (discussed in Section III, C of this Chapter and Chapter Ten) has held that if a prosecutor intentionally or in bad faith misleads the grand jury with erroneous legal instructions or advice, the district court may dismiss the indictment in the exercise of its supervisory powers. See United States v. Wright, 667 F.2d. 793, 796 (9th Cir. 1982). A copy of the jury instructions used in the district should be brought to sessions in which indictments are presented, to ensure against inadvertently misleading the grand jury.

[103] See United States v. Powell, 823 F.2d 996, 998-1000 (6th Cir. 1987).

to avoid stating any opinions as to guilt.[104] The jurors also should be reminded that their duty is to determine only whether the evidence is sufficient to convince them that "probable cause" exists of the guilt of any proposed defendant. It is not their job to determine guilt beyond a reasonable doubt. Advice that the prosecutor's remarks are not evidence and that the grand jurors are to rely on their own recollections is also appropriate.

After reading the proposed indictment, the prosecutor should leave at least one copy with the grand jurors for reference in their deliberations. The prosecutor should also advise the grand jurors that both the prosecutor and the case agent will be available outside the grand jury room during deliberations in case any problems should arise or if the jurors decide that they need more evidence. All grand jury transcripts and documentary evidence should be left by the prosecutor in the grand jury room if possible. If all such evidence cannot be left, the grand jurors should be advised on the record that all transcripts and exhibits are available for review during their deliberations upon their request. This procedure should prevent a "no true bill" based upon a misunderstanding of the law or failure to present readily available evidence.

There are differing views as to whether the grand jury should be presented with a signed or unsigned indictment. In some jurisdictions, the original of the indictment containing the prosecutors' signatures are not displayed to the jurors until after a vote has been taken, on the theory that it will prevent any later contention that the jurors were influenced by the prosecutors' signatures. After the foreman advises that a vote has been taken and the indictment approved, he or she is then given the original indictment to sign.[105] Other attorneys leave the original signed indictment with the jurors during their deliberations. This practice has been criticized as potentially

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[104] See Chapter Ten of this Manual, concerning prosecutorial misconduct. If an opinion is unavoidable, it should be clearly expressed as only the attorney's opinion based upon the evidence before the grand jury. See United States v. McKenzie, 678 F.2d 629, 632-33 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Cederquist, 641 F.2d 1347, 1353 (9th Cir. 1981).

[105] An indictment not signed by the foreperson remains valid despite the technical irregularity. Hobby v. United States, 468 U.S. 339 (1984).

similar to vouching for the indictment. Nonetheless, no court has dismissed an indictment because of pre-signature by the prosecutor without a showing that the prosecutor actually exerted undue influence on the grand jury.[106]

B. Discussions of Plans for a Session and Investigative Strategy

In addition to the opening statement at the beginning of an investigation, it is also good practice, at the start of a session or a series of sessions, to identify the witnesses called and to be called at that session and to review the evidence to ensure that all jurors are fully informed. This is particularly true if a long time has elapsed between sessions, a number of jurors were absent at the most recent sessions, or important evidence was adduced at the last session. Following this recap, many prosecutors advise the grand jury of the day's witnesses, their expected testimony and give a brief background sketch of each witness. While it is improper for an attorney to discuss facts not in the grand jury record, providing the grand jury with a brief background description of a witness should not be objectionable, and courts have upheld previews of witness testimony.[107] The prosecutor who chooses to recap or preview evidence, however, must advise the grand jury that such statements are not in evidence.

In lengthy and complex grand jury investigations, prosecutors often discuss with the grand jury the government's strategy in subpoenaing documents and the order and nature of witnesses to be called. Occasionally, the grand

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[106] See generally Chapter Ten of this Manual, concerning prosecutorial misconduct. See also United States v. Cole, 755 F.2d 748, 757 (11th Cir. 1985); United States v. Brown, 684 F.2d 841, 842 (11th Cir. 1982); United States v. Civella, 666 F.2d 1122, 1127-1128 (8th Cir. 1981); United States v. McKenzie, 678 F.2d at 632-33; United States v. Frantze, 655 F.2d 128, 130-31 (8th Cir. 1981); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Climatemp Inc., 482 F. Supp. 376, 386 (N.D. Ill. 1979), aff'd sub nom. United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983); United States v. Gold, 470 F. Supp. 1336, 1354 (N.D. Ill 1978); United States v. Gakoumis, 624 F.Supp. 655, 657 (E.D. Pa. 1985). See also United States v. Easton, 937 F.2d 160, 162 (5th Cir. 1991). cert. denied 112 S.Ct. 906 (1992) (prosecutor's failure to sign indictment is nonjurisdictional defect).

[107] See United States v. Giorgi, 840 F.2d 1022, 1032 (1st Cir. 1988); United States v. Azad, 809 F.2d 291, 294 (6th Cir. 1986); United States v. Civella, 666 F.2d 1122, 1127 (8th Cir. 1981).

jury is required to make certain decisions concerning the conduct of the investigation, including, for example, whether they want to hear live testimony or to have a transcript of prior testimony read to them. The attorney conducting the investigation should discuss the alternative investigative procedures dispassionately. The final decision as to how to proceed must be made by the jurors. Where a witness's credibility is crucial, the prosecutor can test it before the grand jury. It is also good practice, at some time during each session, to elicit questions from the grand jurors about the evidence to date. The prosecutor may also seek the grand jurors' recommendations about what additional witnesses to call.

Attorneys should not initiate discussions of internal office procedures and should try, as tactfully as possible to avoid answering questions about such procedures. If questions concerning internal procedures should arise, the jurors should be cautioned that neither the internal procedures nor any resulting delay in the grand jury proceedings should influence their vote on any potential indictment. The jurors should also be warned not to engage in deliberations among themselves while the prosecutor and court reporter are present.

C. Other Statements by the Prosecutor

1. Improper Testimony

A prosecutor may not be both an attorney before the grand jury and a witness. If a prosecutor appearing before the grand jury must testify before the grand jury, the prosecutor should immediately cease performing his or her prosecutorial function. Legal and ethical concerns raised by attorney testimony are discussed at length in United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979), cert. denied, 444 U.S. 1032 (1980). In that case, an SEC attorney who was designated as a special attorney for purposes of appearing before the grand jury, made sworn statements before the grand jury that summarized parts of the investigation and outlined the proposed indictment. The court wrote that this practice probably violated professional ethical standards (the actual decision being left to the bar disciplinary process) but refused to dismiss the indictment

in the absence of any evidence of actual prejudice to the defendants.[108] Other courts, exercising of supervisory power prior to the Supreme Court ruling concerning sanctions for prosecutorial misconduct in Bank of Nova Scotia v. United States, 487 U.S 250 (1988), dismissed indictments because prosecutors testified as witnesses.[109] Courts, bar disciplinary panels, and the Department of Justice can impose other sanctions upon prosecutors for such conduct.

In any discussions with the grand jury, therefore, a prosecutor should be careful not to testify or disclose facts not in evidence. By disclosing facts not in evidence, the prosecutor, in effect, becomes an unsworn witness. As with other forms of inappropriate prosecutorial conduct, disclosure of facts not in evidence to the grand jury should not result in the dismissal of an indictment unless the facts so biased the grand jury that they were deprived of autonomous and unbiased judgment.[110] Of course, other sanctions are available, including a court's pronouncement, in dicta of conduct by the prosecutor as unprofessional, or referral of a prosecutor's conduct to disciplinary authorities. °Attorneys should periodically caution the grand jury that what they say is not evidence and should not be considered in any subsequent voting on a proposed indictment. Courts generally will not criticize a prosecutor for disclosing facts not in evidence where the facts relate to insubstantial or uncontested matters or where they concern a matter of formality rather than a matter substantially

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[108] See Disciplinary Rule 5-101(b) and Ethical Consideration 5-9 in ABA Code of Professional Responsibility (1975).

[109] Bank of Nova Scotia is discussed in more detail below in Section III, C of this Chapter and in Chapter Ten. See also United States v. Hogan, 712 F.2d 757, 760 (2d Cir. 1983) (indictment dismissed in part because prosecutor made seal an unsworn witness); United States v. Pignatiello, 582 F.Supp. 251, 253-255 (D.Colo. 1984) (indictment dismissed because unsworn special AUSA appeared before the grand jury); United States v. Gold, 470 F.Supp. 1336, 1344 (N.D.Ill. 1979) (indictment dismissed in part because attorney testified then remained in grand jury); United States v. Treadway, 445 F. Supp. 959, 960-963 (N.D. Tex. 1978) (indictment dismissed because attorney became unauthorized person before grand jury after testifying personally).

[110] See United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987); United States v. Pabian, 704 F.2d 1533, 1540 (11th Cir. 1983); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Cathey, 591 F.2d 268, 274 (5th Cir. 1979); Edgington v. United States, 759 F. Supp. 1239, 1241-1242 (E.D. Tx. 1990), aff'd without opinion 897 F.2d 527 (5th Cir.), cert. denied 495 U.S. 952 (1990); United States v. Linton, 502 F.Supp. 861, 870 (D. Nev. 1980).

material to the indictment.[111] The more substantial the fact, however, the more likely a court will find fault and consider some form of sanction.

2. *Appropriate Prosecutorial Statements*

Prosecutors can properly describe for the record any significant hand or body gestures by a witness. Exhibits should always be described and identified on the record. Documents should be described by type, number of pages and other important features, with the witness acknowledging the description's accuracy. Subsequent references to exhibits by their numbers add clarity to the record. A prosecutor before the grand jury should also keep in mind other limitations of the stenographic process. A stenographer cannot record two or more persons speaking simultaneously, mumbling, the lowering of a voice, persons speaking at a faster than normal pace or using unusual words.

Between the extremes of impermissible testimony and permissible descriptions by a prosecutor before the grand jury, a prosecutor may present a variety of information to the grand jury without becoming a witness. The prosecutor may provide basic identifying information to the grand jurors so that they are clear as to the identity of the subject of an investigation, summarize prior testimony, explain elements of the law and applicable legal theories, and respond to grand jurors' questions. The key element is whether the prosecutor has placed his or her credibility on the line. If he or she has done so, then the prosecutor may have improperly become a witness.[112]

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[111] See United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987), United States v. Civella, 666 F.2d 1122, 1127 (8th Cir. 1981).

[112] See United States v. Blitz, 533 F.2d 1329, 1344 (2nd Cir. 1976).

3. Personal Opinions

A prosecutor may explain the law and express an opinion on the legal significance of the evidence, but otherwise should avoid making any statements or arguments that would improperly influence the grand jurors. A prosecutor's personal opinion may be considered a form of unsworn, unchecked testimony.[113] If a prosecutor expresses a personal opinion, he or she should instruct the grand jury that they are in no way bound by this opinion and must exercise their own independent judgment. In addition, any opinion expressed by a prosecutor should be based on evidence already in the record. As stated in United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982):

> "It is not improper . . . for an attorney merely to state an opinion as to guilt or as to any fact at issue, as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and the jury itself can evaluate."

One practice which courts particularly dislike is where a prosecutor vouches for or comments on the credibility of a witness.[114] Vouching for a witness is unprofessional and unnecessary. However, an attorney may properly inform the grand jurors of discrepancies in the witness's prior and current or expected testimony, if the grand jurors are also advised of their independent duty to assess the witness's credibility. On occasion, prosecutors disclose factors which may be introduced at trial for impeachment, such as a witness's prior criminal record, in order to use the grand jury as a sounding board to evaluate the witness's credibility. When doing so, the prosecutor must be careful to remind the grand jurors that it is their evaluation of the witness's credibility that matters, and not that of the prosecutor. The best practice is to introduce such evidence through a witness, rather than through comments of the prosecutor. A prosecutor is also not required to disclose a witness's source of

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[113] See United States v. Wells, 163 F. 313, 324-327 (D. Idaho 1908).

[114] See United States v. Al Mudarris, 695 F.2d 1182, 1187-88 (9th Cir.), cert. denied, 461 U.S. 932 (1983). On the other hand, some courts have held that commenting on the ultimate guilt or innocence of a proposed defendant is not considered to be improper. See United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1393 (9th Cir. 1983); United States v. McKenzie, 678 F.2d 629, 632-633 (5th Cir.), cert. denied, 459 U.S. 1038 (1982).

potential bias,[115] though such disclosure is normally the best practice in order that the grand jury can serve as a sounding board concerning the witness's credibility and strength of the potential impeachment evidence. Many courts have cautioned prosecutors publicly against expressing personal opinions, particularly where the opinions were expressed in an inflammatory manner.[116]

III. Permissible Evidence

An attorney presenting evidence to the grand jury should know the parameters of permissible and impermissible evidence. Such familiarity not only permits the attorney to give correct legal advice to the grand jury if necessary, but it also permits the prosecutor to put together a case for indictment which will withstand the rigors of trial. Accordingly, this section discusses the parameters of admissible evidence before the grand jury, presentation of evidence from prior grand juries, special concerns in presenting summaries and other hearsay testimony, the use of illegally obtained and other evidence inadmissible at trial before the grand jury, and the restrictions concerning electronic surveillance evidence and evidence derived therefrom.

A. Admissible Evidence

Grand juries may initiate and conduct investigations based on tips, rumors, hearsay, speculation, evidence offered by the prosecutor, and the grand

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[115] United States v. Spillone, 879 F.2d 514, 523 (9th Cir. 1989); United States v. Benjamin, 852 F.2d 413, 416 (9th Cir. 1988), vacated on other grounds, 109 S.Ct. 1494 (1989) (dismissal of indictment not required where prosecutor failed to inform grand jury of witness's involvement in civil litigation with targets); United States v. Bari, 750 F.2d 1169, 1176 (2nd Cir. 1984) (prosecutor's failure to inform grand jury of belief that witness lied on other occasions does not warrant dismissing indictment).

[116] See Chapter Ten of this Manual.

jurors' own personal knowledge.[117] The nature of the grand jury's function, unlike that of an adversary proceeding, "contemplates that it will hear from many sources uninhibited by the strict rules of evidence applicable in a trial and untested by the traditional adversary tools such as cross examination."[118] Through the grand jury, the prosecutor can learn of possible defenses, examine and assess the credibility of potential defense witnesses, compel hostile witnesses and develop rebuttal evidence. Grand jury testimony may also be used to lock-in witness testimony, especially of ill witnesses, reluctant or uncooperative witnesses, cooperating defendants who may eventually become uncooperative, and employees of target employers.

The clear import of recent Supreme Court cases dealing with attacks on evidence presented before the grand jury and with issues involving prosecutorial conduct in the grand jury is that the grand jury does not adjudicate guilt or innocence but is purely an investigative body.[119] To allow defense attacks on the evidence presented would require relaxation of grand jury secrecy rules and complicate pretrial procedures. Therefore, recent cases have held that grand juries and courts should not be burdened with the delay and disruption that would result from permitting defendants to review and question the evidence considered by the grand jury.[120] The Court also expressed concern that adversarial attacks upon the grand jury proceeding could impede the work of future grand juries by making witnesses more reluctant to testify, thereby limiting investigatory access to relevant evidence.

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[117] See United States v. R. Enterprises, Inc., 111 S. Ct. 722, 726 (1991); United States v. Dionisio, 410 U.S. 1, 15 (1972); United States v. Morton Salt Co., 338 U. S. 632, 642-43 (1950); United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 214 (3rd Cir. 1981); In re Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977).

[118] Coppedge v. United States, 311 F.2d 128, 132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963); see also United States v. McKenzie, 678 F.2d at 632.

[119] See United States v. Williams, ___ U.S. __, 112 S. Ct. 1735 (1992); United States v. R. Enterprises, Inc., 111 S. Ct. 722, 726 (1991); United States v. Calandra, 414 U.S. 338, 349 (1974). See also United States v. Wilson, 732 F.2d 404, 409 (5th Cir. 1984); United States v. Reed, 726 F.2d 570, 579 (9th Cir.), cert. denied, 469 U.S. 871 (1984); United States v. Lame, 716 F.2d 515, 518 (8th Cir. 1983); United States v. Ciambrone, 601 F.2d 616, 622.

[120] See United States v. Calandra, 414 U.S. 338, 349-352 (1974); Costello v. United States, 350 U.S. 359 (1956).

The most frequently cited rule governing the range of evidence that may be considered by the grand jury is contained in United States v. Calandra, 414 U.S. 338, 343 (1974). There the Supreme Court stated:

> The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

In further elaborating on the scope of permissible evidence, the Court stated:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . or even on the basis of information obtained in violation of a defendant's 5th Amendment privilege against self-incrimination. . . .[121]

Courts have permitted indictments to stand that were based largely, if not entirely, upon hearsay,[122] illegally obtained or incompetent evidence,[123] or other evidence that would not otherwise be admissible at trial.[124] Courts have

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[121] 414 U.S. at 344-45. See also Costello v. United States, 350 U.S. 359, 362 (1956); United States v. Malsom, 779 F.2d 1228, 1241 (7th Cir. 1985); United States v. DiBernardo, 775 F.2d 1470, 1477 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986); United States v. Wilson, 732 F.2d 404, 409; United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983); In re Grand Jury Investigation, 696 F.2d 449, 450 (6th Cir. 1982); United States v. Beery, 678 F.2d 856, 859 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985); United States v. Tham, 665 F.2d 855, 863 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); United States v. Friedland, 444 F.2d 710, 713 (1st Cir. 1971).

[122] See Section III, C of this Chapter.

[123] See Section III, D of this Chapter.

[124] See United States v. Levine, 700 F.2d at 1179 (evidence of prior convictions and target's refusal to talk to police officers); United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) (evidence of prior convictions).

also permitted indictments to stand that might possibly have been based on inadvertently false testimony.[125] However, the federal prosecutor should carefully consider proof problems at trial before presenting evidence inadmissible at trial to the grand jury, especially if the inadmissible evidence supports an essential element of the case. Grand juries often provide a preview of the strength of a case at trial. That function is diminished if a grand jury relies on inadmissible evidence.

B. Presenting Evidence From a Prior Grand Jury

Attorneys may present evidence from a prior grand jury to a subsequent grand jury in the same district or a different district.[126] The procedures, limitations and requirements for presenting evidence from a prior grand jury vary from jurisdiction to jurisdiction. The discussion that follows is intended to highlight the major variables affecting the presentation of evidence from prior grand juries.

The preferred practice is to present the new grand jury with all transcripts of testimony and documentary evidence from the prior grand jury.[127] Most jurisdictions prefer a complete record to be presented to the subsequent grand jury. However, courts faced with the issue have chosen not to dismiss indictments for failing to present a complete record.[128] Such

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[125] See United States v. DiBernardo, 775 F.2d at 1476-1478.

[126] See Rule 6(e)(3)(c)(iii) and Chapter Four, Section VII of this Manual. See also United States v. Contenti, 735 F.2d 628, 629-631 (1st Cir. 1984); United States v. Kabbaby, 672 F.2d 857, 863 (11th Cir. 1982); In re Grand Jury Proceedings (Sutton), 658 F.2d 782, 783 (10th Cir. 1981).

[127] See United States v. Scop, 940 F.2d 1004, 1012 (7th Cir. 1991); United States v. Carr, 764 F.2d 496, 498 (8th Cir. 1985), cert. denied 475 U.S. 1010 (1986); United States v. Bari, 750 F.2d 1169, 1176 (2nd Cir. 1984); United States v. Long, 706 F.2d 1044, 1050 (9th Cir. 1983).

[128] See United States v. Al Mudarris, 695 F.2d 1182, 1185-86 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Jacobsen, 691 F.2d 110, 114-116 (2nd Cir. 1982); United States v. Fogg, 652 F.2d 551, 558 (5th Cir. 1981); United States v. Phillips, 664 F.2d 971, 1044 (5th Cir. Unit B 1981), cert. denied, 457 U.S. 1136 (1982).

jurisdictions usually permit this practice only if the sitting grand jury will not be significantly misled.

Often selected grand jury transcripts or portions thereof are read to a new grand jury. As stated in United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977): "Reading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute ... fundamental unfairness or a threat to the integrity of the judicial process." Nonetheless, attorneys should be aware of any local restrictions that apply to the reading of prior grand jury transcripts. For example, in those jurisdictions that follow United States v. Estepa, as discussed in Section III.C, the attorney should explain the hearsay nature of the prior transcript and should advise that live witnesses will be called if desired.[129] Some jurisdictions prefer that the transcripts be read to the grand jury by someone other than one of the presenting attorneys,[130] although some permit the prosecutor alone to read the transcripts.[131] Any reading of transcripts by a government agent should be supervised by a presenting attorney.[132] Another practice is to have the foreman or one of the other grand jurors read the transcript. The transcripts should be left with the grand jury during deliberations, as well as after being read, if possible.[133]

Another frequently used method of presenting evidence from prior grand juries is through summaries. Summarizing prior grand jury testimony or

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[129] See United States v. Flomenhoft, 714 F.2d 708, 712-713 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); United States v. Schlesinger, 598 F.2d 722, 726 (2d Cir.), cert. denied, 440 U.S. 880 (1979). See also Section III, C of this Chapter below.

[130] See United States v. Wander, 601 F.2d 1251, 1260 (3rd Cir. 1979); United States v. Chanen, 549 F.2d 1306, 1311-1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

[131] See United States v. Blitz, 533 F.2d 1329, 1344-1345 (2d Cir.), cert. denied, 429 U.S. 819 (1976) (reading prior testimony is ministerial act).

[132] Allowing two agents before the grand jury at the same time to read the transcripts does violate Rule 6(d), although such was found not prejudicial to the defendant and therefore not grounds for dismissing an indictment. Bank of Nova Scotia v. United States, 487 U.S. 250, 262-263 (1988).

[133] United States v. Long, 706 F.2d 1044, 1051 (9th Cir. 1983). One circuit has also suggested that grand jurors be required to read transcripts of the sessions they missed. United States v. Provenzano, 688 F.2d 194, 196 (3rd Cir. 1982).

documentary evidence is perfectly acceptable,[134] and may be preferred by the grand jurors as well as the prosecutor since it saves time and resources. Summaries should not be misleading, incomplete or unduly prejudicial.[135] If the prosecutor decides to present summaries instead of reading all the transcripts, the grand jury must be advised on the record that complete transcripts of those witnesses whose testimony is summarized, including all documentary exhibits, are available for the grand jury's inspection.[136] The grand jurors should be advised of the hearsay nature of the transcripts and be given the opportunity to recall any witnesses.

In general, federal prosecutors are given fairly wide latitude in presenting evidence from one grand jury to another, so long as the attorney's conduct is not so outrageous or prejudicial that his will is substituted for the will of the grand jury. While dismissal of an indictment or other sanctions are rare, attorneys should be fully aware of the requirements in their jurisdiction.[137]

C. Use of Summaries and Other Hearsay Evidence

The Supreme Court has permitted the admission of hearsay evidence in grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974), Costello v. United States, 350 U.S. 359 (1956). Thus, the prosecutor generally

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[134] Bank of Nova Scotia v. United States, 487 U.S. 250, 261 (1988). See also United States v. Kington, 801 F.2d 733, 737 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987); United States v. Schlesinger, 598 F.2d at 726; United States v. Brown, 574 F.2d 1274, 1276 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Litton Systems, Inc., 573 F.2d 195, 201 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Al Mudarris, 695 F.2d 1182, 1185-86;

[135] See United States v. Long, 706 F.2d 1044, 1050 (9th Cir. 1983); United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1247-49 (5th Cir.), cert. denied, 414 U.S. 832 (1973); United States v. Donohue, 574 F. Supp. 1263, 1268 (D. Md. 1983).

[136] See United States v. Al Mudarris, 695 F.2d 1182, 1186; United States v. Schlesinger, 598 F.2d 722, 725.

[137] See Chapter Ten of this Manual, concerning prosecutorial misconduct. United States v. Samango, 607 F.2d 877, 881-884 (9th Cir. 1979).

need not isolate hearsay from non-hearsay during the course of the witness's testimony. The prosecutor, however, should always present any hearsay evidence "on its merits so that the jurors are not misled into believing that the witness is giving his or her own personal account."[138] As stated in United States v. Al Mudarris, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983), a case upholding the use of a summary witness:

> The summary witness procedure is an economical and expedient means of presenting evidence to a grand jury. But the evidence is necessarily derivative and abbreviated. The prosecutor must not abuse the device by pressuring grand jurors into a precipitous decision or otherwise discouraging them from evaluating the predicate evidence.

The prosecutor should further recognize that the grand jurors may wish certain witnesses to be called rather than rely upon hearsay and summaries of their testimony. Summaries are therefore an important tool to be used with caution.

Prosecutors often find reviewing and summarizing the evidence at the start of a series of grand jury sessions useful. The preferred practice is to call the case agent as a witness to present such a summary. In some districts, prosecutors are permitted to summarize the evidence, especially in closing statements.[139] A summary is most useful if a long period has elapsed between sessions or if significant evidence was adduced at a prior session at which a juror was absent. Using a witness, particularly an expert witness, to present summaries of documentary evidence or evidence from a prior grand jury may also be extremely useful in complex investigations.

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[138] USAM 9-11.232.

[139] See Costello v. United States, 350 U.S. 359 (1956); United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983); United States v. Heffington, 682 F.2d 1075, 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. United States District Court, 238 F.2d 713, 721 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

In deciding whether to present hearsay evidence before the grand jury, prosecutors should appropriately consider factors such as efficiency and the burden on both the government and the witness of presenting eyewitness rather than hearsay evidence, as well as the lost opportunity for the grand jury to assess a first-hand witness's credibility, if such will be needed or useful at trial. Investigative agents, economists or other experts often summarize evidence or transcripts. Unless the prosecutor knows the summary to be false, the indictment will not be dismissed.[140]

The prosecutor must be particularly aware of any special requirements imposed by courts in the district concerning summary or hearsay testimony. Some courts require that the individual presenting the summary be sworn.[141] As discussed more thoroughly below, some courts require notification to the grand jury that this is hearsay evidence and that the grand jurors can demand firsthand testimony. Summaries clearly should be neither misleading or incomplete.[142] Improper summary testimony rarely causes dismissal of an indictment without a showing of actual prejudice to the defendants.[143]

Hearsay evidence may be presented to the grand jury even when eyewitnesses could have testified. Moreover, the Supreme Court held in Costello v. United States, 350 U.S. 359 (1956), that a valid indictment may be

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[140] Bank of Nova Scotia v. United States, 487 U.S. 250, 261 (1988); Costello v. United States, 350 U.S. 359, 363 (1956). See also United States v. Long, 706 F.2d 1044, 1050 (9th Cir. 1983); United States v. Schlesinger, 598 F.2d 722, 726; United States v. Barone, 584 F.2d 118, 122-125 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Brown, 574 F.2d 1274, 1275-1276 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Litton Systems, Inc., 573 F.2d 195, 201 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1247-49 (5th Cir.), cert. denied, 414 U.S. 832 (1973).

[141] See United States v. Birdman, 602 F.2d 547, 549-552 (3rd Cir. 1979); United States v. Schlesinger, 598 F.2d 772, 726; United States v. West, 549 F.2d 545, 554-555 (8th Cir. 1977); United States v. Hodge, 496 F.2d 87 (5th Cir. 1974).

[142] United States v. Long, 706 F.2d 1044, 1050.

[143] See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). See also Chapter Ten of this Manual, concerning prosecutorial misconduct.

based solely on hearsay.[144] Nevertheless, some courts prefer that the use of hearsay be limited when possible.[145] The Second Circuit, in United States v. Estepa, 471 F.2d 1132 (2nd Cir. 1972) and its progeny, has suggested that the excessive use of hearsay may be viewed as a form of prosecutorial misconduct.[146] The Department disagrees with Estepa. The decision is particularly questionable in light of subsequent Supreme Court decisions, including United States v. Calandra, 414 U.S. 338 (1974), United States v. Mechanik, 476 U.S. 66 (1987) and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). Furthermore, Estepa has not been enthusiastically endorsed by other Circuits, except for the proposition that the prosecutor should not present misleading evidence to the grand jury.[147] Nonetheless, as a practical matter,

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[144] See also United States v. Alexander, 789 F.2d 1046, 1048 (4th Cir. 1986); United States v. Murphy, 768 F.2d 1518, 1533-34 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Ginsberg, 758 F.2d 823, 830-831 (2d Cir. 1985); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Markey, 693 F.2d 594, 596 (6th Cir. 1982); United States v. Steele, 685 F.2d 793, 806 (3rd Cir.), cert. denied, 459 U.S. 908 (1982); United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Rogers, 652 F.2d 972, 975 (10th Cir. 1981); United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974); United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1248 (5th Cir.), cert. denied, 414 U.S. 832 (1973).

[145] See United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); United States v. Jett, 491 F.2d at 1081-82; United States v. Cruz, 478 F.2d 408, 410 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

[146] In Estepa, the only witness before the grand jury was a police officer who testified in detail about the events surrounding an alleged drug transaction. Although the police officer's actual observations were limited, the grand jury was not advised of the hearsay nature of his testimony. In remanding the case with instructions to dismiss the indictment, the court conceded that "there is no affirmative duty to tell the grand jury in haec verba that it is listening to hearsay". 471 F.2d at 1136. However, the court expressed concern that the grand jurors may have been misled into thinking the officer was offering eye-witness testimony. The court concluded that the grand jury may be presented with hearsay "subject to only two provisos - that the prosecutor does not deceive grand jurors as to 'the shoddy merchandise they are getting so they can seek something better if they wish'. . . or that the case does not involve 'a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted'." Id. at 1137. See United States v. Diaz, 922 F.2d 998, 1006 (2nd Cir. 1990); United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983); United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967).

[147] The Sixth Circuit has independently condemned a practice of presenting testimony solely in the form of a case agent testifying with respect to each count of a proposed indictment. United

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federal prosecutors can avoid application of the rule limiting hearsay in districts following Estepa by informing the grand jury of the hearsay nature of the testimony it is hearing and by offering to present eyewitness testimony if necessary.[148]

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[147](...continued)
States v. Powell, 823 F.2d 996, 998-1000 (6th Cir. 1987). No other Circuit has relied solely on Estepa to dismiss an indictment. The First, Third, Seventh and Tenth Circuits have declined to decide whether they would follow Estepa by distinguishing cases on factual grounds, primarily by focusing on the first part of the Estepa rule and finding that the grand jury was not intentionally misled. United States v. Murphy, 768 F.2d 1518, 1533-34 (7th Cir. 1985); United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983), cert denied, 459 U.S. 1068 (1984); United States v. Rodriguez-Ramos, 704 F.2d 17, 21-22 (1st Cir.), cert. denied, 463 U.S. 1209 (1983); United States v. Rogers, 652 F.2d 972, 975 (10th Cir. 1981); United States v. Wander, 601 F.2d 1251, 1260 (3rd Cir. 1979). The Eighth Circuit has indicated that it might apply the Estepa rule in an appropriate case. United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977). The Fifth Circuit has stated that it will dismiss an indictment based on hearsay only if, "the integrity of the grand jury proceeding has been impaired." United States v. Cruz, 478 F.2d 408, 411 (5th Cir.), cert. denied, 414 U.S. 910 (1973). The Ninth Circuit has rejected Estepa, absent a showing that the government flagrantly manipulated, overreached or deceived the grand jury. United States v. Buffington, 815 F.2d 1292, 1304 (9th Cir. 1987); United States v. Al Mudarris, 695 F.2d 1182, 1185. The Sixth Circuit permits a challenge to an indictment because of the use of hearsay "only on a showing of demonstrated and longstanding prosecutorial misconduct," United States v. Markey, 693 F.2d 594, 596. The Eleventh Circuit upheld a one-agent summary presentation in United States v. Byrd, 765 F.2d 1524, 1533 (11th Cir.1985).

[148] See United States v. Diaz, 922 F.2d 998, 1006 (2nd Cir. 1990); United States v. Bari, 750 F.2d 1169, 1176-1177 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985). Particularly in the Second Circuit, districts have adopted practices of advising the grand jury of the nature of hearsay evidence when it is presented, such as the following advice:

> Ladies and gentlemen, the testimony (or parts of the testimony) you have just heard contains what is known as "hearsay"-- meaning that Agent ___ just testified to events that he neither saw nor heard firsthand, but rather learned about from other persons. For example, Agent ___ was not present at the _____ he told you about, and thus has no firsthand knowledge of it. What he has told you is information told to him by other agents and eyewitnesses, such as Agent ___ and _____. You have the right to request that the persons with firsthand knowledge come before you and testify, and if you do so, we will attempt to make them available. You should also realize, however, that hearsay is evidence that you are permitted to consider in your deliberations.

Because such a colloquy between the prosecutor and grand jury is not routinely transcribed if conducted outside the presence of a witness, prosecutors in such districts usually provide such (continued...)

Although the Department believes the Estepa rule to be an incorrect interpretation of the law, it nonetheless has established the following policy regarding the use of hearsay evidence:

> There has been considerable criticism voiced that hearsay evidence is relied upon too much in grand jury proceedings. From the perspective, however, that a grand jury is a layman's inquiry, conducted ex parte to determine probable cause rather than guilt or innocence, and that in certain forms hearsay is highly creditable evidence, there is a justification for using hearsay in grand jury proceedings. Each U.S. Attorney should be accountable to himself/herself in this regard and to the grand jurors. Worthy of consideration are guidelines on the use of hearsay in grand jury proceedings set out in A.B.A. Standards For Criminal Justice, Standards Relating To the Prosecution Function 3.6(a)(Approved Draft, 1971). Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. [citations omitted] The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment.[149]

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[148](...continued)
advice while a summary witness is in the room, so it appears in the transcript. All prosecutors appearing in a grand jury in an unfamiliar district should investigate the district's practice concerning such advice.

[149] USAM 9-11.232.

D. Illegally Obtained or Incompetent Evidence

As a general rule, a grand jury may consider inadequate or incompetent evidence[150] or even illegally obtained evidence.[151] The leading case in this area is United States v. Calandra, 414 U.S. 338 (1974), in which the Supreme Court considered whether evidence obtained by an illegal search and seizure could be used as the basis for questioning a grand jury witness. The Court held that the exclusionary rule, which in a trial context would not permit the use of such evidence, is inapplicable to grand jury proceedings.[152] The Court explained that the exclusionary rule was designed to deter unlawful police conduct and that its extension to grand jury proceedings would not significantly further that goal. Balanced against the minimal increase in the exclusionary rule's deterrent effect was the Court's belief "that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties."[153]

In addition to permitting grand juries to hear evidence obtained in violation of a person's Fourth Amendment rights, courts have also permitted in certain limited circumstances the use of evidence obtained in violation of Fifth

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[150] See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Roth, 777 F.2d 1200, 1203 (7th Cir. 1985); United States v. DiBernardo, 775 F.2d 1470, 1475 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986); United States v. Adamo, 742 F.2d 927, 939 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Busk, 730 F.2d 129, 130 (3rd Cir. 1984); United States v. Levine, 700 F.2d 1176, 1180 (8th Cir. 1983); United States v. Gutierrez, 696 F.2d 753, 754-55 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Flaherty, 668 F.2d 566, 584 (1st Cir. 1981); United States v. Myers, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980); United States v. Johnson, 419 F.2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); Coppedge v. United States, 311 F.2d 125, 132 (D.C. Cir. 1962), cert. denied 373 U.S. 946 (1963).

[151] See Lawn v. United States, 355 U.S. 339 (1958); In re Grand Jury Investigation, 696 F.2d 449, 450 (6th Cir. 1982); United States v. Ocanas, 628 F.2d 353, 357 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981); United States v. Fultz, 602 F.2d 830, 833 (8th Cir. 1979).

[152] 414 U.S. at 350-351. See also United States v. Blue, 384 U.S. 251, 255 (1966); United States v. Busk, 730 F.2d 129, 130 (3rd Cir. 1984); United States v. Ocanas, 628 F.2d 353, 357; United States v. Fultz, 602 F.2d 830, 833.

[153] United States v. Calandra, 414 U.S. 338, 350.

Amendment rights,[154] information covered by the Speech or Debate Clause,[155] illegally obtained tax return information,[156] lie detector results,[157] information regarding a target's prior convictions[158] or his refusal to testify[159] and perjured testimony.[160] While a grand jury may be presented with illegally obtained or incompetent evidence, the grand jury may not violate a valid privilege itself.[161] Only the prosecutor's knowing use of perjured testimony to obtain an indictment that otherwise would not have been

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[154] United States v. Blue, 384 U.S. 251 (1966). See also United States v. Shuck, 895 F.2d 962, 963 (4th Cir. 1990) (prosecutor's questioning witness concerning involvement with drugs after witness asserted Fifth Amendment right was not condoned although not unduly prejudicial); United States v. Serrano, 870 F.2d 1, 15-16 (1st Cir. 1989) (agent witness' comment concerning defendant's immunized testimony was harmless). But see United States v. North, 920 F.2d 940, 948 (D.C. Cir. 1990) (distinction between grand jury consideration of evidence unconstitutionally compelled and immunized testimony); United States v. Garrett, 797 F.2d 656, 661-662 (8th Cir. 1986) (prosecutor must prove indictment untainted).

[155] See United States v. Myers, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Helstoski, 576 F.2d 511, 519-20 (3rd Cir. 1978), aff'd sub nom. Helstoski v. Meanor, 442 U.S. 500 (1979); United States v. Johnson, 419 F.2d 56, 58.

[156] See In re Grand Jury Investigation, 696 F.2d at 450.

[157] See United States v. Morano, 697 F.2d 923, 926-927 (11th Cir. 1983).

[158] United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983); United States v. Camporeale, 515 F.2d 184, 189 (2nd Cir. 1975).

[159] See United States v. Davis, 780 F.2d 838, 844 (10th Cir. 1985) (agent witness' improper comment on defendant's failure to appear, while condemned, insufficient to justify dismissal).

[160] See United States v. Spillone, 879 F.2d 514, 525 (9th Cir. 1989); United States v. Roth, 777 F.2d 1200, 1203-04 (7th Cir. 1985); United States v. DiBernardo, 775 F.2d 1470. 1475 (11th Cir.), cert. denied 476 U.S. 1105 (1985); United States v. Claiborne, 765 F.2d 784, 791-792 (9th Cir. 1985); United States v. Adamo, 742 F.2d 927, 939-42; United States v. Levine, 700 F.2d 1176, 1180 (8th Cir. 1983); Coppedge v. United States, 311 F.2d 128, 132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963).

[161] United States v. Calandra, 414 U.S. 338, 346. See United States v. Garrett, 797 F.2d 656, 661-662 (8th Cir. 1986); In re Grand Jury Investigation, 696 F.2d 449 (6th Cir. 1982).

issued is probable grounds for dismissal.[162] The holding in United States v. Williams, 112 S.Ct 1735 (1992), arguably leaves unresolved the extent of the lower courts' supervisory power to dismiss an indictment.

The current status of the law in this area is summarized in the USAM 9-11.231:

> The fact that illegally obtained, privileged, or otherwise incompetent evidence was presented to the grand jury is no cause for abating the prosecution under the indictment, or for inquiring into the sufficiency of the competent evidence before the grand jury, even if the defendant may be expected to have the illegally obtained evidence suppressed or incompetent evidence excluded at trial.

Nonetheless, the Department has established a more exacting standard for its attorneys as follows:

> A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.[163]

The standard does not require the prosecutor to act as a judge or determine complex legal issues prior to the submission of the case to the grand jury. A prosecutor may present evidence obtained as a result of a possible constitutional violation if the prosecutor believes in good faith that the law had changed, or that the evidence would be admissible under some other theory, or that a state adjudication concerning constitutionality would not be upheld in federal court. Of course, to the extent such evidence is used, the grand jury

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[162] Bank of Nova Scotia v. United States, 487 U.S. 250, 261 (1988); United States v. Roth, 777 F.2d at 1203-04; United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978).

[163] USAM 9-11.231.

cannot function as a sounding board for the trial jury's evaluation of the sufficiency of evidence.

E. Electronic Surveillance and Other Recorded Communications

The major exception to the general rule that the validity of an indictment is not affected by the character of the evidence considered is the rule governing evidence of intercepted communications. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2520, created a comprehensive statutory scheme regulating the interception, use and disclosure of oral, wire and electronic communications.[164]

In general, prosecutors may present evidence derived from lawfully intercepted communications to the grand jury in the same manner they would any other evidence or information. Under some circumstances, it may be necessary to obtain a disclosure order under 18 U.S.C. § 2517(5) before disclosing the contents of an intercepted communication to the grand jury. Attorneys must check with the United States Attorney's office that handled the Title III order or orders before deciding to make any such disclosure to the grand jury.

Intercepted communications and evidence derived therefrom that were not lawfully obtained may not be presented to a grand jury. Therefore, a witness may refuse to testify before the grand jury where interrogation will be based upon information obtained by means of illegal wiretapping or electronic surveillance. Gelbard v. United States, 408 U.S. 41 (1972). 18 U.S.C. § 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United

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[164] See USAM 9-7.000, et seq. for Department policies implementing Title III.

> States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Therefore, prosecutors must ensure that all intercepted communications to be presented to the grand jury are lawful and admissible.

Faced with a claim by a witness that his or her interrogation will be based on the illegal interception of his communications, the government must either confirm or deny the allegation. 18 U.S.C. § 3504 also permits a witness to contest illegal electronic surveillance. The circuits vary as to the required specificity of a denial, but most circuits apply a balancing test: the greater the specificity of the allegation, the more detailed the government's denial must be.[165] For example, a mere unsupported allegation of illegal surveillance requires only a simple affidavit from government counsel denying the allegation.[166] A more detailed allegation might require affidavits from government counsel and the investigatory agents of the steps that were taken to determine that there was no illegal surveillance. The most detailed and supported allegations can require a district-by-district search of records of all agencies which conduct such monitoring. Courts acknowledge that this comprehensive inquiry is very time-consuming and resource-intensive and usually not required.[167]

If in fact there was surveillance, the Department's view is that *in camera* inspection of the court order authorizing the surveillance should preclude

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[165] See In re Grand Jury Matter (Backiel), 906 F.2d 78, 91 (3rd Cir. 1990); In re Grand Jury 11-84, 799 F.2d 1321, 1324 (9th Cir. 1986); In re DeMonte, 667 F.2d 590, 599 (7th Cir. 1981); In re Grand Jury Proceedings (Hermann), 664 F.2d 425, 427 (5th Cir. 1981); United States v. Alvillar, 575 F.2d 1316, 1321 (10th Cir. 1978); United States v. Yanganita, 552 F.2d 940, 943 (2d Cir. 1977); In the Matter of the Grand Jury (Vigil), 524 F.2d 209, 216 (10th Cir. 1975) cert. denied 425 U.S. 992 (1976).

[166] In re Grand Jury Proceedings (Garcia-Rosell), 889 F.2d 220, 223 (9th Cir. 1989) (vague and unsupported allegations of surveillance do not even require affidavits, unsworn denial sufficient).

[167] In re Grand Jury Proceedings (Thier), 767 F.2d. 1133, 1134 (5th Cir. 1985) (defendant's allegations are "an invitation to play the game of 'hare and hounds' over and over again").

further inquiry into the legality of the surveillance.[168] At most, *in camera* inspection of affidavits or questioning of agents to determine compliance with the order may be held.[169] A hearing concerning electronic surveillance would breach the very secrecy being protected. Because the Circuits that have considered the question have applied different criteria for responding to a witness's claim, prosecutors should carefully examine the case law in the Circuit in which they are appearing before responding to a witness's illegal surveillance accusation.[170]

Electronic surveillance is often conducted with the consent of one of the parties to the conversation. Such consensual monitoring is legal and is not subject to Title III procedures. Accordingly, interception orders under 18 U.S.C. § 2518 are not necessary.[171] Rather, consensual monitorings are governed by 18 U.S.C. § 2511(2)(c) and (d). The Attorney General issued policy guidance regarding consensual monitoring in a November 7, 1983 Memorandum which is contained in the United States Attorneys' Manual 9-7.300. These requirements should be reviewed before presenting any evidence resulting from electronic surveillance to the grand jury.

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[168] USAM 9-7.410.

[169] See Grand Jury v. Gassiraro, 918 F.2d 1013, 1014-1015 (1st Cir. 1990) (authorizing documents must generally be turned over to appealing witness, but affidavits denying prior surveillance was used in any way in current investigation accepted); In re Grand Jury Matter (Backiel), 906 F.2d 78, 92 (affidavits of AUSA and case agents denying knowledge of surveillance and further check of FBI office sufficient); In re Grand Jury Subpoena Served on Doe, 889 F.2d 384, 387 (2d Cir. 1989) (grand jury witness not entitled to an in camera review of the validity of eavesdropping order; text of authorizations and supporting affidavits suffices); In re Grand Jury Proceedings (Meadows), 831 F.2d 228, 230-231 (11th Cir. 1987) (agent testimony that no electronic surveillance despite prior statement in interview--reliance on interagency notification system sufficient to prove no surveillance).

[170] In re Grand Jury Matter (Backiel), 906 F.2d at 88-91; In re Grand Jury Proceedings (Garcia-Rosell), 889 F.2d 220, 223; In re Grand Jury Subpoena Served On Doe, 889 F.2d at 387; In re Grand Jury Proceedings (Meadows), 831 F.2d at 230-231; In re Grand Jury Proceedings (Hill), 786 F.2d 3, 7 (1st Cir. 1986); In re Grand Jury Proceedings (Thier), 767 F.2d at 1134; In the Matter of the Grand Jury (Vigil), 524 F.2d 209, 216.

[171] United States v. Caceres, 440 U.S. 741 (1979) (consensual monitoring admissible despite failure to comply with DOJ regulations); United States v. White, 401 U.S. 745, 748 (1971); United States v. Haimowitz, 725 F.2d 1561, 1582 (11th Cir.), cert. denied, 469 U.S. 1072 (1984).

IV. Witnesses

This section discusses the mechanics and legal theories applicable to the presentation of evidence to the grand jury through the testimony of witnesses. It reviews the procedures with the cooperative case agent witness summarizing the investigation, explains procedures applicable to fact witnesses who may or may not be cooperative, and concludes with a discussion of Departmental policy and advice concerning examination of targets.

A. Summary Witness

As discussed in Section I.C, prosecutors may use a case agent to summarize the investigation and open or close the case before the grand jury. Such witnesses are often experienced, articulate, focused and credible. The prosecutor must prepare these witnesses however, to ensure all needed testimony is presented in accordance with procedures used for summary testimony in the district or circuit, as discussed above in Section III, C. Preparation involves familiarity with charts and summaries presented as well as being assured of their accuracy. The attorney is responsible for not presenting false, misleading, or incomplete testimony to the grand jury, particularly through this witness.

The prosecutor should discuss strategy for this testimony, as well as any legal problems beforehand. This permits a polished presentation and enhances the witness's credibility. This also avoids the appearance of prosecutorial misconduct where an over-enthusiastic witness, for example, comments upon the target's exercise of his or her constitutional rights.[172] Rules of professional ethics, enforced by the courts and various disciplinary bodies, hold

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[172] See also United States v. Davis, 780 F.2d 838, 844 (10th Cir. 1985) (agent witness's improper comment on defendant's failure to appear, while condemned, insufficient to justify dismissal).

the attorney responsible for the agent's conduct.[173] The grand jurors may fault a prosecutor's professionalism as well (if not attribute bias to the attorney) for an agent's intemperate remarks.

B. Appropriate Treatment of Fact Witnesses and Subjects

Every witness should be treated firmly but with courtesy and consideration, both within and outside the grand jury room. Each witness should be examined as if his or her testimony will become public. Particular care should be taken with recalcitrant or hostile witnesses and with targets, categories of which are discussed in more detail below.

1. Interviewing Grand Jury Witnesses

A witness interview should always be conducted before the grand jury appearance if at all possible. The interview usually saves grand jury time by focusing the witness's testimony. The prosecutor may also decide that a witness need not testify, based on the prior interview. The interview permits the witness to refresh his or her recollection by reviewing documents and discussing relevant matters without the added pressure of the grand jury's presence. It may also make the witness more comfortable with grand jury procedures. All witness interviews, however, *must* be voluntary.

Prosecutors have no authority to compel a witness to be interviewed prior to the grand jury appearance. A witness subpoena must be issued for a time and place in which a grand jury is actually going to be sitting, because "[n]either the FBI nor the Strike Force nor the United States Attorney has been granted subpoena power for office interrogation outside the presence of the grand jury."[174] However, courts recognize that witnesses are regularly

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[173] See Chapter Ten of this Manual, concerning prosecutorial misconduct.

[174] United States v. Digiglio, 538 F.2d 972, 985 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (continued...)

interviewed prior to appearances to ensure that grand jurors are not burdened with duplicate information.[175] Consistent with the case law, the Department forbids "request subpoenas" directing a witness to appear before the United States Attorney or the U.S. Attorney's assistants.[176] Good practice suggests that whenever a grand jury witness is interviewed, the prosecutor should prepare a memorandum outlining the steps that were taken to obtain the witness's presence, to establish that the interview was voluntary. Otherwise, the government may be faced with claims of grand jury abuse.[177]

The timing of witness interviews must balance several considerations. On one hand, if an interview is sought to determine whether a witness has evidence that is worth putting before the grand jury, an interview obviously should be conducted well before the grand jury appearance date. Time, money and effort are not saved if the grand jury is already assembled before the prosecutor decides not to require an appearance before the grand jury. Grand jurors are inconvenienced (and sometimes angered) if the session is cancelled after they appear and other attorneys and witnesses are inconvenienced if the session schedule changes abruptly. On the other hand, if an interview is conducted some time before a grand jury appearance, a witness will have the opportunity to think about the subject matter. This may be a problem if there is reason to believe that the witness may not be candid. If a witness is likely to lie, it may be best to forego any interview. An unprepared witness who is uncooperative may give obviously false testimony, which would severely undercut his or her usefulness as a defense witness at trial.

To minimize disputes about what was said during a witness interview, it is best to have an investigative agent or other member of the investigative team present with the prosecutor when a witness interview takes place. If the

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[174](...continued)
(1977). See also Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954) (the Constitution, statutes and common law do not recognize the United States Attorney's Office as a proper substitute for the grand jury room). See Chapter Six of this Manual, concerning the limits of the grand jury's subpoena power.

[175] United States v. Elliott, 849 F.2d 554, 557 (11th Cir. 1988) (witnesses' failure to subsequently testify does not indicate a misuse of the subpoena power).

[176] USAM 1-14.111.

[177] See e.g., Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954).

prosecutor meets alone with a witness and the witness later testifies in a manner inconsistent with his or her interview, the prosecutor would have to become a witness to provide proof of the prior inconsistent statement.

Begin the interview by explaining grand jury procedures to the witness. Explain to the witness how the grand jury room is set up, the function of the court reporter, and the oath. The prosecutor should tell the witness that the prosecutor is going to advise the witness of his or her constitutional rights on the record that the prosecutor is and explain the Department of Justice policy. Oftentimes witnesses fear being peppered with questions from all the grand jurors. If procedures for aggregating the grand jurors' questions of the witness have not been adopted, as suggested earlier, they may be discussed with the grand jury prior to the witness's testimony. Many witnesses prefer that only the attorney will ask the questions. If the grand jurors have questions, the witness can be excused and recalled to the grand jury room for follow-up questions after the prosecutor receives questions from the grand jurors.

The substance of the interview depends to a large extent on the prior preparation and cooperativeness of the witness. The prosecutor must keep in mind the secrecy limitations of Rule 6(e). Care should be taken not to disclose or attribute statements or documents to specific previous grand jury witnesses unless the witness is a person authorized to receive that disclosure or the material is not considered a "matter occurring before the grand jury" in that district.[178] If a witness has an attorney present, the subject matter of the interview may be limited so that the direction of the investigation or the identification of targets of the grand jury are not disclosed. Notes of the pre-grand jury interviews are considered grand jury material in some districts (e.g. N.D. Illinois and are subject to the secrecy requirements of Rule 6(e).

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[178] United States v. Anderson, 778 F.2d 602, 605 (10th Cir. 1985) (documents disclosed to government's expert witness); United States v. Lartey, 716 F.2d 955, 963 (2d Cir. 1983) (documents disclosed to retired IRS agent); United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982) (disclosure to expert witness pursuant to ex parte Rule 6(e) order); United States v. Thomas, 593 F.2d 615, 623 (5th Cir. 1979) (disclosure to IRS and Agriculture Department personnel). See Chapter Four of this Manual for a discussion of Rule 6(e).

Prosecutors differ on the advisability of confronting a potential witness with incriminating evidence to prevent the witness from committing perjury before the grand jury. Even inconsistent testimony before the grand jury can be used to impeach a witness at trial, should the witness subsequently choose to cooperate and testify. Confronting a witness with incriminating evidence in an interview has drawbacks, however. If a potentially recalcitrant or noncooperative witness has knowledge of such evidence before appearing in the grand jury, the witness has time to fabricate a story the witness may deem credible. The good judgement of the prosecutor will govern what is disclosed to the witness in the interview. When revealing information to a witness in an interview, keep in mind that "forewarned is forearmed."

2. *Advice of Rights*

A witness has no constitutional right to be told that he or she is a potential defendant or target of the investigation.[179] However, the Department of Justice's policy is to advise grand jury witnesses of their Fifth Amendment rights and, if applicable, of their status as "targets." A "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." A "subject" is defined as "a person whose conduct is within the scope of the grand jury's investigation."[180] In some districts, the term "subject" is interpreted broadly and most witnesses are advised to consider themselves subjects.

USAM 9-11.150 provides that the following "Advice of Rights" form should be appended to all grand jury subpoenas served on targets and subjects, and that targets and subjects should be orally advised of these rights, on the record, at the time of their appearance:

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[179] United States v. Washington, 431 U.S. 181, 189 (1977) (witness testified following a Miranda-type warning at the grand jury and these statements were later used against him at trial; there was no right to be told that he was a putative or potential defendant); see also United States v. Swacker, 628 F.2d 1250, 1253 (9th Cir. 1980) (witness advised of Fifth Amendment privilege but not advised of target status).

[180] USAM 9-11.150.

Advice of Rights

A. The grand jury is conducting an investigation of possible violations of federal criminal laws involving: (State here the general subject matter of the inquiry, e.g., the conducting of an illegal gambling business in violation of 18 U.S.C. § 1955).

B. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.

C. Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.

D. If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you do so desire.

Where appropriate, the witness may be advised that he or she is entitled to retain counsel who does not suffer from a potential or actual conflict of interest.[181]

If the witness is a target, the above advice should also contain a supplemental warning that the witness's conduct is being investigated for possible violation of federal criminal law.[182]

3. Secrecy Concerns with Witness Testimony

Rule 6(e) does not apply to witnesses outside the grand jury room. The witness has a First Amendment right to discuss his or her testimony outside the

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[181] USAM 9-11.152. The prosecutor, however, has no obligation to ensure that witnesses before the grand jury obtain advice from conflict-free counsel. United States v. Ramsey, 785 F.2d 184, 193 (7th Cir.), cert. denied 476 U.S. 1186 (1986). Chapter Nine of this Manual discusses conflicts of interest.

[182] USAM 9-11.150.

grand jury room, in the absence of a court order to the contrary.[183] One court has reprimanded a U.S. Attorney's office for requesting potential witnesses not to discuss subpoenas or testimony.[184]

Notetaking by a witness of the questions asked during a grand jury appearance should be prohibited.[185] Notetaking undermines the secrecy of the grand jury proceedings. Verbatim notes would essentially provide a witness with a transcript of his or her testimony. Rule 6(e)(1) provides, however, that only the court reporter and government attorneys are authorized to make and maintain the record of the grand jury's proceedings. Thus, a witness who prepares verbatim notes is making an "unofficial" transcript of the proceedings. The rules do not authorize such a transcript and it would be at variance with the majority case law that denies a witness automatic access to a transcript of his or her own testimony before the grand jury.[186] The issue sometimes arises when a witness wishes to take notes in order to consult with counsel. As discussed below, the witness has a right to consult with counsel outside the grand jury room. However, because Rule 6(e) does not apply to witnesses outside the grand jury room, such notetaking would allow the witness and counsel to track more accurately the direction and progress of an investigation than if the witness relied on memory alone in reporting what occurred during the grand jury appearance. Witnesses would be free to circulate notes to defense attorneys and prospective witnesses, wholly defeating the purpose of Rule 6(e).[187] In attempting to prevent witness note-taking, the best approach to use with most courts is to emphasize the potential for compromising the secrecy of

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[183] Butterworth v. Smith, 110 S.Ct. 1376, 1379 (1990). In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1563 (11th Cir. 1989) (nondisclosure order upheld); In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 678-680 (8th Cir.), cert. dismissed 479 U.S. 1013 (1986) (nondisclosure order upheld); In re Swearingen Aviation Corp., 605 F.2d 125, 127 (4th Cir. 1979)(target has not standing to challenge third party nondisclosure order).

[184] In re Grand Jury Proceedings, 814 F.2d 61, 68-70 (1st Cir. 1987) (letters accompanying subpoenas improperly purported to impose on recipients obligation to keep secret subpoena or fact of his or her compliance with it).

[185] In re Grand Jury Proceedings of John Doe, 842 F.2d 244, 248 (10th Cir. 1988).

[186] See Chapter Four of this Manual.

[187] For a general discussion of secrecy and disclosure issues, see In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 679 (8th Cir.), cert. denied 479 U.S. 1013 (1986) (upholding district court's prohibition on witness' describing substance of testimony to target).

the grand jury's proceedings. Courts can also be informed of the delays caused by note-taking.

4. Questioning the Witness

a. By attorney

Before questioning a witness, the prosecutor must address several preliminary matters. First, the witness should be sworn by the grand jury foreperson. A witness may then be made more comfortable by explaining the nature of the proceeding and identifying the individuals present. Department policy suggests that each witness be advised of the following: (1) that his or her testimony is given under oath and is being recorded; (2) that he or she can be prosecuted for perjury or for making false statements or for obstruction of justice if he or she fails to testify truthfully; and, if the prosecutor believes the witness may lie, (3) that perjury and obstruction of justice are felonies punishable by up to five years imprisonment.

Preparation is vital to substantive questioning. Interviews should be conducted if at all possible. The prosecutor should also be fully aware of every document that bears on the testimony of a witness, although for tactical purposes the prosecutor may choose not to confront the witness with every document. The prosecutor should also be familiar with prior testimony connecting the witness to the matters under investigation (grand jury, deposition or trial)[188] and any information about the witness gained from interviews or other sources. It is often helpful to ask the witness to bring his or her personal business diary to assist his or her memory for dates, locations, and meetings.

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[188] Prior to 1979, Section 7(a)(10) of the Bankruptcy Act provided both use and derivative use immunity to debtors or officials of corporate debtors submitting to examination in bankruptcy proceedings. See United States v. Overmyer, 899 F.2d 457, 465 (6th Cir. 1990); United States v. Rogers, 722 F.2d 557, 559-561 (9th Cir. 1983); United States v. Beery, 678 F.2d 856, 860 (10th Cir. 1982). The current Bankruptcy Code tracks 18 U.S.C. § 6001 and requires the witness claim the privilege against self-incrimination. 11 U.S.C.§ 344 (1979).

The attorney should outline the areas to be covered during the questioning with references to relevant documentary material.[189] The outline is very important to ensure a thorough examination, since the testimony may not follow the order anticipated by the attorney. An outline allows the attorney to pay close attention to the witness's answers instead of thinking about the next line of inquiry. A witness's answers may suggest the need for immediate follow-up questions. The use of an outline ensures that a prosecutor who asks follow-up questions will not lose track of other necessary areas of examination.

When examining a witness, the attorney should keep three general objectives in mind. The first and most important is to obtain from the witness all the information that the witness has on the events in question. Second, the attorney should make sure that if the witness disclaims knowledge or claims lack of memory, all the areas involved are covered so that if the witness testifies for the defense at trial, the government can impeach the witness's "improved memory" at trial with his or her lack of memory before the grand jury. Third, the attorney should question the witness in a manner that will enable the jury to evaluate his or her credibility.

To this end, relevant documents should be used to assist the prosecutor in making a complete record. Documents should be given grand jury exhibit numbers and noted for the record immediately prior to showing them to the witness. The examining attorney should elicit from the witness sufficient identifying information from the witness concerning the document so that it is clear to the grand jury and for the record what document is being discussed. When using a complicated document or one that is of central importance to the investigation, the examining attorney may also wish to distribute copies of the document to the grand jurors or use an enlargement that can be followed by the witness and grand jurors as questioning progresses. Copies of personal business diaries are often especially useful as a grand jury exhibit and to refresh a witness's memory.

Experienced prosecutors often tailor their questioning style to the witness. The attorney's questions to any witness should be clear and as short as possible. Some attorneys use only leading questions when examining

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[189] In preparing the outline, the examining attorney should be alert to any technical terminology or phrases unique to a particular trade or profession that will be used during the questioning; such terminology and phrases will have to be clearly defined for the witness and the grand jury.

cooperative witnesses, in order to expedite the examination and develop as little impeachment evidence as possible. Other attorneys ask few leading questions and develop a longer record, especially if the prosecutor is unsure whether the witness will cooperate or testify at trial. Many experienced prosecutors use leading questions in preliminary areas and if the witness becomes evasive, recalcitrant or hostile.[190] Argumentative questions should always be avoided. Open-ended, nonleading questions such as "explain," "go on," "describe the meeting" have several advantages. Most importantly, they permit the prosecutor and the grand jury to evaluate the witness's depth of knowledge, as well as to develop leads. Also, the witness cannot later claim he or she did not understand the question. If the witness's response is used for impeachment at trial, a witness's narrative is far more compelling than a "yes" or "no" answer to a leading question. Finally, the more a witness talks, the more difficult it is to conceal false testimony. Many witnesses who are lying make slips when answering questions in narrative form.

Questioning must be sufficiently detailed to establish that the witness's testimony is based on personal knowledge and not mere speculation. Thus, the examining attorney should not be satisfied with generalized statements or conclusions of the witness since such are of little use in establishing the foundation for an indictment and are generally inadmissible in court. The examining attorney must follow through to obtain the *who*, *what*, *when*, *where*, and *how* of matters. Such questioning also permits the witness to identify secondary sources of information--the existence of records or correspondence in other locations and the identities of other witnesses. Specific questioning is particularly important regarding testimony relevant to a conspiracy. If a witness is testifying concerning certain conspiratorial meetings, it is essential to obtain his or her best recollection of the dates and locations, the names of the participants, the exact nature of the discussions, the specific decisions or agreements that were made, and the participants' subsequent actions.

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[190] United States v. Weiss, 752 F.2d 777, 786 ((2nd Cir. 1985). The use of leading questions before the grand jury also does not affect the government's ability to introduce that testimony at trial to impeach a witness. United States v. Williams, 737 F.2d 594, 608 n. 7 (7th Cir.), cert. denied, 470 U.S. 1003 (1984); United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980); United States v. Champion International, Inc., 557 F.2d 1270, 1274 (9th Cir.), cert. denied, 434 U.S. 938 (1977).

There are some situations, however, where it is unwise to press a witness to give too many details to the grand jury. For example, where a grand jury is investigating a long-term conspiracy, pressing witnesses for dates, times and places of every meeting may result in inconsistencies and erroneous testimony. Thus, it may be wise to delay asking specific questions of a cooperative witness until the witness refreshes his or her recollection with documents or other evidence.

In complex investigations, it is useful to have another attorney assist during grand jury sessions. This attorney should also be present during all witness interviews conducted prior to the grand jury session and should review the examining attorney's grand jury outline of questions. Both attorneys should be satisfied that the outline will elicit all relevant information. The attorney not doing the examination may closely follow the examining attorney's outline during questioning to ensure that all areas are covered and should make notes of answers and of any areas not fully developed. The listening attorney should generally not interrupt the examining attorney's questions or pass notes to the attorney during questioning as this can interfere with the flow of testimony and distract both the witness and the examining attorney. The listening attorney should then consult with the examining attorney before the termination of an area of questioning or at a break to suggest additional or clarifying questions.

If a witness has been interviewed previously by a government agent before his or her grand jury appearance, the prosecutor may end the examination of the witness with the following:

Attorney: "You were interviewed by agents of the FBI before you came here today, weren't you?"

Witness: "Yes".

Attorney: "Did you talk to them in more detail than the questions I asked of you here today?"

Witness: "Yes".

Attorney: "All your answers to their questions were truthful weren't they?"

Witness: "Yes, they were".

Attorney: "And all your answers here today were truthful, weren't they?"

Witness: "Yes, they were".

Attorney: "Even though we didn't go into as much detail?"

Witness: "Yes".

Attorney: "And do you intend to continue to cooperate with the law enforcement agents who are investigating this matter?"

Witness: "Of course".

Attorney: "Thank you".

b. By grand jurors

An attentive and interested grand jury will usually have questions for the witness. Whenever possible, procedures should be established which defer questions by members of the grand jury until the conclusion of the attorney's examination. The better practice is for the prosecutor to ask the witness to leave the room, discuss the questions with the grand jury, and, if necessary, explain why certain questions may be improper. Upon the witness's return, either the grand jurors or the attorney may pose the questions.

Grand jurors frequently ask excellent questions and their participation aids the attorneys. Prosecutors frequently solicit their participation by making copies of certain documents for the grand jurors where it would be helpful to them in following the questioning or the line of testimony.

The following considerations should be kept in mind when determining whether a grand juror's proposed question to a witness is appropriate:

1. Whether the question discloses other facts in the investigation that should not become known to the witness;

2. Whether the witness is hostile;

3. Whether the question may call for privileged, prejudicial, misleading or irrelevant evidence.

Some attorneys allow the grand jurors to ask their questions without prior screening or discussion. In that event, they should be advised that the rules concerning grand jury secrecy prohibit them from advising a witness of another witness's grand jury testimony, at least not in a way that would reveal the identity of the prior witness. Grand jurors should also heed tactful advice concerning privileged and prejudicial evidence.

5. Access by Witness to Counsel

There is no right to have counsel present in the grand jury room.[191] However, a witness may leave the grand jury room to consult with counsel.[192] Such consultations should not be allowed to interfere unduly with the grand jury proceedings and may be appropriately regulated.[193]

The Sixth Amendment right to counsel does not attach at the grand jury stage because no criminal proceedings have been instituted. Similarly, the right under Miranda to appointed counsel, which is based on the Fifth Amendment,

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[191] Fed. R. Crim. P. 6(d). Brewer v. Williams, 430 U.S. 387, 397 (1977); Kirby v. Illinois, 406 U.S. 682 (1972).

[192] See United States v. Mandujano, 425 U.S. 564, 606 (1976) (Brennan, J., concurring) (may consult with attorney at will). The prosecutor has no obligation to ensure that witnesses before the grand jury obtain good advice from conflict-free counsel. United States v. Ramsey, 785 F.2d 184, 193 (7th Cir. 1986). See also Chapter Nine of this Manual for a discussion of Conflicts of Interest.

[193] In Matter of Lowry, 713 F.2d 616, 617-618 (11th Cir. 1983) (no right to consult after each question); In re Tierney, 465 F.2d 806, 810-811 (5th Cir. 1972) (witness allowed to consult only after every two or three questions; court has power to prevent disruption of proceedings by frivolous departure from grand jury room), cert. denied, 410 U.S. 914 (1973); United States v. Soto, 574 F. Supp. 986, 996 (D. Conn. 1983) (immunized witness may leave grand jury room every 20 minutes to consult with counsel for ten minutes; witness may not write down questions nor his answers).

does not attach because the grand jury is not the equivalent of custodial police interrogation. However, the witness should routinely be advised of his or her right to counsel. Where a target chooses to testify without counsel available outside the grand jury room for consultation, the prosecutor should establish on the record that witness has waived his or her right to counsel.[194]

The prosecutor may determine, in certain circumstances that it is to the government's advantage to find counsel for a witness, such as where the witness faces possible contempt charges. The Criminal Justice Act, 18 U.S.C. § 3006A, which authorizes appointment and payment of counsel in indigent cases, does not provide for appointment of counsel for an indigent grand jury witness. Usually, however, the Federal Defender's Office will represent the witness without appointment. In the unusual case where Federal Defenders will not advise the witness because of a conflict or other reason, appointment of a panel attorney may be permitted under the provisions of the Criminal Justice Act which allow for counsel when the witness faces loss of liberty (for example, potential criminal contempt charges).

Although the parameters of the witness's right to consult with counsel outside the grand jury room are unclear, prosecutors and courts generally permit the witness consultation of reasonable length and frequency.[195] In the opening remarks to the witness, the prosecutor will often tell the witness to ask for a brief recess if he or she needs to consult with counsel. When a witness invokes that right, the best practice is to ask the foreperson to note the time the witness leaves the room and the time he or she returns in case these interruptions become disruptive of the grand jury process. When the witness returns, have the foreperson state for the record how much time elapsed. A witness who has not been immunized presumably has a stronger reason and, therefore, a greater right to consult with counsel, although the extent of this

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[194] United States v. Gaddy, 894 F.2d 1307, 1313-1315 (11th Cir. 1990).

[195] United States v. Mandujano, 425 U.S. 564, 606 (1976); In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); see also In Matter of Lowry, 713 F.2d 616, 617-618 (11th Cir. 1983) (witness has no right to disrupt grand jury to consult with counsel after every question).

right is not clear.[196] Unreasonable consultations should not be permitted to obstruct orderly questioning of the witness.

A witness who insists upon leaving the grand jury room frequently to consult with an attorney at length may be taken to the court for an order directing the witness to discontinue such a practice and, if necessary, to establish ground rules for such consultations.[197] If the witness refuses to answer questions, the federal prosecutor may present the matter before the court for a ruling on the propriety of the questions. As stated in People v. Ianniello, 21 N.Y.2d 418, 425, 235 N.E.2d 439, 444, cert. denied, 393 U.S. 827 (1968):

> By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of contempt proceedings.

Limited questioning of a witness about his or her conversations with counsel to ensure that he or she has been apprised of rights and responsibilities is permissible.[198] Care should be taken not to examine the witness as to these conversations with counsel in a manner that would violate the witness's attorney-client privilege.

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[196] Compare United States v. Mandujano, 425 U.S. at 606 (Brennan, J., concurring) (may consult with attorney at will) with In re Tierney, 465 F.2d at 810 (witness allowed to consult only after two or three questions).

[197] See United States v. Soto, 574 F. Supp. 986, 996 (D. Conn. 1983) (the witness was allowed to consult with counsel for ten minutes after a 20-minute question period before the grand jury).

[198] United States v. E.H. Koester Bakery Co., 334 F. Supp. 377, 383 (D. Md. 1971).

C. Recalcitrant and Hostile Witnesses

Not all witnesses are cooperative, and some may require examination with all the vigor of cross-examination at trial. As with all witnesses, examination of recalcitrant and hostile witnesses should be conducted firmly but courteously.

Abusive examination of a witness is not only improper, but will not be productive, and will often alienate the grand jury. A prosecutor should not try to intimidate a witness with threats of criminal proceedings (as distinguished from "cautions" or reminding the witness of his or her legal obligation to be truthful). Bullying a witness, that is, forcefully questioning in such a manner as to make it obvious that the witness should give certain answers, should be avoided. Prosecutors should be careful with the tone and inflection of their voices. Using an abusive tone with a witness may make the grand jury hostile to the government.

Unnecessary, repetitious questioning should also be avoided. While the prosecutor can attempt to perfect a record for a subsequent perjury prosecution in appropriate circumstances, repetitious questioning in order to coax the witness into the commission of perjury should not occur.[199] Do not examine the witness as to his or her conversations with witness's counsel in a manner that would violate the witness's attorney-client privilege.[200] Do not attempt to "trick" the witness by asking his or her reaction to testimony that does not exist, or by advising the witness that documents are available that demonstrate a certain point when, in fact, the documents do not exist or do not support the examiner's characterization. Should the witness testify on the basis of such a confrontation, the witness may be in a position to retract such testimony at trial. Further, the prosecutor is under a duty not to mislead the grand jury. The government as well as the prosecutor will be embarrassed if the court and jury become aware of the prosecutor's conduct in the grand jury.

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[199] Bursey v. United States, 466 F.2d 1059, 1079-1080 (9th Cir. 1972).

[200] Questioning designed merely to ensure that a witness has been apprised of his rights and responsibilities is permissible. United States v. E.H. Koester Baker Co., 334 F. Supp. 377, 383 (D. Md. 1971).

Of course, the federal prosecutor should take care that he or she is not abused by the witness. Obnoxious, recalcitrant witnesses should be dealt with firmly and the prosecutor should make it clear that the prosecutor is in control of the questioning. Witnesses before the grand jury do not have a right to refuse to answer questions, other than asserting the privilege against self-incrimination,[201] demonstrating illegal use of electronic surveillance,[202] or establishing some other valid privilege. The prosecutor, where appropriate, should cut off the witness or admonish the witness if the witness is not addressing the question posed. In general, the prosecutor should be guided by Justice Sutherland's admonition in Berger v. United States, 295 U.S. 78, 88 (1935): "He [the prosecutor] may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

The prosecutor has no duty to tell a grand jury witness what evidence it may have against the witness.[203] There is also no obligation to advise the witness of evidence inconsistent with his or her testimony. However, it is sometimes a good practice to confront a witness of such evidence. The witness may not have understood the question. Even a recalcitrant witness may take advantage of the opportunity to clarify his or her answer. Additionally, prosecutors often appreciate being able to weigh the merits of contradictory evidence at this stage of the investigation. A prosecutor choosing to examine a witness concerning inconsistent evidence should keep in mind the requirements of Fed. R. Crim. P. 6(e) regarding disclosure of other testimony before the grand jury. Thus, for example, a witness may be informed that other witnesses have related a significantly different version of the events in question, but not that John Doe has said so. If confronting the witness with an inconsistent document, the prosecutor should ensure that the document itself does not contain the producing entity's name and fact of production.

At the beginning of the session, the prosecutor may give a hostile witness additional warnings about the danger of prosecution for perjury and false statements. A hostile witness should also have been advised of his or her

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[201] United States v. Mandujano, 425 U.S. 564, 572-576 (1976) (grand jury witness has absolute duty to answer all questions, subject only to a valid Fifth Amendment claim).

[202] See Chapter Six, Section VIII, E, 3.

[203] United States v. Washington, 431 F.2d 181, 188-189 (1977); United States v. Busher, 817 F.2d 1409, 1411 (9th Cir. 1987).

rights at the beginning of the session.[204] It is sometimes appropriate to remind the witness that he or she is under oath and of the possible penalties for untruthful testimony. If the attorney is convinced that the witness is lying, care should be taken to develop a precise record for possible indictment.[205]

Despite the best efforts of an examining attorney to elicit full and truthful testimony from a witness, occasionally a witness will be intentionally evasive, misleading or untruthful on points that are material to the investigation. The examining attorney must then be aware that the witness's questions may form the basis for a later charge of perjury (18 U.S.C. § 1621), false declarations (18 U.S.C. § 1623) or obstruction of justice (18 U.S.C. § 1503) and construct a record accordingly.[206]

The questions should be clear and concise. They should center on issues material to the investigation. Moreover, the record must be clear that the witness has not misunderstood a question or been misled. Accordingly, the examining attorney may wish to define terminology again or ask the witness if he or she fully understands particular questions. Examination must be fair but firm; vigorous, if necessary, but never abusive. Non-responsive or evasive answers should not be accepted. The examining attorney should not, however, engage in unnecessary repetition or other conduct that appears to coax the witness into the committing of perjury, since such conduct may constitute abuse of the grand jury process.[207]

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[204] USAM 9-11.150 - 9-11.152. A prosecutor's failure to advise a witness of his or her Miranda rights and right to remain silent does not, however, justify perjury. United States v. Weiss, 752 F.2d 777, 786 (2nd Cir. 1985).

[205] For example, for a perjury prosecution to be successful, a prosecutor must establish the materiality of the perjury in the context of the investigation. See United States v. Pandozzi, 878 F.2d 1526, 1533 (1st Cir. 1989); United States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Parr, 516 F.2d 458, 470 (5th Cir. 1975). For a discussion of the issues surrounding perjury indictments, see Chapter Eleven of this Manual.

[206] United States v. Moeckley, 769 F.2d 453, 465 (8th Cir. 1985) (evasive witness convicted of perjury); United States v. Weiss, 752 F.2d 777, 786 (2nd Cir. 1985). See also Chapter Eleven.

[207] Bursey v. United States, 466 F.2d 1059, 1079-1080 (9th Cir. 1972).

A witness has no right to be advised that he or she may recant untruthful testimony and thereby avoid a perjury charge under 18 U.S.C. § 1621 or a false declaration indictment under 18 U.S.C. § 1623.[208] However, if the attorney suspects the witness may have committed prejury, the better practice is to ask the witness if he or she wishes to retract or correct any testimony and, if appropriate, to advise the witness, to the extent permitted by Rule 6, of contradictory evidence.[209]

Some lower courts appear to have developed the view that if the grand jury witness is a defendant or virtually a defendant (i.e., he is a target or the prosecutor has reason to believe he may be indicted), then warnings must be given.[210] But where the government has not entertained the idea of bringing criminal charges against a witness, it has no duty to warn him or her.[211] It is also the policy of the Department of Justice to advise a witness of his or her Fifth Amendment privilege, notwithstanding the lack of a clear constitutional imperative.

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[208] See United States v. Scrimgeour, 636 F.2d 1019, 1026 (5th Cir.), cert. denied 454 U.S. 878 (1981); United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Gill, 490 F.2d 233, 240-241 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974); United States v. Parr, 516 F.2d 458, 472 (5th Cir. 1976); United States v. Lardieri, 506 F.2d 319, 322-323 (3rd Cir. 1974).

[209] United States v. Pandozzi, 878 F.2d 1526, 1528 (1st Cir. 1989); United States v. Valentine, 820 F.2d 565, 572 (2nd Cir. 1987); United States v. Lopez, 779 F.Supp. 13, 16 (S.D. N.Y. 1991).

[210] United States v. Luxenberg, 374 F.2d 241, 246 (6th Cir. 1967). See also United States v. Torcasio, 959 F.2d 503, 507 (4th Cir. 1992) ("Although the better practice, of course, would have been for the prosecutor to specifically advise Torcasio of his rights on the record, we find no abuse of discretion in the court's ruling that Torcasio had received adequate notice of his Fifth Amendment rights because they were outlined in material enclosed with Torcasio's grand jury subpoena.")

[211] See Robinson v. United States, 401 F.2d 248, 250 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959, 960 (3rd Cir.), cert. denied, 389 U.S. 838 (1967).

D. Target Subpoenas and Notifications

1. Department of Justice Policy

The grand jury may subpoena *and* question a target or a subject.[212] However, because of possible prejudice in requiring a target to invoke the Fifth Amendment before the grand jury, a target should not be subpoenaed unless the United States Attorney or appropriate Assistant Attorney General and the grand jury specifically approve.[213] Moreover, if both the target and the target's attorney signify in writing that the target will invoke his or her Fifth Amendment privilege if called, then ordinarily, the target should be excused from testifying.[214]

2. Target Letters and Warnings

In appropriate cases, prosecutors are encouraged to notify targets of their status a reasonable time before seeking an indictment, in order to afford the target an opportunity to testify before the grand jury.[215] The target notification letter should include the following:

(i) the date on which the target may appear; (ii) that the target is advised to consult with counsel about the matter; (iii) that the target will have to waive his or her Fifth Amendment privilege against self-incrimination explicitly prior to

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[212] See United States v. Washington, 431 U.S. 181, 186 (1977); United States v. Wong, 431 U.S. 174, 176 (1987); United States v. Mandujano, 425 U.S. 564, 574 (1976).

[213] USAM 9-11.151.

[214] USAM 9-11.154. See Kemp v. Gay, 947 F.2d 1493, 1498 (D.C. Cir. 1991) (upholding court order in civil proceeding that witness either testify or submit in advance a written explanation of why such testimony would violate his Fifth Amendment privilege).

[215] USAM 9-11.152, 9-11.153.

testifying; (iv) that, should the target testify, the target will have to consent to a full examination under oath, and (v) that anything the target says before the grand jury may be used against him or her.

The government is under no legal obligation to notify a target prior to indictment.[216] Failure to warn, therefore, will not cause dismissal of the indictment.[217] Notification should not be made where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or where it otherwise would be inconsistent with the ends of justice.[218] Form "target letters" are usually on file in each United States Attorney's office. The attorney should not misrepresent status as target or subject to the witness or his counsel.[219]

The Supreme Court has not squarely resolved whether self-incrimination warnings must be given to grand jury witnesses when they are targets of a grand jury's investigation. However, the Court in Minnesota v. Murphy, 465 U.S. 271 (1984), strongly suggested that self-incrimination warnings will not be required in the grand jury. Earlier, in United States v. Mandujano, 425 U.S.

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[216] United States v. Washington, 431 U.S. 181, 186 (1977); United States v. Pacheco-Ortiz, 889 F.2d 301, 307-311 (1st Cir. 1989); United States v. Acceturo, 858 F.2d 679, 681-682 (11th Cir. 1988); United States v. Valentine, 820 F.2d 565, 572 (2nd Cir. 1987); United States v. Burke, 781 F.2d 1234, 1245 (7th Cir. 1985); United States v. Caputo, 633 F.Supp. 1479, 1488 (E.D. Pa. 1986).

[217] Departmental regulations create no rights, substantive or procedural, for the benefit of witnesses or parties in civil or criminal litigation. See USAM 1-1.100. See also United States v. Caceres, 440 U.S. 741 (1979) (consensual monitoring admissible despite failure to comply with DOJ regulations). See also United States v. Busher, 817 F.2d 1409, 1411 (9th Cir. 1987) (alleged disregard of guidelines for bringing RICO prosecutions); United States v. Thomas, 593 F.2d 615, 622 (5th Cir. 1979) (taxpayer has no right to conference before IRS criminal referral is filed).

[218] USAM 9-11.153.

[219] Such, while not condoned, does not warrant dismissal of an indictment. United States v. Babb, 807 F.2d 272, 278-279 (1st Cir. 1986); United States v. Short, 671 F.2d 178, 187-188 (6th Cir. 1982), cert. denied 457 U.S. 1119 (1982); United States v. Crocker, 568 F.2d 1049, 1055 (3rd Cir. 1977). Instead, the matter may be brought to the attention of the Office of Professional Responsibility. United States v. Gillespie, 1992 U.S.App. Lexis 19341 (7th Cir. No. 91-2593 issued August 20, 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307-311 (1st Cir. 1989); United States v. Acceturo, 858 F.2d 679, 681-682 (11th Cir. 1988).

564 (1976), the Court observed that federal prosecutors customarily warn targets of their Fifth Amendment rights before grand jury questioning begins.[220] Similarly, in United States v. Washington, 431 U.S. 181 (1977), the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting.[221] However, in Murphy, in the course of holding that self-incrimination warnings need not be given in the context of an interview with a probation officer, the Court noted that self-incrimination warnings are not required in the grand jury room, since the grand jury is not an inherently coercive setting. As stated above, Department policy requires targets receive notification and warnings. Most lower courts look with favor upon a prosecutor administering appropriate warnings where a witness is a target or appears to be committing perjury.[222]

3. Request by Targets to Testify

Although there is no legal duty to allow a target to testify before the grand jury,[223] Department policy requires that a target be permitted to testify at his or her request unless it would cause undue delay or otherwise burden the grand jury.[224] Always advise the grand jury of a target's request to testify.

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[220] 425 U.S. at 580-581.

[221] 431 U.S. at 188.

[222] United States v. Moeckley, 769 F.2d 453, 465 (8th Cir. 1985) (perjury conviction upheld where perjury and other warnings given but not target warnings). United States v. Washington, 431 U.S. 181 (1977) also reversed United States v. Wong, 553 F.2d 576, 578 (9th Cir. 1974), which had required warnings. It should be noted, however, that, one court after Washington found such warnings insufficient. In that case, the target had already been indicted by the grand jury on related matters, but had not yet been notified of the indictment. United States v. Doss, 545 F.2d 548, 551-552 (6th Cir. 1977).

[223] See United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 648 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Briggs, 514 F.2d 794, 804 (5th Cir. 1975).

[224] USAM 9-11.152. See also United States v. Gardner, 516 F.2d 334, 338-339 (7th Cir.), cert. denied, 423 U.S. 861 (1975) (prosecutor chose not to present witness for fear of perjury).

If the target testifies, the record should reflect:

(1) The target's explicit waiver of the privilege against self-incrimination made either by the target himself or in the form of a letter from his attorney (signed by the target);

(2) The target's waiver of counsel if not represented; and

(3) The fact that the target's appearance is voluntary.

Courts have held a person under investigation has no right to appear before the grand jury.[225]

4. Request by Target to Read Written or Prepared Statements

Prosecutors generally should oppose a request by a target to submit a written statement to the grand jury. Such statements are fundamentally self-serving, do not allow the jury to weigh the witness's credibility, and cannot ordinarily be used to develop a case for perjury or false declaration, unless the statement is made under penalty of perjury.[226] The prosecutor should advise the grand jury of his or her position on any such request and seek their concurrence, since the decision whether to accommodate such a request is left to the sound discretion of the grand jury.

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[225] United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 648 (9th Cir. 1980), cert. denied 452 U.S. 961 (1981); Hodge v. Henderson, 761 F.Supp. 993, 1009 (S.D.N.Y. 1990)(New York state grand jury).

[226] See 18 U.S.C. §§ 1621, 1623. See also USAM 9-11.152.

5. Exculpatory Evidence

In United States v. Williams, _____ U.S. _____, 112 S. Ct. 1735 (1992), the Supreme Court held that a prosecutor has no duty to present exculpatory evidence to a grand jury, and that the lower federal courts may not impose such a duty pursuant to their supervisory power over the grand jury. The Supreme Court therefore explicitly rejected the Tenth Circuit's rule, set forth in United States v. Page, 808 F.2d 723, 727-728 (10th Cir.), cert. denied, 482 U. S. 918 (1987), which required a prosecutor to present "substantial exculpatory evidence" to the grand jury. In reaching this result, the Court emphasized that the role of the grand jury is "not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge."[227]

Despite Williams, Department of Justice policy requires the presentation of exculpatory evidence in certain circumstances. USAM 9-11.233 states:

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

If it is unclear whether known evidence is exculpatory, a prosecutor should err on the side of disclosure. Disclosure permits the prosecutor to use the grand jurors' experience, and to use them as a sounding board for trial jurors' reaction to the potentially exculpatory evidence.

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[227] 112 S.Ct. 1735 at 1744 (1992). Thus United States v. Wood, 833 F.2d 113, 114 (8th Cir. 1987), in which a district court exercised its supervisory powers to order the prosecutor to either represent certain perjury allegations or permit a private individual to make such presentation, is of doubtful continuing validity. Prior cases which had declined to establish an obligation to present exculpatory evidence included: Hochman v. Rafferty, 831 F.2d 1199, 1203-1204 (3rd Cir. 1987); United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988); United States v. Busher, 817 F.2d 1409, 1411 (9th Cir. 1987); United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir. 1986).

E. Other Witnesses Raising Sensitive Legal Issues

Prior approval of the Department of Justice is required to subpoena three types of witnesses: reporters, attorneys and contumacious witnesses. A reporter has no constitutional right to refuse to testify concerning news sources.[228] However, the Department of Justice has adopted a policy intended to provide protection to the news media from forms of compulsory process that might impair the news-gathering function. The policy thus restricts the authority to issue subpoenas to reporters. Departmental procedures are set forth in 28 C.F.R. 50.10.[229] The Department requires that prior approval be obtained for all attorney subpoenas, as more fully discussed in Chapter Six, Section I, B. Finally, Departmental approval is required in order to resubpoena a contumacious witness, that is, one who had previously refused to testify before a grand jury and was consequently incarcerated for that refusal.[230] It should be noted, however, that these Department policies do not create enforceable rights in a witness to contest a subpoenas.[231]

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[228] Branzburg v. Hayes, 408 U.S. 665, 679 (1972).

[229] See Chapter Six, Section I, B, 2 of this Manual and USAM 9-2.161.

[230] USAM 9-11.160. In order to obtain such approval, the attorney must demonstrate that the witness is now prepared to testify or that the witness's appearance is justified since the witness possesses information essential to the investigation. There is no legal bar on the reimposition of civil contempt sanctions. United States v. Shillitani, 384 U.S. 364, 371 n.8 (1963).

[231] See, e.g., Holifield v. United States, 909 F.2d 201, 205 (7th Cir. 1990) (IRS summons of attorney); In re Grand Jury Subpoenas, 906 F.2d 1485, 1496 (10th Cir. 1990) (attorney subpoena); In the Matter of Klein, 776 F.2d 628, 634-635 (7th Cir. 1985) (attorney subpoena).

V. Control and Organization of Subpoenaed Documents

A. Initial Steps to Obtain Subpoenaed Documents

Adequate control and organization of documents obtained during the grand jury investigation is essential. Such organization assists in locating relevant documents to be used as evidence, complying in a timely manner with pretrial discovery requirements and establishing the chain of custody at trial.

1. Determine who will have custody of the original documents and where they will be maintained

It is well-established that federal prosecutors, in the performance of their duties, may assist the grand jury by examining, analyzing, and reviewing voluminous material produced before the grand jury.[232] Analysis may also be performed by authorized government personnel, such as investigatory agents deemed necessary by an attorney for the government in the performance of the attorney's duty to enforce federal criminal law.[233]

During the initial stages of the investigation, before any documents are produced pursuant to a subpoena duces tecum, the government attorney must determine who on the trial team will be the custodian of the documents obtained during the investigation.

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[232] Securities and Exchange Commission v. Dresser Industries, 628 F.2d 1368, 1383 (D.C. Cir. 1980). Government counsel's assistance to the grand jury may form the basis for obtaining an impounding order. United States v. United States District Court, 238 F. 2d 713, 720-721 (4th Cir.) cert. denied, 352 U.S. 981 (1957).

[233] Fed. R. Crim. P. 6(e)(3)(A)(ii). See United States v. Apodaca, 820 F.2d 348, 349 (10th Cir.), cert. denied 484 U.S. 903 (1987); United States v. Cook, 744 F.2d 561, 564 (10th Cir.), cert. denied 479 U.S. 889 (1986); United States v. Lartey, 716 F.2d 955, 962 (2nd Cir. 1983); United States v. Stanford, 589 F. 2d 285, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1118 (E.D. Pa. 1976).

a. The investigative agent as custodian

In many districts, the case agent maintains custody of subpoenaed records. If this approach is implemented, federal prosecutors should request that the grand jury authorize the investigator to serve as custodian of the original subpoenaed records on behalf of the grand jury. However, the agent should not be appointed as an agent of the grand jury itself unless it is required by the local court rules.[234]

If it becomes necessary to remove any original documents from the jurisdiction of the court, e.g., for laboratory testing to analyze handwriting, the grand jury should be informed and their approval obtained. The approval may be a "blanket approval" obtained from the grand jury at the beginning of the case. The agent can be authorized to analyze, maintain, test and produce on request all grand jury documents.

It may also be necessary in some districts to obtain court approval for the return of the subpoenaed records at the end of the investigation or after all appeals are exhausted. This approval is provided orally on the record in some districts. Local practice in other districts requires that a written order be obtained.

b. The prosecutor as custodian

An alternative approach for Departmental attorneys is to obtain an order from the District Court during the initial stage of the investigation[235] appointing the attorney as custodian and authorizing the removal of documents

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[234] The terminology "agent of the grand jury" is controversial. The Supreme Court has held that such oaths are unauthorized, but refused to set aside the indictment for they did not cause elevation of the agents' credibility and their effect on the decision to indict was negligible. Bank of Nova Scotia v. United States, 487 U.S. 250, 260 (1988).

[235] See United States v. Ponder, 238 F. 2d 825, 827 (4th Cir. 1956); In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D. N.Y. 1945).

to the attorney's office out of the district, if necessary.[236] The court's order can also make clear that the prosecutor's control and custody of the documents continues for the life of the grand jury[237] and any subsequent grand jury involved in the investigation, and through the final appeal of any subsequent conviction; that the subpoena respondent is entitled to have access to the records he or she produced; and that the respondent may authorize third parties to review the records he or she produced.

c. Adequate, secure storage for documents

After determining who will be the custodian of records, the prosecutor must determine where the original documents and copies will be stored. Frequently, the documents will be maintained under appropriate security either in the case agent's office or the United States Attorney's office. In complex white-collar investigations it is not unusual for document production to be extremely voluminous, e.g., filling numerous file cabinets. In such instances, it may be necessary for the Division, office or investigative agency handling the case to rent additional space to maintain the records and install appropriate security devices. The grand jury should be informed about the location of the documents. In many districts, the prosecutor inquires if the grand jurors would like to visit the storage room or facility. During a lengthy grand jury investigation, it is a good idea to remind the grand jurors from time to time that the records are being stored and maintained on their behalf and that any of the documents obtained during the investigation can be made available for their review upon request.

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[236] Government counsel are entitled to examine documents outside the presence of the grand jury. United States v. United States District Court, 283 F.2d 713, 720 (4th Cir.), cert. denied, 352 U.S. 981 (1957). To facilitate this examination process, the courts have permitted removal of documents to government counsel's office in another district. See, e.g., In re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D. Va. 1957); In re Grand Jury Proceedings, 1973 Trade Cas. (CCH) ¶ 74,389 (S.D. Cal.).

[237] This will obviate any claim by a subpoena recipient that it has complied with the subpoena by delivering the documents to the grand jury and has a right to remove the documents at the end of that day's session. See In re Mesta Machinery Co., 184 F. 2d 375, 376 (3rd Cir. 1950); In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

2. *Negotiating Strategy for Document Production*

Often, counsel for the subpoena recipient will call the prosecutor named on the subpoena to discuss subpoena compliance, including matters such as extensions of time for production, whether originals or copies are required, clarification of certain subpoena requests, numbering of the documents, whether documents maintained by certain members of the corporation are corporate or "personal" documents, and the burdensomeness of the subpoena.

If more than one prosecutor is handling an investigation, it is recommended that the attorneys meet and discuss the subpoenas in advance of their issuance. This discussion should include what compromises or concessions the government trial team will make, and whether piecemeal production will be accepted. Anticipate the possible objections, problems, and difficulties opposing counsel may raise and be ready to address and solve them.

Negotiating sessions with counsel for the subpoenaed individual or company can provide an important source of information, particularly if counsel describes his or her problems in detail. Frequently information can be obtained about (a) the subpoena recipient or his company; (b) how the recipient conducts his business; (c) the company's filing system, and (d) when applicable, the industry in general.

During negotiations, federal prosecutors should be cordial, firm and fair. When possible without undue delay to the investigation, accommodate opposing counsel or at least make the effort to do so. It may avoid unnecessary litigation about the scope and burdensomeness of the subpoena. While federal prosecutors generally are successful in such litigation, it can be very time consuming. All modifications of the subpoena should be immediately reduced to writing.

Federal prosecutors should consider utilization of stipulations, affidavits, and admissions when seeking documents only to establish a particular fact, such as interstate commerce. Frequently, a subpoena recipient is willing to admit or stipulate to that issue rather than produce all the underlying documents. Such documents are generally of little probative value to other issues. Consequently, the chances of missing a critical document by using such a stipulation are small. However, if this approach is used, make sure that the stipulation or admission is in a form that will be usable at trial. If no such agreement can be reached,

then insist upon production of all the documents bearing on this issue called for by the subpoena.

3. *Production/Return of Documents to the Grand Jury*

The subpoena may require actual production of the subpoenaed documents before the grand jury or it may permit production to the case agent. Delivery of subpoenaed documents to agents of the Internal Revenue Service or Federal Bureau of Investigation is proper.[238] However, the subpoena recipient has a right to produce his or her documents before the grand jury. The government may insist on the explanatory testimony of a document custodian before the grand jury.

The government may not insist upon production at its offices or to the case agent if the subpoena recipient does not agree. When production is made to the agent, the government attorney generally requires that the subpoena recipient provide an affidavit stating he or she made a thorough search for the subpoenaed records and produced the records in full compliance with the subpoena.

Although an affidavit of compliance may not be as thorough and as illuminating as questioning the document custodian before the grand jury, it is generally sufficient to protect the government's and the grand jury's interests at that early stage of document production. If after reading the documents and conducting some further investigation, the prosecutor believes the affidavit is inadequate or inaccurate, he or she can always subpoena the document custodian to elaborate before the grand jury. While it is the Department's position that false representations in the affidavit can be the basis for a perjury,

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[238] United States v. Nathan, 816 F.2d 230, 234 (6th Cir. 1987). Even financial records governed by the Right to Financial Privacy Act, 12 U.S.C. § 3420, do not require personal delivery to the grand jury. United States v. A Residence Located at 218 Third Street, New Glarus, Wisconsin, 805 F.2d 256, 260 (7th Cir. 1986). See also United States v. Duncan, 598 F.2d 839, 867 (4th Cir. 1979); United States v. Universal Manufacturing Co., 525 F.2d 808, 812-813 (8th Cir. 1975); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1118 (E.D. Pa. 1976); United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 521 (E.D. N.Y. 1974).

obstruction of justice, or false statement charge in appropriate circumstances, at least one court has found prosecution for false statements inappropriate.[239]

Where the option of a return to the office of the United States Attorney or case agent is chosen, the grand jury should be advised that option has been selected and that the documents have been received. It is important to remember that the power to subpoena documents resides in the grand jury, not in the prosecutor or agent. Timely disclosure of subpoena returns to the grand jury can help defeat any subsequent claims of grand jury abuse.

B. Handling of Subpoenaed Documents

Once documents have been received in response to subpoenas duces tecum, the staff encounters some of the most difficult and important tasks in developing a criminal investigation. This includes the segregation, identification, organization and analysis of the documents received.

1. Avoid Chain of Custody Problems

The document control system should be designed so that the government can adequately prove the chain of custody for documents and records to secure their admission as evidence at trial. Occasionally, it will become critical during a criminal trial to prove a defendant had access to or reviewed certain records. Thus, it will be necessary to prove who produced the records. It is essential that documents returned in response to each subpoena remain segregated from all other records returned in response to other subpoenas. Records should be kept in clearly marked envelopes, boxes or file cabinets. A document log, as discussed below will assist in maintaining the segregation of document returns.

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[239] USAM 9-69.267. But see United States v. Deffenbaugh Industries, Inc., 957 F.2d 749 (10th Cir. 1992).

On occasion, the subpoena recipient will permit government investigators to review his or her files and remove the records from his or her premises. If this opportunity arises, an inventory and log should be compiled on the scene, similar to the practice when a search warrant is conducted.

Sometimes a subpoena recipient will produce a certain type of document that may later be the subject of a chain of custody dispute. While any document may conceivably fall into this category, some are more susceptible to such claims than others. For example, video, audio and computer tapes or other materials about which claims of alteration or tampering may be lodged are frequently the subject of chain of custody disputes. Also, on occasion it may be necessary to determine if certain fingerprints are on a document, indicating the defendant handled and read it. If the chain of custody cannot be satisfactorily established, the materials may be excluded from trial. Consequently, it is important that the staff identify such materials immediately upon receipt and establish appropriate safeguards for them. Sufficient security, logs, and the testimony of document custodians are the best safeguards.

2. *Prepare Document Log*

Certain United States Attorneys' offices, Division field offices, and Sections have document clerks who receive and log in documents produced in response to grand jury subpoenas. Generally, a separate log book is maintained for each grand jury or each grand jury matter. Such logs will contain information such as the name of the subpoena recipient; the number of cartons of documents returned; the date or dates they were subpoenaed; the date or dates the documents were received; the storage location of these documents (e.g., Aisle B, Bins 3 and 4); and whether the submission is partial or complete. The logs may also note additional information, such as the addresses of the recipients; name, address and telephone number of a company's contact; name, address and telephone number of counsel; the existence of search and compliance affidavits; etc. Generally such control logs are arranged in alphabetical order.

In offices where such a system is used, once the log entry has been made, staff members can sign for or log out the documents they want to examine. Document returns should be examined immediately to determine

whether compliance is complete. The determination should be entered in the log and the grand jury should be informed at their next meeting. If compliance is not complete, counsel for the subpoena recipient should be notified immediately.

3. Number and Identify Documents

As documents are received during the grand jury investigation, they should be placed into separate boxes or envelopes to prevent the commingling of documents from various sources. The documents should be clearly marked in a manner that identifies the source. Each page produced by the source should be numbered consecutively. Complex numbering (e.g., DB-21-C-150-2) should be avoided; such a number is difficult to cite in the record and increases the chance of reporter error and juror confusion. Further, the initials of the corporation submitting documents should not be used to identify that corporation if confidentiality regarding the ownership of the documents is desired.

The precise numbering system is usually determined by the staff (e.g., some attorneys prefer coding by paragraph number of the subpoena) unless a document control system was previously adopted in the office or section. In the latter situation, the established practice should be followed. One effective numbering system works in the following manner:

a) Assign a number to each subpoena when it is issued, for example, 0309.

b) Number each page received pursuant to subpoena 0309 as follows: 0309-001, 0309-002, 0309-003. This system informs the staff of the source of the document, the number of documents provided by the source, and identifies each page.

c) Numbering in this fashion can be accomplished efficiently with a Bates stamp. Use colored ink, such as blue or red, to stamp the original. Because the number on all copies will appear in black, the use of the colored ink will immediately reveal whether a document is a copy or original.

Initially, a decision must be made as to whether to number all documents received, or just those that appear, at first reading, to have any relevance to the subject matter of the investigation. Numbering all documents will, of course, give the greatest control. However, in matters involving the submission of voluminous documents, it may not be feasible to number every document, given the limited size of the staff and time constraints. In such huge submissions, those documents that will probably not be used should be segregated and kept in a carefully identified file.

A subpoena recipient can be requested to number the documents before they are submitted. The company or its counsel may oblige because it gives them a measure of control over the submission and the ability to track and organize documents for their own purposes. Generally, they will number the documents in whatever manner and with whatever prefixes the prosecutor suggests. The numbering system requested is usually set forth in the subpoena schedule or in a cover letter accompanying service of the subpoena. It can also be handled after service, either in writing or by telephone, with counsel for the recipient, but delaying the matter runs the risk that the documents will be produced without numbering or that the numbering system selected by the recipient will not be useful.

The attorneys and agents may be tempted to number the documents further after receipt, for example, to identify critical document topics or all documents relating to a particular witness. This practice should be avoided. The better practice is to use separate file folders to hold copies of relevant documents for each critical document topic or witness. This avoids cluttering the documents with additional symbols and avoids the potential problem of having to eradicate them before submission to the grand jury or trial jury.

4. Copy Documents

The prosecutors and agents should always work with copies of the original submissions to avoid inadvertently marking them or losing the originals. As soon as the documents have been numbered, copies should be made. The number of copies to be made depends on the number of people who need copies, the number of files the staff wants to maintain, and the manner in which pre-trial discovery will be handled.

For many documents, two "working copies" should be made which can be marked up, one for the agents and one for the attorneys. In addition, the investigative team may want to organize certain documents in various files, for example, a critical documents file and various witness files.

It is also a good idea to determine whether copies of the documents are going to be made available to defense counsel during pretrial discovery, as opposed to opening a discovery room where all the records are housed with a copy machine provided for their use. If you intend to provide the defense with copies, the investigative team may prefer to make them at this time. Depending on the needs of the investigation, you might make as many as five copies of certain documents. Because of security and control problems, as well as expense, undue proliferation of copies should be avoided.

In certain cases, where the document submissions are particularly voluminous, the investigative team may wish to microfilm the documents to conserve space. However, this is time-consuming and relatively expensive because it requires the use of microfilm readers to review the documents and a microfilm printer to copy documents.

After copying, the original numbered documents should be placed and maintained in an "original file" until they are needed. Usually, such use is essential only at trial or if a witness cannot identify or read a copy.

5. Index and Organize Documents

To effectively use the documents received, it is important to index and organize them as early as possible. Upon receipt of the documents, it is good practice to make a quick index of the nature and types of documents received and their location, particularly in the case of multi-box submissions. This should be done on a box-by-box-basis to facilitate ready access.

Thereafter, the investigative team may wish to organize the files along several lines, e.g.: 1) written by or referring to particular persons; 2) relating to events in a chronological order; 3) pertaining to different possible criminal

violations; 4) having to do with particular sections or areas of the country; 5) hot documents; or 6) referring to specific subjects or targets.

As discussed in greater detail below, the organization of documents may be computerized effectively. For example, a computerized chronology can be created of relevant documents and relevant testimony before the grand jury. Similarly, each important document can be summarized on computer to permit easier organization of evidence when preparing for trial.

In cases where it is not practical to computerize the document organization due to the cost or relatively small number of documents, the organization can be achieved through the use of file folders. For example, copies of all documents relating to a potential witness should be placed in that witness's folder.

During lengthy grand jury investigations, it may be very helpful to have staff members summarize lengthy documents and grand jury transcripts in a form that makes the information easily retrievable from the document or transcript, without having to read the entire record.

6. Marking Exhibits

Once documents have been identified as exhibits or potential exhibits for either grand jury or trial use, the originals should be pulled and replaced with copies. Additional copies should be made for courtroom or grand jury use as needed. In many districts, local practice permits the identifying number placed on the document early in the investigation to later serve as the grand jury exhibit number and the trial exhibit number. This avoids the necessity of renumbering or using exhibit stickers.

In instances where the document is not already numbered or local practice requires separate grand jury exhibit numbers, premarking of exhibits may not always be possible or advisable. Because the grand jury is an investigative proceeding, staff may not be able to anticipate a witness's testimony at this stage. Consequently, it may be necessary to mark the exhibits as they are used. Whenever they are marked, they should be identified for the record so that it is clear that the witness is testifying about that particular

document and no other. This is important if you subsequently need to impeach that witness with respect to his or her testimony about that document. It is also useful to refresh a witness's recollection.

The practice regarding the handling of grand jury exhibits varies widely. In some districts, the courts will require the removal of the grand jury exhibit sticker before the document is delivered to a trial jury or made public. In such a district, a) the grand jury exhibit sticker can be placed on a slip of paper or "post-it" note and then stapled to the document so it can be removed prior to trial, b) a copy can be used as the grand jury exhibit, or c) the identifying number Bates-stamped on the document early in the investigation can be used as the grand jury exhibit number.

Some attorneys attach a copy of the exhibit to the transcript of the witness who first discussed or identified it. It is best not to attach the original exhibit because it can be difficult to remember where it is located when it is needed at a later time. An alternative method is to keep all exhibits in separate numbered folders at one location, either in the grand jury room or in the document storage area. As exhibits are needed for subsequent grand jury sessions, they can be easily located and retrieved. Some prosecutors maintain the original exhibits in the document storage area and leave copies of each in the grand jury room so the originals do not have to be transported to each session.

In some districts, it is necessary to have all grand jury exhibits available at each session. In other districts, that is not necessary as long as the documents are easily retrievable upon request. Also, some prosecutors mark all documents discussed by a witness in the grand jury as grand jury exhibits; others do not, marking as grand jury exhibits only those which are read or published to the grand jury.

7. Computerized Document Control

Use of computers in complex litigation can help organize documents and retrieve information. Automated litigation support requires access to a computer, printer, and a computer program that provides the computer with

instructions, referred to as software. The computer size can range from a word processor with the ability to search multiple files to a mainframe computer.

The use of an appropriate computer, computer program, and assistance in data entry will be necessary if a case requires automated litigation support. Such assistance can be arranged in some instances through the investigative agency, such as the Federal Bureau of Investigation (FBI) or the Internal Revenue Service; through the United States Attorney's office or the Executive Office of United States Attorneys; through various Divisions, such as the Antitrust, Civil or Criminal Division; or with the assistance of a private vendor at Department expense. Because these systems can be very costly, it is imperative to have appropriate authorization before obtaining any support services or equipment from outside the Department.[240] If a private vendor is to be used, the prosecutor may need to obtain court authorization to release grand jury materials to named individuals who work for the vendor prior to the release of the information.[241] The individuals must also be placed on the Rule 6(e) list after receiving appropriate warnings about the necessity of maintaining grand jury secrecy.

a. Summary database

Litigation support systems vary widely. The most frequently used computer system involves the storage of summary information in the database. It is necessary for the staff, usually a paralegal or agent, to summarize the information contained in the document. For example, the date of the document, the type of document, the author, the addressee, the subject matter of the document, the name of the witness who would introduce the document at trial, and the name of people mentioned in the document may all be included. It is necessary for the summary to be entered into the computer, frequently by

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[240] Consult appropriate procedures in your office or Division for access to litigation support services. Antitrust Division Directive ATR 2850 (1987); Natural Resources Division Directive 27-90 (May 18, 1990); (similar procedures used in Criminal Division--directive awaits publication).

[241] United States v. Lartey, 716 F.2d 955, 963 (2nd Cir. 1983) (retired IRS employees deemed government personnel for purposes of Rule 6(e)). See generally, Chapter Four of this Manual.

clerical staff. If the above information is included, it becomes possible for the computer to search the database upon demand for a list of all documents mentioning the target, that were authored by a particular witness. It would also be possible to produce a chronological listing of all documents relating to a particular subject matter. Depending upon the sophistication of the program, more complicated searches can be accommodated.

In addition, with adequate programming the summaries can be expanded to include information from memoranda of interviews and grand jury transcripts, so that ultimately a computer-generated timeline results, listing all significant events and evidence in an investigation.

b. Full-text database

A second type of computer system is the full-text search and retrieval program. Utilizing this method, the entire text of each document is entered into the computer, by optical scanning or retyping. The computer searches the entire text of the documents. If optical scanning is utilized, it will be necessary to obtain the use of a scanner and possibly an additional printer. If the equipment is unavailable, private vendors can provide the service.[242]

Some full-text programs also call for brief summaries or indexes of the documents at the time the document is entered into the system. The indexing process can be time-consuming but enables the computer to dramatically speed requested searches. Full-text search capacity can be particularly useful when grand jury transcripts and/or civil depositions are entered into the system, either through optical scanning or machine-ready computer discs provided by the court reporter.

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[242] A Rule 6(e) disclosure order may be required to permit disclosure to the vendor.

c. Combination programs

Some software combines the summary database function and the full-text search capacity. These programs are expensive and often require computers with a great deal of storage capacity.

d. Various uses for computer programs

Listed below are examples of automated litigation systems that have been successfully used by Department attorneys.

a) As discussed above, information from documents (date, author, recipients, source, document number, document type, subject codes and/or brief descriptions of contents) create a document index database. Reports can be generated grouping all documents authored or received by a witness in chronological order; all documents related to a particular subject code; or in any useful grouping and order.

b) Telephone databases are created from selected calls appearing on the phone bills of targets. Reports can be generated showing telephone activity between target phone numbers by date. Because this is a particularly time-consuming analysis, it is recommended that a target's bills from a highly suspect period be processed on a test basis. Only if it appears that further analysis will be fruitful should larger sets of telephone bills be processed.

c) Summary digests of lengthy transcripts create a database which allow searching for subject and witness information. This can be particularly helpful in organizing voluminous civil depositions in a parallel proceeding and lengthy grand jury testimony.

d) Information from expense reports, credit card receipts, diaries, and airline tickets can be entered into the computer to create a database from which reports are generated showing the travel and expense history of a firm.

e) Information obtained from local, state, and federal agencies relating to contract bids create a bid tabulation database from which reports can be generated showing the bidding history of a particular firm.

f) Information from invoices, price lists, and rate schedules can create a price analysis database from which reports can be generated showing the effective price charged or paid by each company on a daily basis.

g) Full text transcript databases can be created from machine-readable copies of testimony provided by court reporters who employ adaptable systems.

h) Computer-generated graphics and computer simulations can be useful in making grand jury and courtroom presentations. Enlargements can be provided by the FBI graphics shop.

i) Financial data can be easily analyzed with the use of spreadsheet computer programs.

j) The initial screening of voluminous document productions has been accomplished by contract paralegals dictating objective descriptions on a box-by-box basis. Descriptions were then transcribed and KWIC (key word in context) listings and box digests provided for attorney review.

k) If only a simple reordering of information is required, information can be keyed in columns in a word-processing computer and sorted with word-processing software. Some invoice and pricing applications are well-suited to this simplified approach.

l) Occasionally, the information sought by subpoena will be stored on the witness's or target's computer.[243]

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[243] See, e.g., National Union Elec. Corp. v. Matsushita Elec. Industrial Co., 494 F. Supp 1257 (E.D. Pa. 1980) (in civil antitrust case, defendants successfully moved during pre-trial discovery to have plaintiff create a computer-readable tape of data that had been previously supplied by plaintiff in written form; court noted growing trend in federal courts to order broad production of computer materials); Daewoo Electronics Company, Ltd. v. United States, 650 F. Supp. 1003 (CIT 1986) (government required to disclose administrative record in form of computer tapes compatible with plaintiff's system.)

Frequently, it may be necessary to process computerized data obtained in machine-readable form on a mainframe computer, rather than a smaller personal computer.[244]

e. Advantages/caveats related to computer use

1. Time/cost considerations

The time and cost benefits of a computerized system are usually realized at the conclusion of the process. For example, a manual system which involves typing index cards and a computerized index system may require equal staff resources to implement. However, if properly implemented the computerized system will provide faster, more reliable retrieval of information. In addition, the computerized system will provide information based on more criteria and combinations of criteria than a manual system can usefully employ. The reports described above are examples of the useful tools generated by computer systems. The time and resources required to locate pertinent information are greatly reduced and information can be compiled in ways not possible with manual systems.

A computerized system requires attorney involvement in its design and implementation to ensure the ability to usefully retrieve information and to establish the applicability of the work-product privilege should post-indictment discovery of a system be sought by the defense. A computerized system usually will require substantial involvement of non-attorney personnel as well and, in large applications, non-government personnel. Training of appropriate staff members is required.

As with manual systems, overly ambitious projects may be completed too late in the investigation to be useful. It must be determined whether adequate

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[244] Consult the procedures in your office, Section and Division about obtaining access to the requisite computers. For example, staff members from the Antitrust Division's Information Systems and Support Group (ISSG), with the assistance of Division attorneys, have drafted a "Schedule of Documents" specifically for machine-readable data.

funds and staffing will be available during the time period needed. Since a computerized system is dependent on hardware and software reliability, attention to backup systems and reporting procedures is required.

Use of a computerized system requires discipline and planning. A system can result in the retrieval of information which was not considered significant at the beginning of an investigation. For example, all documents authored by witness James T. Smith may not appear vital to the investigation until Smith is identified as a target. Retrieval of those documents is precise only if all document authors are always entered in a standardized format, i.e., Smith, J.T. Not all projects are candidates for computerized systems. Many can be accomplished manually or with combinations of manual and limited computerized systems.

2. *Discovery of computerized systems*

If the computerized data is at issue in the case, the defendant may be granted access, pursuant to Fed. R. Crim. P. 16, for the purpose of challenging the credibility and reliability of the information and impeaching witnesses. United States v. Liebert, 519 F. 2d 542, 547 (3rd Cir. 1975).

When determining whether computerized litigation support systems are discoverable, courts have distinguished between systems which purely organize discoverable data and those that include the work product of attorneys, such as summaries of selected documents[245] and/or analysis of documents.[246] Because the work product privilege can successfully and properly block access

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[245] See Shelton v. American Motors Corp., 805 F.2d 1323, 1328-1329 (8th Cir. 1986); Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985).

[246] See In re IBM Peripherals EDP Devices Anti-Trust Litigation, 5 Computer Law Service Rep. 878 (N.D. Cal. 1975)(computerized trial support system containing summaries and analyses of documents not discoverable); United States v. AT&T, 642 F.2d 1285, 1298-1300(D.C. Cir. 1980).

to summary databases, federal prosecutors may wish to be involved in designing the system, and to submit summaries and documents for inclusion.[247]

C. Access to Documents By Owner

The subpoenaed party should be accorded reasonable access to his or her own documents, although he or she should not be permitted such access if to do so would seriously disrupt the grand jury proceedings. Generally, these matters can be negotiated by telephone. However, the subpoenaed party should put his or her request in writing and the agreed procedures for reviewing the records should also be in writing prior to making the records available.

In some cases it may be more practical for the government staff to provide copies of the documents, to avoid repeated review of documents. The cost of the copying should be negotiated. In other instances, the government may be able to make a copy machine available to the subpoenaed party.

Generally, the subpoenaed party will inspect the documents in the office of the United States Attorney for the district in which the grand jury is sitting or in a specially designated discovery room set up for this purpose in long-running, complex cases. An agent or member of the investigative team must be present at all times while the documents are being reviewed to ensure that no documents are removed or altered. Such supervision is vital in the event the defense later contends that important evidence was altered or removed from the discovery room.

Sometimes a dispute may develop regarding whether or not a subpoena recipient was accorded reasonable access to his or her documents. To meet such allegations, it is advisable to keep a record of the date(s) and time(s) of such access. This record should be maintained by the document custodian or document clerk in the prosecutor's your office or by someone who can, if

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[247] See generally R.C. Cook and S.O. Reed, "Discovery of Computerized Litigation Support Systems", 39 Trial Lawyer's Guide 38 for a detailed discussion of discovery issues relating to computerized litigation support systems.

necessary, testify on the subject. Clearly, the record should not be maintained by a staff attorney. The record should also include the date of the request(s) for access and a notation of any reasons why access was denied at that time.

D. Access to Documents by Third Parties

1. With the Owner's Consent

Not infrequently, parallel civil litigation will be instituted while the documents are in the custody of the grand jury and the civil litigants will make arrangements with the subpoenaed party to inspect his or her documents. Sometimes, investigations will be instituted by other government agencies involving the subpoenaed party and the subpoenaed party will arrange to have the documents examined by those agencies.

The prosecutor has a responsibility to provide a subpoenaed party/document owner with reasonable access to his or her documents. However, the prosecutor should control the timing and procedure used in order to ensure the subpoenaed party's requests for access do not delay or compromise the grand jury investigation. Within the time constraints and resource limitations of the investigative team, the subpoenaed party's request should be accommodated as soon as possible.

Methods used to provide access to documents varies. If the personnel is available, the investigative team can copy the requested documents and charge the requesting party for the service. However, where voluminous documents have been produced, it may not be practical to copy all the documents. In such cases, the requesting party may be willing to microfilm or optically scan all of the records. Otherwise, the documents are reviewed one-by-one with an agent present at all times.

If access to documents is going to be provided to a third party with the subpoenaed party's consent, the prosecutor should require a letter from the subpoenaed party authorizing the third party to review any and all documents

produced to the grand jury pursuant to a specific subpoena. If a corporation has gone into bankruptcy, the bankruptcy trustee can authorize review of the corporate documents by a third party.

The same procedures utilized to provide access to the owner of the documents should apply with authorized third parties. Make certain the third parties review no other documents and have the agents or document clerk keep a detailed log of the access provided. If the owner of the documents does not accompany the third party when the owner arrives to review the records, the prosecutor should require the third party to present identification.

In districts where subpoenaed documents are considered by the court to be Rule 6(e) materials, the better practice is to obtain authorization from the court for any third party review of documents, even when the owner has no objection.

2. *Without the Owner's Consent*

Because of the broad investigatory and subpoena power of the grand jury, persons outside the grand jury investigation may seek access to the documents compiled without the owner's consent.[248]

It is permissible to show certain subpoenaed documents to grand jury witnesses in the course of interviewing or questioning them. However, the source of the documents should not be revealed.[249] And disclosure of subpoenaed documents must be made to the defendant as required by discovery

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[248] In certain circumstances, document owners concerned about actual or potential disclosure of their documents to third parties without their consent have moved for a protective order or for sanctions against government personnel for violating Fed. R. Crim. P. 6(e). See Consumer Credit Agency, Inc. v. United States, 599 F. 2d 770 (6th Cir. 1979) (protective order); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980)(contempt).

[249] See Chapter Four of this Manual.

rules, statutes and case law. [250] However, in some districts, the court requires court authorization before release of Rule 6(e) materials to the defendant. Be sure to check the local practice.

The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3420(a)(4), requires that records subpoenaed from financial institutions be accorded protection as Rule 6(e) material.[251] Transfer of records obtained pursuant to the Act among agencies may only be made when the transferring agency provides written certification that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. 12 U.S.C. § 3412(a). The certification must be served on the owner of the records within 14 days, unless a court order authorizing a delay in notification is obtained. 12 U.S.C. § 3412(b) and (c).

However, in 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), creating 18 U.S.C. § 3322, which permits disclosure of grand jury information concerning banking law violations in certain circumstances. Section 3322(a) permits disclosure without a court order to a government attorney for the purpose of enforcing FIRREA's civil penalties or asset forfeiture provisions. Section 3322(b) permits disclosure of grand jury information to financial institution regulatory personnel upon petition of a Department attorney and a court determination of "substantial need."[252]

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[250] See Fed. R. Crim. P. 6(e)(3)(C)(ii), 16; 18 U.S.C. § 3500 (the Jencks Act); and Brady v. Maryland, 373 U.S. 83 (1963).

[251] 18 U.S.C. § 3420(a)(1) also requires that records be presented to the grand jury, unless their volume makes such return impractical, in which case a summary may be presented. Prior to the 1988 amendment one district court had quashed subpoenas because of the lack of presentation. The only circuit to consider the issue held that failure to present the records to the grand jury would not justify their suppression at trial. United States v. Kington, 801 F.2d 733, 736-737 (5th Cir. 1986), cert. denied 481 U.S. 1014 (1987).

[252] The legislative history establishes that Congress intended that the "substantial need" standard in fact be more lenient than the "particularized need" standard normally applied pursuant to Fed. R. Crim. P. 6(e). Moreover, the agency may use the material in a regulatory proceeding, rather than in a judicial proceeding as otherwise specified in Baggot. Congress determined that in connection with the banking-related offenses, a court would not be able to deny disclosure merely because the agency may have alternative discovery tools available to it. See 135 Cong. Rec. HR 5294 (daily ed. Aug. 4, 1989). Instead, Congress suggested that courts consider a number of factors in connection with such orders, including:

(continued...)

Beyond the situations described above, any government attorneys or private litigants seeking access to grand jury materials and/or subpoenaed documents must obtain an order from the court after demonstrating a strong "particularized need" for the materials pursuant to Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979) and United States v. Sells Engineering, 463 U.S. 418, 443 (1983).[253]

In general, it is Department policy that grand jury exhibits and documents produced pursuant to grand jury subpoena that are within the scope of Rule 6(e) are not subject to the disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. §552 et seq.[254] Obviously, the secrecy of the grand jury would be severely compromised if grand jury documents could be routinely obtained by FOIA requests. Exemption 3(a) of FOIA has been

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[252](...continued)
(1) the public interest served by disclosure, particularly the protection of the public health or safety or the safety or soundness of a federally insured financial institution; (2) the burden or cost of duplicating the grand jury investigation; (3) the potential unavailability of witnesses; (4) the fact that the department or agency already has a legitimate independent right to the materials; (5) the avoidance of unnecessary inefficiency or waste of resources; (6) the need to prevent ongoing violations of law; and (7) the expiration of an applicable statute of limitations. See 135 Cong. Rec. S2396 (daily ed. March 8, 1989).

Because Congress stated it did not intend that the court become a rubber-stamp for the prosecutor, the Justice Department attorney must make more than a showing of mere convenience or simple relevance to matters within the agency's jurisdiction. Accordingly, the Justice Department attorney should carefully draft § 3322 orders, after receiving from the regulatory agency a detailed accounting and explanation of the need for and proposed use of the material. The order should name the principal regulatory personnel, specify the authorized use permitted in connection with their regulatory jurisdiction, and set appropriate limits upon future disclosure by the regulatory agency. Department policy permits the order to be submitted by any Department attorney authorized to be in the possession of the grand jury information. In some instances, therefore, the order may be drafted by a civil or asset forfeiture attorney in possession of the information pursuant to § 3322(a).

[253] See Chapter Four of this Manual.

[254] See, e.g., Fund for Constitutional Gov. v. National Archives, 656 F.2d 856, 868 (D.C. Cir. 1981); Thomas v. United States, 597 F.2d 656, 657 (8th Cir. 1979); Librach v. FBI, 587 F.2d 372, 373 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979).

construed to exempt Rule 6(e) materials from disclosure.[255] In addition, other exemptions of FOIA frequently apply to grand jury documents. For example, the Supreme Court has held that FOIA's Exemption 7, protecting records "compiled for law enforcement purposes," barred production of certain documents gathered pursuant to a grand jury subpoena.[256] Exemption 7 also protects from disclosure documents that could reasonably be expected to reveal the identity of a confidential source during the course of the investigation,[257] and documents that indicate the name of an individual who was investigated for suspected criminal activity but was not indicted.[258]

E. Return of Documents

Documents lawfully obtained during a grand jury investigation are normally maintained until either the investigation is concluded and no indictment is returned; all appellate rights have been exhausted following criminal prosecution; or until the conclusion of any civil action arising out of the grand jury proceedings.

It is well settled that "[D]ocuments, records or papers produced in obedience to a subpoena duces tecum remain the property exclusively of the person who produces them and they must be returned to him as soon as proper use and examination of them for the purpose for which they were summoned

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[255] See, e.g., Fund for Constitutional Gov. v. National Archives, 656 F.2d 856, 867-870. But see Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 581 (D.C. Cir. 1987)(Rule 6(e) and FOIA Exemption 3(a) protect only those records that would reveal the inner workings of the grand jury).

[256] 5 U.S.C. § 552(b)(7); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); See Landano v. Department of Justice, 956 F.2d 422 (3rd Cir. 1992).

[257] Nadler v. Department of Justice, 935 F.2d 1479, 1484 (11th Cir. 1992).

[258] See, e.g., Fund for Constitutional Gov. v. National Archives, 656 F.2d at 863-865.

has been completed." In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D. N.Y. 1945).[259]

A subpoenaed party can demand the return of his documents at the conclusion of the grand jury investigation or at the conclusion of any criminal proceedings arising from the investigation. If an impoundment order was not obtained at the beginning of the investigation authorizing the government to retain the documents until all appellate rights of the accused have been exhausted, it may be necessary to obtain such a court order following a demand for the return of documents.

Copies of subpoenaed documents may be made by the government and retained.[260] However, if the subpoenaed documents were obtained by an illegally constituted grand jury, the government may have to return the copies.[261]

It is Department policy to return or destroy subpoenaed documents when they are no longer of use to the Department, even absent a specific request for the return of the records from the document owner.[262] This general policy is in accord with the Right to Financial Privacy Act, 12 U.S.C. §§ 3420 (a)(3), which mandates either return to the respondent or destruction of documents provided by a financial institution, as defined by the Act. Certain districts require court authorization before subpoenaed documents are returned or destroyed.

When the documents are to be returned, the staff should contact the subpoena recipient and make appropriate arrangements. Some subpoenaed parties may not want the documents back and will authorize the staff to shred

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[259] United States ex re. Woodard v. Tynan, 776 F.2d 250, 252 (10th Cir. 1985); United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983); United States v. Kosovsky, 506 F. Supp. 43, 44 (W.D. Okl. 1980); United States v. Halper, 470 F. Supp. 103, 105 (S.D. N.Y. 1979); United States v. E.H. Koester Bakery Company, 334 F. Supp. 377, 381 (D. Md. 1971).

[260] United States v. Ponder, 444 F.2d 816, 818 (1971); United States v. General Electric, 211 F. Supp. 641, 642 (E.D. Pa. 1962); Maryland and Virginia Milk Producers Ass'n v. United States, 250 F.2d 425, 426 (D.C. Cir. 1957); In re Petroleum Indus. Investigation, 152 F. Supp. 646, 647 (E.D. Va. 1957).

[261] See United States v. Wallace & Tiernan Co., 336 U.S. 793, 800 (1949).

[262] See USAM 9-2.162.

or otherwise destroy them. However, most respondents will request the return of their documents. Some respondents may want to pick them up. Others will accept return by mail. The staff should keep accurate records of the date and method of return for each subpoena.

Chapter Three

INDICTMENT AND INFORMATION

I. Distinction Between Indictment and Information

Indictments and informations are written, formal criminal charges on which the accused is brought to trial. Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that the indictment or information be a "plain, concise and definite written statement of the essential facts constituting the offense charged." An offense punishable by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, unless indictment is waived, in which case it may be prosecuted by information.[263] An information may be used where the offense charged is punishable by one year

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[263] Fed. R. Crim. P. 7(a). The Ninth Circuit has held that an indictment need not be returned against a corporation since the corporation can be punished only by fine. United States v. Armored Transp., Inc., 629 F.2d 1313, 1317-20 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The court reasoned that a crime punishable only by fine is not an "infamous crime" within the meaning of the Fifth Amendment. Accord United States v. Yellow Freight Systems, Inc., 637 F.2d 1248, 1253-55 (9th Cir.), cert. denied, 454 U.S. 815 (1980). The Ninth Circuit is the only circuit to have adopted this approach.

or less.[264] Where several misdemeanor offenses are charged in separate counts, the fact that the aggregate penalty upon conviction may exceed one year does not necessitate prosecution by indictment.[265]

In order to proceed by information where an indictment would otherwise be required, a waiver of indictment must be obtained from the defendant in open court after he has been advised of the nature of the charge and of his rights. A written waiver form should be executed by the defendant.[266] While indictments must be returned by a grand jury,[267] informations may be returned by the United States Attorney's Office on its own authority.

The language of an information differs from an indictment only slightly. The opening sentence of the information should read "The United States Attorney charges" rather than "The Grand Jury charges". An information will not contain a signature line for the grand jury foreperson.

The prosecuting attorney, rather than grand jury, files the information with the presiding judge or magistrate.[268] If the prosecutor wants an arrest warrant to issue based upon the information, Rule 5 of the Federal Rules of Criminal Procedure requires either that the information be signed under oath or that the information be accompanied by an affidavit.

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[264] Duke v. United States, 301 U.S. 492, 494-495 (1937); United States v. Brewer, 681 F.2d 973, 974 (5th Cir. 1982).

[265] United States v. Johnson, 585 F.2d 374, 377 (8th Cir.), cert. denied, 440 U.S. 921 (1978); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978).

[266] Courts have held that it is permissible for the written waiver form to be executed and filed with the court prior to the defendant's appearance in open court, and even prior to the actual filing of the information, but this practice is not recommended. See Young v. United States, 354 F.2d 449, 452 (10th Cir. 1965), cert. denied, 384 U.S. 912 (1966); Ching v. United States, 292 F.2d 31, 32 (10th Cir. 1961); United States v. East, 5 F.R.D. 389 (D. Ind. 1946) (information filed in E.D. Pa.; waiver of right to indictment thereafter executed in N.D. Ind., pursuant to Rule 20).

[267] Fed. R. Crim. P. 6(f)

[268] In some districts informations are presented by the prosecutor to the Clerk of the Court. Filing does not occur until the defendant waives prosecution by indictment pursuant to Fed. R. Crim. P. 7 (b).

It is not necessary for the grand jury to have any involvement in the return of an information, but if the grand jury has been conducting the investigation, the prosecuting attorney should usually inform the grand jury when an information has been filed. Often, this occurs when the defendant is testifying before the grand jury under the terms of the plea agreement. The grand jury should be advised that the information is the product of their hard work.

When an information is filed against a corporation, the waiver of indictment must be executed by an officer empowered to act for the corporation. The proof necessary to show that the officer is so empowered varies from district to district. Some judges will require written confirmation of a vote by the board of directors authorizing the officer to execute the waiver of indictment and to enter any accompanying plea. This practice is recommended given the sanctions which may be imposed upon corporations, particularly financial institutions. See 31 U.S.C. §§1503, 1504 (eff. 10/28/92).

II. Function and Purpose of an Indictment or Information

The Sixth Amendment provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation . . ." Fed. R. Crim. P. 7(c)(1) gives effect to these requirements by providing the following:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or

> customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.

The indictment or information is the initial pleading filed by the government in criminal litigation.[269] It should set forth the facts evidencing the elements of the offense sought to be charged. Each indictment will require a varying amount of factual detail. For simple cases, the indictment may consist of only one paragraph which alleges the date, place, and elements of the offense.[270] For more complex cases, particularly where a scheme is alleged, the indictment should describe the offenses and the roles played by each defendant.

The prosecutor's goal in drafting an indictment is to tell the government's story in a simplified and persuasive manner, keeping in mind that the document itself will be seen and scrutinized by the trial judge, the jury, defense counsel, the probation officer and the appellate courts.

The indictment must adequately apprise the defendant of what he must be prepared to meet at trial. Further, the indictment serves as one measure for determining a defendant's Fifth Amendment privilege against double jeopardy. The factual record developed in the first trial is also taken into account in any subsequent double jeopady analysis. Grady v. Corbin, ___ U.S. ___, 110 S.Ct 2084 (1990). The indictment must contain sufficient detail to permit the defendant to understand the nature of the charges against him, to prepare a defense, and to invoke the double-jeopardy provision of the Fifth Amendment, if appropriate. Russell v. United States, 369 U.S. 749, 763-772 (1962).

In reviewing the sufficiency of an indictment, the courts will construe the document as a whole to ascertain whether the foregoing requirements have been met.[271] An indictment is likely to be found legally sufficient if it describes with reasonable particularity the acts or practices alleged to constitute the offense. What is required are factual allegations rather than a simple recitation

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[269] Another method of initiating criminal litigation is by filing a complaint. Fed. R. Crim. P. 3.

[270] See, e.g., United States v. Peterson, 867 F.2d 1110, 1114 (8th Cir. 1989).

[271] United States v. Hand, 497 F.2d 929, 934-935 (5th Cir. 1974), cert. denied, 424 U.S. 953 (1976); Moore's Federal Practice ¶ 7.04 (1982).

of the acts or practices proscribed by the law allegedly violated. There is no requirement, however, that the indictment set forth the government's evidence to support the factual allegations, or describe in detail the contents of any documents to which reference may be made.[272]

III. Limitation on Naming Unindicted Co-Conspirators

The Department strongly discourages, and the courts have severely criticized, the practice of naming individuals as unindicted co-conspirators in an indictment.[273] The basis for this policy is that the person named, but not indicted, does not have the opportunity to defend himself against the formal accusation. There is no legitimate prosecutorial need to name such a person in the indictment. The indictment can allege merely that the defendant "conspired with another person or persons known to the grand jury," and the identity can be supplied, if requested, in a bill of particulars.[274]

However, the policy against naming unindicted co-conspirators does not apply where the fact of the person's conspiratorial involvement is a matter of public record or knowledge, where the person has been charged separately, for example, for participating in the same criminal activities.

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[272] See Brown v. United States, 143 F. 60, 65 (8th Cir.), cert. denied, 202 U.S. 620 (1906); United States v. Mobile Materials, Inc., 871 F.2d 902, 906-910 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, __ U.S.__ (1990); but see United States v. Nance, 533 F.2d 699, 701 (D.C. Cir. 1976) (where indictment charging theft of money by false pretenses listed name of victim, date of false representation, loss to victim and date money was paid to defendant, but did not specify the false representation that induced victims to pay money, it was fatally defective).

[273] USAM 9-11.130. United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977); United States v. Briggs, 514 F.2d 794-797, 808 (5th Cir. 1975); Application of Jordan, 439 F. Supp. 199, 202 (D. W.Va. 1977).

[274] See United States v. Mannino, 480 F. Supp. 1182, 1185 (S.D. N.Y. 1979); United States v. Hubbard, 474 F. Supp. 64, 82 (D.D.C. 1979); United States v. Fine, 413 F. Supp. 740, 746 (W.D. Wis. 1976). But see United States v. Lobue, 751 F. Supp. 748, 756 (N.D. Ill. 1990) (defendants in RICO prosecution not entitled to names of unindicted co-cospirators where names were not required for defendants to understand nature of extortion and bribery charges).

IV. Duplicitous Indictments

Indictments charging two or more distinct offenses in a single count are duplicitous.[275] Such indictments may fail to give defendants adequate notice of the nature of the charges against which they must defend. Duplicitous indictments also hinder a defendants ability to plead prior convictions or acquittals as a bar to a subsequent prosecution for the same offense.[276] Duplicitous indictments may also prevent the jury from deciding guilt on each offense separately and lead to uncertainty as to whether the defendant's conviction was based on a unanimous jury decision.[277] A single count of an indictment alleging that the means used by the defendant to commit an offense are unknown or that the defendant committed the offense by more than one specified means is not duplicitous.[278]

Since the rule prohibiting duplicity is a rule of pleading, a violation is generally not fatal to the indictment.[279] The government may correct a

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[275] United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); United States v. Wood, 780 F.2d 955, 962 (11th Cir.) (indictment in question struck appropriate balance and not duplicitous), cert. denied, 476 U.S. 1184 (1986); see United States v. Kimberlin, 781 F.2d 1247, 1250-51 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986); cf. United States v. Morse, 785 F.2d 771, 774 (9th Cir.), cert. denied, 476 U.S. 1186 (1986); United States v. Hawks, 753 F.2d 355, 357-58 (4th Cir. 1985); United States v. Alvarez, 735 F.2d 461, 465 (11th Cir. 1984); Fed. R. Crim. P. 7(c)(1).

[276] See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774.

[277] See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774; cf. United States v. Margiotta, 646 F.2d 729, 732-33 (2d Cir. 1981) (dictum), cert. denied, 461 U.S. 913 (1983).

[278] See, e.g., United States v. Acosta, 748 F.2d 577, 579 (11th Cir. 1984); United States v. UCO Oil Co., 546 F.2d 833, 838 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

[279] See Wright, Federal Practice and Procedure: Criminal (2d ed. 1982) § 142, at 475; United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); United States v. Droms, 566 F.2d 361, 363 n.1 (2d Cir. 1977).

exist if each count of the indictment requires proof of facts that the other counts do not require.[286] When deciding whether an indictment is multiplicitous, courts must consider whether Congress unambiguously intended to create separate offenses with the possibility of multiple convictions and cumulative punishment for the same conduct.[287] Since the rule prohibiting multiplicity is a rule of pleading, the defect is not necessarily fatal to the indictment.[288] When multiplicity becomes apparent before trial, the court may order the government to choose the count on which it will proceed.[289] The court may require the government to dismiss or consolidate multiplicitous counts when the violation becomes apparent after the trial has begun.[290] A multiplicitous indictment will not necessarily be dismissed after trial, especially if the counts are merged for the purpose of imposing sentence and do not result in an increased sentence, or if the court vacates the convictions affected by the

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[285](...continued)
United States v. Brown, 688 F.2d 1112, 1120 (7th Cir. 1982) (rejecting claim that allowing multiplicitous indictments to go to jury exaggerated defendant's alleged criminality).

[286] See Lovgren v. Byrne, 787 F.2d 857, 863 (3d Cir. 1986); United States v. Marquardt, 786 F.2d 771, 778-779 (7th Cir. 1986); United States v. Maggitt, 784 F.2d at 599; United States v. Roberts, 783 F.2d 767, 769 (9th Cir. 1985); see also United States v. Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985).

[287] See United States v. Woodward, 469 U.S. 105, 109 (1985); Albernaz v. United States, 450 U.S. 333, 336 (1981); United States v. Grandison, 783 F.2d 1152, 1156 (4th Cir. 1986); United States v. Kimberlin, 781 F.2d at 1252; United States v. Wilson, 781 F.2d 1438, 1439-40 (9th Cir. 1986) (per curiam); see also United States v. Long, 787 F.2d 538, 539 (10th Cir. 1986) (ambiguity in definition of offense must be evaluated against turning a single transaction into multiple offenses); cf. United States v. Woodward, 469 U.S. 105, 108-10 (1985) (per curiam) (no indication of congressional intention not to allow separate punishment for distinct offenses of making false statements to federal agency and intentionally failing to report the transportion over $5,000 into country); United States v. Shaw, 701 F.2d 367, 396-397 (5th Cir. 1983) (in absence of congressional directive indicating otherwise, defendant can be charged and convicted of two separate offenses resulting from one action provided each offense requires proof of fact not necessary to other), cert. denied, 465 U.S. 1067 (1984).

[288] See generally Wright, § 142, at 475.

[289] Id. § 142, at 525; see United States v. Anderson, 709 F.2d 1305, 1306 (9th Cir. 1983), cert. denied, 465 U.S. 1104 (1984).

[290] See United States v. Molinares, 700 F.2d 647, 653 n.11 (11th Cir. 1983).

duplicitous indictment by electing the basis upon which it will continue.[280] A corrective instruction to the jury may also cure the violation.[281] A duplicitous indictment, however, that is found prejudicial to the defendant may be dismissed.[282] By failing to challenge a duplicitous indictment before trial, a defendant risks waiver.[283]

V. Multiplicitous Indictments

Indictments charging a single offense in different counts are multiplicitous.[284] Such indictments may result in multiple sentences for a single offense or otherwise prejudice the defendant.[285] Multiplicity does not

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[280] Wright, supra., § 145, at 523; cf. United States v. Elam, 678 F.2d 1234, 1251 (5th Cir. 1982) (when duplicity objection not raised in timely manner, defendant's motion to require Government to elect between two conspiracy statutes properly denied).

[281] See United States v. Kimberlin, 781 F.2d at 1251; United States v. Moran, 759 F.2d 777, 784 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); United States v. Wood, 780 F.2d 955, 962 (11th Cir.), cert. denied 476 U.S. 1184 (1986).

[282] See United States v. Bowline, 593 F.2d 944, 947-48 (10th Cir. 1979); cf. United States v. Drury, 687 F.2d 63, 66 (5th Cir. 1982), cert. denied, 461 U.S. 943 (1983); United States v. Kimberlin, 781 F.2d 1247, 1250-51 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986).

[283] Fed. R. Crim. P. 12(b)(2); see United States v. Mosley, 786 F.2d 1330, 1333 (7th Cir.), cert. denied, 474 U.S. 1004 (1986); United States v. Leon, 679 F.2d 534, 539 (5th Cir. 1982); cf. United States v. Kimberlin, 781 F.2d at 1251-52 (considering post-trial challenge to duplicitous indictment, court applied practical, not "hypertechnical," standard); United States v. Price, 763 F.2d 640, 643 (4th Cir. 1985) (dictum) (holding that appellant waived right to challenge duplicitous indictment by failure to raise claim before trial, but indicating that for proper showing of cause, consequences of waiver might be relieved).

[284] See Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Maggitt, 784 F.2d 590, 599 (5th Cir. 1986); United States v. Love, 767 F.2d 1052, 1062-63 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); United States v. Swingler, 758 F.2d 477, 491-92 (10th Cir. 1985); United States v. Pierce, 733 F.2d 1474, 1476 (11th Cir. 1984); United States v. Gann, 732 F.2d 714, 721 (9th Cir.), cert. denied, 469 U.S. 1034 (1984).

[285] See United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986); United States v. Gullett, 713 F.2d 1203, 1211-12 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984). But see

(continued...)

However, it is permissible to correct obvious clerical errors in indictments, or to delete surplusage.[295] Courts have also allowed changes to the indictment amending date,[296] location of offense,[297] names,[298] and other technical matters.[299] If the proper statute is not cited in the indictment and the government's proof establishes another violation, the indictment is not defective unless the defendant is misled.[300] Where a defendant seeks to delete surplusage from an indictment, the defendant must make the request to the court by motion.[301]

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[295] It is permissible for the government to narrow the scope of a conspiracy charge by eliminating one or more objects of the conspiracy. United States v. Miller, 471 U.S. 130, 143 (1985); United States v. Diaz, 690 F.2d 1352, 1356 (11th Cir. 1982).

[296] United States v. Nicosia, 638 F.2d 970, 976 (7th Cir. 1980) (changing date from August 20, 1977 to October 20, 1977); United States v. Buble, 440 F.2d 405, 406 (9th Cir.) (indictment stating that a 1963 tax return was filed in 1963 and that a 1964 tax return was filed in 1964 changed to reflect the correct years of filing as 1964 and 1965, respectively), cert. denied, 404 U.S. 828 (1971);

[297] United States v. Stith, 479 F.2d 315, 317 (8th Cir. 1973) (correcting location of bank which was victim of embezzlement from St. Louis City to St. Louis County was permissible).

[298] United States v. Kegler, 724 F.2d 190, 193-195 (D.C. Cir. 1984) (name of payee on forged checks changed from "Angela Mateer" to "Andrea Mateer"); United States v. Janoe, 720 F.2d 1156, 1160-1161 (10th Cir. 1983) (name of insuring agency of bank changed from "Federal Deposit Insurance Corporation" to "Federal Savings and Loan Insurance Corporation").

[299] United States v. Powers, 572 F.2d 146, 152 (8th Cir. 1978) (the words "30-30 caliber revolver" properly amended to read "30-30 caliber rifle").

[300] United States v. Garner, 529 F.2d 962, 966 (6th Cir. 1976).

[301] See Rule 7(d), Federal Rules of Criminal Procedure.

multiplicitous counts.[291] The defendant risks waiver by failing to challenge a multiplicitous indictment before trial.[292] The court may grant relief from waiver, however, for good cause.[293]

VI. Amendment of an Information

Since an information is prepared by the prosecuting attorney, it can be amended with leave of court at any time before a verdict is rendered, provided no additional or different offense is charged and no substantial rights of the defendant are prejudiced. [294]

VII. Amendment of an Indictment

The general rule is that an indictment may not be amended except by resubmission of the case to the grand jury. A substantive amendment to the indictment deprives the defendant of the Fifth Amendment right to be tried only on those offenses contained in an indictment returned by a grand jury. Stirone v. United States, 361 U.S. 212, 217-219 (1960).

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[291] See United States v. Long, 787 F.2d at 540; United States v. Fiallo-Jacome, 784 F.2d 1064, 1067 (11th Cir. 1986); United States v. Kimberlin, 781 F.2d at 1254; United States v. Wilson, 721 F.2d 967, 971 (4th Cir. 1983); United States v. Lewis, 716 F.2d 16, 23 (D.C. Cir.), cert. denied, 464 U.S. 996 (1983).

[292] Fed. R. Crim. P. 12(b)(2); see United States v. Price, 763 F.2d 640, 643 (4th Cir. 1985) (dictum); United States v. Mosely, 786 F.2d 1330, 1333 (7th Cir. 1982), cert. denied, 474 U.S. 1004 (1986) (dictum); United States v. Mastrangelo, 733 F.2d 793, 800 (11th Cir. 1984).

[293] Fed. R. Crim. P. 12(f); see United States v. Marino, 682 F.2d 449, 454 n.3, 455 (3d Cir. 1982).

[294] Fed. R. Crim. P. 7(e). See United States v. Manos, 340 F.2d 534, 536 (3rd Cir. 1965); United States v. Peach Mountain Coal Min. Co., 161 F.2d 476, 477 (2d Cir. 1947); United States v. Nitti, 733 F. Supp. 496, 497-498 (D.P.R. 1990).

VIII. Pre-Indictment Procedures

A. Target Notifications and Meetings With Opposing Counsel

During the course of a grand jury investigation, the prosecutor should consider whether to inform counsel for potential defendants of the status of the investigation. This can be useful in determining the existence of potential defenses which you may not have considered. In addition, this notification can serve as a vehicle for initiating pre-indictment plea negotiations. In most instances, this notification is accomplished by sending potential defendants or their counsel a letter identifying the individual or entity as a target of the investigation, i.e., one who may be considered for indictment.

Notifying counsel of his client's potential status serves two purposes: first, it advises counsel that his client may be able to appear before the grand jury voluntarily, without immunity, if desired; and, second, it provides counsel with notice that this is the time to meet with the prosecution team to make whatever arguments seem appropriate before a final decision concerning indictment is made.

B. United States Attorney's Signature

Rule 7(c) of the Federal Rules of Criminal Procedure specifies that an indictment "shall be signed by the attorney for the government." In relevant part, Rule 54(c) defines "attorney for the government" to include the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, and an authorized assistant of a U.S. Attorney. This provision recognizes that the prosecutor makes the final decision whether or not to prosecute. If the attorney for the government refuses to sign, there is no indictment. United States v. Cox, 342 F.2d 167, 171-172 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

C. Grand Jury Review of Testimony/Documents

Before the last session with the grand jury, the prosecutor should ensure that all document subpoenas have been fully complied with. If witnesses have not produced documents, the prosecutor should insist upon production prior to the return of the indictment to avoid any basis for a motion to dismiss the indictment because of post-indictment abuse of the grand jury process. Once an indictment is returned and the grand jury has completed its role in the investigation, the grand jury subpoena should be considered invalid.[302] If the subpoenaed documents are not immediately necessary to the case, the prosecutor can consider whether to obtain the documents after indictment through the use of a trial subpoena issued pursuant to Fed. R. Crim. P. 17(c), accompanied by a court order directing pre-trial production of the documents.

Although it is not required, the prosecutor may wish to have in the grand jury room on the day the grand jury considers the proposed indictment all transcripts of testimony that are relevant to the indictment and all relevant grand jury exhibits. The prosecutor should advise the grand jury on the record that all the transcripts and exhibits are available for review by the grand jurors upon their request. This will establish two important facts. First, that the accurate record of the testimony itself was available to the grand jury so they were not operating solely on the basis of the prosecutor's summary of the evidence when returning the indictment. Second, it establishes that any juror who may have missed some portion of the live testimony had access to the transcript of proceedings prior to voting on the indictment. This will help neutralize a post-indictment attack on the indictment based upon the allegation that some jurors who voted on the indictment did not hear all of the evidence. Such an attack should be unsuccessful in any event, since an indictment is valid even though some jurors voting to indict did not attend every session.[303]

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[302] If the grand jury is continuing to investigate crimes or targets not covered by the indictment, however, and the subpoenaed records are relevant to that investigation, they may be returned to the grand jury during the course of its investigation.

[303] Neither the U.S. Constitution nor the Federal Rules of Criminal Procedure require that all jurors voting to indict be present at every session. An indictment is valid if a quorum is present and at least 12 jurors vote to indict. See United States ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir.), cert. denied, 323 U.S. 790 (1944); United States v. Provenzano, 688 F.2d 194, 202-03 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Mayes, 670 F.2d 126, 128-29 (9th Cir. 1982); United States v. Cronic, 675 F.2d 1126, 1130 (10th Cir.

D. Summary of the Evidence

The evidence should be summarized for the grand jury prior to the indictment. The preferred method of providing this summary is by questioning the case agent, although it can also be done by the prosecutor in some districts.[304]

The summary must be accurate and the prosecutor should remind the jurors that it is their recollection, not the summary, that controls. The summary should include the facts marshalled against each defendant, and the prosecutor should remind the jurors of any inconsistent or exculpatory evidence they have heard.

E. Summary of Law

The prosecutor should cover the elements of the offenses charged in the indictment and the standard of proof -- probable cause to believe an offense has been committed by the prospective defendants -- that covers the return of an indictment. When referring to the elements of the offense and any other question of law, the prosecutor should use the case law and approved instructions of the circuit in which the indictment is to be returned. Note, however, that even if improper instructions are given, the indictment is not invalidated.[305] In all comments to the grand jury, the prosecutor should be guided by principles of fairness and the knowledge that all statements are being recorded. If the prosecutor's comments to the grand jury are reviewed by a court, it is important that the government be in a position to demonstrate that everything said was correct and that none of the comments were inflammatory or prejudicial.

1982), rev'd on other grounds, 466 U.S. 648 (1984).

[304] See Chapter One of this Manual; United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957).

[305] United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976).

F. Presentation of Indictment

The original indictment should be left with the grand jurors for their deliberation. No one other than the jurors, not even the court reporter, is to be present during deliberation.[306]

Fed. R. Crim. P. 7(c)(1) states the indictment "shall be signed by the attorney for the government." It does not state when the indictment should be signed. In some jurisdictions the prosecutor obtains all the appropriate signatures before presentation to the grand jury. In some jurisdictions the grand jury is presented with a substitute final page that contains only the signature line for the grand jury foreperson, even though courts have regularly held that presentation of a signed indictment to the grand jury is insufficient ground for dismissal.[307] In other jurisdictions the entire indictment is presented, unsigned, to the grand jury. Only after the foreperson signs the indictment is it signed by the attorney for the government.

Before leaving the grand jury to begin their deliberations, the prosecutor should inquire whether there are any questions. Legal questions may be answered by the prosecutor. Colloquy between the prosecutor and the grand jurors on the record regarding the form of the indictment, the number of counts in the indictment, and the number of defendants is permitted.[308] If questions arise as to factual matters, a witness should be called to testify, or the grand jury may be referred to a particular transcript or exhibit. The prosecutor should advise the foreperson to call the prosecutor back into the grand jury room if any problems arise during deliberations that the prosecutor may be able

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[306] Fed. R. Crim. P. 7(d).

[307] United States v. Brown, 684 F.2d 841, 842 (11th Cir. 1982); United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Climatemp, Inc., 482 F. Supp. 376, 386 (N.D. Ill. 1979); United States v. Tedesco, 441 F. Supp. 1336, 1342 (M.D. Pa. 1977). But see United States v. Gold, 470 F. Supp. 1336, 1354-55 (N.D. Ill. 1979) (a signed indictment shown to or in some way made known to the grand jury cited as one of many reasons for dismissal of an indictment due to prosecutorial abuse). Gold has been labeled "an unusual decision" in the case In re November 1979 Grand Jury, 616 F.2d 1021, 1023 (7th Cir. 1980).

[308] United States v. McKenzie, 678 F.2d 629, 634 (5th Cir. 1982) (interplay between prosecutors and grand jury expected after grand jury advised prosecutors it wished to see an amended indictment).

to resolve. If the grand jury has any questions once they have begun their deliberations, the prosecutor should carefully state that the prosecutor does not want the question in any way to indicate the status of their deliberation or any kind of head-count as to where the deliberation stands. And, of course, any colloquy between the prosecutor and the grand jurors must be recorded. Answering questions once deliberations have begun would seem to be consistent with the prosecutor's role as the "guiding arm of the grand jury."[309]

Rule 6(f) requires concurrence of 12 jurors for the return of a true bill. The existence of a proper vote is determined from the record kept by the foreperson or other designated grand juror filed with the clerk of the court pursuant to Rule 6(c). This record, according to Rule 6(c), "shall not be made public except on order of the court." There need not be a separate vote on each count of the indictment.[310] However, sound practice suggests that there be a recorded vote as to each court or to each defendant. It is not necessary that the record disclose that 12 or more grand jurors concurred on each count for each defendant.[311] After return of the indictment, it shall be signed by the foreperson or deputy foreperson.[312] The foreperson's signature attests that the bill is an official act of the grand jury (a "true bill"). Failure of the foreperson to sign or endorse the indictment is an irregularity but is not fatal.[313]

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[309] See United States v. Singer, 660 F.2d 1295, 1303 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

[310] United States v. Felice, 481 F. Supp. 79, 82 (N.D. Ohio), aff'd, 609 F.2d 276 (6th Cir. 1978); United States v. Winchester, 407 F. Supp. 261, 278 (D. Del. 1975).

[311] United States v. Bally Mfg., 345 F. Supp. 410, 421 (E.D. La. 1972).

[312] Fed. R. Crim. P. 6(c).

[313] Hobby v. United States, 468 U.S. 339, 344 (1984) (citing Frisbie v. United States, 157 U.S. 160, 163-165 (1985)); see also Notes of Advisory Committee of Rules, Note 1 to Subdivision (c), 6.

G. Return of Indictment in Court

The grand jury returns the indictment to a federal magistrate in open court.[314] The jurors usually accompany the foreperson into court so that the court may inquire whether the jury concurs in the indictment. How this is done, however, will depend upon local practice.

IX. Re-presentation

Rule 6(e)(3)(c)(iii) provides that no court order is necessary to transfer one grand jury's material to a successor grand jury. Such language "contemplates that successive grand juries may investigate the same or similar crimes."[315] Usually, all documents and testimony before the first grand jury should be presented to the new grand jury.[316] Nevertheless, a prosecutor has some discretion, particularly where numerous witnesses were called before the first grand jury and only a small percentage were actually necessary for the proposed indictment. A successor grand jury need not hear all of the direct testimony presented to the predecessor grand jury, but rather may choose to rely on transcripts or on accurate summaries.[317] Caution must be exercised,

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[314] Fed. R. Crim. P. 6(f).

[315] United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); cf. In re Grand Jury Proceedings (Sutton), 658 F.2d 782, 783 (10th Cir. 1981) (dictum) (second subpoena may be required when party contends documents are incomplete or subpoena orders witness to testify).

[316] See United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975) (in eight of witness's lies to prior grand jury, need for thorough evaluation by second grand jury was essential).

[317] United States v. Flomenhoft, 714 F.2d 708, 711-712 (7th Cir. 1983) (reliance on transcripts permissible), cert. denied, 450 U.S. 1068 (1984); United States v. Long, 706 F.2d 1044, 1050 (9th Cir. 1983) (summaries permissible); see also United States v. Fogg, 652 F.2d 551, 558 (5th Cir. 1981); United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may exercise some discretion in choosing evidence to bring before grand jury so long as grand jury is not misled); United States v. Chanen, 549 F.2d 1036, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

however, because the use of incomplete or misleading summaries of prior testimony can give rise to allegations that the grand jury was biased and the indictment should be dismissed .[318] To avoid any appearance of unfairness, all exculpatory evidence should be re-presented to the new grand jury.

X. Superseding Indictments

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

A. Caption

The caption should reflect that it is a superseding indictment, and should include a reference to the case number of the original indictment.

The superseding indictment should be presented to the same grand jury that returned the original indictment. Under exceptional circumstances (i.e., the original grand jury panel has expired, etc.) the case can be re-presented to a new grand jury.

B. Advice to the Grand Jury

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

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[318] United States v. Mahoney, 495 F. Supp. 1270, 1275 (E.D. Pa. 1980).

re-presented. They should be advised that they should deliberate anew on the proposed supersedeing indictment, and that they should not give any weight to the fact that a prior indictment was returned.

C. Speedy Trial Act Considerations

Under 18 U.S.C. § 3161(h)(6), the running of the "trial clock" is suspended from the date the indictment is dismissed upon motion of the government until a charge is filed against the defendant for the same offense, or any offense required to be joined with the offense charged in the original indictment. As explained in the original Senate Report on the Speedy Trial Act, § 3161(h)(6) provides that only the time period during which the prosecution has actually been halted is excluded from the 70-day time limit. For example, if the government decides 50 days after indictment to dismiss charges against the defendant, then waits six months and reindicts the defendant for the same offense, the government has only 20 days in which to prepare for trial, absent other excludable time periods.[319] Since the exclusion begins only with the dismissal of the original charges, once a superseding indictment is intended, it is important to obtain dismissal of the original charge as soon as possible, once the decision has been made to present a superceding indictment.

Section 3161(h)(6) applies only when the government obtains dismissal of charges contained in the indictment. If the defendant successfully moves to dismiss the indictment, 18 U.S.C. § 3161(d) applies, and all time limits on the new charges are computed without regard to the existence of the original charge.[320]

Note also that even where the government obtains the dismissal of the original indictment, time limits on new offenses charged in the superseding indictment -- i.e., those which are not the "same offense" or "offenses which are required to be joined with" the offense charged in the original indictment -- are computed without reference to the time limits on the original charge.

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[319] S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).

[320] United States v. Sebastian, 428 F. Supp. 967, 973 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977).

jurisdictions for subpoenaed documents that do not reveal some secret aspect of the grand jury investigation.[340]

As explained in United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979):

> Unlike testimony, documents are created for purposes other than the grand jury investigation; they are, therefore, more likely to be useful for purposes other than revealing what occurred before the grand jury.

2. *Collections of Documents*

Collections of documents, by contrast to individual documents, are more likely to be treated as covered by Rule 6(e). A court also is more likely to treat subpoenaed documents as covered by Rule 6(e) if the request is framed in terms of the grand jury investigation -- for example, a request that calls for the disclosure of *all* documents subpoenaed by a particular grand jury or a list or inventory of all such documents -- because such a request is more likely to

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[340] Federal prosecutors should be particularly careful in those jurisdictions that are beginning to take a broader view of the coverage of Rule 6(e) in light of the suggestion in United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983), that subpoenaed documents should be treated the same as testimony. See United States v. Sutton, 795 F.2d 1040, 1050-51 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987). For example, the Sixth Circuit in In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988), established a broad presumption that subpoenaed documents are covered by Rule 6(e). Deviating from the rule followed in most other circuits, the court held:

> The general rule, however, must be that confidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be matters occurring before the grand jury just as much as testimony before the grand jury.

851 F.2d at 866.

exhibits, so long as disclosure of the documents does not reveal that they were exhibits.[336]

1. Individual Documents

Most courts do not consider individual documents subpoenaed by the grand jury to be "matters occurring before the grand jury." The rule that has evolved is that Rule 6(e) does not apply to subpoenaed documents that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury investigation.[337] For example, the approach adopted by the Third, Seventh, and District of Columbia Circuits requires the court to conduct a factual inquiry into whether disclosure of subpoenaed documents will reveal the inner workings of the grand jury.[338] Several district courts have also used this approach to varying degrees.[339] Under this approach, only those subpoenaed documents revealing some secret aspect of a grand jury's investigation would be governed by Rule 6(e) and would require a showing of "particularized need" before disclosure would be permitted. Accordingly, a court order allowing disclosure might not be necessary in these

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[336] See Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987); In re Grand Jury Investigation, 630 F.2d 996, 1000 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975).

[337] See DiLeo v. Commissioner of Internal Revenue, 959 F.2d 16, 19 (2d Cir. 1992); Securities and Exchange Commission v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d at 1000-01; United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). But see In re Grand Jury Proceedings, 851 F.2d 860, 866 (6th Cir. 1988); In re Grand Jury Disclosure, 550 F. Supp. 1171, 1177 (E.D. Va. 1982).

[338] Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869-70 (D.C. Cir. 1981); In re Grand Jury Investigation, 630 F.2d 996, 1001 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1090 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

[339] E.g., In re Doe, 537 F. Supp. 1038 (D.R.I. 1982) (thorough review of case law on the applicability of Rule 6(e) to grand jury documents).

A. Grand Jury Testimony/Transcripts/Colloquy

Transcripts of witness testimony, statements made by government attorneys, and any other statements made by or before the grand jury, while in session, clearly constitute "matters occurring before the grand jury" and may not be disclosed, except in conformity with one of the exceptions to Rule 6(e).[333] Some courts have held that the court's charge to the grand jurors is not covered by Rule 6(e) because the ground rules by which the grand jury operates do not reflect matters occurring before the grand jury.[334]

B. Documents

The courts differ widely as to the extent that documents are considered "matters occurring before the grand jury." Therefore, the local rules and the case law in the jurisdiction where the grand jury is sitting should be carefully consulted before any documents are disclosed.

Rule 6(e) usually does not govern the disclosure of documents obtained by means independent of the grand jury.[335] This is true even when such documents have later been examined by the grand jury, or made grand jury

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[333] See United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 220 (1979); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981). But see In re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (court may permit disclosure of grand jury testimony if disclosure is in public interest).

[334] United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973). But see United States v. Hart, 513 F. Supp. 657, 658 (E.D. Pa. 1981).

[335] See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982); In re Grand Jury Subpoena, 920 F.2d 235, 242 (4th Cir. 1990); In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 (5th Cir. 1980).

II. What Is Covered By Rule 6(e)

Rule 6(e) prohibits the disclosure of any information that would reveal "matters occurring before the grand jury," a term which is not defined by the Rule itself. Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal thetrategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury.[330] Thus, Rule 6(e) does not apply to material obtained or created independently of the grand jury as long as the disclosure of such material does not reveal what transpired before or at the direction of the grand jury.[331] Rule 6(e) also does not apply to information that, under certain circumstances, has become a matter of public record, such as its introduction at trial.[332]

Attorneys should consult the case law in the jurisdiction where the grand jury is sitting to determine what constitutes "matters occurring before the grand jury." The following sections provide general guidelines on how certain categories of information have been treated under Rule 6(e).

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[330] See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d 996, 1000 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States Industries, Inc. v. United States Dist. Court, 345 F.2d 18, 21-22 (9th Cir.), cert. denied, 382 U.S. 814 (1965); Anaya v. United States, 815 F.2d 1373, 1379 (10th Cir. 1987).

[331] See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982); In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 (5th Cir. 1980).

[332] See United States v. Sutton, 795 F.2d 1040, 1049 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987); Sisk v. Commissioner of Internal Revenue, 791 F.2d 58, 60 (6th Cir. 1986).

D. Obligation on Government Attorneys and Support Staff

Government attorneys and support staff are prohibited from disclosing matters occurring before the grand jury, subject to several important exceptions that are discussed in detail elsewhere in this Chapter.

E. No Obligation on Witness

Rule 6(e) specifically prohibits any obligation of secrecy from being "imposed on any person except in accordance with this rule." Therefore, witnesses are not bound by the secrecy obligations of the Rule[325] and courts ordinarily are reluctant to impose such an obligation.[326] One circuit permits the imposition of a reasonable obligation of secrecy on a witness if there is a compelling need to do so.[327] The grand jury foreman or a government attorney may request a witness not to make unnecessary disclosures when those disclosures, or attendant publicity, might hinder an investigation.[328] However, a government attorney making such a request should make absolutely clear that it is only a request.[329]

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[325] Sells Eng'g, Inc., 463 U.S. at 425 ("Witnesses are not under the prohibition [forbidding disclosure of matters occurring before the grand jury] unless they also happen to fit into one of the enumerated classes.").

[326] In re Grand Jury Proceedings, 814 F.2d 61, 68-70 (1st Cir. 1987); In re Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); see In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600, 606-07 n.11 (D.C. Cir. 1976).

[327] In re Grand Jury Subpoenaed Duces Tecum, 797 F.2d 676, 678-80 (8th Cir.), cert. dismissed, 479 U.S. 1013 (1986); see also In re Swearingen Aviation Corp., 486 F. Supp. 9, 11 (D. Md. 1979), modified, 605 F.2d 125 (4th Cir. 1979).

[328] See In re Grand Jury Proceedings, 814 F.2d at 70; In re Castiglione, 587 F. Supp. 1210, 1212 n. 4 (E.D. Cal. 1984); In re Grand Jury Proceedings, 558 F. Supp. 532, 535 (W.D. Va. 1983).

[329] See United States v. Radetsky, 535 F.2d 556, 569 (10th Cir. 1976), cert. denied, 429 U.S. 820 (1977); (improper for prosecutor to "admonish" witness to keep secret); In re Langswanger, 392 F. Supp. 783, 788 (N.D. Ill. 1975).

B. Obligation on Grand Jurors

Grand jurors are subject to the secrecy requirement of Rule 6(e). The court generally provides each grand juror with a copy of the Federal Grand Jury Handbook that includes an explanation of Rule 6(e)'s obligation of secrecy. In addition, each grand juror's obligation of secrecy usually is emphasized in the oath each juror takes and in the charge given to the grand jury by the judge. Federal prosecutors may wish to reiterate the requirements of Rule 6(e) in the opening statement to the grand jury and at appropriate times during subsequent grand jury sessions.

The grand jurors may disclose matters occurring before them, except for their deliberations, to the attorneys representing the government for use in the performance of their duties or to others when ordered to do so by the court. A grand juror obviously may discuss matters occurring before the grand jury with other grand jurors, but should do so only in the grand jury room.

C. Obligation on Reporter

The reporter who takes and transcribes the evidence is permitted to be present during grand jury sessions, except when the grand jury is deliberating or voting. Rule 6(e) specifically imposes an obligation of secrecy on the reporter. Further, the Rule explicitly recognizes that the reporter may utilize other persons as typists to transcribe the recorded testimony by including such typists among those who are prohibited from making disclosures. Transcription centers should not be used because of the potential for a breach of grand jury secrecy.[324]

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[324] See Memorandum from Stephen S. Trott, Assistant Attorney General, Criminal Division, to all United States Attorneys, Jan. 10, 1984.

A. Purpose of Rule 6(e)

Rule 6(e) codifies the traditional rule of grand jury secrecy by prohibiting members of the grand jury, government attorneys and their authorized assistants, and other grand jury personnel from disclosing matters occurring before the grand jury, except as otherwise authorized by the rule. Grand jury secrecy is vital to the investigative function of the grand jury. It serves several distinct interests, primarily: (1) to encourage witnesses to come forward and testify freely and honestly; (2) to minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations; (3) to safeguard the grand jurors themselves and the proceedings from extraneous pressures and influences; and (4) to protect accused persons who are ultimately exonerated from unfavorable publicity.[322]

The reasons for grand jury secrecy are particularly strong while an investigation is pending. But while these reasons may lose some of their force after the proceedings have been concluded, grand jury secrecy may never be breached, except as provided for by Rule 6(e), no matter how compelling the circumstances.[323]

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[322] See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); Executive Sec. Corp. v. Doe, 702 F.2d 406, 409 (2d Cir.), cert. denied, 464 U.S. 818 (1983); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); United States v. Jones, 766, F.2d 994, 999 (6th Cir.), cert. denied, 474 U.S. 1006 (1985); In re Special March 1981 Grand Jury, 753 F.2d 575, 578 (7th Cir. 1985); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 843 (9th Cir. 1985); United States v. Eisenberg, 711 F.2d 959, 961 (11th Cir. 1983).

[323] See Douglas Oil., 441 U.S. at, 222 (1979); In re Bonanno, 344 F.2d 830, 834 (2d Cir. 1965); In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501, 505 (5th Cir. 1980); United States v. Fischbach and Moore, Inc., 776 F.2d at 844; In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1576 (11th Cir. 1983). But see In re Biaggi, 478 F.2d 489 (2d Cir. 1973) (court may disclose grand jury information if there is a sufficient public interest).

Chapter Four

THE REQUIREMENT OF SECRECY
RULE 6(e)

I. Rule 6(e)

The general secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure are contained in Section 6(e)(2). It provides that:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Consequently, where the dismissal of an indictment and is a result of the government's motion and superseding charges are subsequently filed, different time limits for trial will apply to different charges in the same indictment if the superseding charges are new or if the superseding indictment adds new defendants.. 18 U.S.C. § 3161(h)(7) can be used to equalize the trial date for multiple defendants charged in the same indictment. Where multiple charges with different time limits are contained in an indictment against a single defendant, a continuance under 18 U.S.C. § 3161(h)(8) might be appropriate, to avoid multiple trials or a trial of all charges by the earliest date.

XI. No Bills

Occasionally, a grand jury will refuse to return an indictment presented for its consideration. This is referred to as a "No Bill" or a "No True Bill." Where a grand jury returns a "No Bill" in a situation where a complaint or information is pending against the defendant, Rule 6(f) of the Federal Rules of Criminal Procedure requires the foreperson of the grand jury to report such action to a federal magistrate. Where no complaint or information is pending, a "No Bill" by a grand jury generally does not require such a report to a federal magistrate. However, it is advisable to determine whether the local rules in the jurisdiction require such a report following a "No Bill."

If a grand jury refuses to indict, the prosecutor may resubmit evidence to a different grand jury.[321] However, once a grand jury declines to return an indictment on the merits, Department policy requires the approval of the responsible Assistant Attorney General prior to resubmission.

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[321] United States v. Thompson, 251 U.S. 407, 413-14 (1920); United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 457 U.S. 1120 (1986); United States v. Radetsky, 535 F.2d 556, 565 (10th Cir.), cert. denied, 429 U.S. 820 (1976).

Where the owner of the documents does not consent to their release, disclosure must be authorized by the court. The standard for such authorization is not Rule 6(e), but whether the party seeking the documents is lawfully entitled to have access to them.[345]

Before disclosing any documents subpoenaed by the grand jury, attorneys should be certain that disclosure is not restricted by another statute. For example, the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3420) requires that protected financial records subpoenaed by a grand jury be accorded protections similar to the protections provided by Rule 6(e). Similarly, the Tax Reform Act of 1976 (26 U.S.C. § 6103) restricts disclosure of tax information obtained from the Internal Revenue Service.

Absent a specific request for materials from an attorney working on civil matters for the U.S. Government, a prosecutor should not *initiate* the disclosure of subpoenaed documents to another attorney working solely on civil matters without an appropriate court order. This policy does not apply to materials that were obtained from sources independent of the grand jury.[346] Nor is it intended to deter prosecutors from fulfilling their general duty to notify civil attorneys in their office or in the Civil Division of possible civil law violations ascertained by virtue of a criminal investigation.[347] It is simply to caution attorneys that when a prosecutor initiates the disclosure of subpoenaed materials in the absence of a request, or even advises a civil attorney of their existence, grand jury secrecy may be compromised.

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[345] See United States v. Interstate Dress Carriers, Inc., 280 F.2d at 54; Capitol Indem. Corp. v. First Minnesota Constr. Co., 405 F. Supp. 929, 931 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337, 340-43 (E.D. Pa. 1972).

[346] See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 15-16.

[347] See Memorandum from Attorney General Meese to All United States Attorneys regarding Coordination of Criminal Fraud, Waste and Abuse Proceedings (July 16, 1986) at 1-2, citing 28 C.F.R., Part O, App. to subpart y.

reveal the scope or direction of the investigation.[341] In general, the less specific or itemized the request the more likely it is that a court will prohibit disclosure.[342]

3. *Affidavit, Narratives or Summaries Prepared by the Subpoena Recipient*

Different considerations may also apply to documents, such as affidavits, narratives, and summaries, that are prepared specifically by the subpoena recipient for the grand jury and frequently submitted in lieu of the underlying documents or an actual grand jury appearance. The policy reasons for grand jury secrecy apply more strongly to such documents because they resemble testimony and are more likely than ordinary business records to reveal the nature and scope of the grand jury's investigation.[343]

While Rule 6(e) may not apply to the disclosure of subpoenaed documents, a court order nevertheless may be required for their public disclosure. Subpoenaed documents remain the property of the person from whom they were subpoenaed. The grand jury has only temporary custody.[344]

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[341] See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 868-70 (D.C. Cir. 1981); see also United States v. Stanford, 589 F.2d 285, 291 n.6 (7th Cir. 1978); In re Doe, 537 F. Supp. 1038, 1047 (D.R.I. 1982). But see United States v. Saks & Co., 426 F. Supp. 812 (S.D.N.Y. 1976).

[342] See In re Grand Jury Disclosure, 550 F. Supp. 1171, 1184 (E.D Va. 1982). But see Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 581-84 (D.C. Cir. 1987) (holding that request for all evidence collected by the Justice Department regarding certain events, including evidence submitted to any grand jury, was not per se too broad)

[343] See In re Special February, 1975 Grand Jury, 662 F.2d 1232, 1237-38 (7th Cir. 1981), aff'd sub nom. United States v. Baggot, U.S. 476 (1983).

[344] See United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); In re Grand Jury Proceedings, 486 F.2d 85, 93-94 (3d Cir. 1973); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979); In re Special March 1981 Grand Jury, 753 F.2d 575, 580 (7th Cir. 1985); DiLeo v. Commissioner of Internal Revenue, 959 F.2d 16, 20 (2d Cir. 1992).

C. Government Memoranda Summarizing or Referring to Testimony or Documents

Government memoranda, or portions thereof, that excerpt, summarize or refer to grand jury testimony or documents are covered by Rule 6(e) to the extent that their disclosure would reveal "matters occurring before a grand jury." Documents prepared by an attorney or his authorized assistants that reflect grand jury information cannot be disclosed.[348] In this regard, the disclosure of an analysis of subpoenaed documents may reveal more about the strategy and direction of an investigation than would disclosure of the underlying documents. In such cases, the analysis obviously should not be disclosed.[349] On the other hand, if the analysis does not reveal matters occurring before the grand jury it is disclosable. Similarly, Rule 6(e) does not cover a simple audit of subpoenaed documents or a summary of information that is not otherwise a matter occurring before the grand jury.[350]

Government memoranda that reflect information provided by witnesses outside the grand jury room, however, usually are not covered by Rule 6(e).[351] Consult the U.S. Attorney for the district in which the grand jury is sitting for the practice of that district with regard to the applicability of Rule 6(e) to government memoranda of interviews of subpoenaed witnesses conducted prior to, subsequent to, or in lieu of, an appearance before the grand jury.

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[348] See In re Special February 1975 Grand Jury, 662 F.2d 1232, 1238 (7th Cir. 1981), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501, 505 (5th Cir. 1980); United States Industries, Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978); U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 17.

[349] See In re Grand Jury Matter, 697 F.2d 511, 513 (3d Cir. 1982); In re Special February, 1975 Grand Jury, 662 F.2d at 1238.

[350] United States v. DiBona, 610 F.Supp. 449, 451 (E.D. Pa. 1985); Cumis Ins. Soc. v. South Coast Bank, 610 F. Supp. 193, 198-99 (N.D. Ind. 1985).

[351] See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982). But see In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672, 682 (D. Or. 1985) (memorandum of a post-grand jury appearance interview treated as covered by Rule 6(e)).

Memoranda reflecting information obtained independent of the grand jury, such as summaries of bidding information prepared by other agencies, ordinarily should be treated as outside the coverage of Rule 6(e), even if the document is later submitted to the grand jury.[352] However, one court has held that an analysis of information prepared specifically for the grand jury is covered by Rule 6(e) even if obtained independently of the grand jury.[353]

At least one court has held that government memoranda requesting authority to conduct a grand jury inquiry are covered by Rule 6(e) because such memoranda provide a blueprint for the government's investigation.[354]

D. Nature of Investigation or Identity of Targets

Sometimes, it is necessary to disclose at least some information describing the nature of a grand jury inquiry during the course of an investigation. In most circumstances, such information should be very general. For example, a government attorney could say, "We are investigating a possible price-fixing conspiracy in the road building industry." In some situations -- for example, during plea negotiations or witness interviews -- it may be appropriate to summarize the evidence in greater detail. This should be done only when necessary to conduct the investigation effectively. Attorneys should be careful not to disclose the identities of specific witnesses, actual verbatim testimony, or other information that would reveal the strategy or precise direction of the investigation, or anything that has actually occurred before the grand jury.[355]

The identities of the targets of the investigation should not be disclosed since one of Rule 6(e)'s specific aims is to protect individuals who ultimately

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[352] See In re Grand Jury Matter (Catania), 682 F.2d at 64; Sisk v. Commissioner of Internal Revenue, 791 F.2d 58, 60 (6th Cir. 1986).

[353] In re Grand Jury Matter, 697 F.2d 511, 513 (3d Cir. 1982).

[354] In re Disclosure of Grand Jury Matters (Miller Brewing Co.), 518 F. Supp. 163, 166 (D. Wis.), modified on other grounds, 687 F.2d 1079 (7th Cir. 1981).

[355] See United States v. Bazzano, 570 F.2d 1120, 1125 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978).

are not indicted from unfavorable publicity.[356] The exception to this rule is the disclosure to targets of their status as targets.[357] A government attorney, when appropriate, may also advise counsel whether his or her client is a target, a subject of the grand jury investigation, or just an informational witness.

E. Local Rules May Provide For Additional Secrecy

The local rules in a particular jurisdiction may provide for additional secrecy. The local rules of one district court, for example, contain particularly strict secrecy requirements for subpoenaed documents. Consequently, the local rules regarding the disclosure of information concerning the grand jury should be carefully reviewed before making any disclosures.

F. Access to Records Relating to Procedural Aspects of the Grand Jury

Rule 6(e)(6) provides that: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before grand jury." Under this Rule, records that relate to the procedural aspects of the grand jury may not be disclosed if the legitimate interests protected by Rule 6(e) would be threatened.

The scope of this prohibition is not entirely clear, however, because Rule 6(e)(6) does not define the term "records".[358] The notes of the Advisory Committee on the Federal Rules of Criminal Procedure state that Department of

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[356] See United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); United States v. Eisenberg, 711 F.2d 959, 961 (11th Cir. 1983).

[357] See USAM 9-11.153.

[358] In re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778, 781 (9th Cir. 1982) (subjects of grand jury investigaion had a right of access to ministerial records subject to the rule of grand jury secrecy); see also United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) (the court's charge to the grand jury is not covered by Rule 6(e)).

Justice authorization to a U.S. Attorney to apply to the court for a grant of immunity for a witness is included within the scope of the rule. In In re Grand Jury Impanelled March 8, 1983, 579 F. Supp. 189 (E.D. Tenn. 1984), one of the few cases to interpret Rule 6(e)(6), the court held, without discussion, that motions to quash subpoenas are not covered by Rule 6(e)(6). Id. at 192 however, the court also held that motions, briefs and similar papers that tend to reveal the substance of grand jury records, orders and subpoenas should be sealed to protect the information contained therein. Id. The court in In re Donovan, 801 F.2d 409 (D.C. Cir. 1986), suggested that motions for disclosure of grand jury information are subject to Rule 6(e)(6), but only to the extent that the motion contains information that is subject to the general rule of secrecy. Id. at 410.

Until there is further interpretation of Rule 6(e)(6), prosecutors should file preindictment motions, subpoenas, letters of authorization, immunity orders and the like under seal, unless there are compelling reasons to the contrary. Similarly, efforts to discover procedural records should be resisted if any of the policy reasons behind Rule 6(e) are implicated.[359] While procedural records of the grand jury are generally treated as "matters occuring before the grand jury" for purposes of Rule 6(e), at least one court has held that the empanelment and expiration dates of the grand jury are not cloaked in secrecy.[360] Thus, contumacious witnesses are entitled to know when the grand jury before which they have been subpoenaed will expire.

G. Names of Witnesses

Rule 6(e) prohibits the disclosure of the identities of witnesses subpoenaed by or appearing before the grand jury.[361]

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[359] See In re Special Grand Jury (For Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982).

[360] See In the Grand Jury Investigation (DiLoretto), 903 F.2d 180, 182 (3d Cir. 1990).

[361] See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. White Ready-Mix Concrete Co., 509 F. Supp. 747, 750 (N.D. Ohio 1981).

H. Interview Memoranda

According to the majority view, Rule 6(e) does not apply to government memoranda of witness interviews conducted prior to serving the witness with a grand jury subpoena, even if the statements contained in such memoranda are later reported to the grand jury by the government attorney or repeated to the grand jury by the witness.[362] By contrast, however, statements obtained from witnesses who have been subpoenaed to appear before the grand jury ordinarily should be treated the same as grand jury testimony. For this reason, it may be good practice for government attorneys and their agents to elicit as much information as possible from a witness before serving that witness with a grand jury subpoena. In any event, case law should be carefully reviewed before disclosing any interview memoranda. Several courts have treated interview memoranda that were later presented to the grand jury the same as transcripts of grand jury testimony.[363]

I. Proffer Memoranda

Proffer memoranda should be treated like interview memoranda. As a general rule, the secrecy requirements of Rule 6(e) do not extend to proffers because they reflect information that is obtained independently of the grand

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[362] See Blalock v. United States, 884 F.2d 1546, 1551 (11th Cir 1988); In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982); Anaya v. United States, 815 F. 2d 1373, 1380 (10th Cir. 1987); In re Grand Jury Proceedings (Bath Iron Works), 505 F. Supp. 978, 980 (D. Me. 1981); In re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207, 211 (D.R.I. 1980).

[363] In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982) (interview memoranda should be treated the same as grand jury transcripts); In re Special February, 1975 Grand Jury, 662 F.2d 1232, 1237-38 (7th Cir. 1981) (in certain very limited circumstances, a report of an interview given in lieu of a grand jury appearance is covered by Rule 6(e)), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672, 682 (D. Or. 1985) (post-appearance statements by witness of what transpired before grand jury covered by Rule 6(e)).

jury.[364] This is particularly true when the witness providing the proffer is not later called before the grand jury. Attorneys should carefully consult the local case law. A few jurisdictions treat documents that reveal what will happen before the grand jury, such as proffers, as covered by the Rule.[365]

III. Disclosure to Attorneys for the Government; Rule 6(e)(3)(A)(i)

Rule 6(e)(3)(A)(i) permits the disclosure of information covered by Rule 6(e) without a court order to "an attorney for the government for use in the performance of such attorney's duty."[366]

A. Definition of "attorney for the government"

Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorney for the government" as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney." While the term "attorney for the government" would appear to include attorneys working on either civil or criminal matters, the Supreme Court held in United States v. Sells Engineering, Inc., 463 U.S. 418, 427 (1983), that Rule 6(e)(3)(A)(i) permits disclosure only to attorneys working on criminal matters.[367] Consequently, disclosure is not permitted to attorneys

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[364] Disclosure of interview and proffer memoranda may be resisted on other grounds; e.g., the attorney work-product and informants' privileges.

[365] See In re Grand Jury Investigation (Lance), 610 F.2d 202, 216-17 (5th Cir. 1980); United States v. Armco Steel, 458 F. Supp. 784, 790 (W.D. Mo. 1978).

[366] See generally U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984.

[367] The Court declined to address the issue of "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 430 n.15. However, in United States v. John Doe, Inc., I, 481 U.S. 102, 108 (1987), (continued...)

for federal administrative agencies,[368] Parole Commission hearing officers,[369] or state governments.[370] However, any Department of Justice attorney, or non-Department of Justice attorney (including a state prosecutor or federal agency attorney) appointed under 28 U.S.C. § 515 as a Special Assistant United States Attorney or Special Assistant to the Attorney General, is an "attorney for the government" for purposes of Rule 6(e)(3)(A)(i).[371] In addition, the term "attorney for the government" includes not only those attorneys who actually appear before the grand jury but also supervisory attorneys who are working on the matter.[372]

Government attorneys (other than Assistant U.S. Attorneys) who actually appear before the grand jury generally receive letters signed by the Assistant Attorney General for the pertinent Division authorizing them to appear before the grand jury as "an authorized assistant of the Attorney General." However, a letter of authorization is not necessary prior to appearing before the grand jury and failure to obtain one will not invalidate a subsequent indictment.[373]

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[367](...continued)
the Court subsequently made clear that members of the prosecution team may, without prior court authorization, continue to use materials or information subject to Rule 6(e) in a companion or related civil proceeding, so long as such use does not contravene Rule 6(e)'s purposes.

[368] See United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980) (Federal Maritime Commission); In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) (Federal Trade Commission).

[369] See Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980).

[370] See Illinois v. Abbott & Assocs., Inc., 460 U.S. 557, 567 (1983); In re Grand Jury Proceedings, 580 F.2d 13, 17 (1st Cir. 1978); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 949 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973).

[371] See In re Subpoena of Persico, 522 F.2d 41, 66 (2d Cir. 1975); In re Perlin, 589 F.2d 260, 266 (7th Cir. 1978); United States v. Zuber, 528 F.2d 981, 982 (9th Cir. 1976); United States v. Mitchell, 397 F. Supp. 166, 170-71 (D.D.C.), aff'd, 559 F.2d 31 (D.C. Cir. 1974), cert. denied, 431 U.S. 933 (1977). See also In re Perlin, 589 F.2d at 265-67. Great care should be taken with the use of cross-designated state attorneys since it is unclear how courts will apply existing disclosure law to all aspects of the cross-designated program.

[372] United States v. Sells Eng'g, Inc., 463 U.S. 418, 429 n.11 (1983).

[373] United States v. Balistrieri, 779 F.2d 1191, 1209 (7th Cir.), cert.denied, 475 U.S. 1095 (1985).

B. Use of Grand Jury Materials for Civil Cases

As a general rule, grand jury information may not be used for civil investigations or cases. However, much of the material developed during the course of a criminal investigation is not covered by Rule 6(e) and consequently may be disclosed to civil investigation staffs. It is imperative that attorneys carefully distinguish between Rule 6(e) and non-Rule 6(e) material. In this regard, prosecutors should not create unnecessary impediments, or impose unnecessary restrictions, on the disclosure of non-6(e) material or information. For example, prosecutors should not disclose to civil attorneys who request pre-existing business records, where disclosure would not otherwise compromise grand jury secrecy, that the documents were obtained by grand jury subpoena. Rather, a prosecutor should make an independent determination that matters are or are not covered by Rule 6(e). If the prosecutor determines that the documents are not covered by 6(e), then he or she should disclose them to the civil attorney who has requested them without revealing the fact that the information was obtained by grand jury subpoena.

If a prosecutor is uncertain whether the material to be disclosed is subject to Rule 6(e), the attorney should file a notice of use with the court. This will provide the court with an opportunity to respond to the notice with an order to file a motion under Rule 6(e)(3)(C)(i), should one be necessary. Alternatively, attorneys may file a motion for use, attaching a proposed order.[374]

Although the grand jury should not be used to conduct a civil investigation, an attorney who was involved in a grand jury proceeding as a member of the prosecution team (including supervisory attorneys) may, without prior authorization of the court, continue to use materials or information subject to Rule 6(e) in a companion or related civil proceeding as long as such use does not contravene Rule 6(e)'s purposes. United States v. John Doe, Inc., I, 481 U.S. 102, 108-11 (1987).[375] An attorney who so uses Rule 6(e) material or information should be careful not to disclose the material or information to

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[374] Although the practice regarding a prosecutor's determination of 6(e)'s coverage of subpoenased documents and whether to disclose such documents varies from district to district, we recommend the practice in text as the preferred practice.

[375] See also, DiLeo v. Commissioner of Internal Revenue, 959 F.2d 61, 21 (2d Cir. 1992).

other members of the civil staff who were not members of the prior criminal staff or to disclose the Rule 6(e) material in civil pleadings. See U.S. Attorneys' Manual 9-11.250; and the Attorney General's Guidelines (March 1990). See also Chapter Five of this Manual on Parallel Proceedings.

Attorneys who were not members of the grand jury staff may not use grand jury materials for civil matters after the close of the grand jury without indictment or concurrently with a criminal matter involving the same party or parties, unless they first obtain a court order pursuant to Rule 6(e)(3)(C)(i). United States v. John Doe, Inc., I, 481 U.S. at 111. Although, there is no requirement that separate staffs be used to investigate or litigate similar matters,[376] extreme caution should be exercised by such staffs not to disclose information subject to Rule 6(e) to attorneys or other personnel who were not members of the prosecution team.

C. Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) Exception

The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), authorizes a person who is privy to matters occurring before the grand jury concerning a banking law violation to disclose that information, without need of a court order, to an attorney for the government for use in imposing a civil penalty pursuant to 12 U.S.C. § 1833a. See 18 U.S.C. § 3322(a). FIRREA also authorizes a court, on motion of an attorney for the government and upon a showing of substantial need, to order disclosure of grand jury information acquired during an investigation of a banking law violation to identified personnel of a federal bank regulatory agency to assist an attorney for the government to whom matters have been disclosed under 18 U.S.C. § 3322(a). 18 U.S.C. § 3322(b)(1). Section 3322(c) requires that grand jury material disclosed under section 3322(a) or (b) be used only for imposing civil penalties under 12 U.S.C. § 1833a.

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[376] See United States v. Archer-Daniels-Midland Co., 785 F.2d 206, 212-13 (8th Cir. 1986), cert. denied, 481 U.S. 1028 (1987).

D. Asset Forfeiture

Criminal forfeiture has become an important weapon in the criminal law enforcement arsenal. See, e.g., 18 U.S.C. §§ 982, 1963, 2253; 21 U.S.C. § 853. Through enactment of these forfeiture statutes, Congress has expressed its clear intent that federal prosecutors should take all appropriate steps to deny criminals the opportunity to profit from their misdeeds.

An attorney who has prosecuted the forfeiture aspects of a criminal case may be unable to obtain the criminal forfeiture of all of the property subject to forfeiture in a given investigation. The attorney may then be responsible for, or involved in, subsequent civil litigation aimed at forfeiting the remaining property. As is true in other criminal prosecutions, an attorney who has gained access to matters occurring before the grand jury while investigating the criminal forfeiture aspects of cases may use that information for the purpose of instituting a civil forfeiture proceeding without prior court authorization. See United States v. John Doe, Inc., I, 481 U.S. at 108-11. Of course, a prosecutor may not disclose such information to previously uninvolved civil attorneys without a court order pursuant to Rule 6(e)(3)(C)(i). Id. at 111.

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

A. Definition of "government personnel"

Under Rule 6(e)(3)(A)(ii), grand jury information may be disclosed without a court order to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by 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." "Government personnel" includes all federal government employees who are assisting attorneys in the

investigation and prosecution of criminal violations.[377] Therefore, "Government personnel" includes not only members of the prosecution support staff, such as economists, secretaries, paralegals and law clerks, and federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the government prosecutor.[378] Necessarily, "Government personnel" also includes administrative personnel who need to determine the applicability of Rule 6(e)'s disclosure prohibition for purposes of responding to requests for records under the Freedom of Information Act. Such administrative personnel assist prosecuting attorneys in the proper enforcement of the Rule by ensuring that unauthorized disclosure of 6(e) matters does not occur and that information not covered by Rule 6(e) is not withheld improperly.

At least one court has held that temporary government personnel and independent contractors employed by the agency are "government personnel" within the meaning of the rule.[379] However, individuals who are cooperating with the government in connection with a particular investigation without reimbursement for their services, such as informants or private investigators, are not permitted access to grand jury materials.[380]

In 1985, Congress amended Rule 6(e)(3)(A)(ii) expressly to include "personnel of a state or subdivision of a state" within the scope of the rule. Employees of the District of Columbia are included within the government personnel exception to Rule 6(e) as federal personnel.[381]

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[377] See United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); United States v. Bazzano, 570 F.2d 1120, 1125 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978); United States v. Penrod, 609 F.2d 1092, 1096 n. 7 (4th Cir.), cert. denied, 446 U.S. 917 (1979); In re Grand Jury, 583 F.2d 128, 130 (5th Cir. 1978); In re Perlin, 589 F.2d (7th Cir. 1978).

[378] See United States v. Jones, 766 F.2d 994, 1000 (6th Cir.), cert. denied, 474 U.S. 1006 (1985) (Bureau of Alcohol, Tobacco and Firearms agent); United States v. Claiborne, 765 F.2d 784, 795 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986) (IRS and FBI agents); United States v. Block, 497 F. Supp. 629, 630 (N.D. Ga. 1980), aff'd, 660 F.2d 1086 (5th Cir. 1981) (IRS agent).

[379] United States v. Lartey, 716 F.2d 955, 963-64 (2d Cir. 1983); see also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985).

[380] See United States v. Tager, 638 F.2d 167, 171 (10th Cir. 1980).

[381] United States v. McRae, 580 F. Supp. 1560, 1562-63 (D.D.C. 1984).

Strict precautions should be taken when disclosing information to government employees who have civil law enforcement functions, such as IRS agents, to ensure that grand jury materials are not used improperly for civil purposes. Personnel assisting the grand jury investigation ordinarily should not work on a related civil matter and should receive precautionary instructions, preferably in writing, regarding the use and disclosure of grand jury materials.[382] In some district courts, a cautionary letter is routinely sent to all persons within the investigating agencies who may gain access to grand jury materials. Such letters instruct these persons about the duty of secrecy imposed by Rule 6(e). The employee reads and countersigns the letter and returns it to the prosecutor who then files it with the court in compliance with Rule 6(e)(3)(B). See Section D, below, for a discussion of Rule 6(e)'s notice requirements.

B. When Necessary to Assist in Enforcing Federal Criminal Laws

Disclosure to government personnel under Rule 6(e)(3)(A)(ii) is permitted only when necessary to assist in enforcing federal criminal laws. This Rule does not permit disclosure for civil law enforcement purposes.[383] Further, this Rule requires that the disclosure be enforcement-related and does not permit the disclosure of grand jury materials after the completion of prosecution. One court has gone so far as to hold that probation officers who prepare presentence investigation reports are not permitted access to grand jury materials because they do not assist in either the investigation or the prosecution of the case.[384] The Department disagrees with this holding and believes that attorneys may include grand jury information in presentence reports, because participatng in the sentencing process is part of the government attorneys' "duty

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[382] See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1125-26 (E.D. Pa. 1976); see also Fed. R. Crim. P. 6(e)(3)(B).

[383] See In re Perlin, 589 F.2d 260, 268-69 (7th Cir. 1978); In re Grand Jury Investigation No. 78-184, 642 F.2d 1184, 1188-90 (9th Cir. 1981), aff'd sub nom. United States v. Sells Engineering, In., 463 U.S. 418 (1983).

[384] United States v. Hogan, 489 F. Supp. 1035, 1039 (W.D. Wash. 1980); see also Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980) (disclosure not appropriate for use in parole revocation hearings).

to enforce federal criminal law." In addition, disclosure to the District Court through its probation service as part of the sentencing process under Rule 32 should not be considered a Rule 6(e) disclosure.[385] See Section IX of this Chapter, "Disclosure to the Court at Trial or Related Proceedings."

Attorneys should consult the local U.S. Attorney's office to determine the local practice as to whether Rule 6(e) information may be contained in presentence reports. The determination of the need for assistance under Rule 6(e)(3)(A)(ii) is within the discretion of the prosecutor and need not be justified.[386] Nonetheless, government prosecutors should exercise care and limit the disclosure of grand jury materials as much as practicable.

Disclosure under Rule 6(e)(3)(A)(ii) to government personnel for use in a separate investigation is not permitted. Government personnel who are seeking discovery of grand jury material for use in a different investigation must proceed under Rule 6(e)(3)(A)(i) or Rule 6(e)(3)(C)(i).

C. No Need for Court Authorization

There is no need for court authorization to disclose grand jury materials under Rule 6(e)(3)(A)(ii).[387] When in doubt as to the applicability of Rule 6(e)(3)(A)(ii), an attorney should consider seeking a court order authorizing release under Rule 6(e)(3)(C)(i).

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[385] Ordinarily, sentencing memoranda are matters of public record. On occasion, however, it may be appropriate to file sentencing memoranda under seal if there is a specific need for non-disclosure. See United States v. Alexander, 860 F.2d 508, 513-14 (2d Cir. 1988).

[386] See In re Perlin, 589 F.2d 260, 268 (7th Cir. 1978).

[387] See United States v. Sells Engineering, Inc., 463 U.S. 418, 426 (1983).

D. Notice--Rule 6(e)(3)(B)

Rule 6(e)(3)(B) provides that:

> Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that 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. 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 under this rule.

Under this Rule, a prosecutor must promptly provide a list of all government personnel to whom disclosure has been made to the supervising judge. Although not required by the Rule, the list of names should be furnished to the court before the information is disclosed whenever it is possible to do so.[388] Such prior notice is what Congress contemplated when it amended Rule 6(e) in 1977.[389] If prior notice is not possible, the court should be notified of disclosure as soon thereafter as possible. The 1985 amendments to Rule 6(e)(3)(A)(ii) also require certification that all persons to whom grand jury material have been disclosed under this rule have been advised of their obligation of secrecy under Rule 6(e).[390]

Support personnel and supervisory personnel of attorneys and case agents need not be listed. Essentially, these persons may be considered the "alter egos" of the attorneys and agents they support.

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[388] See United States v. Hogan, 489 F. Supp. 1035, 1038 (W.D. Wash. 1980).

[389] S. Rep. No. 354, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S. Code Cong. & Admin.News 530.

[390] A sample letter containing precautionary instructions is included in the Appendix to this Manual.

E. Record of Disclosure/Advice of Secrecy

Attorneys conducting criminal investigations and prosecutions should keep detailed records of disclosures made under Rule 6(e)(3)(A)(ii) and should advise all recipients of grand jury materials of the secrecy requirements of Rule 6(e). Written precautionary instructions are preferable as they can be used in any hearing challenging the grand jury procedures.[391]

V. Disclosure To A Witness

A. Access to Own Transcript

The large majority of courts have held that neither the Federal Rules of Criminal Procedure[392] nor the Freedom of Information Act[393] gives a grand jury witness a general right to a transcript of the witness's own testimony. Thus, under Rule 6(e)(3)(D), a witness who wishes to obtain a transcript of his or her grand jury testimony must file a motion in the district where the grand jury was convened. Disclosure is permitted only when ordered by a court "preliminarily to or in connection with a judicial proceeding" upon a finding that a "particularized need" exists for the desired disclosure that outweighs the

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[391] See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1105 (E.D. Pa. 1976).

[392] See In re Bianchi, 542 F.2d 98, 100 (1st Cir. 1976); Executive Sec. Corp. v Doe, 702 F.2d 406, 408-09 (2d Cir.), cert. denied, 464 U.S. 818 (1983); Bast v. United States, 542 F.2d 893, 896 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), cert denied, 412 U.S. 954 (1973). But see In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989).

[393] See Thomas v. United States, 597 F.2d 656, 657 (8th Cir. 1979) (habeas corpus petitioner not entitled to receive copies of grand jury minutes and a transcript of grand jury proceedings under Freedom of Information Act). Valenti v. United States Dep't of Justice, 503 F. Supp. 230, 232-33 (E.D. La. 1980)

need for maintaining the secrecy of the transcript.[394] As discussed in this Chapter at Section VIII, below, "particularized need" is a difficult standard to satisfy.

A few courts, however, have granted witnesses pretrial access to grand jury transcripts absent a showing of particularized need, reasoning that Rule 6(e) does not prohibit disclosure to a witness who already has knowledge of his or her testimony.[395] But, if a prosecutor wishes to allow a witness to review his or her prior grand jury testimony as part of the *prosecutor's* preparation for trial, the prosecutor may need to obtain an order under Rule 6(e)(3)(C)(i) before disclosing the witness's transcript to the witness. For a full discussion of the use of grand jury testimony by a government attorney to refresh the recollection of witnesses in preparation for trial, see Section X, below. In any case, however, attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's office before disclosing to a witness a transcript of his or her grand jury testimony.

B. Disclosure to a Witness of Another's Grand Jury Transcript or Testimony

It is improper to disclose the grand jury testimony of one witness to another witness. In United States v. Bazzano, 570 F.2d 1120, 1124-26 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978), the court held that Rule 6(e) is violated whenever a government attorney or agent discloses the grand jury testimony of one witness to another in order to shape either or both witnesses' trial testimony. The court distinguished such improper disclosure, however, from the acceptable practice of a prosecutor who, in a pretrial interview (or in the grand jury room), restates in general terms the evidence that other witnesses have given.

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[394] See Fed. R. Crim. P. 6(e)(3)(C)(i); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-20 (1979) Dennis v. United States, 384 U.S. 855, 869-70 (1966) United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)

[395] In re Sealed Motion, 880 F.2d 1367, 1370-71 (D.C. Cir. 1989); Bursey v. United States, 466 F.2d 1059, 1080 (9th Cir.1972); United States v. Heinze, 361 F. Supp. 46, 57 (D. Del 1973).

C. Disclosure to a Witness of Documents Subpoenaed from Another Party

It may be necessary to disclose to a witness documents subpoenaed from another party in order to impeach the witness, refresh the witness's recollection, authenticate a document, identify handwriting or encourage truthful testimony. See Fed. R. Crim. P 6(e)(3)(C)(i). Before a witness is shown a document subpoenaed from another party, attorneys should be thoroughly familiar with the case law and the local rules governing the disclosure of subpoenaed documents in the jurisdiction in which they are practicing.[396]

The case law on whether subpoenaed documents constitute matters occurring before a grand jury is not settled.[397] Many courts have reasoned that when a particular subpoenaed document is sought or disclosed for a lawful and independent purpose, i.e., "for its own sake -- for its intrinsic value in the furtherance of a lawful investigation," it does not necessarily constitute a matter occurring before the grand jury.[398]

Other courts have held that subpoenaed documents and transcripts of grand jury testimony are subject to the same degree of secrecy and that the court must balance the need of the party seeking disclosure against the effect

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[396] Attorneys should also be aware of any legal restrictions other than Rule 6(e) imposed on the disclosure and use of subpoenaed documents, such as bank records. See Right to Financial Privacy Act, 12 U.S.C. § 3420.

[397] See Section II, B, of this Chapter for a full discussion of the treatment of subpoenaed documents under Rule 6(e).

[398] Securities Exchange Commission v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

such disclosure would have on the policies underlying grand jury secrecy.[399] In these jurisdictions, a court order would be necessary before showing a witness documents subpoenaed from another party.

For a discussion of the use of subpoenaed documents by a government attorney to refresh the recollection of witnesses in the grand jury room and in preparation for trial, see Section X, B, below.

VI. Disclosure to Defendant; Bases for Pre-Trial Discovery of Grand Jury Material

There are four commonly encountered bases for disclosure of grand jury material to a criminal defendant. Three of these are covered by specific provisions of the Federal Rules of Criminal Procedure; the fourth (Brady material) has its origin in the Due Process Clause of the Fifth Amendment.

A. Disclosure to Defendant of His or Her Own Testimony

Rule 16(a)(1)(A) provides in pertinent part that, upon request, an individual defendant shall be permitted to inspect and copy or photograph:

> (1) relevant written or recorded statements by the defendant;
>
> (2) written record . . . containing . . . oral statement[s] made by the defendant to a person then known to the defendant to be a government agent; and

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[399] In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988); Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1008-09 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Investigation of Cuisinarts, Inc, 516 F. Supp. 1008, 1022 n.17 (D. Conn.), aff'd, 665 F.2d 24 (2d Cir. 1981), cert denied, 460 U.S. 1068 (1982); In re Grand Jury Disclosure, 550 F. Supp. 1171, 1177 (E.D. Va. 1982).

(3) testimony of a defendant before a grand jury which relates to the events charged.

Grand jury testimony is producible to a defendant only if "relevant" to the case in which production is requested.[400]

With respect to corporate defendants, Rule 16(a)(1)(A) provides that, upon request, the corporation may obtain transcripts of relevant grand jury testimony of its officers or employees who had the authority to bind the corporation legally for the alleged offense, either at the time of their testimony or when the alleged offense was committed.[401] Department policy is to require a written representation from defendants' counsel that the employees were in a position to bind the corporation before disclosing their statements.[402] The grand jury witness whose testimony is to be produced should be notified of the Rule 16 motion since the witness has standing to object to disclosure.[403]

The government is not required by Rule 16 to disclose the transcript of a non-defendant witness who reiterates what was said by a defendant.[404] Such a transcript, however, may have to be disclosed under the Jencks Act and Rule 26.2, as discussed below.

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[400] United States v. Disston, 162 F.2d 1035, 1037 (7th Cir. 1980).

[401] At least one court has held that a corporate defendant is entitled to non-grand jury statements to the same extent as an individual defendant. In re United States, 918 F.2d 138, 139-40 (11th Cir. 1990).

[402] Normally, an order is entered that restricts any further disclosure of such testimony by the corporate defendant.

[403] See United States v. RMI Co., 599 F.2d 1183, 1186-87 (3d Cir. 1979); United States v. White Ready-Mix Concrete Co., 449 F. Supp. 808, 811 (N.D. Ohio 1978).

[404] See United States v. Callahan, 534 F.2d 763, 765-66 (7th Cir.), cert denied, 429 U.S. 830 (1976); United States v. Walk, 533 F.2d 417, 418-20 (9th Cir. 1975).

B. Disclosure of Grand Jury Transcripts of Government Witnesses Pursuant to the Jencks Act and Rule 26.2

Both the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2,[405] provide that after a witness called by the governemnt has testifed a criminal defendant, upon motion, is entitled to any prior statements made by the witness that relate to the subject matter of the witness's testimony. Under Rule 26.2(f)(3), which carries forward a provision that was added to the Jencks Act in 1970, "a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury" is included in the definition of "statement." The Jencks Act applies only to criminal trials, not to pretrial proceedings, such as suppression or preliminary hearings.[406]

Because the government is required to produce only those transcripts that relate to the subject matter of the witness's testimony,[407] a dispute may arise as to whether all or part of a the transcript relates to the subject matter about which the witness has testified. In such cases, the court must determine whether the transcript ought to be produced in whole or in part. If, after reviewing the challenged transcript *in camera*, the court concludes that only part of a witness's grand jury transcript relates to the subject matter concerning which the witness has testified, the court will excise the unrelated portions and order the remainder of the transcript to be produced to the moving party. This procedure is required by Rule 26.2(c), which provides:

> If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court *in*

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[405] Rule 26.2, which became effective December 1, 1980, transfers the substance of the Jencks Act from Title 18 to the Federal Rules of Criminal Procedure and makes production of "statements" of a witness to the opposing side an obligation of the defendant as well as the prosecution.

[406] United States v. Sebastian, 497 F.2d 1267, 1268-70 (2d Cir. 1974); United States v. Montos, 421 F.2d 215, 220-21 (5th Cir.), cert denied, 397 U.S. 1022 (1970); Robbins v. United States, 476 F.2d 26, 32 (10th Cir. 1973).

[407] United States v. Ferreira, 625 F.2d 1030, 1034 (1st Cir. 1980); United States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975); United States v. Smaldone, 544 F.2d 456, 460 (10th Cir.), cert denied, 430 U.S. 967 (1976).

> *camera*. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

Under the Jencks Act and Rule 26.2, a prosecutor cannot be required to produce a witness's grand jury transcript until after the witness has completed his or her direct testimony.[408] However, while the trial court may be without power to order the early disclosure of Jencks Act materials, arrangements may be made to provide Jencks Act material to the defendant in advance of trial where, for example, the defendant makes appropriate concession in exchange for the disclosure.[409]

C. Disclosure of Grand Jury Transcripts Upon a Showing of Grand Jury Abuse - Rule 6(e)(3)(C)(ii)

Under Rule 6(e)(3)(C)(ii), a court may allow the disclosure of matters occurring before a grand jury at the request of a defendant "upon a showing

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[408] United States v. Campagnuolo, 592 F.2d 852, 863-64 (5th Cir. 1979); United States v. Callahan, 534 F.2d 763, 766 (7th Cir.), cert denied, 429 U.S. 830 (1976); United States v. Eisenberg, 469 F.2d 156, 160 (8th Cir. 1972), cert denied, 410 U.S. 992 (1973); United States v. Liuzzo, 739 F. 2d 541, 544 (11th Cir. 1984). But see United States v. Budzanoski, 462 F.2d 443, 454 (3d Cir. 1972) (Jencks Act governs disclosure of grand jury testimony of a witness after he or she has testified, but the Act does not affect pre-trial discovery of such testimony, which is governed by Rule 6(e)); United States v. Short, 671 F.2d 178, 185-86 (6th Cir.), cert denied 457 U.S. 1119 (1982) (Jencks Act does not apply to a motion for pretrial disclosure of grand jury transcript, such a motion is covered by Rule 6(e)); United States v. Troutman, 814 F.2d 1428, 1453 (10th Cir. 1987) ("Government is not obligated to give transcripts of the grand jury proceedings to the defense before trial . . . absent a showing of 'particularized need' for the transcripts").

[409] See e.g., United States v. Sebastian, 497 F.2d 1267, 1269-1270 (2d Cir. 1974); United States v. Peterson, 524 F.2d 167, 175 (4th Cir. 1975), cert denied, 423 U.S. 1088 (1976).

that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." However, a presumption of regularity attaches to grand jury proceedings,[410] and the party charging an abuse of the grand jury process carries a heavy burden even to get a hearing on the allegations.[411] In response to such motions to dismiss, courts are generally receptive to the government's *ex parte* submission of the grand jury matters at issue for *in camera* review.[412]

A defendant seeking the production of grand jury transcripts must do more than make general, unsubstantiated or speculative allegations of impropriety concerning a grand jury's proceedings to prevail under Rule 6(e)(3)(C)(ii).[413] The defendant's motion must establish that grounds may exist and that the requested grand jury materials are necessary for a court to termine the allegations of abuse. Defense counsel have often failed to make the requisite showing.[414]

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[410] See United States v. DeVincent, 632 F.2d 147, 154 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. West, 549 F.2d 545, 554 (8th Cir.), cert. denied, 430 U.S. 956 (1977).

[411] See In re Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert denied, 461 U.S. 932 (1983). See generally Chapter Ten of this Manual for a discussion of grand jury abuse.

[412] See e.g., United States v. West, 549 F.2d 545, 554 (8th Cir.), cert. denied, 430 U.S. 956 (1977).

[413] See United States v. Budzanoski, 462 F.2d 443, 454 (3d Cir.), cert denied, 409 U.S. 949 (1972); United States v. Edelson, 581 F.2d 1290, 1291 (7th Cir.), cert. denied, 440 U.S. 908 (1979); United States v. Harbin, 585 F.2d 904, 907 (8th Cir. 1978); United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980), cert denied, 450 U.S. 934 (1981).

[414] See United States v. Williams, 644 F.2d 950, 952 (2d Cir. 1981); United States v. Provenzano, 688 F.2d 194, 201 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Fife, 573 F.2d 369, 372 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); United States v. Edelson, 581 F.2d 1290, 1291 (7th Cir. 1978); United States v. Harbin, 585 F.2d 904, 907 (8th Cir. 1978); United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980) ; United States v. Cole, 755 F.2d 748, 758-59 (11th Cir. 1985).

D. Disclosure of Brady Material

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process if the evidence is material either to guilt or punishment, regardless of the good or bad faith of the government attorneys in not producing it. Brady, however, did not create an absolute right of access to grand jury testimony of possible defense witnesses.[415]

To the extent that Brady material is contained in grand jury materials other than in transcripts of witnesses who will testify at trial, it should be produced. The government satisfies its Brady obligation so long as it discloses Brady material in sufficient time for the defendant to make effective use of it.[416] When Brady material, whether exculpatory or impeaching, is contained in Jencks Act material, disclosure is timely if the government complies with the Jencks Act.[417]

VII. Disclosure to Another Grand Jury; Rule 6(e)(3)(C)(iii)

Rule 6(e)(3)(C)(iii) permits the disclosure of grand jury material "when the disclosure is made by an attorney for the government to another federal grand jury." This exception to Rule 6(e), adopted in 1983, codified the existing case law that permitted, in some circumstances, the disclosure of grand jury

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[415] See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Natale, 526 F.2d 1160, 1170 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); United States v. Presser, 844 F.2d 1275, 1284 (6th Cir. 1988); Gollaher v. United States, 419 F.2d 520, 527 (9th Cir.), cert. denied, 396 U.S. 960 (1969).

[416] United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir.), cert. denied, 474 U.S. 1005 (1985); United States v. Presser, 844 F.2d 1275, 1283-84 (6th Cir. 1988).

[417] United States v. Martino, 648 F.2d 367, 384 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 943 (1982); see also United States v. Campagnuolo, 592 F.2d 852, 863-64 (5th Cir. 1979)(court invalidated discovery order requiring pretrial disclosure of exculpatory Brady material contained in Jencks Act statements).

material from one grand jury to another.[418] No court order is required prior to disclosure nor must the court be notified of the disclosure.[419] The rule applies to transfers between federal grand juries in the same district and to transfers between federal grand juries in different districts.

VIII. Disclosure Under Court Order; Rule 6(e)(3)(C)(i)

Rule 6(e)(3)(C)(i) provides that:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made - (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

A. Must be "preliminarily to or in connection with a judicial proceeding"

1. Definition of "judicial proceeding"

The leading definition of judicial proceeding was provided by Judge Learned Hand in Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958):

> [T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial

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[418] See United States v. Contenti, 735 F.2d 628, 630 (1st Cir. 1984); United States v. Penrod, 609 F.2d 1092, 1095-97 (4th Cir.), cert. denied, 446 U.S. 917 (1979); United States v. Garcia, 420 F.2d 309, 311 (2d Cir. 1970).

[419] See United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

> control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.

Under this definition, courts have held that the following qualify as judicial proceedings, or circumstances preliminary to judicial proceedings: the grand jury's own proceedings,[420] the proceedings of other grand juries,[421] attorney and judicial disciplinary proceedings,[422] police officer disciplinary proceedings,[423] jeopardy assessment Tax Court proceedings,[424] impeachment hearings,[425] state grand jury proceedings[426] and state criminal trials.[427] The critical factor common to these proceedings is that they involve post-investigation uses of grand jury material that necessarily involve resort to the

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[420] See United States v. Mayes, 670 F.2d 126, 129 (10th Cir. 1980); In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 96 (E.D.N.Y. 1979). But see United States v. Tager, 638 F.2d 167, 170 (10th Cir. 1980).

[421] See United States v. Stanford, 589 F.2d 285, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982). Rule 6(e)(3)(C)(iii) eliminates any doubt that disclosures may be made to another federal grand jury.

[422] In re Federal Grand Jury Proceedings, 760 F.2d 436, 438 (2d Cir. 1985); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281, 285-86 (8th Cir. 1978); In re Barker, 741 F.2d 250 (9th Cir. 1984). But see In re Grand Jury 89-4-72, 932 F.2d 481, 485 (6th Cir. 1991).

[423] See Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896-97 (7th Cir. 1973), In re Disclosure of Grand Jury Transcripts, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970).

[424] See Patton v. Commission of Internal Revenue, 799 F.2d 166, 172 (5th Cir. 1986); Patrick v. United States, 524 F.2d 1109, 1117 (7th Cir. 1975).

[425] See Haldeman v. Sirica, 501 F.2d 714, 715 (D.C. Cir. 1974).

[426] See In re Disclosure of Evidence, 650 F.2d 599, 601 (5th Cir. Unit B 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B 1981).

[427] See In re Grand Jury Proceedings, 654 F.2d 268, 271-72 (3d Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Proceedings, 483 F. Supp. 422, 423 (E.D. Pa. 1979).

judicial system. However, judicial proceedings that are instituted solely to obtain grand jury materials, while technically meeting the definition of "judicial proceeding," do not fall within the scope of Rule 6(e)(3)(C)(i).[428]

A majority of courts do not permit disclosure of grand jury materials when a government agency seeks disclosure for use in an administrative proceeding for which no judicial action is planned. For example, the courts have held that the following ordinary administrative proceedings do not qualify as judicial proceedings: parole revocation hearings,[429] Federal Energy Regulatory Commission preliminary investigations,[430] Federal Maritime Commission adjudicatory hearings,[431] state medical board investigations,[432] and Federal Trade Commission investigations.[433] The essential difference between judicial proceedings and ordinary administrative proceedings is that in the former judicial review is clearly intended to be part of the decision-making process, while in the latter judicial review remains speculative.

2. *Definition of "preliminarily to"*

The Supreme Court in United States v. Baggot, 463 U.S. 476 (1983), held that a civil tax audit is not preliminary to a judicial proceeding within the meaning of Rule 6(e)(3)(C)(i). In reaching this conclusion, the Court enunciated a two-pronged definition of "preliminarily to." First, it held that Rule 6(e)(3)(C)(i) "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated."[434] Disclosure is not "preliminarily to" a judicial proceeding "if the primary purpose of disclosure is

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[428] See American Friends Serv. Comm. v. Webster, 720 F.2d 29, 72 (D.C. Cir. 1983).

[429] See Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980).

[430] See In re J. Ray McDermott and Co., 622 F.2d 166, 171 (5th Cir. 1980).

[431] See United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980).

[432] See United States v. Young, 494 F. Supp. 57, 59 (E.D. Tex. 1980).

[433] See In re Grand Jury Proceedings, 309 F.2d 440, 443-44 (3d Cir. 1962).

[434] 463 U.S. at 480.

not to assist in preparation or conduct of a judicial proceeding."[435] Second, the Court stated that litigation must be more than a remote contingency. The Court left open the question of just "how firm the agency's decision to litigate must be before its investigation can be characterized as 'preliminar[y] to a judicial proceeding'."[436]

B. Must Show "particularized need"

A court may permit disclosure of grand jury materials under Rule 6(e)(3)(C)(i) only when the requesting party has demonstrated a "particularized need" for the material. The particularized need standard was defined in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Under the standard, the movant must demonstrate 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 [the] request is structured to cover only material so needed. . . . [Moreover], in considering the effects of disclosure of grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries."[437] Both private litigants and the government must show particularized need.[438] If the court concludes that disclosure is warranted, it must be limited to only that material for which particularized need has been shown.[439] Further, any disclosure "may include protective limitations on the use of the disclosed material."[440] The party

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[435] Id.

[436] Id. at 482 n.6.

[437] 441 U.S. at 222; see also United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

[438] United States v. Sells Engineering, Inc., 463 U.S. 418, 444-45 (1983).

[439] Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 222; see also United States v. Sobotka, 623 F.2d 764, 768 (2d Cir. 1980); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla., 323 F.2d 233, 242 (5th Cir. 1963); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 845-46 (9th Cir. 1985); United States v. Liuzzo, 739 F.2d 541, 545 (11th Cir. 1984).

[440] Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 223.

seeking disclosure has the burden of proof with regard to establishing particularized need.[441] The district court that determines whether there is "particularized need" is vested with substantial discretion in resolving the matter.[442]

The Supreme Court has not provided a precise definition of "particularized need." In general, courts have focused on how the sought-after materials will be used. For example, disclosure may be permitted when it is sought for use in refreshing the recollection, impeaching, or testing the credibility of witnesses at trial.[443] Disclosure also has been permitted for the same purposes in deposition settings.[444] However, there is no absolute right to the grand jury testimony of a witness who later testifies in a different judicial proceeding.[445] Further, a request for disclosure for purposes of refreshing the recollection of a witness may be premature if it is not yet known whether the witness's recollection will, in fact, need to be refreshed.[446]

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[441] Id.

[442] See In re Sealed Case, 801 F.2d 1379, 1381 (D.C. Cir. 1986); In re Federal Grand Jury Proceedings, 760 F.2d 436, 439 (2d Cir. 1985); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1299 (4th Cir. 1986); In re Antitrust Grand Jury, 805 F.2d 155, 161 (6th Cir. 1986); United States v. Peters, 791 F.2d 1270, 1284 (7th Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Benson, 760 F.2d 862, 864 (8th Cir.), cert. denied, 474 U.S. 858 (1985); United States v. Murray, 751 F.2d 1528, 1533 (9th Cir.), cert. denied, 474 U.S. 979 (1985); United States v. Warren, 747 F.2d 1339, 1347 (10th Cir. 1984).

[443] See United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); In re Grand Jury Matter (Catania), 682 F.2d 61, 66 (3d Cir. 1982); United States v. McGowan, 423 F.2d 413, 418 (4th Cir. 1970); Texas v. United States Steel Corp., 546 F.2d 626, 631 (5th Cir.), cert. denied sub. nom. J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977); Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir.), cert. denied, 434 U.S. 889 (1977); Petrol Stops Northwest v. United States, 571 F.2d 1127, 1131 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); See also United States v. Parker, 469 F.2d 884, 888 (10th Cir. 1972).

[444] See Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431, 434 (2d Cir. 1963); United States v. Fischbach and Moore Inc., 776 F.2d 839, 845 (9th Cir. 1985). See also Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir.), cert. denied, 434 U.S. 889 (1977).

[445] See In re Federal Grand Jury Proceedings, 760 F.2d 436, 439 (2d Cir. 1985).

[446] See In re Grand Jury Testimony, 832 F.2d 60, 63 (5th Cir. 1987); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 540 (7th Cir. 1984).

Several courts have examined the need for disclosure in terms of the ability of the party seeking disclosure to obtain the requested material from some other source or by some other means.[447] Courts have also found "particularized need" where one party has access to grand jury material and the party seeking disclosure does not, because it would be inequitable not to allow disclosure to the other party.[448] This factor is rarely decisive but should be given some weight in determining "particularized need."

On the other hand, disclosure will not be allowed upon a mere showing of relevance, nor for general discovery.[449] In most cases, convenience, avoidance of delay, the complexity of the case, the passage of time, and expense also are insufficient reasons to justify disclosure.[450] However, while these factors generally are insufficient in and of themselves, when coupled with other factors they may be used to demonstrate the requisite "particularized need." For a discussion of the factors relevant to disclosure for government use, see Section VIII, D, below.

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[447] See United States v. Moten, 582 F.2d 654, 663 (2d Cir. 1978); In re Disclosure of Evidence, 650 F.2d 599, 601-02 (5th Cir. Unit B 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B 1981); In re Grand Jury Proceedings (Miller Brewing Co.), 717 F.2d 1136 (7th Cir. 1983).

[448] See Dennis v. United States, 384 U.S. 855, 873 (1966); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1302-03 (4th Cir. 1986); Illinois v. Sarbaugh, 552 F.2d 769, 776 (7th Cir.), cert. denied sub nom. J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977); United States Industries, Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); United States v. Evans & Assoc. Constr. Co., 839 F.2d 656, 659 (10th Cir.), aff'd on rehearing, 857 F.2d 720 (10th Cir. 1988). But see Texas v. United States Steel Corp. 546 F.2d 626, 630-31 (5th Cir. 1977).

[449] See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Hernly v. United States, 832 F.2d 980, 984-85 (7th Cir. 1987); Thomas v. United States, 597 F.2d 656, 658 (8th Cir. 1979); Petrol Stops Northwest v. United States, 571 F.2d 1127, 1129 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

[450] See Smith v. United States, 423 U.S. 1303, 1304 (1975); United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); In re Grand Jury Matter, 697 F.2d 511, 513-14 (3d Cir. 1982); In re Disclosure of Evidence, 650 F.2d 599, 602 (5th Cir. Unit B 1971) (per curium) modified on other grounds, 662 F.2d 362 (5th Cir. Unit B 1981); In re Holovachka, 317 F.2d 834, 837-38 (7th Cir. 1963), aff'd, 463 U.S. 418 (1983); In re Sells, 719 F.2d 985 (9th Cir. 1983); United States v. Liuzzo, 739 F.2d 541, 545 (11th Cir. 1984).

C. Particularized Need Must be Balanced Against Need for Maintaining Grand Jury Secrecy

In determining whether disclosure is permitted under Rule 6(e)(3)(C)(i), the court must balance the particularized need of the party seeking disclosure against the continuing need for secrecy. As the need for secrecy decreases, the burden of demonstrating need for the materials in question is reduced.[451] The burden of demonstrating that the need for disclosure outweighs the need for secrecy rests with the person seeking disclosure.[452]

By far the most important factor to be considered in weighing the need for continued secrecy is whether the grand jury investigation has been completed. While the grand jury investigation is pending, all of the reasons for secrecy are in full force and effect. Under these circumstances, it is extremely unlikely that sufficient need would be demonstrated to outweigh the secrecy concerns and disclosure would be precluded.[453] Once the investigation is terminated and the grand jury is discharged, however, some of the reasons for maintaining secrecy no longer obtain and disclosure is more likely to be

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[451] See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 223 (1979); Dennis v. United States, 384 U.S. 855, 870 (1966); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); In re Grand Jury Investigation, 630 F.2d 996, 1001 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 949 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); United States v. Tucker, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S. 958 (1976); Illinois v. Sarbaugh, 552 F.2d 768, 774-75 (7th Cir.), cert. denied, sub nom. J.L. Simmons Co. V. Illinois, 434 U.S. 889 (1977); In re Disclosure of Testimony, 580 F.2d 281, 287 (8th Cir. 1978).

[452] See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978).

[453] See United States v. Moten, 582 F.2d at 662-63; United States v. Colonial Chevrolet Corp., 629 F.2d at 929; In re Grand Jury Proceedings (Northside Realty Assocs)., 613 F.2d 501 (5th Cir. 1980); In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986); In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1576 (11th Cir. 1983).

ordered.[454] But while the importance of secrecy may be reduced when the grand jury investigation is concluded, it is far from eliminated.[455]

Generally, the most significant consideration that survives the termination of the grand jury investigation is that secrecy encourages witnesses to testify fully and honestly without fear of retribution. This consideration should be given significant weight regardless of the status of the investigation.[456] This consideration may be limited, though not eliminated, by a showing that the requested information already has been disclosed to a witness's corporate employer,[457] as will often be the case during discovery in a criminal proceeding. This is particularly true when the disclosed information has been shared with the employer's co-defendants.[458] This consideration may also be limited by a witness's consent to disclosure. This factor alone, however, may not be dispositive.[459]

Another factor to be considered in balancing the need for secrecy against the need for disclosure is the type of information at issue. For example, there

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[454] See Dennis v. United States, 384 U.S. 855, 870 (1966); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); United States v. Rose, 215 F.2d 617 (3d Cir. 1954); United States v. Colonial Chevrolet Corp., 629 F.2d at 950; In re Grand Jury Proceedings (Northside Realty Assocs.), 613 F.2d at 506; Wisconsin v. Schaffer, 565 F.2d 961, 967 (7th Cir. 1977); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281, 287 (8th Cir. 1978); Petrol Stops Northwest v. United States, 571 F.2d 1127, 1129-30.

[455] See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Baker v. United States Steel Corp., 492 F.2d 1074, 1078 (2d Cir. 1974); In re Grand Jury Testimony, 832 F.2d 60, 64 (5th Cir. 1987); United States v. Fischbach and Moore Inc., 776 F.2d 839, 844 (9th Cir. 1985).

[456] See United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); Illinois v. Sarbaugh, 552 F.2d 768, 775; Petrol Stops Northwest v. United States, 571 F.2d 1127, 1128-29 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

[457] U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18, 22 (9th Cir.), cert. denied, 382 U.S. 814 (1965).

[458] See Illinois v. Sarbaugh, 552 F.2d 768, 775

[459] See Executive Sec. Corp. v. Doe, 702 F.2d 406, 408-09 (2d Cir.), cert. denied, 464 U.S. 818 (1983); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984).

are fewer secrecy concerns raised by the disclosure of subpoenaed documents than by the disclosure of grand jury transcripts.[460]

Other factors that decrease the need for secrecy include a public airing of the information at trial, as well as the passage of time.[461] Factors that increase the need for secrecy include the acquittal of certain defendants and the possibility of further criminal trials.[462]

Illinois v. Sarabaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), is illustrative of the balancing approach used to determine particularized need. The court held that the state's need for the grand jury transcripts in a private treble damage antitrust action outweighed the need for secrecy and permitted disclosure of the transcripts. The secrecy concerns had been dissipated by the termination of the grand jury investigation and the disclosure of the transcripts to defendants during criminal discovery. The diminished secrecy concerns were outweighed by the state's need for the documents to refresh the witness's recollection and to impeach the credibility of witnesses at trial. In addition, fairness favored disclosure since the defendants in the private action already had copies of the transcripts obtained during discovery in the prior criminal case.

D. Disclosure to Civil Attorneys or to Other Government Agencies

Courts have recognized that secrecy concerns are reduced where disclosure is sought by a public body for a public purpose; however, reduced secrecy concerns do not *per se* establish particularized need.[463] In United

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[460] See In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1088-1094 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

[461] See In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1300 (4th Cir. 1986).

[462] See United States v. Fischbach and Moore Inc., 776 F.2d 839, 844 (9th Cir. 1985).

[463] See United States v. Sobotka, 623 F.2d 764, 766 (2d Cir. 1980); In re Grand Jury Matter, 697 F.2d 511, 513-514 (3d Cir. 1982); In re Disclosure of Evidence, 650 F.2d 599 (5th (continued...)

States v. Sells Engineering, Inc., 463 U.S. 418 (1983), the Court held not only that Rule 6(e)(3)(C)(i) governs disclosure of materials to government attorneys for civil purposes, but also that the government must show particularized need. However, the Court acknowledged that the particularized need standard "accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case".[464] Such considerations include: 1) the public interest served by disclosure to the government; 2) the reduced risk of further disclosure or improper use posed by disclosure to government attorneys as opposed to private parties or the general public; 3) the burden and cost of duplicating an extensive grand jury investigation; and 4) any independent legitimate rights that the government may have to the materials.[465] The Supreme Court reaffirmed this view in United States v. John Doe, Inc. I, 481 U.S. 102, 112-13 (1987).[466]

A case that is illustrative of the balancing approach used to determine particularized need when the government is the party seeking disclosure is In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986). In that case, the Civil Division of the Department of Justice was seeking access to grand jury material concerning a government contractor for use in a civil proceeding against the contractor. The court found that the need for secrecy had been greatly reduced because the grand jury had been terminated for four years, the resulting criminal proceeding had been concluded by a jury verdict following a full airing of the entire controversy, the defendant in both the criminal and civil proceedings had had unlimited possession of the grand jury material for about eight years, no witness had come forward to protest disclosure, and there was less risk of further improper disclosure or improper use by disclosure to the government. Balanced against the minimal need for secrecy was the government's need for the grand jury materials to put it on

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[463](...continued)
Cir. 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. 1981); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281, 286 (8th Cir. 1978).

[464] United States v. Sells Engineering, 463 U.S. 418, 445 (1983).

[465] Id. at 445-46.

[466] See also In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986); In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

equal terms with the civil defendant, which had access to the materials for eight years, and the lapse of a substantial amount of time that necessarily had dimmed the memories of potential witnesses. Under these circumstances, the court held that disclosure to the Civil Division was appropriate. Id. at 1303.

In addition to subpoenaed documents, civil attorneys may also request access to agents and auditors who assisted the grand jury investigation by explaining the documents. The same standard that applies to a civil attorney's access to subpoenaed documents should apply to the civil attorney's access to such agents and auditors. Of course, agents and auditors should be cautioned not to disclose any grand jury testimony, the direction of the grand jury investigation, or anything else learned solely by virtue of their appearance before the grand jury.

E. Disclosure For State or Local Law Enforcement Purposes

1. For Civil Enforcement Purposes

During a federal grand jury investigation, evidence occasionally will be developed tending to show a violation of a state's civil law. Absent a pending or contemplated state judicial proceeding, a prosecutor may not be able to communicate with the appropriate state officials about such evidence since the "preliminarily to or in connection with a judicial proceeding" requirement of Rule 6(e)(C)(i) cannot be met. Furthermore, even where this requirement can be satisfied, state or local law enforcement officials seeking access to grand jury material for use in a civil proceeding still must demonstrate particularized need before a court may authorize disclosure. See Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 567-68 (1983). However, the Supreme Court in Abbott & Associates did emphasize that the particularized need standard had sufficient flexibility to take into account any public interest served by disclosure to a governmental body. Id. at 568 n.15.

2. For Criminal Enforcement Purposes

Subdivision 6(e)(3)(C)(iv) permits disclosure otherwise prohibited by Rule 6(e):

> 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 purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

It is the intent of the amended Rule and the policy of the Department to share grand jury information to assist states in the enforcement of state criminal law whenever it is appropriate to do so. While there is no requirement for a state or local government to demonstrate a particularized need for the grand jury information, there should be a substantial need. United States Attorneys and other government prosecutors seeking authorization to apply for a disclosure order must request that authorization from the Assistant Attorney General of the Division having jurisdiction over the matter before the grand jury. The U.S. Attorneys' Manual sets forth the information that should be included in a request for authorization and the factors that should be considered by the Assistant Attorney General in making a decision to seek disclosure.[467]

The Department usually will oppose disclosure of grand jury material to a state attorney general while a federal investigation is pending, but usually will request disclosure once the investigation has closed. If authorization to seek a disclosure order is granted, the proposed order must include a provision that further disclosures of the grand jury material by state officials be limited to those state or local officials for use in the enforcement of state criminal laws. If the motion for disclosure is denied, a copy of the order denying the motion must be sent to the Assistant Attorney General who authorized the filing of the motion.

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[467] See USAM 9-11.260.

F. Mechanics of Obtaining Disclosure Orders

Rule 6(e)(3)(D) and 6(e)(3)(E) govern the mechanics of seeking and obtaining disclosure orders under Rule 6(e)(3)(C)(i). These rules provide that:

> (D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. 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 (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.
>
> (E) 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 reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. 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. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

These rules adopt the procedure suggested by the Supreme Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), for resolving venue where disclosure is sought for use in a judicial proceeding instituted in a different district from that in which the grand jury sat.[468] The procedure

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[468] See also Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d 1293, 1300 (5th Cir.), cert. denied, 437 U.S. 905 (1978); Illinois v. Sarabaugh, 552 F.2d 768, 772 (7th Cir.), cert. denied, 434 U.S. 889 (1977).

requires the party seeking disclosure to file a motion for disclosure in the district where the grand jury sat (the grand jury court). The grand jury court must determine the need for continued secrecy. Where the need for continued secrecy remains high -- for example, when the grand jury investigation is still active -- the grand jury court may decide that disclosure is inappropriate and deny the motion. If the grand jury court decides that disclosure may be appropriate, the grand jury court should transfer the requested materials with a statement evaluating the need for continued secrecy to the court where the civil proceeding is located (the civil court). Finally, the civil court should determine particularized need and balance it against the need for continued secrecy as stated by the grand jury court.

Where the person seeking disclosure is not the government, Rules 6(e)(3)(D) and (E) also require that person to notify the attorney for the government, the parties to the judicial proceeding and such other parties as the court may direct. These Rules also require the court to afford these parties a reasonable opportunity to appear and be heard. The Notes of the Advisory Committee for the Federal Rules of Criminal Procedure indicate that the clause, "such other parties as the court may direct" should include all persons who might suffer substantial injury from disclosure.[469]

If the party seeking disclosure is the government, the proceeding may be *ex parte*, although the courts have the discretion to conduct adversary hearings.[470] Government attorneys should ordinarily file Rule 6(e)(3)(C)(i) motions *ex parte* whenever a public filing would result in a breach of grand jury secrecy.

Under Rule 6(e)(5), hearings on motions for disclosure should be closed to the public. This is necessary to prevent the disclosure of any grand jury information that may be discussed at the hearing.

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[469] See also Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 224-231 (1979).

[470] See In re Grand Jury Investigation, 774 F.2d 34, 37 (2d Cir. 1985), rev'd on other grounds sub nom. United States v. John Doe, Inc., 481 U.S. 102 (1987); In re Grand Jury Matter (Catania), 682 F.2d 61, 66 (3d Cir. 1982).

G. Appeal of Orders Granting or Denying Disclosure Orders

The law on whether disclosure orders are appealable is unclear. Generally, while the grand jury is sitting, an order denying disclosure is not appealable because of the potential disruptions that would occur.[471] A writ of mandamus may be available to review an order denying disclosure in certain extraordinary circumstances, but such review is rare.[472] The grant or denial of a disclosure order also may be appealable if the disclosure motion is the only matter pending before the federal court and appellate review otherwise might be lost,[473] or if the controversy over disclosure arose in an independent, plenary proceeding.[474] Finally, most courts have held that orders transferring grand jury materials from the court where the grand jury sat to a court that is conducting subsequent proceedings are not appealable.[475] Courts differ, however, on whether an order by a court conducting a subsequent civil proceeding permitting disclosure is appealable.[476]

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[471] See In re Grand Jury Proceedings, 580 F.2d 13, 15 (1st Cir. 1978).

[472] See United States v. Weinstein, 511 F.2d 622, 624 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103, 1106 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); In re Moore, 776 F.2d 136, 139 (7th Cir. 1985).

[473] See United States v. Sobotka, 623 F.2d 764, 766 (2d Cir. 1980).

[474] See Baker v. United States Steel Corp., 492 F.2d 1074, 1077-78 (2d Cir. 1974) (dictum); In re Grand Jury Investigation, 630 F.2d 996, 999 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d 1293, 1300 (dictum); Illinois v. Sarbaugh, 552 F.2d 768, 773.

[475] See Baker v. United States Steel Corp., 492 F.2d at 1077-78; In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d at 1300. But see In re Grand Jury Proceedings (Alpha Portland Indus, Inc.), 649 F.2d 387, 388 (6th Cir.), cert. dismissed, 453 U.S. 946 (1981).

[476] See Baker v. United Steel Corp., 492 F.2d at 1077-78 (order for disclosure was nonappealable); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 841-843 (7th Cir. 1984) (disclosure order in subsequent civil case is appealable if appeal will not delay criminal proceeding); United States v. Fischbach and Moore, Inc., 776 F.2d 839 (9th Cir. 1985) (order for disclosure is appealable).

IX. Disclosure to Court at Trial or in Related Proceedings.

A government attorney may make grand jury information public at trial without prior court approval.[477] Once such information is a matter of public record, it may be used for any purpose, including use in civil investigations.

By analogy to the use of grand jury materials at trial, courts have permitted the use of such materials without prior court approval at Rule 11 proceedings, in connection with the acceptance of a guilty plea, and at sentencing. See, e.g., United States v. Manglitz, 773 F.2d 1463, 1467 (4th Cir. 1985).

A. Disclosure at Rule 11 proceedings

Federal Rule of Criminal Procedure 11(f) provides:

> (f) Determining Accuracy of Plea
>
> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

While this requirement arguably may be satisfied solely by admissions by a defendant,[478] it is often the preferred practice for the government to proffer the facts it would prove if the case were to go to trial. Under such circumstances, it is appropriate for the government attorney, as part of the attorney's duty to enforce the criminal laws, to introduce grand jury material at the Rule 11 proceeding without first obtaining a court order.[479] Of course, a prosecutor may not use the Rule 11 hearing as a pretext for disclosing grand

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[477] United States v. Garcia, 420 F.2d 309, 311 (2d Cir. 1970) (per curiam); United States v. Weinberg, 226 F.2d 161, 168 (3d Cir. 1955), cert. denied, 350 U.S. (1956).

[478] See Santobello v. New York, 404 U.S. 257, 261 (1971).

[479] United States v. Manglitz, 773 F.2d 1463, 1467 (4th Cir. 1985).

jury material to government attorneys involved in a civil investigation of the same defendant. Should a prosecutor abuse his or her discretion in this regard, the court may require the record sealed at the conclusion of the Rule 11 hearing.[480]

B. Disclosure at Sentencing

It would also appear that a government attorney, in the performance of the attorney's duty to enforce the criminal laws, is not required to obtain a court order before disclosing grand jury material at sentencing.[481] In this regard, however, attorneys should consult local practice before disclosing grand jury information at a sentencing hearing. At least one court has held that a prosecutor must obtain a court order under Rule 6(e)(3)(C)(i) before disclosing grand jury material at a sentencing hearing.[482]

X. Use of Materials in Investigation or Case

A. Quotation of Transcripts in Motions and Briefs

It is often necessary to quote from transcripts in motions and briefs. Although federal prosecutors should keep this to a minimum, such verbatim use of grand jury transcripts may be unavoidable (for example, when defending against a claim of prosecutorial abuse).

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[480] Id.

[481] Id.

[482] United States v. Alexander, 860 F. 2d 508, 512-14 (2d Cir. 1988).

Precautions should be taken when filing motions and briefs that contain Rule 6(e) material. Attorneys should consider filing a motion requesting the court to place the document -- or, at a minimum, the portion with previously undisclosed Rule 6(e) material -- under seal. A frequently followed practice is to place all of the Rule 6(e) material in a separate memorandum for the court only, advising defense counsel of the filing but not providing them with a copy of the memorandum. In this regard, while *in camera* proceedings are considered extraordinary events in the constitutional framework because they generally deprive one party to a proceeding of a full opportunity to be heard on an issue,[483] courts have sanctioned *in camera* submissions where an ongoing interest in grand jury secrecy is at stake.[484]

Government attorneys also may seek a court order permitting -- or mandating -- limited disclosure of matters occurring before the grand jury where such disclosure is necessary for the resolution of an issue prior to trial.

B. Using Subpoenaed Documents to Refresh Recollection

Documents subpoenaed by the grand jury can be very useful in refreshing a witness's recollection. Documents such as telephone records, pricing sheets, correspondence and memoranda can help a cooperative witness recall specific details and place events in a proper time sequence. Similarly, confronting a recalcitrant witness with documentary evidence may prod the witness to remember, or at least admit to, things he otherwise might deny or not recall.

The disclosure of subpoenaed documents raises concerns involving the secrecy requirements of Rule 6(e) and, to a lesser extent, the company's proprietary interest in its documents. As a threshold matter, federal prosecutors should consult the local rules, the case law, and the U.S. Attorney's office in the jurisdiction where the grand jury is sitting to determine

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[483] See In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977).

[484] See e.g., In re Antitrust Grand Jury, 805 F.2d 155, 161-62 (6th Cir. 1986); In re John Doe Corp., 675 F.2d 482, 489-90 (2d Cir. 1982); In re Special September 1978 Grand Jury, 640 F.2d 49, 56-58 (7th Cir. 1980).

whether subpoenaed documents are considered "matters occurring before the grand jury". This is an area in which the courts differ widely.[485]

As a practical matter, most jurisdictions will neither explicitly allow nor prohibit the disclosure of subpoenaed documents to witnesses. While the general rule is that individual documents subpoenaed by the grand jury do not constitute "matters occurring before the grand jury," disclosure of a large number of documents could reveal the scope or direction of the grand jury and, thus, implicate one of the secrecy concerns of the rule.

1. Use of Subpoenaed Documents Inside Grand Jury Room

Attorneys often disclose subpoenaed documents to grand jury witnesses during their appearances to refresh recollection and elicit detailed and accurate testimony. Documents can pin down the dates and times of contacts, attendance at meetings, the movement of prices over time and -- in the case of some correspondence and memoranda -- the substance of conversations. Disclosure of documents for these purposes is consistent with the grand jury's obligation to elicit information and examine "every clue" to determine if a crime has been committed.[486]

In the course of a witness's grand jury testimony, many attorneys take the opportunity to authenticate and lay a foundation for a subpoenaed document if it is considered likely to become a trial exhibit. This has been found helpful in: (1) obtaining stipulations to the document's authenticity at trial; (2) identifying at an early stage a problem in establishing the document's authenticity; and (3) locking a witness into a line of testimony concerning the exhibit for trial. Particular care should be taken if the witness might not be available for interviews in a post-indictment context. However, because document authentication may be time-consuming, it should be done only with important documents. Care must be taken not to waste grand jury time.

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[485] See Section II, B of this Chapter, above, for a discussion of the treatment of subpoenaed documents under Rule 6(e).

[486] Blair v. United States, 250 U.S. 273, 282 (1919); Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

One issue arising in this context is whether documents subpoenaed from a company other than the witness's employer may be shown to a witness.[487] As an initial matter, local practice and the law in the district where the grand jury is sitting must be checked. If the practice is not prohibited, it may be helpful to disclose such documents to prod a witness's memory and help elicit a more detailed account of pertinent events. As with the disclosure of other documents, this disclosure is consistent with the grand jury's obligation to investigate fully and ferret out all pertinent facts. Care must be taken, however, not to disclose unnecessary information in which one company has a proprietary interest to the representative of another company, and to be aware of any other legal restrictions that may govern disclosure.[488]

It is important that an accurate record be made whenever subpoenaed documents are disclosed to a witness in the grand jury room. The document should be clearly identified and, when appropriate, marked as a grand jury exhibit. This will help produce a clearer transcript and may protect against future charges of impropriety and unauthorized disclosure.

2. *Use of Subpoenaed Documents Outside the Grand Jury Room*

There is often not enough grand jury time to show a witness all pertinent documents in the grand jury room. It is frequently helpful to have a cooperating witness examine the documents at his or her leisure so that the witness has ample time to supplement his or her memory and provide a detailed and chronological account of what occurred. This ensures maximum accuracy and orderly testimony. Under these circumstances, showing the witness documents during an interview outside the grand jury room is appropriate.

There is little problem in showing a witness his or her own company's documents outside the grand jury room. The question becomes more difficult in cases where a former employee authored documents, or there is a third-party

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[487] See this Chapter, Section V, C, for a discussion of disclosure to a witness of documents subpoenaed from another party.

[488] See, e.g., Right to Financial Privacy Act, 12 U.S.C. § 3420.

witness. In those situations, great care must be taken to safeguard the company's proprietary interest in its documents.

Various safeguards have been adopted in connection with the disclosure of documents to a third-party witness. For example, some attorneys do not reveal the source of the document (i.e., which company produced it to the grand jury), showing the witness a copy with all identifying codes removed. Other attorneys have entered into confidentiality agreements pertaining to the government's use of the documents with subpoenaed parties. Such agreements contain language to the effect that the government will reveal the company's documents during interviews only as necessary to conduct the investigation. The company thus implicitly approves reasonable disclosure of their documents to third parties.

Finally, some courts and U.S. Attorneys' offices have approved the practice of using an agent to review subpoenaed documents outside the presence of the grand jury. The agent then presents a summary analysis or explanation of the documents to the grand jury.[489] This procedure usually involves expert witnesses, such as Treasury or FBI agents, or economists.

C. Using Grand Jury Testimony to Refresh Recollection

Disclosing to a grand jury witness his or her prior testimony may encourage the witness to recant or correct his or her prior testimony. It also will assist in preparing the witness for trial. Occasionally, an attorney may consider revealing the substance of one witness's testimony to another in the hope of eliciting truthful testimony. However, the attorney should be careful not to reveal information that would identify the prior witness.

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[489] See In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1957).

1. During Grand Jury Session

It sometimes is necessary for a witness to appear a second time before the grand jury. The witness may have been untruthful during his or her first appearance and may wish to recant or expand on his or her initial testimony. In both cases, it is common for the witness (or counsel) to seek access to the transcript of the witness's testimony. In most jurisdictions, the witness is not entitled to automatic access to his or her transcript.[490] In these jurisdictions, a Rule 6(e) order must be obtained to allow disclosure of the transcript to the witness and witness's counsel.[491]

In seeking to refresh recollection or confront a witness with contradictory information, a prosecutor may consider revealing the statements of or information provided by one witness to another. Opinions differ as to the efficacy of such disclosure in eliciting the witness's truthful testimony. Some prosecutors do not find it useful and, instead, focus upon making a detailed record to preserve a possible perjury charge. Others believe that some disclosure could prod a witness to change the witness's testimony or remember something he or she might otherwise claim not to recall. In these circumstances, most agree that little of the other information should be revealed, for tactical reasons as well as Rule 6(e) concerns. Most prosecutors reveal only that the grand jury has heard contradictory evidence. Again, care should be taken not to reveal any information that would disclose the identities of prior witnesses.

2. Preparation for Trial

Most attorneys find it helpful to allow a prospective trial witness to see his or her grand jury testimony when preparing for trial. This often requires a

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[490] See this Chapter, Section V, A and B, concerning the witness's right of access to his or her transcript and the Department's policy regarding such disclosure.

[491] See this Chapter, Section VIII. Attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's Office as to whether a 6(e) order is necessary if the transcript is disclosed to the witness alone.

Rule 6(e) disclosure order that should be obtained early in the pretrial stage. The government's motion for disclosure should state that disclosure to a prospective witness of his or her grand jury testimony is necessary to assist the witness in preparing for trial or an upcoming grand jury session and involves minimal secrecy concerns. If the court grants disclosure the order typically provides that the witness may be provided a copy of his or her transcript which the witness may show counsel, but that no copies or other disclosure may be made. The copy of the transcript must be returned at the conclusion of the trial.

In some jurisdictions, a witness may read the transcript of his or her grand jury testimony without a Rule 6(e) order. In any case, the transcript provided to the witness should contain only the witness's testimony, with all colloquy between government attorneys and grand jurors removed.

XI. Disclosure to Computer Specialists

Lengthy criminal investigations that involve large volumes of testimony and numerous documents often require the assistance of computer specialists (e.g., computer programmers, document coders and transcript keyers) to organize the accumulated information. When disclosing grand jury information to computer specialists, prosecutors should file the requisite notices or seek the appropriate orders.

If the computer specialist is a federal government employee, no court order is necessary because disclosure falls within Rule 6(e)(3)(A)(ii).[492] A notice of disclosure should be filed with the court under Rule 6(e)(3)(B).

The computer specialists used by the Department sometimes are employed by private contractors. There is some authority for equating private contractors with permanently employed government personnel under Rule 6(e)(3)(A)(ii).[493] Nonetheless, attorneys should check with the U.S. Attorneys office for the district in which the grand jury is sitting and follow the

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[492] See this Chapter, Section IV.

[493] See United States v. Lartey, 716 F.2d 955, 963-64 (2d Cir. 1983).

practice used by that office. The practice followed by most U.S. Attorneys' offices is to seek a court order under Rule 6(e)(3)(C)(i).[494] A confidentiality agreement should be included in the papers filed with the court to demonstrate that the secrecy of the grand jury will not be breached significantly by disclosure.

XII. Non-Disclosure Orders

A. Restrictions on Witnesses

As discussed in Section I, E, of this Chapter, Rule 6(e) does not impose any obligation of secrecy on witnesses and courts ordinary will not impose any such obligation.

B. Protective Orders

The court may regulate the disclosure of materials turned over under court order to limit to the maximum extent possible the invasion of grand jury secrecy.[495] The nature and scope of the protective order will vary depending upon the circumstances of a given case. Generally, the greater the need for secrecy and the greater the risks of subsequent disclosure, the more stringent the protective order.

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), illustrates a particularly comprehensive protective order. The court permitted the disclosure of grand jury transcripts to the state but required the deletion of all portions of the transcript that were irrelevant to the state's case. Second, the court permitted use of the transcripts in the pending litigation only

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[494] See this Chapter, Section VIII.

[495] See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219-222 (1979).

for the express purpose of impeaching the credibility of witnesses, or refreshing their recollection. Finally, the court permitted disclosure to a single attorney; required that attorney to keep a log of all subsequent disclosures; prohibited the copying of the transcripts; and required the return of the transcripts once they were no longer needed.

XIII. Sanctions

Rule 6(e)(2) provides that a "knowing violation of Rule 6 may be punished as a contempt of court." Thus, the court with appropriate jurisdiction may issue a contempt citation against a government attorney who knowingly discloses or uses information in violation of Rule 6(e).[496] However, contempt is a severe sanction and the government ordinarily can make an argument that lesser sanctions, if any, would be appropriate to remedy improper disclosures. For example, attorneys who have improperly used Rule 6(e) materials for civil law enforcement purposes may argue that the appropriate remedy is a prohibition against continued disclosure or use[497] or an order permitting disclosure of the Rule 6(e) materials to the opposing party.

Defendants may request the imposition of more onerous sanctions, such as exclusion of the improperly obtained evidence in the civil suit, substitution of attorneys, quashing outstanding subpoenas that are based on the improperly obtained evidence or dismissal of the criminal indictment, the civil case, or both.[498] Courts are unlikely to order such drastic remedies.

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[496] In re Grand Jury Investigation (Lance), 610 F.2d 202, 219 (5th Cir. 1980). One court has held that a Rule 6(e) violation is punishable only as a criminal contempt and may be enforced only by the court or United States Attorney, a defendant having no private right of action. In re Grand Jury Investigation, 784 F. Supp. 1188 (E.D. Mich. 1990).

[497] See In re Special March 1981 Grand Jury, 753 F.2d 575, 577 (7th Cir. 1985).

[498] See Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989).

There should be no suppression of evidence if a government employee acted in good-faith reliance on a facially valid Rule 6(e) order.[499] Further, a subpoena should be quashed only when there is a flagrant abuse of Rule 6(e).[500]

A remedy as drastic as dismissal of an indictment clearly is unwarranted, particularly when the violation of Rule 6(e) is inadvertent. As stated in United States v. Rosenfield, 780 F.2d 10, 11 (3d Cir. 1985), cert. denied, 478 U.S. 1004 (1986):

> An abuse of the grand jury by the prosecution merits dismissal of an indictment only where the defendant is actually prejudiced, or "(t)here is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit." (Citations omitted).[501]

Chapter Ten of this Manual contains additional discussion on prosecutorial misconduct.

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[499] See Graham v. Commissioner of Internal Revenue, 770 F.2d 381, 384-386 (3d Cir. 1985); United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987). But see United State v. Tager, 638 F.2d 167, 171 (10th Cir. 1980) (reversing denial of motions to dismiss indictment and to suppress evidence where court of appeals concluded that district court had no authority to order disclosure of grand jury information to non-government agent assisting in the investigation).

[500] See Gluck v. United States, 771 F.2d 750, 756-758 (3d Cir. 1985).

[501] See also In re Grand Jury Investigation (Lance), 610 F.2d 202, 219; United States v. Stone, 633 F.2d 1272, 1275 (9th Cir. 1979); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656, 660 (10th Cir.), aff'd on rehearing, 857 F.2d 720 (10th Cir. 1988); United States v. Kabbaby, 672 F.2d 857, 863 (11th Cir. 1982).

XIV. Security of Grand Jury Information

Department employees should be aware of the requirements for handling grand jury information outlined in DOJ Order 2600.4 (Safeguarding Grand Jury Information) and Security Awareness Memorandum No.4 (October 26, 1981).[502] Employees working with grand jury information must exercise special precautions when using, storing, transferring and/or destroying such material.

A. Safeguards During Use

When grand jury information is being used by Department employees, it should be kept under constant observation by an authorized person who is in a position to exercise direct physical control over it. The material should be covered, turned face down, placed in storage containers, or otherwise protected when persons who should not have access are present. As soon as practical after use, the material should be returned to storage containers.

B. Storage Requirements

Grand jury information should be stored in a lockbar file cabinet and secured with a GSA approved combination lock or its equivalent. Documents subpoenaed by the grand jury need not be stored in lockbar file cabinets, but should be stored in rooms with secure door locks. Entrances and exits to rooms where grand jury information or subpoenaed grand jury documents are stored must be locked during nonworking hours, or when no authorized individual is present, to ensure security of the material.

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[502] Failure to follow these internal regulations should not result in any sanctions against the government. United States v. Caceres, 440 U.S. 741 (1979).

C. Safeguards During Transfer

When grand jury information cannot be personally transmitted by an authorized Department of Justice employee, it should be transferred by U.S. Postal Service certified mail with return receipt. Documents subpoenaed by the grand jury can be transferred by mail or by a private courier service.

Chapter Five

PARALLEL PROCEEDINGS: CIVIL AND CRIMINAL

I. Introduction

The current governmental emphasis on the timely coordination of criminal, civil, and administrative remedies has led to increased litigation on a variety of fronts.[503] Prosecutors now face the prospect of "parallel proceedings"[504] in nearly every white collar crime investigation. Historically,

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[503] Actions may include criminal prosecution under the False Claims Act, 18 U.S.C. §287 or the criminal false statements provisions of 18 U.S.C. §1001, civil suits brought under the False Claims Act, 31 U.S.C. §3729-3731, or the Contract Disputes Act of 1978, 41 U.S.C. §604, suspension or debarment actions, bid protests to the General Accounting Office, or injunctive actions before the Claims Court or federal district court alleging nonresponsibility, criminal tax prosecutions by the Internal Revenue Service, investigation by the Securities and Exchange Commission, or even shareholder's (derivative) suits.

[504] The term "parallel proceedings" refers to the simultaneous or successive investigation of separate criminal, civil and administrative actions by different agencies, different branches of government or private litigants involving the same party and the same facts. Such overlap is the result of the broad spectrum of civil and administrative sanctions in the government's arsenal, and the willingness of prosecutors and regulators to pursue them in addition to criminal sanctions. Examples of situations in which parallel proceedings may arise include: concurrent SEC and grand jury securities fraud investigations (See, e.g., Securities and Exchange Commission v. Dresser Industries, 628 F.2d 1368 (D.C. Cir.)(en banc), cert. denied, 449 U.S. 993 (1980); civil actions referred by government agencies such as the Food and Drug Administration or the Federal Reserve for criminal investigation by the Justice Department (See, e.g., United States v. Kordel, 397 U.S. 1 (1970), civil asset forfeiture actions filed in connection with RICO or controlled substances prosecutions; and taxpayer refund suits filed against the Internal Revenue (continued...)

civil and administrative remedies were largely ignored, overlooked or deferred pending completion of criminal action. While it is the policy of the Justice Department to consider the general availability of non-criminal sanctions in lieu of criminal penalties, most white collar and drug cases deserve to be, and are, handled criminally, sometimes to the exclusion of all other remedies. However, the decisions of the Supreme Court in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983), have made prosecutors extremely conscious of the importance of facilitating affirmative civil and administrative actions that in many cases have as great an impact as criminal prosecution.

A. Justice Department Guidelines on Coordinating Sanctions

1. 1986 Justice Department Guidelines

In 1986, in response to the Sells and Baggot decisions, the Department of Justice promulgated its "Guidelines on the Coordination of Criminal and Civil Remedies in Cases of Fraud Against the Government." The Guidelines are still in effect. The Department recognized that Sells and Baggot issues had to be addressed at the beginning of large fraud investigations, and for that reason set forth Guidelines to be followed in coordinating the criminal and civil aspects of all matters which present possible civil monetary remedies for the United States.

The Guidelines provide that prosecutors within the United States Attorneys' offices must strive to provide early notification and involvement by the civil side of their offices on all criminal referrals, indictments, declinations, pleas and convictions that have a potential civil impact. Criminal attorneys are instructed to obtain records through methods other than grand jury subpoenas,

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[504](...continued)
Service in the midst of investigation or prosecution for tax fraud (See, e.g. Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962)).

including Inspector General (IG) subpoenas[505] and other investigative techniques[506], consistent with the needs of the criminal case, and to guard against making statements or using theories in the criminal case which might affect the merits in the civil action (such as the amount of damages). Criminal attorneys are also instructed to provide immediate notice to the appropriate civil attorneys to protect against the dissipation of a defendant's assets. Apart from the procedures referenced in the Guidelines, the following procedures should also be considered:

a. Criminal attorneys should structure the investigation so that IG subpoenas, witness interviews, search warrants, and, where possible, undercover operations are used first before opening the matter before a grand jury.

b. Investigators should be asked to establish a listing of all available evidence prior to any grand jury investigation.

c. Investigators should be asked to catalogue all evidence to show whether or not it was obtained by a grand jury.

d. Criminal attorneys should debrief the investigative agents prior to their participation in grand jury activities, and advise them of civil interest.

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[505] The Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101 (1978), 5 U.S.C. App. 3, established in many federal agencies the position of Inspector General (IG). Among the IG's principal duties are "to conduct and supervise audits and investigations relating to the programs and operations of the designated federal agencies." 5 U.S.C. App. 3 § 2(1). To that end, IG's have the power to issue administrative subpoenas duces tecum requiring the production of documents to support their audits and investigations.

[506] There is a vast of array of non-grand jury investigative tools that prosecutors may use to gather evidence in their investigations. These tools include audits, witness interviews, civil investigative demands (CIDs), and the standard tools of criminal investigation, such as search warrants, electronic surveillance, and informants.

e. Criminal attorneys should discuss with the civil attorney and the investigative agencies the manpower requirements for the respective investigations, e.g., how many auditors and agents.

f. Criminal attorneys should remind their investigators to closely examine and notify them of all health and public safety issues that might require the dissemination of information about nonconforming products or the issuance of special public safety alerts during the criminal investigation.

g. Criminal attorneys must discuss with the civil attorney aspects of any plea agreement before the agreement is finalized where the agreement affects civil forfeiture.

h. Criminal attorneys should inform agency counsel that administrative settlements of civil liability should not be concluded without the prior approval of criminal attorney.

i. Criminal attorneys should inform the appropriate program personnel and contract personnel that certain administrative contract actions (e.g., written or verbal change orders, modifications, waivers, or deviations of any contract provisions) should not be taken without input from the criminal attorney.

2. 1990 Justice Department Guidelines

In March 1990, the Attorney General's Advisory Committee issued guidelines to address the Rule 6(e) issues arising from parallel proceedings. The "Guidelines Concerning Disclosure and Use of Matters Occurring Before the Grand Jury in Civil or Administrative Proceedings," hereinafter referred to as "Attorney General's 1990 Guidelines," urged adoption of general procedures to encourage sharing of investigative information:

Deferring civil or administrative proceedings pending the conclusion of a criminal investigation;

Use of administrative subpoenas, Inspector General subpoenas, or other legal processes outside the grand jury to obtain access to records and documents provided that the specific concurrence of an attorney for the government is received as to each administrative subpoena to be issued;

Reliance on thorough investigative interviews conducted outside the setting of the grand jury;

Assignment of a second attorney for the government or an additional investigator, not on the grand jury disclosure list, to handle civil or administrative aspects of an investigation;

Participation of government personnel involved in the civil aspect of the case in proffer discussions or interviews conducted outside the setting of the grand jury provided that both the civil and criminal attorneys for the government concur;

Use of global settlements to resolve both the criminal and civil aspects of a case with the concurrence of the civil and criminal attorneys for the government.

Where appropriate, reliance on extensive plea and sentencing memoranda, detailing the factual basis for criminal charges for the public record.

In addition, the Attorney General's 1990 Guidelines also contain an internal requirement that judicial approval must be obtained prior to the disclosure of information that either was presented to the grand jury or obtained through the grand jury processes. The Guidelines specify that no disclosure of grand jury documents can be made without obtaining a court order pursuant to Rule 6(e), written approval by the United States Attorney, or a prior judicial determination that the materials are not "matters occurring before the grand jury." See, Attorney General's 1990 Guidelines at 3. As is the situation with

regard to other Departmental policies, compliance is expected in all cases, but a failure to comply with the Attorney General's 1990 Guidelines is not intended to confer any rights on a defendant or another party in litigation with the United States.

B. The Advantages and Disadvantages of IG Subpoenas

Although evidence obtained through IG subpoenas may be used fully in criminal, civil and administrative proceedings, there are a number of significant disadvantages with their use. First, prosecutors should scrutinize carefully the subpoena authority afforded the agency by applicable statutes and regulations to determine whether the administrative subpoena exceeds the IG's statutory authority. See, e.g., United States v. Montgomery County Crisis Center, 676 F. Supp. 98 (D. Md. 1987)(DOD IG could not issue administrative subpoena in investigation of a disclosure of classified information because, *inter alia*, the investigation did not involve fraud, waste or abuse)[507]. Second, the processing time required for IG subpoena requests may be excessive. Third, like grand jury subpoenas, a failure of a company to comply with a subpoena requires the commencement of a judicial enforcement proceeding. These proceedings take time to commence and litigate, and they may not be handled as quickly as grand jury enforcement proceedings. IG subpoenas must be enforced through the Civil Division of the U.S. Attorney's Office which has venue.

One of the most serious drawbacks to the IG subpoena is that it is limited to documentary evidence only. Testimony cannot be compelled, except to obtain a certification upon production that the requested documents are complete, accurate and in compliance with the subpoena. If there is a need to compel testimony, grand jury subpoenas remain the only way to obtain this evidence. However, most investigations do not confront such problems until they are well advanced. A prosecutor may want to structure an investigation so

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[507] A number of regulatory agencies such as the bank regulatory agencies Office of Thrift Supervision (OTS); Office of Comptroller of the Currency (OCC); Board of Governors of the Federal Reserve System (FED); Resolution Trust Corporation (RTC); etc. may have other subpoena or document-production authority under their organizing statutes as part of an administrative law hearing ("cease and desist proceeding," in some agencies).

that an IG subpoena is used first, reserving grand jury testimony until the conclusion of the investigation.

Experience has shown that the benefits of using IG subpoenas far outweigh the disadvantages. Unless there are serious statute of limitations issues in a case, or some suspicion that documents are being destroyed, prosecutors should give serious consideration to using IG subpoenas.

C. Potential Dangers of Parallel Proceedings

The simultaneous pursuit of parallel criminal, civil and administrative proceedings regarding the same subject matter can pose serious threats to the integrity of a pending criminal investigation. At the time a criminal investigation is "warming up" or under way, a prosecutor could become embroiled in a Congressional hearing, a qui tam action, and a suspension and debarment proceeding. It is essential for prosecutors to anticipate the dangers associated with parallel proceedings and to take the appropriate actions to minimize them.

Not only can simultaneous proceedings create the potential for exploitation of civil discovery to obtain information unavailable under criminal rules of procedure, see, Campbell v. Eastland, 307 F.2d 478, 487-88 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), the premature disclosure of evidence relating to the criminal proceedings could impede the criminal investigation, causing prospective witnesses to fear disclosure or allowing a prospective defendant to hide or destroy evidence. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979), quoted with approval, United States v. Sells Engineering Inc., 463 U.S. 418, 424 (1983). In addition, resolution of the criminal investigation may well "moot, clarify, or otherwise affect various contentions in the civil case." United States v. Mellon Bank, N.A., 545 F.2d 869, 873 (5th Cir. 1976).

Taking civil depositions taken during the pendency of an ongoing grand jury investigation involving the same witnesses risks possible perjury by witnesses, manufacturing of evidence, and intimidation of witnesses. Needless to say, it could damage the government's case if, in connection with civil depositions, a witness were to communicate, even inadvertently to those who

have not yet appeared the substance of testimony previously presented to the grand jury. In Peden v. United States, 512 F.2d 1099, 1104 (Ct.Cl. 1975), the court noted the dangers of parallel proceedings in a civil action where the underlying transactions of the civil and criminal proceedings were related:

> [A] hearing that is in the nature of a dress rehearsal for a criminal trial, in which all the Government witnesses testify and are cross-examined at length, but the defendant to be does not, is potentially a big lift to the criminal defense and could well be decisive in securing an acquittal, if anything could.

Depositions of witnesses who are marginally relevant to the civil case also can be problematic for the government. Opposing counsel may not have the same incentive as the prosecutor to prepare the witnesses for the depositions, and may not have the necessary information about the pending criminal investigation to anticipate areas of inquiry. In these circumstances, the witnesses' recollection of events may not be adequately refreshed prior to the depositions. This is a particular danger where the parallel proceeding involves two private litigants.

Prosecutors and investigators must carefully monitor the progress of any parallel proceedings. Frequently, although by no means always, a prosecutor may want to request a stay of the civil action. If a prosecutor does not keep informed on the status of discovery in a parallel civil proceeding, he or she may not be able to move quickly enough to seek a stay of the civil action (or of discovery in that action) in order to avoid any interference with the testimony of government witnesses.

II. Use of IG Investigative Authority After Initiation of Criminal Investigation

Courts have held that the use of IG authority can be proper after initiation of a criminal investigation by the Department of Justice, even if the IG serves as a conduit of information for the Justice Department investigation. As an example, in United States v. Aero Mayflower Transit Co., 831 F.2d 1142 (D.C. Cir. 1987), the court upheld summary enforcement of

administrative subpoenas issued by the Inspector General of the Department of Defense who was conducting a joint investigation with the FBI and the Antitrust Division into allegations of price-fixing. The recipients of the subpoenas argued that the subpoenas should be quashed on the grounds that they were issued at the direction of the Justice Department, and were therefore issued for an improper purpose. In rejecting this argument, the court stated:

> [N]o body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority.
>
> Nor is there a suggestion of any restriction on the Justice Department's power to obtain through the grand jury process all the information sought by the subpoenas here at issue. The Inspector General subpoenas clearly did not operate to circumvent statutory or other limitations on the Justice Department's investigative powers. The use of Inspector General subpoenas, instead of grand jury subpoenas, did, however, further an important Defense Department interest. Information obtained through a grand jury would not be readily available to the Defense Department in pursuing civil remedies against those who may have defrauded it. See Fed. R. Crim. P. 6(e). The procedure followed by the two Departments of government, was, therefore, reasonably calculated to serve the legitimate interests of both.
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> . . . . So long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial.

Id. at 1146.

The Third Circuit has indicated that Rule 6(e) does not bar a United States Attorney's Office from conducting a joint investigation with an IG office. Nor does Rule 6(e) bar a U.S. Attorney's Office from making use of information obtained by the IG's efforts to further a grand jury investigation, at

least where the prosecutors cease communicating information about their investigation to the IG after the date on which they begin presenting information to the grand jury.[508]

However, if an IG investigation is to be pursued after a criminal investigation into the same or related conduct has begun, IG investigators should take care to keep documents obtained in the course of their work separate from documents obtained through the grand jury. They should also consult with government attorneys to ensure that their activities are not likely to have any adverse effect upon the criminal investigation.

III. Exceptions to Grand Jury Secrecy: Access by Investigators and Other Support Personnel

While Rule 6(e) limits the information which can be disclosed by federal prosecutors, it does not prohibit the disclosure of all information related to an investigation.[509] The restrictions imposed by the Rule apply only to "matters occurring before the grand jury." This restricts disclosure of transcripts of grand jury testimony, the nature of the evidence produced before the grand jury, including the identity of witnesses who have testified before the grand jury, as well as the views or deliberations of the grand jury. See e.g., 2 Beale & Bryson, Grand Jury Law & Practice §7:06; 50 ALR Fed 675 (and cases cited therein); Attorney General's 1990 Guidelines, at 3-4.

Two of the limited exceptions to the general rule of grand jury secrecy are particularly relevant in the context of disclosures to investigators and other individuals who are helping federal prosecutors in their investigations. Rule 6(e)(3)(C)(1).

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[508] See United States v. Educational Development Network Corp., 884 F.2d 737, 741 (3rd Cir. 1989).

[509] For a complete discussion of Rule 6(e) and Grand Jury secrecy restrictions, see Chapter Four of this Manual.

First, Rule 6(e)(3)(A)(ii) provides that "matters occurring before the grand jury" may be disclosed to "government personnel" as long as that investigator is deemed necessary to assist an attorney for the government in the performance of that attorney's duty to enforce federal criminal law,[510] *and* that investigator thereafter uses that grand jury material only to provide that assistance.[511] This provision provides for access by such persons as government agents, auditors and even private parties when they have been retained to assist government investigations. See, e.g., United States v. Lartey, 716 F.2d 955, 963-64 (2d Cir. 1983).

Second, Rule 6(e)(3)(C)(i) permits a court to order disclosure of grand jury documents or testimony "preliminarily to or in connection with a judicial proceeding,"[512] upon a petition filed with the court by the government.[513] Such disclosure is made in such a manner, at such a time, and under such conditions as the court may direct.[514] Disclosure under this provision is limited to uses that relate "fairly directly to some identifiable litigation, pending or anticipated." United States v. Baggot, 463 U.S. 476, 480 (1983). It is not enough for the government to show that some litigation may emerge from the matter in which the grand jury material is to be used, or even that litigation is factually likely to emerge. The focus is on the actual use to be made of the material. If the "primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under Rule 6 (e)(3)(c)(i) is not permitted".[515]

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[510] Fed. R. Crim. P. 6(e)(3)(A)(ii). See United States v. Jones, 766 F2d. 994, 998-1000 (6th Cir.)(disclosure of grand jury material to a Treasury agent permissible, cert denied, 474 U.S. 1006 (1985); United States v. Cook, 794 F.2d 561, 564-65 (10th Cir.)(disclosure of grand jury transcripts to state police deputized as U.S. Marshals to aid in federal investigation), cert denied, 479 U.S. 889 (1986).

[511] See Fed. R. Crim. P. 6(e)(3)(B).

[512] See Fed. R. Crim. P. 6(e)(3)(C)(i).

[513] See Fed. R. Crim. P. 6(e)(3)(D).

[514] See See Fed. R. Crim. P. 6(e)(3)(C).

[515] United States v. Baggot, 463 U.S. at 480 (citation omitted).

Disclosure issues can be extremely complex and failure to comply with the applicable rules can cause problems in the investigation. A knowing violation of Rule 6(e) may be punished as a contempt of court. Fed. R. Crim. P. 6(e)(2). See, e.g., United States v. Smith, 815 F.2d 24 (6th Cir. 1987). Furthermore, improper disclosure could result in a suppression of evidence, or other relief aimed at correcting the improper disclosure. Possible sanctions for violation of grand jury secrecy may also include dismissal of the indictment. See United States v. Phillips, 664 F.2d 971, 1044 (5th Cir. 1981), cert denied, 459 U.S. 906 (1982) (court will only dismiss indictment upon a showing "that there was such an abuse of the grand jury process that any substantial rights of the defendant were impaired or the integrity of the grand jury proceedings was impugned")(citation omitted).

In many cases, prosecutors may be able to determine clearly that certain documents or other investigative information may lawfully be disclosed, without in any way violating Rule 6(e). If a prosecutor is unsure whether the secrecy requirements of Rule 6(e) apply to certain information that federal law enforcement agencies have gathered in the course of the grand jury investigation, he or she should discuss the matter with a supervisor. If serious questions still remain, the matter should be presented to the court for resolution.

IV. Financial Institution Fraud Investigations

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183 (August 9, 1989), provided potent means by which to undertake coordinated criminal, civil and administrative enforcement actions against victimizers of financial institutions. The Crime Control Act of 1990 ("CCA"), Pub. L. 101-647, 104 Stat. 4789 (November 29, 1990) supplemented FIRREA, adding additional provisions designed to strengthen the government's attack on financial institution fraud. These new civil enforcement statutes have greatly increased the number of parallel proceedings, thus greatly increasing the need for coordination between criminal and civil authorities.

With these statutes came new challenges for federal prosecutors and federal civil litigators, along with federal regulators, to achieve punishment of

wrongdoers, provide general deterrence, and obtain maximum financial recoveries through administrative actions (e.g., cease and desist actions with a restitution component; civil money penalty actions), civil actions (e.g., law suits against directors and officers of financial institutions initiated by the federal regulatory agencies through their retained counsel ("fee counsel"); civil penalties under Section 951 of FIRREA (12 U.S.C. § 1833a), a statute enforced by the Department of Justice; civil forfeitures under Section 963(a)(1) of FIRREA, as amended by the CCA (18 U.S.C. §§ 981(a)(1)(C), 981(a)(1)(D), 981(a)(1)(E)), criminal fines, restitutions and forfeitures.

Coordination and cooperation are the watchwords for successful financial institution fraud efforts. To facilitate such coordination and cooperation, a new position, "Special Counsel," was created in the office of the Deputy Attorney General to coordinate the investigation and prosecution of financial institution fraud. The Senior Interagency Group, whose membership includes the Special Counsel and senior officials from federal financial institution regulatory agencies was formed. The Interagency Bank Fraud Enforcement Working Group at the national level, and local bank fraud working groups in a number of districts, were established. Financial institution fraud coordinators were designated in United States Attorneys' offices with significant financial institution fraud caseloads. These organizations are available to address parallel proceeding issues when they arise and cannot be resolved at the case attorney level.

Financial institution fraud prosecutors and civil litigators should be familiar with two policy statements designed to promote coordination and minimize parallel proceeding difficulties. First, on June 25, 1992, the Senior Interagency Group adopted a policy statement on collection and reporting procedures for restitution payable to financial institution regulatory agencies. Second, the Federal Deposit Insurance Corporation issued a policy statement, "POL 91-2," effective February 27, 1991, applicable to FDIC and Resolution Trust Corporation lawyers responding to Department of Justice requests for information or grand jury subpoenas or trial subpoenas.

Financial institution fraud prosecutors desiring to share grand jury information with their civil counterparts in the Department of Justice may do so without a court order under 18 U.S.C. § 3322(a), provided the financial institution fraud prosecutor received the information in the course of duty or under Fed. R. Crim. P. 6(e)(3)(A)(ii), and the information concerned a "banking law violation," as defined in section 3322(d)(1). In some districts,

federal prosecutors move under Fed. R. Crim. P. 6(e)(C)(i) for a disclosure order despite the availability of Section 3322(a). One reason reported for such action is to expand the use to which the information may be put by the Department of Justice civil attorney. Another is to make it abundantly clear that the "use in connection with" language of Section 3322(a) encompasses, via the court order, further disclosures by the civil attorney. While the language of the statute, reasonably construed, appears to authorize such further disclosures, some offices prefer to obtain a court order expressly granting such authority.

Grand jury information may be shared, also, with "identified personnel of a financial institution regulatory agency," upon motion of "an attorney for the government," and "for use in relation to any matter within the jurisdiction of such regulatory agency ... or to assist an attorney for the government to whom matters have been disclosed under subsection (a) [of section 3322]." The term "attorney for the government" means a Department of Justice attorney. (Section-By-Section Analysis of S.413, Cong. Rec. S 2396 (March 8, 1989); Fed. R. Crim. P. 54(c)).

The motion is addressed to the United States District Court and should demonstrate that the agency has a "substantial need" for the information to be disclosed. For a discussion of the intended meaning of the term "substantial need," see the Section-By-Section Analysis supra, and the Joint Explanatory Statement of the Committee of Conference, Cong. Rec. H 5294 (August 4, 1989). The proposed disclosure order filed with the motion should be tailored to include any limits the attorney for the government would have placed on the agency's use of the information. Otherwise, Section 3322(b)(1)(A) authorizes unrestricted use of the information "in relation to any matter within the jurisdiction of such regulatory agency."

The Fraud Section of the Criminal Division is available for consultation on parallel proceeding issues arising in the financial institution fraud area. Inquiries may be addressed to the Deputy Section Chief.

V. Federal Tax Investigations

The authority of the Internal Revenue Service to issue an administrative summons concerning collection or ascertainment of tax liability is codified at 26 U.S.C. § 7602. Under this statute, the Secretary of the Treasury can issue a summons to conduct criminal as well as civil investigations provided that the IRS has not yet made a referral to the Justice Department for criminal investigation or prosecution.[516] The legislative history suggests that this procedure was adopted to simplify the procedure for issuing and enforcing summonses in response to the Supreme Court's decision in United States v.

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[516] Title 26, United States Code, Section 7602, provides, in pertinent part:

> (a) Authority to summon, etc. -- For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax or collecting any such liability, the Secretary is authorized--
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act . . . to appear before the Secretary . . . .
>
> (3) To take such testimony of the person concerned . . . .
>
> (b) Purpose may include inquiry into offense. -- The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of such section (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.
>
> (c) No administrative summons when there is Justice Department referral. --
>
> (1) Limitation on authority. -- No summons may be issued under this title, and the Secretary may not begin any action under 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

LaSalle National Bank, 437 U.S. 298, 318 (1978).[517] There, the Supreme Court held that the critical point for determining the propriety of an administrative summons was when a formal criminal referral was made to the Department of Justice. The Court said that where the agency makes an institutional decision to abandon the determination of civil tax liability in favor of criminal prosecution, the administrative summons would be issued in "bad faith," and thus unenforceable. The legislative response was apparently an attempt to create a "bright-line" rule. However, some courts of appeal have rejected this interpretation, and continue to hold that the IRS cannot issue or enforce a tax summons once it has made an institutional commitment to seek criminal prosecution.[518]

VI. Issues Concerning Abuse of Process

A. Misleading the Subject of Parallel Proceedings

One of the most common claims made by subjects of parallel proceedings is that they were misled by the agent conducting the investigation as to the true nature of the investigation. This assertion can arise in a variety

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[517] See discussion in Beale & Bryson, Grand Jury law & Practice, § 8.10, citing S. Rep. No. 97-494, 97th Cong., 2d Sess. 285-87 (1982); S. Conf. Rep. No. 97-530, 97th Cong., 2d Sess. 584 (1982); Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982, 97th Cong., 2d Sess., 234-36 (1982); Pickel v. United States, 746 F.2d 176, 184 (3d Cir. 1984); Moutevelis v. United States, 727 F.2d 313, 315 (3d Cir. 1984).

[518] United States v. Michaud, 907 F.2d 750, 752 (7th Cir. 1990) (en banc); Hintze v. Internal Revenue Service, 879 F.2d 121, 128 n.8 (4th Cir. 1989); United States v. Lawn Builders of New England, 856 F.2d 388, 391-92 (1st cir. 1988).

of contexts, including motions to suppress evidence,[519] motions to dismiss indictment,[520] and motions to deny enforcement of civil subpoenas.[521]

In the leading case on this issue, United States v. Tweel, 550 F.2d 297 (5th Cir. 1977), the court suppressed records that had been voluntarily furnished by the taxpayer to an IRS revenue agent who had deliberately misrepresented the criminal nature of his investigation. The court held that Tweel's agreement to provide the records was voided because it had been obtained by the agent's affirmative misrepresentation.

The application of Tweel has been limited to situations where there is an affirmative misrepresentation as to the scope of the investigation.[522] Courts have declined to extend the rationale of Tweel to situations where the agent merely has failed to apprise the subject of the possibility of criminal

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[519] United States v. Tweel, 550 F.2d 297, 300 (5th Cir. 1977).

[520] United States v. Rodman, 519 F.2d 1058, 1059 (1st Cir. 1975) (indictment dismissed where subject of SEC investigation was induced to cooperate based on representation that SEC would make a strong recommendation against criminal prosecution and no such recommendation was made); United States v. Rand, 308 F. Supp. 1231, 1235 (N.D. Ohio 1970) (criminal case dismissed where it was based on testimony of subject at SEC trial which testimony was induced by representation that there would be no criminal prosecution).

[521] Securities Exchange Commission v. ESM Government Securities, Inc., 645 F.2d 310, 318 (5th Cir. 1981).

[522] United States v. Hrdlicka, 520 F. Supp. 403 (E.D. Wis. 1981) (court suppressed evidence obtained by Department of Agriculture agent who misrepresented the scope of his investigation).

sanctions.[523] In addition, the principles announced in Tweel do not apply in the context of undercover investigations.[524]

B. Post-Indictment Proceedings

Since one of the rationales underpinning the court decisions which permit the use of civil and administrative processes during the course of a criminal investigation is that the government is not obtaining any information which it would not be able to obtain through the use of a grand jury subpoena, the courts may more closely scrutinize the use of administrative subpoenas to obtain information once an indictment is returned. For example, in Securities and Exchange Commission v. Dresser Industries, Inc., 628 F.2d 1368, 1391, Judge Edwards, in his concurring opinion, stated:

> Once an indictment has issued, the policy interest expressed in United States v. LaSalle National Bank, 437 U.S. 298 (1978), concerning the impermissibility of broadening the scope of criminal discovery through the summons authority of an agency, may come into play. I express no opinion as to whether or not the summons authority of a government agency may continue once an indictment has been issued or, if it may, whether protective conditions need be placed on the exercise of that power.

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[523] United States v. Powell, 835 F.2d 1095 (5th Cir. 1988); Groder v. United States, 816 F.2d 139, 144-45 (4th Cir. 1987); United States v. Caldwell, 820 F.2d 1395, 1399 (5th Cir. 1987); United States v. Serlin, 707 F.2d 953, 956 (7th Cir. 1983); United States v. Wuagneux, 683 F.2d 1343, 1347-48 (11th Cir. 1982); United States v. Miller 660 F.2d 563, 569 (5th Cir. 1981); United States v. Goss, 650 F.2d 1336, 1348-49 (5th Cir. 1981); United States v. Meier, 607 F.2d 215, 217 (8th Cir. 1979); United States v. Noth, 606 F.2d 229, 234 (6th Cir. 1979); United States v. Robson, 477 F.2d 13, 18 (9th Cir. 1973), cert. denied, 420 U.S. 927 (1973); United States v. Lehman, 468 F.2d 93, 105 (7th Cir. 1972); United States v. Tonahill, 430 F.2d 1042, 1045 (5th Cir. 1970), cert. denied, 400 U.S. 943 (1970); United States v. Prudden, 424 F.2d 1021, 1025 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1970).

[524] Jones v. Berry, 722 F.2d 443, 447 n.5 (9th Cir. 1983); United States v. Irvine 699 F.2d 43, 45-46 (1st Cir. 1983).

Similarly, in United States v. Educational Development Network Corp., 884 F.2d 737, 743 n.11 (3d Cir. 1989), in upholding the use of IG subpoenas in a joint criminal and administrative investigation, the court specifically noted: "There is nothing in this record to show that the agency investigation itself was improper or used as a subterfuge by the USAO once it was unable to obtain the subpoenas from a grand jury."

VII. Forfeiture Proceedings

The Attorney General's 1990 Guidelines specifically recognize the unique role that criminal forfeiture now plays in federal law enforcement, and the importance of seeking to forfeit all criminally derived property. Since it often is not feasible to include criminal forfeiture counts in an indictment, the Guidelines have specifically addressed the issue of authorized disclosures in forfeiture cases:

> An attorney for the government who has previously gained access to matters occurring before the grand jury while investigating the criminal forfeiture aspects of a case may use that information for the purpose of instituting a civil forfeiture proceeding without prior court authorization, subject only to the following limitations:
>
> a) If a civil complaint or pleading will be filed in a case where the grand jury investigation concluded without an indictment, an order authorizing disclosure of matters occurring before the grand jury . . . shall be obtained prior to filing the complaint or pleading.
>
> b) If the filing of a complaint or any other pleading in the civil forfeiture action

will disclose matters occurring before the grand jury . . . shall be obtained prior to filing the complaint or pleading.

c) If discovery proceedings, pre-trial of a civil forfeiture case or any other proceedings will disclose matters occurring before the grand jury, as defined herein, an order authorizing this disclosure . . . shall be obtained prior to the discovery, hearing, trial or proceedings.

These guidelines are based on the recognition that under United States v. John Doe, Inc. I, 481 U.S. 102 (1987), attorneys who have gained access to matters occurring before the grand jury in the course of conducting bona fide investigations into the criminal forfeiture aspects of cases are permitted to participate in subsequent civil forfeiture proceedings and use the information obtained during the grand jury investigation for the purpose of instituting the related civil proceeding. For that reason it is especially important for the civil forfeiture attorney to participate early in the grand jury investigation in order to make use of that information without a disclosure order. Significantly, John Doe gives forfeiture attorneys the right to initiate civil forfeiture without a disclosure order; it does not permit disclosure of such information during the prosecution of the civil forfeiture without a disclosure order.

Federal prosecutors should develop criminal asset forfeiture evidence in the grand jury. Potential witnesses with information that would support forfeiture should be called before the grand jury. Moreover, potential third party claimants should be subpoenaed before the grand jury to lock in their testimony regarding the assets. This may eliminate the need for an ancillary hearing following criminal forfeiture since the court at that stage is permitted to consider the relevant portions of the record of the criminal case in resolving third party claims to the forfeited assets. 21 U.S.C. § 853 (n)(5). However, prosecutors are reminded that the grand jury should not be used knowingly as a tool to prepare a civil case.

VIII. Double Jeopardy Considerations: United States v. Halper

In general, the government may impose both civil and criminal sanctions for the same conduct.[525] In May 1989, the Supreme Court considered the circumstances under which a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause. The Court, in a unanimous decision by Justice Blackmun, in United States v. Halper, held that the imposition of excessive civil penalties after the criminal conviction of a defendant for the same offense violated the Double Jeopardy Clause of the Constitution. The Court stated that the government was entitled to "rough remedial justice" in seeking civil penalties, but that the civil fines were so disproportionate to the harm done to the government that they could not fairly be characterized as remedial when imposed on top of a criminal sentence.[526]

In the wake of the Halper decision, several lower courts have been reluctant to find a double jeopardy violation under Halper in parallel proceedings.[527]

In two recent cases involving the forfeiture of property in connection with drug offenses Halper was analyzed. The Ninth Circuit held that the forfeiture of real property utilized for growing marijuana did not constitute double jeopardy where a defendant was charged with manufacturing marijuana on the property, ruling that in forfeiture cases there is no necessary proportion between the value of the property forfeited and the criminal use of the property.[528] The Second Circuit, however, has held that the government has

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[525] See, e.g., United States v. Halper, 490 U.S. 435, 443 (1989); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

[526] See Halper, 490 U.S. at 449.

[527] See United States v. Louisville Edible Oil Prods., Inc., 926 F.2d 584, 587 (6th Cir.)(Halper does not prevent multiple prosecution by federal and state authorities for the same conduct), cert. denied, 112 S.Ct. 117 (1991); United States v. Fliegler, 756 F. Supp. 688, 693-94 (E.D.N.Y. 1990)(Halper permits imposing government civil fines, after defendants had received criminal sentence including imprisonment, community service, and restitution for government contract fraud); Brown Const. Trades, Inc. v. United States, 23 Cl.Ct. 214, 216-17 (1991)(termination of plaintiff's contract with government was remedial in nature, and therefore permissible under Halper despite previous conviction for defrauding government).

[528] United States v. McCaslin, 959 F.2d 786, 788 (9th Cir. 1992).

the burden of establishing that the forfeiture sanction is entirely assignable to the civil and remedial purposes it serves to be reasonably justified as a civil fine as apposed to punishment.[529] The Second Circuit held in that case that the action was not barred on double jeopardy grounds because the federal government had no role in the defendant's prosecution by the state for the underlying drug offenses.[530]

Another court has held that the debarment of a defendant from participation in federal programs was strictly remedial, and therefore did not constitute "punishment" for purposes of the Double Jeopardy Clause when that defendant was later criminally prosecuted for the conduct that gave rise to the debarment.[531] Moreover, the Supreme Court appears to have left options open for the government to pursue the same penalties in circumstances other than those found in Halper. The Court would allow the government to seek punitive civil penalties against a defendant previously acquitted in a criminal action. Halper also appears to have left the government free to seek civil and criminal penalties in the same proceeding, so long as the "total punishment did not exceed that authorized by the legislature."[532]

In order to avoid possible double jeopardy challenges, serious consideration should be given to including special language in plea agreements or administrative agreements where these issues might arise. The Fraud Section's Defense Procurement Fraud Unit in the Criminal Division and the Commercial Litigation Branch of the Civil Division both have sample Halper provisions.

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[529] Id. at 38.

[530] United States v. Certain Real Property and Premises known as 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29, 36-37 (2d Cir. 1992).

[531] See United States v. Bizzell, 921 F.2d 263, 266-267 (10th Cir. 1990).

[532] United States v. Halper, 490 U.S. 435, 450-51 (1989).

IX. Stays of Parallel Civil Proceedings

In certain situations, the government may choose to request a stay or postponement of the civil proceeding in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in a criminal case. Such a stay may be needed to prevent a civil litigant from gaining access to information available in civil but not criminal discovery, from learning the strategies of the government's case, or for other reasons.

Government requests for stays of civil proceedings on the ground that a pending grand jury investigation or criminal trial may be jeopardized, absent a stay, are frequently granted. United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352, 355 (S.D.N.Y. 1966); R.J.F. Fabrics, Inc. v. United States, 651 F. Supp. 1437, 1440 (CIT, 1986); In re Ivan F. Boesky SEC Litig., 128 F.R.D. 47, 48-49 (S.D.N.Y. 1989)(staying civil case to protect government from plaintiff using liberal civil discovery rules to end-run the criminal discovery strictures of Fed. R. Crim. P. 16(a)(1); Newman v. United States, (N.D. Ohio Jan. 10, 1992)(staying a civil case in which the plaintiffs were seeking a tax refund because they were involved in a pending criminal proceeding involving allegations of tax fraud during the years in question).

However, in civil forfeiture cases government requests for stays are much more difficult to obtain. The primary reason for the lack of success in staying civil forfeiture cases is because it is the government that elected to commence the civil action in the midst of its criminal investigation. Further, courts are often faced with objections to a stay from an unindicted and thus sympathetic claimant, who is being deprived of his or her property without opportunity to challenge the forfeiture for the period of the criminal investigation. See United States v. Banco Cafetero Int'l, 107 F.R.D. 361, 367 (S.D.N.Y. 1985)(government motion to stay forfeiture proceeding pending entry of verdict or plea in criminal case denied government had instituted the civil proceeding after the indictment and should have foreseen the discovery request). In re Ramu Corp., 903 F.2d 312, 317 (5th Cir. 1990); United States v. One Parcel of Real Estate Located at 12525 Palm Road, North Miami, 731 F. Supp. 1057, 1059-60 (S.D. Fl. 1990).

Because of the overriding importance of the criminal investigative process, and because of the significant differences between civil and criminal

discovery,[533] it is well established that courts have the discretion to accord substantial weight to the possible effects on a pending criminal case in ruling on motions to stay discovery in related civil proceedings. In the leading case of Campbell v. Eastland,[534] the Fifth Circuit recognized that criminal prosecutions must often take priority over the rights of litigants in civil cases:

> The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority; which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

307 F.2d at 487 (emphasis added).

Without distinguishing whether the United States was or was not a party to both proceedings, the Fifth Circuit has succinctly posed the problem concerning the improper use of civil discovery:

> In handling motions for a stay of the civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil

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[533] Compare Rules 26 through 37, Fed. R. Civ. P., with Rules 15 through 17, Fed. R. Crim. P. Rule 16, Fed. R. Crim. P., significantly restricts discovery in criminal cases by specifically describing what is discoverable. In addition, Rule 15, Fed. R. Crim. P., which controls depositions in criminal cases, permits a party to an action to depose only its own witnesses to preserve testimony at trial, and then only pursuant to a court order in "exceptional cases." In sharp contrast, the civil rules allow depositions of all parties to the action and any other person necessary to obtain testimony relevant to the subject matter of the action. Fed. R. Civ. P. 26.

[534] Campbell v. Eastland, 307 F.2d 478 (5th Cir.1962).

> Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive.
>
> . . .
>
> A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and policies applicable to one suit from doing violence to those pertaining to the other.

Id.

In ruling on stays of civil discovery pending the completion of the related proceedings, many courts have expressed concerns about the improper use of civil discovery to circumvent the limitations imposed on discovery in criminal proceedings.[535] See, e.g., United States v. Stewart, 872 F.2d 957 (10th Cir. 1989) (courts have authority, under Rule 16, Fed. R. Crim. P., to prevent parties from abusing discovery procedures); Afro-Leon, Inc. v. United States, 820 F.2d 1198, 1202-1204 (Fed.Cir. 1987) (broad scope of civil discovery may present the criminal defendant an irresistible temptation to use that discovery to his advantage in the criminal case); Securities and Exchange Commission v. Dresser Industries, 628 F.2d 1368, 1376 n.20 (D.C. Cir. 1980) (en banc) (government may seek postponement of the noncriminal proceeding to prevent the criminal defendant from broadening his rights of criminal discovery

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[535] Compelling policies justify the restricted scope of discovery in criminal proceedings. For example: (1) broad disclosure of the essentials of the government's criminal case might result in perjury and manufactured evidence; (2) revelation of confidential government sources would discourage the voluntary cooperation of such sources and create the opportunity for intimidation of witnesses; and (3) discovery would not be mutual because the potential criminal defendant could limit disclosure by invoking the Fifth Amendment, leading to unfair "surprise" of the prosecution at a later point. Campbell v. Eastland, 307 F.2d 478, 487, n.12, (5th Cir. 1962) (citing, "Developments in the Law – Discovery," 74 Harv. L. Rev. 940, 1052 (1961)). See also SEC v. Dresser, Industries, 628 F.2d at 1376.

against the government); Founding Church of Scientology v. Kelley, 77 F.R.D. 378, 381 (D.D.C. 1977)(government interest in preserving secrecy of continuing criminal investigation outweighs plaintiff's need for discovery); Peden v. United States, 512 F.2d 1099, 1103 ("deferrable civil proceedings constitute improper interference with the criminal proceedings if they churn over the same evidentiary material").

Courts are more likely to favor the government's position in obtaining a civil stay against an individual once that individual has been indicted and is required to defend the criminal matter. When both civil and criminal proceedings arise out of the same or related transactions, the government is entitled, as a general rule, to a stay of discovery in the civil forfeiture action until disposition of the criminal matter.[536] Indeed, the existing provisions of the most commonly used federal civil forfeiture statutes allow for stays of civil forfeiture proceedings only upon the return of an indictment or information in the related criminal proceeding.[537] For example, the civil drug forfeiture statute (21 U.S.C. § 881(i)) specifically provides as follows:

> The filing of an indictment or information alleging a violation of [the federal controlled substances statutes], or a violation of State or local law that could have been charged under [the federal controlled substances statutes], which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

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[536] See, e.g., United States v. One 1967 Buick Hardtop Electra, 304 F. Supp. 1402 (W.D. Pa. 1969), and cases cited therein.

[537] The civil money laundering forfeiture statute (18 U.S.C. §981(g)) similarly provides that:

> The filing of an indictment or information alleging a violation of law, Federal, State, or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

The courts have strictly construed the "good cause" showing necessary to obtain a post-indictment stay. See United States v. Real Estate at 1303 Whitehead St., Key West, Florida, 729 F. Supp. 98, 100 (S.D. Fl.1990) (government must show good cause for a stay in the same form that a party must show justification for a preliminary injunction); United States v. All Funds ($100,000), 767 F. Supp. 36,42 (E.D.N.Y. 1991) citing United States v. Leasehold Interests in 118 Avenue D, 754 F. Supp. 282, 287 (E.D.N.Y. 1990)("mere conclusory allegations of potential abuse or simply the opportunity by the claimant to improperly exploit civil discovery . . . will not avail on a motion for a stay").

Moreover, the legislative history for 21 U.S.C. § 881(i) reflects concern for the government's interest:

> Generally, the courts have been willing to grant such stays of civil forfeiture proceedings when the government has commenced a criminal action concerning the same acts that have given rise to the forfeiture. Absent such a stay, the government may be compelled in the context of the civil forfeiture action to disclose prematurely aspects of its criminal case.

S. Rep. No. 225, 98th Cong., 2d Sess. 1, 215-16 n.57 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3398-99 n.57.

Chapter Six

SUBPOENA POWER: LIMITATIONS AND ENFORCEMENT

I. Introduction

Central to the function of the federal grand jury is its subpoena power. Through its ability to compel the testimony of witnesses and the production of documents, the grand jury serves a vital role in the investigation of crime. The compulsion of grand jury subpoenas provides a powerful tool to law enforcement in identifying wrongdoing.

Recognizing the importance of grand jury subpoenas to effective law enforcement, courts have construed the authority of the grand jury to issue subpoenas in a broad fashion. As a general rule, absent the assertion of some common law or constitutionally based privilege[538], a subpoenaed witness must comply with the commands of a grand jury subpoena.

It has often been observed that the grand jury "'has a right to every man's evidence'".[539] Thus, no class of individuals is legally exempted from compliance with grand jury subpoenas. An individual's station or position does not place him or her beyond the reach of the grand jury. Indeed, the grand

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[538] See Chapter Seven of this Manual for a discussion of privileges applicable to grand jury proceedings.

[539] Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (citing cases); In re Grand Jury Matters, 751 F.2d 13,16 (1st Cir. 1984).

jury's subpoena power has been extended to the President of the United States,[540] Members of Congress,[541] doctors,[542] lawyers,[543] accountants,[544] and journalists.[545] Like all subpoenaed witnesses, these individuals may be compelled, in appropriate cases, to appear and provide evidence to the grand jury.

The grand jury's subpoena power is defined by its function to investigate wrongdoing and determine whether probable cause exists to return an indictment.[546] Accordingly, the grand jury may through its use of subpoenas require the production of all witnesses and non-privileged evidence which is relevant to its investigation, provided compliance with the subpoena is not unreasonably burdensome. The grand jury need not make a threshold showing of probable cause to justify issuance of a subpoena.[547] Moreover, a strong presumption of regularity attaches to any subpoena issued by the grand jury.[548]

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[540] See United States v. Nixon, 418 U.S. 683 (1974) (trial subpoena).

[541] See United States v. Gravel, 408 U.S. 606 (1972).

[542] United States v. Mullings, 364 F.2d 173, 176 n.2 (2d Cir. 1966). See United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971); United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961). But see Ramer v. United States, 411 F.2d 30, 39 (9th Cir.), cert. denied, 396 U.S. 965 (1969).

[543] In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984). See Chapter Seven of this Manual for a discussion of the attorney client privilege in grand jury proceedings.

[544] See United States v. Arthur Young & Co., 465 U.S. 805 (1984).

[545] See Branzburg v. Hayes, 408 U.S. 665 (1972).

[546] Costello v. United States, 359 U.S. 359, 362 (1956).

[547] United States v. R. Enterprises, Inc., ___ U.S.___, 111 S.Ct. 722 (1991); In re Grand Jury Subpoena, 920 F.2d 235, 244 (4th Cir. 1990); In re Grand Jury Proceedings, 896 F.2d 1267, 1278 (11th Cir. 1990).

[548] United States v. R. Enterprises, Inc., 111 S.Ct. at 728.

A. General Limitations on the Grand Jury's Subpoena Power

The authority of the grand jury to subpoena witnesses and evidence before it, while broad, is not absolutely unfettered. The grand jury's subpoena power is intended to aid it in investigating alleged wrongdoing. Accordingly, this authority, which stems from the grand jury's investigative function, is also defined by that function. Thus, the limited function performed by the grand jury -- the investigation of crime -- prescribes several significant limitations on the grand jury's subpoena power.

1. Grand Jury Subpoenas May Not Be Used For Trial Preparation

The grand jury's subpoena power cannot be used after indictment to gather evidence, conduct pre-trial discovery or otherwise engage in preparation for the trial of an indicted defendant.[549] However, even after an indictment is returned, the grand jury may continue to issue subpoenas that might relate to the matter under indictment, if the subpoenas involve an ongoing investigation which is considering whether to charge additional defendants,[550] or to charge additional offenses against a previously indicted individual.[551] For example, often there is a continuing tax investigation which is not concluded at the time a drug or fraud indictment is returned. In cases where the investigation continues post-indictment, the federal prosecutor should always establish and maintain a clear record that describes the conduct and suspected violations that are under scrutiny. The grand jury may issue subpoenas to investigate these matters,

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[549] E.g., In re Grand Jury Proceedings, 814 F.2d 61, 70 (1st Cir. 1987); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062 (1977); United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972).

[550] See United States v. Gibbons, 607 F.2d 1320, 1323 (10th cir. 1979).

[551] United States v. Dyer, 722 F.2d 174, 179 (5th Cir. 1983); In re Grand Jury Proceedings (Pressman), 586 F.2d 724, 725 (9th Cir. 1978); In re Grand Jury Proceedings, 896 F.2d 1267, 1279 (11th Cir. 1990).

even if that investigation might lead to the discovery of additional evidence against a defendant who is already under indictment.[552] Thus, potential trial witnesses may continue to be compelled to appear before the grand jury, as long as their testimony is sought as part of an ongoing investigation and is not obtained solely for trial preparation. In short, the fact that an indictment has been returned against some defendants does not, standing alone, provide grounds for a grand jury witness to refuse to comply with a subpoena.[553]

Moreover, the grand jury need not cease issuing subpoenas at the moment it obtains the bare minimum of proof necessary to obtain an indictment.[554] The grand jury has an obligation to thoroughly investigate any of the matters brought before it. Therefore, prior to the return of an indictment, the grand jury can issue all of the subpoenas that are necessary for a complete investigation, without concern for whether it has already received sufficient evidence to establish a prima facie case.

2. *Grand Jury Subpoenas May Not Be Used Solely For Locating Fugitives*

As a matter of Department policy, prosecutors are forbidden from using the grand jury's subpoena power solely to aid in locating and arresting fugitives.[555] The United States Attorneys' Manual recognizes, however, that there may be instances where the grand jury wishes to locate a fugitive in order to obtain that individual's testimony on matters which are then under investigation. In other instances, the whereabouts of a fugitive may be relevant to a legitimate investigation into a criminal offense such as: escape, 18 U.S.C. §§ 751, 752; harboring, 18 U.S.C. §§ 1071, 1072; misprision of a felony, 18

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[552] In re Grand Jury Proceedings, 814 F.2d 61, 71 (1st Cir. 1987); In re Grand Jury Proceedings, 632 F.2d 1033, 1040 (3d Cir. 1980).

[553] See In re Grand Jury Proceedings, 632 F.2d 1033, 1041.

[554] See United States v. Picketts, 655 F.2d 837, 841 (7th Cir.), cert. denied, 454 U.S. 1056 (1981).

[555] See USAM 9-11.120B.

U.S.C. § 4; accessory after the fact, 18 U.S.C. § 3; or failure to appear, 18 U.S.C. § 3146. In such instances, the grand jury's subpoena power may properly be used to search for a fugitive.[556]

3. The Grand Jury's Subpoena Power May Not Be Used To Obtain Evidence For Use In Civil Proceedings

Since the function of the grand jury is to investigate criminal matters, it well established that the government may not use grand jury subpoenas to conduct civil investigations.[557] This prohibition on using grand jury subpoena power to gather evidence for civil cases is reinforced by Rule 6(e) of the Federal Rules of Criminal Procedure, which cloaks grand jury proceedings in secrecy and authorizes disclosure of grand jury information in related civil cases only by order of court.[558] To obtain such a disclosure, the movant must show both that the disclosure is being made preliminary to or in connection with a judicial proceeding and that there is a "particularized need" for the disclosure.[559]

4. Venue Limitations On The Grand Jury's Subpoena Power

As a general rule, a grand jury only has the jurisdiction to investigate offenses which fall within its venue. Therefore, a case should not be presented to a grand jury in a district unless venue for the offenses under investigation also lies in that district. See USAM 9-11.121. In many federal cases, venue will lie in more than one district. In such instances, each district should be able to independently investigate the offense. See 18 U.S.C. § 3237.

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[556] Id.

[557] United States v. Sells Engineering, Inc., 463 U.S. 418, 431-33 (1983).

[558] See Rule 6(e)(3)(C)(i), Fed. R. Crim. P.

[559] See Rule 6(e)(3)(C)(i); United States v. John Doe, Inc., 481 U.S. 103, 117 (1987). See also Chapter Four of this Manual for a full discussion of Rule 6(e).

Moreover, there is no requirement that a grand jury conclusively determine venue at the outset of its investigation. The grand jury may investigate wrongdoing to determine whether and to what extent venue lies in the district.

While venue considerations ultimately limit a grand jury's investigative power, they do not provide potential grand jury witnesses with grounds to challenge their subpoenas. A witness may not contest the right of a grand jury to inquire into events which occurred in another district on the ground that the grand jury lacks venue to pursue an investigation.[560]

5. *Grand Jury Subpoenas May Not Be Used To Harass Or Intimidate*

The grand jury's broad subpoena power may also be curtailed if it is abused. In compelling cases, courts will refuse to enforce subpoenas used to harass or intimidate any person.[561] Prohibited harassment includes the use of a grand jury subpoena to coerce a plea bargain, when such use has no relation to a proper purpose of the grand jury.[562] To succeed in opposing a subpoena on the ground of alleged prosecutorial harassment, a complainant must show that the grand jury has lost its independence.[563] This is a difficult burden to meet.[564]

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[560] Blair v. United States, 250 U.S. 273, 282-83 (1919); In re May 1972 San Antonio Grand Jury, 366 F.Supp. 522, 530 (W.D.Tex. 1973).

[561] United States v. R. Enterprises, Inc. 111 S. Ct. 722, 727(1991); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

[562] United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir.), cert. denied, 464 U.S. 978 (1983).

[563] United States v. Doe, 541 F.2d 490, 492 (5th Cir. 1976).

[564] See e.g., In re Borden, 75 F.Supp. 857 (N.D. Ill. 1948) (subpoena not harassing, despite delivery of many files under prior subpoenas and fact that all previous investigations of petitioner indicated innocence).

B. Departmental Policies Limit The Ability Of The Grand Jury To Investigate Certain Matters

As a matter of internal policy, the Department of Justice imposes certain limitations on the grand jury's subpoena power in federal criminal investigations. The policy constraints imposed by the Department in the grand jury field fall into two basic classes:

First, as a threshold matter, the Department restricts the authority of United States Attorneys' offices to independently commence grand jury investigations into certain matters. There are two aspects to these restrictions. At the outset, in a limited number of cases involving offenses which have national security implications, prosecutors must obtain the prior approval of the Department before commencing a grand jury investigation.[565] Prior Departmental approval is also needed before commencing a grand jury investigation into alleged violations of federal criminal law involving terrorist acts overseas.[566] In addition, by policy, United States Attorneys are cautioned to consult with the appropriate component of the Department of Justice prior to commencing grand jury investigations into some 31 different sensitive or complex subject matter areas.[567] These Departmental policies, which limit the discretion of United States Attorneys in instituting investigations, also constitute internal restraints upon the grand jury's subpoena power.

In addition to these policies which limit the ability of the United States Attorneys to commence investigations, the Department has established policies governing the issuance of grand jury subpoenas. These policies call for prior Department approval of certain grand jury subpoenas and are designed to monitor and avoid claims of overreaching in sensitive areas such as attorney-client relationships and relations with the news media.

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[565] See USAM 9-2.132.

[566] See USAM 9-2.136.

[567] See USAM 9-2.133.

1. Departmental Policy Regarding Subpoenas To Attorneys For Information Relating To The Representation Of Clients

As a matter of policy, the Department has limited the discretion of United States Attorneys' Offices to issue subpoenas to attorneys for information relating to the representation of a client.[568] Under current Departmental guidelines, no subpoena may be issued to an attorney seeking information relating to the representation of a client or the fees paid by such client without the prior approval of the Assistant Attorney General of the Criminal Division. In order to secure Department approval for such subpoenas, a federal prosecutor must show:

> (i) That there are reasonable grounds to believe that the information sought by the subpoena is needed for the successful completion of the case;
>
> (ii) That all reasonable efforts to obtain the information from alternate sources have proven unsuccessful;
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> (iii) That the need for the information must out-weigh any potential adverse affect of the attorney-client relationship;
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> (iv) That the subpoena is narrowly drawn; and

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[568] See USAM 9-2.161(a); See also, In re Horn, No. 91-15577 slip op. (9th Cir. Nov. 25, 1992)(quashing attorney subpoena covering "great deal" of material protected by attorney-client privilege and containing the impermissible request that the attorney provide the grand jury with a description of documents subpoenaed and reasons for claiming the privilege); Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania, No. 91-1425 (3rd Cir. Sept. 16, 1992)(Pennsylvania Rule of Professional Conduct requiring prior judicial approval before serving grand jury subpoenea on an attorney where the attorney would be queried about past or present clients may not be enforced against federal prosecutors).

(v) That the information sought by the subpoena is not protected by any valid claim of privilege.[569]

An important aspect of this Departmental policy entails a finding that a subpoena to an attorney does not call for the disclosure of privileged information. Therefore, compliance with the Departmental policy requires a thorough understanding of the scope of the attorney-client privilege. That topic is covered separately in Chapter Seven of this Manual.

2. *Departmental Policy Regarding Subpoenas To Members Of The News Media*

While the courts have not recognized any broad First Amendment privilege applicable to members of the news media in grand jury proceedings,[570] the Department recognizes that issuing grand jury subpoenas to members of the media raises sensitive policy considerations. Accordingly, it is the policy of the Department of Justice that grand jury subpoenas directed at members of the news media for information relating to the news gathering function must be approved in advance by the Attorney General. However, such approval is not required if the news media organization has expressly agreed to provide the subpoenaed materials which have been previously published or broadcast and the United States Attorney or responsible Assistant Attorney General is satisfied that the requirements of 28 CFR §50.10 have been satisfied.[571]

Requests for Attorney General authorization to subpoena members of the news media are judged against an exacting standard. To secure such approval, all reasonable efforts must first be made to obtain the information from sources

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[569] Id.

[570] Branzburg v. Hayes, 408 U.S. 665 (1972).

[571] See 28 C.F.R. § 50.10(e); USAM § 9-2.161.

outside the media.[572] Prosecutors must then attempt to negotiate with the news media and receive voluntary compliance with any subpoena.[573]

If the requested information cannot be obtained from alternate sources and efforts at negotiating voluntary compliance fail, the Attorney General may authorize the issuance of a subpoena.[574] However, before the subpoena will be authorized, it must be shown that:

> (i) Based on non-media sources, reasonable grounds exist to believe a crime has occurred;
>
> (ii) The information in the possession of the news media is "essential to a successful investigation";
>
> (iii) Efforts to secure the information from non-media sources have failed; and
>
> (iv) The proposed subpoena is narrowly tailored to avoid claims of harassment and to avoid production of a large volume of unpublished material.[575]

It should be noted that this policy applies only to subpoenas which seek information relating to the news-gathering function. Thus, the policy does not apply to subpoenas which simply seek commercial or financial information from media organizations.[576]

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[572] 28 C.F.R. § 50.10(b).

[573] 28 C.F.R. §§ 50.10(c)-(d).

[574] 28 C.F.R. § 50.10(e).

[575] 28 C.F.R. § 50.10(f)(1)-(6).

[576] 28 C.F.R. § 50.10(m).

3. *Departmental Policy Regarding Resubpoenaing Contumacious Witnesses Before Successive Grand Juries*

The Department has established a policy relating to resubpoenaing contumacious witnesses before successive grand juries. As discussed below and in Chapter Eight, witnesses who refuse to answer questions properly put to them by the grand jury may be held in contempt and either fined or imprisoned until they comply with the directions of the grand jury. Such a contempt citation may extend for the life of the grand jury. When the grand jury term draws to a close, so too does the contempt citation.

While there appears to be no legal bar on the reimposition of contempt sanctions by successive grand juries[577] it is the general policy of the Department not to resubpoena a contumacious witness before successive grand juries for the purpose of instituting further contempt proceedings.[578] Therefore, prior approval of the Assistant Attorney General, Criminal Division, is required before a contumacious witness may be subpoenaed by successive grand juries. In order to obtain such approval, the prosecutor must show either: (a) that the witness is now prepared to testify; or (b) that the appearance of the witness is justified since the witness possesses information essential to the investigation.

In light of this Departmental policy limiting prosecutorial discretion to seek successive contempt citations, prosecutors should proceed carefully when dealing with recalcitrant witnesses. If a grand jury is approaching its expiration date, the sanction of contempt has little deterrent effect on a contumacious witness.

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[577] Shillitani v. United States, 384 U.S. 364, 371 n.8 (1963).

[578] See USAM 9-11.160.

II. Subpoenas Ad Testificandum and Subpoenas Duces Tecum

Grand jury subpoenas generally fall into two basic classes: subpoenas ad testificandum, which call upon witnesses to appear and testify; and subpoenas duces tecum, which compel the production of physical evidence before the grand jury. These two classes of subpoenas may be used interchangeably by the grand jury in its fact finding process. Thus, the grand jury may issue a subpoena to a witness compelling that witness to testify, produce physical evidence, or both testify and provide physical evidence.

Subpoenas ad testificandum and subpoenas duces tecum are powerful tools for collecting evidence. However, each class of subpoena is subject to specific limitations. The scope of each of these classes of subpoenas, and the restrictions on their use, are discussed separately below:

A. The Scope of Subpoenas Ad Testificandum

It is a settled aspect of grand jury practice that "the grand jury's authority to subpoena witnesses is not only historic ... but essential to its task."[579] Thus, the "longstanding principle that 'the public ... has a right to every man's evidence', except for those persons protected by a constitutional, common-law or statutory privilege, ... is particularly applicable to grand jury proceedings."[580]

Applying this broad standard, courts have rejected a series of threshold objections by grand jury witnesses to subpoenas ad testificandum. Thus, a grand jury witness may not refuse to respond to a subpoena or answer questions on the grounds that the information sought by the grand jury is not relevant to

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[579] Branzburg v. Hayes, 408 U.S. 665, 688 (1972), citing Blair v. United States, 250 U.S. 273, 279-281 (1919); In re Grand Jury Matters, 751 F.2d 13, 17 (1st Cir. 1984).

[580] Branzsurg v. Hayes, 408 U.S. at 688. See United States v. Mandujano, 425 U.S. 564, 58 (1976).

its investigation.[581] Nor may a witness decline to testify because of fear of retaliation by others.[582] Since grand jury proceedings are generally "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials," [583] a subpoenaed witness may not interpose narrow evidentiary objections to questions posed by the grand jury. Moreover, a witness generally may not object to a grand jury subpoena and refuse to answer questions on the grounds that they are based on evidence which was illegally seized.[584]

1. Limitations on Subpoenas Ad Testificandum

a. Privileges

There are, however, some limitations on the power of a grand jury to compel testimony. At the outset, constitutional, common law and statutory privileges restrict the grand jury's subpoena power. It is well established that witnesses may invoke the Fifth Amendment privilege against self-incrimination

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[581] See Blair v. United States, 250 U.S. 273, 282 (1919); United States v. Weinberg, 439 F.2d 743, 749 (9th Cir. 1971).

[582] See, e.g., In re Grand Jury Proceedings, 943 F.2d 132, 135 (1st Cir. 1991); United States v. Gomez, 553 F.2d 958 (5th Cir. 1977); Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975); United States v. Doe, 478 F.2d 194 (1st Cir. 1973); In re Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); LaTona v. United States, 449 F.2d 121 (9th Cir. 1971). But see United States v. Banks, 942 F.2d 1576, 1579 (11th Cir. 1991)(refusal to testify based on fear of harm to self or family may be a defense).

[583] United States v. Calandra, 414 U.S. 338, 343 (1974).

[584] United States v. Calandra, 414 U.S. 338, 354-55 (1974). But see Gelbard v. United States, 408 U.S. 41 (1972).

before the grand jury.[585] Witnesses are also entitled to assert various common law privileges during grand jury proceedings.[586]

b. Statutory Objections to Grand Jury Subpoenas

1) Electronic Surveillance

Federal criminal law also provides grand jury witnesses with several narrowly-defined statutory rights to challenge grand jury subpoenas. At the outset, federal law enforcement officials are prohibited by statute from using information obtained during illegal electronic surveillance in any grand jury proceeding.[587] Accordingly, it has been held that grand jury witnesses may object to questions on the grounds that they are the fruit of an illegal electronic surveillance.[588]

When a witness objects to grand jury proceedings on the grounds that they are the product of illegal electronic surveillance, the government can overcome this objection by demonstrating that no surveillance occurred,[589] by providing the records of a court-authorized surveillance to the supervising judge for *in camera* review,[590]or by establishing that any previous surveillance

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[585] See Chapter Seven of this Manual for a discussion of the Fifth Amendment in grand jury proceedings.

[586] See Chapter Seven of this Manual for a discussion of common law privileges.

[587] 18 U.S.C. § 2515.

[588] Gelbard v. United States, 408 U.S. 41 (1972).

[589] Matter of Special February 1977 Grand Jury, 570 F.2d 674, 678 (7th Cir. 1978); In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975); In re Persico, 491 F.2d 1156 (2d Cir.), cert.denied, 419 U.S. 924 (1974).

[590] Matter of Archeluta, 561 F.2d 1059 (2d Cir. 1977); In re Grand Jury Impaneled January 21, 1975 (Freedman), 529 F.2d 543, 549 (3d Cir.), cert.denied, 425 U.S. 992 (1976); United States v. Tucker, 526 F.2d 279, 281 (5th Cir.), cert.denied, 425 U.S. 958 (1976); In re Quinn,

played no role in the instant investigation.[591] Some cases have held that, in instances involving specific allegations of misconduct, the grand jury witness may also be entitled to review the wiretap application, affidavit and orders, in redacted form if necessary to protect sensitive information.[592]

2) Bankruptcy Proceedings

The Bankruptcy Code also prescribes procedures for "immunity for persons required to submit to examination to testify or to provide information" in bankruptcy proceedings.[593] Formerly, this immunity was conferred in bankruptcy cases without the direct involvement of the United States Attorney.[594] This procedure had the potential for mischief since prosecutors could be unaware of immunities being issued in parallel bankruptcy proceedings. In 1979, however, the Bankruptcy Code was amended to require that immunity in bankruptcy proceedings be issued pursuant to the statutory immunity provisions of 18 U.S.C. § 6001. Thus, the current practice requires the United States to apply for immunity for witnesses in bankruptcy proceedings.

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525 F.2d 222 (lst Cir. 1975); Matter of Grand Jury (Vigil), 524 F.2d 209, 214-217 (10th Cir. 1975), cert.denied, 425 U.S. 927 (1976).

[591] In re Grand Jury v. Gassiraro, 918 F.2d 1013, 1015 (1sr Cir. 1990).

[592] In re Grand Jury Proceedings (Katsouros), 613 F.2d 1171, 1173 (D.C. Cir. 1979); Melickian v. United States, 547 F.2d 416, 420 (8th Cir.), cert.denied, 430 U.S. 986 (1977); In re Lochiatto, 497 F.2d 803, 807 (1st Cir. 1974); In re Grand Jury, 851 F.2d 499, 500 (1st Cir. 1988).

[593] 11 U.S.C. § 344.

[594] See 11 U.S.C. § 25(a)(10) (1976). See also United States v. Berry, 678 F.2d 856, 859 (10th Cir. 1982).

The immunity conferred on witnesses in bankruptcy proceedings extends to grand jury investigations. Thus, as a general rule, the grand jury cannot use the immunized testimony of a witness in bankruptcy proceedings, or the fruits of that immunized testimony, in its investigation.[595]

3) Drug Treatment Records

The Drug Abuse Confidentiality Act, 42 U.S.C. § 290 ee-3 limits the ability of the grand jury to use grand jury subpoenas to obtain drug abuse treatment records from federally funded treatment facilities. Under the Act, treatment records are considered confidential.[596] The Act does not provide for release of records in response to a grand jury subpoena. Instead, treatment records can be obtained only with the consent of the patient[597] or "if authorized by an appropriate order of a court of competent jurisdiction."[598] Procedures for obtaining disclosure orders are governed by the Code of Federal Regulations.[599] To secure such an order, the government must show that:

> (i) The crime involved is extremely serious, such as one which causes or threatens loss of life or serious bodily injury;
>
> (ii) There is a reasonable likelihood that the treatment records will disclose information of substantial value to the investigation;

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[595] See e.g., United States v. Berry, 678 F.2d 856, 859 (11th Cir. 1982); In re Grand Jury Proceeding, 497 F. Supp. 979, 985-88 (E.D.Pa. 1980).

[596] 42 U.S.C. § 290 ee-3(a).

[597] 42 U.S.C. § 290 ee-3(b)(1).

[598] 42 U.S.C. § 290 ee-3(b)(2)(C).

[599] 42 C.F.R. § 2.61 et seq.

(iii) Other means of obtaining the information are unavailable or ineffective;

(iv) The need for the information outweighs any injury to the patient or the physician-patient relationship; and

(v) The custodian of the records has been afforded the assistance of counsel.[600]

Failure to abide by the procedures prescribed under the act can lead to suppression of evidence,[601] and other sanctions, including fines of up to $5,000 for each unauthorized disclosure.[602]

c. Subpoenas May Not Be Used to Compel Interviews

A grand jury subpoena ad testificandum compels testimony before the grand jury. Accordingly, a prosecutor may not use a subpoena merely to compel an office interview with an individual.[603] However, nothing prohibits a voluntary pre-testimony interview with a witness who is subpoenaed before the grand jury.[604]

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[600] 42 C.F.R. § 2.65(d)(1)-(5).

[601] 42 U.S.C. § 290 ee-3(c); see United States v. Corona, 849 F.2d 562, 565 (11th Cir.), cert. denied, 489 U.S. 1084 (1988).

[602] 42 U.S.C. § 290 ee-3(f).

[603] United States v. Digiglio, 538 F.2d 972, 985 (3d Cir. 1976), cert.denied, 429 U.S. 1038 (1977); see Pirbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954).

[604] In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 212 (D. D.C. 1980); United States v. Mandel, 415 F. Supp. 1033, 1039-40 (D. Md. 1976), vacated, 591 F.2d 1347 (4th Cir.), aff'd on rehearing, 602 F.2d 653 (4th Cir. 1979) (en banc), cert.denied, 445 U.S. 961 (1980).

Attorneys often interview subpoenaed witnesses prior to their scheduled grand jury appearances and, as a result of those interviews, determine either that the witnesses could not offer testimony of value to the grand jury, or that the witness' testimony would not best be heard by the grand jury at that particular time. In such instances, attorneys may decide to excuse the witness or to postpone his/her grand jury appearance. To establish that excusing or postponing a witness appearance has been done properly, attorneys should generally advise the grand jury of the reason for not calling a witness. This will give the grand jury the opportunity to request the witness' appearance and there will be no question that the attorneys have withheld evidence from the grand jury.

d. Subpoenas to Targets or Subjects of the Grand Jury's Investigation

Under Department of Justice policy, a "target" of a grand jury investigation is a person who is linked by substantial evidence to the commission of a crime and who, in the judgment of prosecutors, is a putative defendant. A "subject" of a grand jury investigation is a person whose conduct falls within the scope of the investigation.[605] As a legal matter, the grand jury may properly subpoena "targets" and "subjects" to testify before it.[606] However, care should be taken to ensure that subpoenaed "targets" or "subjects" are not misled as to their status before the grand jury.[607]

Yet, subpoenas to "targets" or "subjects" may carry the appearance of unfairness. To avoid any potential for misunderstanding, the Department of Justice has prescribed specific policies relating to subpoenas directed at "targets" or "subjects." There are two aspects to this policy. First, while there is no clear legal requirement that grand jury witnesses be advised of their Fifth

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[605] See USAM 9-11.150.

[606] See United States v. Mandujano, 425 U.S. 564, 572-75 (1976). United States v. Wong, 431 U.S. 1974, 179 n.8 (1977); In re Lopreato, 511 F.2d 1150, 1153 (1st Cir. 1975).

[607] See United States v. Babb 807 F.2d 272, 277 (1st Cir. 1986)(court finds prosecutorial misconduct in prosecutor's false statement to grand jury witness that he was not a target).

Amendment rights,[608] as a matter of policy, the Department requires advice of rights forms to be attached to all subpoenas served on "targets" or "subjects."[609] These advice of rights forms advise potential witnesses regarding the subject matter of the investigation, the witness' Fifth Amendment rights, and the witness's right to consult with counsel. Prosecutors are also encouraged to advise "targets" and "subjects" regarding their Fifth Amendment rights prior to questioning them in the grand jury.[610]

As a matter of policy, the Department has prescribed certain restrictions on subpoenaing "targets" before the grand jury.[611] Under the existing Departmental guidelines, prior to subpoenaing a "target," efforts should be made to secure the "target's" voluntary appearance. If the "target" refuses to appear voluntarily, a subpoena must be approved in advance by the grand jury, along with the United States Attorney or the responsible Assistant Attorney General. In determining whether to approve the subpoena, these officials must consider the importance of the "target's" testimony to the conduct of the investigation, whether the "target's" testimony can be provided by other witnesses and whether the information sought from the target is protected by a valid claim of privilege.

B. The Scope of Subpoenas Duces Tecum

In addition to its power to compel testimony, the grand jury may use subpoenas duces tecum to require witnesses to produce physical evidence.[612] While this physical evidence typically consists of documents, subpoenas duces

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[608] See United States v. Washington, 431 U.S. 181, 186, 190-91 (1977).

[609] See USAM 9-11.150.

[610] Id. At least in the First Circuit, violations of the Department's policy concerning target and subject warnings may result in referrals of such matters by the Court of Appeals to the Department's Office of Professional Responsibility. United States v. Pacheco-Ortiz, 889 F.2d 301, 311 (1st Cir. 1989).

[611] See USAM 9-11.151.

[612] Fed. R. Crim. P. Rule 17(c).

tecum are not limited to records. Rather, a grand jury subpoena duces tecum may be used to obtain other physical evidence such as voice exemplars,[613] handwriting exemplars[614] and hair samples.[615]

Like subpoenas ad testificandum, grand jury subpoenas duces tecum are given broad force and effect. Thus, as a general rule, a subpoena duces tecum may seek all non-privileged documents and physical evidence[616] including documents or information which another party may have already produced,[617] or information which may readily be available other than from the subpoenaed party.[618] Moreover, a subpoena duces tecum may require the production of original documents.[619] This may be especially important, for example, where it is important to capture notations, erasures, or colored markings that may not show up on copies of documents.

Subpoenas duces tecum may be served on any natural person, legal entity, or corporation. Documents or other tangible items may be obtained by subpoena duces tecum from any person who is either in physical or constructive

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[613] See United States v. Dionisio, 410 U.S. 1, 5-15 (1973) (grand jury subpoena of voice exemplar does not violate defendant's Fourth Amendment protection against unreasonable search and seizure or Fifth Amendment right against self-incrimination).

[614] See United States v. Mara, 410 U.S. 19, 22 (1973) (grand jury subpoena requiring handwriting exemplars does not violate defendant's Fourth Amendment protection against unreasonable search and seizure); United States v. Richardson, 755 F.2d 685, 686 (8th Cir. 1985) (per curiam) (grand jury subpoena requiring handwriting exemplars in backward slant unlike natural handwriting does not violate defendant's Fourth Amendment protection against unreasonable search and seizure or Fifth Amendment right against self-incrimination).

[615] See In re De Jesus Berrios, 706 F.2d 355, 357 n.2 (1st Cir. 1983) (dictum) (subpoena for witness testimony "may be broad enough to include nonverbal evidence such as hair samples"); In re Grand Jury Proceedings (Mills), 686 F.2d 135, 139-40 (3d Cir.) (grand jury subpoena of hair samples does not violate Fourth Amendment), cert.denied, 459 U.S. 1020 (1982).

[616] See In re Corrado Bros. Inc., 367 F.Supp. 1126, 1129 (D. Del. 1973).

[617] United States v. Davis, 636 F.2d 1028, 1038 (5th Cir. 1981), cert.denied, 454 U.S. 862 (1981).

[618] See In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F.Supp. 1192, 1198 (N.D. Ga. 1975).

[619] See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956).

possession or control of them.[620] Once a subpoena duces tecum is served on a person, another cannot claim to re-take possession of required evidence to prevent the person served from complying with the subpoena. The recipient of a subpoena has a continuing obligation to produce all documents and other evidence that fall within the time frame of the subpoena, including those which it discovers after its response to the subpoena.[621]

1. Limitations on Subpoenas Duces Tecum

The power to issue subpoenas duces tecum is not unlimited. The Fourth Amendment and Rule 17(c) of the Federal Rules of Criminal Procedure both apply to grand jury subpoenas[622] and impose constraints upon subpoenas duces tecum.

A grand jury subpoena must not be overly broad.[623] Moreover, the subpoena must seek items which are relevant to an ongoing investigation.[624] The requested evidence must be described with sufficient particularity[625] and

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[620] Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir.), cert.denied, 352 U.S. 833 (1956).

[621] United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984), cert.denied, 470 U.S. 1004 (1985).

[622] See Boyd v. United States, 116 U.S. 616, 621 (1886); Hale v. Henkel, 201 U.S. 43, 70 (1916) (extending Fourth Amendment to subpoenas).

[623] United States v. R. Enterprises, Inc., ___ U.S. ___; 111 S. Ct. 722 (1991); Brown v. United States, 276 U.S. 134, 142 (1928); United States v. Dionisio, 410 U.S. 1, 11 (1973).

[624] Hale v. Henkel, 201 U.S. 43, 70 (1906), Schwimmer v. United States, 232 F.2d 855, 861 (8th Cir.), cert. denied, 352 U.S. 833 (1956); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert.denied, 403 U.S. 9004 (1971).

[625] Brown v. United States, 276 U.S. 134, 142 (1928); United States v. Medical Society, 26 F. Supp. 55, 57 (D.D.C. 1938).

the subpoena must be limited to a reasonable period of time. Finally, the burden of complying with a subpoena duces tecum may not be oppressive.[626]

a. Particularity

Subpoenas duces tecum are subject to the Fourth Amendment's particularity requirement. The subpoenas must describe with sufficient particularity the items which are sought. Particularity objections are not judged against a rigid, mechanical standard. In the context of grand jury subpoenas duces tecum, the particularity requirement:

> comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[627]

Applying this standard, courts have upheld as sufficiently particular subpoenas which requested numerous records spanning many years.[628]

b. Reasonableness

Grand Jury subpoenas duces tecum are also subject to the Fourth Amendment's requirement that searches and seizures be "reasonable." While

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[626] Brown v. United States, 276 U.S. 134, 143 (1928); In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F. Supp. 1192, 1198 (N.D. Ga. 1975); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D. N.Y. 1947). In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949); In re Borden, 75 F. Supp. 857, 860 (N.D. Ill. 1948).

[627] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946) (footnotes omitted).

[628] E.g., Brown v. United States, 276 U.S. 134 (1927), (3 year time period).

no showing of probable cause need be made to sustain a subpoena duces tecum, a demand for documents will still be scrutinized for its reasonableness.

The standard of review applied to reasonableness challenges of grand jury subpoenas is highly deferential. Typically, "[a] grand jury subpoena issued through normal channels is presumed to be reasonable."[629] Therefore, "[the] burden of showing unreasonableness must be on the recipient who seeks to avoid compliance."[630]

There are two basic components to this reasonableness requirement: First, the subpoena may not be too broad and sweeping. Second, the time period encompassed by the subpoena must be reasonable.[631] Factors to be considered in determining reasonableness include the type and extent of the investigation, the materiality of the subject matter to the type of investigation, the particularity of the subpoena, the good faith of the government and any showing of particular need.[632] Applying these standards, courts have frequently sustained far reaching subpoenas as reasonable.[633]

c. Relevance

The Fourth Amendment requires that the requested material in a subpoena duces tecum be relevant to a legitimate criminal investigation. In the

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[629] United States v. R. Enterprises, Inc., ____ U.S. ____, 111 S.Ct. 722, 760 (1991).

[630] Id.

[631] See Brown v. United States, 276 U.S. 134, 142 (1934); In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 994 (D.R.I. 1975); In re Grand Jury Investigation (Gen. Motors Corp.), 174 F. Supp. 393, 395 (S.D. N.Y. 1959).

[632] In re Linen Supply Co., 15 F.R.D. 115, 118-19 (S.D. N.Y.1953).

[633] See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956) (27-year period unreasonable); In re Radio Corp. of Am., 13 F.R.D. 167 (S.D. N.Y. 1952) (18-year period approved); In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948) (20-year period approved); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947) (time period reduced from 27 years to 10 years); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y.1947) (26-year period reduced generally to 10 years).

past, some courts have placed an affirmative obligation of demonstrating relevance upon the government, requiring the United States by affidavit to demonstrate the relevance of a challenged subpoena. Other courts have not placed this affirmative duty upon the government.[634]

Recently, the Supreme Court has cast doubt upon this Third Circuit precedent and suggested that the initial burden of proof in relevance challenges to grand jury subpoenas rests with the party seeking to avoid compliance.[635] Moreover, the Court has defined a deferential standard of review for relevance challenges to subpoenas, holding that a:

> [M]otion to quash must be denied unless the district 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.[636]

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[634] Compare In re Grand Jury Matter (Backiel), 906 F.2d 78, 87 (3d Cir.) (government required to file affidavit "establishing nexus" between information sought and ongoing investigation when seeking testimony of witness in grand jury proceeding), cert. denied, 111 S.Ct. 509 (1990) and In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1495-96 (10th Cir. 1990) (government only required to provide notice to subpoenaed witness showing that information sought was relevant to legitimate grand jury investigation) with In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 246-47 (2d Cir. 1985) (en banc) (neither Fifth or Sixth Amendment, common law, nor statutory privilege require government to show need before enforcing grand jury subpoena served on attorney when client was unindicted target of investigation), cert.denied, 475 U.S. 1108 (1986); United States v. Ryan, 810 F.2d 650, 657 (7th Cir. 1987) (government could obtain criminal contempt indictment of recalcitrant witness without showing need for testimony) and In re Grand Jury Investigation (Harvey), 769 F.2d 1485, 1487 (11th Cir. 1985) (government could enforce grand jury subpoena served on target's attorney without showing relevance and need).

[635] United States v. R. Enterprises, Inc., ____ U.S. ____, 111 S.Ct. 722, 728 (1991). See also In re Grand Jury 87-3, Subpoena Duces Tecum, 995 F.2d 229 (4th Cir. 1992) (district court should balance the possible constitutional infringement and the government's need for documents when it rules on [a] motion to quash, on a case-by-case basis, and without putting any special burden on the government).

[636] Id.

III. Individuals and Information that are Subject to Subpoena

Over time, a body of caselaw has developed identifying individuals, entities and types of information that are subject to grand jury subpoenas. Consistent with the broad scope generally given to the grand jury's subpoena power, in most instances, questions regarding the reach of subpoenas have been resolved in favor of the grand jury.

A. Corporations

It is now well-established that grand jury subpoenas may be served upon any natural person, legal entity or corporation. Service may be effected on a corporation by serving an officer or managing agent for the corporation.[637] In the alternative, where state law permits, service can be made upon the Secretary of State for the state in which the corporation is located.[638] In proper cases, grand jury subpoenas may also be used to reach foreign corporations doing business in the United States, foreign affiliates of United States corporations, and American corporate records which are maintained overseas. The international reach of the grand jury's subpoena power is discussed later in this Chapter.

B. Federal Executive Branch Officers and Agencies

In United States v. Nixon, [639] the Supreme Court held that, subject to claims of executive privilege, the President of the United States was obliged to comply with a subpoena issued in a federal criminal case. In light of the Nixon decision, it is generally conceded that federal executive branch officers and

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[637] In re Electrical & Musical, Indus. Ltd., Middlesex, England, 155 F. Supp. 892, 893 (S.D. N.Y. 1957).

[638] In re Canadian Int'l Paper Co., 72 F. Supp. 1013, 1021 (S.D. N.Y. 1947).

[639] 418 U.S. 683 (1974).

agencies are subject to grand jury subpoenas.[640] One caveat should be noted, however. One appellate court has held that grand jury subpoenas may not be used to obtain federal agency records which are subject to the strictures of the Privacy Act, 5 U.S.C. § 552a.[641] This has led some federal agencies to resist compliance with grand jury subpoenas on Privacy Act grounds. In such cases, prosecutors may have to rely on one of the other disclosure methods specified in the Privacy Act to secure access to these documents.[642]

C. Congressional Records

The Speech and Debate Clause of the United States Constitution provides that, "for any Speech or Debate in either House, they [the members of Congress] shall not be questioned in any other place."[643] This constitutional provision limits the reach of subpoenas, including grand jury subpoenas. As a general rule, Congressional records may be subpoenaed only with the consent of the chamber subpoenaed.[644] However, the Speech and Debate Clause does not prevent individual legislators or their staff members from testifying at grand jury proceedings involving crimes where questions do not require testimony about legislative acts.[645]

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[640] In re Grand Jury Subpoena Issued to U.S. Postal Service, 535 F. Supp 31 (E.D. Tenn. 1981).

[641] See Doe v. Stephens, 851 F.2d 1457, 1466 (D.C. Cir. 1988).

[642] For example, the Privacy Act, 5 U.S.C. § 552a(b)(7), and the Code of Federal Regulations, 28 C.F.R. § 16.40(b), allow the release of these records pursuant to a formal written request of a law enforcement agency when they are needed to carry out an authorized law enforcement activity.

[643] U.S. Const., Art I, Sec. 6, Cl. 1

[644] Souce v. David, 448 F.2d 1067, 1072 (D.C. Cir. 1971).

[645] Gravel v. United States, 408 U.S. 606, 622 (1977).

D. State and Local Government Records

Consistent with the Supremacy Clause of the United States Constitution, "[a]s a general matter [federal] courts ... have rejected the view that state records are privileged from disclosure [pursuant to a federal grand jury subpoena]."[646] This rule requiring disclosure pursuant to grand jury subpoena holds true even if state law prohibits release of the records.[647] Thus, state laws typically cannot shield state records from scrutiny by a federal grand jury.[648]

E. Telephone Companies

In many complex investigations, telephone records are a valuable source of information. Therefore, such records are commonly subpoenaed by grand juries. Under federal law, telephone companies may disclose these records in response to a grand jury subpoena without notifying their customers.[649] Moreover, the United States may obtain court orders prohibiting disclosure of these subpoenas.[650]

Department policy prescribes one limitation on the grand jury's power to subpoena telephone toll records. In the absence of exigent circumstances, a

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[646] In re Special April 1977 Grand Jury, 581 F.2d 589, 592 (7th Cir.), cert.denied, 439 U.S. 1046 (1978); In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977).

[647] See e.g., In re Special April 1977 Grand Jury, 581 F.2d at 592; United States v. Blasi, 462 F. Supp. 373 (M.D. Ala. 1979); United States v. Grand Jury Investigation, 417 F. Supp. 389, 392 (E.D. Pa. 1976).

[648] See In re Grand Jury, 821 F.2d 946 (3d Cir. 1987) (No qualified privilege for state legislative records).

[649] 18 U.S.C. § 2703(c)(1)(B) and (c)(2).

[650] 18 U.S.C. § 2705.

grand jury subpoena for toll records of members of the news media may only be sought with the express approval of the Attorney General.[651]

F. Bank Records -- The Right to Financial Privacy Act

In federal criminal investigations, financial records are another valuable source of information. It is now well established that subpoenas duces tecum may seek a customer's financial records directly from the customer's bank.[652] However, when the grand jury seeks individual account information, the Right to Financial Privacy Act applies to these grand jury subpoenas.[653]

The Right to Financial Privacy Act provides that financial institutions shall provide individual account information to federal grand juries in response to grand jury subpoenas.[654] The Act then prescribes certain procedures for the handling and use of these records. The Act also regulates disclosure of grand jury subpoenas for individual customer account information and provides for reimbursement to banks which are subpoenaed for individual account records. Under the Act, the subpoenaed documents must be physically presented to the grand jury unless the volume of records makes this impractical.[655] The records then may only be used for the purpose of

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[651] 28 C.F.R. § 50.10.

[652] See United States v. Miller, 425, U.S. 435, 441 (1976); In re Seiffert, 446 F.Supp. 1153, 1155 (N.D. N.Y. 1978).

[653] 12 U.S.C. § 3401 et seq. The Right to Financial Privacy Act only applies to bank records of individuals, or partnerships of five or fewer individuals. See 12 U.S.C. § 3401(4).

[654] See 12 U.S.C. § 3413(i).

[655] 12 U.S.C. § 3420(a)(1). While the Act requires that bank records be physically returned to the grand jury, it is not essential that a representative of the financial institution present the records to the grand jury. This function can be performed by an investigator or other witness. See Appeal of Lewallen, 805 F.2d 256, 260-1 (7th Cir. 1986).

considering whether to issue an indictment,[656] and must either be destroyed or returned to the bank at the conclusion of the investigation.[657]

Upon a proper showing, the government may obtain a court order under the Act prohibiting disclosure of the grand jury subpoena to the bank's customer.[658] Moreover, in some cases involving crimes committed against financial institutions, bank officers are forbidden from disclosing subpoenas to their customers.[659]

Finally, unlike most subpoenaed grand jury witnesses, a bank is entitled under the Act to be compensated for the costs incurred in responding to a subpoena duces tecum for individual account records.[660]

Local practices should be followed in subpoenaing bank records. Most banks do not notify their customers of the issuance of the subpoena. Consequently, a court order is generally not required. In some districts, banks expect to receive a letter which asks them not to disclose the existence of the subpoena for 30, 60, or 90 days. This letter may need to be reissued at the end of the prescribed period.

G. Consumer Credit Report Records

Other sources of financial information which may be relevant to a grand jury investigation are consumer reporting or credit agencies, which compile consumer credit reports. Disclosure of consumer credit information is

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[656] 12 U.S.C. § 3420(a)(2).

[657] 12 U.S.C. §3420(a)(3)-(4).

[658] 12 U.S.C. § 3409.

[659] See 12 U.S.C. § 3420(b) and 18 U.S.C. § 1510. See also Section VI of this Chapter, below.

[660] 12 U.S.C. § 3415. It should be noted that these reimbursement provisions apply only to individual account records. 12 U.S.C. § 3401(4). Thus, there is no obligation to reimburse banks for the cost of complying with subpoenas for corporate records.

controlled by the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. In its initial form, the Fair Credit Reporting Act only authorized the release of consumer credit reports in response to "an order of the court." 15 U.S.C. § 1681b(1). This statutory language resulted in a split among the courts regarding whether a grand jury subpoena constituted "an order of court" for purposes of the Act,[661] and initially led the Department to caution prosecutors to seek court orders under 15 U.S.C. § 1681b(1) in order to obtain this information.[662]

In 1989, however, Congress amended the Fair Credit Reporting Act to eliminate this statutory ambiguity. In its current form, the Act provides for disclosure of consumer credit information either at the direction of the court, or in response to a grand jury subpoena. 15 U.S.C. § 1681b(1). The recent amendment eliminates the prior legal uncertainty in this field and makes it clear that the production of credit information can be compelled by a grand jury subpoena.

IV. "Forthwith" Subpoenas

A "forthwith" subpoena is a subpoena which compels a witness to appear before the grand jury or produce documents shortly after service of the subpoena. As a general matter, a "forthwith" subpoena will command compliance by a witness within one day of the day in which it is served.[663]

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[661] Compare In re Gren, 633 F.2d 825 (9th Cir. 1980) (grand jury subpoena is not an order of court under the Fair Labor Reporting Act) with United States v. Retail Credit Men's Ass'n of Jacksonville, 501 F.Supp 21 (M.D. Fla. 1980) (grand jury subpoena constitutes an order of court under the Act).

[662] See USAM 9-11.141.

[663] See, e.g., United States v. Hartey, 716 F.2d 955, 962 (2d Cir. 1983) (subpoena returns required at 4:00 p.m., subpoenas served at 3:50 p.m. and 4:00 p.m.); United States v. Re, 313 F. Supp. 442 (S.D. N.Y. 1970) (subpoena served on the morning before production was due).

A. "Forthwith" Subpoenas and the Courts

While courts have sustained the use of "forthwith" subpoenas, prosecutors may anticipate that a "forthwith" subpoena will receive close judicial scrutiny. Therefore, such subpoenas should be employed only in exigent circumstances. As a general rule, courts consider the following factors in assessing the reasonableness of a subpoena which compels immediate compliance by a grand jury witness: (1) whether the grand jury had clear reason to believe that immediate action was needed to prevent destruction or alteration of records; (2) whether compelling immediate compliance with the subpoena unduly prejudices the grand jury witness; (3) whether any grounds would exist to quash the subpoena if the witness was not compelled to comply immediately; and (4) the scope and specificity of the subpoena.[664]

Courts are also sensitive to the potential for abuse presented by "forthwith" subpoenas. In particular, some courts have expressed concern that "forthwith" subpoenas may be used to conduct warrantless searches in violation of the Fourth Amendment.[665] To curb this type of misuse of the grand jury's subpoena power, a number of constraints have been imposed on the use of "forthwith" subpoenas. Thus, it has been held that a "forthwith" subpoena may not authorize the serving agent to seize the items sought or demand that the items be immediately surrendered to him.[666] Nor can a "forthwith" subpoena be issued when the grand jury is not actually in session.[667]

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[664] United States v. Re, 313 F. Supp. at 449-50.

[665] See, e.g., United States v. Hilton, 534 F.2d 556, 565 (3d Cir.), cert.denied, 429 U.S. 828 (1976); United States v. International Business Machine Corp., 83 F.R.D. 97, 100 (S.D. N.Y. 1979); In re Nwamu, 421 F.Supp. 1361, 1364 (S.D. N.Y. 1976).

[666] In re Nwamu, 421 F.Supp. 1361 (S.D. N.Y. 1976).

[667] United States v. Hilton, 534 F.2d 556, 565 (3d Cir.), cert.denied, 429 U.S. 828 (1976).

B. Department Policy and Practical Considerations

The United States Attorneys' Manual requires that "forthwith" subpoenas be issued in criminal cases "only with the prior approval of the U.S. Attorney."[668] Moreover, as a matter of policy, the Department cautions prosecutors to consider the following factors when assessing whether to issue a "forthwith" subpoena: (1) the risk of flight or destruction or fabrication of evidence; (2) the degree of inconvenience to the witness; and (3) the need for the orderly presentation of evidence before the grand jury.

In practice, the use of "forthwith" subpoenas should be approached with caution. As a practical matter, such subpoenas will be closely scrutinized by the courts. Moreover, the sole benefit of a "forthwith" subpoena -- immediate production of the requested testimony or documents -- can often be frustrated by the filing of a motion to quash, which effectively stays compliance with the subpoena. In those unusual instances where it is deemed necessary to issue "forthwith" subpoenas, the prosecutor should ensure that the grand jury is in session when the subpoenas are issued; establish on the record before the grand jury a factual basis to support the issuance of the "forthwith" subpoena; secure the grand jury's approval for the "forthwith" subpoena; and ensure that the subpoena is carefully drafted to avoid any colorable claims that it is subject to being quashed. Moreover, where probable cause exists, serious consideration should also be given to using a search warrant in lieu of a "forthwith" subpoena to immediately secure evidence.

V. Issuance And Service of Grand Jury Subpoenas

A. Introduction

In practice, the issuance and service of grand jury subpoenas is governed by the Federal Rules of Criminal Procedure, local court rules, and local custom or practice. Because local practices vary from jurisdiction to jurisdiction,

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[668] See USAM 9-11.140.

federal prosecutors should be alert to the procedures employed in the specific jurisdiction in which they practice. While local custom and usage often define practice in this field, there are some general standards which govern this aspect of grand jury practice.

B. Issuance of Subpoenas

Rule 17(a) of the Federal Rules of Criminal Procedure provides that subpoenas "shall be issued by the clerk under the seal of the Court." According to the rule "[t]he clerk shall issue [the] subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." As a practical matter, prosecutor typically obtains a supply of blank, signed subpoenas for use throughout the term of the grand jury. These subpoenas are maintained by the United States Attorney's Office for issuance in grand jury investigations.

Typically, the federal prosecutor determines in the first instance which persons and/or entities will be served with grand jury subpoenas. While prosecutors need not obtain the grand jury's authorization for the issuance of subpoenas,[669] some jurisdictions require that the grand jury be notified of subpoenas issued on its behalf. Other jurisdictions require the foreman to initial a copy of each subpoena, signifying that the grand jury has been notified of the subpoena's issuance. While prosecutors make the initial determination regarding issuance of subpoenas, they may only issue subpoenas on behalf of the grand jury. Thus, for example, grand jury subpoenas may not be used to compel witness interviews outside the setting of the grand jury.[670]

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[669] See United States v. Kleen Laundry & Cleaners, Inc., 381 F.Supp. 519, 522 (E.D.N.Y. 1974).

[670] See United States v. Digilio, 538 F.2d 972, 985 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

C. Service of Subpoenas

Grand jury subpoenas may be served anywhere within the United States.[671] Subpoenas may also be served at United States installations overseas or served abroad on United States nationals or residents.[672]

The mechanics of service are defined by Rule 17(d) of the Federal Rules of Criminal Procedure, which provides that:

> A subpoena may be served by the marshal, by his deputy or by any person who is not a party and who is not less than 18 years of age ... .

Subpoenas are generally served by the United States Marshal, his deputies, or by FBI or other case agents. Moreover, in some districts, institutional witnesses like banks, telephone companies or consumer credit bureaus will accept service of subpoenas through the United States Mail.

While Rule 17(d) forbids parties from serving subpoenas, this prohibition against service by a party applies in practice only to the defendant. Thus, "[t]here is no prohibition on service by a government attorney or other government employee, or by the defense attorney."[673] The better practice is for prosecutors not to serve subpoenas, since some courts have frowned on this practice. The local practice should also be checked in this regard because the district court may, by local rule, require that service be made only by the marshal or his deputy.

Practice varies as to the procedure to be followed when subpoenas are to be served on witnesses residing outside the district in which the grand jury is sitting. In some districts, the marshal in the district in which the grand jury is sitting will request that all subpoenas be sent to him. The marshal will then forward the subpoenas for service to the marshal in the appropriate district. In other districts, the marshal will request that the subpoenas be sent directly to

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[671] Rule 17(e)(1), Fed.R.Crim.P.

[672] Rule 17(e)(2), Fed.R.Crim.P.; 28 U.S.C. § 1783.

[673] 8 Moore's Federal Practice, at ¶ 17.04.

the marshal in the district in which the witness resides. Prosecutors are cautioned to determine the appropriate practice in their jurisdiction.

Rule 17(d) also defines who may properly be served with a grand jury subpoena, stating that service must be made "to the person named." This rule is strictly construed. For example, service of a subpoena for corporate records on a former employer has been held ineffective.[674] Similarly, service on counsel for a party, as opposed to the party himself, is ineffective. Should the witness fail to appear, it is doubtful that the court would impose penalties for contempt.[675] However, service of the subpoena may be made upon the witness's attorney, subject to an agreement to that effect between the prosecutor and counsel. A written record should be made of the alternate arrangements and the actual method employed.

A subpoena duces tecum directed to a corporation (or to a partnership or other unincorporated association which is subject to suit under a common name) may be served on an officer, director, or general manager of the business entity.[676] The officer or agent accepting the subpoena on behalf of the business entity need not be explicitly authorized to accept service as prescribed in Fed.R.Civ.P. 4(d)(3); an implicit authorization will suffice.[677]

Rule 17 provides no guidance regarding the practice to be employed in recording service of grand jury subpoenas. As a result, disparate practices have arisen throughout the United States. Thus, in some districts, the clerk's office maintains files of grand jury subpoenas that have been served. In these districts, if the marshal returns the executed subpoena to the prosecutor's office, the subpoena file copy should be conformed and the executed subpoena promptly filed with the clerk. Where the marshal does not return the subpoena to the United States Attorney's Office, the staff should check with the office of either the marshal or the clerk to be certain that service has been made within a reasonable time and that the return is on file with the clerk. In other districts,

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[674] Ferrari v. United States, 244 F.2d 132, 141 (9th Cir. 1957).

[675] See Harrison v. Prather, 404 F.2d 267, 269 (5th Cir. 1968).

[676] In re Electric & Musical Indus. Ltd., Middlesex, England, 155 F.Supp. 892 (S.D.N.Y. 1957); In re Vankoughnet, 184 F.Supp. 819 (E.D. Mich. 1960).

[677] See In re Grand Jury Subpoenas Issued to Thirteen Corps., 775 F.2d 43, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

the clerk does not maintain files of grand jury subpoenas. In such instances, the served subpoenas, with the marshal's return noted thereon, are kept on file in the prosecutor's office.

D. Witness Fees

By statute,[678] grand jury witnesses are entitled to an attendance fee for each day's attendance and the time occupied in travelling to testify. In addition, a witness may be reimbursed for travel expenses, lodging and subsistence at the same rates available to government employees for official travel in the area of attendance.

In order to assure payment of these expenses, a Form OBD-3-Revised (Witness Attendance Fees, Travel and Miscellaneous Expense Claim) should be promptly completed for each witness. After discharge of the witness, the certificate should be signed by the attorney conducting the investigation, the United States Attorney or an Assistant United States Attorney, depending upon the practice in the district.[679] The original form should then be forwarded the marshal for payment of the witness's claims for allowances.

Under Fed. R. Crim. P. 17(d), fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States. Thus, grand jury witnesses are not entitled to travel advances. However, if it becomes apparent that a witness who is subpoenaed on behalf of the United States is unable to attend a grand jury session for want of sufficient funds with which to defray expenses of travel and subsistence, the prosecutor may request the marshal for the district in which the witness resides to supply sufficient funds to enable the witness to attend. The marshal usually will only advance sufficient funds for one-way transportation and lodging. The remaining expenditures will be covered when the witness submits his or her attendance certificate. The subpoena itself should be transmitted through the marshal in the issuing district. The prosecutor should also notify the marshal in the

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[678] 28 U.S.C. § 1821.

[679] See 28 C.F.R. 21.7.

witness' district that the request for an advance has been made, stating where the witness is to testify. Advances to witnesses should not be requested as a matter of course.

VI. Non-Disclosure of Grand Jury Subpoenas[680]

A. General Rule

By its terms, Rule 6(e) of the Federal Rules of Criminal Procedure, which cloaks grand jury proceedings in secrecy, does not apply to witnesses subpoenaed before the grand jury.[681] Therefore, as a general rule, subpoenaed grand jury witnesses cannot be compelled to keep secret the fact that they have been subpoenaed. Nor can a grand jury witness be forbidden from disclosing what has transpired before the grand jury. In some narrow instances, federal law may be construed as requiring disclosure of grand jury subpoenas.[682]

While the grand jury can request that a witness not disclose matters occurring before the grand jury, care must be exercised in making such requests. In order to avoid any allegations that grand jury witnesses were misled or coerced into silence, it should be made absolutely clear that a witness's decision whether to disclose what transpired in the grand jury must be a voluntary one.[683]

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[680] See Chapter Four of this Manual for a discussion of the secrecy requirements of Rule 6(e), Federal Rules of Criminal Procedure.

[681] See Rule 6(e)(2), Fed. R. Crim. P. ("No obligation of secrecy may be imposed on any person except in accordance with this rule.")

[682] See, 20 U.S.C. § 1232(b)(2)(B) (requiring academic institutions to notify students of subpoenas for student records).

[683] See In re Grand Jury Proceedings, 814 F.2d 61, 68-70 (1st Cir. 1987) (letters directing subpoena recipients not to disclose existence of subpoena or fact of compliance violate Fed. R. Crim. P. 6(e)(2)).

B. Exceptions

The general rule governing non-disclosure of grand jury subpoenas is subject to several important exceptions. In some instances involving subpoenas to financial institutions or telephone companies, federal law permits the United States to seek orders prohibiting disclosure of grand jury subpoenas. In a limited class of cases, Congress has flatly forbidden the disclosure of information relating to grand jury subpoenas and has imposed criminal penalties against those who improperly release grand jury information. These exceptions to the general rule relating to non-disclosure of grand jury proceedings are discussed below.

1. Non-Disclosure of Subpoenas to Financial Institutions -- The Right to Financial Privacy Act, 12 *U.S.C.* § 3401

The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq., governs grand jury subpoenas issued to financial institutions for individual customer records. Frequently these customer financial records constitute important evidence in the investigation of federal offenses. Where bank records are sought by the grand jury as part of a criminal investigation, premature disclosure of the existence of a subpoena could frustrate or impede the investigation.

In order to prevent banks from prematurely disclosing grand jury subpoenas to their customers, the Act contains two separate sets of non-disclosure provisions. The court may enter an order directing a bank to delay disclosure of a grand jury subpoena to its customer.[684] In order to secure such an order, the government must submit an application.[685] In its application, the government must satisfy the court that the subpoenaed records are sought in connection with a lawful investigation and contain information

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[684] See 12 U.S.C. § 3413(i).

[685] See 12 U.S.C. § 3409.

believed to be relevant to that investigation.[686] The government must also demonstrate "with reasonable specificity" that premature disclosure of the subpoena could threaten the safety of individuals, result in flight or the destruction of evidence, lead to intimidation of potential witnesses or otherwise seriously jeopardize an investigation.[687]

These court-authorized non-disclosure provisions apply to all grand jury subpoenas issued to financial institutions. However, the Act imposes a separate, higher obligation of secrecy on bank officials when responding to grand jury subpoenas for customer records relating to possible crimes committed against financial institutions. By law, bank employees are forbidden from disclosing the "existence or contents o[f] such subpoena[s] or information that has been furnished to the grand jury in response to such subpoena[s]."[688] Unauthorized disclosure of a grand jury subpoena issued to a bank in connection with an investigation of a crime against a financial institution is a federal offense, punishable by up to five years' imprisonment and a $250,000 fine.[689]

2. *Non-Disclosure of Subpoenaed Telephone Records or Other Stored Wire and Electronic Communications*

Other common sources of information relied upon in grand jury investigations are telephone toll records or other stored wire and electronic communications records. Like bank records, these documents can provide valuable information in the investigation of complex federal crimes. Yet, where stored communications records are sought by the grand jury as part of a criminal investigation, premature disclosure of the existence of a subpoena could frustrate or impede an ongoing investigation.

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[686] 12 U.S.C. § 3409(a)(1)-(2).

[687] 12 U.S.C. § 3409(d)(3)(A)-(E).

[688] 12 U.S.C. § 3420(b)(1).

[689] Id. See 18 U.S.C. § 1510(b)(1) (disclosing a grand jury subpoena "with the intent to obstruct" constitutes a five year felony); 18 U.S.C. § 1510(b)(2) (knowing disclosure of subpoena constitutes a misdemeanor punishable by one year imprisonment).

Under federal law, telephone companies are not required to disclose the release of subscriber, service or telephone toll records to their customers when those records are sought pursuant to grand jury subpoenas.[690] Moreover, in order to avoid premature disclosure of grand jury subpoenas directed at electronics communications providers, the government may obtain a court order delaying customer notification.[691] Such an order is issued on the application of the United States upon a showing that disclosure of the subpoena would:

> (i) endanger the safety of individuals,
>
> (ii) present a risk of flight, result in destruction of evidence, or lead to intimidation of potential witnesses, or;
>
> (iii) otherwise seriously jeopardize an investigation.[692]

VII. Motions to Quash Subpoenas

Rule 17(c) of the Federal Rules of Criminal Procedure allows for the filing of motions to quash grand jury subpoenas "if compliance would be unreasonable or oppressive." While the rule does not define what constitutes an "unreasonable or oppressive" subpoena, witnesses may move to quash a grand jury subpoena on the ground that it seeks information which is subject to a constitutional, statutory, or common law privilege. Strictly speaking, a motion to quash may not be the proper vehicle for advancing claims of privilege. Such claims typically must be resolved on a question-by-question basis. Nonetheless, motions to quash are often framed in terms of privilege challenges.

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[690] See 18 U.S.C. § 2703(c)(1)(B) and (c)(2).

[691] 18 U.S.C. § 2705. However, a letter from the prosecutor to the telephone company mandating non-disclosure may violate Fed. R. Crim. P. 6(e)(2). In re Grand Jury Proceedings, 814 F. 2d 61, 68-70 (1st Cir. 1987).

[692] 18 U.S.C. § 2705(b)(1)-(5).

Beyond claims of privilege, there are other constraints upon grand jury subpoenas. A subpoena may not be overly broad,[693] must call for information which is relevant to the crimes under investigation,[694] must encompass a reasonable time frame[695] and must describe the information sought with sufficient particularity to allow a response.[696] In rare instances, a subpoena may also be quashed if it is used to harass or intimidate or because of other governmental misconduct.[697]

A presumption of regularity attaches to all grand jury subpoenas duces tecum.[698] Thus, the party who seeks to quash a subpoena on the ground that it is unreasonable or burdensome bears a heavy burden.[699]

Some courts have required that the government initially demonstrate the relevance of the subpoenaed documents to a legitimate grand jury investigation once a subpoena has been challenged. In the Third Circuit the government's initial burden may be met by the government's submission of a "Schofield"

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[693] Brown v. United States, 276 U.S. 134, 142 (1928); In re November 1975 Grand Jury, 433 F. Supp. 1094, 1097 (N.D. Ill., 1977); In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D. N.Y. 1949).

[694] United States v. R. Enterprises, Inc., ___ U.S. ___; 111 S. Ct. 722, 727 (1991); Hale v. Henkel, 201 U.S. 43, 71 (1906); In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984). Schwimmer v. United States, 232 F.2d 855, 862 (8th Cir.), cert.denied, 352 U.S. 833 (1956).

[695] Brown v. United States, 276 U.S. 134, 143 (1928); In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984); In re Grand Jury Subpoena Duces Tecum, 405 F.Supp. 1192, 1198 (N.D. Ga. 1975); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947).

[696] Brown v. United States, 276 U.S. 134, 143 (1928); In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984); In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 991, 999 (D.R.I. 1975); In re United Shoe Mach. Corp., 73 F.Supp. 207, 211 (D. Mass. 1947).

[697] See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85, 92 (3d Cir. 1973); United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir.), cert. denied, 464 U.S. 978 (1983); United States v. Doe, 541 F.2d 490, 492 (5th Cir. 1976). See In re Grand Jury Matters, 751 F.2d 13, 17 (1st Cir. 1984). (District Court had authority to control of subpoena to attorneys).

[698] United States v. R. Enterprises, Inc., ___ U.S. ___; 111 S. Ct. 722, 728 (1991); In re Grand Jury Subpoena, 920 F.2d 235, 244 (4th Cir. 1990); In re Lopreato, 511 F. 2d 1150, 1152 (1st Cir. 1975). Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972).

[699] United States v. R. Enterprises, Inc., 111 S Ct. at 728; In re Grand Jury Subpoena Duces Tecum (M.N.G. Allen and Assoc., Inc.), 391 F.Supp. 991, 995 (D.R.I. 1975).

affidavit containing a very brief description of the nature and/or purpose of the grand jury investigation and the general relevance of the subpoenaed documents to the investigation.[700] The "Schofield" affidavit should be submitted to the court *in camera*. Most other circuits do not require such an initial showing of relevancy, however, and have either declined to follow Schofield or have distinguished it.[701]

The Third Circuit's affidavit requirement may no longer be valid or may be severely limited in light of the Supreme Court's decision in United States v. R. Enterprises, Inc., ___ U.S. ___ 111 S.Ct. 722 (1991). After the R. Enterprises decision, the government only would have to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion.

A. Costs of Compliance

Absent some specific statute authorizing reimbursement,[702] the government is generally not required to reimburse a person for costs incurred in complying with a subpoena duces tecum.[703] However, the court in In re Grand Jury No. 76-3 (Mia.), Subpoena Duces Tecum, 555 F.2d 1306, 1308 (5th Cir. 1977), noted that a court exercising its power under Rule 17(c) of the Fed.R.Crim.P. may, in the appropriate circumstances, modify a grand jury

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[700] In re Grand Jury Proceedings, (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973); In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963, 966 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1008 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc) (subpoena directed to client's attorney).

[701] Declined to follow: In re Pantojas, 628 F.2d 701, 704 (1st Cir. 1980); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hellman), 756 F.2d 428, 431 (6th Cir. 1986); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663, 665 (8th Cir. 1986); In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982). Distinguished: United States v. Santucci, 674 F.2d 624, 627-631 (7th Cir. 1982), cert.denied, 459 U.S. 1109 (1983); United States v. Skipworth, 697 F.2d 281 (10th Cir. 1983).

[702] See 12 U.S.C. § 3415.

[703] See Hurtado v. United States, 410 U.S. 578, 588-89 (1973); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

subpoena to require the cost of compliance to be borne by the government. A showing of financial burden entailed in complying with a subpoena may also be considered by a court in assessing the reasonableness or burdensomeness of a subpoena in the context of a motion to quash.

B. Appeals

Under 18 U.S.C. § 3731, the government may appeal an order quashing a grand jury subpoena.[704]

The party to whom a grand jury subpoena is directed generally may not appeal the denial of a motion to quash the subpoena, but must either comply or refuse to comply with the subpoena. If the witness refuses to comply, he or she may contest the validity of the subpoena on appeal, if the witness is subsequently cited for contempt.[705] In a limited class of cases, appellate review may be appropriate where denial of immediate review would render impossible any review at all.[706] For example, in Perlman v. United States, 247 U.S. 7 (1918), immediate review of an order directing a third party to produce documents that were Perlman's property was allowed because it was unlikely that the third party would risk contempt to vindicate Perlman's rights.[707]

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[704] See In re Grand Jury Investigation, 599 F.2d 1224, 1226 (3d Cir. 1979); United States v. Calandra, 455 F.2d 750, 752 (6th Cir. 1972), rev'd on other grounds, 414 U.S. 338 (1974); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 55 (7th Cir. 1980).

[705] United States v. Ryan, 402 U.S. 530 (1971); see Cobbledick v. United States, 309 U.S. 323 (1940); In re Oberkoetter, 612 F. 2d 15, 16-17 (1st Cir. 1980).

[706] United States v. Ryan, 402 U.S. 530 (1971).

[707] See also In re Grand Jury Proceedings, 832 F.2d 554, 558-9 (11th Cir. 1987) (applying Perlman); In re Gren, 633 F.2d 825 (9th Cir. 1980) (immediate appeal from an order denying a motion to quash a subpoena permitted because subpoena recipient was subject to civil suit for improperly divulging consumer credit information).

VIII. Enforcement of Subpoenas

A refusal or failure to produce documentary material in compliance with a subpoena, or incomplete or untimely compliance, may require a motion to compel compliance and, if necessary, initiating civil or criminal contempt proceedings.[708]

A. What Constitutes Contempt[709]

Contempt by refusing or failing to comply with a subpoena may be either criminal or civil in nature. Its constituent elements are found in Fed. R. Crim. P. 17(g)[710] and 42; 18 U.S.C. § 401;[711] and 28 U.S.C. § 1826 (Organized

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[708] See Chapter Eight of this Manual for a more detailed discussion of contempt in the context of a refusal to testify despite a grant of immunity.

[709] An additional discussion of civil and criminal contempt in the context of refusal to comply with an 18 U.S.C. § 6002 compulsion order may be found in Chapter Eight, Section IV of this Manual.

[710] Fed. R. Crim. P. 17(g):

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

[711] 18 U.S.C. § 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official

(continued...)

Crime Control Act).[712] Simply stated, contempt is committed if a person is properly subpoenaed and willfully fails to produce records which are in existence and under the person's control at the time the subpoena is served.[713] Failure to appear is sufficient to constitute contempt. A witness who appears but refuses to produce the documents demanded is not yet in contempt of court (unless an order to testify or produce is secured in advance from the court, as for example, with an immunity order). The act of contempt does not occur until the witness refuses to obey a direct order of the court.[714] This means that the recalcitrant witness must be presented before the court, a proper foundation must be established, and the court must issue a direct order to the witness to produce.

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[711](...continued)
transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[712] 28 U.S.C. § 1826:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . .

[713] Nilva v. United States, 352 U.S. 385, 392 (1957); Goldfine v. United States, 268 F.2d 941 (1st Cir. 1959), cert. denied, 363 U.S. 842 (1960).

[714] Brown v. United States, 359 U.S. 41, 49 (1959); United States v. Chandler, 380 F.2d 993, 1000 (2d Cir. 1967).

To sustain a charge of contempt, whether the charge is criminal or civil, the following must occur:

1. There must be valid service of the subpoena;

2. The recipient must fail to make production of the documents requested after a court order has directed him or her to do so;

3. In the case of criminal contempt, the recipient's failure must be the result of his or her willful acts;[715]

4. The documents must be in existence at the time; and

5. The recipient must have control of the requested documents.

B. Distinction Between Civil and Criminal Contempt

The essential differences between criminal and civil contempt are the nature and purpose of the relief sought.[716] A contempt proceeding is civil if the purpose is remedial and intended to coerce the person into doing what he or she is supposed to do.[717] The sanction for civil contempt is conditional and must be lifted once the contemnor has complied with the court's order.[718] To more fully realize the coercive effect of a possible contempt sanction, a witness expected to refuse to produce (or testify) should be taken before a grand jury

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[715] Willfulness is not a necessary element of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); T.W.M. Mfg. Co. v. Dura Corp., 722 F.2d 1261, 1273 (6th Cir. 1983), cert. denied, 479 U.S. 852 (1986).

[716] E.g., Hicks v. Felock, 485 U.S. 624, 631-32 (1988); Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911); In re Weiss, 703 F.2d 653, 661 (2d Cir. 1983); United States v. Powers, 629 F.2d 619, 626-27 (9th Cir. 1980); In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979).

[717] Shillitani v. United States, 384 U.S. 364, 368 (1966).

[718] Id.; Newman v. Graddick, 740 F.2d 1513, 1522 (11th Cir. 1984).

panel which has a period of time left to serve, rather than a panel which is about to expire.[719] If the purpose is to punish the wrongdoer, however, the proceeding is one for criminal contempt and the sentence will be determinate.[720] Although a civil contemnor may later argue that civil incarceration has become punitive in character because he or she remains unwilling to testify,[721] the court may continue the confinement so long as it is persuaded that the coercive sanction may produce its intended result in the future.[722]

The Supreme Court, in Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966), held that a sentence for criminal contempt in excess of six months requires a jury trial.[723] Of course, the government cannot know in advance what penalty will be imposed. Nevertheless, the government should not press for imprisonment in excess of six months absent a jury trial, and should be certain the court is aware of the Cheff rule.

C. Proof

The contempt is usually established by the government by the following proof:

1. The affidavit or testimony of a deputy marshal or of a special agent that he/she served the subpoena upon the defendant on the date and at the time indicated by the return date;

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[719] USAM 9-11.160.

[720] United States v. United Mine Workers, 330 U.S. 258, 302 (1947); United States v. Rylander, 714 F.2d 996, 1001 (9th Cir. 1983); In re Timmons, 607 F.2d 120, 124 (5th Cir. 1979).

[721] see, e.g. Simkin v. United States, 715 F.2d 34, 36 (2d Cir. 1983).

[722] Id. at 37; In re Grand Jury, 851 F. 2d 499, 502 (1st Cir. 1988); Matter of Federal Grand Jury February 1987 Term, 677 F. Supp. 26, 28 (D. Me. 1988).

[723] See also United States v. Twentieth Century Fox, 882 F.2d 656, 662 (2d Cir. 1989) (organization has a right to a jury trial when fine imposed for criminal contempt exceeds $100,000), cert. denied, 493 U.S. 1021 (1990).

2. The subpoena itself, which may be submitted with the marshal's or agent's affidavit, or introduced separately, showing that it was properly issued by the clerk of court upon application of the United States;

3. If necessary, the affidavit or testimony of the clerk or a deputy clerk showing that issuance of the subpoena was in conformity with Fed. R. Crim. P. 17;

4. The affidavit or testimony of the foreperson of the grand jury establishing the presence of a quorum on the date and time in question. In this regard, the best evidence would be the minutes of the grand jury as maintained by the secretary that a quorum was present. (Authentication by the grand jury foreperson or secretary and his/her testimony would be necessary if the grand jury minutes are used.) The foreperson's affidavit or testimony should also include the fact that:

   a. The defendant did not appear, or

   b. Appeared and refused or failed to produce, or

   c. Appeared and refused or failed to produce all the documents ordered by the subpoena.

   Copies of appropriate parts of the grand jury transcript may be offered through the testimony of the court reporter, the foreperson, or a government attorney.

5. The testimony of the recipient or the appropriate representative of a corporate recipient before the grand jury (if any), as revealed by the transcript. This testimony would be admissible through the foreperson, or the court reporter, or counsel for the government by affidavit.[724]

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[724] If the recipient or corporate representative appears before the grand jury and fails or refuses to produce the subpoenaed material, in whole or in part, the prosecutor should take the opportunity to adduce the necessary evidence at that time regarding the document's control, custody or possession and the recipient's willfulness in failing or refusing to produce.

6. Whatever evidence is available to show the existence of the documents, their control by the recipient, and the recipient's refusal to produce. For criminal contempt, failure to appear on the return date is sufficient to establish the requisite willfulness, thus shifting the burden to the defendant to show a good faith effort to comply.[725]

D. Procedure and Forms

The procedure to be followed for failure or refusal to comply with a subpoena to produce documents essentially is the same for both criminal and civil contempt.

Punishment for failure to produce is criminal in nature. The procedure to be followed, because the refusal or failure does not occur in the actual presence of the court, must be in accordance with Fed. R. Crim. P. 42(b).[726] Rule 42(b) provides:

> Disposition Upon Notice And Hearing. A criminal contempt, except as provided in subdivision (a) of this rule, 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 of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or

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[725] United States v. Johnson, 247 F.2d 5, 8 (2d Cir.), cert. denied, 355 U.S. 867 (1957).

[726] Harris v. United States, 382 U.S. 162 (1965).

> hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

It is settled that the summary procedure provided for by Fed. R. Crim. P. 42(a) is not appropriate for a refusal to produce evidence before a grand jury, even when the refusal takes place directly in the presence of the court and at the court's request. This rule is usually utilized where a party, during a court hearing or trial, is abusive of the court or otherwise engages in contumacious conduct that obstructs the proceeding.[727]

The courts have held that Rule 42(b) also applies to civil contempt proceedings, including those brought under 28 U.S.C. § 1826 and, therefore, a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense.[728] The notice should specify whether the proceeding will be criminal or civil.[729]

Both criminal and civil contempt may be pursued by way of an Order to Show Cause. Actual criminal or civil contempt proceedings may be preceded by a Motion to Compel Compliance.

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[727] See, e.g., Harris v. United States, 382 U.S. 162 (1965); United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

[728] Shillitani v. United States, 384 U.S. 364 (1966); United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980); Matter of Kitchen, 706 F.2d 1266, 1271 (2d Cir. 1983); In re Rosahn, 671 F.2d 690, 696 (2d Cir. 1982); United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977); United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 414 U.S. 1079 (1974).

[729] Fed. R. Crim. P. 42(b); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911); United States v. United Mine Workers, 330 U.S. 258, 297 (1947).

1. Order to Show Cause[730]

As provided in Fed. R. Crim. P. 42(b), a show-cause order can be requested by the government. The request should take the form of an application by the United States for an order to show cause why respondent should not be found in contempt. Affidavits setting forth the foundational facts discussed above should be submitted to the court by the prosecutor presenting the matter. The affidavit of the deputy marshal or agent who served the subpoena should also be submitted with the application.

In addition, the Third Circuit requires an affidavit by the government setting forth the general relevancy of the subpoenaed documents to the grand jury investigation.[731] Most other circuits, however, have either declined to follow or have distinguished the Third Circuit's approach.[732]

2. Indictment

An alternative procedure which may be followed in pursuing criminal contempt occurring before the grand jury (after direct order of the court) is for the grand jury to return an indictment for violation of 18 U.S.C. § 401.[733]

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[730] See form entitled Order to Show Cause in Appendix of this Manual.

[731] In re Grand Jury Proceedings (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 965 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1010 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc). But see United States v. R. Enterprises, Inc., _ U.S. __, 111 S.Ct. 722 (1991).

[732] See Section II, B, 1 of this Chapter above for a discussion of relevance requirements.

[733] See United States v. Armstrong, 781 F.2d 700, 702-06 (9th Cir. 1986); United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

3. Motion to Compel Compliance

If a witness appears before the grand jury and refuses to comply with the subpoena based on some objection to the subpoena, e.g., attorney-client privilege, work-product privilege, First, Fourth, or Fifth Amendments, 18 U.S.C. § 2515 (prohibition of use as evidence of intercepted wire, or oral communications) or § 3504 (evidence derived from an unlawful act), the government may wish to bring on a motion to compel compliance rather than going directly to contempt proceedings. This affords the government an opportunity to litigate issues of fact or law prior to any contempt proceedings.

The motion should be brought upon notice and should be accompanied by some indication in writing to counsel that if the motion is granted and there is a lack of compliance with the court's order, the government intends to proceed immediately against the witness in a contempt proceeding under Rule 42(b) or 28 U.S.C. § 1826. The witness should be required to raise all possible objections to the subpoena at the hearing on the motion to compel, rather than litigating such issues at the contempt hearing. Care should be taken to research the case law prior to the hearing on the motion to compel regarding the particular objection because in some instances the government has an initial burden to meet. For example, if a First Amendment objection is raised, the government may have to establish the legitimacy of the grand jury investigation.

If a claim of privilege is made, the court will first determine whether the privilege exists. If so, the court may order an in camera inspection of the documents for which the protection is sought.[734]

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[734] In re Grand Jury Proceedings (Doe), 602 F. Supp. 603, 610 (D.R.I. 1985).

E. Defenses

1. Fourth Amendment

The Fourth Amendment's prohibition against unreasonable searches and seizures has been applied to grand jury subpoenas, but only to the extent that a subpoena that is unnecessarily broad in scope will be held unreasonable.[735] A subpoena duces tecum is thus subject only to the general Fourth Amendment requirement of reasonableness and need not be based on probable cause.

2. Fifth Amendment

A corporation has no Fifth Amendment privilege against self-incrimination.[736] This rule applies to all corporations, no matter how small, and most other "artificial entities," such as partnerships.[737] Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the custodian of the records or other corporate officials.[738]

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[735] See United States v. R. Enterprises, Inc., 111 S.Ct. at 728, 760.

[736] Hale v. Henkel, 201 U.S. 43, 74 (1906); United States v. White, 322 U.S. 694, 699 (1944). For a detailed discussion of the application of the Fifth Amendment to subpoenas see Chapter Seven of this Manual.

[737] Bellis v. United States, 417 U.S. 85 (1974); In re Grand Jury Proceedings (United States), 626 F.2d 1051, 1054 (1st Cir. 1980).

[738] See Braswell v. United States, 487 U.S. 99 (1988); United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury Empanelled March 17, 1987, 836 F.2d 150, 151 (3d Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143, 145 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, (continued...)

Records required to be made or kept by the business, kept by employees within the business, submitted to the business from time-to-time, or kept on the business premises and used in day-to-day transactions of the business are considered business records for purposes of the Fifth Amendment.[739] Appointment calendars and diaries kept by employees of the business generally are considered business records, even when they contain personal as well as business-related notations.[740]

3. Illegal Wiretaps

A grand jury witness is entitled, by reason of 18 U.S.C. §§ 2515 and 3504, to refuse to respond to questions based on illegal interception of oral or wire communications.[741] However, a grand jury witness does not have standing to suppress evidence before a grand jury. The witness merely has the right not to testify in response to questions based on the illegal interception of his or her wire or oral communications.[742]

The government's response to a claim of an illegal interception depends on whether any interception occurred. If there was no interception, the government will file an affidavit denying that any interception took place.[743] Under some circumstances, generally depending on the strength and specificity

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[738](...continued)
946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987).

[739] United States v. MacKey, 647 F.2d 898, 900 (9th Cir. 1981).

[740] United States v. MacKey, 647 F.2d 898, 900 (9th Cir. 1981); In re Grand Jury Subpoena Duces Tecum, 522 F. Supp. 977 (S.D.N.Y. 1981); United States v. Waltman, 394 F. Supp. 1393 (W.D. Pa.), vacated on other grounds, 525 F.2d 371 (3d Cir. 1975); In re Grand Jury Proceedings, 349 F. Supp. 417, 418 (N.D. Oh. 1972).

[741] Gelbard v. United States, 408 U.S. 41 (1972).

[742] Id. at 47; see In re Marcus, 491 F.2d 901, 903 (1st Cir.), vacated, 417 U.S. 942 (1974).

[743] See, e.g., In re Pantojas, 628 F.2d 701, 703 (1st Cir. 1980).

of the allegation of illegality, the affidavit must be reasonably specific and conform with the requirements set forth in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).[744]

If an interception did occur, the government must so indicate and provide the court with documents demonstrating that the interception was pursuant to court order.[745] To the extent that such documents must be provided to the witness, they may be in redacted form (e.g., to delete material which might identify informants).[746]

4. Improper Government Motive

A subpoena recipient need not comply with a subpoena if it is issued for an improper motive, for example to obtain information for use at trial or for use in a civil investigation or to harass or intimidate the subpoena recipient. A

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[744] E.g., Grand Jury v. Gassiraro, 918 F.2d 1013, 1014-15 (1st Cir. 1990) (per curiam); In re Grand Jury Matter, 906 F.2d 78, 92 (3rd Cir.), cert. denied, 111 S.Ct. 509 (1990); Matter of John Doe Trader Number One, 894 F.2d 240, 243, 246 (7th Cir. 1990); In re Grand Jury Proceedings (Garcia-Rosell), 889 F.2d 220, 223 (9th Cir. 1989) (per curiam); United States v. Garrett, 773 F.2d 1071 (9th Cir. 1985); In re Grand Jury Proceedings (Hermann), 664 F.2d 423, 427-28 (5th Cir. 1981) (per curiam), cert. denied, 455 U.S. 1000 (1982); But see, United States v. Apple, 915 F.2d 899, 905-09 (4th Cir. 1990) (in trial context, federal prosecutor's denial insufficient to rebut defendant's prima facie showing that state agency had conducted illegal electronic surveillance when federal prosecutor's denial lacked showing that certain state agency had been checked for records of illegal surveillance); In re Grand Jury Proceedings (Ghibaudy), 757 F.2d 108, 114-15 (7th Cir. 1984), cert. denied, 471 U.S. 1018 (1985) (government required to respond by affidavit to witness's motion for disclosure even when motion of witness not verified or supported by affidavit); cf., Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 702(a), 84 Stat. 922 (codified at 18 U.S.C. § 3504(a)(1)(1988)) (if aggrieved party asserts evidence obtained by illegal electronic surveillance, opponent must admit or deny such allegation).

[745] For a discussion as to what documents are necessary to prove a valid intercept, see USAM 9-7.110 and 7.113.

[746] In re Grand Jury, 851 F. 2d 499, 501 (1st Cir. 1988).

subpoena recipient has a heavy burden to justify non-compliance on these grounds.[747]

5. Fear of Retaliation

Fear of retaliation and for the physical safety of the witness does not constitute just cause to refuse to testify or produce documents.[748] Even where fears are legitimate, courts have refused to excuse the witness from testifying.[749] A few courts have recognized duress or coercion as a defense to a contempt charge, but those courts have found the defense inapplicable to the facts presented.[750]

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[747] United States v. R. Enterprises, Inc., 111 S.Ct. at 728. See Section II above for a more detailed discussion of the scope of grand jury subpoenas.

[748] Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); In re Grand Jury Proceedings, 943 F. 2d 132, 135 (1st Cir. 1991); In re Grand Jury Proceedings (Lahey), 914 F.2d 1372, 1374-75 (9th Cir. 1990) (per curiam); In re Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1171 (7th Cir. 1990); United States v. Gomez, 553 F.2d 958 (5th Cir. 1977); Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975); In re Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); LaTona v. United States, 449 F.2d 121 (8th Cir. 1971).

[749] In re Grand Jury Proceedings (Taylor), 509 F.2d 1349, 1350 (5th Cir. 1975); LaTona v. United States, 449 F.2d at 121. But see, United States v. Banks, 942 F.2d 1576, 1579 (11th Cir. 1991)(refusal to testify based on fear of harm to self or family may be a defense).

[750] See In re Grand Jury Proceedings (Gravel), 605 F.2d 750, 752 (5th Cir. 1979); United States v. Patrick, 542 F.2d 381, 386 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

F. Successive Contempt Citations

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Assistant Attorney General, Criminal Division.[751] Although language in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1966), may authorize successive contempts, the Department has taken a more restrictive stance.

G. Appeals

Contempt adjudications are appealable as final decisions under 28 U.S.C. § 1291.[752] A contempt adjudication is not final for purposes of appeal under § 1291 until a sentence or sanction has been imposed.[753] An application for a show-cause order for criminal contempt is a "criminal case" within the meaning of the Criminal Appeals Act, 18 U.S.C. § 3731, and a government appeal of the denial of a criminal contempt order is thus subject to the requirements of that provision.[754]

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[751] See USAM 9-11.160. Exceptions to this policy are also described in the United States Attorneys' Manual.

[752] See Wright, Miller & Cooper, Fed. Prac. and Proc. 15 Jurisdiction § 3917 (1976); United States v. Martin Linen Supply Co., 485 F.2d 1143, 1145 (5th Cir. 1973) (government appeal of denial of criminal and civil contempt), cert. denied, 415 U.S. 915 (1974); United States v. Metropolitan Disposal Corp., 798 F.2d 1273 (9th Cir. 1986) (witness's appeal of criminal contempt).

[753] Weyerhaeuser Co. v. International Longshoremen's Union, 733 F.2d 645 (9th Cir. 1984).

[754] United States v. Goldman, 277 U.S. 229, 235 (1928); United States v. Sanders, 196 F.2d 895 (10th Cir. 1952).

H. Refusal to Testify or Refusal to Answer Certain Questions

Once the problems of self-incrimination and immunity have been overcome,[755] the ingredients of contempt and the procedures to be followed are the same as described above as to production of documents.

IX. International Issues

A. Introduction

There are special considerations involved when evidence sought by United States investigators and prosecutors is located in a foreign country. In particular, a United States official seeking such evidence must be certain not to offend the sovereignty of the foreign nation. An investigator or prosecutor from the United States who attempts to investigate criminal activity abroad without the permission of the foreign government may become the subject of a diplomatic protest, or may even be arrested for such activity in a foreign country, and, may be denied access to evidence which otherwise would be provided. To avoid these consequences, and to determine the most efficient method of obtaining the desired evidence, the Office of International Affairs (OIA) of the Criminal Division of the Department of Justice should be consulted prior to making any attempts to obtain evidence or information from a foreign country.

There are several methods that may be used to conduct investigations and obtain evidence from abroad. These methods are outlined below.[756]

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[755] See Chapter Eight of this Manual for more detailed discussion of immunity procedures.

[756] For a more detailed discussion, see USAM 9-13.500 et seq.

B. Obtaining Assistance From Foreign Governments

There are three formal methods of obtaining assistance from foreign governments:

1. Letters rogatory, i.e., requests for judicial assistance from our judiciary to the foreign judiciary pursuant to 28 U.S.C. § 1781;

2. A request pursuant to a Mutual Legal Assistance Treaty (MLAT); and

3. A request pursuant to an executive agreement.

There may also be informal ways to obtain access to evidence abroad, such as police-to-police requests accomplished through U.S. law enforcement agents stationed at various embassies abroad, and diplomatic requests for records which the foreign government considers to be public records available upon an official request. Information regarding the procedures to be used and samples of such requests can be obtained from OIA.[757]

C. Grand Jury Secrecy

1. Disclosure Orders

When using the formal methods, the prosecutor will be required by the foreign government to show that a crime has been committed and that the evidence sought is relevant to the investigation. In some cases this showing can be made without the use of grand jury material. In other cases, however, grand jury material will necessarily have to be included in the request. If so,

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[757] Various mutual legal assistance treaties and memoranda of understanding between the United States and foreign governments are described in Beale & Bryson, Grand Jury Law & Practice, § 6:50 (Cum. Supp. 1991).

the prosecutor must obtain an order authorizing disclosure to the foreign officials under Federal Rule of Criminal Procedure 6(e). When using informal methods, disclosure may or may not be required. If a disclosure is going to be made, even informally, the same requirements concerning grand jury secrecy apply. For the court to authorize disclosure, it must be satisfied as to two points: (1) that the disclosure is preliminary to or in connection with a judicial proceeding; and (2) that particularized need has been shown. As to the first point, there is a split in the circuits on the issue of whether disclosure for the purpose of assisting a grand jury's own investigation is itself properly viewed as preliminary to or in connection with a judicial proceeding, for purposes of a motion for 6(e)(3)(C)(i) disclosure. The Seventh and Ninth Circuits, as well as various district courts have held that it is.[758] The Tenth Circuit and various other district courts have taken an opposite view, stating that the grand jury investigation whose material is sought to be disclosed cannot itself be the judicial proceeding contemplated by 6(e)(3)(C)(i).[759] As to the showing of "particularized" need, the same considerations discussed, also in Chapter Four apply to a disclosure for the purpose of obtaining evidence abroad.

If there is some question whether evidence and information provided in the proposed request for foreign assistance actually discloses "matters occurring before the grand jury" within the ambit of Rule 6(e)(2), the government is charged with the responsibility of seeking the guidance of the court prior to making the disclosure.[760] The government may seek a determination by the court that the proposed disclosure does not directly reflect matters occurring before the grand jury. Furthermore, in its motion for disclosure, the

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[758] See, e.g., United States v. Benjamin, 852 F.2d 413, 416 (9th Cir. 1988),vacated on procedural grounds, 490 U.S. 1043 (1989) and 879 F.2d 676 (9th Cir. 1989); United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); United States v. Stanford, 589 F.2d 285, 290 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); In re 1979 Grand Jury Proceedings, 479 F.Supp. 93 (E.D.N.Y. 1979); In re Braniff Airways, Inc., 390 F. Supp. 344, 346 (W.D. Tex. 1975); In re Grand Jury Witness Subpoena, 370 F. Supp. 1282, 1284 (S.D. Fla. 1974).

[759] See United States v. Tager, 638 F.2d 167, 170 (10th Cir. 1980); In re Grand Jury Proceedings, 445 F. Supp. 349 (D.R.I.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978). See also In re Miami Federal Grand Jury No. 79-8, 479 F. Supp. 490, 493 (S.D. Fla. 1979) (stating, in dictum, that to apply 6(e)(3)(C)(i) "to the very grand jury from which disclosure is sought seems somewhat illogical.")

[760] See, e.g., In re Special February, 1975 Grand Jury, 662 F.2d 1232, 1244 (7th Cir. 1981), aff'd sub nom., United States v. Baggot, 463 U.S. 476 (1983); United States v. Interstate Dress Carriers, Inc, 280 F.2d 52 (2nd Cir. 1960).

government may request a finding that such disclosure will be preliminary to and in connection with a judicial proceeding, that the government has shown a compelling particularized need justifying the limited disclosure proposed, and that this need outweighs the need for grand jury secrecy.

2. Grand Jury Subpoenas

In addition to the above methods, which rely on the cooperation of foreign governments, evidence can also be obtained unilaterally in some circumstances through the use of grand jury subpoenas.

a. Subpoenas directed to United States citizens and permanent residents of the United States[761]

Pursuant to 28 U.S.C. §§ 1783[762] and 1784[763], subpoenas can be issued to nationals or residents of the United States who are located in a foreign country, and the courts have the power to hold that individual in contempt if he or she fails to comply with the subpoena.[764] The district court can direct the

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[761] See generally USAM 9-13.525; Beale & Bryson, Grand Jury Law and Practice § 6:50 (Cum. Supp. 1991).

[762]Title 28, United States Code, Section 1783 provides:

Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

[763]Title 28, United States Code, Section 1784, authorizes a court which has issued a subpoena under 28 U. S. C. § 1783 to impose contempt sanctions upon a person who fails to comply with that subpoena.

[764] Blackmer v. United States, 284 U.S. 421, 436 (1932).

issuance of a grand jury subpoena pursuant to this authority.[765] Foreign law, however, may restrict the method of serving such subpoenas, especially when the witness is a dual national. OIA should be consulted prior to the service of such subpoenas. In most cases, the subpoena may be served by a consular official of the United States who acts upon receiving a request from the Department of State. These requests are coordinated by the Special Authorizations Unit, Justice Management Division (202-272-8429).

b. Subpoenas directed to domestic branches of banks and businesses to obtain records located abroad

In some cases, the foreign bank that holds the relevant records may have a branch office located in the United States. United States courts have upheld the use of grand jury subpoenas to compel a bank that does business in the United States to turn over records held by a branch of the same bank in a foreign country, even where the law of the foreign country provides that such information is protected by a bank secrecy act or privilege.[766] In determining whether a particular subpoena is enforceable, the courts utilize the balancing test of the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965), which provides:

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[765] United States v. Danenza, 528 F.2d 390 (2d Cir. 1975) (affirming order holding witness in civil contempt for failure to comply with grand jury subpoena issued pursuant to 28 U.S.C. § 1783); see United States v. Lansky, 496 F.2d 1063, 1067 (5th Cir. 1974) (defendant's conviction for criminal contempt based upon failure to comply with grand jury subpoena issued pursuant to 28 U.S.C. § 1783 reversed due to insufficiency of evidence).

[766] See In re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); In re Grand Jury Subpoena Directed to Marc Rich and Company, A.G., 707 F.2d 663 (2nd Cir. 1983), cert. denied, 463 U.S. 1215 (1983); but see, In re Sealed Case, 825 F.2d 494 (D.C. Cir. 1987), cert. denied, 484 U.S. 963 (1987), (refusing to uphold civil contempt citation where non-target bank was owned by foreign government, but limiting holding to specific facts).

"Limitations on exercise of enforcement jurisdiction:"

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> 1. Vital national interests of each of the states,
>
> 2. The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> 3. The extent to which the required conduct is to take place in the territory of the other state,
>
> 4. The nationality of the person, and
>
> 5. The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

Some foreign governments, however, have strongly objected to such subpoenas, contending that they constitute an infringement of their sovereignty by the United States. Since the use of unilateral compulsory measures can adversely affect international relationships, United States officials must obtain written approval through OIA before issuing any subpoenas to persons or entities in the United States for records located abroad. USAM 9-13.525 sets forth the following procedures which must be utilized:

The request for OIA concurrence must be in writing and set forth:

> 1. The subject matter and nature of the grand jury investigation or trial;

2. A description of the records sought including their location and identifying information such as bank account numbers;

3. The purpose for which the records are sought and their importance to the investigation or prosecution;

4. The extent of the possibility that the records might be destroyed if the person or entity maintaining them becomes aware that they are being sought; and

5. Any other information relevant to the Office of International Affairs' determination.

In emergencies, OIA can act on the basis of an oral request containing the above information. In such instances, if OIA concurs in the issuance of a subpoena, the oral request must be followed by a written request.

OIA will take the following considerations into account in determining whether such a subpoena should be authorized:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties, or letters rogatory;

2. The indispensability of the records to the success of the investigation or prosecution; and

3. The need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.

It is also possible to obtain such records by serving subpoenas on appropriate officers of foreign banks if the officer enters the United States.[767]

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[767] United States v. Field, 532 F.2d 404, rehearing denied, 535 F.2d 660 (5th Cir. 1976), cert. denied, 429 U.S. 940 (1976) (testimonial evidence sought, relating to bank's business operations). But see In re Sealed Case, 832 F.2d 1268, 1272-73 (D. C. Cir. 1987) (not sufficient (continued...)

In addition, attorneys and agents for foreign corporations who travel in the United States may be subpoenaed to produce records of foreign corporations.[768] However, the concurrence of OIA must be obtained prior to the service of such subpoenas.[769]

D. Consent Directives

Another method which has been used to gain access to foreign documents otherwise protected by bank secrecy laws is to direct the target cooperating witness of the investigation. This compels the witness to sign a consent directive authorizing the foreign bank to disclose records of any and all accounts over which the cooperating witness has signatory authority. Where the witness is not cooperating, a court order compelling the execution of such directive may be obtained. In Doe v. United States, 487 U.S. 201 (1988), the United States Supreme Court approved this procedure, affirming an order holding the target of an investigation in civil contempt for his refusal to obey such a court order. The Court held that the target's Fifth Amendment privilege against self-incrimination was not violated by compelling such consent because the consent directive was carefully drawn so that the target did not acknowledge that any such account in a foreign bank existed or was controlled by the target, and did not indicate whether documents or any other information relating to the target were present at the foreign bank. The consent form approved by the Court stated:

> I,[name], of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which

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[767](...continued)
to show personal jurisdiction over custodian subpoenaed to produce records, must also show in personam jurisdiction over companies whose records are sought).

[768] United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982).

[769] USAM 9-13.525.

> relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, date ____. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

The recognition that will be given to such directives by foreign governments, however, is unclear. In Doe v. United States, 487 U.S. 201, 218 n.16 (1988), the government of the Cayman Islands filed an amicus brief in which it maintained that a compelled consent was not sufficient to authorize the release of confidential financial records protected by Cayman law.

Chapter Seven

PRIVILEGES: COMMON LAW AND CONSTITUTIONAL

I. Common Law

A. The Attorney/Client Privilege

The attorney/client privilege occupies an important place in our adversarial legal system, and is the oldest privilege recognized at common law. Its purpose is to promote and facilitate an individual's ability to seek legal advice, knowing that he or she can discuss matters candidly and completely with counsel, by protecting such communications from compelled disclosure under most circumstances.[770] However, the privilege operates in a manner likely to impede the truth-seeking function of the grand jury and therefore must not be expansively construed.[771] Although the privilege is designed to provide confidentiality, its purposes are subverted where the assertion of the privilege is designed to provide a cloak of secrecy around the illicit business

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[770] Upjohn v. United States, 449 U.S. 383 (1985).

[771] United States v. Nixon, 481 U.S. 683, 710 (1974).

affairs of an individual or corporation.[772] Efforts to obtain either testimonial or documentary evidence from or related to a subject's attorneys must be made with an understanding of the nature, extent, and scope of this privilege.[773]

Rule 501 of the Federal Rules of Evidence states that questions of privilege are to be decided by federal courts as "governed by the principles of the common law". The privilege applies to the grand jury stage of litigation, including matters related to the subpoena powers of the grand jury.[774]

The elements of the attorney/client privilege have been set forth in various forms by several courts. However, the most widely accepted formulation of those elements is that propounded by Professor Wigmore, who identifies eight elements:

> (1) Where legal advice of any kind is sought (2) from a legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the privilege be waived.[775]

The burden of establishing the existence of an attorney/client privilege as to testimonial or documentary evidence always rests upon the proponent of the privilege.[776] Thus, each of the elements listed above must be established before the privilege can be maintained. These enumerated elements are discussed in greater detail below.

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[772] In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986).

[773] See Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (grand jury has the right to obtain every person's evidence "except for those persons protected by a constitutional, common-law, or statutory privilege").

[774] In re Grand Jury Subpoena, 599 F.2d 504, 509 (2d Cir. 1979).

[775] 8 Wigmore, Evidence Sec. 2292 (McNaughton rev. 1961); United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986)(4 elements).

[776] United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986); In re Grand Jury Empanelled February 14, 1978 (Markowitz), 603 F.2d 469, 477 (3rd Cir. 1979); United States v. Tratner, 511 F.2d 248, 252 (7th Cir. 1975).

1. Elements (1) and (2): "Where Legal Advice Of Any Kind Is Sought From A Professional Legal Advisor In His Capacity As Such."

a. The general rules

As a broad proposition, whenever a person or entity talks to a lawyer for the purpose of obtaining legal advice, the person's conversations and communications may be privileged from compelled disclosure. This general rule applies to both individuals and artificial entities such as corporations.[777] However, not all communications with a lawyer are privileged; they must be made in the context of the effort to seek legal advice. Case law discusses the need for a "manifested intent" to seek legal counsel; a person's "subjective belief" that the conversation was privileged is not by itself sufficient to establish the privilege.[778] The existence of the privilege is based on a review of all the factual circumstances surrounding the relationship between the person and the attorney to determine whether the parties' behavior is consistent with the intent to maintain an attorney/client relationship.[779]

The attorney/client relationship need not pre-date the communication. Indeed, a person who discloses facts to a lawyer to determine if the lawyer will accept a case may be entitled to the privilege.[780] Similarly, the fact that the lawyer is later unable to continue as counsel because of a conflict of interest or other reason does not obviate the privilege as to communications made prior to the termination of the attorney/client relationship.[781]

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[777] Upjohn v. United States, 449 U.S. 383, 388-90 (1981).

[778] United States v. Keplinger, 776 F.2d 678, 700 (7th Cir. 1985), cert. denied, 106 S.Ct. 2919 (1986).

[779] See United States v. (Under Seal), 741 F.2d 871, 873-76 (4th Cir. 1984) and cases cited therein.

[780] United States v. Dennis, 843 F.2d 652, 656 (2d Cir. 1988).

[781] In re Walsh, 623 F.2d 489, 493 n.4 (7th Cir.), cert. denied, 449 U.S. 994 (1980).

The advice sought must be "legal" in nature, as opposed to mere business advice. For example, communications on business matters by corporate counsel who has both business and legal functions are not privileged. The corporation will have the burden of showing that counsel's communications were exclusively legal in nature to maintain the privilege.[782]

The person seeking the advice must be a "client" in the ordinary sense of the word, and the opposite party must be a lawyer asked to serve in his professional capacity as such.[783] However, a person is not a "client" simply because he or she maintains some form of association with an attorney.[784] Similarly, a lawyer acting as "mere scrivener" (such as one filling out real estate forms or tax returns) is not acting as a lawyer rendering legal advice, and no privilege exists for related communications.[785] "The mere fact that a person is an attorney does not render privileged everything he does for a client. Ministerial or clerical services . . . are not within the privilege."[786]

b. Tax Cases

The principles discussed above often arise in the context of demands for tax data. As the Second Circuit stated, there is a "rather arbitrary line" between privileged and non-privileged communications in this area.[787] Two leading cases help illustrate where and how that line should be drawn.

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[782] In re Sealed Case, 737 F.2d 94, 100 (D.C.Cir. 1984).

[783] Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1978) (en banc).

[784] United States v. Layton, 855 F.2d 1388, 1406 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); United States v. Tedder, 801 F.2d 1437, 1442 (4th Cir. 1986).

[785] Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (tax returns); Pollock v. United States, 202 F.2d 281, 286 (5th Cir.), cert. denied, 345 U.S. 993 (1953) (real estate forms).

[786] United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969).

[787] United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

In United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973), Gurtner's attorney advised him to consult with accountant Foulk who had a "working relationship" with the attorney about preparation of Gurtner's tax returns. The Ninth Circuit refused to find the communications between Foulk and Gurtner privileged. Noting that "[i]f what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." 474 F.2d at 298-99 (citations omitted). The court went on to state:

> Gurtner did not prove that Foulk was acting as a consultant for his attorney. Moreover, even if we assumed that Foulk was the agent of an attorney, not all consultations with such agents are privileged. Gurtner's consultations with Foulk for the purpose of preparing the tax returns did not fall within the privilege. Such consultations, even with an attorney who is preparing the returns, are not privileged.

474 F.2d at 299 (citations omitted).

By comparison, the accountant in United States v. Cote, 456 F.2d 142 (8th Cir. 1982), was told by his taxpayer/clients that the IRS was going to audit the clients. Cote, a CPA, sent the clients to an attorney, Murphy. Murphy asked Cote to audit the clients' financial data, after which Cote sent the workpapers to Murphy. Based on the audit, Murphy advised the clients to file an amended return. The IRS subpoenaed the audit papers, and Cote asserted the attorney/client privilege. The Eighth Circuit upheld the assertion of the privilege, noting that Murphy's "advice to file amended returns was formulated after evaluating the results of the audit[,] . . . [the] decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide. It is clear that the accountant's aid to the lawyer preceded the advice and was an integral part of it."[788] The court fashioned a "test" of "whether the accountant's services are a necessary aid to the rendering of effective legal services to the client."[789]

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[788] 456 F.2d at 144 (emphasis supplied).

[789] Id. The taxpayers won at best a Pyrrhic victory as the court went on to hold that once

(continued...)

The distinctions reflected by Cote and Gurtner are specifically applicable to tax cases, but also reflect the analysis used by courts to distinguish legal from other forms of advice which a lawyer may be called upon to render for a client.[790]

c. Collateral facts; fee information.

There are many facts communicated between a lawyer and client in the context of seeking legal advice that are collateral to the communications needed to seek legal advice. Generally these collateral facts are not privileged. For example, the fact that a lawyer has communicated with a client[791] and the client's physical characteristics[792] generally are not privileged. Even the specific identity of the client ordinarily is not privileged.[793] Counsel may be compelled to confirm that he or she had contact with the client, to testify about the client's present whereabouts[794], and to confirm that he or she apprised the client of court dates or surrender dates.[795]

Modern federal grand jury practice frequently involves inquiry into the question of fees, and particularly who paid the lawyer's fees, how they were paid, what amount was charged, etc. The long-established general rule is that

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[789](...continued)
the amended returns were filed, the taxpayers had made a disclosure of privileged data which required further disclosure of the underlying data for the amended returns. 456 F.2d at 144-45.

[790] See United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984).

[791] In re Walsh, 623 F.2d 489, 495 (7th Cir.), cert. denied, 449 U.S. 493 (1980).

[792] Id. at 495.

[793] In re Grand Jury Proceedings (United States v. Jones), 517 F.2d 666, 670 (5th Cir. 1975). But see discussion below.

[794] In re Grand Jury Subpoena Served Upon Field, 408 F. Supp. 1169, 1172 (S.D.N.Y. 1976); Walsh, 623 F.2d at 495.

[795] United States v. Innella, 821 F.2d 1566 (11th Cir. 1987); United States v. Freeman, 519 F.2d 67 (9th Cir. 1975).

no privilege attaches to information about what fees were paid, in what amount, and in what form.[796] Similarly, questions about who paid the fees are generally not privileged.[797] The cases follow naturally from the proposition that the privilege only protects communications necessary to obtain legal advice.[798] The financial arrangements attendant to seeking such advice ordinarily are not likely to reveal confidential facts or information.

However, there is an evolving exception to these general rules which federal prosecutors can expect to encounter with some frequency. It occurs most often when a target or defendant is provided with retained counsel under circumstances suggesting that an unknown third party, an "anonymous benefactor" who has paid the fees, has a personal interest in providing representation to the target or defendant. The seminal case in this area is Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). As a result of the way circuit courts have construed (or sometimes misconstrued) Baird, prosecutors attempting to ascertain the identity of the anonymous third party payer or anonymous clients have met with mixed success.[799]

Those cases holding that the privilege bars disclosure of the identity of an anonymous client or third-party payer restrict such holdings to a narrow class of cases "where disclosure of the client's identity or fees would have revealed a confidential disclosure."[800] Reasoning that because a client's *motive* for seeking legal advice is privileged,[801] the cases recognize the privilege where there is an indication that the identity of the client or benefactor is sought to determine if the client's or benefactor's *motive* for providing

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[796] See, e.g., Walsh, 623 F.2d at 495; United States v. Haddad, 527 F.2d 537, 538 (6th Cir. 1975), cert. denied, 425 F.2d 974 (1976).

[797] In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

[798] Fisher v. United States, 425 U.S. 391, 403 (1976).

[799] Compare In re Grand Jury Subpoenas (United States v. Hirsch), 803 F.2d 493, 496 (9th Cir. 1986), and In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 250 (2d Cir. 1985), cert. denied, 106 S.Ct. 1515 (1986), with In re Grand Jury Subpoena, 926 F.2d 1423, 1430 (5th Cir. 1991), and In re Cherney, 898 F.2d 565 (7th Cir. 1990).

[800] In re Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489, 493 (7th Cir. 1984); accord United States v. Liebman, 742 F.2d 807, 809 (3rd Cir. 1984).

[801] In re Cherney, 898 F.2d at 568.

counsel was to insulate himself from scrutiny on the same criminal offenses.[802]

While the rationale for this body of case law is debatable[803] it appears to be a uniform proposition among the circuit courts. What is not uniform, however, is the theory supporting the precedent. Two circuits, the Fifth and Eleventh, frequently refer to it as the "last link" doctrine.[804] As the appellation "last link" suggests, these two courts consider that the doctrine stems from whether the identity of the anonymous fee-payer is inculpatory information *per se*. Indeed, the Fifth Circuit has suggested that the information is privileged because the identity of the benefactor may incriminate the benefactor,[805] although later Fifth Circuit cases disavow such a rationale.[806]

By contrast, the other circuits honoring the principle recognize that the incriminating nature of the information does not render it privileged. It is the tendency of such data to reveal the client's or benefactor's motive for retaining counsel that triggers the privilege.[807] In either case, subpoenas to an attorney to ascertain the identity of an anonymous client, or the identity of an anonymous third-party fee payer, must be fashioned in recognition of this evolving body of cases. Further, as is discussed more fully below in this Chapter at Section I,A,6,b "Subpoenas to attorneys" and in Chapter Six concerning subpoena power at Section I,B "Departmental Policies Limit the

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[802] Id.; see also Special March 1980 Grand Jury, 729 F.2d at 493-95 (collecting and analyzing cases from the circuits).

[803] Cf. In re Grand Jury Subpoena Served Upon Doe, 781 F.2d at 248.

[804] See, e.g., In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1042 (11th Cir. 1990).

[805] In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc).

[806] In re Grand Jury Subpoenas, 926 F.2d 1423, 1431-32 (5th Cir. 1991).

[807] In re Grand Jury Subpoenas, 803 F.2d 493, 497-98 ("the relevant inquiry is not whether disclosure of the fee-payer's identity would be incriminating or would lead to further grand jury indictments, but rather, whether the requested information represents a confidential professional communication."); In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983) (in which the Ninth Circuit expressly rejects the incrimination rationale as founded upon a misreading of the Baird opinion); In re Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489, 493-94 (7th Cir. 1984).

Ability of the Grand Jury to Investigate Certain Matters", any subpoena to an attorney must receive approval from the Department before it may be issued in a grand jury proceeding.

2. *"Communications Relating To That Purpose"*

Clients may want to convey a large amount of information to their attorneys for various reasons. However, the Supreme Court succinctly stated in Fisher v. United States, 425 U.S. 391, 403 (1976), that privilege covers "*only* those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege" (emphasis supplied). Thus, where a client conveys pre-existing documents to an attorney to seek legal advice, those documents are not privileged simply because they are in the possession of an attorney. If the client maintained a privilege, whether founded on the Fifth Amendment or the attorney/client privilege, as to documents in the client's possession, that privilege survives when the documents are transferred to counsel. Conversely, if no such privilege attached to the documents while in the client's possession, they do not become privileged by virtue of their transfer to counsel's possession.[808] The fact that documents were pre-existing suggests that they were not generated for purposes of seeking legal advice, and although the grand jury is not entitled to know what the client said to counsel about the documents, it is entitled to the documents themselves. Further, because pre-existing documents are often commingled with the attorney's privileged communications materials, the law requires the proponent of the privilege to assert it as to specific documents or specific questions about such documents.[809]

The privilege protects the client from disclosure of the fact that he or she communicated certain data to an attorney; it does not purport to prevent disclosure of the underlying facts themselves if they are discoverable without violating the privilege.[810] Thus, the fact that a client has told the same facts

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[808] Id., 425 U.S. at 403-05.

[809] United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974); In re Walsh, 623 F.2d 489, 493.

[810] Upjohn v. United States, 449 U.S. 383, 395.

to a third party is not a waiver of the privilege, absent the further showing that the client also revealed his or her communication of those facts to counsel. For example, if a confidential witness testifies about events, the witness has not waived his or her privilege as to communications the witness made to lawyer about those same events.[811] Again, the distinction between "facts" and "communications" is decisive in this area; the former are not privileged, but the latter generally are.

3. "[Communications] Made In Confidence By The Client"

The proponent of the privilege must next establish that the communication in question was made with the intent it be maintained in confidence.[812] This can be accomplished by means of an *in camera* showing to a district judge that the communications were made by a party seeking professional legal advice.[813] The fact that a person discussed facts to obtain legal advice is not enough by itself. It must be established that the advice was sought from a lawyer who was able to represent the person seeking such advice.[814] As is always the case, the existence of the privilege will depend upon the reasonableness of the parties' conduct in view of the interests the privilege seeks to protect.

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[811] United States v. O'Malley, 786 F.2d 786, 793 (7th Cir. 1986). Further, the courts will not infer that by talking to the government about these facts, the cooperating witness must have disclosed to the government whether or not he or she disclosed the same facts to his or her attorney. United States v. James, 708 F.2d 40, 44 & n.3 (2d Cir. 1983).

[812] United States v. (Under Seal), 748 F.2d 871, 876 (4th Cir. 1984) (if client provides data to an attorney with the intent it be used in document to be publicly disclosed, the "mere fortuity" that the document is not actually published will not render the document privileged; intent of the client at the time of transmission is decisive); In re Walsh, 623 F.2d 489, 494.

[813] In re Grand Jury Empanelled February 14, 1978 (Markowitz), 603 F.2d 469, 474 (3rd Cir. 1979).

[814] See, e.g., United States v. Keplinger, 776 F.2d 678, 700 (7th Cir. 1985), cert. denied, 106 S.Ct. 2919 (1986) (corporate officer discussing facts of case with corporate counsel not entitled to claim privilege on basis that counsel represented officer in his individual capacity).

The hallmark of the privilege is confidentiality, which in turn requires a showing of intent that the communications be confidential. Thus, meetings between a client and the attorney which are conducted in the presence of non-client third parties[815] are presumptively not privileged.[816] Moreover, this confidentiality must be understood by the parties to be perpetual; if the client conveys information or data to the attorney with the knowledge it will be disclosed at some future time to third parties, that communication is not privileged.[817] However, there is no talismanic formula by which a client must assert an intent for confidentiality; if the circumstances of the communication reveal an intent that confidence be maintained, the courts will infer that intent.[818]

It is essential that the communication claimed as privileged was made by the "client", for only communications made by that client are privileged.[819] This does not mean, however, that only the communications *from* the client *to* the attorney will be privileged. Communications from counsel to the client may likewise be protected from disclosure if revealing them will effectively disclose confidential client communications.[820] As the Ninth Circuit explained in Fischel:

> Of necessity, the privilege is not limited to the actual communication by the client to the attorney. Ordinarily the compelled disclosure of an attorney's

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[815] The unique circumstances of the "joint defense agreement" are discussed in Chapter Nine "Conflicts of Interest/Multiple Representation" at Section III.

[816] See, e.g., United States v. Pipkins, 528 F.2d 559 (5th Cir. 1976).

[817] In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986).

[818] In re Sealed Case, 737 F.2d 94, 102 (D.C.Cir. 1984).

[819] See In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (attorney must disclose information told to him or her about the attorney's client by third parties).

[820] In re Sealed Case, 737 F.2d 94, 99 (D.C.Cir. 1984).

> communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney.[821]

The analysis above applies with equal force to both individual and corporate clients, however, the process of identifying those real persons, associated with the artificial corporate entity, whose communications are privileged is more complicated. Crucial to the prosecutor's understanding of this area of privilege law is the holding in Upjohn v. United States, 449 U.S. 383 (1981).[822] Upjohn involved a corporation's internal investigation to discover whether certain illegal acts occurred. The investigation was conducted by corporate counsel who acted primarily by sending a questionnaire to corporate employees. The government sought to subpoena the responses to that questionnaire. The corporation claimed them as privileged. The lower courts rejected the claim of privilege, relying on the doctrine that only corporate officers contained within the "control group" of the company were capable of making privileged communications.

The Supreme Court reversed, noting that although only high-level corporate officers are entitled to retain or manage corporate counsel, virtually any employee of a corporation is capable of getting the corporation into legal difficulties. Thus, when a corporation seeks to ascertain how its employees have acted, the principles of the attorney/client privilege require that all corporate employees be able to communicate with corporate counsel secure in the knowledge that their responses will be maintained in confidence. Conversely, if corporate counsel is asked to relate legal advice to the corporation about how to comply with the law, it is essential that this advice be transmitted to those actually in a position to comply with the advice. The Court reasoned that if this transmission of advice was left to corporate officers, removing it from the usual arena of privilege, corporations would have less of an incentive to obtain and follow the advice of counsel, which the Court found contrary to the policies embodied by the privilege.[823] Accordingly, the Court held that the questionnaires were privileged. Upjohn stands for the proposition

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[821] 557 F.2d at 211; see also United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984).

[822] Upjohn also contains a discussion of the "Work-Product Doctrine", a topic discussed below in Section I,B of this Chapter.

[823] 449 U.S. at 390-95.

that the present employees of a corporation may make privileged communications with corporate counsel where the usual indicators of attorney/client confidentiality are present.[824]

4. *"Are At His Instance Permanently Protected From Disclosure By Himself Or By The Legal Advisor"*

The attorney/client privilege is possessed by the client, and must be maintained by the attorney as fiduciary to the client. Thus, the attorney is under an affirmative duty to assert the privilege on the client's behalf.[825] The privilege can be effectively claimed by either the attorney or the client.[826] It is possible for the client to permit an authorized disclosure of the communication, which acts as a waiver of the privilege.[827] However, because only the client can waive the privilege, the finding that the disclosure was authorized must be fully supported by the evidence.[828]

This ethical duty of the lawyer to maintain the privilege is shared by all those agents of either the lawyer or the client who come into possession of such information. The courts have long recognized that modern legal practice requires lawyers to rely upon the services of non-lawyers.[829] This may

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[824] The Court's decision expressly reserves the question of whether former corporate employees' communications to corporate counsel are also privileged; Upjohn v. United States, 449 U.S. 383, 395 n.3. The Ninth Circuit has extended the principles of Upjohn to former employees. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).

[825] In re Grand Jury Proceedings, 831 F.2d 222, 225 (11th Cir. 1987).

[826] Fisher v. United States, 425 U.S. 391, 402 n.2 (1976).

[827] In re von Bulow, 828 F.2d 94, 100-101 (2d Cir. 1987).

[828] Id.

[829] See the discussion above in this Chapter, Section I,A,1,b, "Tax cases", regarding accountants working with tax lawyers.

include secretarial personnel, interpreters, investigators, law clerks, etc.[830] Of course, the parties must always maintain the usual components of a confidential relationship, particularly in relation to their supervision of these support personnel.

5. *"Except The Privilege Be Waived"*

It is essential that the prosecutor first analyze all assertions of privilege to determine if the claim is correctly asserted, and second, determine if the privilege has been waived. Waiver of the attorney/client privilege, for purposes of a grand jury investigation, often means that the grand jury will get access to documents which are especially probative.

Unlike constitutional rights, which are only waived upon a showing of knowing and voluntary relinquishment of the right, the attorney/client privilege can be waived either by mistake or design. Some waivers of the privilege are deliberately made by persons or corporations. These circumstances require little analysis, although it may be useful to recall that usually only officers or directors are empowered to waive the attorney/client privilege of a corporation, a decision they must make as fiduciaries to the corporate entity and not for personal reasons.[831] Passage of control over the corporation, as in bankruptcy, vests in the new regime the power to waive the privilege, even where the previous officers would have asserted the privilege on the corporation's behalf.[832]

Once privileged communications concerning a particular issue have been disclosed, the privilege is usually deemed waived for all communications concerning the same issue or subject matter.[833] A limited number of courts

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[830] See, e.g., United States v. Kovel, 296 F.2d 918, 922-24 (2d Cir. 1961).

[831] CFTC v. Weintraub, 471 U.S. 343, 348 (1985).

[832] Id. at 349.

[833] In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977).

have created an exception for disclosures made during settlement negotiations,[834] or when disclosure was inadvertent and there would be no unfairness to the other party by the refusal to disclose other communications.[835] In these cases, the privilege was deemed waived only with respect to the communications that had been disclosed.

To understand when waiver applies, how far it applies, and to whom it is effective, the prosecutor must distinguish a number of inter-related concepts: the inadvertent waiver; the authorized waiver (which includes the "advice of counsel" defense); the "Crime/Fraud" doctrine; "limited" or selective waiver; and partial waiver (including the "Fairness Doctrine").

a. Inadvertent waiver

Inadvertent disclosure of privileged communications may constitute a waiver of the privilege.[836] A client does not have to intend that the privilege be waived for a waiver to be complete and effective.[837] If a client simply makes a mistake and loses documents he sought to treat as confidential under the attorney/client privilege, and if they are discovered by a third party, the privilege is waived.[838] The traditional rule is that even theft of confidential materials will result in waiver, although there are plainly other considerations

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[834] Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974).

[835] Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977). But see In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989).

[836] In re Grand Jury Proceedings, 727 F. 2d 1352, 1356 (4th Cir. 1984); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979).

[837] In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C.Cir.), cert. denied, 444 U.S. 915 (1979).

[838] 8 Wigmore, Evidence Section 2325, p. 633 (McNaughton rev. ed. 1961).

which militate against governmental involvement in such misconduct.[839] It is the client's responsibility to maintain the security and integrity of such communications. The client is expected to take "some affirmative action to preserve confidentiality."[840] This principle applies with equal force to individuals and corporations, who are admonished to treat their confidential communications "like jewels -- if not crown jewels."[841]

Waiver by inadvertent disclosure is also applicable to the spoken word. For example, in United States v. Gann, 732 F.2d 714, 723 (9th Cir. 1984), the arrested defendant used a telephone located in a roomful of arresting officers to make a phone call to his attorney. The admissions contained within that conversation were admissible against him over his assertion of the privilege, because he "knew or should have known" that the police were able to hear his discussions with counsel, and he bore the burden of finding an appropriately private place for the communications.

In cases where it is counsel, not the client, who was sloppy in handling confidential items, the courts also may find a waiver.[842] As a practical matter, if the attorney has control over the client's litigation, the attorney has an implied authority to waive the privilege on behalf of the client.[843] However, the inadvertent disclosure of documents under an accelerated discovery schedule has been held to be "compelled," so that the privilege could be claimed with respect to the same documents in subsequent litigation.[844] It

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[839] See In re Grand Jury Proceedings Involving Berkly & Co., 466 F. Supp. 863, 868-70 (D. Minn. 1979), aff'd, 629 F.2d 548 (8th Cir. 1980) (privilege remains intact where, despite all plausible precautions, confidential communications were obtained by recently fired employee; court concedes that traditional rule would deem privilege waived).

[840] In re Horowitz, 482 F.2d 72, 82 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

[841] In re Sealed Case, 877 F.2d 976, 980 (D.C.Cir. 1989).

[842] In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979). But see Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D.Ill. 1982).

[843] Drimmer v. Appleton, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986).

[844] Transamerica Computer v. Intern. Business Mach., 573 F.2d 646 (9th Cir. 1978); International Business Machs. Corp. v. United States, 471 F.2d 507, 511 (2d Cir. 1972), rev'd en banc, 480 F.2d 293 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974).

is unclear how much application this principle should have to grand jury practice, wherein opportunities to assert the privilege are certainly present. The prosecutor who encounters this situation is reminded that the party who wants the privilege to remain intact bears the burden of promptly notifying the grand jury of the inadvertent disclosure as soon as it is discovered.[845]

b. Authorized disclosures

On occasion a client will implicitly or explicitly authorize conduct by his or her attorney that results in waiver of the privilege. The client usually does not desire that the conduct result in a waiver, i.e., other motives are usually in mind, but the course of conduct requires acceptance of the waiver of the privilege as a price of such strategy.

For example, if a client seeks relief from a conviction by asserting that his or her previous attorney was incompetent, the client waives the prexisting confidential relationship with prior counsel.[846] If the client permits his or her counsel to use privileged information in examination of a witness at trial, the client waives the privilege of confidentiality on that topic.[847]

The most prevalent form of authorized waiver involves assertion of the "advice of counsel" defense, wherein the defendant asserts that an intent to commit an offense could not have been formed because the defendant relied in good faith upon the advice of an attorney that the conduct in question was permissible. A defendant or target who invokes this defense implicitly waives the privilege as to any confidential communications with his or her attorney on the subject matter involved in the defense.[848] Significantly, this doctrine applies when a target tells a grand jury that he or she should not be indicted

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[845] Permian Corp. v. United States, 665 F.2d 1214, 1220 n. 11 (D.C.Cir. 1981).

[846] United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987).

[847] Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir.), cert. denied, 351 U.S. 943 (1956).

[848] See, e.g., United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991); United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979).

because of the advice of counsel, and the assertion acts to waive the privilege at a subsequent trial.[849] Indeed, some cases hold that the use of an advice of counsel defense in preliminary negotiations with the government prosecutor, outside the context of a judicial proceeding, also constitutes an implicit waiver of the privilege.[850]

As noted above, a lawyer who either inadvertently or deliberately but mistakenly reveals confidential information often will be held to waive the client's privilege. Counsel for the client in In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C.Cir.), cert. denied, 444 U.S. 915 (1979), tendered documents without asserting any privilege. Subsequent counsel insisted this was an error, that the documents were privileged and that the client intended to assert that privilege. The court, however, held any such privilege waived. Noting that counsel was agent for the client, and that disclosure of documents pursuant to subpoena was clearly within the scope of that agency.[851]

c. The "Crime Fraud" doctrine

Because the attorney-client privilege affords a client the opportunity to communicate in secret, it is susceptible to abuse by those who would hide behind the privilege to conduct criminal offenses. Accordingly, "the attorney-client privilege is waived when the client uses the attorney-client relationship to engage in ongoing fraud rather than to defend against past misconduct."[852] Note the qualifier "ongoing" in the above passage; the proponent of this exception must be prepared to demonstrate that there is an ongoing offense

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[849] United States v. Plache, 913 F.2d 1375, 1380 (9th Cir. 1991).

[850] United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979).

[851] 604 F.2d at 674-75.

[852] In re Special September 1978 Grand Jury (II), 640 F.2d 49, 59 (7th Cir. 1980) citing Clark v. United States, 289 U.S. 1 (1933) and United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 921 (1974).

being furthered by the resort to the privilege.[853] Note further that this exception relates to the *client's* misuse of confidentiality; it applies without regard to whether the attorney was aware that the client was involving their communications in criminal activity.[854]

A District Court judge decides whether this exception to the privilege applies. In United States v. Zolin, 491 U.S. 554 (1989), the Supreme Court affirmed the power of a district court to review materials *in camera* to determine whether they should be deemed in furtherance of a crime or fraud.[855] However, the prosecutor must support such allegations with some *prima facie* proof that they are factually accurate. That showing can be made by using "any non-privileged evidence in support of [the] request for *in camera* review even if [this] evidence is not 'independent' of the contested communication."[856]

Although formulated in different ways, the prevailing view is that the *prima facie* standard "refer[s] to enough to require explanation rather than evidence that by itself satisfies a more-likely-than-not standard . . . a *prima facie* case must be defined with regard to its function: to require the adverse party . . . to come forward with that explanation . . . If the court finds the explanation satisfactory, the privilege remains."[857] However, the D.C. and Fifth Circuits adopt a minority view that a *prima facie* case requires evidence sufficient to support a verdict in favor of the claim of fraud, a significantly higher standard.[858]

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[853] See, e.g., In re John Doe Corp., 675 F.2d 482, 491 (2d Cir. 1982) (purportedly confidential communication "was used by the corporation for purposes other than seeking and receiving legal advice ... [to mislead investors in a manner] reflecting ongoing criminality").

[854] In re Feldberg, 862 F.2d 622, 624 (7th Cir. 1988); United States v. Hodges & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977).

[855] 491 U.S. at 568-570.

[856] Id. at 574.

[857] In re Feldberg, 862 F.2d 622, 625-26 (7th Cir. 1988) (discussing precedent from the Second, Sixth and Seventh Circuits).

[858] In re International Systems & Controls Corp., 693 F.2d 1235, 1242 (5th Cir. 1982); In re Sealed Case, 676 F.2d 793, 814-15 & n.88 (D.C.Cir. 1982).

d. The "Limited" waiver

Determining whether a waiver of the attorney/client privilege has occurred is only part of the waiver analysis process. The prosecutor must also determine what exactly has been waived, and with regard to whom. Even the clearest examples of waiver are unlikely to permit the grand jury to discover all communications of all kinds between attorney and client.

Initially, the prosecutor must distinguish between two forms of waiver: selective or "limited" waiver, and partial waiver. Selective waiver refers to which third parties are entitled to disclosure of attorney/client materials, and refers to parties or entities, not the materials themselves. Partial waiver refers to which materials are considered no longer privileged, without regard to who is entitled to see the materials.[859] This section deals with the former concept.

The Eighth Circuit invented the term "limited" waiver and is the chief proponent of the concept. The Second, Third, Fourth, and District of Columbia Circuits reject both the term and the concept. The split arises from an en banc decision of the Eighth Circuit, Diversified Industries v. Meredith, 572 F.2d 596 (8th Cir. 1978)(en banc). Diversified, like Upjohn v. United States, involves a corporation accused of wrongdoing which commissioned counsel to conduct an internal investigation into the allegations. An adversary in litigation sought access to the resulting investigatory report, and Diversified resisted on privilege grounds.

Initially, the Eighth Circuit found that the report was subject to the attorney/client privilege. However, the adversary had pointed out that Diversified had previously disclosed the report "in a separate and nonpublic SEC investigation."[860] In reply to the adversary's claim that this constituted a waiver by voluntary disclosure, the court held "that only a limited waiver of the privilege occurred ... [because] [t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders,

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[859] See Westinghouse v. Republic of Philippines, 951 F.2d 1414, 1427 n.14 (3rd Cir. 1991).

[860] 572 F.2d 596, 611.

potential stockholders and customers." [861] Thus was born the concept of "limited waiver", by which a party can hope to disclose its privileged data to selected third parties without being held to have waived its privilege as to the rest of the world.

The response to Diversified outside the Eighth Circuit has been uniformly negative; indeed, the Eighth appears to be the only Circuit which adheres to its principles.[862] The other circuits to consider the concept of limited waiver point out the paucity of analysis in the Diversified opinion[863] and flatly reject Diversified's premise that the ends served by the attorney/client privilege could be thwarted by telling a corporation to maintain its confidential communications, even with respect to the SEC.[864]

A cogent analysis for the prosecutor comes from the Fourth Circuit, which flatly rejected an invitation to apply Diversified to the grand jury context.[865] Prosecutors should continue to maintain that documents are no longer privileged against a grand jury subpoena *duces tecum* if there is proof the documents have previously been disclosed to any third party, be it government agency or private entity. As the District of Columbia Circuit observed in Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981), it is inconsistent with the purpose of the attorney/client privilege to "pick and choose" those third parties to whom they wish the waiver to apply, for the privilege is simply "not designed for such tactical employment."

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[861] Id. (emphasis supplied).

[862] See United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (applying the principle without noting any conflict among other circuits).

[863] Westinghouse v. Republic of Philippines, 951 F.2d 1414, 1424.

[864] Permian Corp. v. United States, 665 F.2d 1214, 1221 n.13 (D.C.Cir. 1981).

[865] In re Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979).

e. Partial waiver/ "Fairness Doctrine"

The fact that privileged materials have been disclosed does not mean that all privileged data held by attorney or client is then available to the prosecutor or grand jury. This is the principle of "partial waiver," which holds that a client's waiver of privilege as to a confidential communication constitutes only a waiver "as to all other communications on the same subject matter."[866]

Courts in the United States have long recognized that it would be unfair to permit a litigant to reveal some confidential communications with counsel, but then permit that litigant to preclude disclosure of all other confidential communications on the same topic by asserting the attorney/client privilege.[867] Professor Wigmore refers to such efforts as "waiver by implication" (which, as noted above as to inadvertent waiver, is a concept applicable elsewhere), and agrees that this waiver entitles the opponent to discover all related communications on the same subject matter.[868]

The courts refer to this concept as the "Fairness Doctrine," which "aim[s] to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective [sic, should read "partial"] disclosure during litigation of otherwise privileged information."[869] Like the concept of "limited" or selective waiver discussed above, it stems from the principle that the attorney/client privilege is not intended to provide the client with both a sword and a shield, as where the client would seek to reveal the favorable confidential data while withholding the unfavorable confidential data.[870]

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[866] In re Sealed Case, 676 F.2d 793, 809 (D.C.Cir. 1982) (emphasis supplied).

[867] Hunt v. Blackburn, 128 U.S. 464, 470-71 (1888).

[868] 8 Wigmore, Evidence Sec. 2327, p. 635 (McNaughton rev. ed. 1961).

[869] In re von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).

[870] Id.

Fairness Doctrine principles apply with equal force to both verbal and documentary communications.[871] There are, however, two important limitations on the doctrine which the prosecutor must recognize. First, the waiver is usually found only where the disclosure of confidential communications occurs in the context of adversarial litigation. The theory is that "legal prejudice" does not arise from the partial disclosure unless it arises to damage the opponent's interests in litigation.[872] The von Bulow case, for example, involved a book written by an attorney about a notorious murder case in which the attorney-author described privileged conversations with his client. The Second Circuit held that this constituted a waiver of the privilege as to those particular conversations, but reversed a lower court order that all related conversations also be disclosed, because neither attorney nor client had made such partial disclosures in the course of adversarial litigation.[873]

Although the grand jury may not bear all the hallmarks of "adversarial litigation" in the sense of confrontation of witnesses or evidentiary objections, these proceedings are certainly judicial fact-finding procedures in which truth and accuracy are of paramount concern.[874] As such, it is entirely consistent with the Fairness Doctrine's requirement of adversarial litigation to apply that doctrine to disclosures made before a grand jury.[875] The von Bulow opinion acknowledges that the doctrine need not be strictly limited to courtroom proceedings if "assertions before trial ... mislead or prejudice an adversary at trial and thereby impede the proper functioning of the judicial system."[876] As such, the prosecutor should always urge application of the Doctrine when partial disclosures are made in the grand jury.

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[871] In re von Bulow, 828 F.2d 94, 102-03.

[872] Id. at 102 (emphasis in original text).

[873] Accord, In re Sealed Case, 676 F.2d 793, 809 n.54 (D.C.Cir. 1982) (courts retain discretion "not to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it.")

[874] Cf., United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983).

[875] See In re Sealed Case, 676 F.2d at 809.

[876] In re von Bulow, 828 F.2d 94, 102 & n.1 (emphasis supplied).

The second limitation on the Fairness Doctrine relates to the scope of the waiver occasioned by partial disclosure. Again, when the disclosure is made in the course of adversarial litigation, the client is required to disclose "all other communications relating to the same subject matter."[877] The question of what constitutes "the same subject matter," however, "depend[s] heavily on the factual context in which the privilege is asserted," and thus must be resolved in the discretion of the district court on a case-by-case analysis.[878]

6. Miscellaneous Principles

a. Appealability

The first level of review of privilege issues is with that district judge empowered to supervise the functions of the grand jury. Assertions by the client that a communication is privileged, or assertions by a prosecutor that the privilege either does not apply or has been waived, are brought to the district court for resolution by means of motion practice; either the government moves for entry of orders to compel production or the witness moves to quash the subpoena in question pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, or both.[879]

The path from the district court to the circuit court of appeals is often tortuous. From the government's perspective, the process is fairly straightforward. When a witness's motion to quash a subpoena is granted on the basis of an assertion of the attorney/client privilege, the district court's order is appealable under 18 U.S.C. § 3731. Section 3731 permits appeal from

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[877] In re Sealed Case, 877 F.2d 976, 981 (D.C.Cir. 1989), quoting In re Sealed Case, 676 F.2d 793, 809 (D.C.Cir. 1982) (emphasis supplied); see also Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981); 8 Wigmore, Evidence Sec. 2327, p. 638 (McNaughton rev. ed. 1961).

[878] In re Sealed Case, 877 F.2d 976, 981 (D.C.Cir. 1989).

[879] For a case in which virtually every form of such motion practice can be found, review In re Grand Jury Subpoena, 926 F.2d 1423 (5th Cir. 1991).

all final decisions of the district court which have the effect of excluding evidence. The Section is generally construed to permit the government to appeal the exclusion of evidence in the grand jury context.[880]

For the witness, the general rule is that a district court's denial of a motion to quash a grand jury subpoena filed on privilege grounds is not a final and appealable order.[881] This effectively requires the proponent of the privilege to accept a civil contempt sanction which does constitute a final and appealable order.[882] This process assures that grand jury processes will not be delayed by piecemeal appeals, and encourages review of only those issues which the witness is willing to litigate in earnest.[883]

However, attorney/client issues frequently fall into an exception to these general rules because the proponent of the privilege is not the custodian of the records or information requested by the subpoena. In a typical case, a lawyer may retain documents from a client which are sought by subpoena. The client may insist that they are privileged and ask the lawyer to make that assertion in response to a subpoena. But if the lawyer does so and the assertion is rejected by a district court, the lawyer may be forced to absorb a contempt sanction for the client or the client's assertion of privilege may become hostage to the selfish interests of the lawyer. The courts have long recognized the practical difficulties inherent in this situation. In Perlman v. United States, 247 U.S. 7 (1918), the Supreme Court permitted the person (or entity) asserting the privilege to intervene in the litigation of the privilege and obtain immediate

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[880] Nixon v. Sirica, 487 F.2d 700, 721 (D.C.Cir. 1973); In re Grand Jury Subpoenas, 803 F.2d 493, 495-96 (9th Cir. 1986); In re Grand Jury Empanelled (Colucci), 597 F.2d 851, 855-57 (3rd Cir. 1979).

[881] United States v. Nixon, 418 U.S. 683, 690-91 (1974); Cobbledick v. United States, 309 U.S. 323, 328 (1940).

[882] In re Grand Jury Subpoena, 926 F.2d 1423, 1429 (5th Cir. 1991) (grand jury contempt cases are an exception to the general rule that civil contempt sanctions are not appealable, "because no underlying case awaits final resolution"); United States v. Ryan, 402 U.S. 530, 532-33 (1971) (same).

[883] In re Subpoenas to Local 478, Int'l Union of Oper. Eng'rs. & Benefit Funds, 708 F.2d 65 (2d Cir. 1983).

appeal of an adverse ruling. Unfortunately, the circuit courts have not adopted a uniform position on whether the attorney must actually absorb the contempt sanction before the client/intervenor's appeal rights attach.[884]

Under any standard, however, appellate review of a lower court ruling on motions to quash a subpoena are conducted on an abuse of discretion standard. The findings as to the existence of an attorney/client privilege is a mixed question of law and fact which is reviewed *de novo*.[885]

b. Subpoenas to attorneys

Although the issue is too involved for complete discussion in this Manual, the prosecutor must be aware that certain states (e.g., Massachusetts, Rhode Island) have adopted provisions in their state Codes of Professional Responsibility which purport to make it an ethical violation for a prosecutor to issue a grand jury subpoena to an attorney, if the attorney will be questioned or asked to provide documents about a past or current client, without first seeking prior judicial approval. Other states (e.g., Illinois, Oklahoma) have considered or are considering similar proposals. The constitutional issues inherent in these initiatives are substantial, but will not be detailed here. In any event, the prosecutor is admonished to be aware of the governing authorities in the jurisdiction in which he practices.

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[884] The Second, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits permit the intervenor to appeal without requiring counsel (or third-party custodian) to accept a contempt sanction. See In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 767 F.2d 26, 29 (2d Cir. 1985); United States v. Jones, 696 F.2d 1069, 1071 (4th Cir. 1982)(per curiam); In re Grand Jury Proceedings (Fine), 641 F.2d 199, 203 (5th Cir. 1981); In re Grand Jury Proceedings (Gordon), 722 F.2d 303, 306 (6th Cir. 1983); In re Klein, 776 F.2d 628, 630 (7th Cir. 1985); In re Grand Jury Subpoena, 784 F.2d 857, 859 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); In re Grand Jury Subpoena Dated Dec. 10, 1987, 926 F.2d 847, 853 (9th Cir. 1991).

The First, Eleventh and D.C. Circuits each engraft additional requirements before permitting intervenor to appeal. In re Oberkoetter, 612 F.2d 15, 18 (1st Cir. 1980); In re Grand Jury Proceedings (Doe), 831 F.2d 222, 225 (11th Cir. 1987); In re Sealed Case, 655 F.2d 1298, 1301 (D.C.Cir. 1981).

[885] In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986).

Even in those jurisdictions which do not adopt such proposals, prosecutors who subpoena attorneys may encounter arguments that the subpoena should be quashed as violative of the Sixth Amendment right to counsel in the absence of a showing by the prosecutor that the testimony of the attorney is essential to the grand jury's inquiry. Further, pursuant to Department policy, prosecutors must make such a showing to get advance approval from the Department for issuance of a subpoena to an attorney where the testimony or evidence sought is related to a past or current client of the attorney.[886] A more detailed discussion of the Department's policy concerning attorney subpoenas may be found in Chapter Six, Section I,A,6, of this Manual. There is no parallel requirement that the prosecutor make a showing of need to a district court, and indeed such a requirement is inconsistent with the proper functioning of the grand jury.[887]

Counsel may seek to quash the subpoena on the grounds that it impairs the client's rights under the Sixth Amendment, on the theory that if counsel testifies as a witness before the grand jury and the client is later indicted, counsel could be called as a witness against the client, depriving the client of counsel's representation at trial. This theory is flawed first, because there is no Sixth Amendment right to counsel at the grand jury stage[888] and second, because the specter of counsel becoming a trial witness is simply too speculative at the grand jury stage to justify counsel being excused from the obligations imposed by a subpoena. These topics are extensively detailed in In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir. 1985)(en banc), cert. denied, 475 U.S. 1108 (1986).

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[886] United States Attorneys' Manual, 9-2.161(a) (eff. July 18, 1985).

[887] See United States v. Dionisio, 410 U.S. 1 (1973).

[888] Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion)

c. Joint defense agreements[889]

Because federal criminal investigations often involve multiple parties as targets, federal prosecutors can expect to encounter "joint defense agreements" with increasing frequency. These are agreements, usually in writing, by which a group of clients who are represented respectively by a group of attorneys join together to pool their resources and expertise. Such agreements invariably stipulate that the communications made by any one or more member(s) of the group of clients, to any one or more of the attorneys, shall be deemed a confidential attorney/client communication covered by the privilege held by all. For example, if targets A, B, and C are subpoenaed to appear before the grand jury, A may communicate about the facts of the investigated case with C's attorney, and within the context of the privilege, A may resist compelled disclosure of their communications.

The theory usually espoused by defense counsel who are party to these agreements is that such joint defense agreements cause the attorney\client privilege to attach whenever any party to the agreement communicates with another member. Significantly, defense counsel can be expected to simultaneously assert that the joint defense agreement does not operate to create the usual fiduciary relationship between all its members, to avoid conflict of interest issues which can result if a member of the agreement later appears as a government witness during the criminal prosecution.[890]

The joint defense agreement requires certain sweeping exceptions to the general rules outlined throughout this Section. For example, a person generally can only claim the privilege as to communications with his or her *own* attorney (or agent of the attorney); in the joint defense context, the privilege extends to communications made to someone else's attorney. Under the general rule, a communication is not deemed confidential where it is made in the presence of a third party; in the joint defense context, the presence of other subscribers to the agreement when confidential communications are made does not breach the showing of confidentiality. Most significantly, in the usual case, a client's

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[889] An additional discussion of joint defense agreements is located in Chapter Nine, Section III, of this Manual.

[890] These conflict of interest issues are more fully discussed in this Manual at Chapter Nine "Conflicts of Interest/Multiple Representation".

unilateral action can operate to waive the privilege; in the joint defense context, the courts protect the subscribers by requiring that the privilege may only be waived upon the consent of all the parties to the agreement.[891]

As of the date this Chapter was written, the propriety of extending the protections of the attorney/client privilege to the joint defense context appears a settled issue.[892] It also appears resolved that the agreements are effective as to targets or subjects appearing before a grand jury.[893] The courts consider the agreements desirable to the extent they facilitate the efforts of attorneys to provide competent representation to their clients.[894] Nevertheless, because joint defense agreements further expand the protections of the privilege, and because membership in the agreement is a prerequisite to seeking its protection, the courts will demand clear proof of the existence and scope of the agreement before it may be invoked.[895]

The joint defense privilege is an extension of the attorney/client privilege. Waller v. Financial Corp. of America, 828 F.2d 579, 583 note 7 (9th Cir. 1987). The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy. In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived. Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests. To qualify for privilege the communication must have been made in confidence. In addressing whether

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[891] See John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990); In re Grand Jury Subpoenas 89-3 and 88-4, 902 F.2d 244, 248 (4th Cir. 1990). Both cases acknowledge and approve these exceptions to the general rules governing attorney\client confidential communication principles.

[892] Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1966).

[893] Continental Oil Co. v. United States, 330 F.2d 347, 349 (9th Cir. 1964); In re a Grand Jury Subpoena Dated November 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975).

[894] United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989).

[895] United States v. Lopez, 777 F.2d 543, 552-53 (10th Cir. 1985).

a given communication was meant to be confidential, what the client reasonably understood is the key question. United States v. Bay State Ambulance and Hospital Rental Service, Inc., 874 F.2d 20, 27-29 (1st Cir. 1989).

Notwithstanding the courts' acceptance of the propriety of joint defense agreements, they pose unique problems for prosecutors operating in the grand jury context. In the case of corporate investigations, several corporate officers and employees, whether witnesses, subjects, or targets (or any combination of the three) may have signed on to a joint defense agreement at the earliest point that the grand jury investigation became known. Once a witness has joined the agreement, his or her subsequent usefulness as a witness may be compromised. As an example, debriefing the person prior to testimony at the grand jury or trial stage requires the prosecutor to divine those facts known by the witness of his or her own accord, as opposed to those facts learned during membership in the joint defense agreement. Failure to segregate privileged from non-privileged information can gravely jeopardize the admissibility of all the evidence obtained from the witness.

Accordingly, the prosecutor is urged to ascertain at the earliest feasible opportunity whether the witness is a member of any joint defense agreement. Under the principles discussed in above in this Chapter at Section I, A, the witness can be asked whether he or she is participating in a joint defense agreement. It is wise to ask for the text of any written agreements, although these may reflect privileged information, in which case the assertion of privilege should be addressed to the supervisory judicial officer for the grand jury. If a witness becomes a member of such an agreement, that fact can diminish his or her usefulness as a cooperating witness, as noted above. It is thus appropriate for the prosecutor to notify the witness (and counsel), at the grand jury stage of an investigation, that participation in a joint defense agreement could negatively impact on any future negotiated plea agreement involving such a witness. While the subject or target may enjoy an absolute right to join or participate in these agreements, that does not mean that exercise of the right is without cost, and this fact should be clearly communicated to the witness and counsel as early as possible.

d. Remedies

As a matter of both ethics and sound policy, government attorneys exercising derivative grand jury powers should strive to honor the attorney/client privilege. Indeed, it should be remembered that government lawyers themselves are entitled to rely upon the privilege in their dealings with client agencies of the government.[896] However, the grand jury may inadvertently consider data which should have been insulated from review by operation of the privilege. This raises the question of what remedies are available to the aggrieved client.

The grand jury is an investigative body generally "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."[897] As such, although the grand jury may not itself violate a valid privilege, it may consider evidence obtained by a separate person or entity in violation of such privilege.[898] Such consideration is not itself an intrusion upon these privileges, but "only a derivative use of the product of a past unlawful [action]."[899]

Consistent with the logic of these cases, the general rule is that an indictment is not rendered invalid by virtue of grand jury consideration of data privileged under the attorney/client privilege.[900] The remedy afforded an aggrieved client is a motion at trial to exclude evidence derived from an unwarranted intrusion into the attorney/client privilege.[901]

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[896] F.D.I.C. v. Cherry, Bekaert & Holland, 131 F.R.D. 596 (M.D.Fla. 1990).

[897] United States v. Calandra, 414 U.S. 338, 343 (1974).

[898] Cf., Calandra, 414 U.S. at 351 (Fourth Amendment); Lawn v. United States, 355 U.S. 339, 350 (1958) (Fifth Amendment).

[899] United States v. Calandra, 414 U.S. 338, 354.

[900] In re Sealed Case, 877 F.2d 976, 981-82 (D.C.Cir. 1989).

[901] Id.; see also United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981) (intrusion into defense camp, in which cooperating co-conspirator may have revealed confidential communications learned when attending group defense meetings, not cause for dismissal of indictment but required exclusion of any privileged information revealed to prosecutor).

B. The Work Product Doctrine.

As a practical matter, assertions of the attorney/client privilege at the grand jury stage of a case will usually be accompanied by a corresponding assertion of the work-product "privilege." However, although the two concepts frequently appear together in practice, they are analytically distinct propositions of law and must be assessed in accord with those differences. Both may be asserted as a bar against disclosure of documents before the grand jury, but the merits of the claims require entirely separate treatment.

"[Work Product] consists of the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions."[902] Although the precepts of the Work Product Doctrine have historical antecedents in England,[903] the Doctrine gained prominence in America with the decision in Hickman v. Taylor, 329 U.S. 495 (1947). As the facts of Hickman reflect, the doctrine is primarily a matter of regulating what information may be discovered by an opponent in litigation about the theories of an attorney on the case.

Under the Work Product Doctrine,[904] a lawyer generally may not be required to disclose those memoranda or notes which would reveal counsel's "mental impressions" about a matter in litigation.[905] The Doctrine is codified for federal practice at the trial level: Rule 26(b)(3), Fed. R. Civ. P. and Rule 16(a)(2) and (b)(2), Fed. R. Crim. P. However, Rule 16, Fed. R. Crim. P.

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[902] In re Grand Jury Subpoenas dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).

[903] 8 Wigmore, Evidence Sec. 2318 (McNaughton rev. ed. 1961)

[904] Case law often uses the words "doctrine" and "privilege" interchangeably when discussing the Work Product Doctrine. See, e.g., United States v. Nobles, 422 U.S. 225, 239 (1975), wherein the Court refers to the "privilege derived from the work-product doctrine". This Manual will refer to the "doctrine." "Privilege" connotes a protection for parties designed to foster free communication; as will be seen, the Work-Product Doctrine only indirectly attempts to foster free communication, but primarily seeks to promote fairness in adversarial proceedings. See United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1299 (D.C.Cir 1980).

[905] Hickman v. Taylor, 329 U.S. 495, 508.

textually applies to only the post-indictment stage of a criminal case, leading at least one court to conclude that Rule 26(b)(3), a more comprehensive formulation of the Doctrine, governs its application at the grand jury stage.[906] In any event, there is no doubt that the doctrine applies to all relevant stages of criminal cases, and indeed that its utility "is even more vital" in criminal litigation.[907]

The premise of the Doctrine is that lawyers preparing for litigation must be free to record their theories, impressions, strategies, and evaluations secure in the knowledge that these will not be disclosed to opposing counsel. The Hickman Court expressed the view that absent such protections, lawyers would refuse to record their impressions and assessments, such that "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."[908] Thus, it is often noted that the Doctrine "is distinct from and broader than the attorney-client privilege."[909]

These distinctions arise in several meaningful ways. Under the attorney/client privilege, only communications from client to counsel are protected; under the Doctrine, the lawyer can maintain secrecy about communications with third parties, including adversaries. The attorney/client privilege is usually waived by disclosure to third parties; the Work-Product Doctrine permits disclosures to allies which are not considered waivers of the protections offered by the doctrine.[910] The attorney/client privilege is possessed by the client only, although the lawyer is obliged to respect it; the Work-Product Doctrine is maintained jointly by both lawyer and client, and the decision by one to waive is not binding on the other.[911] Unlike the attorney/client privilege, the Work-Product Doctrine may be overcome by a

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[906] In re Sealed Case, 676 F.2d 793, 808 n.49 (D.C.Cir. 1982).

[907] United States v. Nobles, 422 U.S. 225, 238 (1975).

[908] 329 U.S. at 511.

[909] United States v. Nobles, 422 U.S. at 238 n.11.

[910] In re Sealed Case, 676 F.2d 793, 809.

[911] In re John Doe, 662 F.2d 1073, 1076-79 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980); In re Grand Jury Proceedings, 604 F.2d 798, 800 (3rd Cir. 1979).

showing of good cause. And, as discussed more fully below, the privilege can exist at any time between lawyer and client; the Doctrine only exists at times involving anticipated, actual, or completed litigation.

1. Work Product Principles In Grand Jury Litigation

The application of the Work-Product Doctrine to grand jury proceedings is unquestioned. The first appellate case to so hold was In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir 1973), a decision subsequently cited with approval by the Supreme Court in United States v. Nobles, 422 U.S. 225, 238 n. 12. Since Duffy was decided, every circuit has considered the question and agreed that the Doctrine applies to grand jury proceedings. As Mr. Justice White observed, "a grand jury investigation is in some respects similar to pretrial discovery," the context in which the doctrine first arose.[912]

The Doctrine is applicable to both a grand jury subpoena duces tecum and to an IRS summons.[913] It applies to the work product of an attorney whether counsel represents a person or a corporate entity.[914] For purposes of corporate counsel, the court looks to determine "whether the communication to the corporate attorney by the employee is in furtherance of the attorney's duty to investigate the facts in order to advise the corporate client in anticipation of litigation."[915]

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[912] Nobles, 422 U.S. at 247 n.6 (White, J., concurring).

[913] Upjohn v. United States, 449 U.S. 383 (1981).

[914] Id.

[915] In re Grand Jury Subpoenas, 599 F.2d 504, 510 (2d Cir. 1979).

2. *Burdens Of The Parties*

The party seeking to resist grand jury process under a claim of work product bears the initial burden of establishing that a document or item constitutes attorney work product.[916] This is a relatively low-threshold, *prima facie* requirement.[917] To demonstrate that the Doctrine applies, the party asserting its application may properly be required to submit the materials to the district court for *in camera* review.[918]

Once the court determines that the work-product doctrine applies, the burden then shifts to the government (in the grand jury context) to establish good cause for disclosure. "To the extent that work product contains relevant, nonprivileged facts, the Hickman doctrine merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery."[919] These concepts of "good cause" and "adequate reasons" are discussed below.

3. *Disclosure Of Work Product*

a. "Fact" work product

There are many documents and other items which attorneys generate that are not work product. "The work product rule does not extend to every written document generated by an attorney; it does not shield from disclosure

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[916] Hickman v. Taylor, 329 U.S 495, 512.

[917] Appeal of Hughes, 633 F.2d 282, (3rd Cir. 1980); In re Grand Jury Subpoenas, 599 F.2d at 510.

[918] In re Murphy, 560 F.2d 326, 336 n.20 (8th Cir. 1977); In re Grand Jury Proceedings (Sutton), 658 F.2d 782, 784 (10th Cir. 1981).

[919] In re Sealed Case, 676 F.2d 793, 809, quoting Hickman v. Taylor, 329 U.S. 495, 512.

everything that a lawyer does. Its purpose is more narrow, its reach more modest."[920] For example, an attorney cannot claim work product protection for records generated for business purposes.[921]

But when lawyers create writings in anticipation of litigation these writings are likely work product. Whether they are nevertheless discoverable writings may depend on whether they reflect "fact" or "opinion" work product.[922] For example, if a witness provides counsel with a handwritten statement attesting to facts, it is "fact" work product. If the lawyer writes a summary of his or her interview with the same witness, assessing the testimony and the witness, it is more likely to be considered "opinion" work product.[923] The former is still subject to the Work-Product Doctrine, however. As discussed more fully below, the grand jury may be able to obtain access to such materials. Conversely, "opinion" work product is virtually never discoverable. The gap between the two is measured in terms of "differing degrees."[924]

The Hickman opinion itself adopted the notion that there are some exceptions to the work-product doctrine. The Court allowed that where relevant (and otherwise nonprivileged) information was "hidden in an attorney's file" which was "essential" to the opponent's case, and some hardship would result if the opponent were required to obtain the information elsewhere (the Court's example was a missing witness), then fact work product could be discovered.[925] The Court's requirements of *need* and the showing of *hardship* are reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

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[920] Jordan v. Department of Justice, 591 F.2d 753, 775 (D.C.Cir. 1978) (en banc).

[921] United States v. Davis, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862 (1981).

[922] In re John Doe, 662 F.2d 1073, 1076-79 & n.4 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

[923] See, e.g., In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973).

[924] In re Grand Jury Subpoenas, 599 F.2d 504, 512 (2d Cir. 1979).

[925] Hickman v. Taylor, 329 U.S. 495, 511.

1) "Need"

The term "need" is construed strictly by the courts. It is never sufficient to show merely that the material sought is relevant[926] or that it will assist the grand jury is assessing the relative culpability of the targets of its investigation.[927]

Those cases in which the standard was satisfied suggest that the relatively innocuous nature of the item sought may tip the balance in favor of disclosure,[928] particularly in view of the fact that "a grand jury's claim to disclosure is stronger than that of a civil litigant."[929] For example, the facts in the Hughes case (cited above at note 156) involved disclosure of a list of people interviewed, where the need for the list by the grand jury was "relatively low.[930] Other cases hold that documents reflecting entirely the work product of nonlawyers assisting counsel, or which contain entirely factual information, enjoy only "limited protection"[931] or "qualified immunity."[932] The courts' preference that the material not have been authored by a lawyer is pronounced.[933]

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[926] Appeal of Hughes, 633 F.2d 282, 288 (3rd Cir. 1980).

[927] In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 935-36 (6th Cir. 1980).

[928] In re Sealed Case, 676 F.2d 793, 812 n.72 (D.C.Cir. 1982).

[929] Id. at 823 and n.126.

[930] Appeal of Hughes, 633 F.2d 282, 289. The government's agreement to let counsel redact marginalia from the list made the disclosure even more palatable to the court. Id.

[931] In re Sealed Case, 676 F.2d at 812 n.72.

[932] In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977).

[933] See, e.g., Upjohn v. United States, 449 U.S. 383, 400 (discussing nonprivileged statements authored by a witness in his or her own handwriting); Duffy, 473 F.2d 840, 848 (discussing "statements prepared or signed by the interviewee").

2) "Hardship"

The courts require "need" and "hardship" in the conjunctive, and as is true of "need", the "hardship" requirement often is not easily met. This is particularly true of federal grand juries, whose subpoena powers are extensive, because the hardship requirement obliges the proponent to show an inability to obtain equivalent information without disclosure of work product.[934] However, true hardships are recognized, the most obvious being the death of a witness.[935] The persistent "hostility" of a witness may also sway the court to a finding of hardship.[936]

Some cases take a simpler approach by combining "need" and "hardship" into a larger analysis of whether the proponent has shown "good cause" for the disclosure of work product. In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 936 n.3 (6th Cir. 1980), lists the various factors used to assess good cause:

1. the nature of the information sought;

2. the extent to which the information would tend to reveal counsel's thought processes;

3. the likely reliability of the information;

4. the degree to which the disclosure threatens to turn counsel into a witness, or would otherwise interfere with the attorney/client relationship;

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[934] In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 849 (8th Cir. 1975) (allowing disclosure of list of witnesses, but refusing disclosure of attorney's summary of their testimony where the witnesses "were known and accessible to the grand jury"); see also In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d at 935-36 (emphasizing the grand jury's subpoena powers to get equivalent information); In re Grand Jury Investigation, 599 F.2d 1224, 1232 (3rd Cir. 1979) (requiring government to demonstrate it had exhausted chance for equivalent evidence by issuing grand jury subpoenas).

[935] In re Grand Jury Investigation, 599 F.2d at 1231-33.

[936] In re Grand Jury Subpoena, 81 F.R.D. 691, 695 (S.D.N.Y. 1979).

5. the availability of other sources of information; and

6. any associated Fifth or Sixth Amendment concerns.

b. "Opinion" work product

In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court all but excluded the possibility that work product reflecting the "mental impressions" of an attorney could be properly disclosed. In the case before it, involving a request for an attorney's summaries of witness interviews, the Court did "not believe *any* showing of necessity c[ould] be made [there]," and that only in "rare situations" could such data be ordered disclosed.[937] The Court was equally emphatic in Upjohn v. United States, 449 U.S. 383 (1981). Noting that some circuit courts had erected absolute bars against disclosure of opinion work product, the Court again declined to adopt an absolute rule but then pronounced: to obtain opinion work product, a far stronger showing is required "than simply one of showing substantial need and the inability to obtain equivalent evidence without undue hardship."[938] Given that the "simpl[e]" elements of need and hardship are already difficult to satisfy in the area of fact work product, this language has posed a huge obstacle to requests for opinion work product.[939]

4. "Anticipation of Litigation"

As noted above, the Work Product Doctrine is designed to preserve fair play in adversarial litigation. As such, the Doctrine only applies to items

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[937] 329 U.S. at 512-13 (emphasis supplied).

[938] 449 U.S. at 401.

[939] See, e.g., United States v. Amerada Hess Corp., 619 F.2d 980, 987-88 (3rd Cir. 1980); In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224-1235 (3rd Cir. 1979); In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977).

prepared "in anticipation of litigation."[940] Grand jury investigations are litigation of a type to justify the privilege.[941] As a practical matter, the grand jury usually does not seek work product about counsel's efforts on the *present* investigation, but rather seeks work product from other, prior matters. However, it is generally accepted that "litigation" is defined to include both related and unrelated cases, as well as terminated and completed litigation.[942]

Determining when a lawyer acts "in anticipation of litigation" is a process one court described as "a slippery task."[943] It is clear that this standard does not require that litigation has already begun when the work-product is created.[944] Indeed, Upjohn v. United States, 449 U.S. 383 (1981), involved work-product protection for items gathered after the corporation learned that possible criminal conduct occurred among its employees but well before any governmental entity was aware of those allegations. This has led courts to consider the element satisfied even when "litigation [is] not necessarily . . . imminent, . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."[945]

Although the courts are flexible about this area, there must be some realistic reason to believe that litigation will ensue, as opposed to a generalized, theoretical possibility. For instance, the facts in Davis (cited above in note 175) involved a claim that attorney-generated records relating to corporate tax issues were created in anticipation of litigation, on the theory that the IRS routinely audits corporations. The Fifth Circuit refused to find this element satisfied. Similarly, in United States v. El Paso Corp., 682 F.2d 530, 542-44,

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[940] Jordan v. Department of Justice, 591 F.2d 753, 775 (D.C.Cir. 1978) (en banc).

[941] Appeal of Hughes, 633 F.2d 282, 285 (3rd Cir. 1980).

[942] In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3rd Cir. 1979); In re Murphy, 560 F.2d 326, 335 (8th Cir. 1977); In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).

[943] United States v. El Paso Corp., 682 F.2d 530, 542 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984).

[944] In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 847 (8th Cir. 1973).

[945] United States v. Davis, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862 (1981) (emphasis supplied, citations omitted). See also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3rd Cir. 1979) ("some possibility of litigation must exist").

the court refused to extend work-product protection to attorneys' papers theorizing about the results of hypothetical litigation, because the court concluded the documents had "much more the aura of daily business than ... of courtroom combat." Indeed, in Jordan v. Department of Justice, 591 F.2d 753, 775 (D.C.Cir. 1978)(en banc), the court refused to extend work-product protection to the manuals on litigation technique maintained within a prosecutor's office because they were not created for any particular litigation and thus did not reflect any mental impressions of an attorney about any given case.

It is not necessary, however, that the work product be created with knowledge of precisely what litigation will ensue so long as the prospect of some litigation is real. Thus, In re Special September 1978 Grand Jury (II), 640 F.2d 49, 61-62 (7th Cir. 1980), the Seventh Circuit extended work-product protection to documents created in anticipation of litigation with a state regulatory agency, where the entity seeking those documents was a federal grand jury seeking to protect entirely federal interests.

5. Work Product of Agents for Lawyers

Like the the attorney/client privilege, the Work Product Doctrine recognizes that some work-product will necessarily be created by non-lawyers, e.g., accountants, investigators, law clerks, etc. The Supreme Court's decision in United States v. Nobles, 422 U.S. 225 (1975), is a good example. There the Court extended the protections of the Doctrine to notes made by a private investigator who, while acting at the direction of defense counsel, interviewed witnesses to a bank robbery. The Court noted that the work-product protections "necessarily must" extend to the agents of counsel.[946] The logic of this rule is apparent. Before the agent can know what tasks to perform, the agent must receive guidance from the lawyer, which guidance itself can reveal counsel's mental impressions.[947] Naturally, all the other prerequisites to the

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[946] 422 U.S. at 239 n.13.

[947] See, e.g., Appeal of Hughes, 633 F.2d 282, 289-90 (3rd Cir. 1980).

Doctrine apply, such that the agent's efforts must be conducted in anticipation of litigation.[948]

6. Waiver and Disclosure of Work Product

Like the attorney/client privilege, the protections of the Work Product Doctrine can be waived. However, unlike the attorney/client privilege, the Work-Product Doctrine seeks to protect *both* attorney and client and its protections may be invoked by either.[949] Because of the analytical differences between the attorney/client privilege and the Work-Product Doctrine, waiver of the privilege does not necessarily equal waiver of the work-product doctrine.[950] Further, although disclosures of confidential communications by the client usually waive the attorney/client privilege, disclosures of work product do not automatically waive the protections of the Doctrine, which "looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality."[951]

The most salient point used to decide whether the protections of the Doctrine are waived is the identity of the person or party to whom disclosure was made. If disclosure was made to a current or likely opponent in litigation, a waiver is likely to have occurred. In United States v. Nobles, 422 U.S. 225 (1975), defense counsel sought to impeach witnesses by using notes of interviews conducted of those witnesses by a private investigator, acting at counsel's direction, and in anticipation of the litigation. The Court concluded that these notes constituted work product, but noted that the protections of the Doctrine are not absolute, and held that "testimonial use" of the work-product constituted a waiver of the protection.[952] The Court noted further that

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[948] In re Grand Jury Subpoenas, 599 F.2d 504, 512-13 (2d Cir. 1979).

[949] In re Grand Jury Proceedings, 604 F.2d 798, 800 (3rd Cir. 1979).

[950] United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1299 (D.C.Cir. 1980); In re Grand Jury Proceedings, 106 F.R.D. 255 (D.N.H. 1985).

[951] In re Sealed Case, 676 F.2d 793, 809 (D.C.Cir. 1982).

[952] 422 U.S. at 239 & n.14.

"testimonial use" differs in kind from counsel's reliance upon work product in examination of witnesses, which would not constitute a waiver.[953] Accordingly, the testimonial use of work-product materials in the context of litigation may constitute a waiver of the protections against disclosure.[954]

Within the context of a trial, disclosures almost necessarily will occur as to party opponents. Outside that context, the question of whether disclosure results in waiver of the protections of the Work Product Doctrine turns upon the identity of the person or entity to whom disclosure is made. If the disclosure of work product is made to an adversary, *or* if made to a third party with no restrictions on its use, the protections are forfeited.[955] The test is whether by disclosure, either intentionally or by failure to limit its use by the recipient, the attorney "enable[s] an adversary to gain access to the information."[956]

The cases on whether disclosure is made to an adversary involve an assessment of predictive behavior by counsel: was the disclosure made to a party or entity likely to become an adversary?[957] By contrast, disclosure to a third party with common interests in litigation does not implicate the fairness of the adversarial process, and thus does not constitute a waiver of the protections.[958] "'[C]ommon interests' should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate

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[953] Id.

[954] See, e.g., United States v. Salsedo, 607 F.2d 318, 320-21 (9th Cir. 1979) (use of work product materials in cross-examination of witnesses waives protection).

[955] In re John Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) ("disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material").

[956] Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3rd Cir. 1991).

[957] In re Subpoenas Duces Tecum, 738 F.2d 1367, 1371-75 (D.C.Cir. 1984) (disclosure to the SEC under the "voluntary compliance" program waived doctrine because there was "no question" that the SEC could become an adversary in the future); In re Sealed Case, 676 F.2d 793, 817 (same); Westinghouse, 951 F.2d at 1428 (same).

[958] United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1299 (D.C.Cir. 1980).

litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of trial preparation efforts."[959]

7. The Crime/Fraud Exception

The crime/fraud exception applies to the Work Product Doctrine, and no circuit court has ever held to the contrary.[960] However, there is a split among the circuits about whether the showing of crime or fraud necessarily results in waiver for *both* attorney and client. Some cases suggest that even where the client is engaging in fraud, the innocent lawyer retains an interest in maintaining the secrecy of his or her work product.[961] Other cases make no apparent effort to distinguish between the parties and hold the waiver complete.[962] All courts seem to agree, however, that the guilty client may not assert the protections of the innocent lawyer.[963] Of course, if the attorney is personally involved in crime or fraud the protections of the Doctrine evaporate.[964]

To assert that this exception applies, the government must make a *prima facie* showing that a fraud exists that is "sufficiently serious to defeat the work product privilege."[965] This decision is committed to the discretion of the

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[959] Id.

[960] See, e.g., In re Sealed Case, 676 F.2d 793, 811 n.67 (D.C.Cir. 1982); In re John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982); In re Special September Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980).

[961] In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801 n.4 (3rd Cir. 1979); In re Special September Grand Jury (II), 640 F.2d at 62-63.

[962] In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

[963] See, e.g., In re Special September Grand Jury (II), 640 F.2d at 63.

[964] In re John Doe, 662 F.2d 1073, 1079-80 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

[965] In re Sealed Case, 676 F.2d 793, 814.

district court.[966] In this regard, it is accepted that the fraud "could be something less than criminal activity, but certainly encompasses criminal activity subverting or attempting to subvert the judicial process."[967]

The government must also show "some valid relationship between the work product under subpoena and the *prima facie* violation."[968] Courts vary in the application of this required relationship; one court has announced that the documents sought under the exception must bear a "close relationship" between work product and the allegedly fraudulent conduct.[969] However espoused, the test is intended to prevent the fact of the client's fraud from being converted into a general entry into the work product of counsel.[970]

Perhaps the most significant aspect of the crime/fraud exception is that it may constitute the one occasion on which an attorney's opinion work product will be subject to disclosure. While it appears likely that an innocent lawyer's opinion work product will remain inviolate even where the client engages in ongoing fraud,[971] a lawyer personally involved in the fraud will find the courts far less reluctant to order disclosure of even opinion work product.[972]

Finally, although one case holds that the government still must show need and hardship when seeking to invoke the crime/fraud exception to the Work Product Doctrine,[973] that view is insupportable in light of the underlying principles on which the Work Product Doctrine is premised, i.e.,

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[966] Id., 676 F.2d at 813.

[967] Id. at 814 (courts may not require proof of fraud beyond a reasonable doubt); see also In re John Doe, 662 F.2d at 1079 n.4.

[968] In re Sealed Case, 676 F.2d 793, 814-15.

[969] In re Murphy, 560 F.2d 326, 338.

[970] Id.; In re Sealed Case, 676 F.2d at 815 n.91.

[971] In re Special September Grand Jury (II), 640 F.2d 49, 63.

[972] See In re John Doe Corp., 675 F.2d 482, 492 ("where so-called work product is in aid of a criminal scheme, fear of disclosure may serve a useful deterrent purpose and be the kind of rare occasion on which an attorney's mental processes are not immune"); In re Murphy, 560 F.2d at 336 n.19.

[973] In re Doe, 662 F.2d 1073, 1078 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

the elimination of "sharp practices" by lawyers.[974] Thus, the better view is that "[o]nce a sufficient showing of crime or fraud has been made, the privilege vanishes as to all material related to the ongoing violation."[975]

C. Marital Privileges

The common law marital privilege was codified in Rule 501 of the Federal Rules of Evidence. This privilege is available in grand jury proceedings.[976]

The marital privilege is composed of two separate privileges based on the marital relationship: the confidential communications privilege and the adverse spousal testimony privilege. The former privilege bars testimony by one spouse as to confidential communications between the two; the latter privilege provides that a witness can neither be compelled to testify nor foreclosed from testifying adversely against his or her spouse.[977]

Both the adverse spousal testimony privilege and the confidential communications privilege require the existence of a valid marriage. While the existence of the privilege is a matter decided under federal law, the determination as to the validity of the marriage depends upon state law.[978] Thus, in a state which does not recognize common law marriages, simply living together does not permit a person to invoke either of the marital privileges.[979]

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[974] Hickman v. Taylor, 329 U.S. 495, 509 (1947).

[975] In re Sealed Case, 676 F.2d 793, 812 n.74.

[976] Rule 1101(d), Federal Rules of Evidence; In re Snoonian, 502 F.2d 110, 112 (1st Cir. 1974); In re Grand Jury Proceedings, 664 F.2d 423, 429 (5th Cir. 1981).

[977] Trammel v. United States, 445 U.S. 40 (1980); United States v. Wood, 924 F.2d 399, 401-402 (1st Cir. 1991); United States v. Byrd, 750 F.2d 586, 589 (7th Cir. 1985).

[978] United States v. White, 545 F.2d 1129 (8th Cir. 1976); United States v. Lustig, 555 F.2d 737 (9th Cir. 1977).

[979] United States v. Snyder, 707 F.2d 139, 147 (5th Cir. 1983).

The privilege is not conditioned on a judicial determination that the marriage is happy or successful, but only that it is valid.[980] Courts will reject a claimed privilege, however, if it is based upon a fraudulent marriage, not entered into in good faith.[981]

The two privileges have separate elements. The adverse spousal testimony privilege operates in the following manner:

1. It applies to all adverse testimony against a defendant-spouse, including testimony on nonconfidential matters and matters which occurred prior to the marriage;

2. It must be asserted during a marriage and may not be asserted after the marriage is terminated;

3. It may not be asserted where the marriage between the defendant and the testifying spouse is in fact moribund, though legally still valid;

4. The spousal testimony privilege may only be asserted by the witness-spouse.[982]

The confidential communications privilege operates in the following manner:

1. The communications privilege only applies to communications made in confidence between the spouses during a valid marriage;

2. The communications privilege is not a total bar to testimony, but must be invoked selectively depending on the nature of the question;

3. The communications privilege only applies to communications, whether verbal or nonverbal;

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[980] United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978). But see United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977).

[981] United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975).

[982] United States v. Byrd, 750 F.2d 586, 590 (7th Cir 1985).

4. In connection with the operation of this privilege, the confidentiality of communications made during a valid marriage is presumed;

5. The communications privilege survives the termination of the marriage;

6. The communications privilege may not apply where the communications occur between permanently separated spouses, even though they are technically made within a valid marriage;

7. The communications privilege may be claimed by either the witness-spouse or the defendant-spouse.[983]

For the confidential communication privilege to exist, there must be a communication. The taking of fingerprints, handwriting samples and records have been held not to be testimonial communicative evidence in the context of the confidential communications privilege.[984] This privilege extends only to communications intended by one spouse to convey a message to the other and does not include acts or observations of acts.[985] The communications privilege also requires that the communications be made in confidence. The burden is on the party seeking to defeat the claim of privilege to overcome the presumption of confidentiality.[986]

Certain exceptions apply to both privileges. One exception to the confidential communications privilege is where both spouses are co-conspirators in the matter under investigation. For example, conversations between a husband and a wife about crimes in which they are presently jointly

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[983] United States v. Byrd, 750 F.2d 586, 590-592; see also United States v. Evans, et al, Case No. 91-2481, Slip Op. (8th Cir. June 5, 1992); United States v. Wood, 924 F.2d 399, 401-402 (1st Cir. 1991).

[984] United States v. Thomann, 609 F.2d 560, 564 (1st Cir. 1979); United States v. Cotton, 567 F.2d 958 (10th Cir. 1977).

[985] United States v. Smith, 533 F.2d 1077 (8th Cir. 1976); United States v. Klayer, 707 F.2d 892, 894 (6th Cir. 1983); United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979).

[986] In re Grand Jury Investigation, 603 F.2d 786, 788 (9th Cir. 1979).

participating are not within the protection of the privilege.[987] The focus of the "joint criminal participation" exception is actual participation and it does not matter if only one spouse, in fact, was prosecuted for the criminal activity. [988]

The adverse testimony privilege also has certain exceptions. Where husband and wife are co-conspirators, some courts have held that acts made in furtherance of the conspiracy are outside the privilege.[989] Finally, if an offense has been committed by a party against the spouse, or against the child of either spouse, the victim spouse's testimony as to that activity is also outside the privilege.[990]

Granting immunity to both spouses overcomes both marital privileges.[991] As neither spouse can be prosecuted for what is then said, the underlying precept of the privilege - preservation of the family - is maintained.

D. Physician-Patient Privilege

The physician-patient privilege did not exist at common law. Since this privilege is a statutory creation by the states, and since there is no federal statute or common law privilege, the physician-patient privilege is generally

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[987] United States v. Ammar, 714 F.2d 238, 257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Mendoza, 574 F.2d 1373, 1379 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974); United States v. Price, 577 F.2d 1356, 1364 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979).

[988] United States v. James S. Hill, Jr., Case No. 91-1576, slip op. (3rd Cir. June 22, 1992).

[989] United States v. Clark, 712 F.2d 299 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978), aff'd, 455 U.S. 40 (1980). The Third Circuit has not recognized this exception. In re Malfitano, 633 F.2d 276 (3d Cir. 1980).

[990] United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976); United States v. Cameron, 556 F.2d 752, 755 (5th Cir. 1977); United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975).

[991] United States v. Doe, 478 F.2d 194 (1st Cir. 1973).

inapplicable in federal courts pursuant to Rule 501, Federal Rules of Evidence.[992]

The Second and Sixth Circuit Courts of Appeals however, have recognized a psychotherapist-patient privilege.[993] Three circuits have rejected this privilege.[994] The circuits which accept this privilege are of the view that Rule 501 did not strictly limit the development of privileges to those recognized by the common law at the time the Federal Rules of Evidence were enacted. Instead, they look to the guidance from Trammel that Rule 501 was not intended "to freeze the law of privilege."[995]

Since a split in the circuits has developed on this issue, the federal prosecutor must be aware of the law in his or her circuit.

E. Clergy-Penitent Privilege

The clergy-penitent privilege exists at common law (as well as in the statutes of many states) and is therefore applicable to federal grand jury proceedings. This privilege is strictly construed to avoid suppressing otherwise relevant evidence unless an overriding societal goal is present.[996] The goal of this privilege is to foster confidentiality and to protect the privacy of individuals who wish to disclose flawed acts and receive the guidance of their clergy in return.

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[992] Whalen v. Roe, 429 U.S. 589, 602 n. 28 (1977).

[993] United States v. Diamond, Case No. 91-1467, Slip Op. (2nd Cir. June 1, 1992); In re Zuniga, 714 F.2d 632, 636 (6th Cir.), cert. denied, 464 U.S. 983 (1983).

[994] In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), cert. denied, 493 U.S. 906 (1989); United States v. Corona, 849 F.2d 562, 566 (11th Cir. 1988), cert. denied, 489 U.S. 1084 (1989); United States v. Meagher, 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976).

[995] Diamond, Slip Op. at page 4068.

[996] See Trammel v. United States, 583 F.2d 1166, 1168 (10th Cir. 1978), aff'd, 445 U.S. 40 (1980).

The clergy-penitent privilege is limited to confidential communications made to a clergyman in that person's capacity as a spiritual advisor.[997] As with the marital privileges and the attorney-client privilege, the goal of the privilege is not furthered unless the communication sought to be protected was made in private. The clergyman must be an actual clergyman offering spiritual advice. In Dube, the defendant sought out a "clergyman" for income tax avoidance purposes. The Seventh Circuit rejected the claimed privilege: "We see no more need for a protective privilege than if the taxpayer had consulted his butcher or barber. The taxpayer is not a penitent seeking spiritual relief from his sins, only a citizen seeking relief from his obligation to pay taxes."[998]

F. Parent-Child Privilege

Despite the lack of any authority to support their position, grand jury witnesses periodically claim a privilege for intra-family communications. They argue that the confidence and privacy in the family relationship must be protected in much the same way as the courts protect the marital relationship.

The United States District Court for the District of Nevada is the only federal court to recognize a family privilege.[999] Relying on the Supreme Court's directions in Trammel v. United States, 445 U.S. 40 (1980), and United States v. Nixon, 418 U.S. 683 (1974), to construe privileges narrowly, all other federal courts have rejected claims of a parent-child privilege.[1000]

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[997] United States v. Dube, 820 F.2d 886, 889 (7th Cir. 1987).

[998] Dube, 820 F.2d 886, 889.

[999] In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983).

[1000] In Re: Grand Jury Proceeding, of John Doe, 842 F.2d 244, 245-248 (10th Cir. 1988); United States v. Davies, 768 F.2d 893, 896 (7th Cir. 1985); In re Grand Jury Subpoena (Santarelli), 740 F.2d 816 (11th Cir. 1984); United States v. Jones, 683 F.2d 817 (4th Cir. 1982); In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. 1981); United States v. Penn, 647 F.2d 876 (9th Cir. 1980).

Notwithstanding this clear line of authority, it is the policy of the Department of Justice not to seek disclosure of close family confidential communications unless they consist of business communications among close family members.[1001]

G. Accountant-Client Privilege

Federal courts have refused to recognize a pure accountant-client privilege.[1002] However, communications made by a client to an accountant assisting the client's attorney, for the purpose of obtaining legal advice from the attorney, may be privileged. The accountant may be viewed as the attorney's agent and communications with that accountant may be covered under the umbrella of the attorney-client privilege.[1003]

[1001] USAM 9-23.211.

[1002] United States v. Arthur Young & Co., 465 U.S. 805, 815 (1984); Couch v. United States, 409 U.S. 322, 335 (1973).

[1003] See United States v. Kovel, 296 F.2d 918, 921-22 (2nd Cir. 1961); see also Section I,A,1,b "Tax cases" in this Chapter for a more complete discussion of the application of the attorney-client privilege to accountant communications.

II. Constitutional

A. First Amendment

1. Introduction

In several instances, individuals have raised First Amendment considerations as a limitation on grand jury subpoena power. Grand jury witnesses have sought to prevent disclosure of evidence to grand juries by invoking the First Amendment's protections for freedom of the press, free exercise of religious beliefs, and freedom of association. While some courts have expressed a willingness to entertain such arguments, to date claims to a broad constitutional privilege grounded in the First Amendment have met with little success. Generally, courts that have considered this issue have refused to recognize far-reaching First Amendment testimonial privileges. The role of the First Amendment as a constraint on the grand jury's subpoena power is discussed below:

a. Freedom of the Press First Amendment Claims by journalists

The leading case with respect to grand jury privilege claims grounded upon the First Amendment's guarantee of freedom of the press is Branzburg v. Hayes, 408 U.S. 665 (1972). In Branzburg, the petitioner, a newspaper reporter, refused to comply with a grand jury subpoena which called for him to testify regarding criminal activities he had reported. The petitioner's story had been obtained from confidential sources who were themselves involved in these activities.

The petitioner argued that if reporters were compelled to reveal information obtained from confidential sources, their ability to gather news would be impeded. Therefore, petitioner contended that a grand jury subpoena

directed at a journalist would impair freedom of the press and violate the First Amendment.

The court rejected this argument. Noting that "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order," the court refused to exempt reporters from the general public duty to testify when called by the grand jury.[1004] According to the court, in the absence of bad faith, harassment, or grand jury abuse, a newsman must comply with a grand jury subpoena.

It should be noted, however, that in civil and criminal cases some courts have seized upon Justice Powell's concurrence in Branzburg to conclude that a qualified First Amendment privilege may exist for journalists.[1005] The application of this qualified privilege to grand jury proceedings must be seriously questioned in light of Branzburg. Indeed, at least one appellate court has flatly refused to extend even a qualified First Amendment privilege to grand jury proceedings.[1006]

[1004] Branzburg v. Hayes, 408 U.S. 665, 703-04.

[1005] United States v. Burke, 700 F.2d 70, 78 (2d. Cir) cert. denied, 104 S.Ct. 72 (1983) (criminal proceeding); Zerilli v. Smith, 656 F.2d 705, 710 (D.C. Cir. 1981) (civil action); United States v. Criden, 633 F.2d 346, 355 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (criminal proceeding); Miller v. Transamerican Press, inc., 621 F.2d 721, 725 (5th Cir. 1980), cert. denied, 450 U.S. 1041, (1981) (libel action); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977) (civil action); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1979), cert. denied, 427 U.S. 912 (1976) (criminal proceeding); Cervantes V. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125, (1973) (libel action); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., Inc., 455 F. Supp. 1197 (N.D. Il. 1978) (civil action).

[1006] In re Grand Jury Proceedings, 810 F. 2d 580, 583-86 (6th Cir. 1987).

b. Freedom of Association objections to grand jury subpoenas

Some courts have also entertained challenges to grand jury subpoenas founded upon the First Amendment's right of free association.[1007] While these courts have acknowledged that the First Amendment may place some limitations on the grand jury, generally the courts have rejected First Amendment right of association claims in the grand jury context. Recognizing that the grand jury's investigative function constitutes a compelling governmental interest, these cases have refused to allow First Amendment associational claims to limit the scope of otherwise valid subpoenas issued as part of a good faith criminal investigation.[1008]

c. Religious freedom objections to grand jury subpoenas

In several instances, members of the clergy have asserted that the First Amendment's protections for freedom of religion forbid the grand jury from compelling their appearance and testimony.[1009] While conceding that grand jury subpoenas may not be used to harass or intimidate witnesses on the basis of their religious beliefs, courts have typically refused to exempt the clergy from testifying on First Amendment grounds.[1010]

[1007] In re Grand Jury Proceedings, 842 F.2d 1229, 1232 (11th Cir. 1988); In re Grand Jury Proceedings, 776 F.2d 1099, 1103 (2d Cir. 1985); In re Roberts, 650 F. Supp. 159 (N.D. Ga. 1987).

[1008] Ibid.

[1009] See In re Possible Violations of 18 U.S.C.§§ 371, 641, 1503 (Maren), 564 F.2d 567 (D.C. Cir. 1977) (Minister, Church of Scientology); In re Cuetto, 554 F. 2d 14 (2d Cir. 1977) (lay minister, Protestant Episcopal Church).

[1010] Ibid. But see, discussion of clergy - penitent privilege in this Chapter, Section I, E, above.

B. Fifth Amendment[1011]

The Fifth Amendment provides that "[no] person ... shall be compelled in any criminal case to be a witness against himself...." The privilege against self-incrimination can be claimed in any proceeding, whether civil or criminal, administrative or judicial.[1012] A person claiming the privilege must establish three elements: (1) personal compulsion; (2) of a testimonial communication; (3) that would incriminate the person claiming the privilege. As with any claim of privilege, the burden is on the person claiming the privilege to establish that it is properly asserted.[1013]

This privilege is often raised in an attempt to resist producing business records[1014] or other evidence to the grand jury, but in most instances, the courts have held that the Fifth Amendment privilege is not a bar to obtaining almost any type of business record pursuant to a grand jury subpoena. In general, corporations and other artificial entities, such as partnerships, have no Fifth Amendment privilege against self-incrimination.[1015] Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the records custodian, other corporate

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[1011] For an additional discussion of the Fifth Amendment privilege in connection with grants of immunity, see Chapter Eight of this Manual.

[1012] Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (deposition); Lefkowitz v. Turley, 414 U.S. 70 (1973) (grand jury); Kastigar v. United States, 406 U.S. 441, 444 (1972).

[1013] United States v. Rylander, 460 U.S. 752, 767-768 (1982); United States v. Kave, 760 F.2d 343, 354 (1st Cir. 1985); In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968 (2d Cir. 1985); In re Bevill, Bresler & Schulman Asset Mgt., 805 F.2d 120, 126 (3d Cir. 1986); United States v. Sorrells, 877 F.2d 346, 351 (5th Cir. 1989); United States v. Brown, 918 F.2d 82 (9th Cir. 1990); In re Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983).

[1014] For more extensive treatment of this area, see generally Beale & Bryson, Grand Jury Law and Practice, §§ 6.30-6.33 (1986) and 28 American Criminal Law Review 723 (1991) (Sixth Survey of White Collar Crime: "Fifth Amendment: Production of Documents").

[1015] Braswell v. United States, 487 U.S. 99 (1988); Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694, 698 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

officials, or even a former corporate official.[1016] However, if the records are characterized as being purely personal or the subpoena is directed to a sole proprietor, there may be both Fifth and Fourth Amendment problems in obtaining such records. Each element of the privilege, and the leading cases dealing with it, are discussed below.

1. Personal Compulsion

The Supreme Court has repeatedly held that the Fifth Amendment privilege only applies when a person is compelled to make an incriminating statement.[1017] Thus, if the preparation of business records is voluntary, no compulsion is present since a subpoena that calls for production of such records does not cause such records to be created. Nor does a subpoena for business records require the person producing them to restate or affirm the truth of their contents. Therefore, the Supreme Court has held that the Fifth Amendment does not protect the contents of business records.[1018] At least one court has suggested that a similar rule might be appropriate for voluntarily created personal papers.[1019] Although the contents of business records are not

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[1016] In re Grand Jury Subpoena Dated November 12, 1991 (Paul), 957 F.2d 807, 812 (11th Cir. 1992) (former corporate official); Braswell v. United States, 487 U.S. 99 (1988); In re Grand Jury, 836 F.2d 150 (3rd Cir. 1987); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); see United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); Curcio v. United States, 354 U.S. 118, 123-24 (1957).

[1017] See e.g., Braswell v. United States, 487 U.S. 99, 102 (1988); Doe v. United States, 487 U.S. 201, 215 (1987); Andresen v. Maryland, 427 U.S. 463, 477 (1976); Fisher v. United States, 425 U.S. 391, 399 (1976); Olmstead v. United States, 277 U.S. 438, 462 (1928).

[1018] Braswell v. United States, 487 U.S. 99, 102 (1988); United States v. Doe, 465 U.S. 605 (1984).

[1019] See In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).

privileged, the act of producing the documents may have certain testimonial aspects that may not be used against the person producing the documents.[1020]

2. *Incriminating Communication*

The Fifth Amendment provides that no person shall be compelled to incriminate himself in a criminal proceeding. This privilege applies to any testimony that would incriminate the person making the statement. It does not apply to statements that would incriminate someone other than the person making the statement.[1021] The privilege is not limited to facially incriminating communications. Courts have uniformly held that the privilege extends to any compelled communications that lead to an incriminating inference.[1022]

3. *Testimonial Communication*

The Supreme Court has held in a series of cases culminating in Braswell v. United States, 487 U.S. 99 (1988), that generally the production of business documents pursuant to a subpoena duces tecum is not a "testimonial communication" protected by the Fifth Amendment. In certain unique situations, the "act of production" may have testimonial significance. In those

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[1020] Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605, 612 (1984); In re Custodian of Records of Variety Distributing, 927 F.2d 244, 246 (6th Cir. 1991).

[1021] Rogers v. United States, 340 U.S. 367 (1951).

[1022] See United States v. Doe, 465 U.S. 605 (1984) (act of producing sole proprietor's business records found to involve testimonial self-incrimination since production concedes the existence, possession and authenticity of the documents); Andresen v. Maryland, 427 U.S. 463, 473-74 (1976) (act of production of subpoenaed personal records may constitute compulsory authentication of incriminating information).

cases, the act of production may not be used against the person producing the documents. However, the production of the documents may nevertheless be compelled, even absent a grant of immunity.

The Supreme Court also held in Doe v. United States, 487 U.S. 201, 215 (1988), that requiring a target to execute a "consent directive" with respect to foreign bank accounts was not a testimonial communication because neither the form, nor its execution communicated any factual assertion, implicit or explicit, or conveyed any information to the government.

In general, the Fifth Amendment privilege does not extend to artificial entities whose records are held by a custodian or agent in a representative capacity. This includes corporations,[1023] unincorporated associations,[1024] and partnerships.[1025] According to Bellis v. United States, 417 U.S. 85, 88 (1974), this is true even if the records would incriminate the custodian who is producing them. Thus, in most cases, not only can a corporate document custodian be required to produce documents, the custodian can also be forced to identify and authenticate documents before the grand jury.[1026]

A corporation cannot invoke the Fifth Amendment privilege even where it is a mere alter ego of its owner.[1027] This also applies to doctors, lawyers, and other professionals doing business as "professional corporations."[1028]

[1023] Braswell v. United States, 487 U.S. 99, 102 (1988); Wheeler v. United States, 226 U.S. 478, 489 (1913); Wilson v. United States, 221 U.S. 361, 380 (1911); Dreier v. United States, 221 U.S. 394 (1911).

[1024] United States v. White, 322 U.S. 694, 380 (1944).

[1025] Bellis v. United States, 417 U.S. 85, 95 (1974).

[1026] Haner v. United States, 440 U.S. 1308, 1309 (1979); In re Custodian of Records of Variety Distributing, Inc., 927 F.2d 244, 247-251 (6th Cir. 1991); In re Sealed Case, 877 F.2d 83, 86-87 (D.C.Cir. 1989); In re Grand Jury Proceeding (John Doe Co., Inc.), 838 F.2d 624, 626 (1st Cir. 1988); United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 318 (2d Cir. 1979).

[1027] Braswell v. United States, 487 U.S. 99 (1988); Hair Industry Ltd. v. United States, 340 F.2d 510, 511 (2d Cir.), cert. denied, 381 U.S. 950 (1965); see United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972).

[1028] United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 73 (2d Cir. 1986); Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

The rationale for this limitation of the Fifth Amendment privilege to natural persons was succinctly stated by the Supreme Court in United States v. White, 322 U.S. 694, 700 (1944):

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of the organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

In addition, courts have refused to look behind the particular organizational form chosen in deciding whether to allow a Fifth Amendment privilege claim. If a person chooses to organize as a corporation even if the person is the sole shareholder, the person can not assert a Fifth Amendment privilege to shield his or her business records from production.[1029]

A number of factors are relevant in determining whether a partnership is a collective entity independent of its members or the individual business of a single partner, including number of partners, type of partnership, whether it has held itself out to the public as a collective entity, whether it holds property in the partnership name, and whether more than one partner has access to the books and records.[1030] Small family partnerships have been held to have no Fifth Amendment privilege.[1031]

[1029] Braswell v. United States, 487 U.S. 99 (1988); In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 59 (2d Cir. 1985).

[1030] Bellis v. United States, 417 U.S. 85, 86-88 (1974).

[1031] United States v. Mahady & Mahady, 512 F.2d 521, 524 (3rd Cir. 1975). c.f. United States v. Malis, 737 F.2d 1511, 1512-1513 (9th Cir. 1984); United States v. Allshouse, 622 F.2d 53, 55 (3d Cir. 1980); United States v. Alderson, 646 F.2d 421, 423 (9th Cir. 1981); United States v. Silverstein, 314 F.2d 789, 791 (9th Cir. 1963).

Other collective entities have been denied the use of the privilege against self-incrimination. The ultimate determination is whether, based on all the circumstances, the particular organization:

> has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.[1032]

The treatment of business records of a sole proprietorship was determined in United States v. Doe, 465 U.S. 605 (1984). In Doe, the Supreme Court held that the contents of voluntarily prepared business records were not privileged since the creation was not compelled. However, the act of producing the records of a sole proprietorship could amount to a compelled incriminating testimonial communication. The Court noted that the District Court had made a specific finding that "enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic."[1033] Therefore, although the records themselves are not privileged, the government may have to grant use immunity for the "act of production" to obtain the business records of a sole proprietorship.[1034]

The "act of production" doctrine is limited to sole proprietorships and does not extend to other artificial collective entities such as corporations. In Braswell v. United States, 487 U.S. 99 (1988), the Supreme Court distinguished Doe and held that the president and sole shareholder of a

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[1032] United States v. White, 322 U.S. 694, 701 (1944) (denying the Fifth Amendment privilege to an unincorporated labor union); see also Rogers v. United States, 340 U.S. 367 (1951) (treasurer of Communist Party could not assert privilege as to books and records of party); In re Grand Jury Proceedings, 633 F.2d 754, 757 (9th Cir. 1980) (trust records are not personal records of trustee); In re Witness Before the Grand Jury, 546 F.2d 825, 827 (9th Cir. 1976) (no expectation of privacy as to the records of investment-limited partnerships or joint ventures).

[1033] 465 U.S. 605, 613, n.11.

[1034] See USAM 9-23.215; see also Fisher v. United States, 425 U.S. 391, 411 (1976) (production of accountant's papers in the possession of a taxpayer would not be testimonial self-incrimination, as the existence and location of the records was a "foregone conclusion").

corporation could not interpose a Fifth Amendment objection to the compelled production of corporate records, even if the act of production might prove to be personally incriminating.[1035] The Court did note, however, that the government could make no evidentiary use of the act of production in any prosecution against that individual.[1036]

There are two other areas where, in general, the Fifth Amendment is not available. First, there is generally no Fifth Amendment protection available for records required to be kept by law.[1037] For a particular class of documents to be deemed a "required record," they must be kept pursuant to a law or regulation whose purpose is essentially regulatory; they must be of the type customarily kept by the business and they must have a "public aspect."[1038] Second, there is no Fifth Amendment protection for demonstrative or physical evidence, since the privilege applies only to testimony. This includes handwriting samples,[1039] fingerprints and photographs,[1040] voice exemplars,[1041] and blood samples.[1042]

[1035] See also In re Kave, 760 F.2d 343, 356 (1st Cir. 1985); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143, 148 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 862 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Malis, 737 F. 2d 1511 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 945 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

[1036] Braswell v. United States, 487 U.S. 99, 118. See also In re Custodian of Records of Variety Distributing, Inc., 927 F.2d 244 (6th Cir. 1991).

[1037] Grosso v. United States, 390 U.S. 62, 71 (1968); Shapiro v. United States, 335 U.S. 1, 7 (1948); United States v. Rosenberg, 515 F.2d 190, 199 (9th Cir.), cert. denied, 423 U.S. 1031 (1975).

[1038] Grosso v. United States, 390 U.S. 62, 67-68; United States v. Lehman, 887 F.2d 1328, 1333 (7th Cir. 1989); In re Grand Jury Proceedings, 801 F.2d 1164 (9th Cir. 1986); In re Two Grand Jury Subpoena Duces Tecum, 793 F.2d 69, 73 (2nd Cir. 1986); cf. Baltimore Department of Social Services v. Bouknight, 493 U.S. 549 (1990).

[1039] United States v. Mara, 410 U.S. 19 (1973).

[1040] Schmerber v. California, 384 U.S. 757 (1966).

[1041] United States v. Dionisio, 410 U.S. 1 (1973).

[1042] Schmerber v. California, 384 U.S. 757 (1966) (warrant may be required under Fourth Amendment, however, for production of blood samples).

The nature of the documents themselves may also be an issue. In Grand Jury Subpoena Duces Tecum v. United States, 657 F.2d 5 (2d Cir. 1981), the Second Circuit examined a personal Fifth Amendment claim asserted by a corporate executive concerning pocket and desk calendars used to record business appointments. The Second Circuit remanded the case to the district court for clarification of the nature of each item. It proposed a "non-exhaustive list of criteria" to be used in determining whether production of the calendars would amount to self-incrimination. These criteria included:

> who prepared the document, the nature of its contents, its purpose or use, who maintained possession, and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation's business.[1043]

The district court, on remand,[1044] held that the desk calendar was a corporate document but that the pocket calendar was more a personal paper and therefore within the scope of the Fifth Amendment privilege. Other circuits have applied a similar case-by-case analysis for the determination of the issue.[1045]

The few courts that have considered specifically whether documents are personal or corporate generally find that mixed documents are corporate and outside the privilege. For example, the Ninth Circuit in United States v. MacKey, 647 F.2d 898, 901 (9th Cir. 1981), held that a diary and desk calendar used to record business meetings and transactions, kept in the office, and used in the daily management of the corporation were properly

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[1043] 657 F.2d at 8.

[1044] In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, 571 F. Supp. 977 (S.D. NY 1981).

[1045] See e.g., In re Grand Jury Proceedings United States, 626 F.2d 1051, 1053 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033, 1042 (3rd Cir. 1980); United States v. Wujkowski, 929 F.2d 981, 984 (4th Cir. 1991); United States v. Mason, 869 F.2d 414, 416 (8th Cir. 1989); United States v. MacKey, 647 F.2d 898 (9th Cir. 1981); In re Sealed Case (Government Records), 950 F.2d 736 (D.C. Cir. 1991) (involving government records subpoenaed from HUD in independent counsel investigation).

discoverable corporate papers despite personal non-business notations and lack of corporate possession or ownership.[1046]

The Fifth Amendment privilege also was held inapplicable to telephone records in Matter of Grand Jury Subpoenas, 959 F.2d 1158 (2d Cir. 1992), because the records were not personal papers, were not an expression of John Doe, the president and sole shareholder of XYZ Corporation, and contained no testimonial declarations by John Doe. The court found that the subpoenaed documents were the records of XYZ Corporation and were evidence of XYZ Corporation's payments of Doe's telephone bills. As such, they were third-party records not subject to the protection of the Fifth Amendment.

In In re Sealed Case (Government Records), 950 F.2d 736, 740 (D.C. Cir. 1991) (involving records subpoenaed from HUD in an independent counsel investigation), the D.C. Circuit held that the rationale of Braswell v. United States, 487 U.S. 99 (1988), encompasses government records. The court found that the production of government records fell outside the personal Fifth Amendment privilege, since the records in issue belonged to the government agency and not to the custodian seeking to challenge their production. The court also stated that an inquiry into the nature, purpose and use of the document is necessary to determine whether a document is a government document,[1047] regulations regarding the treatment of certain records are relevant to the inquiry.

4. Disclosure of Records Held by Third Parties

On occasion, it may be necessary to compel a target or subject of an investigation to execute a form consenting to the disclosure of documents held by a third party, for example, foreign bank records in a bank secrecy jurisdiction, to avoid the application of a foreign blocking statute. The Supreme Court in Doe v. United States, 487 U.S. 201 (1988), held that a court order compelling a target of a grand jury investigation to authorize the disclosure of bank records without specifically identifying those documents or

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[1046] See also In re Steinberg, 837 F.2d 527 (1st Cir. 1988).

[1047] See United States v. Wujkowski, 929 F.2d 981, 984 (4th Cir. 1991).

acknowledging their existence does not violate the target's Fifth Amendment privilege against self-incrimination.[1048] The Court reasoned that execution of the consent form was not testimonial and, therefore, not within the privilege. The holding in Doe should also apply to other third parties in addition to banks.

Personal documents protected by the Fifth Amendment do not lose their privileged status when turned over to an attorney if the production meets all the requirements of the attorney-client privilege. Such documents are protected by the attorney-client privilege, not the Fifth Amendment.[1049] However, if possession goes to a person other than an attorney, the government may serve a subpoena on the third party, and thus avoid compulsion on the person incriminated by the documents.[1050] In addition, a person who is incriminated by documents prepared by a third party may not validly claim a Fifth Amendment privilege as to the documents by taking possession of them or by transferring them to his or her attorney.[1051]

[1048] See also United States v. Ghidoni, 732 F.2d 814 (11th Cir.), cert. denied, 465 U.S. 932 (1984).

[1049] Fisher v. United States, 425 U.S. 391, 401 (1976).

[1050] Couch v. United States, 409 U.S. 322, 327 (1973); In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987 (Doe), 834 F.2d 1128, 1131 (2d Cir. 1987); In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851, 859 (3rd Cir. 1979); In re Grand Jury Investigation, 921 F.2d 1184, 1189 (11th Cir. 1991).

[1051] Fisher v. United States, 425 U.S. 391, 396 (1976).

Chapter Eight

IMMUNITY PROCEDURES AND PRACTICE

I. Introduction

A. Function of Prosecutorial Discretion

Within the federal criminal justice system, the prosecutor has wide discretion in determining when, who, how, and whether to prosecute individuals for violations of federal criminal law. The choice of which offenses and which individuals to prosecute, from among the many potentially indictable cases, is constitutionally committed to the Executive Branch.[1052]

The decision to confer immunity to compel a witness to testify notwithstanding the witness's Fifth Amendment privilege is within the prosecutor's discretion. An immunized witness cannot refuse to testify on the ground that the testimony will be incriminating. The decision to compel testimony through a grant of immunity is a powerful investigative tool available to the prosecutor.

[1052] United States v. Schwartz, 787 F.2d 257, 266 (7th Cir. 1986).

B. Fifth Amendment Privilege and Immunity

1. Fifth Amendment Privilege

a. Who can assert the privilege?

The Fifth Amendment privilege against self-incrimination is personal, applying only to natural individuals. The privilege may be asserted in response to demands for testimony[1053] or document production.[1054]

Corporations and other collective entities have no Fifth Amendment privilege against self-incrimination.[1055] Courts have denied the availability of the Fifth Amendment privilege to corporations with a sole stockholder,[1056] subchapter S corporations,[1057] professional corporations,[1058] and dissolved

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[1053] Doe v. United States, 487 U.S. 201, 215 (1988) (Doe II); Curcio v. United States, 354 U.S. 118, 121, 128 (1957); Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

[1054] United States v. Doe, 465 U.S. 605, 610-612 (1984) (Doe I); United States v. White, 322 U.S. 694, 698-99 (1944); See Chapter Seven, Section II of this Manual for a detailed discussion of the Fifth Amendment privilege as it relates to document production.

[1055] Bellis v. United States, 417 U.S. 85, 93 (1974) (partnership); Rogers v. United States, 340 U.S. 367, 371 (1951) (political party); United States v. White, 322 U.S. 694, 701 (1944) (labor union); Johnson v. United States, 228 U.S. 457, 458-459 (1913); Wheeler v. United States, 226 U.S. 478, 480 (1913) (dissolved corporation); Hale v. Henkel, 201 U.S. 43, 51 (1906) (corporation). See Chapter Four of this Manual for a detailed discussion of production of records by corporations and sole proprietorships.

[1056] Braswell v. United States, 487 U.S. 99, 100 (1988); Hair Industry Ltd. v. United States, 340 F.2d 510, 511 (2d Cir.), cert. denied, 381 U.S. 950 (1965).

[1057] United States v. Richardson, 469 F.2d 349, 351 (10th Cir. 1972).

[1058] United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 73 (2d Cir. 1986); Reamer v. Beall, 506 F.2d 1345, 1346 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

corporations.[1059] If the privilege is asserted with respect to such an entity, the government may be required to present evidence that the corporation existed as a collective entity rather than a sole proprietorship.[1060]

b. The witness's assertion of the privilege

A person may invoke the Fifth Amendment privilege when he or she has a good faith belief that a direct, truthful answer would either furnish evidence of a crime or lead to the discovery of evidence needed to prosecute that person.[1061]

The statement with respect to which the privilege is invoked must be incriminating and the apprehension of prosecution reasonable. The witness need not demonstrate that a prosecution based on the incriminating answer would be successful. It is enough if it would "furnish a link in the chain of evidence" needed to prosecute the claimant for a federal crime[1062] or a state crime.[1063] The claimant must face a real and substantial hazard of self-incrimination, rather than an imaginary or insubstantial one.[1064] The

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[1059] Grant v. United States, 227 U.S. 74, 80 (1913); In re Grand Jury Subpoena to Thirteen Corporations, 775 F.2d 43, 48 (2d Cir. 1985).

[1060] In re Sealed Case, 877 F.2d 83, 90 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 839 (1990) (although bank account established, corporation never incorporated or did business).

[1061] See Hoffman v. United States, 341 U.S. 479, 486-487 (1951).

[1062] Hoffman v. United States, 341 U.S. at 486; Blau v. United States, 340 U.S. 159, 161 (1950).

[1063] Murphy v. Waterfront Commission, 378 U.S. 52, 78 (1964).

[1064] United States v. Apfelbaum, 445 U.S. 115, 128 (1980); Marchetti v. United States, 390 U.S. 39, 53 (1968); Grosso v. United States, 390 U.S. 62, 66-67 (1968).

Whether the standard is met depends to some extent on the potential crime. A witness invoking the privilege due to fear of a perjury prosecution, may do so if the witness' testimony may establish that he or she has already committed perjury in an earlier proceeding. In re Morgenroth, 718 F.2d 161, 165-167 (6th Cir. 1983). However, if a witness has not yet testified,

(continued...)

compelled testimony must also expose the claimant to possible criminal prosecution, not barred by the statute of limitations, double jeopardy clause or a pardon.[1065]

A witness may not validly invoke the Fifth Amendment in order to refuse to answer a question because it would degrade him[1066] or incriminate a third party.[1067] Fear for personal safety or for the safety of family members is not a valid basis for refusing to testify.[1068] Nor may the witness attempt to

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[1064](...continued)
he or she cannot assert the privilege as a shield for a lie untold for the witness is under an obligation to testify truthfully. United States v. Whittington, 786 F.2d 644, 645 (5th Cir. 1986). The privilege against self-incrimination never justifies commission of perjury. United States v. Friedrick, 842 F.2d 382, 394 n. 16 (D.C. Cir. 1988). In the context of most antitrust grand jury investigations involving conspiracies to restrain trade, the fear of prosecution standard is readily found. See In re Corrugated Container Antitrust Litigation, 620 F.2d 1086, 1091 (5th Cir. 1980); In re Folding Carton Antitrust Litig., 609 F.2d 867, 870 (7th Cir. 1979). On the other hand, fear of criminal prosecution may not be cited to avoid a civil tax investigation. Donaldson v. United States, 400 U.S. 517, 534-536 (1971). The fear of criminal prosecution standard is not met for purposes of the Fifth Amendment privilege where one seeks to avoid production of financial documentation if the real desire in the filed return was to protest taxes. United States v. Neff, 615 F.2d 1235, 1240-41 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

[1065] Pillsbury Co. v. Conboy, 459 U.S. 248, 266 n.1 (1983)(Marshall, J. concurring); In re Gault, 387 U.S. 1, 42-47 (1976) (privilege applicable in juvenile proceeding). See also United States v. Sharp, 920 F.2d 1167, 1172 (4th Cir. 1990); United States v. Blumberg, 1992 U.S. Dist. Lexis 3741 (S.D.N.Y. 1992).

[1066] United States v. Frascone, 299 F.2d 824, 827 (2d Cir. 1962).

[1067] United States v. Seewald, 450 F.2d 1159, 1161-1162 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972).

[1068] Piemonte v. United States, 367 U.S. 556, 559 n.2 (1960) In re Grand Jury Proceedings, 943 F.2d 132, 135 (1st Cir. 1991). See generally, Matter of Grand Jury Investigation, 922 F.2d 1266, 1272-1273 (6th Cir. 1991); United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977). However, at least one court has stated that if a witness has a genuine and reasonable fear of retaliation, the prosecutor has the burden of explaining why the government should not be required to take steps to protect the witness or the witness' family from retaliation. Matter of Grand Jury Proceedings Empanelled May 1988, 894 F.2d 881, 883-884, appeal after remand, Matter of Grand Jury Proceeding of December 1989, 903 F.2d 1167, 1170 (7th Cir. 1989) (upholding finding that fears of witness unreasonable).

balance his or her refusal to testify against an assertion that the government already possessed the information sought from the witness.[1069]

No appellate court has explicitly decided whether a witness granted immunity may refuse to testify based on a real and substantial fear of foreign prosecution. Although several immunized witnesses have asserted the privilege based on a fear of foreign prosecution, no such claim has been recognized by an appellate court. In the cases litigated to date, the Supreme Court and lower courts have found the stated fear of foreign prosecution was "remote and speculative," i.e. that the witness claiming the privilege had failed to show real or substantial risk of foreign prosecution.[1070]

Although local practice may vary, as a rule, every witness appearing before a grand jury should at least supply his or her name, home address and place of business. However, in some cases, supplying a business address may provide a link connecting the person with the criminal activity under investigation and would, therefore, properly be protected by the Fifth Amendment.

No ritual or talismanic phrase is necessary to invoke the privilege.[1071] In general, the assertion of the privilege against self-incrimination must be made in response to specific questions or document requests.[1072] Blanket

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[1069] United States v. Bell, 902 F.2d 563, 566 (7th Cir. 1990).

[1070] See, e.g., Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972); Environmental Techtonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1165 (3rd Cir.), aff'd, 493 U.S. 400 (1987); In re Sealed Case, 825 F.2d 494, 496-497 (D.C.Cir.), cert. denied, 484 U.S. 963 (1987); In re Grand Jury Proceeding (Doe No. 700), 817 F.2d 1108, 1112 (4th Cir.), cert denied, 484 U.S. 890 (1987); United States v. (Under Seal), 807 F.2d 374, 375 (4th Cir. 1986); United States v. Joudis, 800 F.2d 159, 162-164 (7th Cir. 1986); United States v. (Under Seal), 794 F.2d 920, 923 (4th Cir. 1985); In re Application of Pres. Comm. on Org. Crime, 763 F.2d 1191, 1199 (11th Cir. 1985); In re Nigro, 705 F.2d 1224, 1227 (10th Cir. 1982); In re Grand Jury Subpoena of Flanagan, 691 F.2d 116, 121-122 (2d Cir. 1982); In re Baird, 668 F.2d 432, 433-434 (8th Cir.), cert. denied, 456 U.S. 982 (1982); United States v. Brummitt, 665 F.2d 521, 525-526 (5th Cir. 1981); In re Federal Grand Jury Witness, 597 F.2d 1166, 1167-1168 (9th Cir. 1979); In re Quinn, 525 F.2d 222, 223 (1st Cir. 1975).

[1071] Emspak v. United States, 349 U.S. 190, 194 (1955).

[1072] United States v. Neff, 615 F.2d 1235, 1238 (9th Cir.), cert. denied, 447 U.S. 925 (continued...)

refusals are usually not acceptable, for they impede the court's inquiry to determine whether each question gives rise to a reasonable fear of prosecution.[1073] Still, in some cases where the witness was a potential target, courts have allowed a blanket refusal to testify or produce documents because the claimant appeared to have a valid Fifth Amendment claim as to virtually all questions or documents.[1074]

c. Evaluating the validity of the asserted privilege

In many cases, a witness or the witness's attorney will inform the prosecutor that the witness intends to assert his or her Fifth Amendment privilege. After the nature and extent of the claim is discussed, the prosecutor can decide whether to call the witness, waive his or her appearance or consider a grant of immunity. The prosecutor should not accept the word of the claimant that the privilege will be claimed.[1075] The witness should be

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[1072](...continued)
(1980). But see Kemp v. Gay, 947 F.2d 1493, 1498 (D.C. Cir. 1991) (upholding court's requirement of prior written assertion and explanation of privilege claim).

[1073] United States v. Argomaniz, 925 F.2d 1349, 1355 (11th Cir. 1991); United States v. Sharp, 920 F.2d 1167, 1170-1171 (4th Cir. 1990); United States v. Brown, 918 F.2d 82, 84 (9th Cir. 1990); Bank One of Cleveland, N.A. v. Abbe, 915 F.2d 1067, 1077 (6th Cir. 1990); United States v. Pratt, 913 F.2d 982, 990 (1st Cir. 1990); Estate of Fisher v. C.I.R.., 905 F.2d 645, 649 (2nd Cir. 1990); United States v. Clark, 847 F.2d 1467, 1474 (10th Cir. 1989); United States v. Rodriguez, 706 F.2d 31, 39 (2d Cir. 1983). But see In re Sealed Case, 832 F.2d 1268, 1270 (D.C. Cir. 1987); United States v. Jackson, 915 F.2d 359, 360 (8th Cir. 1990). Obviously, practices vary. The D.C. Circuit permitted a court to order the witness to prepare a written explanation of the assertion of the privilege under oath. Kemp v. Gay, 947 F.2d 1493, 1498 (D.C. Cir. 1991).

[1074] See Maffie v. United States, 209 F.2d 225, 231-232 (1st Cir. 1954); Marcello v. United States, 196 F.2d 437, 441 (5th Cir. 1952).

[1075] See USAM 9-11.154: "Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself/herself."

required to assert the privilege on the record before the grand jury or petit jury in response to pertinent questions.

If the prosecutor intends to challenge the assertion of the privilege, the witness must be called. However, it is Department policy that ordinarily a target's written assertion of the privilege should not be challenged before the grand jury.[1076] The witness need not be asked all questions, but once the witness asserts the privilege, the prosecutor should ask if the witness intends to assert the privilege as to all questions on the same topic or about the same transaction. Once it is clear the witness does not intend to answer any other questions, the witness may be excused.

If the prosecutor believes that a claimant is not entitled to assert the Fifth Amendment or has asserted a claim that is broader than necessary to protect the claimant's rights, the prosecutor may challenge the assertion by a motion to compel.

A judge, not the witness, makes the final determination of the availability of the Fifth Amendment based upon the facts of the case and the "implications of the questions in the setting" in which asked.[1077] The court will determine whether the witness validly and properly invoked the privilege. If the witness'ss basis for asserting the Fifth Amendment is not clear from the questions posed or types of documents demanded, the claimant may be required to establish in *camera* the basis for the assertion by describing the nature of the criminal charge for which he or she would be providing evidence or by allowing a judge to examine the materials to determine whether they are of the type protected by the privilege.[1078]

[1076] See USAM 9-11.154: "However, if a "target" of the investigation (as defined in USAM 9-11.150 as a putative defendant to a prosecution, one with substantial evidence linking him to a crime) and his/her attorney state in a writing, signed by both, that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e. the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry."

[1077] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[1078] In re Three Grand Jury Subpoenas, 847 F.2d 1024, 1028-1030 (2d Cir. 1988); In re Horowitz, 482 F.2d 72, 79 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

d. Waiver of the Fifth Amendment privilege

A witness may knowingly and voluntarily waive his or her Fifth Amendment privilege.[1079] Department policy requires an explicit waiver from a subject or target who chooses to exercise his or her right to testify and present evidence on his or her own behalf before the grand jury.[1080] The subject or target must also consent to full examination under oath. Also, a witness who fails to invoke the Fifth Amendment as to questions to which the privilege would have applied has waived the privilege as to all questions on the same subject in the same proceeding.[1081] If the witness has initially been advised of the right against self-incrimination and received an explanation concerning the penalties for perjury, the witness is not entitled to repeated warnings that he or she can refuse to testify in order for the waiver to be valid.[1082] Courts are often hesitant to determine that a waiver has occurred.[1083]

[1079] United States v. Washington, 431 U.S. 181, 186-190 (1977).

[1080] See USAM 9-11.152.

[1081] The witness may also be found to have waived the privilege with respect to parallel proceedings. United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987). See additional discussion of parallel proceedings in Chapter Five of this Manual.

[1082] United States v. Valentine, 820 F.2d 565, 572 (2nd Cir. 1985); United States v. Babb, 807 F.2d 272, 276 (1st Cir. 1986).

[1083] See, e.g., Emspak v. United States, 349 U.S. 190, 196-199 (1955); Bank One of Cleveland N.A. v. Abbe, 916 F.2d 1067, 1077 (6th Cir. 1990); In re Hitchings, 850 F.2d 180, 181 (4th Cir. 1988) (affirmation of grand jury testimony not waiver; additional immunity grant necessary for trial testimony); United States v. Friedrick, 842 F.2d 383, 397, 399 (D.C. Cir. 1982) (agreement concerning polygraph examination during informal investigation not waiver despite execution of form); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979) (proper Fifth Amendment invocation at trial despite grand jury testimony given on same subject), cert. denied, 446 U.S. 935 (1980).

In most federal jurisdictions waiver of one's Fifth Amendment privilege before the grand jury does not constitute waiver of the privilege at trial.[1084] Only in the District of Columbia is Fifth Amendment waiver before the grand jury deemed waiver of the privilege at trial.[1085]

Once a witness voluntarily reveals incriminating facts, the witness may not refuse to disclose the details related to those facts.[1086] Waiver of the privilege with respect to information contained in a document can, in some circumstances, also result in compelled testimony concerning those documents.[1087] Thus, once the waiver has occurred, for each question asked, the appropriate determination for a court is whether the answer demanded would subject the witness to a "real danger of further incrimination."[1088]

A witness who has previously discussed facts relevant to a grand jury investigation with an FBI agent, investigator or federal prosecutor may still assert the Fifth Amendment privilege before the grand jury as to testimony concerning those same facts.[1089] The earlier statements do not constitute a waiver of the privilege since intervening events may have created apprehension of potential criminal prosecution or the statements before the grand jury may be an independent source of evidence against the witness.[1090] A guilty plea is a

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[1084] United States v. Licavoli, 604 F.2d 613 (9th Cir. 1973); United States v. Houssand, 550 F.2d 818, 821 n.3 (2d Cir. 1977).

[1085] United States v. Miller, 904 F.2d 65, 67-68 (D.C. Cir. 1990); United States v. Ellis, 416 F.2d F.2d 791 (D.C. Cir. 1969).

[1086] Brown v. United States, 356 U.S. 148, 155-56 (1958); Rogers v. United States, 340 U.S. 367, 373-374 (1951).

[1087] Olsen v. United States, 872 F.2d 820, 823 (8th Cir. 1989).

[1088] Rogers v. United States, 340 U.S. 367, 374 (1951). See also United States v. Apfelbaum, 445 U.S. 115, 128 (1980).

[1089] United States v. Cain, 544 F.2d 1113, 1117 (1st Cir. 1976) (prior deposition); United States v. Lawrenson, 315 F.2d 612, 613 (4th Cir. 1963) (refusal to repeat unsworn statement); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958) (confession to FBI agent).

[1090] See Pillsbury Co. v. Conboy, 459 U.S. 248, 262-264 (1983); In re Morganroth, 718 F.2d 161, 165-67 (6th Cir. 1983).

waiver of the privilege with respect to the crime charged, but not a blanket waiver of the privilege as to potential other offenses.[1091]

2. Types of Immunity

Prosecutors obtain immunity for witnesses either pursuant to the federal immunity statute or by an agreement. It is helpful to keep this in mind to avoid becoming confused by a number of other terms frequently used to describe immunity, such as formal, informal, use, transactional, letter, desk, pocket and act-of-production immunity.

a. Statutory Immunity

The current statute is 18 U.S.C. 6001 et seq. Enacted in 1970 and upheld by the Supreme Court in the case of Kastigar v. United States, 406 U.S. 441, 453 (1972), the federal immunity statute provides the witness with use immunity, i.e., testimony compelled by the statue cannot be used against the witness in a subsequent criminal prosecution. Prior statutes conferred transactional immunity. Transactional immunity differs from use immunity because it protects the witness against a subsequent criminal prosecution for the subject matter of the immunity. Under the use immunity statute, the government can still prosecute the witness provided, in the language of 18 U.S.C. 6002, "...no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The prohibition against derivative use of the testimony is fundamental to the constitutionality of the statute. As the Supreme Court pointed out in Kastigar v. United States, 406 U.S. 441,460-461, "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as

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[1091] Bank One of Cleveland N.A. v. Abbe, 916 F.2d 1067, 1077 (6th Cir. 1990).

an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Prior statutes conferring transactional immunity were broader than the protection afforded by the Fifth Amendment. The Court now holds that immunity from use and derivative use is co-existensive with the privilege against self-incrimination.

b. Non-Statutory Immunity

Prosecutors will often extend non-statutory immunity to a witness. Commonly referred to as "informal immunity", "letter immunity," or "pocket immunity", non-statutory immunity is an agreement or contract between the government, the witness, and, normally, the witness's attorney, setting out the terms of the bargain, including the scope of immunity being conferred. The prosecutor typically sets out the immunity agreement in the form of a letter and hence the term "letter immunity". It should be emphasized that non-statutory immunity may confer either use or transactional immunity, depending upon the terms of the agreement, whereas the statute confers only use immunity. A sample letter that sets forth the agreement for non-statutory immunity may be found in the Appendix to this Manual.

One of the important differences between statutory and non-statutory immunity is that statutory immunity is binding upon the state, whereas informal immunity is not. This is because the state prosecutor is not a party to the agreement between the federal prosecutor and the witness and is therefore not bound. Another reason is that non-statutory immunity is not "compelled" in the sense of the Fifth Amendment but is the product of a voluntary agreement. The witness is therefore protected by the terms of the agreement rather than the Fifth Amendment.

It should be emphasized that non-statutory immunity does not bestow immunity upon the witness from liability to the United States, or any other person, under civil statutes.

c. Act-of-Production Immunity

The act of producing the business records of a sole proprietorship in response to a subpoena is protected by the Fifth Amendment. The act of production is testimonial because it tacitly concedes the existence of the records, their possession and control by the person subpoenaed, and that such records are those called for by the subpoena. The Supreme Court's holding in United States v. Doe, 465 U.S. 605, 612-614 (1984), means that prosecutors must now compel production of such records from persons who are targets of the investigation. A request for act-of-production or Doe immunity under the statute is obtained in the same manner as testimonial immunity, and the Department of Justice will issue the same letter of authority. To avoid any question about the fact that the immunity is limited to the act of production, prosecutors must therefore spell out this fact in the Court's order.

Before seeking immunity for the production of records, it is important to determine who will be available to authenticate such records if they are to be introduced against the defendant. Care, too, must be taken in examining the target before the grand jury to prevent developing immunized testimony that could precipitate a Kastigar hearing or taint the case. In receiving the records pursuant to Doe immunity, the prosecutor should be careful to limit his or her questions strictly to the identity of the records as being those called for by the subpoena.

Act-of-production or Doe immunity does not extend to the records of other entities such as corporations, even closely-held corporations and partnerships. It remains to be seen whether the Court will extend its ruling to include personal as distinct from business records.

II. Statutory Framework

The federal immunity statute is divided into separate sections for court and grand jury proceedings, administrative agency proceedings and congressional proceedings. Section 6002 sets out the general rule that in all such proceedings a witness cannot refuse to testify if ordered to do so under appropriate provisions of the statute. Prosecutors will have little occasion to be concerned with Section 6004, which requires administrative agencies to seek approval of the Attorney General to grant immunity to witnesses at agency proceedings. United States Attorneys are not required to review such requests, which administrative agencies send directly to the Department of Justice. Nor will prosecutors be concerned with Section 6005, which provides for immunity in congressional proceedings. Section 6001 defines terms applicable to the statute. Prosecutors will be concerned almost exclusively with Section 6003.

A. Section 6003

"(a) In case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment-

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

B. Authorization

Under existing federal regulations, the Attorney General has delegated his authority to approve immunity requests down to the level of Deputy Assistant Attorneys General. Letters of authority are issued by divisions of the Department of Justice having cognizance of the subject matter of a request. All divisions must first obtain the concurrence of the Criminal Division before approving immunity requests. The Criminal Division has authority to approve immunity requests relating to any matter that is not specifically assigned to another division.

III. Applying for and Obtaining an Immunity Order

A. Department of Justice Guidelines and Procedures

The Attorney General's guidelines for immunity are contained in USAM 9-23.000 et seq.

a. A completed form must be signed by the United States Attorney or, in his or her absence, by a senior supervisory assistant.

b. The completed request form should be sent to the Witness Immunity Unit of the Criminal Division or to the Division having cognizance of the subject matter of the request. The Witness Immunity Unit conducts a name check of the witness with the FBI, IRS, and with litigating sections of the Criminal Division. The Unit reviews the request and prepares a letter of authority for approval of the Assistant Attorney General or any designated Deputy Assistant Attorney General.

In the case of requests submitted to other Divisions, the Unit conducts a name check and prepares a concurrence memorandum for the Criminal Division.

c. Upon approval of an immunity request, the Department of Justice issues a standard authorization letter to the requestor. In most cases such letters are sent via facsimile copier, with the original being mailed afterwards. It should be noted that the wording of the letter of authority covers ancillary proceedings. This wording is intended to extend the authority to compel the witness'ss testimony to trials following grand jury proceedings. Accordingly, prosecutors who have obtained immunity for a witness to testify before the grand jury will use the same authority to compel the witness to testify at a trial resulting from such proceedings.

d. Upon receipt of the letter of authorization, the prosecutor will prepare an order for the court's signature and will normally attach the letter of authority to the order. In most districts prosecutors present the order and letter of authority to the judge *ex parte*.

B. Attorney General's Guidelines/Criteria for Granting Immunity

A compulsion order may not be sought unless two statutory preconditions are satisfied: First, that the testimony or information sought may be necessary to the public interest; and, second, that the potential witness has refused or is likely to refuse to testify or provide information based on the privilege against self-incrimination. The questions set out in the form request are designed to address the factors set forth below.

1. Public Interest Standard

The Attorney General's immunity guidelines set out six standards to use in evaluating whether an immunity order will be in the public interest. These standards are not all-inclusive, but a concise statement of the factors which will

be considered in evaluating and approving an immunity request. A discussion of these six standards follows.

a. The seriousness of the offense, and the importance of the case in achieving effective enforcement of the criminal laws

Most crimes which become the focus of a grand jury investigation by federal prosecutors are felonies. The federal prosecutor should point out any case specific facts which will support a conclusion that the offense is serious, apart from merely its maximum penalty, and that the specific case is important in that district.

b. The value of the potential witness's testimony or information to the investigation or prosecution

This is one of the most crucial factors to assess, because an immunity order, as discussed below in Section V of this Chapter, will realistically foreclose prosecution of the witness in the majority of cases. Thus, for the immunity order to be in the public interest, the expected value of the testimony must outweigh the likely damage of allowing a culpable individual to escape prosecution. This requires delicate balancing, and the decision often must be made based on incomplete information.

It is usually desirable to obtain a "proffer" of the witness's expected testimony from the witness's attorney, or from the witness. If the proffer is initially obtained from the attorney, it is good practice to require that the essential details of the attorney proffer be confirmed by the prospective witness before immunity is requested. Whichever approach is taken, it is crucial that the proffer encompass all relevant facts and all relevant documents to which the witness can testify and that it be given in sufficient detail so that the prosecutor is able to evaluate the nature and quality of the expected testimony.

Prior to obtaining a proffer, the prosecutor and the witness's attorney should agree upon the ground rules for obtaining the proffer. Absent such a ground rule agreement, the witness's statement may be used as substantive evidence against the witness. The ground rules should be reduced to a letter agreement and signed by the prosecutor, the witness, and the attorney for the witness. Generally, these letters provide only direct use immunity and permit the government to use the information to pursue leads or as a basis for cross-examination or rebuttal in any subsequent prosecution.

Even if a proffer is obtained, the prosecutor must closely scrutinize the witness's involvement in the criminal conduct and all available information which would determine the witness's knowledge and likely degree of cooperation with the investigation. Prior to seeking immunity, the prosecutor should gather as much information about the witness as possible through other witness interviews, public sources, subpoenaed documents, and grand jury testimony of other individuals.

c. Likelihood of the witness promptly complying with the immunity order and providing useful testimony

If the witness has a history of a lack of cooperation, seeking a compulsion order against the witness could delay the investigation and provide little useful information. Since the application and review process takes quite a bit of time, the authorizing official at the Department of Justice needs the prosecutor's assessment regarding the chances that the immunity process may result in delay and possible contempt proceedings.

d. Person's culpability relative to other possible defendants

The witness's relative culpability must be weighed against the likely value of his or her testimony in deciding whether immunity would be in the public interest. The Attorney General's guidelines state that, in the absence of

"unusual circumstances," it would not be in the public interest to compel the testimony of a high-level or extremely culpable witness to convict a lower-level or less culpable individual. However, in appropriate investigations, immunizing such a witness can be justified if the witness offers his or her cooperation at an early stage of the investigation, or is an unattractive potential defendant because of other factors such as advanced age or poor health.

The prosecutor should be aware of the dangers inherent in immunizing a highly culpable individual. If the witness testifies at trial, the jury may focus on the fact that the witness was not prosecuted while less involved individuals stand trial. The result could be an acquittal of the less culpable defendant who stands trial.

e. The possibility of successfully prosecuting the witness without immunity

This is closely related to the fourth factor. For example, a witness may be highly culpable, even a ringleader, but if his or her involvement is entirely outside the statute of limitations period, an immunity order may be warranted.

f. The possibility of adverse consequences to the witness if the witness testifies pursuant to a compulsion order

Retaliation against a witness can be both economic and physical and can occur even when investigating white-collar crimes. Where serious potential harms exist, prosecutors should consider taking advantage of the Witness Security Program. In addition, the obstruction of justice statutes, which prohibit attempts to influence or intimidate witnesses and prohibit retaliation against witnesses, are available to deter abuse of witnesses.[1092]

[1092] 18 U.S.C. §§ 1510, 1512, 1515.

2. *Exercise of the Privilege*

The second criteria for the grant of immunity is that the witness has refused or is likely to refuse to testify on the basis of his or her privilege against self-incrimination. Accordingly, requests for authorization should only be made where there is a reasonable expectation that the witness will assert the privilege (or has already done so) and when there is a reasonable expectation that the court would recognize this assertion of the privilege. Prosecutors should not merely accept at face value an assertion of the privilege. An independent assessment should be made as to whether the privilege is available. If there appears to be no sound basis for invoking the privilege, the prosecutor should consider challenging this invocation and having the court determine its validity. Requests for authorization to immunize a witness should not be made solely as a matter of "insurance" to cover a remote contingency.

C. Anticipating Assertion of Privilege

Although the immunity statute authorizes the grant of immunity to witnesses who indicate that they will invoke their Fifth Amendment privilege if called to testify, some judges and United States Attorneys are unwilling to seek immunity until the witness actually claims the privilege. However, other judges encourage the United States Attorney to seek immunity in anticipation of assertion of the privilege to avoid delaying a trial while such requests are being processed.

Another question that may arise in connection with a witness who has indicated that he or she will invoke the privilege if called before the grand jury is whether the prosecutor may call that individual before the grand jury without granting that witness immunity. The Department policy is that a non-target witness may be called before the grand jury even if the prosecutor is unwilling to grant that witness immunity. With respect to targets, if both the target and the target's attorney state in writing that the target will assert the privilege if called, then ordinarily the target should be excused from testifying. However, the prosecutor may insist on an appearance by the target if the information sought from the target is not subject to the Fifth Amendment. In determining the desirability of insisting on such an appearance, the prosecutor should

consider the factors which justified issuing a subpoena to the target in the first place, i.e., the importance of the expected testimony, its unavailability from other sources, and the possible applicability of the Fifth Amendment.

The ABA Standards on Criminal Justice, Standard 3-3.6(e), provides as follows:

> (e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to law.

The Department position is that this standard is overbroad, making it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the questions without incriminating himself or herself. Since the Department distinction between target and non-target witnesses appears to conform with the commentary to ABA Standard 3-3.6(e), which refers only to "potential defendants" and not to all witnesses, Department policy would appear to be consistent with ABA Standard 3-3.6(e).

D. Preparing and Presenting the Compulsion Order

18 U.S.C. § 6003 describes generally the content of the application and form of proposed order the prosecutor should submit to the court. 18 U.S.C. § 6003(b)(2) authorizes the U.S. Attorney to seek a compulsion order when the witness (1) "has refused" or (2) "is likely to refuse" to testify on the basis of his or her privilege against self-incrimination. Thus, the statute authorizes seeking and obtaining a compulsion order prospectively, as well as after the witness has already refused to testify. The language of the application and proposed compulsion order should reflect whether the witness "has refused" or "is likely to refuse" to testify.

18 U.S.C. § 6003 says that the district court "shall issue" a compulsion order upon proper application of the United States Attorney. The sole function of the court is to ascertain that there has been compliance with the statute; the court is not empowered to inquire into the merits of the application.[1093] Accordingly, once Department of Justice authorization has been obtained, the matter of actually seeking a compulsion order rests with the discretion of the United States Attorney.

The prosecutor submits the application seeking the court order, and the proposed order for the court's signature, to the judge assigned to the grand jury matter. As with most grand jury matters, practices vary with the various districts. Some districts assign immunity matters to the magistrate judge. Some judges may wish to see the authorization letter and any applicable Division approval memorandum. In other districts, the judge will approve an application in which the United States Attorney states that he or she has received the appropriate authorization. As contemplated by the statute, the submission of the papers is often done *ex parte*. However, in some districts a closed hearing is held on the grand jury matter, but the witness and the witness's attorney are present to raise any challenges to the entry of the order. Clearly, if any hearings are conducted on the immunity order, they should be *in camera* and all records should be sealed to prevent any breach of grand jury secrecy.

E. Presenting the Immunized Witness in the Grand Jury

If the compulsion order has been obtained *ex parte* and prospectively, it is wise to advise the witness of his or her rights on the record before the grand jury. The prosecutor may then ask the witness if the witness intends, as anticipated, to assert his or her Fifth Amendment rights in response to any questions asked. If the witness answers affirmatively, the foreperson of the

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[1093] In re Kilgo, 484 F.2d 1215, 1219 (4th Cir. 1973); see S. Rep. No. 617, 91st Cong., 1st Sess. 145 (1969), H.R. Rep. No. 1549, 91st Cong., 2d Sess. 43 (1970); see also Bursey v. United States, 466 F.2d 1059, 1073 (9th Cir. 1972).

grand jury will then read the order to the witness.[1094] The immunity order should be marked as an exhibit to the witness's grand jury testimony. The witness may also be asked questions until the witness refuses to answer on the basis of his or her Fifth Amendment rights. The prosecutor can then ask the witness if his or her answer will be the same to any other questions asked. The prosecutor would then follow the steps outlined previously.

If the immunity order has been entered at a closed grand jury hearing, but with the witness present, the prosecutor can begin the questioning of the witness in the grand jury by describing for the record the proceedings which took place in court regarding the immunity order. The immunity order would be marked as an exhibit and the witness would affirm that he or she was present when the order was entered and his or her understanding of the order compelling testimony.

The immunity authorized by the statute is not self-executing. The witness must physically appear and claim the privilege and be advised of the order before the witness can be held in contempt for refusing to testify.[1095]

After the immunity order has been read to the witness, the prosecutor should make it clear on the record that the witness understands the order. The witness should state his or her understanding that the witness has no right to refuse to answer questions, but that what he or she says cannot be used against the witness; the witness should state his or her understanding that the witness did not receive immunity for anything about which he or she does not testify; and that, notwithstanding the order, he or she may still be prosecuted for perjury or giving a false statement if the witness does not testify truthfully. While this is part of the immunity order, it is wise to repeat this admonition.

[1094] The fact that government counsel, rather than the foreperson, read the order to the witness provides no justification for the witness' refusal to answer questions thereafter. In re Grand Jury Proceedings, 872 F.2d 5, 9 (1st Cir. 1989).

[1095] United States v. DiMauro, 441 F.2d 428, 440 (8th Cir. 1971); see Proving Federal Crimes at 3-15 to 17.

IV. Refusal to Comply with Compulsion Order

The refusal of a witness to testify before a grand jury or to produce other information after the issuance of an order of compulsion under 18 U.S.C. § 6002 is punishable by civil or criminal contempt.[1096]

A. Civil Contempt

1. Statute and Rules

28 U.S.C. § 1826, a codification of preexisting practices, was enacted in 1970 to provide a statutory basis for the application of summary civil contempt powers to recalcitrant witnesses. It provides that a witness may be held in contempt when he or she refuses to comply with a court order "without just cause shown."[1097] Also pertinent to the contempt power and its exercise, whether civil or criminal, are Rules 17(g) and 42 of the Federal Rules of Criminal Procedure.[1098]

Ordinarily, the district courts should first consider the feasibility of effecting compliance with compulsion orders through the imposition of civil contempt under 28 U.S.C. § 1826. "The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would

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[1096] See, e.g.,Harris v. United States, 382 U.S. 162, 165 (1965); United States v. Armstrong, 781 F.2d 700, 702-03 (9th Cir. 1986); United States v. Petito, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982); In re Grand Jury Proceedings (Mena), 662 F.2d 532, 533 (9th Cir. 1981). See Chapter Six, Section VII, of this Manual for a discussion of contempt in the context of subpoena enforcement.

[1097] Where non-frivolous defenses are alleged, a hearing may be required, as discussed below.

[1098] United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980).

be inappropriate."[1099] The court, however, is not required to consider civil contempt expressly on the record prior to the institution of criminal contempt proceedings against recalcitrant witnesses.[1100] And a grand jury may indict a contumacious witness under 18 U.S.C. § 401(3) without a court's prior consideration of civil contempt.[1101]

Whether a contempt proceeding is civil or criminal will depend upon the nature of the sanction imposed. The purpose of civil contempt is not to punish the witness by imprisonment, but rather to secure testimony or other evidence through the creation of an incentive for compliance.[1102] On the other hand, the purpose of criminal contempt is to punish the witness for his or her refusal to obey the court's order, thus vindicating the court's authority.[1103]

Confinement for civil contempt is limited to the life of the court proceeding or the term of the grand jury, but in no event may the confinement exceed 18 months.[1104] A civil contempt confinement may interrupt the

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[1099] United States v. Wilson, 421 U.S. 309, 317 n.9 (1975), quoting Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966). See In re Grand Jury Impaneled January 21, 1975, 529 F.2d 543, 551 (3rd Cir.) (court normally will impose least onerous sanction reasonably calculated to gain compliance), cert. denied, 425 U.S. 992 (1976).

[1100] In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 217-18 (3rd Cir. 1981).

[1101] United States v. Armstrong, 781 F.2d 700, 702-06 (9th Cir. 1986).

[1102] Although a civil contemnor may later argue that civil incarceration has become punitive in character because he remain unwilling to testify, see, e.g., Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983), the court may properly continue the confinement so long as it is persuaded that the coercive sanction may produce its intended result in the future. Id. at 37; In re Grand Jury, 851 F.2d 1499, 1502 (1st Cir. 1988); Matter of Federal Grand Jury February 1987 Term, 677 F. Supp. 26, 28 (D. Me. 1988).

[1103] E.g., Hicks v. Felock, 485 U.S. 624, 631-32 (1988); Gompers v. Buck Stove and Range Co., 221 U.S. 418, 439-452 (1911); In re Weiss, 703 F.2d 653, 660-662 (2d Cir. 1983); United States v. Powers, 629 F.2d 619, 626-27 (9th Cir. 1980); In re Grand Jury Investigation, 600 F.2d 420, 422-423 (3d Cir. 1979).

[1104] In re Grand Jury Proceedings (Doe), 863 F.2d 667, 668 (9th Cir. 1988); McQuade v. United States, 839 F.2d 640, 642 (9th Cir. 1988); In re Grand Jury Proceedings (Klayman), 760 F.2d 1490, 1491 (9th Cir. 1985); United States v. Powers, 629 F.2d 619, 625-26 (9th Cir. 1980).

service of a preexisting state or federal sentence.[1105] When the potential duration of civil coercive confinement is severely limited, however, a court may consider civil contempt a futile sanction.[1106]

A witness can purge himself or herself of civil contempt at any time. Thus, when the witness complies with the order, the witness must be released. When the grand jury has expired, civil contempt is not available.[1107] The witness cannot purge himself or herself before a no-longer-existent grand jury.

Although not precluded by the Constitution,[1108] the Department of Justice has a general policy against calling a witness before a successor grand jury and seeking civil contempt when the witness has refused to testify before a prior grand jury and was incarcerated as a result. [1109]

2. *Mechanics of Prosecution*

Federal Rule of Criminal Procedure 42 is applicable to both civil and criminal contempt proceedings.[1110] However, the summary procedure provided for by Rule 42(a) is not appropriate for a refusal to testify before a

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[1105] In re Grand Jury Investigation, 865 F.2d 578, 580-583 (3rd Cir. 1989); Sanchez v. Meese, 807 F.2d 601, 601-603 (7th Cir. 1986); In re Sealed Case, 794 F.2d 749,750 (D.C.Cir. 1986), cert. denied, 429 U.S. 924 (1977). But see United States v. North, 621 F.2d 1255, 1261 n.9 (3rd Cir. 1980) (civil contempt may not be sufficient where "the contemnor is already incarcerated and is therefore unlikely to respond to a threat of summary civil contempt"), cert. denied, 449 U.S. 866 (1980).

[1106] United States v. North, 621 F.2d at 1263 (3d Cir.), cert. denied, 449 U.S. 866 (1980).

[1107] Shillitani v. United States, 384 U.S. 364, 371 (1966); United States v. Armstrong, 781 F.2d 700, 702-03 (9th Cir. 1986); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 218 (3rd Cir. 1981).

[1108] Shillitani v. United States, 384 U.S. at 371 n.8.

[1109] USAM 9-11.160.

[1110] Matter of Kitchen, 706 F.2d 1266, 1271-1272 (2d Cir. 1983); United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980)

grand jury. Rule 42(a) deprives the contemnor of procedural safeguards and is available only when immediate punishment is necessary to put an end to acts disrupting the proceedings. A hearing is not required by Rule 42(a).

"Rule 42(b) prescribes the 'procedural regularity' for all contempts in the federal regime except those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself."[1111] Rule 42(b) applies to civil contempt proceedings initiated under 28 U.S.C. § 1826, which permits a court to "summarily" order the confinement of a grand jury witness who refused to comply with an order to testify.[1112] Thus, a potential contemnor is entitled to notice, a hearing, and a reasonable time to prepare his or her defense as prescribed by Rule 42(b), despite the use of the word "summarily" in § 1826(a).

It is not required that a potential contemnor have formal notice.[1113] Rule 42(b) only requires a reasonable time for the preparation of a defense, that is, to show "just cause" for refusing to respond. The determination of how much time is reasonable is within the discretion of the district court and will vary according to the circumstances of each case. One court, noting that contempt proceedings against grand jury witnesses often present complex issues of law and/or fact, was of the opinion that a five-day notice period should be adopted as the standard, absent a showing of some compelling need to shorten the time or of some reason why a longer time is needed.[1114] Two days have been held adequate where no showing of just cause appeared to have been available.[1115] Where the issues have been considered at an immunity hearing, the witness may have had adequate time to prepare, even though very little time elapses between the alleged contempt and the contempt hearing.

[1111] Harris v. United States, 382 U.S. 162, 167 (1965).

[1112] In re Sadin, 509 F.2d 1252, 1255 (2d Cir. 1975); In re Grand Jury Investigation (Bruno), 545 F.2d 385, 388 (3rd Cir. 1976); United States v. Alter, 482 F.2d 1016, 1023-1024 (9th Cir. 1973).

[1113] United States v. Rylander, 714 F.2d 996, 1004 (9th Cir. 1983).

[1114] United States v. Alter, 482 F.2d at 1023-24.

[1115] In re Sadin, 509 F.2d 1252, 1255-56 (2d Cir. 1975).

A witness who appears and refuses to testify before a grand jury is not yet in contempt. The refusal must be of a direct order of the court, such as a compulsion order under 18 U.S.C. § 6002.[1116] The witness should be told of the obligation to testify and that if the witness refuses he or she can be held in contempt. A recalcitrant witness can be taken to the court to secure a direct order of the court requiring the witness to testify and giving an appropriate warning regarding the consequences of failing to testify. The witness should then be returned to the grand jury and the request renewed. If the witness again refuses, contempt proceedings should be undertaken.

The hearing required under Rule 42(b) and 28 U.S.C. § 1826(a) may conceivably take place the same day and may depend on the nature of the defense, if any, offered by the witness. Courts generally appear reluctant not to grant notice of at least several days when substantial issues are raised. In that event, the courts require an advisory hearing that, at the very least, allows the witness to pursue all nonfrivolous defenses to the contempt charge. On the other hand, evidentiary hearings are not required in the absence of solid allegations that raise genuine issues.[1117] A defendant is not entitled to a jury trial in a civil contempt proceeding.

Whether or not such issues are raised, the government should be prepared to lay a foundation to establish the contempt, e.g., to establish the presence of a quorum on the date and time in question. This may be shown by an affidavit or testimony of the grand jury foreperson or secretary or properly authenticated grand jury minutes. In establishing the contempt, it is probably best to read the relevant questions and responses from a properly authenticated transcript of the grand jury proceeding.

Section 1826(b) prohibits granting bail while an appeal from an order of confinement is pending if the appeal appears frivolous or taken for delay. An appeal from a confinement order under this Section is to be disposed of "as soon as practicable," but not later than thirty days from the filing date. These provisions lend a certainty to the sanction consistent with the urgent public need

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[1116] Such an order would be lacking if the witness were appearing pursuant to informal immunity.

[1117] The potential defense and objections to a contempt charge are discussed below.

to obtain testimony.[1118] Thus, the statute itself affords a sound predicate for government opposition to an application for bond pending appeal.

B. Criminal Contempt

1. Statute and Rules

Where it is appropriate to impose punishment upon a recalcitrant witness, the court may invoke the provisions of 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure. Criminal contempt is punishable under 18 U.S.C. § 401 by fine or imprisonment; courts may not impose both a fine and imprisonment, nor a fine coupled with probation.[1119] Unlike civil contempt, the confinement or fine imposed is for a definite period or amount.[1120] The witness cannot purge himself or herself of the contempt and thereby avoid the sentence.

Sentences up to and including six months may be given after the notice and hearing required by Fed. R. Crim. P. 42(b).[1121] The Supreme Court has ruled, however, that sentences exceeding six months may not be imposed absent a jury trial or waiver thereof.[1122] After a jury trial, there is no limit to the length of the sentence as there is no maximum set for punishing criminal contempt under Rule 42(b). Nevertheless, the government should not press in a

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[1118] See United States v. Coplon, 339 F.2d 192, 194 (6th Cir. 1964).

[1119] Penfield Co. v. Securities Exchange Commission, 330 U.S. 585, 593 (1947); In re Bradley, 318 U.S. 50, 51 (1943); United States v. Holmes, 822 F.2d 481, 496-499 (5th Cir. 1987); United States v. Hilburn, 625 F.2d 1177, 1181 (5th Cir. 1980); MacNeil v. United States, 236 F.2d 149, 154 (1st Cir.), cert. denied, 352 U.S. 912 (1956).

[1120] United States v. United Mine Workers, 330 U.S. 258, 303 (1947).

[1121] United States v. Rylander, 714 F.2d 996, 1005 (9th Cir. 1983).

[1122] Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); see also United States v. Twentieth Century Fox, 882 F.2d 656, 665 (2d Cir. 1989) (organization has a right to a jury trial when fine imposed for criminal contempt exceeds $100,000), cert. denied, 492 U.S. 1021 (1990).

non-jury hearing for imprisonment in excess of six months and should be certain that the court is aware that any sentence longer than six months requires that the defendant be allowed a jury trial.

In one case involving criminal contempt occurring before a grand jury, a sentence of five years imprisonment was imposed.[1123] Prosecution was by grand jury indictment for violation of 18 U.S.C. § 401.

A sentence for another criminal offense may be interrupted to compel the witness to serve an intervening contempt sentence so that an adjudication of criminal contempt not be deprived of its efficacy.[1124] In In re Grand Jury Investigation (Oreski), 865 F.2d 578, 580 (3rd Cir.), cert. denied, 110 S. Ct. 264 (1989), a majority of a panel of the Third Circuit specifically held that a federal court has the authority to interrupt a preexisting state-imposed criminal sentence during the period of confinement to compel the witness to serve the contempt sentence, rejecting Second Circuit decision to the contrary eleven years earlier in In re Liberatore, 574 F.2d 78, 87 (2d Cir. 1978).

2. *Mechanics of Prosecution*

Rule 42 of the Federal Rules of Criminal Procedure governs the procedures as to notice and hearing for both criminal and civil contempt. These procedures are discussed above under civil contempt.

[1123] United States v. Papadakis, 802 F.2d 618, 622 (2d Cir. 1986), cert. denied, 479 U.S. 1092 (1987). See United States v. Lach, 874 F.2d 1543, 1549 (11th Cir. 1989) (two consecutive 42-month terms); United States v. Sternman, 415 F.2d 1165, 1167 (6th Cir. 1969) (three years), cert. denied, 397 U.S. 907 (1970). See also United States v. Patrick, 542 F.2d 381, 393 (7th Cir. 1976) (four-year sentence imposed upon immunized trial witness convicted of contempt), cert. denied, 430 U.S. 931 (1977). But see United States v. Underwood, 880 F.2d 612, 620-621 (1st Cir. 1989) (three year contempt sentence excessive under Sentencing Guidelines); United States v. Garcia, 755 F.2d 984, 990 (2d Cir. 1985) (nine year contempt sentence held excessive).

[1124] In re Grand Jury Investigation (Oreski), 865 F.2d at 580-81 and n.4 (citing, inter alia, the unanimous holdings of the nine Courts of Appeals which have addressed this issue); United States v. Liddy, 510 F.2d 669, 672-73 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975). See United States v. North, 621 F.2d 1255, 1263 (3rd Cir.), cert. denied, 449 U.S. 866 (1980).

Bail for a defendant found in criminal contempt is controlled by the provisions of Fed. R. Crim. P. 46.

The obstruction of justice statute (18 U.S.C. § 1510) was designed to deter coercion or intimidation of potential witnesses or informants from giving information to federal criminal investigators prior to initiation of judicial proceedings. It is not used in connection with contempt proceedings.

C. Defense and Challenges to Contempt

In attempting to avoid the contempt sanction or to show "just cause" under 28 U.S.C. § 1826(a), witnesses have raised a variety defenses and challenges.[1125]

1. Constitutionality of the Statute

The Supreme Court upheld the validity of 18 U.S.C. §§ 6001-6003 against constitutional attack in Kastigar v. United States, 406 U.S. 441, 448 (1972). The use and derivative use immunity conferred by § 6001-6003 and the protections afforded by the Fifth Amendment are coextensive. Consequently, a grant of use immunity is sufficient to overcome the privilege against self-incrimination.[1126]

[1125] Defenses based on the attorney-client, marital, and other privileges are more fully discussed in Chapter Seven of this Manual.

[1126] Kastigar v. United States, 406 U.S. 441, 453; United States v. Rose, 806 F.2d 931, 932 (9th Cir. 1985); In re Grand Jury Subpoena of Flanagan, 691 F.2d 116, 120-21 (2d Cir. 1982); United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973).

2. *Availablity of Immunity in All Cases*

While the immunity statute was enacted under the Organized Crime Act of 1970, the statute contains no limitation on the types of cases in which it may be invoked. 18 U.S.C. § 6003.[1127] A challenge that the immunity statute is available only to organized crime cases has no merit.

3. *Validity of Approval*

Contempt defendants have attempted to challenge the validity of a compulsion order on the ground that the statutorily-required approval by the Attorney General or other designated officials of the Department of Justice was not sufficient when granted by an Acting Attorney General or other designee.[1128]

Title 18, United States Code, Section 6003(b) provides in relevant part that "[a] United States Attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section . . . . " The designated Assistant Attorneys General and Deputy Assistant Attorneys General are defined in 28 C.F.R. § 0.175.[1129]

[1127] See In re Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

[1128] Challenges to the authority of an Acting United States Attorney to make application for a compulsion order have been rejected. In re Grand Jury Proceedings, 673 F.Supp. 1138, 1143 (D. Mass. 1987); In re Grand Jury Proceedings, 671 F. Supp. 5, 6-7 (D. Mass. 1987).

[1129] For example, 28 C.F.R. § 0.175(a) designates the officials who may approve applications for compulsion orders in investigations within the bailiwick of the Criminal Division:

> The Assistant Attorney General in charge of the Criminal Division, or any Deputy Assistant Attorney General of the Criminal Division is authorized to exercise the authority vested in the Attorney General by 18 U.S.C. [§] 6003, to approve the application of a U.S. Attorney to a Federal court for an order

(continued...)

In the event of a temporary vacancy in one or more of the authorizing officials' positions, when an official resigns, for example, and his or her successor has yet to be appointed, 28 C.F.R. § 0.132 defines who may act in the absent official's place. Together, these regulations authorize an Acting Attorney General, Deputy Attorney General, designated Assistant Attorney General, or Deputy Assistant Attorney General to approve a request for a compulsion order under § 6003. Every court that has considered a defendant's challenge to a compulsion order and resulting contempt citation on this ground has rejected the argument.[1130] A defendant's challenge to the validity of a compulsion order approved by a properly designated Acting official, therefore, is unfounded.

4. Public Interest Showing

Section 6003 provides that a United States Attorney, with the approval of a designated official of the Department of Justice, may request an immunity order "when in his judgment . . . the testimony or other information from such individual may be necessary to the public interest." The United States Attorney's discretionary decision to confer immunity cannot be reviewed by the court; the court's only function is to see that the procedures enumerated in the statute have been satisfied.[1131] In a resulting contempt proceeding, therefore,

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[1129](...continued)

> compelling testimony or the production of information by a witness in any proceeding before or ancillary to a court or grand jury of the United States . . . when the subject matter of the case is . . . within the cognizance of the Criminal Division . . . .

[1130] In re Grand Jury Proceedings, Horak, 625 F.2d 767, 769 & n.1 (8th Cir.) ("this contention is without merit"), cert. denied, 449 U.S. 840 (1980); United States v. Yanganita, 552 F.2d 940, 947 (2d Cir. 1977) ("This contention is meritless"). See Application of President's Commission on Organized Crime, 763 F.2d 1191, 1199-1200 (11th Cir. 1985); In re Grand Jury Proceedings (Pressman), 586 F.2d 724, 725, vacated, 593 F.2d 906 (9th Cir. 1978); In re Horn, 458 F.2d 468, 472-73 (3rd Cir. 1972); United States v. DiMauro, 441 F.2d 428, 438-39 (8th Cir. 1971); In re December 1968 Grand Jury, 420 F.2d 1201, 1203 (7th Cir.), cert. denied, 397 U.S. 1021 (1970); Federal Trade Commission v. Foucha, 356 F. Supp. 21, 23-24 (N.D.Ala. 1973).

[1131] In re Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

the defendant witness cannot challenge the propriety of the United States Attorney's decision to grant immunity.

5. Fourth Amendment Issues

A grand jury witness cannot successfully invoke the exclusionary rule.[1132] With the exception of illegal electronic surveillance issues (discussed below), a grand jury witness cannot avoid testifying on the ground that the witness's testimony is sought as a result of an illegal search. As noted below, however, a grand jury witness may challenge the reasonableness of a subpoena under a motion to quash.

6. Electronic Surveillance

As discussed in Chapter Six of this Manual, the federal wiretap statute precludes the use of information obtained during illegal electronic surveillance in any grand jury proceedings.[1133] On the basis of this statutory exclusionary rule, the Supreme Court in Gelbard v. United States, 408 U.S. 41, 47, 59-60 (1972), held that a grand jury witness may raise as a defense to a contempt charge the claim that questions propounded to the witness were based upon illegal electronic surveillance.[1134]

Under the Gelbard doctrine, when a witness alleges that his or her appearance before the grand jury is based on information obtained through illegal electronic surveillance, the government must respond to the degree necessary to overcome the strength and specificity of the allegations of

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[1132] United States v. Calandra, 414 U.S. 338, 354-55 (1973).

[1133] 18 U.S.C. § 2515. See USAM Section 9-11.124.

[1134] Gelbard v. United States, 408 U.S. 41, 47, 59-60 (1972). The Court left open the question of whether a grand jury witness may refuse to answer when the illegal electronic surveillance was authorized by court order. Id. at 61 n.22.

illegality, by demonstrating that no surveillance occurred,[1135] by demonstrating the legality of the surveillance, or by establishing that any surveillance played no role in the instant investigation.[1136] The legality of the surveillance may be demonstrated by providing the wiretap authorization pleadings to the supervising judge for *in camera* review[1137] or may require disclosure to the contemnor and possibly an adversarial hearing,[1138]

[1135] E.g., Grand Jury v. Gassiraro, 918 F.2d 1013, 1014-15 (1st Cir. 1990) (per curiam); In re Grand Jury Matter, 906 F.2d 78, 92 (3rd Cir.), cert. denied, 111 S.Ct. 509 (1990); Matter of John Doe Trader Number One, 894 F.2d 240, 243, 246 (7th Cir. 1990); In re Grand Jury Proceedings (Garcia-Rosell), 889 F.2d 220, 223 (9th Cir. 1989) (per curiam); United States v. Garrett, 773 F.2d 1071, 1072 (9th Cir. 1985); In re Grand Jury Proceedings (Hermann), 664 F.2d 423, 427-28 (5th Cir. 1981) (per curiam), cert. denied, 455 U.S. 1000 (1982). But see, United States v. Apple, 915 F.2d 899, 905-09 (4th Cir. 1990) (in trial context, federal prosecutor's denial insufficient to rebut defendant's prima facie showing that state agency had conducted illegal electronic surveillance when federal prosecutor's denial lacked showing that certain state agency had been checked for records of illegal surveillance); In re Grand Jury Proceedings (Ghibaudy), 757 F.2d 108, 114-15 (7th Cir. 1984) (government required to respond by affidavit to witness's motion for disclosure even when motion of witness not verified or supported by affidavit) cert. denied, 471 U.S. 1018 (1985). Cf., Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 702(a), 84 Stat. 922 (codified at 18 U.S.C. § 3504(a)(1)(1988)) (if aggrieved party asserts evidence obtained by illegal electronic surveillance, opponent must admit or deny such allegation).

[1136] Grand Jury v. Gassiraro, 918 F.2d 1013, 1015 (1st Cir. 1990).

[1137] In re Grand Jury Proceedings (Hill), 786 F.2d 3, 7 (1st Cir. 1986) (contemnor not entitled to all procedural rights of defendant in criminal proceeding, but is entitled to ex parte hearing on the legality of surveillance); Matter of Archuleta, 561 F.2d 1059, 1062-1063 (2d Cir. 1977); In re Grand Jury Impaneled January 21, 1975 (Freedman), 529 F.2d 543, 549-550 (3rd Cir.), cert. denied, 425 U.S. 992 (1976); United States v. Tucker, 526 F.2d 279, 281-282 (5th Cir.), cert. denied, 425 U.S. 958 (1976); In re Quinn, 525 F.2d 222, 225 (1st Cir. 1975); Matter of Grand Jury (Vigil), 524 F.2d 209, 214-216 (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976); In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196, 198 (5th Cir. 1975) (witness not entitled to inspection of documents at suppression hearing when in camera inspection upheld facial validity of wiretap order), cert. denied, 525 U.S. 911 (1976); In re Persico, 491 F.2d 1156, 1162 (2d Cir.) (witness cited for contempt entitled only to in camera inspection by district court), cert. denied, 419 U.S. 924 (1974).

[1138] In re Grand Jury Proceedings (Leahy), 735 F.2d 1230, 1231-32 (10th Cir. 1984) (per curiam); In re Grand Jury Proceedings (McElhinney), 698 F.2d 384, 385-86 (9th Cir. 1983); In re De Monte, 667 F.2d 590, 598-99 (7th Cir. 1981) (per curiam); In re Grand Jury Investigation (Harkins), 624 F.2d 1160, 1166-67 (3rd Cir. 1980); In re Grand Jury Proceedings (Katsouros), 613 F.2d 1171, 1175-76 (D.C. 1979) (per curiam); Melickian v. United States, 547 F.2d 416,

(continued...)

depending generally on the specificity of the contemnor's showing of illegality.[1139]

7. Propriety of Grand Jury Investigation

A grand jury witness has no standing to challenge the jurisdiction of the grand jury, the propriety of its investigation, or the constitutionality of the statute underlying the crime being investigated.[1140]

8. Relevance of Information Sought by Subpoena

A grand jury witness may have a limited right to challenge the relevance of the information sought to the grand jury's investigation. In United States v. R. Enterprises, Inc., _____ U.S. _____; 111 S.Ct. 722 (1991), the Supreme Court held that, under Fed. R. Crim. P. 17(c), a witness may challenge a grand jury subpoena as "unreasonable or oppressive" on relevance grounds in a motion to quash. The witness, however, bears the burden of showing unreasonableness and must meet an exacting standard:

> we conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that

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[1138](...continued)
420 (8th Cir.) (dictum), cert.denied, 430 U.S. 986 (1977); In re Lochiatto, 497 F.2d 803, 808 (1st Cir. 1974).

[1139] Documents submitted to the contemnor may be in redacted form to protect sensitive information. In re Grand Jury, 851 F.2d 499, 500-501 (1st Cir. 1988).

[1140] Blair v. United States, 250 U.S. 273, 281-83 (1919); Matter of Fula, 672 F.2d 279, 283 (2d Cir. 1982); In re Grand Jury Proceedings Involving Eva Rosahn, 671 F.2d 690, 695 (2d Cir. 1982); Matter of Jabbar, 560 F.Supp. 186, 187 (S.D.N.Y. 1983). Cf. In re Maury Santiago, 533 F.2d 727, 730 (1st Cir. 1976) (court considered, but rejected, witness' claim that government was using grand jury to investigate crime already indicted).

> 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 (emphasis added).[1141]

The Court noted in dictum that a district court may require the government to reveal the general subject of the investigation before requiring the witness to carry his or her burden of persuasion.[1142] The government's identification of the subject of the investigation, however may be to the district court *in camera* "to ensure that subpoenas are not routinely challenged as a form of discovery."[1143]

9. State Prosecution

An immunized witness may not refuse to testify on the grounds that he or she may be subject to prosecution by state or local authorities based upon the witness's grand jury testimony.[1144]

10. Foreign Prosecution

Contempt defendants have attempted to claim that they may be subject to prosecution by foreign authorities on the basis of their grand jury testimony.

[1141] United States v. R. Enterprises, Inc., 111 S.Ct. at 728 (emphasis added). Cf. Nelson v. United States, 201 U.S. 92, 115 (1906) (witness ordered to produce documents in civil antitrust trial cannot object to relevance of documents to issues at trial).

[1142] United States v. R. Enterprises, Inc., 111 S.Ct. at 728.

[1143] Id.

[1144] Murphy v. Waterfront Commission, 378 U.S. 52, 53 (1964); In re Grand Jury Proceedings (Samuelson), 763 F.2d 321, 322 n.3 (8th Cir. 1985); In re Grand Jury Proceedings (Hartmann), 757 F.2d 1580, 1582-83 (5th Cir. 1985); In re Grand Jury Proceedings (Mena), 662 F.2d 532, 533 (9th Cir. 1981). See United States v. Rose, 806 F.2d 931, 932-33 (9th Cir. 1985); In re Inzirillo, 542 F.2d 90, 91 (1st Cir. 1976).

The courts have usually responded that the secrecy requirements of federal grand jury proceedings, Fed. R. Crim. P. 6(e), effectively protect grand jury witnesses from the use of their testimony in any foreign prosecution.[1145] Moreover, any claim by a contempt defendant that he or she is subject to foreign prosecution is likely to be remote and speculative, precluding its use as a defense to contempt.[1146]

11. Fear of Retaliation

A grand jury witness's general fear of retaliation and concern for his or her physical safety do not constitute "just cause" for his refusal to testify.[1147] Some courts have permitted contemnors to attempt to demonstrate a specific,

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[1145] In re Grand Jury Proceedings, 889 F.2d 220, 222 (9th Cir. 1989) (per curiam); In re Sealed Case, 825 F.2d 494, 497 (D.C. Cir.), cert denied, 484 U.S. 963 (1987); In re Grand Jury Proceedings, 748 F.2d 100, 104 (2d Cir. 1984); In re Grand Jury Proceeding 82-2, 705 F.2d 1224, 1227 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983); In re Baker, 680 F.2d 721 (11th Cir. 1982) (per curiam); In re Miscellaneous Grand Jury Proceedings (Campbell), 628 F.2d 1260, 1262 (9th Cir. 1980); In re Grand Jury Witness (Lemieux), 597 F.2d 1166, 1167 (9th Cir. 1979); In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); United States v. Armstrong, 476 F.2d 313, 316 (5th Cir. 1973). But see In re Grand Jury Subpoena of Flanagan, 690 F.2d 116, 121-24 (2d Cir. 1982); In re Baird, 668 F.2d 432, 432-434 (8th Cir.), cert. denied, 456 U.S. 982 (1982).

[1146] Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478-81 (1972); United States v. Yanganita, 552 F.2d 940, 946-47 (2d Cir. 1977); In re Quinn, 525 F.2d 222, 223 (1st Cir. 1975).

[1147] Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); In re Grand Jury Proceedings, 943 F.2d 132, 135 (1st Cir. 1991); In re Grand Jury Proceedings (Lahey), 914 F.2d 1372, 1374-75 (9th Cir. 1990) (per curiam); In re Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1171 (7th Cir. 1990); United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977); Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975); United States v. Doe, 478 F.2d 194 (1st Cir. 1973); In re Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); LaTona v. United States, 449 F.2d 121, 122 (8th Cir. 1971).

imminent danger from their testimony as a potential defense to contempt or as information relevant to sentencing.[1148]

12. Advice of Counsel

A grand jury witness's reliance on the advice of counsel to disobey a court order does not excuse the witness's contempt.[1149] Nor does reliance on an accountant.[1150]

13. Religious Beliefs

A witness may not refuse to testify on the basis of the witness's moral or religious beliefs.[1151]

[1148] In re Grand Jury Proceedings Impaneled May 1988, 894 F.2d 881, 887 (7th Cir. 1989); In re Grand Jury Proceedings (Taylor), 509 F.2d 1349, 1351 (5th Cir. 1975); LaTona v. United States, 449 F.2d 121, 122 (8th Cir. 1971).

[1149] United States v. Armstrong, 781 F.2d 700, 706 (9th Cir. 1986) (good faith reliance on advice of counsel to disobey court order does not prevent a finding of willfulness in criminal contempt conviction); United States v. Snyder, 428 F.2d 520, 522-23 (9th Cir.), cert. denied, 400 U.S. 903 (1970).

[1150] Steinert v. United States, 571 F.2d 1105, 1108 (9th Cir. 1978) (defendant's disobediance of court order to answer questions was willful even though he acted in good faith reliance on the advice of a tax accountant.)

[1151] United States v. Baldwin, 770 F.2d 1550, 1558 (11th Cir. 1985) (attorney's refusal to appear at criminal trial based on religious reasons did not negate finding of willfulness for criminal contempt conviction), cert. denied, 475 U.S. 1120 (1986); Matter of Credido, 759 F.2d 589, 593 n.2 (7th Cir. 1985) (moral beliefs provide no defense to duty to testify). See also Matter of Thornton, 560 F. Supp 183, 185-6 (S.D.N.Y. 1983) ("personal views" cannot take precedence over duty to testify).

V. Prosecution After the Entry of an Immunity Order

A. Introduction

A witness who has provided testimony at a grand jury or trial pursuant to a court ordered grant of immunity, or pursuant to a promise of informal use immunity, or any state investigation pursuant to a state grant of immunity, may nonetheless be prosecuted, even for a crime about which the witness testified. If the prosecution of such a witness is undertaken, the defendant likely will claim that his or her testimony was used against the defendant. The government will then be required to prove affirmatively that it did not use the witness's immunized testimony against the witness, for example, as direct evidence of the witness's involvement; and that it did not use information directly or indirectly derived from the testimony, for example, as a lead to developing evidence against the witness or in focusing the investigation on the witness.

B. Constitutionality and Limitations of Protection Provided Under Statutory Immunity

The protection granted to the witness by 18 U.S.C. § 6002 has been upheld as constitutional in the face of a challenge that use and derivative use immunity was violative of a witness's Fifth Amendment privilege against self-incrimination. The Court in Kastigar v. United States, 406 U.S. 441, 443 (1972), held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege."[1152] Prior to the passage of 18 U.S.C. § 6001, et seq., a witness was protected by transactional immunity. Under transactional immunity, a witness could not be prosecuted for the events about which he or she testified, even if the government had independent evidence of the witness's participation in the crime. Section 6002, however,

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[1152] Kastigar v. United States, 406 U.S. 441, 453 (1972).

confers a less sweeping protection. A witness may be prosecuted for the very activities about which he or she testifies if the government does not use the testimony.

In Kastigar, the Court stated that the witness should be "in substantially the same position" after testifying under immunity as that witness would have been had the Fifth Amendment privilege been claimed.[1153] The key element of the analysis is "substantially." The immunity protection does not mean that "in order for a grant of immunity to be 'coextensive with the Fifth Amendment privilege,' the witness must be treated as if he had remained silent."[1154]

As the Court pointed out in United States v. Apfelbaum, 445 U.S. 115, 124-25 (1980), the statutory grant of immunity does not "bar the use of the witness's statements in civil proceedings," but only protects against use in subsequent criminal proceedings. Thus, testimony given under a statutory grant of immunity may be used against the witness in a subsequent civil proceeding. Further, the immunity granted for testimony before the grand jury or at the criminal trial does not cover the same individual if he or she is subpoenaed to testify at a civil deposition.[1155] Thus, a private litigant cannot compel a witness's testimony at a civil deposition if the witness asserts the Fifth Amendment, even though the expected testimony will track the immunized grand jury testimony.

1. Use of Immunized Testimony in a Perjury or False Statements Prosecution

The immunity statute does not protect the witness from a prosecution for perjury, 18 U.S.C. § 1621, or false statements to the grand jury or court, 18

[1153] Kastigar v. United States, 406 U.S. at 458-59.

[1154] United States v. Apfelbaum, 445 U.S. 115, 124 (1980).

[1155] Pillsburg Co. v. Conboy, 459 U.S. 248, 263-264 (1983).

U.S.C. § 1623.[1156] The untruthful statements which form the basis of the indictment may be used against the witness in the perjury or false statement prosecution.[1157] In addition, uncharged statements in the immunized testimony of the witness may be used, for instance, to place the charged statements in context. As the Supreme Court stated in United States v. Apfelbaum, 445 U.S. 115, 131 (1980): "Neither the immunity statute nor the Fifth Amendment precludes the use of [the witness's] immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence."

Furthermore, the immunity statute may not protect a witness who "otherwise fail(s) to comply with the order [of immunity]." In one instance, a witness who testified falsely, both to the grand jury and at trial, under a grant of immunity was charged with not only false statements, but a conspiracy to obstruct justice and to give false testimony. The court upheld the conspiracy count, stating that "[t]he sweep of the exception against the use of immunized testimony . . . extends to any conduct aimed at frustrating the purpose of the grant of immunity."[1158]

[1156] The statute protects the witness from the use of his or her testimony in a prosecution for prior perjury or false statements. See United States v. Bianchi, 542 F. 2d 98, 100 (1st Cir. 1976); United States v. Soto, 574 F. Supp. 986, 991-92 (D. Conn. 1983), and cases cited therein.

[1157] The statute may protect the witness against use of allegedly perjurious or false testimony in proceedings other than a prosecution. In United States v. Glover, 608 F. Supp. 861, 863 (S.D.N.Y. 1985), aff'd, 779 F. 2d 39 (2d Cir.), cert. denied, 475 U.S. 1026 (1986), the government could not use alleged false testimony given by the witness under immunity at another's trial in the sentencing proceedings against the witness. In that case, however, the sentencing court had not observed the witness giving the testimony. In United States v. Martinez-Navarro, 604 F.2d 1184, 1186-1187 (9th Cir. 1979), cert. denied, 444 U.S. 1084 (1980), the court which had heard testimony did consider immunized false testimony at the sentencing.

[1158] United States v. Gregory, 611 F. Supp. 1033, 1037 (S.D.N.Y. 1985).

2. *Prosecution of Witness Granted Transactional Immunity by State Authorities*

Some state immunity statutes provide a witness with transactional immunity. Federal prosecutors are not bound by the "transactional" language of state statutes. The witness's state immunity is honored in the federal courts only to the use/derivative use extent. The federal prosecution may be brought if the federal government can establish that it made no direct or indirect use of the immunized testimony or of any leads derived from the immunized testimony.[1159] Similarly, a witness who has been compelled to testify under federal statutory immunity may be prosecuted by a state. However, in such a prosecution, the state may be required to show in response to defendant's challenge that its evidence was obtained independently of the federally immunized testimony.[1160]

3. *Prosecution Following a Grant of Informal Immunity*

With a grant of non-statutory or informal immunity, a witness may be protected from use and derivative use even though the federal prosecutor did not utilize the formal immunity process. The federal prosecutor should carefully draft informal immunity agreements, limiting such agreements to use immunity to the same extent as under the statute. A sample letter utilized for informal immunity may be found in the Appendix to this Manual.

[1159] Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964); see also United States v. Helmsley, 941 F.2d 71, 81-83 (2d Cir. 1991).

[1160] In re Grand Jury Proceedings, Nol 84-4 (Hartmann), 757 F.2d 1580, 1582-1583 (5th Cir. 1985), and cases cited therein.

4. Witness Must Claim Privilege

A witness may receive statutory immunity only when the witness has been compelled by a court pursuant to Section 6002, *et seq.* to testify following an assertion of the witness's Fifth Amendment privilege (or an announcement of the intention to claim the privilege). If the witness testifies voluntarily, for example, after an explicit promise only of use immunity, i.e., without barring derivative use, then the government is free to prosecute on the basis of evidence derived from the immunized testimony.[1161] Such a limited agreement should be in writing and unambiguous. Otherwise, a court may interpret the promise of immunity to encompass the full constitutional protection.[1162] The better practice is for the prosecutor to specifically reserve, in writing, the right to utilize the testimony for all derivative uses.

5. No Entitlement to Pre-indictment Relief

Pre-indictment relief for an immunized witness is generally not granted. An immunized witness who has not been indicted is not likely to prevail on a motion for a preliminary injunction to stop another grand jury investigation from focusing on the witness and returning an indictment. In Brennick v. Hynes, 471 F. Supp. 863, 868-869 (N.D.N.Y. 1979), the plaintiff, who had been immunized and gave testimony under the Bankruptcy Act,[1163] sought to

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[1161] See United States v. Dornau, 491 F.2d 473, 479-480 (2d Cir.) (witness testified voluntarily under the former Bankruptcy Act, which explicitly granted only use immunity), cert. denied, 419 U.S. 872 (1974).

[1162] But see United States v. Gutierrez, 696 F.2d 753, 756 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983), where a witness voluntarily made a statement in return for protection from prosecution for those transactions about which she testified. The court found that she was not granted the minimal constitutional protection, stating that "[b]ecause [the witness], with full knowledge of her rights, voluntarily agreed to make a statement, the constitutional principles enunciated in Kastigar v. United States [citations omitted], are inapplicable to her claim." United States v. Gutierrez, 696 F.2d at 756 n. 6.

[1163] At the time the Brennick case arose, the Bankruptcy Act granted automatic use and, in the opinion of some courts, derivative use, immunity. The Act has been amended to require that an immunity order under 18 U.S.C. § 6001, et seq. be sought.

enjoin state prosecutors from conducting any further grand jury proceedings directed against him and from seeking to indict him. The court found the motion to be premature and held that it was impossible to determine that any indictment returned by the grand jury would be tainted.[1164]

C. Scope of Protection

The protection conferred by statutory immunity is a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom."[1165] The proscription is twofold: (1) the prosecutor cannot use the testimony against the witness, e.g., as the basis for an indictment, as evidence at trial or to impeach the witness if the witness takes the stand;[1166] and (2) the prosecutor cannot use the testimony to derive evidence against the witness, e.g., to obtain the name of a co-conspirator from the testimony and to use that co-conspirator's testimony as a basis for indictment.[1167] The burden of the government to establish a completely independent source is so great that in many situations there is very little basis on which to distinguish the scope of "use/derivative use" from "transactional" immunity.[1168]

[1164] But see United States v. Rice, 421 F. Supp. 871, 876-878 (E.D.Ill. 1976), wherein the court in the particular circumstances of that case did grant pre-indictment relief.

[1165] Kastigar v. United States, 406 U.S. 441, 460 (1972).

[1166] New Jersey v. Portash, 440 U.S. 450, 459-460 (1979); cf. United States v. Pantone, 634 F.2d 716, 722-23 (3d Cir. 1980) (following Portash that a defendant cannot be impeached by his own immunized grand jury testimony).

[1167] See United States v. Kurzer, 534 F.2d 511, 517-518 (2d Cir. 1976).

[1168] See, for example, United States v. North, 910 F.2d 843, 860-862 (D.C. Cir. 1990); United States v. North, 920 F.2d 940, 941-943 (D.C. Cir. 1990); United States v. Poindexter, 951 F.2d 369, 373-377 (D.C. Cir. 1991).

1. Indirect and Derivative Use

Clearly, the prosecutor cannot use the witness's immunized testimony as evidence to charge or try the witness. Nor, where use/derivative use immunity is granted, can the prosecutor obtain a lead from the testimony and then use the lead to prosecute the witness. The courts, however, have come to different conclusions as to what other uses are prohibited under the terms "direct and indirect" derivative use.

The D.C. Circuit engaged in an exhaustive analysis of "direct and indirect" use in North (North I and North II) and Poindexter. The Court discussed, but did not decide, whether it was appropriate for the prosecutor to make "nonevidentiary use" of the immunized testimony, such as using it for the formation of trial strategy. Regarding the "evidentiary" use of immunized testimony to refresh witnesses' recollections, the Court "held that a prohibited 'use' occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony . . . or if his testimony is in any way 'shaped, altered, or affected,' by such exposure. Kastigar does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony,. It prohibits 'any use, direct or indirect.'" United States v. Poindexter, 951 F.2d 369, 373, quoting North I, 910 F.2d at 860-61 (emphasis in original).

Some circuits read Kastigar to mean that the prosecuting attorney's access to incriminatory immunized testimony of the witness makes it virtually impossible for the government to show no indirect derivative use of that testimony. To these courts, once the information from the immunized testimony is read or heard, it cannot be eradicated from the prosecutor's mind. In a leading case supporting this position, United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973), the court held that the prohibition against indirect use "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[1169]

In McDaniel, however, the United States Attorney read the entire three volume transcript of McDaniels' immunized grand jury testimony. In these

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[1169] See also United States v. Semkiw, 712 F.2d 891, 894-895 (3d Cir. 1983); United States v. Carpenter, 611 F. Supp. 768, 779 (N.D. Ga. 1985).

circumstances the court concluded that "the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case."

Relying upon language in McDaniel, many defendants have argued that once the prosecutor has read the transcript such a reading imparts a confidence or other benefit that the prosecutor otherwise would not have and thus constitutes an impermissible indirect use. However, most courts have refused to apply such a broad rule that in effect creates a *per se* rule that exposure to immunized testimony, alone, results in an impermissible use.[1170] The circuits that do not follow McDaniel reason that McDaniel goes too far and creates, in effect, transactional immunity.[1171] McDaniel and its progeny reason that the use and derivative use immunity grant should leave the witness in the same position as if the witness had claimed the Fifth Amendment privilege. Kastigar, however, reaffirms the language of Murphy v. Waterfront Commission, 378 U.S. 52 (1964), that the witness be left "'in substantially the same position as if the witness had claimed his privilege.'"[1172]

In United States v. Byrd, 765 F.2d 1524, 1531-1532 (11th Cir. 1985), the witness had given incriminating testimony pursuant to a statutory grant of use and derivative use immunity. The testimony was provided before an Assistant United States Attorney and the Assistant U.S. Attorney participated in the decision to prosecute Byrd. The grand jury that voted the indictment heard only the testimony of an FBI Agent, who had also read the immunized testimony. The agent summarized both the testimony of witnesses, excluding Byrd, who had appeared before a previous grand jury, and the contents of interviews conducted prior to the time Byrd testified. The district court dismissed the indictment. The court of appeals held that the district court incorrectly applied a test stricter than that required by Kastigar. The court held

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[1170] See United States v. Mariani, 851 F.2d 595, 600-601 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); United States v. Pantone, 634 F.2d 716, 720-723 (3d Cir. 1980); United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Crowson, 828 F.2d 1427, 1430-1432 (9th Cir. 1987), cert. denied, 488 U.S. 831 (1988).

[1171] See United States v. Mariani, 851 F.2d 595, 601 (2d Cir. 1988); United States v. Byrd, 765 F.2d 1524, 1531 (11th Cir. 1985).

[1172] Kastigar, 406 U.S. 441, 458-59 (1972); see also discussion in United States v. Apfelbaum, 445 U.S. 115, 124-27 (1980), in which the Supreme Court expressly states that for protection of the grant of immunity to be "'coextensive' with...the Fifth Amendment, it need not treat the witness as if he had remained silent."

that the government need not prove as part of its burden that its "decision to indict was not induced by the content of Byrd's immunized testimony," and that Kastigar did not require inquiry into the prosecutors' motives.[1173] The court found that as long as all the independent evidence presented to the grand jury was sufficient to establish probable cause, the existence of such evidence is "deemed to raise a presumption that the decision to indict was not tainted."[1174] To require the government to prove that the immunized testimony was not considered in arriving at the decision to prosecute would be tantamount to treating the grant of use immunity as transactional immunity and would create a virtually impenetrable barrier against prosecution.

2. *Use of the Fact of Testimony*

The prohibition against the use and derivative use of immunized testimony precludes use of any of the content or substance of the testimony, but does not necessarily preclude use of the *fact* that a witness testified. In United States v. Jones, 590 F. Supp. 233, 239 (N.D. Ga. 1984), Georgia state charges were dismissed against the defendant and he testified before a state grand jury pursuant to a state compulsion order. In newspaper articles and other public statements, the fact that Jones had testified in the state investigation became known. However, the substance and details of Jones' testimony were never disclosed. Jones was subsequently indicted by a federal grand jury and moved to dismiss the indictment. He argued that the court should recognize "a different form of 'derivative use,' one in which the *fact* that a witness testified, rather than the substance of his testimony, is used to entice others to provide information or testimony against him." United States v. Jones, 590 F.Supp at 239 (emphasis in original). The district court denied the motion to dismiss, holding that no derivative use had been made of Jones' immunized state grand jury testimony. The federal prosecutors, and the companies and individuals cooperating in the federal investigation, were never told the contents of Jones' testimony. The district court also found it significant that the federal

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[1173] United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985).

[1174] United States v. Byrd, 765 F.2d 1524, 1530-31 (11th Cir. 1985).

prosecutors, in negotiating and obtaining the cooperation and testimony of other companies and individuals, did not use as leverage the fact that Jones had testified.

Notwithstanding the Jones decision, federal prosecutors should avoid disclosing to prospective witnesses the fact that a potential defendant has testified pursuant to a compulsion order. In denying the motion to dismiss, the district court in Jones relied on the fact that the federal prosecutors did not make any use of the fact that Jones had testified and that the witnesses had learned of this fact through other, public sources. Given the expansive definition of derivative use utilized in North I and II and in Poindexter, a prosecutor who discloses the fact that a defendant, or potential defendant, has previously testified pursuant to a compulsion order, may invite a motion to dismiss.

D. Taint Hearing

Even though a witness has testified pursuant to a grant of immunity, this does not in itself present an insurmountable barrier to prosecution.[1175] The government, however, bears a heavy affirmative burden when a claim of improper use of immunized testimony is raised. In certain districts and circuits, a Kastigar hearing may be very time consuming and difficult during a crucial stage of pretrial preparation. In Murphy v. Waterfront Commission, 378 U.S. 52, 79 n. 18 (1964), the Supreme Court recognized the necessity for the government to bear the burden of showing that the "evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[1176] In Kastigar, the Supreme Court held that the government's burden of proof "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled

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[1175] United States v. Catalano, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Pantone, 634 F.2d 716, 719 (3d Cir. 1980); United States v. Zielezinski, 740 F.2d 727, 729 (9th Cir. 1984); United States v. Byrd, 765 F.2d 1524, 1528-1529 (11th Cir. 1985).

[1176] Murphy, 378 U.S. at 79 n.18.

testimony."[1177] Thus, once the defendant makes a *prima facie* showing that he or she gave immunized testimony, the government must be prepared to go forward to show no use of that testimony and to establish its independent evidence. The government, however, is not required to negate all abstract possibilities of taint.[1178]

1. Need for an Evidentiary Hearing

An evidentiary hearing on a Kastigar issue is not always required and the decision rests within the discretion of the trial court.[1179] In some cases, courts decide the question on the pleadings and exhibits attached and made part of the record.[1180] In United States v. Beachner Construction Co., 538 F. Supp. 718, 721 (D. Kan. 1982), the district court denied the witness's motion for an evidentiary hearing after reading the affidavits and transcripts. The court, relying on United States v. Provenzano, 620 F.2d 985, 1005-1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980), found "that the documentary evidence produced by the government pursuant to the (C)ourt's order conclusively shows that the government previously possessed all material facts revealed by defendant's immunized testimony."[1181] Nevertheless, certain district courts may require an evidentiary hearing.[1182]

[1177] Kastigar v. United States, 406 U.S. 441, 460 (1972).

[1178] United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988), cert denied, 490 U.S. 1006 (1989).

[1179] United States v. Dynalectric Co., 859 F.2d at 1580.

[1180] United States v. Dynalectric Co., 859 F.2d at 1580.

[1181] United States v. Thanasouras, 368 F. Supp. 534, 537 (N.D. Ill. 1973); cf. United States v. Lipkis, 770 F.2d 1447, 1451 (9th Cir. 1985).

[1182] In United States v. DeDiego, 511 F.2d 818, 822 n. 4 (D.C. Cir. 1975), the court held that the district court had no discretion to dismiss the indictment without giving the Government the opportunity to prove lack of taint and that the failure to hold an evidentiary hearing was "clear error." The court in United States v. Zielezinski, 740 F.2d 727, 733-734 (9th Cir. 1984), remanded for an evidentiary hearing on the basis of the court's supervisory power and, therefore,

(continued...)

2. *The Government's Burden of Proof*

Whether or not a hearing is mandated, the government still bears an affirmative and heavy burden of proof in order to prevail in the face of a motion to dismiss based on improper use of immunized testimony.[1183] Several courts have reiterated this standard without trying to fit it into the traditional categories.[1184] Other circuits have held that the government's burden is by a preponderance of the evidence.[1185] The issue of whether any use has been made of the immunized testimony is a question of fact.[1186] Thus, the trial court's findings can be reversed on appeal only if clearly erroneous.[1187]

[1182](...continued)
did not reach the issue of whether a taint hearing was constitutionally required. In United States v. Tantalo, 680 F.2d 903, 908 (2d Cir. 1982), the court suggests that the due process clause of the Constitution demands an evidentiary hearing on the issue of the use of the witness' immunized testimony and held that a hearing is required. Cf. United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977); United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983).

[1183] Kastigar v. United States, 406 U.S. 441 (1972).

[1184] See United States v. Catalano, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

[1185] United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. McDonnel, 550 F.2d 1010 (5th Cir.), cert. denied, 434 U.S. 835 (1977); United States v. Zielezinski, 740 F.2d 727, 734 (9th Cir. 1984); United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988); see also United States v. Smith, 580 F. Supp. 1418, 1422 (D.N.J. 1984) (clear and convincing burden) (citing United States v. Hossbach, 518 F. Supp. 759 (E.D. Pa. 1980)).

[1186] United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976); United States v. Dynalectric Co., 859 F.2d at 1578.

[1187] United States v. Romano, 583 F.2d at 7; United States v. Provenzano, 620 F.2d 985, 1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Jones, 542 F.2d 186, 199 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Shelton, 669 F.2d 446, 464 (7th Cir.), cert. denied, 456 U.S. 934 (1982); United States v. Rogers, 722 F.2d 557, 560 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984); United States v. Dynalectric Co., 859 F.2d at 1578.

3. Meeting the Burden of Proof

In response to a motion to dismiss an indictment based on improper use of immunized testimony, the government has the burden of proving the following: 1) the government had independent evidence that served as a basis for the indictment; 2) the government did not use the immunized testimony as a basis for indictment; 3) the government will not use any of the testimony of the witness against him or her at trial; 4) the government did not obtain any leads from the witness's testimony to obtain a basis for the indictment or as potential proof at trial; and 5) the government has not made use of the witness'ss immunized testimony in focusing the investigation on the witness, in making the decision to prosecute[1188] or in formulating its strategy in its preparation for trial.

To meet its burden, the government can submit to the court, *in camera*, the evidence obtained prior to the grant of immunity. This evidence should be considered independently.[1189] In United States v. Romano, 583 F.2d 1, 8 (1st Cir. 1978), the government submitted a memorandum it had prepared prior to the immunized testimony summarizing all the evidence the government had prior to the defendant's immunized testimony before a United States Senate Subcommittee.[1190] Where the government was able to show that the witness was a target of the investigation prior to his immunized testimony, this has weighed in favor of the government.[1191]

[1188] See, however, discussion of United States v. Byrd, 765 F.2d 1524, 1530-1531 (11th Cir. 1985), in Section V, C, of this Chapter above and United States v. Helmsley, 941 F.2d 71, 81-83 (2d Cir. 1991).

[1189] See United States v. First W. State Bank of Minot, N.D., 491 F.2d 780, 783 (8th Cir.) (Federal Bureau of Investigation reports made prior to the date of the testimony and the minutes of two prior grand jury sessions were "independent sources"), cert. denied, 419 U.S. 825 (1974); see also United States v. Lipkis, 770 F.2d 1447, 1450-1451 (9th Cir. 1985).

[1190] See also United States v. Willis, 583 F.2d 203, 206-207 (5th Cir. 1978); United States v. Byrd, 765 F.2d 1524, 1530-1531 (11th Cir. 1985). But see United States v. Carpenter, 611 F. Supp. 768, 779 (N.D. Ga. 1985).

[1191] See United States v. Beachner Construction Co., 538 F. Supp. 718, 720-721 (D. Kan. 1982).

The government may also rely upon the amount of information contained in the questions it asked of the witness. In United States v. Catalano, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974), the court found that the government met its affirmative burden, in part, because most of the questions asked of the immunized witness by the prosecutor in the grand jury session were leading, which indicated the prosecutor already knew the answers and thus already had the evidence.

The quality and quantity of a witness's testimony is relevant to the court's determination of whether such testimony was used to indict, provide leads, or to prepare for trial or plea bargaining. Where the defendant provides little or no information in his or her immunized testimony, and the government can show that it had substantial incriminating information prior to, or apart from, defendant's immunized testimony, some courts have found it impossible for the government to have gained any substantive information from defendant's testimony. This is especially the case where the defendant claims lack of recollection or exculpates himself or herself before the grand jury.[1192]

In addition to showing that the defendant was already the focus of an investigation and that the government had prior evidence against the defendant, the government may need to show that the substance of the defendant's immunized testimony did not lead to the decision of other witnesses to testify against the defendant.[1193] The attorney for the government may introduce affidavits with its papers or at the taint hearing in which co-defendants or witnesses who have pleaded guilty and cooperated certify that the defendant's immunized testimony did not lead to their decision to plead and cooperate.

At a minimum, the government must offer the transcript of the defendant's immunized testimony and an affidavit of the prosecuting attorney setting forth the evidence the government had prior to the testimony, the independent sources of evidence, and what effort was made to segregate the

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[1192] See United States v. Catalano, 491 F.2d 268, 272 (2d Cir), cert. denied 419 U.S. 825 (1974). United States v. Pantone, 634 F.2d 716, 722 (3d Cir. 1980); United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Dynalectric Co., 859 F.2d 1559, 1579-80 (11th Cir. 1988).

[1193] See United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976); United States v. Beachner Contruction Co., 538 F. Supp. 718, 721 (D. Kansas 1982); United States v. Jones, 590 F. Supp. 233, 240-241 (N.D. Ga. 1984).

immunized testimony from the prior and other independent evidence.[1194] The attorney may supplement this showing with affidavits of investigators, and possibly co-defendants or potential witnesses who have pleaded guilty or otherwise have cooperated, and the court reporter (e.g., as to the sequence of witnesses). Where courts have relied on government affidavits, as well as transcripts of the immunized testimony and other prior testimony, the affidavits have contained more than conclusory statements from the government. Thus, the government should be prepared with an affidavit of the prosecutor, setting forth specific facts and the sequence of events.

4. Meeting the Burden of Proof with Respect to Immunized State Testimony

When the immunized testimony was given before a state grand jury, a showing that a "Chinese wall" existed between the state and federal investigations is a factor, but may not be sufficient in itself. In United States v. Smith, 580 F. Supp. 1418, 1422-23 (D.N.J. 1984), evidence that the state and federal investigators did not exchange information, together with the federal government's claim that it never saw the witness's immunized testimony, was but one element of the government's burden of proof. The court in Smith held a 26-day pre-trial evidentiary hearing in which "federal officials from all phases of the government's investigation of the defendant testified and were fully cross-examined by defendant's counsel."[1195] The prospective trial attorney testified to the evidence that would be introduced at trial and the sources of that evidence, the witnesses to be called at trial, the substance of their testimony, the exhibits that the witnesses would identify, any contact that the witnesses had with the defendant's immunized testimony, the time when the trial attorney decided to use particular evidence and the basis for each decision. Clearly, such an extensive hearing is a discovery tool for the defendant. The federal prosecutor should, therefore, consider the possibility that such discovery may

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[1194] Where the prosecutor is aware that the proposed defendant has testified under immunity, the prosecutor can segregate the immunized testimony from other sources of evidence. Where an attorney is unaware that he read testimony that was immunized, this segregation may be almost impossible. See United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973). But see United States v. Byrd, 765 F.2d 1524, 1530-1531 (11th Cir. 1985).

[1195] United States v. Smith, 580 F. Supp. at 1425.

occur when deciding to prosecute an immunized witness and take appropriate measures to segregate the evidence in the case from the immunized testimony so that a showing can be made that no taint occurred.

5. *Who Must Testify at the Taint Hearing*

The government is not required to call each prospective trial witness at a taint hearing. In United States v. Smith, 580 F. Supp. 1418, 1431 (D.N.J. 1984), the defendant argued that the government should do so; the district court, however, rejected that argument: "The focus of a Kastigar hearing is necessarily on the federal investigators and prosecutors and the question of their use or derivative use of defendant's immunized testimony."[1196] This reasoning should also apply when the witness's immunized testimony was given before a federal grand jury.

6. *Timing of the Hearing*

The timing of the taint hearing is discretionary with the trial court; the resolution of the immunity issue may be "at a pre-trial hearing, during trial or at a post-trial hearing or 'combination of these alternatives.'"[1197] Some courts, however, read Kastigar to require a pre-trial hearing.[1198] An argument for a post-trial hearing is that the court can compare the evidence admitted at trial with the subject matter of the defendant's immunized

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[1196] United States v. Smith, 580 F. Supp. 1418, 1431 n.11 (D.N.J. 1984); see also United States v. Romano, 583 F.2d 1, 7-9 (1st Cir. 1978); United States v. Seiffert, 357 F. Supp. 801, 809 (S.D. Tex. 1973), aff'd, 501 F.2d 974 (5th Cir. 1974).

[1197] United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975); United States v. Tantalo, 680 F.2d 903, 909 (2d Cir. 1982); United States v. Jones, 542 F.2d 186, 198 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

[1198] United States v. First W. State Bank of Minot, N.D., 491 F.2d 780, 787 (8th Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Smith, 580 F. Supp. 1418, 1424-25 (D.N.J. 1984).

testimony. The court in United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 803 (E.D. Pa. 1980), ruled that the Kastigar hearing should be deferred until the completion of the trial "notwithstanding the suggestion made in Kastigar that such matters should be considered on a pretrial basis." The court set forth a number of factors to be considered: (1) whether the government will have to expose its entire case during the hearing, (2) whether fragmentation of the trial will occur, (3) whether a delay in the trial will be required, and (4) whether and to what degree prejudice will accrue.[1199]

If there is a problem with extensive pre-trial publicity arising from a Kastigar hearing, it has been suggested that the court hold the taint hearing *in camera*.[1200]

7. *Use of the Grand Jury Which Heard the Immunized Testimony to Indict the Defendant*

Some courts, most notably the Second Circuit in United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir.), cert. denied, 429 U.S. 980 (1976), have held as a matter of law, and fundamental fairness, that an indictment voted by the same grand jury that heard the witness's immunized testimony must be dismissed.[1201] Other circuits have declined to follow such a flat prohibition. In United States v. Zielezinski, 740 F.2d 727, 729 (9th Cir. 1984), the court pointed out that Hinton, on its facts, was an extreme case and that its rule "was not constitutionally compelled."[1202] The court went on to say, however, that the better course was for a prosecutor to present the indictment to a new,

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[1199] See also United States v. Jones, 542 F.2d at 198; cf. United States v. Gregory, 611 F. Supp. 1033, 1042 (S.D.N.Y. 1985); United States v. First W. Bank of Minot, N.D., 491 F.2d 780, 787 (8th Cir.), cert. denied 419 U.S. 825 (1974).

[1200] See United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975).

[1201] See also United States v. Bloom, 586 F. Supp. 939, 940 (S.D. Fla. 1984).

[1202] United States v. Zielezinski, 740 F.2d at 729; see also United States v. Garrett, 797 F.2d 656, 663 (8th Cir. 1986).

untainted grand jury to "avoid the appearance of impropriety."[1203] The prudent course for the attorney who presents an indictment charging a person who has previously testified under a grant of immunity, whether formal or informal, is to make that presentation to a different grand jury from that which heard the immunized testimony.

8. *Use of Compelled Statements Taken During Administrative or Internal Affairs Investigation (Garrity Material)*

Statements taken during the course of a public entity's administrative or internal affairs investigation in which the subject must answer the questions or be subject to discipline such as employment termination, are involuntary statements and may not be used against the subject in a criminal prosecution.[1204] These statements often arise in criminal civil rights prosecutions (18 U.S.C. §§241, 242) where a police department internal affairs investigation has preceded the criminal prosecution. A defendant police officer's compelled statement to his or her department's internal affairs investigator is Garrity material and may not be used in prosecuting that officer.

It is the practice of the Civil Rights Division in such cases to insulate the prosecutors or investigators from exposure to Garrity statements or derivative evidence. Upon challenge from a defendant, a taint hearing in some form may be necessary, and the isolation of the prosecution team from the Garrity material may make the government's showing of independent source easier to prove.

[1203] United States v. Zielezinski, 740 F.2d at 733.

[1204] Garrity v. New Jersey, 385 U.S. 493, 500 (1967); United States v. Frederick, 842 F.2d 382, 395 (D.C. Cir. 1988).

Chapter Nine

CONFLICTS OF INTEREST MULTIPLE REPRESENTATION

I. Conflicts of Interest

The Right to Counsel Clause of the Sixth Amendment has been the subject of increasing scrutiny by the Supreme Court in the past five decades, as the Court has moved from the fundamental premise that all criminal defendants enjoy the right to counsel[1205] into the more exacting process of defining what constitutes the "effective assistance" of counsel. As part of this evolutionary process, the Court's decisions have frequently surveyed the problems associated with conflicts of interest.

Conflicts of interest can arise in a number of contexts, although all share the same essential feature: the prospect that counsel may suffer some impairment which implicates the lawyer's ability to provide the client with counsel's undivided loyalties and efforts. This impairment most frequently arises from counsel's efforts to represent multiple clients whose interests are not precisely identical. It also can arise because of counsel's prior representation of other clients, or because of counsel's own status as a witness, target, party, or similarly interested person in other litigation.

[1205] Powell v. Alabama, 287 U.S. 45 (1932).

In the context of a criminal case, it is clear that a defendant whose attorney was burdened by an actual conflict of interest has been deprived the effective assistance of counsel guaranteed by the Sixth Amendment.[1206] As such, it is essential that the prosecutor conducting grand jury proceedings be sensitive to indications that witnesses, subjects, or targets of a grand jury investigation are represented by counsel who are subject to such conflicts of interest. Delay in recognizing and then addressing such conflicts can directly threaten the success of the grand jury inquiry, and further jeopardize the success of any subsequent criminal prosecution. This chapter of the Manual is intended to assist in the process of identifying conflicts, addressing and resolving them, and seeking judicial intervention when counsel fails or refuses to assist in that process. A discussion of conflicts of interest in the context of prosecutorial misconduct appears in Chapter Ten, Section III of this Manual.

The primary difficulty for a prosecutor in this regard is the fact that conflicts of interest are more easily identified *after* indictment when the relationships of the parties (e.g., witness, immunized witness, defendant, unindicted coconspirator, etc.) are solidified. The Federal Rules of Criminal Procedure, and particularly Rule 44(c), Fed. R. Crim. P., provide the district court with direct textual authority to address the problems of conflicts of interest extant in indicted cases. The constitutional implications of the issues are unquestioned.

By contrast, at the grand jury stage, the relationships among the parties may still be fluid. The prosecutor may not yet know with certainty which subjects will become targets, or which targets are worthy of approach as cooperating witnesses. Counsel need not file appearances or otherwise define their specific relationships with their client(s). The courts are less involved in management of the grand jury procedures than is the trial court post-indictment, so greater reliance on the ethical sensibilities of counsel may be required.

These factors notwithstanding, there are effective means to resolve conflict of interest problems. However, to do so, the prosecutor must understand the relative interests involved. First and foremost is the prosecutor's own obligation to assure the efficiency of the grand jury process and the integrity of those proceedings. Conflicts of interest can "impede the

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[1206] Holloway v. Arkansas, 435 U.S. 482 (1972).

effectiveness of the grand jury investigation"[1207] and the courts have in fact criticized prosecutors who fail to promptly address conflict of interest problems once they become apparent.[1208] Because of this obligation to ensure the orderly functions of grand jury proceedings and the integrity of such investigations, the prosecutor plainly has standing to seek judicial intervention when conflicts of interest arise in grand jury proceedings.[1209]

The second interest implicated is that of the represented individual, who enjoys a limited right to be represented by counsel of choice.[1210] However, this general right is circumscribed by other factors. First among these is the proposition that a defendant does not have a constitutional right to counsel at the grand jury stage.[1211] Second is the rule that even after indictment, a defendant's right to counsel is abridged when the defendant's attorney labors under a conflict of interest[1212] and thus the general right to counsel of one's choice is to be exercised in view of the dictates of the Sixth Amendment.[1213]

The third interest involved at the grand jury stage is the institutional interest of the United States to ensure fundamentally fair proceedings within its

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[1207] In re Matter of Grand Jury Empanelled January 21, 1975, 536 F.2d 1009, 1012 (3rd Cir. 1976).

[1208] See, e.g., In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976); United States v. Iorizza, 786 F.2d 52, 59 (2d Cir. 1986); In re Grand Jury, 446 F. Supp. 1132, 1135 (N.D. Tex. 1978).

[1209] In re Grand Jury Proceedings, 859 F.2d 1021, 1024 (1st Cir. 1988); United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977); In re Gopman, 531 F.2d at 265-66.

[1210] Cf., Powell v. Alabama, 287 U.S. 45, 53 ("...the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice".) (Emphasis supplied).

[1211] In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 244 (2d Cir.), (en banc) cert. denied, 475 U.S. 1108 (1986) (at the grand jury stage, target's interest in being represented by counsel of choice is not of constitutional dimension); see also Kirby v. Illinois, 406 U.S. 682 (1972) (establishing bright line rule that Sixth Amendment right attaches upon the initiation of adversarial proceedings by the government).

[1212] See, e.g., United States v. Cronic, 466 U.S. 648, 656 (1984).

[1213] Wheat v. United States, 486 U.S. 153, 160-62 (1988).

jurisdiction.[1214] Grand jury proceedings in which targets are represented by counsel burdened with a conflict of interest can be expected to result in appellate claims that such circumstances deprived the target of the effective assistance of counsel.[1215] Although such claims usually fail, they tend to diminish public confidence in an orderly grand jury system. Accordingly, as cases like Wheat v. United States, 486 U.S. at 160, demonstrate, this institutional interest calls upon the courts to consider the ethical obligations of attorneys, as reflected by the Code of Professional Responsibility and the Canons of Ethics, to assess whether counsel's representation of a client or clients is consistent with the standards of conduct the public expects the legal profession will honor.

It is useful, therefore, for the prosecutor to study the various provisions of the ethical codes which speak to the topic of conflicts of interest. Although variances exist from one jurisdiction to another, virtually all states premise their ethical precepts on the Model Code of Professional Responsibility, first promulgated by the American Bar Association in 1970 and revised in 1983. The primary concepts are those reflected in Canon 4 and Rule 1.6 (requiring counsel to maintain the confidences of the client); Canon 5 and Rule 1.7 (forbidding counsel from representing a client if it would pose a conflict of interest); Rule 1.9 (governing counsel's conflicts of interest based on previous representation of a former client); Rule 1.10 (discussing the imputed exchange of confidential communications among members of the same law firm); Canon 7 (admonishing counsel to represent clients "zealously within the bounds of the law"); and Canon 9 (requiring counsel to avoid the appearance of impropriety). Federal prosecutors confronted by conflicts of interest must diligently research the precedent in their jurisdiction on these various precepts when confronted by an attorney who will not respond to indications that he or she labors under a conflict of interest.

[1214] Id.

[1215] See, e.g., United States v. Canessa, 644 F.2d 61 (1st Cir. 1988); United States v. Lutz, 621 F.2d 940, 948 (9th Cir. 1980).

II. Multiple Representation

A. The Problem Of Divided Loyalties

Probably the most frequent situation confronting prosecutors in the area of conflicts of interest arises when one lawyer attempts to represent two or more individuals involved in an investigation. A lawyer is obliged to "exercise independent judgment on behalf of a client" and is forbidden from representing "differing interests" which are "conflicting, inconsistent [or] diverse" from any client.[1216] Thus, if counsel represents multiple clients involved in the same investigation, he or she runs a substantial risk of conflicting loyalties whenever those clients face differing levels of culpability.

In a classic conflict of interest situation, the government's investigation identified four targets of a grand jury inquiry.[1217] One of those targets was shown by the government's evidence to be particularly culpable; another was shown to be far less culpable; the remaining two fell between these extremes. The government notified the most culpable target that he could negotiate a deal involving less onerous charges if he would cooperate and provide information against the least culpable target which would increase that target's criminal exposure. The least culpable target was told he could potentially receive misdemeanor charges if he would cooperate against the other three clients. All four men retained the same attorney. The government confirmed to this lawyer its willingness to proceed with the deals outlined above, but also immediately expressed concern that counsel was involved in a conflict of interest: advice to any target about whether to accept the government's offer would necessarily place counsel in the position of damaging the interests of the other three clients.

Although counsel rejected this contention, the conflict was real. Counsel's duty to advise a client about whether to accept offers of leniency or immunity simply could not be discharged where the decision to accept such offers would necessarily impact adversely on the other three clients, but the

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[1216] ABA Model Code of Professional Responsibility, Canon 5.

[1217] These facts, reflective of a commonly encountered circumstance, are drawn from United States v. Dempsey, 724 F.Supp. 573 (N.D.Ill. 1989).

decision to reject the offer would damage the interests of that client.[1218] Further, once counsel entered into an attorney/client relationship with all four men and received confidential communications from them, he placed himself in a position where he would be effectively precluded from cross-examining any former client who agreed to cooperate with the government; thus, he was presumptively unable to continue representing *any* of the four clients.[1219] As such, counsel went from having four clients to being disqualified from further representation of any of them.

The circumstances of United States v. Dempsey arose after indictment, but the principles reflected therein apply equally to the pre-indictment stages of the grand jury investigation.[1220] The more difficult issue involves the level of conflict of interest involved. In Dempsey and the cases found in footnote 16, the conflict was so apparent as to be considered "actual." However, by the time an actual conflict of interest is identified considerable damage may already have been done to the interests of the grand jury, the prosecutor and the targets. Accordingly, the prosecutor should strive to quickly identify circumstances involving a significant potential for conflict of interest.

Some older cases demonstrate reluctance to order disqualification based upon potential conflicts of interest.[1221] There is an understandable reluctance on the part of courts to tell witnesses before a grand jury that they cannot use counsel of their choice. However, such cases almost invariably involve non-target witnesses, where the potential for conflict is more speculative. Where the multiple representation involves clients who are all targets, or who are

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[1218] In re Investigation Before February 1977 Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977); In re Grand Jury Proceedings, 859 F.2d 1021, 1026 (1st Cir. 1988).

[1219] United States v. Dempsey, 724 F.Supp. 573, 578; see also Geer, Representation of Multiple Criminal Defendants: Conflicts of Interests and the Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119, 125 (1976).

[1220] See, e.g., In re Grand Jury Investigation, 436 F.Supp. 818 (W.D.Pa. 1977), aff'd, 576 F.2d 1071 (3rd Cir.), cert. denied, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F.Supp. 273, 276 (E.D.Mich. 1976); In re Investigative Grand Jury Proceedings, 480 F.Supp. 162, 167 (N.D.Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

[1221] See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 608 (D.C. Cir. 1976) (Washington Post); In re Grand Jury Empanelled January 21, 1975, 536 F.2d 1009 (3rd Cir. 1976).

composed of both targets and potential witnesses against those targets, the cases reveal a greater willingness to intervene on the basis of potential conflicts because the probabilities the conflict will ripen to the level of an actual conflict are greater.[1222] Moreover, these earlier cases should be considered in light of the Supreme Court's decision in Wheat v. United States, 436 U.S. 153 (1988), in which the Court emphasized that the negative impact of conflicting loyalties is particularly difficult to assess in the earliest stages of a case. Therefore, the Court held that district courts must enjoy substantial latitude to disqualify counsel on the basis of even potential conflicts of interest.[1223]

Thus, although the distinction between potential and actual conflicts of interest is difficult to define, particularly at the grand jury stage, it is unlikely to be decisive. Cases involving multiple representation will by definition involve multiple subjects and/or targets. The prosecutor must remain free to assess relative culpability, and to extend offers of leniency or immunity on the basis of those assessments, without fear that counsel's efforts to represent more than one subject or target will preclude such offers. As noted above, the prosecutor maintains an obligation to be alert for potential conflicts; however, the ultimate ethical duty falls on the attorney to adhere to the Canons of Ethics in his or her representation of a client.

B. Waivers

When the prosecutor alerts counsel to potential conflicts of interest arising from efforts to represent several subjects or targets before the grand jury, one common response which can be expected is an attempt to waive any resulting problems. This is usually accomplished by counsel's submission of affidavits by each client, in which the client maintains that he or she has been advised of the fact of multiple representation, is aware of the prospect that it could create conflicting interests among the various clients, but nevertheless

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[1222] See, e.g., In re Investigation Before February 1977 Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977) (counsel represented ten witnesses, three of whom were targets of grand jury); Pirillo v. Takiff, 341 A.2d 896 (Pa.), aff'd, 352 A.2d 11 (1975), cert. denied, 423 U.S. 1083 (1976).

[1223] 436 U.S. at 162-63; see also In re Special February 1977 Grand Jury, 581 F.2d 1262, 1264 (7th Cir. 1978); Tucker v. Shaw, 378 F.2d 308 (2d Cir. 1967).

desires to continue with present counsel. The affidavit also usually contains conclusory language stating that the client has been advised about the impact a conflict of interest can have on counsel's ability to vigorously represent the affiant/client.

Such waivers are not decisive, although they are certainly weighty considerations for both the court and the prosecutor to consider. The main problem, as the Supreme Court has repeatedly observed, is that in the earliest stages of a criminal case, it is virtually impossible for even a seasoned attorney to predict how conflicts may arise and impact on counsel's ability to adequately defend a client.[1224] Accordingly, it may well be a dubious proposition to assert that the client's waiver is truly "knowing", under circumstances where it is virtually impossible to "know" what problems will be encountered.

Thus, courts have struggled without success to apply a uniform standard to such waivers. Some courts flatly declare that no waiver of the right to conflict-free counsel is effective.[1225] Others accept such waivers upon a showing they were made voluntarily under a clear understanding of all the relevant facts known at the time.[1226]

In light of the Court's language in Wheat v. United States, it is likely that such waivers can no longer be flatly rejected, because the facts of that case provided an opportunity to impose such a rule. The Court did not discount entirely the prospect that such waivers could theoretically be effective. Rather, the Court emphasized that they cannot be decisive; "a waiver by the defendant [may not] necessarily solve the problem."[1227] Thus, if the trial court

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[1224] See, e.g., Holloway v. Arkansas, 435 U.S. 482, 489-90 (1978) (joint representation poses problems because of inherent difficulty in assessing what counsel did *not* do as a result of divided loyalties); Wheat v. United States, 486 U.S. 153, 159, 161-63, (multiple representation poses "special dangers" to clients because of practical inability to predict, prior to litigation, where the lawyer's efforts may be inhibited by a conflict of interest).

[1225] In re Grand Jury Proceedings, 428 F.Supp. 273, 278 (E.D.Mich. 1976) (a witness cannot "waive the right of the public to an effective functioning grand jury investigation"); In re Grand Jury Investigation, 436 F.Supp. 818, 821 (W.D.Pa. 1977), aff'd, 576 F.2d 1071 (3rd Cir.), cert. denied, 439 U.S. 953 (1978).

[1226] In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); In re Special February 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978).

[1227] 486 U.S. at 161-62.

maintains doubt about counsel's ability to perform in an effective manner, it enjoys "substantial latitude" to reject the client's waiver and insist upon separate representation.[1228] This is a practical result, the Court noted, particularly in view of "the apparent willingness of Courts of Appeals to entertain ineffective assistance claims from defendants who have specifically waived the right to conflict-free counsel."[1229] This *post hoc* ability of the client to ignore the impact of his order waiver is hardly consistent with the courts' institutional interests, and this point should be emphasized to courts confronted by such waivers.

C. Procedures To Resolve Conflicts Of Interest

Multiple representation can occur for a variety of reasons, ranging from an understandable and legitimate desire to reduce costs, to unethical efforts to control the decisions of witnesses or coconspirators. Because there are no uniform circumstances leading to multiple representation cases, there can be no uniform rules about the appropriate response expected of a prosecutor.

However, there are some general principles that apply. First, the rules of ethics and the governing caselaw indicate a decided preference that each client, and particularly subjects or targets of a grand jury, should be individually represented. The prosecutor can fairly indulge in the presumption that a potential conflict of interest exists in multiple representation circumstances. Second, those same rules and precedents contemplate that a client's decision to be represented by counsel be a volitional act.[1230] Any suggestion that a corporation has implicitly or expressly forced an employee to accept representation from a specified lawyer, or that any member of a conspiracy has been forced to accept the services of counsel, raises the obvious likelihood that the provided attorney is serving the interests of someone other than the "client".

[1228] 486 U.S. at 163.

[1229] Wheat v. United States, 486 U.S. 153, 162.

[1230] See Rule 7.3, Model Code of Professional Responsibility (a lawyer shall not accept a client if counsel knows that the client has been subjected to "coercion, duress, or harassment" in forming the relationship).

Accordingly, when several individuals (and particularly one or more targets of the investigation) appear to be represented by the same attorney, the prosecutor should make inquiries designed to determine whether there are ethical problems present. This should first be done outside the judicial forum. The prosecutor should inquire of counsel, in writing, about the circumstances. This letter should ask the names of those whom counsel claims to represent, their status within a corporation (where applicable), the identity of any person paying counsel's fees, and the scope of counsel's representation. This letter should insist upon a written reply, for purposes of any future litigation on the topic.

If developments thereafter increase the prospect that a conflict of interest exists, the prosecutor should issue a letter asking counsel to provide written assurance that the clients have been thoroughly admonished about the dangers inherent in multiple representation. Where appropriate, this letter can begin the process of identifying which client(s) are subjects or targets of the inquiry, and can also include indications that one or more of the client(s) may be considered for leniency or immunity, so that counsel is on notice of the increased likelihood of a conflict. It is also wise at an early point in the case to ascertain whether any Joint Defense Agreements are in existence among the various subjects or targets of the investigation.[1231]

Such an exchange can assist defense counsel in identifying his or her own ethical obligations in a case, such that counsel may decide to assist one or more clients in seeking new counsel. If, however, counsel persists in multiple representation in the face of significant prospects for a conflict, it is advisable to immediately begin building a record for future litigation on the topic. Promptness is essential; interviews with any client/subject are undesirable if the attorney in attendance is laboring under a conflict which involves representation of any other subject or target of the same investigation.

This record can be made in the context of grand jury proceedings. Care must be taken to avoid any questions which could elicit confidential communications between client and counsel, but questions can and should be asked about the identity of counsel, the fees paid (and by whom), any duress or undue influence exerted on the client to seek specific counsel, the client's knowledge of other persons who are represented by the same attorney in the

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[1231] Joint Defense Agreements are discussed in greater detail in Section III of this Chapter, infra.

same inquiry, and the client's understanding of how multiple representation can adversely impact counsel's efforts on the client's behalf. Although, as noted above, clients often sign affidavits purporting to waive any conflict of interest, when questioned about their actual appreciation of how these conflicts can affect their own case, clients often reveal little or no appreciation for the dimensions of the problem.

If all these procedures convince the prosecutor that a significant potential exists for a conflict of interest, that the interests of the investigation and the particular client(s) are jeopardized by the conflict, and that counsel intends to ignore his or her ethical obligations, judicial intervention should be sought. A motion should be filed with the presiding judge in charge of the grand jury, detailing the facts raising these concerns. Because of the various interests implicated by the issue (see Section I., *supra*), it is not advisable to caption this as a "Motion To Disqualify Counsel". Such a caption is likely to further counsel's anticipated claims that the government is simply trying to rid itself of an effective adversary, or trying to fracture the attorney/client relationship and sow distrust between counsel and his or her clients. Rather, the pleading should be captioned as a "Motion For Inquiry Into Potential Conflict Of Interest". This format recognizes the reality that it is in the best interests of the court, the grand jury, the client, and the prosecutor to resolve any serious problems resulting from multiple representation before the case proceeds any further. Even if the court declines to disqualify counsel, there is an adequate record showing that the government did its best to protect all the relevant interests.

Where the motion includes use of any grand jury materials, it should be filed *in camera* or in some other fashion that will protect grand jury secrecy. It also is desirable to file the motion in a manner which will avoid undue publicity or embarrassment to the attorney under discussion. The interest of the prosecutor is to maintain a proper attorney/client relationship, not to punish counsel for disagreeing about the problem. However, it is important that the motion call for an adversarial proceeding; *ex parte* motions of this type are ill-advised.[1232] The written correspondence discussing the prosecutor's concerns should be introduced, to demonstrate the government's efforts to resolve the matter outside the courtroom.

[1232] United States v. Duklewski, 567 F.2d 255, 257 (4th Cir. 1977); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); In re Paradyne Corp., 803 F.2d 604, 607, 612 (11th Cir. 1986).

At the hearing, the prosecutor should request permission to interrogate any and all client(s) of counsel who purportedly wish to continue with existing counsel despite the multiple representation issue. These clients should be asked about the admonitions they received about the potential for conflict, and should be encouraged to verbalize their own understanding of how that could adversely impact on, for example, counsel's ability to cross-examine witnesses. Clients should be asked to confirm receipt of any information provided to counsel about potential plea offers, immunity, or the like. If suggested by the facts, clients should be asked about the possibility they were coerced into seeking counsel's services. Again, questions should be carefully crafted to avoid disclosure of privileged data.

If counsel is disqualified from further representation after such a hearing, the issue is not subject to interlocutory appellate review and substitute counsel must be obtained.[1233] Any appellate review of the topic must wait for an appeal, if any, after conviction by affected client(s).[1234] Similarly, it is unlikely that the prosecutor can seek interlocutory appellate review of a decision not to disqualify counsel.[1235] However, if the court declines to disqualify counsel it should nonetheless fully admonish affected clients about the ramifications of continuing with current counsel under the circumstances.

[1233] United States v. Flanagan, 465 U.S. 259, 263 (1984); In re Schmidt, 775 F.2d 822, 823 (7th Cir. 1985).

[1234] Such appeals will be difficult. See, e.g., Wheat v. United States, 486 U.S. 153 (1988); United States v. Kenney, 911 F.2d 315, 320 (9th Cir. 1990); United States v. Rewald, 889 F.2d 836, 855 (9th Cir. 1989); United States v. Agosto, 675 F.2d 965, 970 (8th Cir. 1982); Hoffman v. Leeke, 903 F.2d 280, 285 (4th Cir. 1990).

[1235] Schmidt, supra note 28, 775 F.2d at 825.

III. Joint Defense Agreements

Joint Defense Agreements ("JDAs") are designed so that a group of clients can communicate among themselves, and with each other's respective counsel, without waiver of the attorney/client privilege. JDAs have, to date, gained approval from the courts.[1236]

These agreements can pose unique difficulties for prosecutors at the grand jury stage. The following facts, drawn from a case in the Western District of Washington,[1237] illustrate the challenges prosecutors can face.

A corporation was suspected of wrongdoing, and grand jury subpoenas were issued. Several employees of the corporation were recipients of these subpoenas, and all retained counsel, albeit not the same counsel. There were further indications that all the lawyers were retained at the expense of the target corporation. The attorneys entered into JDAs, by which they shared information among themselves, including data learned from their clients.

Developments in the case led the government to seek and obtain orders of immunity for all but one of these corporate employees, with the intent that the immunized employees would testify for the government at trial. The one employee who did not receive immunity was indicted. The attorneys for the immunized witnesses apparently continued to exchange information with the attorney for the indicted member of the JDA. The lawyer for that defendant was expected to appear at trial and cross-examine the immunized witnesses, meaning that this lawyer would be precluded from using information he obtained from and about those witnesses in the context of the JDA relationship.

The government accordingly filed a request with the trial court, asking it to inquire into these facts to determine whether defense counsel suffered from a conflict of interest. This motion observed that counsel was privy to information learned from the immunized witnesses pursuant to the JDA; if counsel sought to use that information on cross-examination of these witnesses, he would violate

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[1236] See, e.g., Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347, 349 (9th Cir. 1964) (grand jury case); United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979), cert. denied, 444 U.S. 833 (1979).

[1237] United States v. Anderson, No. CR91-109(Z)R (W.D.Wash.).

their privilege.[1238] If he refrained from use of the information, he would necessarily inhibit his efforts on behalf of the indicted client, implicating Sixth Amendment concerns.

The defendant's attorney, the attorneys for the immunized witnesses, and representatives of the Federal Bar Association acting as *amicus curiae* all filed responses decrying the government's motion. These motions asserted that the government's theory was designed for, or at least would result in, emasculation of the JDA. In the course of resisting the request for inquiry, the attorneys for the immunized witnesses made one particularly noteworthy argument:

> ... the relationship between a joint-defense attorney and another joint defense member's client *is not an attorney-client relationship*. ... In the present case, and in joint defense relationships in general, each lawyer makes clear from the start that he represents only his own client and does not act 'for the benefit and subject to the control' of the other lawyer's clients. ... Since one member's client is not the 'client' of another member, *none of the other duties which define an attorney-client relationship, such as the duty to act exclusively in a client's interest and the duty to act under your client's control and direction, apply to joint defense relationships.*[1239]

Thus, the defense bar apparently views JDAs as creating a limited form of attorney/client relationship, in which the evidentiary privilege of confidentiality is perfected, but in which the ordinary ethical constraints of undivided loyalty to any and all clients are inapplicable. Under this view, a lawyer representing an indicted member of a JDA may not reveal confidences learned from other JDA signatories, but otherwise owes them none of the fiduciary duties existing between a lawyer and a client.

The merits of this view remain untested in any reported decision as of the date this Chapter is written. In the Anderson case discussed herein, the trial court held a hearing at which the defendant was admonished about the

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[1238] See, e.g., McPartlin, supra note 31, 595 F.2d 1321, 1337: "The attorney who thus undertakes to serve his client's codefendant for a limited purpose ... [by obtaining information from the codefendant pursuant to a JDA] becomes the codefendant's attorney for that purpose."

[1239] "Witnesses' Opposition To Government Motion For Inquiry And For Disqualification Of Counsel", pages 12-13, filed on or about June 12, 1991, United States v. Anderson, No. CR91-109Z(R) (W.D.Wash.) (emphasis supplied).

impact the JDA arrangement could have on the defense attorney's ability to cross-examine the immunized government witnesses. Finding that the defendant entered the JDA knowing of its ramifications, and that the waiver of any conflict of interest was effective, defense counsel was permitted to remain on the case.

While this result leaves several compelling issues unresolved, the prosecutor confronted with a JDA must appreciate the problems they present. If a witness joins a JDA at the grand jury stage, he or she may well learn information which is privileged as to other members of the agreement. That information remains privileged, and may not be used as evidence at trial, which in turn complicates the prosecutor's job in segregating privileged from non-privileged data. This may in turn reduce the usefulness of the cooperation provided by the witness. On the other hand, because the witness' decision to cooperate with a third party (the government) does not place him or her in an adversarial context with the other members of the JDA, when the witness testifies at trial he or she cannot be cross-examined by defense counsel on the basis of data defense counsel learned while the witness was a member of the JDA.[1240] This suggests an impairment of defense counsel sufficient to raise Sixth Amendment problems on appeal.

Joint Defense Agreements are analytically difficult creatures. There are many cases in which the courts decry the practice of lawyers who would seek to cross-examine former or present clients. Unfortunately, these cases may be distinguishable because they usually involve either efforts at multiple representation (where the courts are more inclined to find conflicts to be insoluble) or situations in which neither the attorney nor the former client could have reasonably foreseen that one day the lawyer would confront the former client as a witness. In the former group of cases on multiple representation, defense counsel distinguish JDAs as being examples of individual representation for individual clients, but in the context of shared resources. To avoid the effect of the latter group of cases involving successive representation, the lawyers ask their clients to sign extensive waivers which detail the possibility that one or more members of the JDA may later become witnesses for the government. Because the client supposedly enters the agreement knowing that he could confront that prospect, but chooses to do so to take advantage of pooled resources, courts may be reluctant to reject the client's waiver of any conflict of interest.

[1240] United States v. Moscony, 927 F.2d 742, 751-54 (3rd Cir. 1991).

As these issues ripen in the courts, the judiciary may be forced to confront the ramifications of the argument that JDAs effectively create a new form of attorney/client relationship, one which extends the cloak of confidentiality around communications but which otherwise seems to ignore the usual attributes required of that evidentiary privilege. In cases involving corporations or organizations which foist counsel upon lower-echelon members, a JDA could theoretically permit an attorney for one employee-member of the JDA to inform the corporation or organization about the tactics under consideration by another employee-member. In cases in which member-lawyers of a JDA circulate information learned at proffers or in grand jury questioning, that process theoretically could be used to directly frustrate the progress of an investigation. In any number of circumstances, JDAs can be abused whenever the underlying premise is that lawyer-members are not bound by any duty of fealty to other client-members beyond the evidentiary privilege of confidential communications.

Prosecutors are urged to quickly ascertain whether they are confronted by a JDA, particularly in multi-target cases or in the context of corporate wrongdoing, and to seek judicial intervention whenever there is reason to believe that the JDA is being used for any purpose inconsistent with the ethical underpinnings of the attorney/client privilege.

IV. Successive Representation

The protections of the attorney/client privilege for confidential communications are perpetual; unless waiver occurs, the client is entitled to demand that his or her confidences be maintained even after the professional relationship terminates.[1241] As a result, the attorney who confronts a former client as a witness is ordinarily precluded from exploiting any privileged information obtained from that former client, such as by use in cross-examination.[1242]

[1241] These and related concepts are more fully discussed in Chapter Seven "Privileges".

[1242] See Rule 1.9(b), Model Code of Professional Responsibility ("A lawyer who has formerly represented a client in a matter shall not thereafter ... [u]se confidences or secrets (continued...)

A commonly encountered situation involving conflicts of interest arises when counsel for the target of a grand jury is known to have a previous attorney/client relationship with a government witness. This conflict, however, is not likely to ripen at the pre-trial stage. The lawyer's loyalty to the target is not yet implicated, and there will be no occasion for counsel to cross-examine a former client at the grand jury level of proceedings. Indeed, it may well be contrary to the prosecutor's best interest to even address this issue to defense counsel if it would reveal the identity of a witness heretofore unknown by the target or his or her counsel. Accordingly, it may be rare for this form of conflict to present itself as an impediment to the investigation.

However, where indictment of the client seems assured, and where the attorney's former client is certain to be a government witness, it is often advisable to alert counsel to the conflict soon enough to afford the opportunity to locate substitute counsel. If counsel, knowing the facts, resists voluntary removal from the case, the prosecutor should begin the process of seeking judicial intervention promptly after indictment. This should not pose any significant obstacle, as the cases clearly disapprove counsel's participation in a proceeding wherein he or she would cross-examine a former client.[1243] The courts will erect an irrebuttable presumption that counsel obtained privileged information from the prior client[1244] and will usually reject counsel's assurance that no privileged data will be used in examination.[1245]

Another form of successive representation occurs where a subject or target of the current grand jury inquiry is offered immunity or leniency in return for testimony against another subject or target, and this latter subject or target was previously represented by the same attorney who now represents the bargaining target. Rule 1.9(a) of the Model Code precludes counsel from advising the bargaining client, if the advice is called for "in the same or a

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[1242](...continued)
relating to the representation to the disadvantage of the former client..."); see also United States v. Moscony, 927 F.2d 742, 748-49 (3rd Cir. 1991).

[1243] See, e.g., Moscony, 927 F.2d at 750 (An attorney who seeks to cross-examine a former client "inherently encounters divided loyalties").

[1244] See, e.g., United States v. Provenzano, 620 F.2d 985, 1005 (3rd Cir.), cert. denied, 449 U.S. 899 (1980).

[1245] See, e.g., United States v. James, 708 F.2d 40, 45 (2d Cir. 1983).

substantially related matter." Rule 1.9(b) forbids counsel from using any information gained from a former client to "the disadvantage of the former client." In combination, these rules will cause counsel to be disqualified unless the prior client has made a written consent after being informed of all the facts. Apart from these ethical provisions, disqualification of the attorney for the subject who has been offered the bargain should still be required where the interests in jeopardy are those of former clients, i.e., where the interests of the present client would be deemed "materially adverse" to any former client.[1246]

V. Attorneys as Witnesses or Targets

In a real sense, the purest form of conflicting interests exists when the lawyer is personally involved in some litigation or investigation which may conflict with the interests of his or her client. Predictably, the courts are especially sensitive to these circumstances.

If a lawyer for a subject or target of a criminal investigation is also a subject or target of that same inquiry, disqualification is an absolute.[1247] The rule is not so absolute, however, when the lawyer is the subject of an investigation which is unrelated to the matter on which he or she represents a target. In such situations, the client is theoretically able to waive the conflict upon complete disclosure of the fact that counsel is under scrutiny (without revealing, of course, the facts of the case themselves), and counsel can continue to serve the client if the client so desires. In this regard, the stringency applied to such waivers will turn primarily upon whether the case in which counsel represents the client is being pursued by the same prosecutor's office which is investigating the attorney.[1248]

[1246] United States v. Moscony, 927 F.2d at 748-49.

[1247] See, e.g., United States v. Reeves, 892 F.2d 1223, 1227 (5th Cir. 1990); In re Investigative Grand Jury Proceedings on April 6, 1977, 432 F.Supp. 50, 53 (W.D.Va.1977).

[1248] See, e.g., United States v. McLain, 823 F.2d 1457, 1463 (11th Cir. 1987); United States v. DeFalco, 644 F.2d 132, 134 (3rd Cir. 1979) (en banc); United States v. Marin, 630 F.Supp. 64 (N.D.Ill. 1985).

In a related vein, circumstances can arise in which an attorney will be called upon to testify at some proceeding involving a client, whether grand jury or trial. If the testimony involves counsel's testimony in favor of the client, not only is counsel individually disqualified from representation at the proceeding, but so are all other members of counsel's firm.[1249] Conversely, if counsel's testimony is offered by the client's adversary, counsel is likewise disqualified from representation at any proceeding in which such testimony is received.[1250] As is noted in Chapter Seven on the attorney/client privilege, these considerations must be assessed whenever a prosecutor considers summoning an attorney before the grand jury to offer testimony related to a present or former client, and the appropriate authorizations must be obtained from the Department before a subpoena issues.

[1249] United States v. Peng, 766 F.2d 82, 86-87 & n.1 (2d Cir. 1985).

[1250] Uptain v. United States, 692 F.2d 8, 10 (5th Cir. 1982).

Chapter Ten

ALLEGATIONS OF GRAND JURY ABUSE AND PROSECUTORIAL MISCONDUCT

I. Nature of the Prosecution Function

A grand jury possesses extraordinary investigative powers that are dependent on and supervised by the prosecuting attorney. Prosecutorial abuse of the grand jury puts the credibility of the prosecutor at risk. It adversely affects the government's ability to prosecute the case successfully, and, in extreme or repeated cases, could lead to legislative or court-ordered changes that would limit the ability of the government to use the grand jury to investigate fully and effectively violations of federal criminal law.

The Department of Justice policy regarding grand jury practice is set forth in the United States Attorneys' Manual 9-11.020, which states that the prosecutor's function before the grand jury is:

> to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities,

> he/she must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

In applying these standards, prosecutors must attempt to avoid even the appearance of impropriety before the grand jury, particularly in light of the wide range of permissible conduct that defendants allege as grand jury abuse. Courts will hold federal prosecutors to the high standards of conduct which the Department of Justice imposes. One appellate court, in discussing the duties of the prosecutor before the grand jury, stated that one protection which remains "is the conscientious and dutiful conduct by the prosecutor, who 'is an administrator of justice, an advocate, and an officer of the court'. (Citation omitted) ...In failing to adhere to internal policy...the prosecutor...undermined the Department of Justice's commitment to fairness."[1251]

II. Judicial Review

A. Jurisdiction of the Court

Judicial review of grand jury proceedings is extremely limited for several reasons. First, the grand jury is traditionally an independent body that is unrestricted by the technical rules of evidence and procedure. Second, because of the general rule of secrecy of grand jury proceedings, courts are reluctant to interfere with such proceedings, particularly while an investigation is ongoing. Third, courts are unwilling to impede or obstruct the grand jury's vital law enforcement function by questioning the grand jury's conduct. Finally, the doctrine of separation of powers limits the court's ability to supervise the conduct of prosecutors, who are members of the Executive Branch. Nonetheless, courts have dismissed indictments either on due process grounds or as an exercise of their supervisory powers.

[1251] United States v. Gillespie, 974 F.2d 796, 801-802 (7th Cir. 1992).

B. Due Process

A few courts have dismissed indictments because of prosecutorial abuse before the grand jury on due process grounds. Dismissal on due process grounds is rare because most courts view grand jury proceedings as outside of the scope of the Due Process Clause, the indictment being a mere technical instrument to bring on the trial.[1252] A few courts have dismissed indictments on due process grounds because of the knowing use of perjured testimony.[1253] However, the weight of authority in this area is that dismissal, if justified at all, is only justified in flagrant cases.[1254] As discussed more fully below, the Supreme Court's decision in Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988), has established, at a minimum, that a due process claim requires a showing that the alleged abuse "substantially influenced the grand jury's decision to indict."[1255]

C. Supervisory Powers

Courts have dismissed an indictment based on grand jury abuse as an exercise of the court's inherent supervisory powers. They have reasoned that, as inherent supervisor of the grand jury process, they are empowered to

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[1252] See Bracy v. United States, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., on application for stay).

[1253] See United States v. Basurto, 497 F.2d 781, 785-787 (9th Cir. 1974).

[1254] See United States v. Richman, 600 F.2d 286, 292 (1st Cir. 1979) (prosecutorial negligence in not knowing of false testimony is insufficient for dismissal); United States v. Cathey, 591 F.2d 268, 271-273 (5th Cir. 1979) (use of perjured testimony does not automatically require dismissal); United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977) (indictment should be dismissed only in flagrant case of knowing use of perjury relating to a material matter), cert. denied, 435 U.S. 944 (1978); Coppedge v. United States, 311 F.2d 128, 131-132 (D.C. Cir. 1962) (Burger, J.) (perjury does not require dismissal if sufficient competent evidence is presented), cert. denied, 373 U.S. 946 (1963).

[1255] Bank of Nova Scotia v. United States, 487 U.S. at 256.

establish standards of justice and fair play in grand jury proceedings that are not specifically required by the Constitution or federal statutes. In exercising these supervisory powers, courts must not encroach on the legitimate prerogatives and independence of the grand jury and the prosecutor.[1256]

Courts have exercised their supervisory power to dismiss indictments for grand jury abuse to remedy the abuse, preserve the integrity of the grand jury, and to deter similar conduct in the future.[1257] Courts have dismissed indictments or reversed convictions: where the prosecutor's conduct before the grand jury was flagrant and extremely prejudicial;[1258] where the particular misconduct had become repetitive and entrenched;[1259] where the result of the misconduct was unequal treatment of the accused;[1260] or where there was a need to formulate procedural rules governing proper prosecutorial conduct.[1261]

The case law noted above always has been disputed because there is no clear authority for the courts in the exercise of supervisory powers and because grand juries are inherently independent bodies. This case law has become even more questionable in light of Bank of Nova Scotia in which the Supreme Court required a showing of actual prejudice to the defendant before an indictment

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[1256] United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

[1257] See United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979).

[1258] See United States v. Hogan, 712 F.2d 757, 761-762 (2d Cir. 1983); United States v. Serubo, 604 F.2d 807, 817-818 (3d Cir. 1979); United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979); Brown v. United States, 245 F.2d 549, 554-555 (8th Cir. 1957).

[1259] See United States v. Broward, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941 (1979); United States v. Birdman, 602 F.2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980).

[1260] United States v. Jacobs, 531 F.2d 87, 89-90 (2d Cir.), vacated, 429 U.S. 909 (1976).

[1261] See In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 93-94 (3d Cir. 1973); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).

could be dismissed for prosecutorial misconduct on non-constitutional grounds.[1262]

In United States v. Williams, ___ U.S. ___, 112 S.Ct. 1735 (1992), the Supreme Court further restricted the ability of federal courts to invoke the supervisory power as a means of creating prosecutive standards before the grand jury. The Court stated that precedent regarding the supervisory authority of the judiciary applied "strictly with the court's power to control their own procedures." United States v. Williams, ___ U.S. ___, 112 S.Ct. at 1742. The Court then stated:

> We did not hold in Bank of Nova Scotia, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance--just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves. ... Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such "supervisory" judicial authority exists ... .

Id.

D. Supreme Court Authority Limiting A Court's Ability To Dismiss Indictments Based On Grand Jury Abuse

The Supreme Court has been reluctant to interfere with grand jury proceedings by permitting challenges to indictments based on prosecutorial misconduct because of the delay and disruption that would inevitably result.

[1262] See generally Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, Colum. L. Rev. 1433 (1984); cf. United States v. Payner, 447 U.S. 727, 735 (1980) ("Supervisory powers do not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court").

This reluctance was evidenced in the Supreme Court's decisions in Costello v. United States, 350 U.S. 359, 363 (1956), and United States v. Calandra, 414 U.S. 338, 350 (1974). In Costello, the Supreme Court refused to allow a challenge to the nature or sufficiency of the evidence presented to the grand jury. The Court held that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face is enough to call for trial of the charge on the merits."[1263] In Calandra, the Supreme Court declined to apply the Fourth Amendment exclusionary rule to grand jury proceedings. The Court reaffirmed its view as expressed in Costello and stated that any rule that would "saddle the grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[1264] Combined, Costello and Calandra, would seem to bar any challenge to an indictment based on the nature or sufficiency of the evidence presented to the grand jury.

In United States v. Mechanik, 475 U.S. 66, 72-73 (1986), the Supreme Court further curtailed a defendant's or putative defendant's ability to challenge prosecutorial misconduct before the grand jury. The Court held that certain violations of the Federal Rules of Criminal Procedure were rendered harmless beyond a reasonable doubt by the defendant's subsequent conviction by a petit jury. The holding and logic of Mechanik should prevent most post-conviction attacks based on prosecutorial misconduct before the grand jury.

Following Mechanik, defense counsel argued that if procedural errors became moot after conviction, then they should be afforded earlier and greater access to grand jury materials so that they could pursue relief from grand jury abuses by seeking dismissal of the indictment before trial. However, the Supreme Court in Midland Asphalt Corp. v. United States, 489 U.S. 794, 799-800 (1989), refused to create an additional basis for immediate appeal in criminal cases based on Mechanik's limitations on post-conviction relief.

Substantial limitations were placed on the court's ability to dismiss indictments based on its supervisory powers over prosecutors and the grand jury in Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988). In Bank of Nova Scotia, the district court dismissed the indictment because of a

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[1263] Costello v. United States, 350 U.S. at 363.

[1264] United States v. Calandra, 414 U.S. at 350, (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)).

host of violations of Rule 6(d) and (e), as well as other types of prosecutorial misconduct. The Tenth Circuit reversed and the Supreme Court affirmed, holding that a non-constitutional grand jury challenge should result in dismissal of an indictment only if the violation "substantially influenced the grand jury's decision to indict." In other words, the Supreme Court requires actual prejudice before dismissal can be considered an appropriate remedy. As noted above, United States v. Williams, ___ U.S. ___, 112 S.Ct. 1735 (1992), further limits the ability of the courts to dismiss an indictment for alleged grand jury abuse. The combined effect of these Supreme Court cases is to severely limit a defendant's ability to attack the validity of an indictment.

E. Remedies

Although there is a strong presumption of regularity surrounding a grand jury proceeding,[1265] sufficiently outrageous misconduct may lead a court to dismiss an indictment on due process grounds[1266] or as an exercise of its supervisory powers.[1267]

Other sanctions used by the courts to remedy grand jury abuse include quashing subpoenas or issuing protective orders,[1268] suppressing grand jury

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[1265] See United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.), cert. denied, 458 U.S. 1107 (1982); In re Grand Jury Proceedings, (Johanson), 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 430 U.S. 969 (1977); In re Inzirillo, 542 F.2d 90, 91 (1st Cir. 1976).

[1266] See, United States v. Basurto, 497 F.2d 781, 785-787 (9th Cir. 1974).

[1267] See, United States v. Cruz, 478 F.2d 408, 411 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

[1268] In re Grand Jury Subpoena Duces Tecum (Model Magazine), 829 F.2d 1291, 1302 (4th Cir. 1987), cert. denied, ____ U.S. ____ (1990).

testimony,[1269] expunging prejudicial language from indictments,[1270] and recommending disciplinary actions against the prosecutor.[1271]

III. Grand Jury Abuse: Specific Issues

The Department of Justice maintains the highest standards for its attorneys. Department attorneys must abide by all of the appropriate rules to prevent misconduct before the grand jury which would adversely affect the success of the prosecution. Even if misconduct is insufficient to justify dismissing an indictment, it may be sufficient to delay a trial while abuse motions are resolved or to justify providing a defendant with discovery of grand jury materials under Fed. R. Crim. P. 6(e)(3)(C)(ii), to which the defendant would not otherwise be entitled. In any event, engaging in abusive conduct inevitably leads to defending abuse motions and puts a prosecutor's credibility at issue at the outset of a case.

A. Typical Allegations Of Misconduct

Although the case law limits a defendant's ability to successfully attack an indictment based on allegations of a prosecutor's misconduct before the grand jury, such attacks are made frequently even when no misconduct has occurred. The following is a discussion of the more common allegations of misconduct with a brief comment and appropriate case cites for each area. An in-depth analysis of these allegations and the cases can be found in Beale and Bryson, Grand Jury Law and Practice, Ch. 10; Moore's Federal Practice, Volume 8, ¶ 6.04.; Representation of Witnesses Before Federal Grand Juries, National Lawyers Guild, Chs. 12 & 13; and Prosecutorial Misconduct, Gershman, Chs. 2-3.

[1269] United States v. Jacobs, 531 F.2d 87, 89-90 (2d Cir.), vacated, 429 U.S. 909 (1976).

[1270] United States v. Briggs, 514 F.2d 794, 806-807 (5th Cir. 1975).

[1271] United States v. Serubo, 604 F.2d 807, 818-819 (3d Cir. 1979).

1. Improper Conduct

a. Unauthorized persons in grand jury room

The only persons authorized to be present when the grand jury is in session are enumerated in Rule 6(d) of the Federal Rules of Criminal Procedure. These persons are the government attorney, the witness, an interpreter, a court reporter, and the grand jurors.

"Government Attorney" is defined in Rule 54(c) of the Federal Rules of Criminal Procedure for practical purposes to be an Authorized Assistant Attorney General or Assistant U.S. Attorney. Other Department of Justice attorneys are commonly designated by the Attorney General as special attorneys for purposes of conducting grand jury proceedings.[1272] Department of Justice attorneys are not authorized to participate in grand jury proceedings unless they are first appointed as an authorized assistant of the Attorney General, a U.S. Attorney, an Assistant U.S. Attorney, a Special Assistant U.S. Attorney, or an authorized assistant of a U.S. Attorney.[1273] Others who may not be present during grand jury proceedings include U.S. Marshal personnel or other agents who are involved in the transport or guarding of prisoner-witnesses and any non-witness personnel operating technical equipment such as video players and tape recorders. Additionally, more than one witness may not be present at the same time, although, as noted above, duly sworn interpreters are allowed by Rule 6(d).

A Rule 6(d) violation should not result in the dismissal of an indictment where the unauthorized intrusion had no substantial influence on the grand jury's decision to indict.[1274] In United States v. Kilpatrick, 821 F.2d 1456,1467-1468 (10th Cir. 1987), the defendants requested dismissal of the indictment for a violation of Rule 6(d). The Tenth Circuit agreed that the Rule

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[1272] See 18 U.S.C. §515(a).

[1273] USAM 9-11.241-242. See Chapter One, Section II of this Manual for further discussion of this issue.

[1274] Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); United States v. Mechanik, 475 U.S. 66, 72-73 (1986).

had been violated because on several occasions IRS agents appeared before the grand jury jointly reading transcripts and, at times, the prosecutors left the grand jury room and allowed the agents to continue reading. The appellate court reversed the district court's dismissal of the indictment finding that the violation of the Rule did not result "in prejudice or infringement on the grand jury's independent functioning..." Notwithstanding the fact that a defendant's Rule 6(d) claim of abuse will in most instances be unsuccessful (if dismissal of the indictment is sought), the Rule is so clear that there is rarely any reason for its violation.

As noted in Chapter One of this Manual, should an unauthorized person enter the grand jury room, the prosecutor should immediately stop the proceeding, escort the intruder out of the grand jury room, obtain an explanation for the intrusion and place on the record the fact of and reason for the intrusion, noting that no proceedings were conducted in the intruder's presence.

b. Violations of grand jury secrecy

As discussed in detail in Chapter Four of in this Manual, Rule 6(e), Federal Rules of Criminal Procedure, precludes the disclosure of matters occurring before the grand jury, with limited exceptions. The disclosure of grand jury material is often the basis for a motion to dismiss based on grand jury abuse. While Rule 6 provides that a violation may be punished as a contempt of court, at least one appellate court has held that the contempt language is permissive only and that "violations of Rule 6(e) may justify dismissal of the indictment where there has been an abuse of the grand jury process." United States v. Kilpatrick, 821 F.2d 1456, 1469 (10th Cir. 1987). While finding several violations of Rule 6(e), the court indicated that its focus "must be on the integrity of the grand jury's process and independence, rather than on the propriety of the Government's conduct." United States v. Kilpatrick, 821 F.2d at 1469. The court went on to find that the accumulated misconduct did not infringe on the grand jury's ability to exercise independent judgment and therefore dismissal of the indictment was not warranted.

In connection with motions to dismiss based on Rule 6, defendants often claim that the use of "grand jury agents" violates Rule 6's prohibition against

unauthorized presence or unauthorized disclosure. While the practice of having a case agent or case agents sworn by the foreman as "grand jury agents" may be common, the manner in which these agents are utilized may lead to a claim of grand jury abuse.[1275]

c. Personal opinions and testimony of prosecutor

A prosecutor may state an opinion to the grand jury that the evidence warrants the return of an indictment so long as that opinion is based on evidence actually presented to the grand jury.[1276] In doing so, the prosecutor must be careful to avoid presenting this opinion in a manner calculated to inflame or improperly influence the decision of the grand jury.[1277] The prosecutor should be particularly careful not to give a general opinion as to the credibility of a witness.[1278] As a useful guide, the prosecutor should say nothing in summation to a grand jury that would not be proper in a summation before a petit jury.

A prosecutor must not act as a witness in presenting evidence.[1279] If a prosecutor possesses relevant information based on his or her personal knowledge that is essential to obtaining an indictment, that prosecutor should turn the investigation over to another prosecutor and appear before the grand jury only in the role of a sworn witness. It should be noted that a prosecutor

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[1275] United States v. Kilpatrick, 821 F.2d 1456, 1472 (10th Cir. 1987); United States v. Claiborne, 765 F.2d 784, 794-796 (9th Cir. 1985).

[1276] United States v. McKenzie, 678 F.2d 629, 632-633 (5th Cir. 1982); cert. denied, 459 U.S. 1038 (1982); United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979).

[1277] USAM 9-11.020; United States v. Ogden, 703 F.2d 629, 637 (1st Cir. 1983).

[1278] United States v. Giorgi, 840 F.2d 1022, 1031-1032 (1st Cir. 1988); United States v. Al Mudarris, 695 F.2d 1182, 1187 (9th Cir. 1983), cert denied, 461 U.S. 932 (1983); United States v. Ogden, 703 F.2d 629, 637 (1st Cir. 1983).

[1279] United States v. Ogden, 703 F.2d 629, 637 (1st Cir. 1983); United States v. Birdman, 602 F.2d 547, 551-555 (3d Cir. 1979), cert. denied, 444 U.S. 906 (1980); United States v. Treadway, 445 F. Supp. 959, 961-962 (N.D. Tex. 1978); See Chapter Two, Section II, of this Manual for additional discussion of prosecutor statements before a grand jury.

may be deemed an unsworn witness any time the prosecutor presents facts to the grand jury that have not been put in evidence by sworn witnesses.[1280]

d. Use of perjured testimony

A defendant may establish grand jury abuse by demonstrating that the prosecutor obtained an indictment by knowingly submitting perjured testimony to the grand jury.[1281] However, before dismissal may be justified, the perjury must be "material." If sufficient truthful testimony exists to support the indictment, the indictment should not be dismissed since it is presumed the grand jury would have returned the indictment absent the perjurious testimony.[1282] If discovery of the perjury occurs before indictment, the prosecutor must disclose the fact of perjury to the grand jurors. If the discovery comes after indictment, the prosecutor has a duty to disclose this information to defense counsel as part of the constitutional duty to disclose exculpatory evidence.[1283]

e. Misleading use of hearsay

An indictment may be based entirely on hearsay evidence.[1284] However, if the grand jury is misled into believing that the testimony was not hearsay, and if there is a probability that had the jury actually heard the hearsay

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[1280] United States v. Wells, 163 F. 313, 328 (D. Idaho 1908).

[1281] United States v. Basurto, 497 F.2d 781, 785-786 (9th Cir. 1974); United States v. Rivera-Santiago, 872 F.2d 1073, 1088 (1st Cir.), cert.denied, 109 S. Ct. 3227 (1989); United States v. Claiborne, 765 F.2d 784, 791 (9th Cir. 1985).

[1282] United States v. Adamo, 742 F.2d 927 (6th Cir. 1984); United States v. Udziela, 671 F.2d 995, 1001 (7th Cir.), cert. denied, 457 U.S. 1135 (1982). United States v. Cathey, 591 F.2d 268, 271-272 (5th Cir. 1979); United States v. Claiborne, 765 F.2d at 791-792.

[1283] Brady v. Maryland, 373 U.S. 83 (1963).

[1284] Costello v. United States, 350 U.S. 359, 363 (1956).

declarant it would not have indicted the defendant, some courts are inclined to find grand jury abuse.[1285]

The prosecutor should never mislead the grand jury as to the hearsay nature of the evidence. The prosecutor should carefully listen to the testimony of the witness, especially law enforcement summary witnesses, and by clarifying questions make certain that the grand jury understands that the witness is relating information provided to the agent either verbally or in writing by other witnesses or agents. In the event a motion to dismiss is filed, the transcript will aid in defeating that motion.

f. Conflicts of interest[1286]

As a general matter, all federal prosecutors are subject to uniform standards of ethical conduct which were issued by the Office of Government Ethics and became effective on February 3, 1993. See 5 CFR 2635. The standards relate to the receipt of gifts, financial interests that may conflict with official duties, use of official position and time, misuse of government property, and release of non-public information. Of particular importance is the requirement that most federal prosecutors file an annual confidential financial disclosure report.

With respect to grand jury practice, it is a clear conflict of interest as well as an ethical violation for a prosecutor to conduct a grand jury investigation against a target whom the prosecutor represented in a private capacity relating to the subject matter of the investigation.[1287] A prosecutor

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[1285] United States v. Estepa, 471 F.2d 1132, 1136-1137 (2d Cir. 1972); cf. United States v. Rodriquez-Ramos, 704 F.2d 17, 21-22 (1st Cir.), cert. denied, 463 U.S. 1209 (1983) (does not find it necessary to adopt Estepa); United States v. Ismaili, 828 F.2d 153, 164 (3rd Cir. 1987); United States v. Kilpatrick, 821 F.2d 1456, 1470 (10th Cir. 1987) (upholding the use of evidence summaries).

[1286] See Chapter Nine of this Manual for a discussion of conflicts of interest relating to representation of witnesses.

[1287] United States v. Schell, 775 F.2d 559, 565 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

facing such a conflict should recuse himself or herself from the case, advise supervisory personnel of the conflict, and thereafter take care not to discuss the matter.

Another area of conflict involves the use of agency attorneys acting as Special Assistant U.S. Attorneys to conduct a grand jury investigation into matters the attorney handled initially on behalf of the agency. The conflict may arise where the Special Assistant U.S. Attorney is more concerned with vindicating the agency's position than in objectively conducting the criminal investigation. Generally, courts will not find misconduct where the agency attorney is properly appointed as Special Assistant U.S. Attorney and there is no evidence that the agency attorney is using the grand jury for improper purposes (e.g., to build a civil case on behalf of his or her agency).[1288]

g. Pre-signed indictment

Some courts have criticized the practice of prosecutors signing indictments prior to submission to the grand jury.[1289] This criticism is based on the theory that a pre-signed indictment in some manner infringes on the independence of the grand jury's decision to indict. Generally, courts will not find misconduct where the only issue is a pre-signed indictment.[1290] In some United States Attorneys' offices the prosecutor will sign the indictment beforehand but will not present the signed copy to the grand jury until after an indictment has been voted. In other offices the prosecutor will not sign an indictment prior to the vote.

[1288] In re Perlin, 589 F.2d 260, 268-269 (7th Cir. 1978); United States v. Birdman, 602 F.2d 547, 561-563 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Gold, 470 F.Supp. 1336, 1351 (N.D. Ill. 1979).

[1289] United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981).

[1290] United States v. Frantze, 655 F.2d 128, 130-131 (8th Cir. 1981); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Laboy, 909 F.2d 581, 585 (1st Cir. 1992).

h. Use or attempted use of privileged materials[1291]

Generally, all privileges that may be asserted at trial may also be asserted before the grand jury.[1292] Apart from the invocation of the Fifth Amendment, the privileges most likely to be asserted before the grand jury are the attorney-client privilege and the marital privileges.

The Department of Justice recognizes the importance of the attorney-client privilege by requiring Criminal Division approval before an attorney can be subpoenaed to give any information relating to the attorney's representation of a grand jury target.[1293] Departmental approval is regularly granted to allow prosecutors to subpoena attorneys to inquire into non-privileged matters. Areas generally considered to be outside the attorney-client privilege include the identity of a client, the fees paid to the attorney by the client and communications that were made to further criminal or fraudulent conduct on the part of the attorney or the client.

There are two related marital privileges: the marital communications privilege and the marital testimonial privilege.[1294] The communication privilege generally protects against disclosure of any confidential communications made between husband and wife. The testimonial privilege allows one spouse to refuse to testify against the other spouse for any purpose. At federal law, a spouse may voluntarily elect to testify against his or her spouse. However, a defendant-spouse may assert the communications privilege to preclude a witness-spouse from testifying as to confidential communications made between the spouses during their valid marriage.[1295] Divorce eliminates the testimonial privilege but not the communication privilege.

[1291] See Chapter Seven of this Manual for a complete discussion of privileges.

[1292] United States v. Calandra, 414 U.S. 338, 346 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

[1293] USAM 9-2.161(a).

[1294] Trammel v. United States, 445 U.S. 40, 51 (1980).

[1295] United States v. Byrd, 750 F.2d 585, 590-592 (7th Cir. 1984).

In most circumstances, violation of a privilege before the grand jury will result in suppression at trial of the privileged evidence (and all evidence derived from it) rather than dismissal of the indictment.[1296] This may be a distinction without a difference in cases where the remaining untainted evidence is insufficient to meet the government's burden of proof at trial. See Chapter Seven of this manual for a detailed discussion of issues of privilege in grand jury practice.

i. Improper legal advice

There is no legal requirement that the prosecutor instruct the grand jury on the law;[1297] nor is there any prohibition against doing so.[1298] The only caveat is that if the grand jury is instructed on the law, the instructions should be accurate and should not be deliberately misleading.[1299] The prosecutor must be sure of the correctness of any legal opinion tendered to the grand jury.

To avoid incorrect legal instructions, provide the grand jury with a copy of the statute or statutes cited in the indictment, with the penalty section deleted. In addition, the prosecutor may provide the standard jury instructions recommended by the Circuit Court of Appeals or instructions used in the past by the district court. In the event the grand jury asks questions that require an explanation of the law and the prosecutor is unsure of the answer, defer answering the question and research the question before attempting to give an opinion.[1300] Defendants will often move to dismiss an indictment arguing grand jury abuse through improper grand jury instructions. These motions will

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[1296] United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert denied, 406 U.S. 917 (1972).

[1297] United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988); United States v. Kenny, 645 F.2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920 (1981).

[1298] United States v. Singer, 660 F.2d 1295, 1303 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

[1299] United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982).

[1300] See Chapter One, Section III, D of this Manual for a discussion of legal instructions.

ordinarily be vague and unsupported because the defendant will not have the transcripts of the grand jury proceedings. To obtain normally inaccessible transcripts there must be a showing of particularized need; "mere unsupported speculation of possible prosecutorial abuse does not meet the particularized need standard. (Citation omitted)". United States v. Canino, 949 F.2d 928, 943 (7th Cir. 1991). A defendant following the proper procedure may ask the district court to examine the transcripts *in camera* to determine whether the instructions were misleading.

j. Inadmissible and illegally obtained evidence

With the exception of privileges, the Federal Rules of Evidence do not apply to grand jury proceedings. There is generally no prohibition against using inadmissible or illegally obtained evidence. As an exception to this general rule, illegally obtained evidence of electronic surveillance is inadmissible in grand jury proceedings. See 18 U.S.C. §2515 and 18 U.S.C. §3504. This issue will often arise when a subpoenaed witness files a motion seeking disclosure of illegal surveillance upon which the grand jury appearance is based. Once the issue is raised, the government must either affirm or deny the occurrence of the alleged unlawful surveillance. In reviewing the adequacy of the government's denial, courts will compare that denial to the specificity of the witness' allegations of illegality.[1301]

Department of Justice policy precludes the presentation of evidence to the grand jury that is known to have been obtained in violation of the target's constitutional rights.[1302] The prosecutor should avoid presenting any evidence to the grand jury that may be inadmissible at trial. This is sound practice for at least two reasons. First, the evidence will not be available at trial and the strength of the case should be evaluated by the prosecutor

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[1301] In re Grand Jury Matter (Backiel) 906 F.2d 78, 91-92 (3rd Cir.1990).

[1302] USAM 9-11.231; See also United States v. Pacheco-Ortiz, 889 F.2d 301, 311-313 (1st Cir. 1989) (failure to give grand jury target warnings as prescribed by U.S. Attorneys' Manual, constitutes misconduct); (cf. United States v. Gillespie, 974 F.2d 796, 801-802 (7th Cir. 1992)) (failure to give target warnings does not call for dismissal of indictment or suppression)).

independent of inadmissible evidence. Second, the grand jury serves an important function as a sounding board for the strength of the government's case. If evidence is presented to the grand jury which will not be utilized at trial the usefulness of the grand jury's questions and even its indicting vote to indict is greatly diminished.

k. Failure to present exculpatory evidence

In United States v. Williams, ___ U.S. ___, 112 S.Ct. 1735 (1992), the Supreme Court held that the federal court's supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. The Court, in Williams, clearly circumscribed the application of the appellate court's supervisory power "to cases involving the violation of the Constitution, applicable statutes, and the Federal Rules of Criminal Procedure."[1303] Department of Justice policy, however, states that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.[1304] While a failure to follow the Department's internal policy should not result in the dismissal of an indictment, appellate courts may refer these violations to the Office of Professional Responsibility to seek discipline of the prosecutor.[1305]

If there is concern that the presentation of exculpatory evidence would negate a finding of probable cause by a grand jury, a prosecutor should be extremely cautious about obtaining an indictment since the exculpatory evidence

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[1303] United States v. Gillespie, 974 F.2d 796, 801 (7th Cir. 1992).

[1304] USAM 9-11.233.

[1305] United States v. Gillespie, 974 F.2d at 802; see also, United States v. Isgro, No 90-50531 (9th Cir. Nov. 25, 1992)(although prosecutor's failures to present exculpatory material to the grand jury and to disclose such material to defendant's counsel did not result in the dismissal of the indictment, the court recommended that the Attorney General examine the prosecutor's conduct to consider disciplinary measures).

will likely be admissible at trial where the burden of proof is significantly higher than probable cause.

2. *Improper Purposes*

a. Use of grand jury for civil proceedings

The grand jury cannot be used for the sole or primary purpose of obtaining evidence for a civil proceeding. However, grand jury evidence, that is, evidence subject to Rule 6(e) of the Federal Rules of Criminal Procedure, obtained in good faith in the course of a criminal investigation can be used in a subsequent civil proceeding upon showing of "particularized need."[1306]

b. Use of grand jury to obtain post-indictment evidence for use at trial

The grand jury process is abused when it is used "for the primary purpose of strengthening the government's case on a pending indictment or as a substitute for discovery."[1307] Even if a defendant establishes that evidence has been used against the defendant which was developed by the grand jury after indictment, the defendant must still show how this evidence has prejudiced him or her and affected the fairness of the defendant's trial. A failure to establish this prejudice will result in the denial of a motion to dismiss based on this type of grand jury abuse.[1308]

[1306] United States v. Sells Engineering Inc., 463 U.S. 418, 442-446 (1983); See Chapter Four of this Manual.

[1307] United States v. Jenkins, 904 F.2d 549, 559-560 (10th Cir. 1990); United States v. Scott, 784 F.2d 787, 792 (7th Cir. 1986); United States v. Doss, 563 F.2d 265, 275 (6th Cir. 1977); United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972).

[1308] United States v. Jenkins, 904 F.2d at 559-560.

However, the grand jury may properly be used where there is a legitimate investigation of additional criminal culpability on the part of the already indicted defendant or the defendant's co-conspirators.[1309] Evidence obtained in such a proceeding may be used in the trial of the previously returned indictment. If a court determines that the grand jury was being used primarily as a discovery device for a pending trial, the court may quash the grand jury subpoena if the challenge is brought before the evidence is obtained,[1310] or it may exclude the evidence at trial.[1311]

c. Use of grand jury to induce perjury or to harass or threaten a witness

It is an abusive practice to use the grand jury for the sole purpose of obtaining false testimony from a witness to charge him or her with perjury.[1312]

It is also an abusive practice to use the grand jury process to harass witnesses. Harassing tactics may include subpoenaing a witness on multiple occasions, engaging in repetitive questioning of a witness, using multiple grand juries to subpoena the same documents from a witness, or issuing subpoenas with very little time between service and appearance.[1313]

Occasionally, a target will testify before the grand jury. Pursuant to Department of Justice policy, the target should be advised of his or her rights. Failure to follow this Department policy may result in a claim of grand jury

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[1309] Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); United States v. George, 444 F.2d 310, 314 (6th Cir. 1971); United States v. Dardi, 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845 (1964). In re Grand Jury Proceedings (Dramante), 814 F.2d 61, 70-71 (1st Cir. 1987).

[1310] In re National Window Glass Workers, 287 F. 219, 223 (N.D. Ohio 1922).

[1311] United States v. Kovaleski, 406 F. Supp. 267, 271 (E.D. Mich. 1976).

[1312] Brown v. United States, 245 F.2d 549, 554-555 (8th Cir. 1957).

[1313] United States v. American Honda Motor Co., 273 F. Supp. 810, 819-820 (N.D. Ill. 1967).

abuse. Following the Supreme Court's decisions in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and United States v. Williams, __ U.S. _, 112 S. Ct. 1735 (1992), this claim should be easily defeated, as the appellate court's ability to use its supervisory power is now limited only to cases involving a violation of the Constitution, applicable statutes, or the Federal Rules of Criminal Procedure.[1314]

Although rare, prosecutorial abuse of a non-defendant grand jury witness has resulted in the dismissal of an indictment. Courts have used two distinct bases for dismissing indictments based on this type of abuse. Some courts have dismissed an indictment on due process grounds upon the defendant showing that he or she suffered actual prejudice because of the abuse of a witness before the grand jury.[1315] Even if the defendant makes no showing of prejudice, a few courts have dismissed indictments in an exercise of their supervisory power to correct flagrant or persistent prosecutorial abuse.[1316] The continued validity of these cases is questionable after Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), in which the Supreme Court required a showing of actual prejudice before dismissing an indictment based on alleged misconduct before the grand jury.

Prior to Bank of Nova Scotia, some courts had suggested that an indictment could be dismissed even where the defendant had failed to show actual prejudice. In United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979), the prosecutor impugned the testimony of witnesses who failed to link the defendants to organized crime, and threatened other uncooperative witnesses.

Under Serubo, an indictment could be dismissed based on witness abuse, even if there were sufficient evidence to support the return of the indictment. Under this theory, the indictment is dismissed not because of actual prejudice suffered by the defendant, but rather to uphold the integrity of the grand jury process. While the Serubo rationale is probably inconsistent with Bank of Nova Scotia, abusive conduct toward grand jury witnesses is improper, unproductive and unnecessary, whether or not it provides the basis for subsequent dismissal of an indictment.

[1314] United States v. Gillispie, 974 F.2d 796, 801-802 (7th Cir. 1992)

[1315] United States v. Serubo, 604 F.2d 807, 816-17 (3d Cir. 1979).

[1316] United States v. Estepa, 471 F.2d 1132, 1136-37 (2d Cir. 1972).

3. *Miscellaneous Allegations of Abuse*

There are several less common claims of abuse that have been considered by the courts. These issues are identified for the purpose of giving notice that they have been raised in some jurisdictions:

1. Prejudicial pre-indictment publicity.[1317]

2. Vindictive prosecution.[1318]

3. Evidence presented to non-quorum.[1319]

4. Improper extension of grand jury term.[1320]

5. Interference with target's right to counsel.[1321]

6. Interference with First Amendment rights.[1322]

7. Selective prosecution

[1317] Representation of Witnesses Before Federal Grand Juries, National Lawyers Guild, Ch. 13 § 13.4(7).

[1318] Id., Ch. 13 § 13.4(11).

[1319] Id., Ch. 13 § 13.4(10).

[1320] Id., Ch. 13 §13.4(12).

[1321] Id., Ch. 12, §12.7.

[1322] Prosecutorial Misconduct, Gershman, Ch. 2 § 2.4(e).

IV. Preventative Measures

To avoid allegations of prosecutorial misconduct, the prosecuting attorney should be fully aware of the rules relating to grand jury practice in the jurisdiction in which the prosecutor is practicing and should conform his or her behavior to those rules.

When appropriate, the grand jurors should be cautioned that statements made by the prosecutor and any opinions expressed by the prosecutor are not evidence and should not be considered in returning an indictment. The grand jury should also be told where evidence is inadmissible at trial or where it has a limited purpose or value. This is particularly important when responding to inquiries by the grand jurors regarding a defendant's prior record, polygraph examinations, and uncorroborated intelligence reports concerning the target or witness. The grand jurors should be informed whenever they are receiving hearsay evidence and should be instructed that they have the right to hear witnesses in person.

If a prosecutor becomes aware of significant prosecutorial misconduct that occurred before the grand jury, he or she should consider seeking a superseding indictment. If an indictment is dismissed because of prosecutorial misconduct, there is usually no prohibition against seeking a new indictment so long as the new grand jury would not be tainted by the prior misconduct.[1323]

[1323] United States v. Serubo, 604 F.2d 807, 818-19 (3d Cir. 1979).

Chapter Eleven

PERJURY AND OBSTRUCTION OF JUSTICE

I. Perjury

This section describes the two principal perjury statutes: 18 U.S.C. §§ 1621 and 1623. Although Title 18 of the United States Code contains over 150 statutes that proscribe perjury of some sort[1324] virtually all perjuries occurring before the federal grand jury and in federal judicial proceedings are prosecuted under §§ 1621 or 1623.

A. Text of Perjury Statutes

1. 18 U.S.C. § 1621 - Perjury Generally

Whoever--

(1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be

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[1324] For a complete list of these statutes, see "Working Papers of the National Commission on Reform of Federal Criminal Laws", Vol. I (cited hereafter as "Working Papers") p. 675, et seq.

administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury . . .

2. *18 U.S.C. § 1623 - False Declarations Before Grand Jury or Court*

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under § 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined, . . . or imprisoned . . . or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations which are inconsistent to the

degree that one of them is necessarily false, need not specify which declaration is false if (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

B. Elements of Perjury

There are four essential elements of perjury that are substantially the same under § 1623 as under § 1621.

1. The Person or Defendant Must be Under Oath

First, the person or defendant must be under oath during his or her testimony, declaration, or certification (except in the case of unsworn declarations under penalty of perjury as permitted by 28 U.S.C. § 1746). So long as the oath is of sufficient clarity that the actor is aware that he or she is under oath and is required to speak the truth, no particular form of oath is required.[1325] However, some courts have held that prosecutions under § 1621 require proof of who administered the oath and the competency and authorization of the oath giver.[1326] On the other hand, the identity of the person administering the oath is not an essential element under § 1623, nor is proof that such person was competent or authorized to administer the oath. Section 1623 only requires that the government prove that the maker of a knowingly false declaration be under oath at the time the statement is made.[1327] Under § 1623, the testimony of the foreperson of the grand jury before which the defendant appeared is sufficient to establish that the requisite oath was taken.[1328] The transcript of the defendant's grand jury testimony should be sufficient to prove that the defendant testified under oath.[1329] The court reporter should provide this testimony regarding the oath. Further, although § 1623 does not specify, as does § 1621, that the oath must be taken

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[1325] Holy v. United States, 278 F. 521 (7th Cir. 1921) (citations omitted).

[1326] United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983).

[1327] Id. at 651-52.

[1328] United States v. Prior, 546 F.2d 1254, 1257-58 (5th Cir. 1977).

[1329] United States v. Picketts, 655 F.2d 837, 840 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Arias, 575 F.2d 253, 254-55 (9th Cir.), cert. denied, 439 U.S. 868 (1978).

"before a competent tribunal," false swearing before a court having no jurisdiction would undoubtedly not be prosecutable under § 1623.[1330]

2. The Person Must Make a False Statement

This element is subject, under § 1621, to the "two-witness rule". Falsity is a question of fact for the jury to decide.[1331] In determining the falsity of the defendant's answer, neither the court nor jury must accept the defendant's interpretation of a question or answer.[1332] Words clear on their face are to be understood in their common sense and usage unless it is clear in the context in which they are used that a different sense or usage was intended.[1333]

3. False Statement Must be Material

The third necessary element is that the false statement must be material to the proceedings. Materiality has been broadly defined to include anything "capable of influencing the tribunal on the issue before it,"[1334] or which "has

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[1330] United States v. Young, 113 F. Supp. 20, 21 (D.D.C. 1953), aff'd, 212 F.2d 236 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954) (prosecution under the District of Columbia statute but basically the same as 18 U.S.C. § 1621); United States v. Cuddy, 39 F. 696, 697 (S.D. Cal. 1889) (prosecution under predecessor statute to §§ 1621 and 1623); see "Working Papers" at 664.

[1331] United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980); United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986).

[1332] United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); Bednar v. United States, 651 F. Supp. 672, 674 (E.D. Mo. 1986), aff'd, 855 F.2d 859 (8th Cir. 1988).

[1333] United States v. Nixon, 816 F.2d 1022, 1030 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

[1334] United States v. Vap, 852 F.2d 1249, 1253 (10th Cir. 1988); United States v. Friedhaber, 826 F.2d 284, 286 (4th Cir. 1987); United States v. Moreno Morales, 815 F.2d 725, 747 (1st (continued...)

a natural tendency to influence, impede or dissuade a grand jury from pursuing its investigations."[1335] Thus, the testimony need not actually have influenced, misled, or impeded the proceeding.[1336] A potential interference with the grand jury's line of inquiry is sufficient to establish materiality.[1337] The statement need not be material to any particular issue, but may be material to any proper matter of inquiry.[1338] The statement may be material to collateral matters that might influence the outcome of decisions before the grand jury.[1339] Thus, a statement is material if it is relevant to a subsidiary issue under consideration,[1340] or to an issue of credibility.[1341] Furthermore, the statement need not be relevant to an offense that is ultimately prosecutable by the grand jury so long as it is a proper subject for investigation by the grand

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[1334](...continued)
Cir.), cert. denied, 484 U.S. 966 (1987); United States v. Sablosky, 810 F.2d 167, 169 (8th Cir.), cert. denied, 484 U.S. 833 (1987); United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987); United States v. Anderson, 798 F.2d 919, 929 (7th Cir. 1986); United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980).

[1335] United States v. Friedhaber, 826 F.2d at 286; United States v. Neal, 822 F.2d 1502, 1506 (10th Cir. 1987); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985); United States v. Drape, 753 F.2d 660, 663 (8th Cir.), cert. denied, 474 U.S. 821 (1985); United States v. Thompson, 637 F.2d 267, 268 (5th Cir. 1981).

[1336] United States v. Vap, 852 F.2d 1249, 1253 (10th Cir. 1988); United States v. Harrison, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); United States v. Anfield, 539 F.2d 674, 677-78 (9th Cir. 1976); United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976).

[1337] United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984).

[1338] United States v. Ostertag, 671 F.2d 262, 264 (8th Cir. 1982).

[1339] United States v. Abroms, 947 F.2d 1241, 1248 (5th Cir. 1991); United States v. Sablosky, 810 F.2d 167, 169 (8th Cir. 1987); United States v. Thompson, 637 F.2d 267, 268 n.2 (5th Cir. 1981).

[1340] United States v. Sisack, 527 F.2d 917, 920 (9th Cir. 1975).

[1341] United States v. Moreno Morales, 815 F.2d 725, 747 (1st Cir. 1987); United States v. Sablosky, 810 F.2d at 169; United States v. Anderson, 798 F.2d 919, 926 (7th cir. 1986).

jury.[1342] Materiality is not negated if the information sought is cumulative or the grand jury does not believe the answer.[1343]

The issue of materiality is a question of law to be decided by the court.[1344] Materiality need only be shown as of the time the false statement was made.[1345] Since materiality is a legal question, there is no evidentiary or factual burden of proof, and the government need not prove materiality beyond a reasonable doubt.[1346] Materiality may be proven in various ways. The government may: introduce a transcript of the grand jury proceedings; produce testimony from the foreperson of the grand jury or another grand juror; produce the testimony of the defendant before the grand jury; produce other indictments returned by the grand jury; or produce the testimony of the prosecutor concerning the scope of the grand jury's investigation, and the

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[1342] United States v. Vap, 852 F.2d at 1253; United States v. Paxson, 861 F.2d 730, 734 (D.C. Cir. 1988).

[1343] United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).

[1344] United States v. Abroms, 947 F.2d at 1247; United States v. Paxson, 861 F.2d at 731; United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Stackpole, 811 F.2d 689, 695 (1st Cir. 1987); United States v. Seltzer, 794 F.2d 1114, 1123 (6th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Bailey, 769 F.2d 203 (4th Cir. 1985); United States v. Weiss, 752 F.2d 777, 786 (2d Cir.), cert. denied, 474 U.S. 944 (1985); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985) United States v. Carter, 721 F.2d 1514, 1535 n.29 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982).

[1345] United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972).

[1346] United States v. Abroms, 947 F.2d 1241, 1246 (5th Cir. 1991); See United States v. Martinez, 855 F.2d 621, 623 (9th Cir. 1988); United States v. Farnham, 791 F.2d 331, 334 (4th Cir. 1986); United States v. Larranaga, 787 F.2d 489, 496 (10th Cir. 1986); United States v. Armilio, 705 F.2d 939, 941 (8th Cir.), cert. denied, 464 U.S. 891 (1983); United States v. Berardi, 629 F.2d 723, 727 (2d Cir.), cert. denied, 449 U. S. 995 (1980); United States v. Watson, 623 F.2d 1198, 1201 (7th Cir. 1980); United States v. Giacolone, 587 F.2d 5, 7 (6th Cir. 1978).

relationship to it of the questions that elicited the perjury.[1347] Materiality also can be shown through other witnesses. The idea of calling the prosecutor should be used only as a last resort.

4. *Statement Must be Made with Knowledge of its Falsity*

The fourth necessary element is that the person make the false statement with knowledge of its falsity.[1348] Perjury requires a showing of specific intent.[1349] It cannot be the result of inadvertence, honest mistake, carelessness, misunderstanding, mistaken conclusions, or unjustified inferences testified to negligently, or even recklessly.[1350] Actual knowledge of falsity may be proven from circumstantial evidence.[1351] If the defendant believed his or her statement to be true when it was made, even though it was in fact

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[1347] United States v. Anderson, 798 F.2d 919, 926; United States v. Farnham, 791 F.2d 331, 333 (4th Cir. 1986); United States v. Ashby, 748 F.2d 467, 470 (8th Cir. 1984); United States v. Thompson, 637 F.2d 267, 268; United States v. Berardi, 629 F.2d 723, 727.

[1348] Section 1621 punishes one who "willfully . . . states . . . any material matter which he does not believe to be true. . . ." Section 1623 punishes one who "knowingly makes any false material declaration. . . ." There does not appear to be any effective difference between these two definitions of the mens rea of the offense. In its report on the Organized Crime Control Act of 1969, the Senate Judiciary Committee stated that in § 1623(a), "[l]anguage changes have been made in the provision as introduced to achieve economy of words . . ." (Senate Report No. 91-617, at 149).

[1349] United States v. Dudley, 581 F.2d 1193, 1198 (5th Cir. 1978).

[1350] United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982); Government of the Canal Zone v. Thrush, 616 F.2d 188, 190-91 (5th Cir. 1980); United States v. Joseph, 651 F. Supp. 1346, 1347 (S.D. Fla. 1987); Dale v. Bartels, 552 F. Supp. 1253, 1266 (S.D.N.Y. 1982), modified, 732 F.2d 278 (2d Cir. 1984).

[1351] United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Watson, 623 F.2d 1198, 1206-07 (7th Cir. 1980; United States v. Kelly, 540 F.2d 990, 994 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

false, an essential element of the crime cannot be proven and a charge of perjury will be defeated.[1352]

C. Principal Differences Between § 1623 and § 1621

There are three principal differences between § 1623 and § 1621. First, § 1623 applies only to perjury occurring "before or ancillary to any court or grand jury. . . ."[1353] The Supreme Court in Dunn v. United States, 442 U.S. 100, 113 (1979), interpreted this language to preclude prosecution under § 1623 for any false statement made in circumstances less formal than a deposition. False statements made in affidavits in anticipation of their being submitted to a court or grand jury cannot be prosecuted under § 1623. Subsection (a) of the statute, however, does provide for prosecution of statements to a grand jury or court made in reliance on documents which the witness knows are false.[1354]

Second, under § 1623, the government's evidentiary burden is reduced as subsection (e) eliminated for § 1623 prosecutions the two-witness rule which still hampers prosecutions under § 1621. In addition, § 1623(c) allows a conviction for making two or more statements which are inconsistent to the degree that one of them is necessarily false.[1355] The government does not have to prove which statement is false, but it is a defense to such a prosecution that, at the time each statement was made, the defendant believed he or she was speaking the truth.[1356]

[1352] United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

[1353] 18 U.S.C. § 1623(a).

[1354] See United States v. Pommerening, 500 F.2d 92, 98 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

[1355] United States v. Flowers, 813 F.2d 1320, 1324 (4th Cir. 1987); United States v. Harvey, 657 F. Supp. 111, 113-14 (E.D. Tenn. 1987).

[1356] United States v. Flowers, 813 F.2d at 1324.

Third, § 1623 is different from § 1621 in that under the former, in certain circumstances, a recantation is a bar to prosecution for perjury.[1357]

D. Section 1622 - Subornation of Perjury

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined, . . . or imprisoned . . . or both.

Prosecution for subornation of perjury requires that the perjury sought must actually have been committed.[1358] But a conspiracy to suborn perjury may be prosecuted whether or not perjury has been committed.[1359] Where perjured testimony is solicited, either by an individual or through a conspiracy, an obstruction of justice has occurred whether or not the perjured testimony has taken place.[1360] It is quite common to join both obstruction of justice and subornation of perjury counts in a single indictment when they arise from the same transaction.[1361] Because the crime of subornation of perjury is distinct from that of perjury, the suborner and perjurer are not accomplices.[1362]

The gravamen of the offense of subornation is the procuring of perjury with knowledge that the testimony to be given is false, and that the one

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[1357] Section 1623(d).

[1358] United States v. Silverman, 745 F.2d 1386, 1394 n.7 (11th Cir. 1984); United States v. Brumley, 560 F.2d 1268, 1278 n.5 (5th Cir. 1977); United States v. Tanner, 471 F.2d 128, 135 (7th Cir.), cert. denied, 409 U.S. 949 (1972).

[1359] Williamson v. United States, 207 U.S. 425, 446 (1908); Outlaw v. United States, 81 F.2d 805 (5th Cir.), cert. denied, 298 U.S. 665 (1936).

[1360] 18 U.S.C. §§ 1503, 1512.

[1361] See, e.g., United States v. Kahn, 366 F.2d 259, 264 (2d Cir.), cert. denied, 385 U.S. 948 (1966); United States v. Root, 366 F.2d 377 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967).

[1362] Segal v. United States, 246 F.2d 814, 821 (8th Cir.), cert. denied, 355 U.S. 894 (1957).

testifying is aware of the falsity of his or her statement.[1363] To establish a prima facie case for subornation of perjury, a prosecutor must show:

1) that perjury was committed;

2) that the defendant procured the perjury corruptly, knowing, believing or having reason to believe it to be false testimony; and,

3) that the defendant knew, believed or had reason to believe that the perjurer had knowledge of the falsity of his or her testimony.

The existence of the perjury must be proved under the same standards as required by the applicable perjury statute. Thus, if § 1621 applies to the underlying perjury, the demands of the two-witness rule must be met.[1364] If § 1623 is applicable to the perjury, the two-witness rule does not apply.[1365] If the charge consists only of conspiracy to suborn perjury, compliance with the two-witness rule is not necessary.[1366]

E. Special Problems

1. Prosecutorial Discretion to Indict Under 18 U.S.C. § 1621 or § 1623

Defendants sometimes challenge the prosecutor's decision to charge a violation of § 1623 rather than § 1621. Those challenges have been

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[1363] Boren v. United States, 144 F. 801, 803 (9th Cir. 1906).

[1364] Hammer v. United States, 271 U.S. 620, 626 (1926).

[1365] See Weiler v. United States, 323 U.S. 606, 608 (1945); Hammer v. United States, 271 U.S. 620, 626 (1926); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973).

[1366] United States v. Gross, 511 F.2d 910, 915 (3d Cir.), cert. denied, 423 U.S. 924 (1975); Hall v. United States, 78 F.2d 168, 169 (10th Cir. 1935).

unsuccessful, but it is good practice to keep in mind the nature of such challenges when making a charging decision. In United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973), appellant argued that he was denied equal protection of the law by the prosecutor's decision to proceed against him under § 1623 rather than under § 1621 because the evidentiary burden of the prosecution is lesser and the penalty more severe under the former statute. The court, citing Yick Wo v. Hopkins, 118 U.S. 356 (1886), held that "where criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants." The court found no discrimination because Ruggiero had failed to demonstrate membership in a specific class of defendants.

In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), however, the specter of such a class was raised in dictum. Kahn was charged under § 1621 and claimed that, had he been charged under § 1623, his subsequent "recantation" would have barred a perjury prosecution. The court failed to confront the issue directly by holding that Kahn's subsequent "recantation" would not have barred prosecution under § 1623 because at the time it was made, it had become manifest that Kahn's original falsity was exposed. However, the court said "we find not a little disturbing the prospect of the government employing § 1621 whenever a recantation exists, and § 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."[1367]

In addition to Ruggiero's equal protection argument seeking to limit the prosecutor's discretion, attorneys for Kahn advanced the proposition that a statute aimed at specific conduct (i.e., § 1623) must prevail over an otherwise applicable general statute (i.e., § 1621).[1368] The Second Circuit did not reach this question in Kahn. However, in dictum in United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), the Seventh Circuit disagreed with Kahn's proposition. The court, in rejecting the defendant's equal protection argument, stated: "Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or

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[1367] United States v. Kahn, 472 F.2d 272, 283.

[1368] See Kepner v. United States, 195 U.S. 100, 125 (1904); Shelton v. United States, 165 F.2d 241, 244 (D.C. Cir. 1947); Wechsler v. United States, 158 F. 579, 581 (2d Cir. 1907).

more separate criminal statutes, the government must elect to prosecute under the statute imposing the greatest burden of proof."[1369]

In United States v. Clizer, 464 F.2d 121, 125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972), a different approach was taken by the Ninth Circuit. Although appellant had been charged with making false statements before a grand jury, the indictment was under § 1621. The court disregarded the statutory reference in the indictment and considered it as an indictment under § 1623: "The government, despite its reference to 18 U.S.C. § 1621, in fact charged Clizer with a violation of 18 U.S.C. § 1623."

While it appears from the case law that it may be advisable to use 18 U.S.C. § 1623 when it applies to a given factual setting, it is clear that:

> when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants. . . . Whether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecutor's discretion.[1370]

[1369] United States v. Devitt, 499 F.2d 135, 139 (7th Cir. 1974).

[1370] United States v. Batchelder, 442 U.S. 114, 123-24 (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); United States v. Swainson, 548 F.2d 657, 665 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

2. *Venue*

Venue for perjury actions lies in the district where the false oath was made, or, where the perjury is committed in an ancillary proceeding,[1371] in the district in which the parent proceeding is pending.[1372]

3. *Unresponsive Answers*

Occasionally, a witness under oath will try to deceive the questioner and mislead the inquiry by giving answers to questions which, although literally true, are evasive or unresponsive. This occurred in Bronston v. United States, 409 U.S. 352 (1973), in which the Supreme Court unanimously held that such conduct does not violate 18 U.S.C. § 1621.[1373] The Court rejected the government's effort to expand the scope of the perjury statute, noting that "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."[1374] Thus "any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner's acuity and not by a federal perjury prosecution."[1375]

[1371] See Dunn v. United States, 442 U.S. 100, 108-10 (1979) (depositions are considered ancillary proceedings); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982) (same).

[1372] United States v. Reed, 773 F.2d 477, 483 (2d Cir. 1985) (distinguishing and departing from its prior decision in United States ex rel. Starr v. Mulligan, 59 F.2d 200 (2d Cir. 1932)).

[1373] The Court's opinion is equally applicable to 18 U.S.C. § 1623, since the elements of the crime of perjury are substantially the same in each statute. See, e.g., United States v. Boone, 951 F.2d 1526, 1536 (9th Cir. 1991); United States v. Eddy, 737 F.2d 564, 571 (6th Cir. 1984); United States v. Abrams, 568 F.2d 411, 422 n.54 (5th Cir.), cert. denied, 437 U.S. 903 (1978); United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977).

[1374] Bronston v. United States, 409 U.S. at 358-59.

[1375] Id. at 362; see also United States v. Earp, 812 F.2d 917 (4th Cir. 1987).

However, courts have distinguished Bronston on the grounds that "an answer that is responsive and false on its face does not come within Bronson's literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true."[1376]

4. The "I don't remember" Syndrome

Prosecutors are often faced with witnesses who, rather than deny a fact, claim that they do not remember it. These witnesses may be prosecuted for perjury.[1377] To prove that a witness actually remembered something, it is necessary to prove both that the witness at one time knew the fact and that the witness must have remembered it at the time he or she testified.

For example, a witness testifies that he or she does not remember having ever paid money to a police officer. The first element of proof in a perjury prosecution against the witness would be that the witness had, in fact, paid money to a police officer. It would then be necessary to prove that the witness must have remembered that payment when the witness testified. If the dates of the transaction and testimony are sufficiently close, memory may be inferred. Probative of the witness's memory at the time of the witness's testimony would be evidence that he or she mentioned such payments either before or after his or her testimony or that the witness remembered other events that occurred at the same time or earlier than the event in question.

It has been held in perjury prosecutions under § 1621 that proof that a defendant lied when the defendant stated that he or she could not remember an event need not be by direct evidence to satisfy the standards of the two-witness

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[1376] United States v. Cuesta, 597 F.2d 903, 920 (5th Cir.), cert. denied, 444 U. W. 964 (1979). Accord United States v. Abroms, 947 F.2d 1241, 1245 (5th Cir. 1991); United States v. Fulbright, 804 F.2d 847, 851 (5th Cir. 1986).

[1377] In re Battaglia, 653 F.2d 419, 421 (9th Cir. 1981); United States v. Swainson, 548 F.2d 657, 662 (6th Cir.), cert. denied, 431 U.S. 937 (1977); United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Nicoletti, 310 F.2d 359, 361 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963).

rule.[1378] These cases reason that since no direct evidence as to what the defendant actually believed is possible, circumstantial evidence is sufficient.

5. *"Two-Witness Rule"*

The so-called "two-witness rule" applies only to prosecutions for perjury brought under 18 U.S.C. § 1621.[1379] Congress has eliminated the rule for prosecutions under § 1623. Since the rule is not of constitutional dimension, the courts have deferred to legislative judgment.[1380] Thus, because § 1623 is the preferred vehicle for prosecutions of perjury occurring before a court or grand jury, the handicap of the two-witness rule is avoided if § 1623 is charged.

The two-witness rule is somewhat of a misnomer. It provides that the falsity of a statement alleged to be perjurious must be established either by the testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused.[1381] Thus, the rule is satisfied by the testimony of a second witness who has given testimony independent of another which, if believed, would prove that what the accused said under oath was false. It is immaterial whether such witness corroborates the first witness.[1382] Alternatively, the rule is

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[1378] United States v. Swainson, 548 F.2d 657, 662 (6th Cir. 1977); United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir. 1975); United States v. Nicoletti, 310 F.2d 359, 363 (7thCir. 1962).

[1379] United States v. Diggs, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977).

[1380] See Weiler v. United States, 323 U.S. 606, 608 (1945); Hammer v. United States, 271 U.S. 620, 626 (1926); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973).

[1381] United States v. Forrest, 639 F.2d 1224, 1226 (5th Cir. 1981); United States v. Maultasch, 596 F.2d 19, 25 n.9 (2d Cir. 1979).

[1382] United States v. Maultasch, 596 F.2d at 25.

satisfied by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused and of a quality to assure that a guilty verdict is solidly founded.[1383]

It should be emphasized that the two-witness rule applies only to proof that a given statement was objectively false. Circumstantial evidence may be used to establish that a perjury defendant made the false statement willfully or with knowledge of its falsity.[1384]

The two-witness rule does not apply to prosecutions for obstruction of justice (18 U.S.C. §§ 1503, 1512), even if the gravamen of the obstruction is that the defendant perjured himself.[1385]

6. The "use" of Material Containing False Statements

In addition to prohibiting the making of false statements, § 1623 applies to one who:

> . . . under oath . . . in any proceeding . . . makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration. . . .

The legislative history of § 1623 is silent as to what type of conduct the "makes or uses" part of the statute is intended to cover. In United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974), the prosecutor subpoenaed defendants and their corporate records. The defendants altered the records, brought them to the grand jury and "relied upon

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[1383] United States v. Forrest, 639 F.2d at 1226; United States v. Maultasch, 596 F.2d at 25 n.9.

[1384] United States v. Hagarty, 388 F.2d 713, 716 n.2 (7th Cir. 1968).

[1385] United States v. Alo, 439 F.2d 751, 753 (2d Cir.) (prosecution for obstruction of justice, rather than for perjury, is not an improper evasion of the two-witness rule), cert. denied, 404 U.S. 850 (1971).

these false documents in answering the United States attorney's questions..." Id. at 98. The appellate court found such conduct to be "use" of the documents before the grand jury.[1386] In United States v. Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978), the court held that physical delivery by the alleged user is not a necessary prerequisite to use under § 1623. It is sufficient that the testimony of the accused tended to give verity to the document.

Other conduct that may constitute perjury is the use of false affidavits submitted in federal court proceedings. In Dunn v. United States, 442 U.S. 100 (1979), the Supreme Court held that a false affidavit submitted to a federal court in support of a motion to dismiss an indictment could not be prosecuted as perjury under § 1623 since such an affidavit lacked the formality required of court proceedings or depositions and therefore was not given in a "proceeding ancillary to a court or grand jury" of the United States as required by § 1623(a). Id. at 113. However, prosecutions for false affidavits submitted in federal court proceedings can be prosecuted under § 1621. Venue for such prosecutions is in the district where the affidavit is sworn. Thus, in those cases in which an affidavit filed in United States District Court in one district was sworn in another district, the perjury prosecution under § 1621 must be brought in the latter district.

7. Indictments

The government has some discretion as to how to charge separate, but related, perjurious statements. Courts have held that all of the false declarations pertaining to a particular subject matter may be embraced in one count.[1387] This includes minor questions which assign falsity to a witness's

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[1386] Id. See also United States v. Larranaga, 787 F.2d 489, 495 (10th Cir. 1986); United States v. Norton, 755 F.2d 1428, 1430 (11th Cir. 1985).

[1387] United States v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970); United States v. Edmondson, 410 F.2d 670, 673 n.6 (5th Cir.), cert. denied, 396 U.S. 966 (1969).

denial of knowledge about the general line of inquiry.[1388] Charging the crime in this manner does not render the indictment infirm for duplicity as only one offense is contained in the count.[1389] In such a situation, proof of the falsity of any one statement charged will sustain the count.[1390] The jury, however, may be required to indicate by special verdict on which false statement or statements there was jury unanimity. On the other hand, false statements made during one grand jury session which are separate and distinct can be charged in multiple counts with separate sentences imposed for a conviction on each count.[1391] For example, in United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982), the court held that separate and distinct false declarations which require different factual proof of falsity may be charged in separate counts even though they are related and arise out of the same transaction.[1392] Furthermore, the fact that a single piece of evidence may be used to prove two counts does not make an indictment multiplicitous.[1393] Two counts are considered to be separate offenses if the proof of one requires an additional fact that proof of the other does not require.[1394]

A perjury indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review of the materiality

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[1388] See Arena v. United States, 226 F.2d 227, 231 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956).

[1389] United States v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982); see also United States v. Wood, 780 F.2d 955, 962 (11th Cir.), cert. denied, 476 U.S. 1184 (1986).

[1390] United States v. De La Torre, 634 F.2d 792, 794-95 (5th Cir. Jan. 1981); United States v. Kehoe, 562 F.2d 65, 69 (1st Cir. 1977); United States v. Isaacs, 493 F.2d at 1155; Vitello v. United States, 425 F.2d at 418.

[1391] United States v. De La Torre, 634 F.2d at 794-95.

[1392] See also United States v. Wood, 780 F.2d 955, 962; United States v. Harrelson, 754 F.2d 1182, 1184 (5th Cir.), cert. denied, 474 U.S. 908 (1985).

[1393] United States v. Stanfa, 685 F.2d 85, 88 (3d Cir. 1982).

[1394] Id. at 87; see also Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), cert. denied, 429 U.S. 895 (1976). Chapter Three, Section V contains a more detailed discussion of multiplicity.

of those falsehoods.[1395] However, the materiality requirement of a perjury indictment may be satisfied by a general statement that the matter was material.[1396] There is no requirement that the perjury occur before the grand jury that issues the indictment.[1397] Nor is there a requirement that the grand jury be able to indict for the substantive offense that was the subject of the inquiry. A grand jury may ask questions, for example, about events outside of the statute of limitations, or about acts that otherwise would not lead to indictments.[1398] However, the courts will strictly scrutinize for fairness any indictment and conviction for perjury before a grand jury that rests upon a defendant's responses to leading questions.[1399]

F. Defenses and Bars to Prosecution

1. In General

A primary defense to an indictment for perjury is that the defendant believed his or her statement to be true when made. Belief that a declaration was true when made is specifically a defense to prosecution under § 1623(c). The major element the government must prove under § 1621 and § 1623 is that the defendant made a false statement *knowing* it to be false. Proof that a defendant believed a declaration to be true defeats a charge of perjury even if

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[1395] United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977); see also United States v. Ryan, 828 F.2d 1010, 1015 (3d Cir. 1987).

[1396] United States v. Ponticelli, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980).

[1397] United States v. Sun Myung Moon, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982).

[1398] United States v. Picketts, 655 F.2d 837, 841 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Reed, 647 F.2d 849, 853 (8th Cir. 1981).

[1399] United States v. Vesaas, 586 F.2d 101, 105 (8th Cir. 1978).

the statement was in fact false.[1400] Usually, the defense of advice of counsel may only be considered by the jury in determining whether the defendant willfully or knowingly gave false testimony.[1401]

2. *Collateral Estoppel*

Collateral estoppel[1402] "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[1403] Collateral estoppel has been an established rule of federal law at least since United States v. Oppenheimer, 242 U.S. 85 (1916), and is now viewed as an integral part of the Fifth Amendment bar against double jeopardy.[1404]

A prosecutor encounters no double jeopardy or collateral estoppel problem when prosecuting a convicted defendant for perjury committed during the defendant's former trial on a substantive offense.[1405] Nor is there any collateral estoppel problem when prosecuting a trial witness for perjury, since a witness is not a party to the suit.

The question of whether collateral estoppel bars prosecution for perjury usually arises where a defendant who has taken the stand and committed perjury

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[1400] United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

[1401] United States v. Becker, 203 F. Supp. 467, 469 (E.D. Va. 1962).

[1402] Res judicata, though sometimes used interchangeably with collateral estoppel, has a distinct meaning and refers to "the preclusion of a claim or cause of action where that claim has been fully litigated and decided in a prior suit." United States v. Drevetzki, 338 F. Supp. 403, 405 (N.D. Ill. 1972).

[1403] Ashe v. Swenson, 397 U.S. 436, 443 (1970); see also United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978).

[1404] Harris v. Washington, 404 U.S. 55, 56 (1971).

[1405] United States v. Williams, 341 U.S. 58, 62 (1951); United States v. Nixon, 634 F.2d 306, 309 (5th Cir.), cert. denied, 454 U.S. 828 (1981).

has been acquitted of the substantive offense and is charged with perjury for testimony given at his or her trial. The collateral estoppel claim is that the jury, by acquitting the defendant, adjudicated the truthfulness of the defendant's testimony in his or her favor and that the government is barred from litigating that issue again.

The problem with such a claim is that since the government must prove every element of its case beyond a reasonable doubt and since the jury's general verdict does not indicate which elements it found lacking in proof, it is difficult to determine whether the jury's acquittal was based on a finding that the defendant's testimony was credible or whether, even though it disbelieved the defendant, the jury found the government's case deficient in some other respect.

Clearly, if the defendant's only testimony is a general denial of guilt, an acquittal would be a bar to a perjury prosecution. In most situations, however, an inquiry must be made into what issues the jury's acquittal "necessarily" adjudicated. In Sealfon v. United States, 332 U.S. 575, 579 (1948), the Supreme Court held that the determination "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

In confirming this point, the Court in Ashe v. Swenson, 397 U.S. 436, 444 (1970),[1406] held:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

Thus, the acquittal of a defendant following a trial on criminal charges does not necessarily bar the defendant's subsequent prosecution for perjury committed during the course of the trial. It is only when an issue of ultimate fact or an element essential to conviction has once been determined by a final

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[1406] See United States v. Williams, 341 U.S. 58, 63 (1951).

judgment in a criminal case that the same issue cannot be relitigated.[1407] In such situations, the collateral estoppel doctrine requires: (1) an identification of the issues in the two actions to determine whether they are sufficiently similar and material; (2) an examination of the record of the prior case to decide whether the issue was litigated in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.[1408] Significantly, the burden is on the defendant to establish that the verdict in the prior trial necessarily determined in the defendant's favor the issue which he or she contends should not be considered.[1409]

The prosecutor must make a thorough analysis of each case to determine if collateral estoppel dictates that an acquittal in a prior trial forecloses a subsequent perjury indictment. Before an indictment of an acquitted defendant for perjury based upon the defendant's testimony at trial is sought, the possibility that such a prosecution has been foreclosed should be explored fully so the government will avoid the appearance of vindictive prosecution or waste of government resources.

3. *Lack of Miranda Warning*

Generally, an indictment for perjury before a grand jury will not be dismissed for failure to advise the witness of his or her privilege against self-incrimination.[1410] There is also no duty to warn the witness of the consequences of committing perjury before the grand jury.[1411] However,

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[1407] United States v. Giarratano, 622 F.2d 153, 155 (5th Cir. 1980); United States v. Sarno, 596 F.2d 404, 407-08 (9th Cir. 1979); United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978).

[1408] United States v. Sarno, 596 F.2d at 408.

[1409] United States v. Giarratano, 622 F.2d at 156 n.4; United States v. Fayer, 573 F.2d at 745.

[1410] United States v. Prior, 553 F.2d 381, 383 (5th Cir. 1977).

[1411] United States v. Babb, 807 F.2d 272, 277 (1st Cir. 1986).

Department of Justice guidelines require prosecutors to give grand jury witnesses warnings resembling Miranda warnings and to advise putative defendants of their status as such,[1412] although failure to do so does not constitute grounds for dismissal of an indictment.[1413]

4. Recantation

a. In general

Title 18 U.S.C. § 1623(d) provides that, in certain limited circumstances, a retraction and correction of false testimony by a witness will act as a bar to prosecution for the initial perjury. Before the enactment of § 1623, the crime of perjury (under § 1621) was complete as soon as the false statement was made.[1414] A subsequent retraction and correction of the testimony did not erase the perjury, but was only relevant as an affirmative defense in showing the absence of intent to commit perjury.[1415] Since recantation is a bar to prosecution under § 1623 rather than an affirmative defense, the issue of recantation is an issue of law to be decided by the

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[1412] See USAM 9-11.150; United States v. Jacobs, 547 F.2d 772, 774-75 (2d Cir. 1976) (court may exercise supervisory power to suppress perjured testimony when prosecutor fails to advise grand jury witness of putative defendant status in accordance with practice of United States attorneys in circuit), cert. dismissed per curiam, 436 U.S. 31 (1978).

[1413] United States v. Catino, 735 F.2d 718, 725 (2d Cir.), cert. denied, 469 U.S. 855 (1984). For a more complete discussion of the rights of witnesses before the grand jury, see Chapter Two, Section IV of this Manual.

[1414] United States v. Norris, 300 U.S. 564, 574 (1937).

[1415] United States v. Goguen, 723 F.2d 1012, 1020 (1st Cir. 1983); United States v. Kahn, 472 F.2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

court.[1416] This defense must be raised before trial under Fed. R. Crim. P. 12(b)(2) as a jurisdictional bar to prosecution.[1417]

A witness's admission of the falsity of his or her declarations does not automatically bar prosecution. Prosecution is barred only if the admission occurs at a time when the false declarations have "not substantially affected the proceeding, and it has not become manifest that such falsity has been or will be exposed."[1418] Thus, if either of these conditions has already occurred prior to the time of the witness's reappearance to correct his or her testimony, the recantation provisions of § 1623(d) are inapplicable and cannot be invoked to bar prosecution.[1419] Moreover, the burden is on the defendant to show that the defendant is within the protection of the recantation exemption.[1420]

In ruling on the timeliness of a claimed recantation by a witness, the courts have generally interpreted the "manifest" proviso of § 1623(d) as applying specifically to the witness's knowledge, derived either from independent sources or directly from the government prosecutor, that the falsity of the witness's prior statements "has been or will be exposed." In the cases where the witness possesses such knowledge, the courts have consistently held that no effective recantation can thereafter be made.[1421]

At least one case, however, suggests, by implication, that "manifest" can also be interpreted to mean that the falsity of the witness's statements has

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[1416] United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982); United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981).

[1417] United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d at 1091; United States v. Denison, 663 F.2d at 618.

[1418] See United States v. Dworkin, 116 F.R.D. 29, 30 n.1 (E.D. Va. 1987).

[1419] United States v. Goguen, 723 F.2d at 1018 n.7; United States v. Denison, 663 F.2d at 61; United States v. Moore, 613 F.2d 1029, 1039-40 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980).

[1420] United States v. Scrimgeour, 636 F.2d 1019, 1022; United States v. Moore, 613 F.2d at 1044.

[1421] United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Denison, 663 F.2d 611 (5th Cir. 1981); United States v. Moore, 613 F.2d 1029, 1039; United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1976).

merely become known to the government or the grand jury, as opposed to the witness. In United States v. Kahn, 472 F.2d 272, 283 (2d Cir.), cert. denied, 411 U.S. 982 (1973), the Second Circuit held that a § 1623(d) defense was not available to the defendant since at the time of the alleged recantation, several other witnesses had already testified concerning the bribes, knowledge of which he had falsely denied during his initial grand jury appearance. There is no indication in the opinion of a finding by the court that at the time of the defendant's attempted recantation, the witness had any knowledge of the contradictory testimony heard by the grand jury. There is also some question as to the standards to be applied in determining when the false declarations of a witness will be considered as having "substantially affected the proceedings," thereby precluding an effective recantation. Certainly a timely recantation would be precluded in any case where the grand jury has already acted.[1422]

Further, in United States v. Crandall, 363 F. Supp. 648, 654-55 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974), the court found that the defendant's false declarations had substantially affected the proceedings since the grand jury had been deprived initially of relevant testimony as to the guilt of other individuals which resulted in a several-month delay in the grand jury's investigation.

While the cases offer some guidance, the determination of whether a given proceeding has been substantially affected by the witness's false declarations can only be made after a consideration of the facts and circumstances of the particular court or grand jury proceeding.

Since the statutory language of § 1623(d) requires both conditions to be satisfied for a valid recantation, reappearance before a grand jury to correct testimony after one of the conditions has occurred does not preclude prosecution for false declarations under § 1623.[1423]

[1422] See United States v. Baldwin, 506 F. Supp. 300, 301 (M.D. Tenn. 1980); United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973).

[1423] United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. cert. denied, 423 U.S. 826 (1976); United States v. Mitchell, 397 F. Supp. 166, 176 (D.D.C. 1974), aff'd, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

b. Advice to witness of section 1623(d) recantation provision

A prosecutor is under no duty to advise a witness of the possibility of recanting under § 1623(d).[1424] This is so even if the prosecutor advises the witness of the penalties for perjury.[1425] In addition, there is no requirement that the government reveal to a perjurer that it has evidence of the untruthfulness of his or her statements, nor must the government delay revealing incriminating evidence to allow the witness to reflect on the witness's perjury.[1426]

A problem may exist when a prosecutor gives a witness an opportunity to "straighten out" testimony and the witness recants at a point when a recantation would not be valid. A recantation is effective only if made before it is clear that the perjury will be exposed or before the perjurious statement has misled the proceeding. It would seem that an argument could be made that the government is estopped from challenging a witness's eligibility to recant if it solicits the recantation. Therefore, a prosecutor should not solicit a recantation unless the prosecutor is willing to forego a prosecution for perjury and, normally, no perjury prosecution should be undertaken subsequent to a solicited recantation, even if the defendant was technically ineligible under § 1623(d).

c. Witness's right to recant

If a witness who has completed his or her testimony requests the opportunity to reappear before the grand jury for the purpose of recantation, the

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[1424] United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982); United States v. Scrimgeour, 636 F.2d 1019, 1026 (5th Cir.), cert. denied, 454 U.S. 878 (1981); United States v. Anfield, 539 F.2d 674, 679 (9th Cir. 1976).

[1425] United States v. Lardieri, 506 F.2d 319, 322 n.2 (3d Cir. 1974).

[1426] United States v. D'Auria, 672 F.2d at 1093; United States v. Denison, 663 F.2d 611, 616-17 (5th Cir. 1981).

prosecutor should grant the request, if the request is timely and in keeping with the legislative intent of § 1623(d) -- promotion of truthful testimony.[1427]

To recant, the witness must, as a condition precedent to giving truthful testimony, admit that the perjurious testimony was false.[1428] An outright retraction and repudiation of the false testimony is essential to a recantation within the meaning of the statute.[1429] Ambiguous statements regarding confusion of the witness or requests to add to and clarify testimony are not sufficient. "Unless he admits that he gave false testimony, there is no occasion for a recantation."[1430]

It is clear, however, that the reappearance by the witness after it has become "manifest" that the falsity of the witness's previous testimony "has been or will be exposed" does not preclude the government from prosecuting the witness for his or her prior false declarations before the grand jury.[1431]

[1427] See Congressional Record - Senate, June 9, 1970, S. Rep. No. 8656.

[1428] United States v. Vesich, 724 F.2d 451, 460 (5th Cir. 1984).

[1429] United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Vesich, 724 F.2d at 460; United States v. D'Auria, 672 F.2d 1085, 1091-92 (2d Cir. 1982).

[1430] United States v. D'Auria, 672 F.2d at 1092; accord United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983).

[1431] United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Mitchell, 397 F. Supp. 166, 177 (D.D.C. 1974), aff'd, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); United States v. Crandall, 363 F. Supp. 648, 655 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974).

5. *Immunity*[1432]

The fact that the defendant testified with immunity before the grand jury or in a trial does not protect the defendant from prosecution for perjured testimony made during the giving of the immunized testimony.[1433] Perjury prosecutions based on immunized testimony are permissible and all statements made during the giving of the immunized testimony, both true and false, may be admitted in the course of a subsequent perjury action if such use is not otherwise prohibited by the Fifth Amendment.[1434]

II. Obstruction of Justice

Obstruction of justice is covered by a number of overlapping statutes generally found within Chapter 73 of Title 18 of the U.S. Code, "Obstruction of Justice." These statutes are result-oriented and most activities that would obstruct or impede the administration of justice can be addressed by one or more of them. Perjury (18 U.S.C. § 1621) and false declarations (18 U.S.C. § 1623) are also methods by which justice can be obstructed and have been discussed previously in this Chapter. This section will focus primarily on 18 U.S.C. § 1503, and touch only in passing on the narrower statutes.[1435]

[1432] See Chapter Eight of this Manual for a full discussion of immunity.

[1433] See 18 U.S.C. §§ 6002, 6003; United States v. Wong, 431 U.S. 174, 178-79 (1977); United States v. Martinez-Navarro, 604 F.2d 1184, 1187 (9th Cir. 1979), cert. denied, 444 U.S. 1084 (1980).

[1434] United States v. Apfelbaum, 445 U.S. 115, 130 (1980); In re Corrugated Container Antitrust Litigation, 661 F.2d 1145, 1158 (7th Cir. 1981), aff'd sub nom., Pillsbury v. Conboy, 459 U.S. 248 (1983).

[1435] For a more detailed exposition of these statutes see USAM 9-69.100, et seq.

A. 18 U.S.C. § 1503

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined, imprisoned or both.

18 U.S.C. § 1503 is one of three statutes prohibiting conduct that would obstruct justice before the grand jury. The other two, 18 U.S.C. § 1512, tampering with a witness, victim, or an informant, and 18 U.S.C. § 1513, retaliating against a witness, victim, or an informant, became effective in October of 1982 as part of the Victim and Witness Protection Act of 1982 (VWPA).[1436]

[1436] Prior to the passage of the VWPA, actions affecting witnesses were also specifically covered by § 1503.

B. The Nature of the Crime

Title 18 U.S.C. § 1503 is composed of two parts. The first part generally prohibits endeavors to "corruptly, or by threats or force, influence, intimidate, or impede. . ." any grand or petit juror, or court official. The second part -- the so-called omnibus clause -- punishes anyone, who "corruptly, or by threats or force, influences, obstructs, or impedes, the due administration of justice," or endeavors to do so. The omnibus clause extends to "those means of interference the draftsmen were not prescient enough to enumerate."[1437] It is not limited by the concept of *ejusdem generis* to actions accomplished by means of coercion or intimidation.[1438] Nor are actions taken against witnesses outside of its purview.[1439]

Courts have not been particularly concerned with defining the conduct that constitutes interference with the "due administration of justice." A definition put forth by the Ninth Circuit is "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court."[1440]

[1437] United States v. Bonanno, 177 F. Supp. 106, 114 (S.D.N.Y. 1959).

[1438] United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975).

[1439] See the legislative history of the VWPA, particularly S. 2420, 97th Cong., 2d Sess., 128 Cong. Rec. S11430 (daily ed. Sept. 14, 1982), S. Rep. No. 532, 97th Cong., 2d Sess. 17-19, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2523-25, and 128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982) (remarks of Senator Heinz). Initially, an omnibus clause such as that in § 1503 was included within § 1512; it was taken out of the bill because it was beyond the scope of the witness protection legislation, and probably duplicative of other obstruction of justice statutes. But see United States v. Hernandez, 730 F.2d 895, 899 (2d Cir. 1984), interpreting 18 U.S.C. §§ 1512 and 1503.

[1440] Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

1. Civil As Well As Criminal Proceedings Can be Obstructed

The great majority of cases under § 1503 have involved endeavors to obstruct witnesses, jurors or officials in grand jury investigations or criminal trials. But the handful of courts that have addressed the issue directly have held that the statute also covers endeavors to obstruct pending civil proceedings.[1441] Furthermore, the United States need not be a party to the case, as the justice being administered is that of the United States regardless of the involvement of the United States.[1442]

2. "Endeavors" As Well As Actual Obstructions Prohibited

The statute speaks of "endeavors" rather than "attempts" to obstruct. The term "endeavor" has been held to be broader than "attempt." As stated in United States v. Russell, 255 U.S. 138, 143 (1921):

> The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . .[1443]

In United States v. Tedesco, 635 F.2d 902, 907 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981), the court observed that "'endeavor' connotes a somewhat lower threshold of purposeful activity than 'attempt,'. . .'the fact that the effort to influence was subtle or circuitous' made no difference," (quoting United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975)).

[1441] Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Sneed v. United States, 298 F. 911, 912 (5th Cir.) (construing 18 U.S.C. § 241, another precursor of § 1503), cert. denied, 265 U.S. 590 (1924); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

[1442] Pettibone v. United States, 148 U.S. 197 (1893); Wilder v. United States, 143 F. 433 (4th Cir. 1906); Sneed v. United States, 298 F. 911 (5th Cir.).

[1443] Accord Osborn v. United States, 385 U.S. 323, 333 (1966).

An endeavor "can be committed merely by words"[1444] and need not be successful to be criminal. Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968); Catrino v. United States, 176 F.2d 884, 886 (9th Cir. 1949).[1445] Factual impossibility is not a defense.[1446]

3. Endeavors to Influence Jurors or Officials

The first clause of § 1503 prohibits endeavors to influence, intimidate or impede any grand or petit juror, or officer of any court whether these endeavors are by threat or force or are "corrupt." The term "officer" has been held to include veniremen,[1447] federal district judges,[1448] and United States Attorneys.[1449]

4. Endeavors to Obstruct the Due Administration of Justice

The omnibus clause of § 1503 has been interpreted very broadly to cover actions that, whether or not taken with respect to jurors, officials, or witnesses,

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[1444] United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978).

[1445] Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968); Catrino v. United States, 176 F.2d 884, 886 (9th Cir. 1949).

[1446] See generally Osborn v. United States, 385 U.S. 323, 332-33 (1966); United States v. Lazzerini, 611 F.2d 940, 941-42 (1st Cir. 1979); United States v. Roe, 529 F.2d 629, 631-32 (4th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1228-29 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); Knight v. United States, 310 F.2d 305, 307 (5th Cir. 1962) (per curiam).

[1447] United States v. Jackson, 607 F.2d 1219 (8th Cir. 1979) cert. denied, 444 U.S. 1080 (1980).

[1448] United States v. Margoles, 294 F.2d 371, 373 (7th Cir.), cert. denied, 368 U.S. 930 (1961).

[1449] United States v. Polakoff, 112 F.2d 888, 890 (2d Cir.), cert. denied, 311 U.S. 653 (1940).

or by means of threats, force or intimidation, tend to impede the due administration of justice. Thus, it covers destruction of documents sought by a federal grand jury,[1450] presenting fraudulent documents at a civil attachment proceeding,[1451] attempts to sell grand jury transcripts,[1452] concealment, destruction or alteration of documents subpoenaed by a federal grand jury,[1453] and falsifying a report likely to be submitted to a grand jury.[1454]

An indictment charging an endeavor to impede the work of a grand jury by destroying, concealing or altering documents must allege that the defendant knew, or had reason to know, that the documents would be called for by the grand jury.[1455] The documents, however, need not be subject to a subpoena.[1456] It does not matter whether the administration of justice is actually hindered.[1457]

The Second Circuit in United States v. Weiss, 491 F.2d 460, 466 (2d Cir. 1974), approved the trial court's instruction that a § 1503 conviction "requires proof of more than mere failure to produce. . . documents. . ." and

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[1450] United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975); United States v. Siegel, 152 F. Supp. 370, 374 (S.D.N.Y. 1957).

[1451] United States v. Coven, 662 F.2d 162, 170 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982).

[1452] United States v. Howard, 569 F.2d 1331, 1335 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

[1453] United States v. Rasheed, 663 F.2d 843, 851 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Faudman, 640 F.2d 20, 23 (6th Cir. 1981); United States v. Simmons, 591 F.2d 206, 209 (3d Cir. 1979; United States v. Weiss, 491 F.2d 460, 466 (2d Cir.), cert. denied, 419 U.S. 833 (1974).

[1454] United States v. Shoup, 608 F.2d 950, 960 (3d Cir. 1979).

[1455] United States v. Faudman, 640 F.2d at 21; United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978); United States v. Siegel, 152 F. Supp. at 376.

[1456] United States v. Solow, 138 F. Supp. 812, 814 (S.D.N.Y. 1956).

[1457] Osborn v. United States, 385 U.S. 323, 333 (1966); United States v. Russell, 255 U.S. 138, 143 (1921); United States v. Nicosia, 638 F.2d 970, 975 (7th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

that ". . . some affirmative conduct. . . such as destruction, concealment or removal of the documents" must be shown.

The omnibus clause of § 1503 has also been held to cover endeavors to suborn perjury or influence a witness not to testify,[1458] giving false denials of knowledge and memory,[1459] giving false and evasive testimony,[1460] and endeavoring to influence a judge[1461] or a juror through a third party.[1462]

C. Elements of the Crime

To prove the defendant guilty of a violation of 18 U.S.C. § 1503, the government must prove that he or she knew or had reason to know that a judicial proceeding was pending in a federal court,[1463] and that the effect of his or her conduct would be to obstruct justice.[1464] The government must also show that the defendant acted with specific intent, or "corruptly."

[1458] United States v. Partin, 552 F.2d 621, 642 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

[1459] United States v. Griffin, 589 F.2d 200, 204 (5th Cir.), cert. denied, 444 U.S. 825 (1979).

[1460] United States v. Cohn, 452 F.2d 881, 883 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972).

[1461] United States v. Glickman, 604 F.2d 625 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

[1462] United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

[1463] Pettibone v. United States, 148 U.S. 197, 206 (1893).

[1464] United States v. Solow, 138 F. Supp. 812, 816 (S.D.N.Y. 1956).

1. A Pending Proceeding

The government must prove that a proceeding was pending in a federal court and that the defendant in the § 1503 action had reason to know of it before the defendant acted to or endeavored to obstruct justice.[1465] The proceeding may be civil[1466] or criminal, including a grand jury investigation.[1467]

A grand jury proceeding is pending once a subpoena has been "issued in furtherance of an actual grand jury investigation, *i.e.*, to secure a presently contemplated presentation of evidence before the grand jury."[1468] No testimony need have been taken by the grand jury.[1469] In fact the grand jury need not be aware that subpoenas have been issued.[1470]

A criminal action continues to be pending "in the district court until disposition is made of any direct appeal taken by the defendant assigning error that could result in a new trial."[1471]

[1465] Pettibone v. United States, 148 U.S. 197 (1893); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974).

[1466] Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

[1467] United States v. Campanale, 518 F.2d 352, 356 (9th Cir. 1975) (per curiam), cert. denied, 423 U.S. 1050 (1976).

[1468] United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975).

[1469] Id.

[1470] United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979).

[1471] United States v. Johnson, 605 F.2d 729, 731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

2. *An Act, the Effect of Which Would be to Obstruct Justice*

Any conduct "designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court" can constitute an act which violates 18 U.S.C. § 1503.[1472] The acts held to constitute obstructive conduct have varied so widely that one court observed that the reach of § 1503 is only limited by the imagination of the criminally inclined.[1473]

3. *The Act Was Done "Corruptly," or With Specific Intent*

The state of mind required to violate 18 U.S.C. § 1503, is that of specific intent.[1474] The act forming the basis for the obstruction charge must have been knowingly and deliberately done for an improper or evil purpose.

The use of the word "corruptly" in the statute has been widely held to connote specific intent.[1475] The specific intent standard goes not only to the act itself but also to proving that the defendant knew that a federal judicial proceeding was pending and that the defendant acted with the purpose of interfering with it.[1476] Only one case, United States v. Neiswender, 590

[1472] Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

[1473] Falk v. United States, 370 F.2d 472, 476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

[1474] United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

[1475] United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980); United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979).

[1476] See Pettibone v. United States, 148 U.S. 197, 207 (1893); United States v. White, 557 F.2d 233, 235-36 (10th Cir. 1977) (per curiam); United States v. Baker, 494 F.2d 1262, 1265

(continued...)

F.2d 1269 (4th Cir.), cert. denied, 441 U.S. 963 (1979), deviates from the specific intent standard. In Neiswender the defendant offered to "guarantee" a jury acquittal in return for a bribe from defense counsel. During his trial for obstruction of justice, the defendant argued that he had only intended to defraud defense counsel, not to cause him to reduce his efforts on behalf of his client and thus obstruct justice. The court held:

> [a] defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.[1477]

Specific intent may be proved by circumstantial evidence.[1478] It may not, however, be presumed as a matter of law.[1479]

D. Venue

Where the act forming the basis of the obstruction charge and the proceeding at which it is aimed are in the same district, there is no question where venue lies. When they are in different districts, however, the circuits are split on whether venue lies where the proceeding is pending or where the act occurred. The greater weight of authority is that venue lies where the

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[1476](...continued)
(6th Cir. 1974). But see United States v. Yermian, 468 U.S. 63 (1984), where the Supreme Court held that *18 U.S.C. § 1001* did not require actual knowledge that the matter was under federal agency jurisdiction.

[1477] United States v. Neiswender, 590 F.2d at 1274.

[1478] United States v. White, 557 F.2d 233, 235 (10th Cir. 1977) (per curiam).

[1479] United States v. Haldeman, 559 F.2d 31, 116 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

proceeding is pending.[1480] The D.C. Circuit, Seventh Circuit, and the Eastern District of Pennsylvania hold that venue is proper *only* where the act occurred.[1481]

[1480] United States v. Kibler, 667 F.2d 452, 454 (4th Cir.), cert. denied, 456 U.S. 961 (1982); United States v. Barham, 666 F.2d 521, 523 (11th Cir.), cert. denied, 456 U.S. 947, reh'g denied, 456 U.S. 1012 (1982); United States v. Tedesco, 635 F.2d 902, 904 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. O'Donnell, 510 F.2d 1190, 1192 (6th Cir.), cert. denied, 421 U.S. 1001 (1975). Kibler, Barham, Tedesco and O'Donnell all reserve decision on the question of whether venue only lies where the proceeding is pending.

[1481] United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (§ 1510); United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971); United States v. Bachert, 449 F. Supp. 508 (E.D. Pa. 1978).

Chapter Twelve

TAX CONSIDERATIONS IN GRAND JURY INVESTIGATIONS[1482]

Introduction

Because of the need for uniform national standards in the enforcement of the internal revenue laws and the strict statutory requirements of 26 U.S.C. 6103 regarding the confidentiality of tax returns and return information, there are tax considerations in virtually every financial grand jury investigation. This Chapter discusses both the specialized procedures involved in the authorization and/or expansion of criminal tax grand jury investigations and the tax confidentiality and disclosure provisions of 26 U.S.C. 6103. While these often interrelated topics are presented in a single tax chapter herein, they are, nevertheless, discrete subject areas of independent significance. For example, federal prosecutors engaged in nontax grand jury investigations might find it helpful to obtain disclosure of tax return information under 26 U.S.C. 6103 without necessarily needing to expand the investigation to tax/non grand jury investigations. Prosecutors should be aware of the separate, yet often interconnected, tax considerations presented herein.

[1482] See generally, United States Attorneys' Manual (USAM) 6-4.120 et seq. On criminal tax matters generally, see the Tax Division's three-volume Criminal Tax Manual (6th edition, 1985), (Green Manual) which includes discussion of such topics as criminal tax offenses under both Titles 26 and 18, methods of proof, and Tax Division policies and procedures, and sample indictment/information forms and jury instructions for criminal tax cases. The Tax Division also has an extensive criminal tax database available on JURIS for Federal prosecutors in both the TAX and BRIEF file groups.

I. Grand Jury Procedures

A. The Federal Tax Enforcement Program

The Federal Tax Enforcement Program is designed to protect the public interest in preserving the integrity of this nation's self-assessment tax system through vigorous enforcement of the internal revenue laws. The purpose of a criminal tax prosecution is to expose the wrongdoer, thereby deterring other potential tax violators.

The government's objective in criminal tax prosecutions is to get the maximum deterrent value from the cases prosecuted. To achieve this objective, the government's tax enforcement activities must reflect uniform enforcement of the tax laws. Uniformity is particularly necessary because prosecution standards in the tax area potentially affect more individuals than any other area of the federal criminal law. Accordingly, the Federal Tax Enforcement Program is designed to have the broadest possible impact on compliance attitudes by emphasizing balanced enforcement, not only with respect to the types of violations prosecuted but also the geographic location and economic and vocational status of the violators.

In view of the importance of the uniform prosecution process, the Tax Division of the Justice Department has been delegated the responsibility of authorizing or declining investigation and prosecution in criminal proceedings arising under the internal revenue laws. See 28 C.F.R. § 0.70; USAM 6-4.211. However, the Federal Tax Enforcement Program can only work effectively if the IRS, the Department of Justice, and U.S. Attorneys work in harmony.

B. Authorization of Tax Grand Jury Investigations

Although a federal grand jury is empowered to investigate both tax and nontax violations of federal criminal laws, use of the grand jury to investigate criminal tax violations must first be authorized by the Tax Division of the

Department of Justice. See 28 C.F.R. § 0.70; 26 U.S.C. § 6103(h). The Tax Division requires that articulable facts supporting a reasonable belief that a tax crime is being or has been committed be shown before authorizing a tax grand jury investigation.

C. IRS Requests to Initiate Tax Grand Jury Investigations

The Criminal Investigation Division (CID) of the IRS generally relies upon the administrative process to secure evidence during an investigation. However, where CID is unable to complete its administrative investigation or otherwise determines that use of administrative process is not feasible, it may request authorization of a grand jury investigation through the Tax Division.

Procedurally, the request must include a completed IRS Form 9131, a Request for Grand Jury Investigation signed by Regional or District Counsel of the IRS, and whatever exhibits are available to support the request. Because this request is a "referral" of the matter to the Tax Division, CID may no longer use administrative process, i.e., summons for documents and testimony. See USAM 6-4.115; 26 U.S.C. § 7602(c).

D. U.S. Attorney-Initiated Tax Grand Jury Investigations

1. IRS Direct Referrals[1483]

a. Referrals for prosecution

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation in direct referral matters. However, many direct referral cases need no further grand jury investigation.

b. Referrals for grand jury investigation in false and fictitious claims cases

Authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287 (other than violations committed by a professional tax return preparer), has been delegated to all United States Attorneys by the Tax Division (See April 20, 1992 bluesheet to the USAM affecting USAM 6-4.120 and implementing its earlier Directive No. 96, dated December 31, 1991). This delegation is subject to the following limitations:

(1) The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

(2) Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has

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[1483] For a generalized description of "direct referral" matters, see USAM 6-4.243.

> filed or conspired to file muiltiple tax returns on behalf of himself or herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he or she is not entitled.

In all cases, a copy of the request for grand jury investigation letter, together with a copy of the (IRS) Form 9131 and a copy of all exhibits, must be sent to the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the copy of the request for grand jury investigation letter (together with the copy of the Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the request for grand jury investigation letter has not been forwarded to the Tax Division by overnight courier or by telefax by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of the delegation of authority. In such a case, the United States Attorney's office may not authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization. This brings the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the United States Attorneys' authority to approve prosecution of such cases (See USAM 6-4.243.). Because the authority to approve prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. Due to the unique problems posed by electronically filed false claims for refunds, Tax Division authorization is required.

2. Tax Division Referrals for Prosecution

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for prosecution by the Tax Division to the extent necessary to perfect the tax charges authorized for prosecution.

3. Tax Division Referrals for Grand Jury Investigation

The U.S Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for that purpose by the Tax Division, whether upon IRS request (see USAM 6-4.121) or Tax Division request (see USAM 6-4.126), to the extent necessary to either perfect the tax charges authorized for investigation or to determine that prosecution is inappropriate (see USAM 6-2.242).

4. Joint Tax-Nontax Investigations with IRS

Authority has been delegated with respect to the approval of a request seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations.

Pursuant to Tax Division Directive No. 86-59, the following officials have the authority to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations:

1. Any U.S. Attorney appointed under 28 U.S.C. § 541 or § 546.

2. Any attorney-in-charge of a Criminal Division Organized Crime Strike Force established pursuant to 28 U.S.C. § 510.[1484]

3. Any independent counsel appointed under 28 U.S.C. § 593.

The authority allows the "designated" official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding conducted within the sole jurisdiction of the designated official's office (26 C.F.R. § 301.6103(h)(2)-1(a)(2)(ii), *provided*, that the designated official determines that:

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with Rule 6(e)(3)(A)(ii), Fed. R. Crim. P., to seek the assistance of government personnel assigned to the IRS to assist said attorney in his or her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multi-jurisdictional investigation, nor are the target individuals considered to have national prominence--such as local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

[1484] By order of December 26, 1989, the Attorney General merged the Organized Crime Strike Forces into the United States Attorneys' Offices.

4. A written request seeking the assistance of IRS personnel and containing pertinent information relating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate IRS official (e.g., Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential criminal tax violations, and the Tax Division interposes no objection to the request.

6. The IRS has made a "referral" pursuant to the provisions of 26 U.S.C § 6103(h)(3) in writing stating that it:

> a. Has determined, based upon the information provided by the attorney for the government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed;
>
> b. Agrees to furnish the personnel needed to assist the government attorney in his or her duty to enforce federal criminal law; and
>
> c. Has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by an attorney(s) from the designated official's office in sufficient time to allow the tax segment of the grand jury proceedings to be evaluated by the IRS and the Tax Division before undertaking to initiate criminal proceedings.

The authority delegated includes the authority to designate: the targets (subjects) and scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, provided, that prior written notification is given to both the IRS and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in his or her correspondence that such notification terminates the "referral" of the matter pursuant to 26 U.S.C. § 7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Enforcement Task Force (Drug Task Force) investigations, individual cases for tax prosecution growing out of grand jury proceedings shall be forwarded to the Tax Division by the U.S. Attorney, attorney-in-charge of a strike force,[1485] or independent counsel with a Special Agent's Report (SAR) and exhibits through Regional or District Counsel (IRS) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of the grand jury investigations conducted by a Drug Task Force shall be forwarded directly to the Tax Division by the U.S. Attorney with an SAR and exhibits.

The authority delegated is limited to matters which seek either to:

1. Expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations;

2. Designate the targets (subjects) and the scope of such inquiry; or

3. Terminate such proceedings.

In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the IRS, remains vested in the Assistant Attorney General of the Tax Division as provided in 28 C.F.R. § 0.70. In

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[1485] By order of December 26, 1989, the Attorney General merged the Organized Crime Strike Forces into the United States Attorneys' Offices.

addition, authority to alter any actions taken pursuant to the delegation contained in Directive 86-59, is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. § 0.70.

E. Joint U.S. Attorney-IRS Request to Expand Tax Grand Jury Investigations

The U.S. Attorney must secure Tax Division approval before expanding a tax grand jury investigation to include targets not authorized by the Tax Division. A written request for expanded authorization must be submitted prior to initiating that phase of the grand jury investigation. The request must establish the basis for the Tax Division's authorization to expand the investigation. See USAM 6-4.213(a)(2).

F. Drug Task Force Requests for Tax Grand Jury Investigations

Grand jury matters involving tax investigation that fall within the jurisdiction of an Organized Crime Drug Enforcement Task Force (Drug Task Force) are distinguished from similar matters for grand jury investigation handled by a U.S. Attorney only in that processing within IRS is streamlined. Regional Counsel (Criminal Tax) of IRS does not become involved in its Drug Task Force referrals or recommendations. Drug Task Force requests for joint tax-nontax investigation with IRS participation require approval by the District Director of IRS, who then makes a referral. Likewise, once the investigation has been concluded, recommendations for or against prosecution are submitted directly to the Tax Division by the District Director of IRS. In all other respects, tax matters within the jurisdiction of a Drug Task Force are procedurally indistinguishable from other tax matters.

G. Tax Division Requests

Grand jury authorization may originate within the Tax Division during evaluation of IRS referrals for prosecution.

H. IRS Transmittal of Reports and Exhibits from Grand Jury Investigations

Recommendations for prosecution of Title 26 and other criminal tax violations resulting from grand jury investigations must be submitted to the Tax Division for authorization. When an investigation has produced sufficient evidence to merit indictment, the U.S. Attorney should have the special agent prepare a Special Agent's Report, attach the relevant exhibits, and, except in Drug Task Force investigations, send it to Regional Counsel (Criminal Tax) of IRS for review and Counsel's recommendation to the Tax Division. Regional Counsel has requested that it be allowed thirty (30) days to review a matter prior to making any recommendation; Tax Division should be allowed thirty (30) days to review a proposed prosecution recommendation.

The U.S. Attorney's views also should be forwarded to the Tax Division. See USAM 6-2.242. These views should contain an analysis of the investigation and recommend either that charges be brought or prosecution be declined. If nontax charges are recommended, the analysis must explain how the nontax charges relate to the tax charges. A copy of the proposed indictment or information should also accompany the analysis. In addition to the U.S. Attorney's analysis, all relevant exhibits generated during the course of the grand jury investigation, the transcript of the proceedings, the SAR, and the Criminal Reference Letter (CRL) must be submitted.

I. IRS Access to Grand Jury Material

All IRS personnel to whom grand jury material has been disclosed must be named in a list provided by the U.S. Attorney to the district court that, under Fed. R. Crim. P. 6(e)(3)(A)(ii), empaneled the grand jury. Fed. R. Crim. P. 6(e)(3)(B). Grand jury material is disclosed to IRS personnel under the following conditions:

a. Grand jury material remains under the aegis of the U.S. Attorney and/or Tax Division;

b. Disclosure of grand jury material may be made only to IRS personnel assisting the attorney for the government in the criminal investigation and only for the purpose of enforcing federal criminal law; and

c. All grand jury material, and any copies made thereof, must be returned to the U.S. Attorney or Tax Division at the conclusion of the grand jury investigation.

IRS may have access to grand jury material for use in civil tax proceedings only in accordance with Rule 6(e)(3)(C)(i), Fed. R. Crim. P. United States v. Baggot, 463 U.S. 476 (1983).

See Chapter Four of this Manual for further information on grand jury secrecy.

J. Subpoenas to Attorneys

Pursuant to USAM 9-2.161(a), the Tax Division requires Justice Department attorneys to obtain the authorization of the Assistant Attorney General (Tax Division) before issuing a subpoena to an attorney in any matter, civil or criminal, within its jurisdiction. The Assistant Attorney General must

be satisfied that the following conditions are met before approving the issuance of the subpoena:

> 1. In a criminal matter, that the information is reasonably necessary to investigate or prosecute a crime that is being or has been committed by any person;
>
> 2. All reasonable attempts to secure the information from alternative sources have failed;
>
> 3. The need for the information outweighs the adverse impact on the attorney-client relationship; and
>
> 4. The information is not protected by a valid claim of privilege.

See USAM 9-2.161(a). For further discussion on this topic, see Chapter Six of this Manual.

II. Confidentiality and Disclosure of Tax Information - 6103

Section 6103 of the Internal Revenue Code (26 U.S.C.) provides, as a general rule, that tax returns and taxpayer return information are confidential. Disclosure may be made only as specifically provided in Section 6103. Unauthorized disclosure subjects the offender to criminal penalties (26 U.S.C. 7213) and permits the wronged party to bring a civil action for damages (26 U.S.C. 7431).

The legislative history of Section 6103 reveals an overriding Congressional concern about government agencies' access to and use of tax information gathered by the I.R.S. However, Congress also recognized the government's need for such material. S. Rep. No. 94-938 94th Cong., 2d Sess., p. 318. In Section 6103, Congress attempts to balance the governmental need for the information with the citizen's right to privacy.

The crux of 6103, with respect to criminal investigations and prosecutions, is found at Sections 6103(h) and (i). Section 6103(h) governs disclosure and use of tax material in cases "involving tax administration." Section 6103(h) also allows, under specific limited circumstances, for the disclosure and use of tax material in joint tax-nontax criminal investigations. Section 6103(i) pertains to the disclosure and use of tax material in "nontax criminal" cases. Unlike the typical disclosure under 6103(h), disclosure of tax returns and taxpayer return information under 6103(i) is done generally pursuant to an *ex parte* court order.

As with Rule 6(e) and grand jury material, there is a crucial distinction under Section 6103 between disclosure to and the subsequent use or redisclosure of tax material by federal prosecutors. That is, 6103(h) and (i) place specific limitations on disclosure of tax material to federal prosecutors and other specific limitations on what subsequent use or redisclosure may be made by the prosecutors.

In addition to Sections 6103(h) and (i), other pertinent provisions include Section 6103(c), which permits a taxpayer to waive the confidentiality that attaches to 6103 material as it pertains to the taxpayer and Section 6103(k)(6), which deals with investigative disclosures by I.R.S. personnel.

Moreover, the prescribed procedure for obtaining tax disclosure is contingent on the relationship between the I.R.S. and the original supplier of the information. In this regard, more restrictions are placed upon the disclosure of tax material if the material was obtained from the taxpayer, as opposed to a third-party witness. Section 6103(b) contains statutory definitions of three categories of tax material: (1) returns, (2) return information, and (3) taxpayer return information. These definitions are described in Section B, below.

Finally, 6103 applies only to information gathered by the Internal Revenue Service. Section 6103 does not apply if the tax information was obtained by a federal prosecutor from a source other than the I.R.S. Thus, for example, the disclosure of a retained copy of a tax return, obtained from a return preparer by way of a grand jury subpoena, is not governed by Section 6103.

A. General Rule of Confidentiality - 6103(a)

Returns and return information shall be confidential and except as authorized by Title 26, no officer or employee (or former officer or employee) of the United States shall disclose any return or return information obtained by the officer or employee in connection with his or her service as an officer or employee.

B. Definitions - 6103(b)

Section 6103(b) contains definitions of the key terms in the tax disclosure statute. A summary of the more significant definitions follows.

"Return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of Title 26 of the United States Code which is filed with the Secretary, by, or on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return as filed.

"Return Information" includes the taxpayer's identity, the nature, source or amount of his or her income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to the determination of the existence, or possible existence, of tax liability. It also includes any part of a "written determination" (as defined in Section 6110(b)) which is not open to public inspection under Section 6110 (Section 6110 deals with public inspection of revenue rulings, determination letters and technical advice memoranda). Return information does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

"Taxpayer Return Information" is return information that was furnished by the taxpayer or the taxpayer's representative, as opposed to being gathered from third-party witnesses.

"Tax Administration" means the administration, management, conduct, direction, and supervision of the execution, and application of the internal revenue laws or related statutes, and the development and formulation of federal tax policy relating to existing or proposed internal revenue laws, and related statutes. Related statutes are those nontax statutes having an enforcement rather than a factual relationship to tax administration. They would include, for example, nontax statutes peculiarly adaptable to promoting compliance with the internal revenue laws and maintaining the federal tax system's integrity. The statute is not "related" merely because tax and nontax statutory violations stem from the same factual base. Tax administration includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws and statutes.

"Inspection" means examination of a return or return information.

"Disclosure" means making known to any person in any manner whatsoever a return or return information.

C. Disclosure to Certain Federal Officers and Employees for Purposes of Tax Administration - 6103(h)

1. General Disclosure Procedures - 6103(h)

Section 6103(h) describes the procedure that must be followed by federal prosecutors, and certain other federal employees, for obtaining disclosure of tax returns and return information for purposes of tax administration. Section 6103(h)(4) governs redisclosure of the obtained information in a matter involving tax administration.

Section 6103(h) may also be used to obtain disclosure in a joint tax-nontax criminal investigation where a legitimate tax administration aspect exists. This provision also allows for use or redisclosure by federal prosecutors under specified conditions. 26 C.F.R. 301.6103(h)(2)-1.

Section 6103(h)(1) provides that returns and return information (including taxpayer return information) are open to inspection by and disclosure to those Treasury Department employees whose official duties require such inspection or disclosure for tax administration purposes. A written request is not necessary for this disclosure.

Section 6103(h)(2) generally provides that returns and return information (including taxpayer return information) are open to inspection by or disclosure to federal prosecutors if those attorneys are personally and directly engaged in, and solely for their use in, any proceeding before a federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a federal grand jury or any federal or state court in a matter involving tax administration. Disclosure of the returns or return information to the federal prosecutor is predicated upon the existence of one of the following conditions of Section 6103(h)(2):

> a. The taxpayer is or may be a party to such proceeding, or the proceeding is in connection with determining the taxpayer's civil or criminal liability or collecting his or her civil liability;
>
> b. The treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation;
>
> c. There is or may be a transactional relationship between the person who is or may be a party to the proceeding and the third-party whose return or return information is requested. Disclosure is permitted where the third party return or return information relates or may relate to the transaction and affect the resolution of an issue in the proceeding or investigation.

Section 6103(h)(3) provides the procedures for disclosure in a matter involving tax administration. Generally, under Section 6103(h)(3)(A), once the Internal Revenue Service has "referred" a case to the Department of Justice, the Secretary may disclose returns or return information on his or her own motion if one of the predicate conditions outlined above is met. There is no need for a formal disclosure request or motion for a judicial order by the Department of Justice.

A second procedure, contained in Section 6103(h)(3)(B) involves a written request to the Secretary of Treasury by a high-level Justice Department official, not including United States Attorneys. This provision is rarely utilized and is much less advantageous than the open disclosure pursuant to the referral under 6103(h)(3)(A).

2. *Use or Redisclosure of Returns and Return Information in Judicial and Administrative Tax Proceedings - 6103(h)(4)*

Section 6103(h)(4) provides for the use or redisclosure of returns and return information in judicial and administrative tax proceedings. A return or return information may be disclosed in a federal or state judicial or administrative proceeding pertaining to tax administration if one of the following conditions is met:

a. The taxpayer is a party to the proceeding or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability;

b. The treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

c. A third-party return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer whose return or return information is requested. Disclosure is permitted only if the third-

party return or return information directly affects the resolution of an issue in the proceeding.

d. Redisclosure is also permitted if required by court order pursuant to 18 U.S.C. 3500 (Jencks Act) or Rule 16, Fed. R. Crim. P. (Discovery). The court will give due consideration to the congressional policy favoring the confidentiality of returns and return information.

D. Joint Tax-Nontax Criminal Investigations

Disclosure to federal prosecutors in joint tax-nontax criminal investigations may be made pursuant to Section 6103(h) in a matter involving tax administration that also involves the "enforcement of a related criminal statute" referred by the Internal Revenue Service. 26 C.F.R. 301.6103(h)(2)-1. There must be a legitimate tax administration aspect, however, and disclosure cannot be obtained under Section 6103(h) on the pretext that every criminal case has tax ramifications.

Use or redisclosure of information obtained by federal prosecutors under Section 6103(h) in joint tax-nontax investigations is also provided for by Treasury Regulation. Title 26 C.F.R. 301.6103(h)(2)-1(a)(2), in essence, permits further disclosure:

a. In a matter involving tax administration that also involves the enforcement of a related federal criminal statute referred by the Internal Revenue Service;

b. In a matter involving the enforcement of a specific federal criminal statute, other than enforcement of a federal criminal statute referred by Internal Revenue Service as related to the tax administration matter, which "involves or arises out of the particular facts and circumstances giving rise to" the matter involving tax administration; and

c. In any other matter related to tax administration. Before any joint tax-nontax investigation is accorded disclosure under Section 6103(h), the "tax grand jury" must first be authorized by or on behalf of the Assistant Attorney General, Tax Division. For further discussion of the authorization of grand jury investigations in tax cases, see Section I, of this Chapter.

With respect to confidential informants and the impairment of investigations, Section 6103(h)(4) further provides, however, that the Secretary of the Treasury has the authority to withhold the return or return information if he or she determines that the disclosure would reveal the identity of a confidential informant or seriously impair a criminal or civil tax case.

E. Investigative Disclosures

Section 6103(h) contains no specific provision for investigative disclosures by federal prosecutors. However, such additional disclosures are implicitly authorized where necessary and proper to conduct an investigation or to prepare for a proceeding by Section 6103(h)(2) which allows disclosure to federal prosecutors in a proceeding or an investigation which might result in a proceeding before a federal grand jury or a federal or state court. Moreover, Treasury Regulation 26 C.F.R. 301.6103(h)(2)-1 interprets and implements Section 6103(h)(2) to allow limited redisclosure of returns and return information by federal prosecutors. Such redisclosures include, but are not limited to, disclosures under the following circumstances:

a. To accomplish any purpose or activity of the nature described in 26 C.F.R. 301.6103(k)(6)-1 (e.g. verify correctness of return; determining responsibility for filing return; establish, verify or collect any tax liability or penalty; identify misconduct under the tax laws; obtain services of persons with special knowledge or skill; properly accomplish collection activity; and prepare for any proceeding described in

Section 6103(h)(2) or conduct an investigation which might result in such proceeding);

b. To properly interview and obtain relevant information from a taxpayer or third-party witness who may be called in the proceeding; or

c. To conduct plea or settlement negotiations, or to obtain stipulations of facts.

Redisclosure of return or taxpayer return information to third-party witnesses is permitted only in those instances where the proper purpose of Section 6103(h) cannot otherwise be accomplished.

F. Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Relating to Tax Administration - 6103(i)[1486]

1. Disclosure of Returns and Return Information for Use in Criminal Investigations - 6103(i)(1)[1487]

a. General - *Ex Parte* order procedure

Section 6103(i)(1) generally provides that tax returns and tax return information may, upon the grant of an *ex parte* order by a federal district court judge or magistrate, to officers and employees of other federal agencies, including the Department of Justice, for nontax criminal investigation purposes. Thus, unlike the typical disclosure under 6103(h)(3)(A), disclosure under 6103(i) requires a court order.

Disclosure will be made under 6103(i) only if the appropriate federal officers or employees are personally and directly engaged in one of the following activities:

1. Preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute (not involving tax administration) to which

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[1486] See generally USAM 9-13.900, Access to and Disclosure of Tax Returns in a Non-Criminal Case. For a procedural overview of this topic, see appropriate forms in the Appendix of this Manual.

[1487] For a sample package of forms involved in seeking tax disclosure under the *ex parte* order procedure of 26 U.S.C. 6103 (i)(1), see the Appendix of this Manual. The forms in this package include: (1) an application for a 6103 (i)(1) *ex parte* order; (2) and authorization for a 6103 (i)(1) application; (3) a 6103 (i)(1) *ex parte* order; and (4) a verification by the assigned prosecutor.

the United States or the federal agency is or may be a party;

2. Any investigation which may result in such a proceeding;

3. Any federal grand jury proceeding pertaining to enforcement of the federal nontax criminal statute.

b. Application for order

Under 6103(i)(1)(B), the application for *ex parte* order of disclosure of returns and taxpayer return information in nontax criminal cases may be made by:

1. the Attorney General

2. the Deputy Attorney General

3. the Associate Attorney General

4. any Assistant Attorney General

5. any United States Attorney

6. any special prosecutor (independent counsel) appointed under 28 U.S.C. 593

7. any attorney in charge of a criminal division organized crime strike force.

In most instances, the application for order will be made by the United States Attorney in whose district the order is being sought.

c. Contents of application

To obtain authorization for disclosure, the applicant must submit facts establishing all of the following:

1. There is reasonable cause to believe based upon information believed to be reliable, that a specific criminal act has been committed,

2. There is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act; and

3. The return or return information is sought exclusively for use in a federal criminal investigation or proceeding concerning the criminal act, and the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

2. *Disclosure to Locate Fugitives - Ex Parte Order Procedure - 6103(i)(5)*[1488]

An *ex parte* order also may be sought under Section 6103(i)(5) for disclosure of returns and return information in order to locate fugitives from federal justice. USAM 9-13.915. A disclosure order may be issued if the judge or magistrate determines that the following conditions are met:

[1488] See the Appendix for samples of the forms involved in seeking tax disclosure to locate fugitives under the *ex parte* order procedure of the 26 U.S.C. 6103 (i)(5).

a. A federal arrest warrant relating to the commission of a federal felony offense has been issued for an individual who is a fugitive from justice;

b. The fugitive's return or return information is sought exclusively for use in locating the fugitive; and

c. There is reasonable cause to believe that the return or return information may be relevant in determining the location of the individual.

3. Disclosure of Return Information Other Than Taxpayer Return Information for Use in Criminal Investigations - No ex parte Order Required - 6103(i)(2):

As an alternative to the *ex parte* court order procedure of 6103(i)(1), Section 6103(i)(2) provides that return information (other than taxpayer return information) shall, upon written request to the Secretary of the Treasury meeting the following requirements, be disclosed to officers and employees of other federal agencies personally and directly engaged in:

a. Preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute (not involving tax administration) to which the United States or federal agency is or may be a party;

b. Any investigation which may result in such a proceeding;

c. Any federal grand jury proceeding pertaining to enforcement of the federal non-tax criminal statute.

The written 6103(i)(2) request to the Secretary for disclosure of return information, other than taxpayer return information, for nontax criminal investigation purposes may be made by:

a. The head of any federal agency

b. The Inspector General of any federal agency

c. The Attorney General

d. The Deputy Attorney General

e. The Associate Attorney General

f. Any Assistant Attorney General

g. The Director of the FBI

h. The Administrator of the DEA

i. Any United States Attorney

j. Any special prosecutor (independent counsel) appointed under 28 U.S.C. 593

k. Any attorney in charge of a Criminal Division Organized Crime Strike Force.[1489]

d. The written request must set forth the following information:

1. The name and address of the taxpayer with respect to whom the requested return information relates (for purposes of this provision, a taxpayer's identity is not considered taxpayer return information);

2. The taxable period(s) to which such return information relates;

3. The statutory authority under which the proceeding or investigation is being conducted; and

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[1489] By order of December 26, 1989, the Attorney general merged the Organized Crime Strike Forces into the United States Attorneys' offices.

4. The specific reason(s) why disclosure is, or may be, relevant to the proceeding or investigation.

With respect to confidential informants and impairment of investigations, Section 6103(i)(6) provides that the Secretary of the Treasury has the authority to withhold requested information under 6103(i) if he or she determines that the disclosure would reveal the identity of a confidential informant or seriously impair a criminal or civil investigation or case. In the case of a court-ordered disclosure request under 6103(i)(1) or 6103(i)(5), the Secretary must so certify to the district court.

4. Use or Redisclosure of Returns and Return Information in Judicial or Administrative Proceedings under 6103(i) - 6103(i)(4)

Section 6103(i)(4) sets forth the requirements for use or redisclosure of returns and return information in judicial or administrative proceedings obtained under 6103(i). Under Section 6103(i)(4)(A), a return or taxpayer return information obtained under grant of an *ex parte* order pursuant to Section 6103(i)(1) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a federal nontax criminal statute or any judicial or administrative proceeding pertaining to the enforcement of a civil forfeiture (not involving tax administration). The disclosure of tax returns or taxpayer return information in a judicial or administrative proceeding is permissible if one of the following conditions is met:

1. The court finds that the return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt or liability of a party; or

2. To the extent required by order of the court pursuant to 18 U.S.C. 3500 (Jencks Act) or Rule 16, Fed. R. Crim. P. (Discovery).

Under Section 6103(i)(4)(B), return information other than taxpayer return information obtained under Section 6103(i)(1) (*ex parte* order), Section

6103(i)(2) (written request) or Section 6103(i)(3) (emergency circumstances) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a federal nontax criminal statute or any judicial or administrative proceeding pertaining to the enforcement of a civil forfeiture (not involving tax administration).

5. Investigative Disclosures

Section 6103(i) contains no specific provision for investigative disclosures by federal prosecutors. However, such additional disclosures are implicitly authorized where necessary and proper to conduct an investigation or to prepare for a proceeding by Section 6103(i)(1) and (2) which allow disclosure to federal prosecutors in a proceeding or an investigation which might result in a proceeding before a federal grand jury or a federal or state court. Moreover, Treasury Regulation 26 C.F.R. 301.6103(i)-1, which interpreted and limited a former version of Sections 6103(i)(1), (2) and (3), allowed limited redisclosure of returns and return information by federal prosecutors, but only to the extent necessary in connection with the proper preparation of the proceeding or investigation. For example, redisclosure is permissible when needed to interview properly and obtain relevant information from a taxpayer or third-party witness who may be called in the proceeding or to conduct plea negotiations.

G. Disclosure by I.R.S. Officers and Employees for Investigative Purposes - 6103(k)(6)

Section 6103(k)6) allows disclosure by I.R.S. officers and employees for investigative purposes. Section 6103(k)(6) provides:

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in

> obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Treasury Regulation 26 C.F.R. 301.6103(k)(6)-1 implements Section 6103(k)(6).

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APPENDIX

FORMS

Appendix-Forms

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FORM 1: ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA, Plaintiff, v. _____, Defendant.	)	No. ORDER TO SHOW CAUSE

Upon application of the United States based upon the affidavit of [Grand Jury Foreperson or Secretary], and good cause appearing therefor, IT IS ORDERED pursuant to Federal Rule of Criminal Procedure 42(b) that [grand jury witness] is ordered to appear on [date of hearing] in the courtroom of the Honorable [presiding District Judge] and show cause why (s)he shall not be found in criminal contempt for his/her disobedience and resistance on [date(s) of refusal to testify] to this Court's Order of [date of compulsion order].

SO ORDERED.

DATED: _____

_____

United States District Judge

FORM 2: SECURITY, CONFIDENTIALITY, AND PRIVACY INFORMATION

I, _____, on behalf of _____ Co., state that I have read the attached letter dated _____ from the Department of Justice as well as Rule 6(e) of the Federal Rules of Criminal Procedure, the Confidentiality Agreement and memorandum to employees concerning confidentiality appended thereto. I understand that the documents to be handled by this firm under contract No. _____ with the Department of Justice were produced under grand jury subpoenas and are subject to the secrecy provisions of Rule 6(e). I will advise each employee of this firm handling the documents of these restrictions and take all necessary steps to assure that neither the documents nor information contained therein are disclosed to anyone except to the extent necessary to perform the work and that the documents are secure from loss, theft and misappropriation. All documents and related information will be delivered to the Department of Justice at the completion of work by this firm and a list of all persons who performed any tasks in connection with this work will be provided. I understand that violation of the terms of the court order permitting disclosure to this firm could place the violator in contempt of court.

Date:_____

_____
authorized official
_____ Co.

Attachment A

Re: Grand Jury Proceedings

Dear :

In connection with the above-referenced investigation, the Department of Justice has contracted with your firm to have documents microfilmed and information contained in documents transferred onto computer-readable disks or tapes. You should be aware that the documents with which you will be working are grand jury documents which were produced pursuant to grand jury subpoenas. Rule 6(e) of the Federal Rules of Criminal Procedure, a copy of which is enclosed for your information, provides that information obtained pursuant to a grand jury investigation is subject to a rule of absolute secrecy and may not be disclosed to outside parties without authorization by the Court.

The District Court for the _____ District of _____ has issued an Order authorizing the release of grand jury documents to your firm for the limited purpose described above. The documents delivered to you and the information contained in them must not be disclosed to anyone except to the extent necessary to perform this work, and no copies of the documents or information are to be retained by you beyond the time necessary to complete the work. In addition, all necessary and appropriate steps must be taken by your firm to assure that the documents delivered to your firm by the Department of Justice are secure from loss, theft, or misappropriation. Violation of the Court order could place the violator in contempt of court.

At the completion of the work, we will require that a list of all persons who performed any tasks in connection with the work be furnished to this office for filing with the court.

Please confirm your agreement to these conditions by signing the enclosed statement and returning it to me.

Thank you for your cooperation.

Sincerely yours,

_____
Attorney
Antitrust Division

Enclosures

Antitrust Division
U.S. Department of Justice

CONFIDENTIALITY AGREEMENT
FOR CONTRACTOR AND SUBCONTRACTOR EMPLOYEE

I. I, _____, do solemnly swear (or affirm) that I understand the high standards of trustworthiness and integrity required of me with regard to materials and information which may come to my attention in connection with Government contract _____ while I am an employee of _____.

II. Except as necessary in the performance of my duties under this contract, I will not:

A. Reveal, divulge, or publicize any matters dealt with under the contract.

B. Disseminate any oral or written information obtained as a result of execution of this contract or performance of work hereunder.

C. Remove any documents from the place of contract performance, except as approved in advance by the Contracting Officer's Technical Representative.

Furthermore, while employed on this contract I will abide by the rules and regulations governing the standards of conduct of Justice Department employees, as outlined in Part 45 of Title 28, Code of Federal Regulations. In addition, I have read and will abide by the provisions of the contract clause entitled "Security, Confidentiality, and Privacy Requirements," which is applicable to this contract. (A copy of the pertinent clause is attached to this Agreement.)

III. As a Contractor or Subcontractor employee on this contract, I understand that all materials provided by the Government, including any copies, notes or working papers derived or produced therefrom, are the property of the Government. If required to do so, by the Contracting Officer, I will promptly surrender such materials and derived copies, notes and/or working papers which are in my custody or control. I understand that my failure to surrender such materials promptly, or my conversion of such materials to a use not called for by the contract (e.g., delivery of a document, or a copy thereof, or notes containing

information taken from the document, to someone not working on this contract), may be a violation of 18 U.S.C. § 641 (theft of Government property) and may subject me to fines (up to $10,000) and imprisonment (up to ten years).

IV. In accordance with contract provisions, this Agreement may be formally modified or changed by the Government in those instances in which the courts (e.g., grand jury investigations), statutory requirements (e.g., civil investigative demands), or specific circumstances dictate such a modification or change.

_____ _____

Date Signature

Security, Confidentiality, and Privacy Requirements

The following procedures and rules shall be followed by the Contractor in compliance with the Privacy Act of 1974 (5 U.S.C. 552a) and the Justice Department's security and confidentiality procedures applicable to this contract.

A. Contractor employees (and any Subcontractor employees, hereinafter referred to as "Contractor personnel") engaged in this project will neither require nor be given access to national security information. However, because Contractor personnel will be given access to Justice Department documents and facilities, background checks will be required. The Contractor will be required to furnish the COTR with the following forms, completed in triplicate, on each employee who will work on the project:

(1) Standard Form 171 - Personal Qualifications Statement;

(2) Standard Form 85 - Data for Nonsensitive or Noncritical-Sensitive Position;

(3) Form FD258 - Applicant Fingerprint Card (in duplicate);

(4) Antitrust Division's "Confidentiality Agreement for Contractor and Subcontractor Employee" (original only); see Part F below.

Blank forms will be available from the COTR at the start of contract negotiations. The completed forms must be submitted to the COTR no later than five (5) working days after the commencement of each employee's participation in this project. Failure to satisfy this requirement will automatically subject the Contractor or Subcontractor employee to dismissal from the project, as set forth in Part B below.

B. The Government reserves the right and prerogative to refuse, or require the Contractor to terminate, the services and access of any Contractor or Subcontractor employee who is or may be an offender, or whose personal habits, criminal history or inclinations are in conflict with Department of Justice employee guidelines or who otherwise may be a security risk. Suitability standards regarding Contractor personnel may be established or modified at any time, and without notice, by the Government.

C. All information and reports generated as a result of this project are, and will remain, the property of the Department of Justice (DOJ). No Government document or information, oral or written, either in final or draft form will be provided to non-DOJ sources by any Contractor personnel without the written approval of the Contracting Officer during the period of this contract, or at any time thereafter.

D. Employees assigned to this contract must abide by the rules and regulations as outlined in the DOJ Employee Standards of Conduct (28 CFR, Part 45). The Contractor must insure that all DOJ documents processed under this contract, and the information contained therein, are protected from unauthorized use and mishandling by assigned personnel. Contractor personnel must be aware at all times of the controlled nature of the documents being processed; and, when not under their direct control or possession, such documents must be stored in a Government-approved storage container in a secure area.

E. There shall be no dissemination or publication, except within and between Contractor personnel of information developed under this contract or contained in the reports to be furnished pursuant to this contract, without the prior written approval of the Contracting Officer. In addition, the Contractor will not issue, or permit to be issued, during the period covered by this contract or any time thereafter, publicity in any form regarding the work hereunder or the Contractor's participation herein, unless such publicity first be approved in writing by the Contracting Officer. Further, the Contractor will not reveal, during the performance of this contract or thereafter, any of the operating methods or systems, contents of files, names of persons, firms, or places mentioned under the contract which the Contractor may acquire, unless approved in writing by the Contracting Officer.

F. The Contractor agrees that each Contractor and Subcontractor employee, prior to and as a pre-condition for employment relating to the subject matter of this contract, will be required to execute a confidentiality agreement with the Contractor, stating in part that the employee will:

1. Not reveal, divulge, or publicize any matters dealt with under this contract.

2. Not disseminate any oral or written information obtained as a result of the execution of this

contract or performance of work thereunder.

3. Not remove any documents from the place of performance, except as approved in advance by the COTR.

4. Abide by the rules and regulations outlined in Part 45, Title 28, Code of Federal Regulations.

The Contractor then will provide the COTR with the original copy of this form signed by each employee not later than the employee's anticipated date of participation in the project.

G. Under the provisions of the Privacy Act of 1974, 5 U.S.C. § 552a(m), which is applicable to this contract, Government Contractors and Contractor personnel are subject to the criminal penalties of 5 U.S.C. § 552a(i). The Contractor agrees that upon termination of the contract, whether with or without cause, he has no property or possessory right to any of the correspondence, files or materials, of whatever kind and description, or any copies or duplicates of such whether developed/prepared by him or furnished to him by the technical office in connection with the performance of this contract; and that, upon demand, he or she will surrender immediately to the Contracting Officer such items, matters, materials, and copies. For any violation of this provision, a restraining order or an injunction may be issued against the Contractor, in addition to any other right or penalty by law which the Government may have.

H. The above terms and conditions of this contract clause concerning "Security, Confidentiality, and Privacy Requirements" are subject to formal modification or amendment by the Government in those instances in which the courts (e.g., grand jury investigations), statutory requirements (e.g., civil investigative demands), or specific circumstances dictate such changes.

FORM 3: MOTION FOR AN ORDER PERTAINING TO LIMITED DISCLOSURE OF GRAND JURY DOCUMENTS

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE ANTITRUST GRAND JURY INVESTIGATION	))))	Misc. No. _____ GRAND JURY NO. ____

MOTION FOR AN ORDER PERMITTING LIMITED
DISCLOSURE OF GRAND JURY DOCUMENTS

The United States of America, by its attorneys, respectfully moves this court pursuant to Federal Rules of Criminal Procedure 6(e)(3)(A)(i) and 6(e)(3)(A)(ii) for an Order permitting the limited disclosure of certain information contained in documents under the control of Grand Jury No. _____ which was impaneled in this District on _____, 199__. In support of this motion the United States states as follows:

1. Pursuant to Grand Jury subpoenas duces tecum served on numerous persons, corporations, and other entities pursuant to an investigation of possible violations of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., and other federal criminal statutes, Grand Jury No. _____ has received the production of [several hundred thousand] documents.

2. In order to fully analyze, collate, and compare information in the documents, it is necessary to establish a computerized retrieval system for the information contained in the documents.

3. To establish a computerized retrieval system the subpoenaed documents must be reviewed and copied and the pertinent information contained in the documents must be coded

onto specially designated coding sheets. The data on the coding sheets must then be keypunched onto disks or tapes, which in turn will be placed into the computer to create the system's information base. To accomplish this, it will be necessary for the Department of Justice to hire a contractor to copy the documents, code the sheets, and prepare computer-readable disks or tapes. The disks or tapes will be placed in the Department of Justice's computer storage and retrieval facilities and will be disclosed only as permitted by Rule 6(e) or the Federal Rules of Criminal Procedure.

4. As discussed in the attached Memorandum of Points and Authorities, the government submits that the disclosure of grand jury documents to an outside contractor is permissible under Rule 6(e) of the Federal Rules of Criminal Procedure with leave of court to the limited extent and for the limited purpose described in this motion.

5. If this motion is granted, the contractor retained by the Department of Justice will be required to sign a statement, in the form attached hereto (Attachment A), agreeing not to disclose to anyone any information obtained by virtue of access to the grand jury documents. Appropriate notice of disclosure as required by Rule 6(e) will be filed with the Court.

6. The government respectfully submits that the important work of the grand jury and the interests of justice will be served if this motion is granted.

WHEREFORE, the United States respectfully requests that the

court issue an order authorizing the attorneys for the government to disclose information contained in the grand jury documents for the limited purposes described in this motion.

Respectfully submitted,

_____

United States Attorney

_____

Attorney
Antitrust Division, Room
U.S. Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202)

DATED:

FORM 4: FORM OF LETTER ADVISING WITNESS OF PROCEDURE FOR DELIVERY OF DOCUMENTS

FORM OF LETTER ADVISING WITNESS OF PROCEDURE FOR DELIVERY OF DOCUMENTS

RE: Grand Jury Subpoena

Dear Sir:

The attached subpoena requires the appearance of you or an authorized custodian of the records of your company before a Federal Grand Jury in [INSERT CITY AND STATE] at the date and time specified. However, if you prefer, you may comply with the requirements of the subpoena without the need to actually appear before the grand jury by either of the following procedures:

(1) by turning over all the subpoenaed documents to the Federal Agent who serves this subpoena upon you and requesting that they be returned (delivered) to the grand jury for you, or

(2) by compiling the documents and mailing them by certified mail to the undersigned at [INSERT ADDRESS] and again requesting that the documents be returned to the grand jury for you.

If you choose to follow either of the foregoing courses of action, please include an affidavit[1] indicating that production is complete, or detailing the outstanding items and the date that they can be expected to be produced. A sample affidavit will be provided upon request. If production is incomplete, you may request an extension of the return date from the undersigned. If production is complete and the required affidavit provided; it will be unnecessary for you or anyone associated with your company to physically appear before the Grand Jury on the subpoena date.

---

[1] An affidavit is not required. Some U.S. Attorneys permit the recipient to respond by letter if it may produce a more timely response.

It is suggested that you retain copies of whatever documents you expect to require in the near future. You have a right to access the documents you have produced during the grand jury's investigation. Such access is provided upon appointment in a controlled setting, as detailed in a memorandum which will be provided upon request. Charges are assessed for copies made during or in connection with such appointments.

Sincerely,

[INSERT NAME OF USA]
United States Attorney

By:
Assistant U.S. Attorney

FORM 5: ALTERNATE FORM OF LETTER ADVISING WITNESS OF PROCEDURE FOR DELIVERY OF DOCUMENTS

ALTERNATE FORM OF LETTER ADVISING WITNESS OF
PROCEDURE FOR DELIVERY OF DOCUMENTS

RE: Grand Jury Subpoena

Dear Sir:

The attached subpoena requires that you or an authorized custodian of the records of your firm to produce documents before a Federal Grand Jury in [INSERT CITY AND STATE] at the date and time specified.

The subpoena does not require you to appear to testify before the grand jury on that date; it merely requires production by that date of the documents specified in the subpoena. If you prefer, you may comply with the requirements of the subpoena without the need to actually appear before the grand jury by delivering the records to Special Agent _____ of _____ prior to the date and time specified, for transmittal to the grand jury. In that event, you may send the documents to Special Agent _____ of _____ at _____ via certified mail or call Special Agent _____ at _____ to make other arrangements. If you wish to personally deliver the subpoenaed records to the grand jury, you may do so on the date and time specified. In that event, please advise Assistant United States Attorney _____ some time prior to that date.

We realize that some of the records called for by the subpoena may be needed by you to prepare your federal and state income tax returns or for other business purposes. We suggest that you make copies of such records for your own use prior to production to the grand jury, to minimize delays and inconvenience in seeking access to such records during the investigation. Should you require access to records produced to the grand jury, please contact Special Agent _____ or this office to arrange for an appointment to view same during normal business hours. A charge will be assessed for copies made of the records after production. Upon request, a memorandum detailing procedures for owner access to grand jury documents will be provided.

If you have any questions with respect to the subpoena or with the procedures outlined in this letter, you should call Assistant United States Attorney at _____.

Sincerely,

[INSERT NAME OF USA]
United States Attorney

By:
Assistant U.S. Attorney

CHRONOLOGY/SEQUENCE REPORT
INVESTIGATION OF JONES COMPANY

DATE	SUMMARY	EXHIBIT NUMBER OR TRANSCRIPT CITE	CODE	PARTY
12/12/91	CALL WAS MADE TO COMPANY PRES. RE: UNPAID INVOICE BY UCA.	12345	CD	BROWN, FAYE
01/01/92	SALES INVOICE SENT TO GREEN	67890	DE	PERKINS, CHRIS GREEN, STAN
01/10/92	MEETING OF JONES, SMITH	TR. JANE DOE P. 35	TR	JONES, BOB SMITH, AL
01/12/92	DEED OF SALE BACKDATED BY PARTIES	127 HOTEL BROOK MI-2875; SMITH, A.	QW	KUNZ, S. SMITH, AL

FORM6: CHRONOLOGY/SEQUENCE REPORT

FORM 7: GRAND JURY SUBPOENA LOG

GRAND JURY SUBPOENA LOG

LEAD SUBJECT _____ GJ _____ AUSA _____

Organization or Party Subpoenaed: _____

Date Subpoena Issued: _____

Date Subpoena Served: _____

Date Documents Received: _____

Inventory or Documents Received: _____

Date Subpoena Returned: _____

Identity of Grand Jury Agent: _____

Date Documents turned over to Grand Jury Agent: _____

Method of Disposition of Subpoenaed Records: _____

Date of Disposition of Records: _____

GRAND JURY SUBPOENA LOG
(ALL RECORDS OBTAINED BY GRAND JURY SUBPOENA INCLUDING ALL FINANCIAL RECORDS)

ISSUED TO	DATE ISSUED	RETURN DATE	DATE SERVED	AGENCY/AGENT WHO SERVED	WHERE RECORDS OBTAINED	DATED OBTAINED	HOW OBTAINED	DATE PRESENTED TO GRAND JURY

FORM 8: GRAND JURY SUBPOENA LOG

FORM 9: MEMORANDUM RE: PROCEDURE TO PROVIDE ACCESS TO RECORDS PROVIDED BY SUBPOENA RESPONDENT

MEMORANDUM

Re: Procedures to Provide Access to Records Provided by Subpoena Respondant

Date: January 30, 1992

To speed your access to records provided pursuant to grand jury subpoena while insuring the continued security of documents obtained during the government's investigation, the following procedures are necessary.

(1) The subpoena respondant is requested to provide a list of all attorneys, paralegals and investigators who are expected to be reviewing his/her documents. Please provide the list, in writing, to Jerry Jones, Special Agent, and John Smith, Discovery Clerk, Federal Bureau of Investigation, at [INSERT ADDRESS]. Individuals seeking access to the Document/Discovery Room should be prepared to present identification upon request.

(2) All individuals entering the room will be asked to leave all briefcases, purses, packages and coats in the foyer of the Document Room. Only notepaper and pencils may be brought into the Document Room by individuals who will be reviewing documents. Upon entering and leaving the room, each person must sign in.

(3) A high-speed copier will be available for your use. Paper will also be provided. There will be a charge of 15 cents per copy. When the machine is in use, please consult the clerk to schedule a time during the day when the copier will be made available to you.

(4) When you would like to copy a document, please notify the Discovery Clerk, who will then log the documents. After you copy the document(s), please present them to the Discovery Clerk so he can initial each copy. When you leave the Document Room, the Discovery Clerk must review all copies you have made to ensure that original documents have not been inadvertently gathered up with the copies.

(5) The Document Room will be open from 9:00 a.m. until 5:00 p.m. Monday through Friday. The room will be closed for lunch from noon until 1:00 p.m. and on national holidays. A telephone will be provided. Bathroom facilities are available in the building and a key can be obtained from the Discovery Clerk.

(6) Because of limited space, the room can only accommodate a maximum of six people reviewing documents at one time. We request your assistance in contacting the Discovery Clerk on Friday of each week to schedule the hours when you will seek access to the room; this will enable us to have the room available when necessary.

(7) We request your assistance in careful handling of the documents. Please be careful to avoid marking, writing or highlighting the documents.

Thank you for your cooperation.

FORM 10: COVER LETTER FOR RETURNING SUBPOENAED DOCUMENTS

COVER LETTER FOR RETURNING SUBPOENAED DOCUMENTS

Dear [INSERT NAME]:

Some time ago you produced documents in compliance with a Federal Grand Jury subpoena in connection with an investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. We have now had an opportunity to examine and evaluate those documents. Because all investigations and appeals in this matter have been exhausted, the documents are being returned to your custody and control.

You have requested that we return the documents subpoenaed from you. We are now prepared to return those documents to your physical custody. Please sign below to acknowledge receipt of your documents and return this letter to the undersigned.

Thank you for your cooperation.

Very truly yours,

[INSERT NAME OF USA]
United States Attorney

By: _____
[INSERT NAME]
Assistant U.S. Attorney

I acknowledge receipt of all documents previously produced pursuant to the grand jury subpoena(es) received in this matter.

DATE: _____ SIGNATURE: _____

FORM 11: MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER PERMITTING LIMITED DISCLOSURE OF GRAND JURY DOCUMENTS

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE	)	Misc. No. _____
GRAND JURY INVESTIGATION	)	GRAND JURY NO. _____
	)	

MEMORANDUM IN SUPPORT OF MOTION
FOR AN ORDER PERMITTING LIMITED
DISCLOSURE OF GRAND JURY DOCUMENTS

This memorandum is filed in support of the government's motion for an order permitting limited disclosure of grand jury documents to an independent contractor for the Department of Justice.

Grand Jury No. _____, which was impaneled in this District on _____, is investigating possible violations of the _____ Act, ___ U.S.C. § ____, and other federal criminal statutes. [Approx. number, i.e. several thousand] documents have been produced to the grand jury pursuant to subpoenas duces tecum to numerous persons, corporations, and other entities. These documents include: _____ [describe documents, i.e. proposals for contracts, estimates prepared in support of such proposals, telephone bills and other telephone records, travel expense reports, hotel bills, airline ticket statements, calendars, diaries] and other records relating to the possible violations under investigation.

In order for the attorneys for the government and the grand jury to evaluate these voluminous records accurately and

expeditiously, it is necessary to establish a computerized document retrieval system. The Department of Justice has been working on the design and implementation of a system that will enable the records to be fully and readily collated, analyzed and compared. To establish the system's information base, subpoenaed documents must be copied and the pertinent data in the documents must be keypunched onto computer-readable disks or tapes. The disks or tapes will then be placed in the Department of Justice's computer storage facilities and the actual analyses of the data will be performed by Department of Justice employees. Access to the computer system and reports generated from the system will be strictly limited in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure.

The Department does not have the equipment or facilities to keypunch and copy the subpoenaed documents. Therefore, the Department desires to enter into a contract with an outside firm with specialized equipment and trained personnel to perform the work. _____ [describe records and other documents] are being selected by government attorneys and will be disclosed to the contractor if the motion is granted. The contractor will copy the selected records where necessary and keypunch from those records discreet pieces of information identified by the government attorneys (such as _____ [describe records to be keypunched, i.e. dates, telephone numbers, locations, and names of individuals and companies]). At the conclusion of the job, all documents and computer tapes and disks will be returned to the Department.

The government, therefore, requests an order permitting disclosure of selected documents that have been subpoenaed by Grand Jury No. _____ to a government contractor for the limited purpose of transferring data into a computer-readable form. This technical assistance is necessary to enable the government attorneys to meaningfully evaluate the documents and to assist the grand jury in its investigation. The request for disclosure is extremely limited in scope and substance, and serves a particularized need.

The grounds for this motion are Rule 6(e)(3)(A)(i) and 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure. A court order is not a prerequisite for disclosure under Rule 6(e)(3)(A)(ii); Rule 6(e)(3)(A)(i), however, would require an order of the court before disclosure. Although the government's position is that the limited disclosure described in this motion is authorized under Rule 6(e)(3)(A)(ii), the government has filed this motion out of an abundance of caution and a desire to receive the court's guidance in maintaining the secrecy of grand jury proceedings.

A. Disclosure to an Independent Contractor is Authorized Under Rule 6(e)(3)(A)(ii)

Rule 6(e) of the Federal Rules of Criminal Procedure imposes a general mandate of secrecy over matters occurring before the grand jury. However, the rule provides a specific exception to the requirement of secrecy for:

> such government personnel as are deemed necessary for an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.

Rule 6(e)(3)(A)(ii). Disclosure of grand jury documents to a government contractor in this case falls within this category.

This section of Rule 6(e) was enacted in 1977 "to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation." Advisory Committee Notes to Subdivision 6(e) 1977 Amendment. Although neither the legislative history of Rule 6(e) nor the case law directly address the issue of disclosure to a government contractor performing data processing work, we submit that the government contractor constitutes "government personnel" within the meaning of subparagraph (3)(A)(ii).[1] That paragraph was included to provide flexibility in the rule of secrecy to permit disclosure to persons employed by the government to provide expertise needed to assist government attorneys in a grand jury investigation. See Sen. Rep. No. 95-354, 95th Cong., 1st Sess. 7, reprinted in 1977 U.S. Code Cong. and Admin. News 527, 530-31. Although disclosure under subparagraph 3(A)(ii) is most typically made to agency employees or investigative personnel of agencies such as the FBI and IRS, the provision of that subparagraph does not exclude persons providing technical assistance to the

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[1] The issue of whether an independent contractor is "government personnel" within the meaning of subsection (A) (ii) has not been litigated. The only reported appellate cases under subsection (A) (ii) deal with whether disclosure may be made to various federal investigators, see, e.g., United States v. Jones, 766 F.2d 994, 1000-1001 (6th Cir. 1985) (disclosure to BATF agent permitted); United States v. Thomas, 593 F.2d 615, 623 (5th Cir. 1979) (disclosure to IRS and Department of Agriculture agents permitted); and whether "governmental personnel" includes state personnel aiding in a federal investigation, see, e.g., United States v. Cook, 794 F.2d 561, 564-565 (10th Cir. 1986) (deputized state agents permitted to review documents).

government on a short-term contractual basis. The Advisory Committee Note to the 1977 Amendment of Rule 6(e) explicitly states that the phrase government personnel "includes, but not limited to, employees of administrative agencies and government departments."

It is clear from both the legislative history and case law that disclosure to government personnel whose expertise is required to assist the attorneys for the government is permissible when the sole purpose of such disclosure and use of disclosed matters is to aid the grand jury investigation. See, e.g., Advisory Committee Note, supra, Sen. Rep. No. 95-354, supra at 6-9, 1977 U.S. Code Cong. and Admin. News at 529-32; United States v. Jones, 766 F.2d 994, 1000, 1001 (6th Cir. 1985); United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1975).

In this case, the disclosed documents will be used only to perform the data processing tasks outlined above, which are necessary to assist the attorneys for the government in this investigation and which the Justice Department cannot perform in-house.[2] The court in the Hawthorne case, supra, held that, even under the pre-1977 version of Rule 6(e), access to voluminous

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[2] This is not the situation, addressed by some courts, in which there was disclosure of grand jury matters to government personnel for use in unrelated civil or criminal investigations. See, e.g., United States v. Sutton, 795 F.2d 1040, 1047-1050 (Em.App. 1986) (disclosure of grand jury matters to agency pursuent to its civil enforcement authority improper despite subsequent court order).

grand jury documents by government personnel with technical expertise to analyze those documents did not breach grand jury secrecy. 406 F. Supp. at 1120-24. The court did, however, set out a series of steps to safeguard the secrecy of the disclosed materials. 406 F. Supp. at 1125-27.

The Department of Justice will take steps necessary to safeguard the secrecy of disclosed grand jury materials.[3] As suggested in Hawthorne, the personnel assisting the Justice Department will be sworn to honor the grand jury secrecy and will be given written instructions that make clear the limited nature of their access to grand jury documents. (See Attachment A to the Motion.) The attorneys for the government will keep a record of persons having access to the documents, the dates of access, and the nature of work performed with regard to the documents. The attorneys for the government will certify to the Court the termination of the technical assistance and that the matters disclosed have been returned to the government attorneys.

B. The Court May Authorize Disclosure to the Government Contractor Under Rule 6(e)(3)(c)(i)

This court is empowered to authorize disclosure of the grand jury documents at issue here to a government contractor for data processing under Rule 6(e)(3)(C)(i). That section provides:

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[3] In re Petition to Inspect & Copy Grand Jury Materials, 735 F.2d 1261, 1274 (11th Cir. 1984) suggests where disclosure is permitted, in that instance to a judicial investigation commission, restrictions should be placed on the disclosure to protect the public interest in grand jury secrecy. In that case, the court imposed restrictions upon the location and reproduction of the records, the duration of their availability and the persons allowed access.

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

The great weight of authority supports the view that a grand jury hearing is a "judicial proceeding" within the meaning of Rule 6(e). See, e.g., United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); United States v. Stanford, 589 F.2d 285, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).[4]

Under circumstances similar to those which exist here, the United States District Court of Appeals for the Seventh Circuit upheld disclosure orders under Rule 6(e) providing transcripts and subpoenaed materials to federal officers and Illinois law enforcement personnel. United States v. Stanford, supra. The district court had issued an order under Rule 6(e) permitting disclosure of subpoenaed employee lists to personnel of the

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[4] But see, United States v. Tager, 638 F.2d 167 (10th Cir. 1980). In United States v. Anderson, 778 F.2d 602 (10th Cir. 1985), the Tenth Circuit limited Tager to investigators "not in any sense in the employ of the government." The disclosure at issue in Tager was made to a privately employed investigator who had independently developed information and referred the case to the government. In this case, the copier and keypunch operators to whom disclosure will be made have no independent interest in or connection with this case; they will merely perform a limited technical and clerical function under contract to the government. The Tenth Circuit will have few opportunities to overrule Tager in light of recent Supreme Court jurisprudence. See United States v. Williams, 112 S. Ct. 1735 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989); United States v. Mechanik, 475 U.S. 66 (1986). See also United States v. Benjamin, 852 F.2d 413 (9th Cir. 1988) vacated 109 S.Ct. ____ (1989) (F.R.Cr.P. 6(e)(3)(A)(ii) does not preclude even the resort to private investigative help, although government must present a strong showing of particularized need which outweighs the interests in grand jury secrecy).

Illinois Department of Public Aid for the purpose of feeding those lists into a computer. The court of appeals reasoned that:

> Rule 6(e) permits disclosure orders not only "in connection with" but also "preliminary to" a judicial proceeding. Although a grand jury proceeding may not itself be "determinable by a court", Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897 (7th Cir. 1973), quoting Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958), it is nevertheless preliminary to such proceedings.

589 F.2d at 292. The court of appeals further noted that the 6(e) orders clearly limited the use of the materials and that persons granted access to the materials were cautioned to maintain secrecy. Thus, the orders did not compromise the secrecy of the grand jury proceeding. 589 F.2d at 293.

CONCLUSION

This court should issue an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, allowing the government to disclose grand jury documents to persons under contract with the government solely for copying and keypunching operations.

The Justice Department needs this technical assistance because it would be virtually impossible to use the information contained in many of the voluminous grand jury documents without a computer and because the Department does not have the required data processing capability in-house.

The government will assure that grand jury secrecy will be maintained by the following procedures:

1. All personnel under contract will be given written instructions that delineate the limited nature of

their access to the grand jury documents.

2. All personnel will be sworn to honor the grand jury secrecy.

3. The government will keep records of persons having access to documents, the dates of access and the nature of the work performed.

4. All grand jury documents and computer tapes and disks will be returned to the government when data processing is completed.

5. The government will certify to the court the termination of the project and that all matters disclosed have been returned to the government.

This type of disclosure is consistent with the purpose of Rule 6(e), and, most importantly, does not offend the objectives of grand jury secrecy or present the potential for misuse or abuse with which the legislature and courts historically have been concerned.

Respectfully submitted,

_____
United States Attorney

By: _____

(202)

DATED: _____

FORM 12: ORDER PERMITTING LIMITED DISCLOSURE OF GRAND JURY DOCUMENTS

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE ANTITRUST GRAND JURY INVESTIGATION	))))	Misc. No. _____ GRAND JURY NO. ____

ORDER PERMITTING LIMITED
DISCLOSURE OF GRAND JURY DOCUMENTS

Upon motion of the United States for an Order permitting limited disclosure of grand jury documents pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure,

IT IS HEREBY ORDERED that the documents produced pursuant to subpoenas duces tecum and under the control of Grand Jury _____ in connection with the investigation of _____ being conducted by the Antitrust Division of the United States Department of Justice may be disclosed by the attorneys for the government to a contractor employed by the Department of Justice for the purpose of copying the documents transferred to a computer-readable form; that personnel of the contractor shall not disclose the grand jury documents of information contained in them, and shall take all necessary precautions to maintain the secrecy of the documents and information; that the attorneys for the Government shall advise said contractor of its obligations under this Order; and that the motion and memorandum of the United States and this Order be placed under seal.

ORDERED this _____ day of _____. 199___.

_____
United States District Judge

FORM 13: LETTER, RE: GRAND JURY SUBPOENA

Re: Grand Jury Subpoena

To whom it may concern:

Pursuant to the enclosed grand jury subpoena, you are required to produce original documents (unless otherwise specified) at the time and place indicated on the subpoena. Alternatively, you may comply with this subpoena by delivering the requested documents to Special Agent ^C of the ^C. You may contact ^C at ^C. The records should be accompanied by an affidavit, signed by the records custodian, stating that the records produced represent all business records in your care, custody and control which comply with the subpoena. If documents have been withheld from production, the affidavit should describe the withheld documents in detail and reflect a detailed basis for withholding the documents.

If all of the subpoenaed records are delivered to Special Agent ^C prior to the return date of the subpoena, you will not be required to appear before the grand jury. If production will not be complete by the return date, you will need to obtain a continuance from the undersigned. Additionally, you should send a letter to Special Agent ^C before the stated return date identifying the documents which have not yet been produced and specifying the reasons for the delay. Once the subpoenaed records are ready to be produced, please mail documents to the Special Agent ^C and not to the undersigned.

Subpoenas issued in connection with proceedings before a grand jury are specifically exempt from the customer notification requirements of the Right to Financial Privacy Act and disclosure is prohibited by 12 U.S.C § 3420 and 18 U.S.C. § 1510(b).

If you have any questions concerning the subpoena or the documents and records requested, please contact the undersigned.

Sincerely,

GERALD E. McDOWELL
Chief, Fraud Section
Criminal Division

By:

Trial Attorney
7701 N. Stemmons Frwy., Ste. 200
Dallas, Texas 75247
(214) 767-7821

Attachment

FORM 14: AFFIDAVIT OF COMPLIANCE WITH SUBPOENA

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE GRAND JURY INVESTIGATION _____	)))) ss.)	AFFIDAVIT OF COMPLIANCE WITH SUBPOENA

_____, being first duly sworn, deposes and says:

1. I am associated with _____ (the "Company") as _____. In this position I have the responsibility for the Company's compliance with the subpoena duces tecum issued to it on _____, 1992, which calls for the production of certain documents before a grand jury of this court.

2. I personally have conducted or supervised compliance by the Company with the subpoena duces tecum. To the best of my knowledge, information and belief, based upon due diligence and reasonable inquiry, the documents enclosed herewith, bearing the numbers _____ constitute all the documents in the possession, custody or control of the company that fall within the terms of the subpoena duces tecum.

3. No documents responsive to the subpoena duces tecum have been withheld by the Company pursuant to a claim of privilege or othewise. To the best of my knowledge, information and belief, based upon due diligence and reasonable inquiry, no one has directed the destruction of any documents responsive to

the subpoena duces tecum and no such documents have been destroyed.

4. The documents made by the Company and produced in compliance with the subpoena duces tecum are memoranda, reports, records or data compilations of acts, events, conditions, opinions or diagnoses that were made at or near the time, by or from information transmitted by, a person with knowledge and that have been kept in the course of the Company's regularly conducted business activity. It has been the Company's regular practice in that business activity to make those memoranda, reports, records, or data compilations. Neither the source of information, nor the method of circumstances of preparation, indicate a lack of trustworthiness for those memoranda, reports, records or data compilations.

5. I understand that the furnishing of these documents to counsel for the United States in response to the subpoena duces tecum and the execution of this Affidavit, are at the sole discretion and election of myself and the Company, and are in lieu of personally producing the documents before the Grand Jury which right to appear is expressly waived.

6. I am authorized by the Company to execute this

Affidavit and I have reviewed all its terms with counsel for the Company before signing and swearing to it.

FURTHER AFFIANT SAYETH NAUGHT.

_____
AFFIANT

SWORN AND SUBSCRIBED TO before me this _____ day of _____, 1992, at _____.

_____
Notary Public
My Commission Expires: _____

INVESTIGATION OF JONES COMPANY
LISTINGS FOR GRAND JURY PURPOSES

BATES STAMP	DOC DATE	ORIG/ COPY	DESCRIPTION	COMPANY DOC	WITNESS/ SOURCE	ADD'L WITNESS(ES)	DATE ID	DATE ADMIN	REMARKS	GRAND JURY #
12345	12/12/91	O	FD-302 INTERVIEW WITH MR. SMITH RE: FRAUD CASE	N	SMITH, FRANK	JONES, BOB				
4578	11/11/91	C	LETTER FROM COMPANY PRESIDENT TO DEPT OF JUSTICE EMPLOYEE RE: PAYMENT OF LAST INVOICE	Y	GREEN, STANLEY	CARRUTHERS, SALLY			TRANSPARENCY, 3 PAGES	12234
1234	12/12/91	O	FD-302 INTERVIEW WITH MR. DOE RE: FRAUD CASE. DOE ADMITS KEEPING TWO SETS OF BOOKS	N	DOE, BRIAN	GREEN, STANLEY; BOND, BOB; BROWN, JANE			24 PAGES	34567

FORM 15: LISTINGS FOR GRAND JURY PURPOSES

JONES COMPANY INVESTIGATION
GRAND JURY DOCUMENT LOG

DOCUMENT NUMBER	DESCRIPTION	WITNESS/SOURCE	DATE OBTAINED	RECEIVED BY (* indicates w/o subpoena)
12345	FD-302 INTERVIEW WITH MR. JONES RE FRAUD CASE	JONES, BOB	2/10/90	BROWN, BILL *
4578	LETTER FROM COMPANY PRESIDENT TO DEPT. OF JUSTICE EMPLOYEE RE: PAYMENT OF INVOICE	CW	2/13/90	HOPKINS, CHRIS
12340	FD-302 INTERVIEW WITH MR. JONES RE: FRAUD CASE. CHRIS IS NOW BENDING OVER HIS PEN REGISTERS	JONES, BOB HOPKINS, CHRIS	2/10/90	BROWN, KAYE*

FORM 16: GRAND JURY DOCUMENT LOG

FORM 17: GRAND JURY DOCUMENT LOG

_____ INVESTIGATION
GRAND JURY DOCUMENT LOG

DOCUMENT NUMBER	DESCRIPTION	WITNESS/SOURCE	DATE OBTAINED	RECEIVED BY (* indicates w/o subpoena)
1				
1A				
2				
2A				
3				
3A				
4				
4A				
5				
5A				
6				
7				
8				
9				
10				
10A				
11				
11A				

FORM 18: DOCUMENT RECEIPT

UNITED STATES ATTORNEY
_____ DISTRICT OF _____

DOCUMENT RECEIPT

1. I _____ of _____ have custody and control of the documents listed below, which I have submitted to Special Agent _____ voluntarily.

2. The documents submitted are as follows:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signature and Title of Persons Submitting Documents _____

_____

Signature of Agent[s] Receiving Documents _____

_____

FORM 19: LETTER, RE: GRAND JURY SUBPOENA

U. S. Department of Justice

United States Attorney
Western District of Wisconsin

Suite 200, City Station
660 W. Washington Avenue
P.O. Box 1585
Madison, WI 53701-1585

608/264-5158

December 17, 1992

Re: Grand Jury Subpoena

Dear Mr. Attorney:

Your client, Mr. John Doe, has been served with a subpoena requiring the production of certain items by him to the grand jury. As I informed you, Mr. Doe is presently a target of the grand jury investigation. You have informed me that Mr. Doe will assert his Fifth Amendment privilege and will refuse to testify before the grand jury. Accordingly, I am excusing him from appearing before the grand jury but, pursuant to the agreement set forth below, the United States will provide him with "act of production" immunity for the production of the items required by the grand jury subpoena.

By this letter, the government agrees to provide Mr. John Doe with "act of production" immunity for his production of the items described in the grand jury subpoena of _____. The government agrees that no direct or indirect use will be made from the "testimonial aspects" of Mr. Doe's providing these items to the grand jury. This immunity also applies to the limited questions which will be asked of Mr. Doe before the grand jury in order to authenticate and identify the items produced.

If this letter conforms with your understanding of our agreement, would you and your client please sign this letter and return it to me. Thank you for your consideration.

Very truly yours,

United States Attorney

By:

_____	_____
Date	Assistant U.S. Attorney
_____	_____
Date	Attorney
_____	_____
Date	Mr. John Doe

FORM 20: INFORMAL USE IMMUNITY

November 17, 1989

Defense Attorney, Esq.
McKenna, Conner & Cuneo
444 South Flower Street
Los Angeles, CA 90071

Re: Witness

Dear Mr. Defense Attorney:

This is to confirm our conversation in which I informed you that the government wishes to interview your client, Ms. Witness, in connection with an investigation by the United States Attorney's Office for the Central District of California ("Office") into alleged insider trading in certain securities. Based on the information developed to date, your client is currently viewed as a witness and not a subject or target of the investigation. In view of your representation to me that your client will nonetheless assert her Fifth Amendment privilege against compulsory self-incrimination, this Office and your client agree as follows:

1. Any information your client provides in response to questions posed by me, or any other agents of the federal government, at the meeting currently scheduled for November 22, 1989, shall receive protections co-extensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of Title 18, United States Code, Sections 6001 et seq. That is, such information shall not be used directly or indirectly against your client in any

criminal case, except that such information may be used in a prosecution for perjury, giving a false statement and/or obstruction of justice.

2. The protections conferred in this Agreement apply only to the November 22, 1989, meeting.

No promises, agreements, or conditions have been entered into other than those expressly set forth in this letter. Nor may any additional promise, agreement, condition or extension of this agreement be made unless in writing and signed by all parties.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

APPROVED:

_____
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

ACCEPTED AND AGREED:

_____ _____
WITNESS DATE

_____ _____
DEFENSE ATTORNEY DATE
Counsel for Witness

FORM 21: REQUEST FOR AUTHORIZATION TO APPLY FOR COMPULSION ORDER

LIMITED OFFICIAL USE

U. S. Department of Justice

Request for Authorization to Apply for Compulsion Order
(18 U.S.C. §6001-6003; 28 C.F.R. 0.175-0.178)

Instructions: Prepare and Submit Original and One Copy. Answer Each Question as Accurately and Completely as Possible.

TO: Witness Records Unit
Criminal Division
U. S. Department of Justice
Room 2746 MAIN Justice
Washington, DC 20530

FAX No. 202-514-1468
TELETYPE CODE - JCRIM

FROM: USA ~
United States Attorney
Address

FAX No.
TELETYPE CODE -

(1) Name of Witness:

(2) District:

(3) Nature of Proceeding:

[ ] Trial [ ] Grand Jury [ ] Other

(4) Name of Subject(s) or Defendant(s):

(5) Date of Testimony (two weeks lead time required):

(6) Proffer of Anticipated Testimony:

[ ] None Obtained
[ ] Debriefing of Witness
[ ] Pursuant to Plea Agreement

[ ] Proffer by Witness
[ ] Proffer by Counsel

(7) Summary of Case or Proceeding:

(8) Witness' Background and Role in Case or Matter and Summary of Anticipated Testimony or Information:

(9) Witness' Family Relationship, if any, to the Subject(s) or Defendant(s):

(10) Assurances or Promises, if any, to Witness in Return for his Testimony:

(11) Acts of Witness Considered as a Waiver of Fifth Amendment Privilege:

(12) Means Other than Immunity to Obtain this Testimony:

(13) Basis Other than Proffer for Summary of Anticipated Testimony:

(14) Relative Culpability of Witness Compared to Subject(s) or Defendant(s):

(15) Why Immunity is Necessary to the Public Interest:
State Facts.

(16) Basis for Belief that Witness Will Assert Fifth Amendment Privilege:

(17) Likelihood that Witness Will Testify if Immunity is Granted:

(18) Prosecution of Witness in this case or Matter:

[ ] Yes [ ] No [ ] Acquitted [ ] Convicted [ ] Plea

If not indicted, why not? If convicted, has the witness been sentenced?

(19) Witness' Privilege Survives Because:

(20) Witness is Presently Incarcerated:

[ ] Yes [ ] No If yes, give details:

(21) Pending Federal or Local Charges against Witness:

[ ] Yes [ ] No If yes, give details:

(22) Federal and State Offenses by Witness that His Testimony Could Disclose:

(23) Opposition, if any, to Granting Immunity by State or Local Prosecuting Officials:

(24) Effect, if any, of Granting Immunity to the Witness Upon any Other Federal District:

(25) Conviction of Witness Possible on Evidence Other than His Own Testimony?
[ ] Yes [ ] No If yes, give details:

(26) Violations (Statutes and Descriptions) by Subject(s) or Defendant(s):

FORM 23: LETTER, RE: GROUND RULES FOR PROFFER

U. S. Department of Justice

United States Attorney
Western District of Wisconsin

Suite 200, City Station
660 W. Washington Avenue
P.O. Box 1585
Madison, WI 53701-1585

608/264-5158

December 17, 1992

Re: Ground Rules for Proffer

Dear Mr. Attorney:

This letter is designed to set forth the ground rules covering statements which will be made by your client, John Doe, to law enforcement officers prior to, and in connection with, the United States entering into an immunity agreement with Mr. Doe. (This language should be modified if the proffer is not an investigative proffer prior to an immunity decision, but is a proffer prior to a possible plea agreement resolving charges against the individual).

No direct use will be made of Mr. Doe's statements, or any information provided by him, in any criminal proceeding. The indirect use of his statements, or other information, is permitted by this agreement. This indirect use includes pursuing leads based on the statements and information provided by Mr. Doe, as well as the use of the statements and information themselves for impeachment and rebuttal purposes should Mr. Doe ultimately be charged by the United States and proceed to trial.

Pursuant to United States v. Threw, 861 F.2d 1046 (7th Cir. 1988), the statements and information provided by Mr. Doe will be provided to the sentencing judge prior to any sentencing hearing, in the event Mr. Doe is charged and convicted. However, pursuant to § 1B1.8, United States Sentencing Guidelines, and Application Note one in the commentary following § 1B1.8, the statements and information provided by Mr. Doe may not be used against him to determine his appropriate guideline range, nor may he be subject to any increased sentence within a guideline range by virtue of the statements and information provided by him pursuant to this agreement.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

IN RE: GRAND JURY APPEARANCE OF Witness ~	)

ORDER

Upon the application of the United States,

IT IS HEREBY ORDERED, under Section 6003 of Title 18, United States Code, that the witness, witness ~, is directed to testify and provide other information notwithstanding his/her claim of possible self-incrimination and further that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) shall be used against the witness in any criminal case except the prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

Dated this _____ day of Month and Year ~.

_____

United States Magistrate Judge

FORM 24: REQUESTS FOR DISCLOSURE OF TAX RETURNS AND RETURN INFORMATION FROM THE IRS NOT RELATING TO TAX ADMINISTRATION

REQUESTS FOR DISCLOSURE OF TAX RETURNS AND RETURN INFORMATION FROM THE IRS NOT RELATING TO TAX ADMINISTRATION

BACKGROUND

U.S. Attorneys may have occasion to seek access to tax information (returns and return information) for use in non-tax criminal matters. Title 26, United States Code, Section 6103(i)(1) provides for tax information to be obtained upon the grant of an ex parte order by a Federal district court judge or magistrate judge for use in criminal investigations. (26 U.S.C. § 6103(i)(5) similarly provides for disclosure of tax information exclusively for use in locating fugitives.) In addition, 26 U.S.C. § 6103(i)(2) provides for return information, other than taxpayer return information, to be obtained by a written request signed by a U.S. Attorney or other person so specified.

SUGGESTED PROCEDURES

1. Upon determination that tax information is needed, regardless of the address of the subject, provide the name, address, and social security number of the subject and the taxable periods for which information is sought to the Internal Revenue Service by calling the local Internal Revenue Service Disclosure Officer.

2. Prepare written request (to be used for disclosure of information obtained by third parties only) or Application for

If your understanding of our agreement conforms with mine, would you and your client please sign this letter and return it to me.

Very truly yours,

United States Attorney

By:

_____	_____
Date	Assistant U.S. Attorney
_____	_____
Date	Attorney
_____	_____
Date	Mr. John Doe

FORM 25: APPLICATION FOR EX-PARTE ORDER TO DISCLOSE RETURNS AND RETURN INFORMATION

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	GRAND JURY NO.
	)	
JOHN DOE NO.	)	

APPLICATION FOR EX PARTE ORDER TO
DISCLOSE RETURNS AND RETURN INFORMATION

Comes now the United States of America, through its attorneys Richard Cullen, United States Attorney for the Eastern District of Virginia, and _____, Assistant United States Attorney, pursuant to 26 U.S.C. 6103(i)(1), and makes application to the Court for an ex parte order directing the Internal Revenue Service (IRS) to disclose to applicant (and to others hereinafter named) returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NO.:

which returns and return information are described as those returns and return information for the taxable period(s) of _____.

In support of its application applicant alleges and states the following:

* (1) There is reasonable cause to believe, based upon

* Note: Prosecutors should set forth in this application sufficient facts to enable the court to find reasonable cause to believe that particular criminal violations have been committed and that the specified returns and return information may be relevant to a matter relating to the commission of such acts.

Ex Parte Court Order, along with the Authorization, Verification and Order (to be used to obtain information obtained by third parties, as well as, taxpayers and their representatives) as specified in USAM 9-13.900 et seq.

3. Mail written request or a copy of the application and unsigned court order to the attention of the Disclosure Officer at the local Internal Revenue Service District Director's Office.

4. Once a certified copy of the signed court order is obtained, mail to the local Disclosure Officer referenced in No. 3 above.

5. When dealing with multiple tax returns, either concerning a single or multiple entities, file a single order as opposed to multiple orders. For example, if you are seeking returns and return information for John and Jane Doe and numerous business entities with which they are associated, a single order identifying the information sought for each entity is preferable over having an individual order for each entity. This is true even where different documents are sought for different years on each entity. You need only identify the years and documents for each entity on the single order.

6. When obtaining State tax returns, you can write or call the appropriate State Department of Revenue or Taxation.

person to give evidence which the person would otherwise refuse to provide on self-incrimination grounds. Subparagraph (b) of Section 6003 provides that the United States Attorney may request such an order when, in his/her judgment, obtaining such evidence is necessary to the public interest and the witness refuses or is likely to refuse to provide it on self-incrimination grounds. Subsection (b) also provides that the United States Attorney act with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General.

4. Pursuant to 28 C.F.R. §0.175(a) as amended (see 54 Fed. Reg. No. 3. 296-297), it delegated to Deputy Assistant Attorneys General the authority of the Attorney General to approve applications to compel testimony of witnesses or the production of other information pursuant to the provisions of the use immunity statute, 18 U.S.C. §§6001-6005.

5. On date ~, Assistant Attorney General AAG~ of the Criminal Division approved this request for immunity for witness~.

6. In my judgment, the requirements of Sections 6003(b)(1) and (2) are met in this case.

_____
United States Attorney

Subscribed and sworn to before me
this _____ day of _____, Year~.

_____
Notary Public, State of _____
My Commission: _____.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

IN RE: GRAND JURY APPEARANCE OF Witness ~	)

AFFIDAVIT

State of Wisconsin)
) ss.
County of)

[United States Attorney], being first duly sworn on oath, deposes and says:

1. I am the United States Attorney for the _____ District of _____ and submit this affidavit in support of the government's application for an order directing the witness, witness ~, to testify notwithstanding his/her claim of self-incrimination.

2. Section 6002 of Title 18 provides that whenever a witness refuses on Fifth Amendment grounds to testify before a Court of the United States and the court orders the witness to give evidence the witness may not refuse to comply with the order on Fifth Amendment grounds. Section 6002 further provides that no testimony or other information may be used against the witness in a criminal case except in a perjury, false statement, or contempt prosecution.

3. Section 6003 of Title 18 provides that where a witness has been called to testify before a Grand Jury of the United States upon the request of the United States Attorney the United States District Court "shall issue" an order requiring the

FORM 22: APPLICATION FOR IMMUNITY WITH ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

IN RE: GRAND JURY APPEARANCE OF Witness ~	)

APPLICATION FOR IMMUNITY

The United States hereby requests under Title 18, United States Code, Section 6003, an order immunizing the witness, witness ~, and ordering him/her to testify in the above matter. This request is predicated on the attached affidavit of United States Attorney _____.

Dated this _____ day of _____.

Respectfully submitted,

_____
United States Attorney

(27) Witness Previously Immunized?

[ ] Yes [ ] No If yes, give details:

(28) Witnesses for whom Immunity has been Authorized in this Proceeding:

(29) Date Investigation Began:

(30) Witness Subject to Electronic Surveillance?

[ ] Yes [ ] No If yes, give details:

(31) Birthdate of Witness:

(32) FBI I.D. No.:

(33) Birthplace:

(34) Social Security No.:

(35) Alias:

(36) Address of Witness:

(37) If Requestor is Department Attorney, has United States Attorney Been Notified?

[ ] Yes [ ] No

_____

AUSA ~
Assistant U. S. Attorney

_____

USA ~
United States Attorney

result of your guilty plea pursuant to this Agreement. Nor may any additional agreement, understanding or condition be entered into unless in writing and signed by all parties.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

ACCEPTED AND AGREED:

_____ _____
DEFENDANT DATE

_____ _____
DEFENDANT'S COUNSEL DATE

whether in interviews, before a grand jury or at any trial or other court proceeding;

(b) to attend all meetings, grand jury sessions, trials and other proceedings at which your presence is requested by this Office or compelled by subpeona or court order;

(c) to produce voluntarily any and all documents, records, or other tangible evidence relating to the matters about which this Office inquires.

3. You further agree (a) to work with a Revenue Agent of the Internal Revenue Service to determine all back taxes owed by you to the United States of America, (b) to file tax returns for all past years in which no returns were filed and to file timely returns in the future, and (c) to pay all back taxes, interest and penalties owed by you to the United States of America according to a schedule determined by the Internal Revenue Service.

4. In exchange for your guilty plea and cooperation, this Office agrees not to bring any additional charges against you relating to your activities involving [DESCRIBE CRIME(S) WITH SPECIFICITY AND LIMIT AS TO TIME]. This Office also will advise the court at the time of sentencing of the nature and extent of your cooperation. This Office may recommend whatever sentence it deems appropriate. You understand that statements made by this Office at the time of sentencing are not binding on the trial judge and that the trial judge is free to impose any sentence that he or she deems appropriate.

5. You must at all times give complete, truthful and accurate information and testimony and must not commit any crimes whatever. If you commit any crimes or if any of your statements or testimony proves to be false, misleading or materially incomplete, or if you otherwise violate this Agreement in any way, this Office will no longer be bound by its representations to you concerning the limits on criminal prosecution as set forth above. You shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including but not limited to perjury, false statements and obstruction of justice. Because your disclosures pursuant to this Agreement will constitute a waiver of your fifth amendment privilege against compulsory self-incrimination, any such prosecution may be

premised on statements and/or information provided by you. Moreover, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against you in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. It is the intent of this Agreement to waive any and all defenses based on the statute of limitations with respect to any prosecutions that are not time-barred on the date you sign this Agreement.

6. This agreement is limited to the United States Attorney's Office for the Central District of California, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring your cooperation to the attention of other prosecution offices, if so requested by your counsel.

7. If it is determined that you have violated any provision of this Agreement:

(a) All statements made by you to this Office or other designated law enforcement agents, or any testimony given by you before a grand jury or other tribunal, whether before or after to this Agreement, shall be admissible in evidence in any and all criminal proceedings hereafter brought against you, and

(b) You shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made you before or after this Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement, you waive any and all rights in the foregoing respects.

8. Except as expressly set forth herein, there are no additional promises, understandings or agreements between the government and you or your counsel concerning your liability for criminal prosecution on any other federal, state or local charges that may now be pending or hereafter be brought against you, or the sentence that might be imposed as a

FORM 68: EXTENSION OF FORMAL USE IMMUNITY

TO INFORMAL INTERVIEWS

November 16, 1989

Defense Attorney, Esq.
_____
_____
_____

Re: Investigation of Trading in XYZ Corporation Securities

Dear Mr. Defense Attorney:

This is to confirm that your client, Mr. Witness, will appear before a federal grand jury, pursuant to subpeona, on August 30, 1989. In view of your representation to me that Mr. Witness will assert his Fifth Amendment privilege against compulsory self-incrimination, I have obtained a court order to compel his testimony pursuant to 18 U.S.C. § 6001 et seq. As we have discussed, after Mr. Witness asserts his Fifth Amendment privilege before the Grand Jury and has been ordered to testify, I will seek the consent of the Grand Jury to meet with and inquire of Mr. Witness outside their presence. I will also advise them that the statements he will make are subject to and co-extensive with the protection granted by the compulsion order.

If the Grand Jury is agreeable to this procedure, then the information that Mr. Witness provides on August 30, 1989, in response to questions posed by me, or any other agents of the government, outside the presence of the Grand Jury, is protected in the same fashion that it would have been had it been given directly to the Grand Jury pursuant to 18 U.S.C. § 6002. You have informed me that with this understanding, you and Mr. Witness agree that Mr. Witness will submit to questioning outside of the Grand Jury's presence on August 30, 1989, prior to any formal testimony that may be required.

You and your client understand that this letter grant of protection co-extensive with the compulsion order applies only to the meeting on August 30, 1989, and that any further extensions of this agreement to additional meetings outside the Grand Jury's presence may be made only in writing.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

FORM 69: PRE-INDICTMENT, COOPERATION AND PLEA AGREEMENT

October 19, 1989

Defendant
C/O Defense Attorney, Esq.
_____
_____

Re: Investigation of Trading in Securities of XYZ Corporation

Dear Mr. Defendant:

This letter is to confirm the agreement between you and the United States Attorney's Office for the Central District of California ("Office") regarding your guilty plea and cooperation in the above-referenced matter. In order to resolve this matter fairly and in a manner that accurately and adequately reflects the scope of your criminal activities, you and this Office agree as follows:

1. You will waive indictment and plead guilty to a felony information charging you with securities fraud in violation of Title 18, United States Code, Sections 77q(a) and 77x and mail fraud in violation of Title 18, United States Code, Section 1341. The maximum sentence you could receive is 10 years in custody, a fine of $500,000, and a mandatory special assessment of $100. You also could be ordered to pay restitution up to the amount of loss determined by the court to have been caused by your activities.

2. You must cooperate fully with this Office, the United States Postal Inspection Service and any other law enforcement agency. As used in this Agreement, "cooperation" requires you:

(a) to respond truthfully and completely to any and all questions or inquiries that may be put to you,

4. If it is determined that you have violated any provision of this Agreement:

(a) All statements made by you to this Office or other designated law enforcement agents, or any testimony given by you before a grand jury or other tribunal, whether before or after this Agreement, shall be admissible in evidence in any and all criminal proceedings hereafter brought against you, and

(b) You shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements you made before or after to this Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement, you waive any and all rights in the foregoing respects.

5. No additional promises, agreements, and conditions have been entered into other than those expressly set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

APPROVED:

ROBERT L. BROSIO
Chief, Criminal Division

ACCEPTED AND AGREED:

_____ _____
WITNESS DATE

_____ _____
DEFENDANT'S COUNSEL DATE

FORM 67: TRANSACTIONAL IMMUNITY

December 25, 1989

Witness
c/o Defense Attorney, Esq.
_____
_____

Re: Investigation of Trading in Securities of XYZ Corporation

Dear Mr. Witness:

This letter is to confirm the agreement between you and the United States Attorney's Office for the Central District of California ("Office") regarding the above-referenced matter. If you fully comply with the terms and conditions of this Agreement, (1) except for criminal tax violations (including those chargeable under 18 U.S.C. § 371), you will not be criminally prosecuted by this Office for [DESCRIBE CRIME(S) WITH SPECIFICITY AND LIMIT AS TO TIME], and (2) no testimony or other information given by you (or any information derived directly or indirectly from such testimony or other information) will be used against you in a criminal tax prosecution. This Agreement does not provide any protection for crimes unless expressly specified above. The terms and conditions of this Agreement are as follows:

1. You must cooperate fully with this Office, the Federal Bureau of Investigation and any other law enforcement agency. As used in this Agreement, "cooperation" requires you:

(a) to respond truthfully and completely to any and all questions or inquiries that may be put to you,

whether in interviews, before a grand jury or at any trial or other court proceeding;

(b) to attend all meetings, grand jury sessions, trials and other proceedings at which your presence is requested by this Office or compelled by subpeona or court order;

(c) to produce voluntarily any and all documents, records, or other tangible evidence relating to the matters about which this Office inquires.

2. You must at all times give complete, truthful and accurate information and testimony and must not commit any crimes whatever. If you commit any crimes or if any of your statements or testimony proves to be false, misleading or materially incomplete, or if you otherwise violate this Agreement in any way, this Office will no longer be bound by its representations to you concerning the limits on criminal prosecution as set forth above. You shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including but not limited to perjury, false statements and obstruction of justice. Any such prosecution may be premised on statements and/or information provided by you, and such prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against you in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. It is the intent of this Agreement to waive any and all defenses based on the statute of limitations with respect to any prosecutions that are not time-barred on the date you sign this Agreement.

3. This agreement is limited to the United States Attorney's Office for the Central District of California, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring your cooperation to the attention of other prosecution offices, if so requested by your counsel.

FORM 65: ATTORNEY PROFFER

August 8, 1989

Defense Attorney, Esq.
_____
_____
_____

Re: Investigation of Trading in XYZ Corporation Securities

Dear Mr. Defense Attorney:

This letter is to confirm that the United States Attorney's Office for the Central District of California is willing to consider a possible [type of agreement -- e.g., nonprosecution, plea] agreement with your client regarding his trading in 1988 in the securities of XYZ Corporation on the basis of material, nonpublic information, in exchange for his complete and truthful cooperation in the investigation of this matter. As part of these discussions, you will provide, pursuant to Rule 11(e)(6) of the Federal Rules of Criminal Procedure, an oral proffer regarding the role of your client in executing trades in XYZ Corporation securities. Accordingly, any statements you make will not be admissible in any subsequent criminal or civil proceeding against your client, nor will these discussions be deemed a waiver of any attorney-client privilege. If we are unable to reach an agreement, the government may, of course, use any information you provide as leads in developing a case against your client.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

FORM 66: WITNESS PROFFER W/LIMITED USE IMMUNITY

AGREEMENT

The following understandings exist as to the meeting of _____, ("Client") and his attorney, Assistant United States Attorney _____, and Special Agent _____, to be held at the office of the United States Attorney for the Central District of California ("Office"), on _____, 1989 ("the meeting"):

(1) Client will respond truthfully and completely to any and all questions or inquiries that may be put to him at the meeting;

(2) Should any prosecution be brought against Client by this Office, the Goverment will not offer in evidence in its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice, or perjury;

(3) Notwithstanding paragraph (2) above, the Government may use (a) information derived directly or indirectly from the meeting for the purpose of obtaining and pursuing leads to other evidence, which evidence may be used in any prosecution of Client by the Government, and (b) statements made by Client at the meeting and all evidence obtained directly or indirectly from those statements for the purpose of cross-examination should Client testify, or to rebut any evidence offered by or on behalf of Client in connnection with the trial and/or at sentencing, should any prosecution of Client be undertaken;

(4) This Agreement is limited to the statements made by Client at the meeting and does not apply to any statements made by Client at any other time, whether oral, written or recorded;

(5) No understandings, promises, agreements and/or conditions have been entered into with respect to the meeting other than those expressly set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

Dated: _____, 1989, at Los Angeles, California.

GARY A. FEESS
United States Attorney for the
Central District of California

By: _____
Assistant U.S. Attorney

_____
Client

_____
Attorney for Client

_____
Special Agent

FORM 64: WITNESS PROFFER

November 19, 1989

Potential Witness
c/o Defense Attorney, Esq.
_____
_____
_____

Re: Investigation of Trading in Securities of XYZ Corporation

Dear Mr. Potential Witness:

This letter is to confirm the terms under which you will provide a proffer to the United States Attorney's Office for the Central District of California ("Office") regarding the investigation in the above-referenced matter. In order for this Office to assess the credibility and value of the evidence, possible testimony and further cooperation that you say you can provide, you and this Office agree as follows:

1. You will provide a truthful and complete summary of all facts about which you have knowledge concerning the investigation in this matter.

2. At all times, you will respond truthfully and completely to all questions or inquiries that may be put to you, whether in interviews, before a grand jury or at any trial or other court proceeding.

3. This Office is not obligated to make any specific plea offer regarding the potential charges against you as a result of your willingness to discuss matters within your knowledge that are relevant to the investigation being conducted by this Office. This Office has complete discretion to decide unilaterally what, if any, charges will be brought against you.

4. If this Office at any time decides to bring charges against you, (a) all statements made by you to this Office or other designated law enforcement agents, or any testimony given by you before a grand jury or other tribunal, whether before or after this Agreement, shall be admissible in any and all criminal

proceedings against you, and (b) you shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that the statements made by you before or after this Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement, you waive any and all rights in the foregoing respects.

5. Any untruthful statements made by you may constitute the predicates for criminal charges against you, including prosecution for perjury, the making of false statements and obstruction of justice.

6. No additional promises, agreements, and conditions have been entered into other than those expressly set forth in this letter, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

GARY A. FEESS
United States Attorney

JAMES R. ASPERGER
Assistant United States Attorney
Deputy Chief, Major Frauds Section

_____ _____
POTENTIAL WITNESS DATE

_____ _____
DEFENSE ATTORNEY DATE
Counsel for Potential Witness

14) Statement as to adverse impact on attorney client relationship:

(a) Has witness agreed to comply with the subpoena?

( ) Yes ( ) No ( ) Unknown

(b) Will witness be disqualified from representation of the client as a result of the subpoena being issued and enforced?

( ) Yes ( ) No Explain: _____

_____

_____

(c) Is witness a target or subject of any investigation or is there a basis to believe that witness will become one:

( ) Yes ( ) No If yes, Explain: _____

_____

_____

15) Basis for belief that information is not privileged:

16) Attach copy of subpoena.

17) Date by which subpoena authorization is needed.

_____

_____
Signature of Requestor

_____
Signature of United States Attorney

FORM 63: APPROVAL LETTER, RE: GRAND JURY INVESTIGATION, REQUIREMENT TO GIVE TESTIMONY

The Honorable **John Doe**
United States Attorney
District of Columbia
Washington, D.C. 22222

Attention **John Doe**
Assistant United States Attorney

Dear **Mr. Doe:**

Re: Grand Jury Investigation,
John Doe, et al.

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a), I hereby approve your request for authority to apply to the United States District Court for the **District of Columbia** for an order pursuant to 18 U.S.C. 6002-6003 requiring **John Doe** to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

John Doe
Assistant Attorney General
Criminal Division

FORM 62: Request for Authorization To Issue A Subpoena To An Attorney For Information Relating To The Representation Of A Client

To: Edgar N. Brown, Chief
Witness Immunity Unit
Criminal Division
Room 1055
1001 G Street, N.W.
Washington, D.C. 20530
PHONE NO. (202) 514-5541
TELEFAX No. (202) 514-1468

From:

PHONE NO.
TELEFAX No.

1) Name of Attorney Witness:

2) District:

3) Nature of Subpoena: ( ) Trial ( ) Grand Jury

4) Name of Case or Investigation:

5) Nature of Case:

( ) Criminal
( ) Civil

____ Tax ____ Forfeiture

____ Other _____

6) (a) Name of Client:

(b) Status of Client:

( ) Defendant in Criminal Case
( ) Defendant in Civil Case
( ) Subject
( ) Target of Grand Jury Investigation
( ) Other _____

7) Relationship of attorney witness to subjects or defendants or targets (specifically indicate whether the witness currently represents any defendants or subjects in the matter in which the subpoena is to be issued):

8) Information sought by the subpoena (if subpoena calls for testimony, indicate the nature of the anticipated testimony):

9) Summary of case or proceeding (include a citation to the charges pending or under investigation in a criminal case):

10) Relevancy of the information sought to the case or proceeding:

11) Factual statement of the need for the information to the successful completion of the case or proceeding:

12) Are there alternative sources for the information?

( ) Yes ( ) No

13) If there are alternative sources for the information, have attempts been made to obtain information from them:

( ) Yes, but with no success.

( ) Yes, with success. Explain below why the subpoena is necessary.

( ) No. Explain below why the alternative sources have not been pursued.

(10) Assurances or Promises, if any, to Witness in Return for his Testimony:

(11) Acts of Witness Considered as a Waiver of Fifth Amendment Privilege:

(12) Means Other than Immunity to Obtain this Testimony:

(13) Basis Other than Proffer for Summary of Anticipated Testimony:

(14) Relative Culpability of Witness Compared to Subject(s) or Defendant(s):

(15) Why Immunity is Necessary to the Public Interest: State Facts.

(16) Basis for Belief that Witness Will Assert Fifth Amendment Privilege:

(17) Likelihood that Witness Will Testify if Immunity is Granted:

(18) Prosecution of Witness in this Case or Matter:
( ) Yes ( ) No ( ) Acquitted ( ) Convicted ( ) Plea
If not indicted, why not? If convicted, has the witness been sentenced?

(19) Witness' Privilege Survives Because:

(20) Witness is Presently Incarcerated: ( ) Yes ( ) No
If yes, give details:

(21) Pending Federal or Local Charges against Witness:
( ) Yes ( ) No If yes, give details:

(22) Federal and State Offenses by Witness that His Testimony Could Disclose:

(23) Opposition, if any, to Granting Immunity by State or Local Prosecuting Officials:

(24) Effect, if any, of Granting Immunity to the Witness Upon Any Other Federal District:

(25) Conviction of Witness Possible on Evidence Other than His Own Testimony?
( ) Yes ( ) No If yes, give details:

(26) Violations (Statutes & Descriptions) by Subject(s) or Defendant(s):

(27) Witness Previously Immunized? ( ) Yes ( ) No If yes, give details:

(28) Witnesses for whom Immunity has been Authorized in this Proceeding:

(29) Date Investigation Began:

(30) Witness Subject to Electronic Surveillance? ( ) Yes ( ) No If yes, give details:

(31) Birthdate of Witness:
(33) Birthplace:
(35) Alias:

(32) FBI I.D. No.:
(34) Social Security No.:
(36) Address of Witness:

(37) If Requestor is Department Attorney, Has United States Attorney Been Notified? ( ) Yes ( ) No
(38) Is United States Attorney or office recused? ( )Yes ( )No

_____
Signature of Requestor

_____
Signature of United States Attorney

room; and if you desire, you will be afforded a reasonable opportunity to step outside the grand jury room to consult with your attorney before answering any question. If you have any question concerning the general subject matter of your appearance, or other questions, you may contact the United States Attorney's Office at (703) 706-9100.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

U.S. Department of Justice

Request for Authorization to Apply for Compulsion Order
(18 U.S.C. 6001-6003; 28 CFR 0.175-0.178)

FORM 61: REQUEST FOR AUTHORIZATION FOR COMPULSION ORDER

TO: Witness Immunity Unit
Criminal Division, Rm. 1055
1001 G Street, N.W.
Washington, D.C. 20530
PHONE No. (202) 514-5541
TELEFAX No. (202) 514-1468

FROM:

PHONE No.-
TELEFAX No.-
TELETYPE CODE-

(1) Name of Witness:

(2) District:

(3) Nature of Proceeding:
( ) Trial
( ) Grand Jury
( ) Other

(4) Name of Subject(s) or Defendant(s):

(5) Date of Testimony

(6) Proffer of Anticipated Testimony:
( ) None Obtained ( ) Proffer by Witness ( ) Debriefing of Witness
( ) Proffer by Counsel ( ) Pursuant to Plea Agreement

(7) Summary of Case or Proceeding:

(8) Witness' Background and Role in Case or Matter and Summary of Anticipated Testimony or Information:

(9) Witness' Family Relationship, if any, to the Subject(s) or Defendant(s):

LIMITED OFFICIAL USE

Previous editions and Form OBD-111A are obsolete

FORM OBD-111
SEP. 92

FORM 59: SCHEDULE OF PROCEEDINGS

Schedule of Proceedings
Before Grand Jury No. ____
on [DATE]
[TENTATIVE\FINAL]

[DATE]

ALL CRIMINAL AUSAs
and Support

[NAME OF GJ
COORDINATOR]

[DATE]

Time	AUSA	Witness/BW/S	Reg/DTF/Forf	Indictment	(JD #)

If you have an indictment, please let the AUSA doing the returns know of all bond information.

Also, please be prepared to go in early.

FORM 60: WITNESS LETTER

Re:

Dear

A subpoena has been issued for your appearance before a federal grand jury in this District. It is the policy of the Department of Justice and this office to provide the following basic information to ALL persons concerning their appearance before the grand jury.

The grand jury consists of sixteen to twenty-three persons who inquire into federal crimes which may have been committed in this judicial District. Only authorized persons may be present in the grand jury room while evidence is being presented. This means that the only persons who may be present while testimony is being given are members of the grand jury, attorneys for the government, the witness under examination, an interpreter when needed, and for the purpose of taking the evidence, a stenographer or operator of a recording device.

You will be asked to testify and answer questions concerning possible violations of federal criminal law. The public, through the grand jury, has a right to every person's evidence except where the privilege against self-incrimination would apply.

The mere fact that this letter is provided to a person subpoenaed to testify before a grand jury should not be taken as any implication or suggestion that the person subpoenaed is likely to be charged (indicted) with the crime under investigation.

In testifying before the grand jury, you will be expected to answer all questions asked of you, except to the extent that truthful answers to questions would tend to incriminate you. An untruthful answer to any question may be the basis for prosecuting the untruthful witness for perjury. Anything that you say my be used against you by the grand jury or may later be used against you in court. You may consult your attorney before testifying; you may have your attorney outside of the grand jury

FORM 58: REQUEST/AUTHORIZATION FOR ISSUANCE OF GRAND JURY SUBPOENA

Case Caption: _____ (FOR OFFICE USE ONLY)
REG/DTF/FORF: _____ (JD # _____)
(GJ # _____)

REQUEST/AUTHORIZATION FOR ISSUANCE OF GRAND JURY SUBPOENA

TO: AUSA _____

FROM: _____

DATE OF REQUEST: _____
AGENCY: _____
ADDRESS: _____
_____
PHONE NO.: _____

IT IS REQUESTED THAT A GRAND JURY SUBPOENA FOR (circle):

Bank Records Business Records Telephone Toll Records

Other Records - Specify _____

Witness Attendance
( ) Photographs
( ) Handwriting
( ) Fingerprints

BE DIRECTED TO:

1. Name/Company: _____
Title: _____
Address: _____
_____
_____

2. Description:
_____
_____
_____
_____
(Attach separate sheet if additional space needed)

3. Date Returnable: _____

NOTE TO REQUESTOR: All subpoenas will be held by the U.S. Attorney's office for service by the requesting agent. It normally takes approximately three days to process this request unless otherwise instructed. Please check the appropriate attachments to accompany the subpoena in the section provided on page 1. If records are obtained pursuant to a subpoena duces tecum, the requesting agent is required to immediately notify the U.S. Attorney's office by submitting a Grand Jury subpoena duces tecum report form.

ATTACHMENTS: (CHECK IF NEEDED)

_____ In Lieu of Letter (Documents)
_____ In Lieu of Letter (Handwriting)
_____ Financial Letter
_____ OBD-211
_____ Obligation Document
_____ Advice of Rights
_____ Target Letter
_____ Witness Letter
_____ Notice to Fact Witness
_____ Subpoena Duces Tecum Report (for all subpoenas duces tecum)
_____ Other - Explain:
_____ 6E Notice to Court
_____ 6E Letter to Agent

AUTHORIZED BY: _____ _____
ASSISTANT UNITED STATES ATTORNEY DATE

(FOR OFFICE USE ONLY)

Description of Records to Read (if different from Item 2):

_____

_____

Date Subpoena Issued: _____

Requesting Agent Notified By: _____ Date: _____

I, the preparer of this subpoena, do state that I have attached the following to the subpoena prepared herein:

ATTACHMENTS:

_____ In Lieu of Letter (Documents)
_____ In Lieu of Letter (Handwriting)
_____ Financial Letter
_____ OBD-211, Voucher Number _____
_____ Obligation Document
_____ Advice of Rights
_____ Target Letter
_____ Witness Letter
_____ Notice to Fact Witness
_____ Subpoena Duces Tecum Report (for all subpoenas duces tecum)
_____ Other - Explain:
_____ 6E Notice to Court
_____ 6E Letter to Agent

information have been produced before the Grand Jury in compliance with the subpoena's terms, for a period of 90 days from the date of service of this Order upon _____; and it is further

ORDERED that this Order and the Government's Motion pursuant to which this Order has been issued shall remain sealed for a period not to exceed 90 days, or until further Order of this Court, whichever shall first occur, except that a copy of this Order may be served upon _____; and it is further

ORDERED that the copy of the Grand Jury subpoena duces tecum, dated _____, addressed to _____ _____ being attached to the Government's Motion seeking issuance of this Order shall remain sealed until the Grand Jury No. _____, concludes the investigation pursuant to which the subpoena has been issued, or until further Order of this Court, whichever shall first occur.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

FORM 57: NON-FINANCIAL INSTITUTION LETTER

DATE

Name of Institution

Re: Your statement dated

Dear Sir/Madam:

We are in receipt of your claim for reimbursement in the amount of $ .00 (copy attached hereto). Pursuant to the Right to Financial Privacy Act, Title 12, United States Code, Section 3415, in some instances reimbursement may be made to certain institutions in the course of complying with a judicial subpoena. Only financial institutions, however, are entitled to reimbursement and only certain kinds of financial records. Your office (e.g., Register of Deeds) is <u>not</u> a "financial institution" within the meaning of the Act. Therefore, when records are obtained from your office, <u>no</u> reimbursement is authorized. The expense of producing records in compliance with judicial subpoenas is considered an expense incurred in the usual course of business.

We appreciate your cooperation in this matter. If you have any questions, please feel free to contact me at (703)706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:_____

Assistant United States Attorney

/jas
Encl.

customers, either directly or indirectly, with notice of the fact of service of the Grand Jury subpoena duces tecum dated _____ or notice of the nature of the information or documents whose production is commanded under the terms of the subpoena, or notice of the fact that such information or documents have been produced before the Grand Jury in compliance with the subpoena's terms; and

2. Commanding that this motion and the order issued pursuant hereto shall remain sealed for a period of time not to exceed 90 days, or until further order of this Court, whichever shall first occur, and providing that copies of the orders issued pursuant hereto may be serviced upon the custodians of records of the subpoenaed financial institutions; and

3. Commanding that the copies of the Grand Jury subpoena duces tecum dated _____, attached hereto, shall remain sealed until the Grand Jury No. _____, concludes its present investigation of _____ and others, or until further order of this Court, whichever shall first occur.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____

Assistant United States Attorney

FORM 56: NON-DISCLOSURE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE:	)	GRAND JURY NO. _____
	)	
JOHN DOE NO. _____	)	
GRAND JURY SUBPOENA	)	
DUCES TECUM, DATED	)	
_____	)	

O R D E R

The United States of America, having moved that _____ _____ be prohibited from disclosing to its customers certain information concerning service upon it of a Grand Jury subpoena duces tecum, dated _____, and good cause having been shown that (1) the investigation being conducted is within the lawful jurisdiction of the Grand Jury No. _____; (2) there is reason to believe that the records being sought are relevant to a legitimate inquiry by the Grand Jury; and (3) there is reason to believe that notification to the customer will result in seriously jeopardizing the Grand Jury's investigation, it is hereby;

ORDERED that _____ shall not provide its customer, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum, dated _____, or of the nature of the documents or information whose production is commanded under the terms of the subpoena, or of the fact that such documents or

FORM 55: MOTION FOR ORDER PROHIBITING NOTIFICATION OF SERVICE OF GRAND JURY SUBPOENA DUCES TECUM

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE:	)	GRAND JURY NO. _____
	)	
JOHN DOE NO. _____	)	
GRAND JURY SUBPOENA	)	
DUCES TECUM, DATED	)	
_____	)	

MOTION FOR ORDER PROHIBITING NOTIFICATION OF SERVICE OF GRAND JURY SUBPOENA DUCES TECUM

The United States of America, by and through its attorneys Richard Cullen, United States Attorney for the Eastern District of Virginia, and _____, Assistant United States Attorney, moves the Court, pursuant to Title 12, United States Code, Section 3409, and Title 28, United States Code, Section 1651, and pursuant to the Federal Rules of Criminal Procedure, for Orders prohibiting certain financial institutions from serving upon their customers notification of the service upon those institutions of Grand Jury subpoenas duces tecum, and states as follows:

1. In _____, Grand Jury No. _____, initiated an investigation of _____ and others. With the assistance of the Office of the United States Attorney for the Eastern District of Virginia, the Grand Jury is presently conducting an investigation of certain violations of the federal criminal violations by _____ and others.

2. On or about _____, a subpoena duces tecum was issued on behalf of the Grand Jury, addressed to the Custodian of Records of a financial institution, and calling for production by them of certain financial records before the _____ Term of Grand Jury No. _____. Copies of this subpoena is attached hereto. There is reason to believe that the records, whose production is sought under the terms of the subpoena, are relevant to the Grand Jury's present investigation of _____ and others.

3. There is reason to believe that, when served with the subpoena, copy of which is attached hereto, the custodian of records to whom the subpoena is addressed will undertake immediately to notify the customers of the financial institution of the fact of service of the subpoena, despite the fact that such notice is not required by the Right to Financial Privacy Act. Such disclosure to the customers of the financial institution subpoenaed will result in serious prejudice to the Grand Jury's ongoing investigation of _____ and others. In particular, notification to those customers of the service of the subpoena will seriously jeopardize the Grand Jury's investigation by impairing its ability to obtain the testimony of other potential witnesses, and execute search warrants.

WHEREFORE, the Government respectfully requests this Court issue orders as follows:

1. Directing that, for a period not to exceed 90 days, the subpoenaed financial institutions shall not provide their

FORM 54: INVOICE LETTER, RE: REQUEST FOR PAYMENT

Date

First Arlington Bank Corp.
1234 Chain Bridge Road
McLean, Virginia 22102

Re: Request for payment

Dear Sir/Madam:

Enclosed is a copy of an invoice for expenses incurred in complying with a grand jury subpoena. In order to process this claim we require that your bank submit an originally executed government invoice (Form OBD-211) and a copy of the grand jury subpoena to which your office responded.

Please note that under the Right to Financial Privacy Act, financial institutions responding to a grand jury request issued requesting production of certain financial records are entitled to such reimbursement for some of the costs involved in responding to grand jury requests. Reimbursement may be made only in connection with the following types of financial records: checking, savings, share, loan or credit card account records pertaining to accounts of individuals or partnerships of five or fewer partners. Under the Act, the Department of Justice will **not** reimburse expenses incurred when the request is for **corporate or partnership records (if more than five partners)**, associations, trusts, government agencies, other legal entities. The following rates have been established for such reimbursement:

1. Search and processing costs may be reimbursed at the rate of $2.50 per quarter hour or fraction thereof, for time spent by employees in locating and retrieving documents, reproducing documents, or packaging and preparing documents for shipment.

2. Computer time and necessary supplies may billed if itemized separately.

3. Reproduction costs will be reimbursed at the rate of .15 cents per page.

4. Transportation costs may be reimbursed for direct costs involved in transporting employees to locate and retrieving the materials requested. Direct costs incurred for delivering the materials to the grand jury, if employees of the financial institution deliver the items personally, may also be reimbursed.

I appreciate your assistance in this matter. If you have any questions, please feel free to contact this office at (703)706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Julia Simmonds
Paralegal Assistant

ORDERED, ADJUDGED and DECREED that _____ be required to testify and provide other information in regard to a matter to be presented to the federal grand jury, that is United States v. John Doe No. _____, and to provide such information at any other proceeding ancillary to the above-styled matter.

Provided, that the said _____ is hereby granted immunity from the use against him in any criminal case of any testimony or other information compelled under such Order, or any information directly or indirectly derived from such testimony or other information, except that the above does not immunize the said _____ against charges of perjury, giving a false statement or otherwise failing to comply with the Order of the Court.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

I ASK FOR THIS:

RICHARD CULLEN
UNITED STATES ATTORNEY

_____

Assistant United States Attorney

FORM 53: IMPANELMENT ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF)
GRAND JURY NO.)

ORDER

This Court's Order of December , 19 , calling Grand Jury ___to commence service on February , 19 , is hereby VACATED, and,

Pursuant to Fed. R. Crim. P. 6, it is

ORDERED that the names of seventy-five (75) persons be drawn from the Jury Wheel in the manner prescribed by law for service as grand jurors, during the period beginning January __, 19__, to serve for a period of eighteen (18) months, notwithstanding Local Rule 26 unless sooner discharged by Court.

Pursuant to Local Rule 26, it is further

ORDERED that the Grand Jury selected from the foregoing persons be summoned by the Clerk to commence service at 9:00 a.m. on January __, 19__, to serve for two consecutive days.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

4. This application is made with the approval of Robert S. Mueller, III, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority invested in him by Title 18, United States Code, Section 6003 and Title 28, Code of Federal Regulations, Section 0.175. A copy of the letter from said Assistant Attorney General expressing such approval is attached hereto.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____

Assistant United States Attorney

FORM 52: ORDER OF IMMUNITY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	
v.	)	
	)	
JOHN DOE NO.	)	

ORDER OF IMMUNITY

The United States of America by its attorney, Richard Cullen, United States Attorney for the Eastern District of Virginia, and _____, Assistant United States Attorney for the Eastern District of Virginia, having moved the Court for an Order requiring _____ to testify pursuant to Title 18, United States Code, Sections 6002 and 6003, in regard to a matter to be presented to the federal grand jury, that is United States v. John Doe No. _____, and to provide such information at any other proceeding ancillary to the above-styled matter, and being advised that the request for immunity was approved by the Assistant Attorney General of the Criminal Division, United States Department of Justice on _____, and that the testimony and other information from this witness may be necessary to the public interest, and furthermore, such individual is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, it is hereby,

FORM 50: LETTER REQUESTING HANDWRITING SAMPLES

Re:

Dear

You have been served with a subpoena issued by a federal grand jury in connection with a criminal investigation being conducted in this district. That subpoena directs you to provide handwriting samples on _____.

As a convenience to you, you may, if you wish, make arrangements with _____ to provide the handwriting samples in lieu of appearing personally before the grand jury.

I appreciate your cooperation in this matter. If you have any questions, please feel free to contact me at (703) 706-3700

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

FORM 51: IMMUNITY MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	
v.	)	
	)	
JOHN DOE NO.	)	

M O T I O N

Richard Cullen, United States Attorney for the Eastern District of Virginia, hereby moves that this Court issue an Order pursuant to the provisions of Title 18, United States Code, Section 6001, et. seq., compelling _____ to give testimony or provide other information, which he refuses to give or provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before the Grand Jury of the United States presently empaneled within this District, and respectfully alleges as follows:

1. The said _____ has been called to testify or provide other information before said grand jury;

2. In the judgment of the undersigned, the testimony or other information from said witness may be necessary to the public interest.

3. In the judgment of the undersigned, said witness _____ has refused to testify or provide other information on the basis of his privilege against self-incrimination.

FORM 49: LETTER OF RECORDS SUBPOENA (FIRREA)

(date)

Custodian of Records
(name of bank)

Re: United States v. John Doe

Dear Sir:

You have been served with a subpoena that has been issued by a federal grand jury in connection with a criminal investigation being conducted in this District. That subpoena directs you to produce the records on (date subpoena is returnable) before the grand jury in Alexandria, Virginia.

As a convenience to you, you may, if you wish, deliver copies of the requested documents to Agent (name of agent, agency and address), in lieu of appearing personally before the grand jury. Any questions pertaining to the records under subpoena should be directed to Special Agent (name of agent) at (telephone number).

This subpoena is subject to the restrictions of Title 12, United States Code, Section 3420(b), as amended by Section 943(b)(1) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73. It is a criminal offense for anyone affiliated with this institution to disclose the existence of or the items requested by this subpoena.

You are hereby notified that civil and criminal penalties exist for making certain disclosures regarding this subpoena. The prohibited notifications and applicable penalties are stated in Sections 943 and 962 of the FIRREA [12 U.S.C. Section 3420(b) and 18 U.S.C. 1510(b)].

Under the Right to Financial Privacy Act, financial institutions responding to a grand jury requests for production of certain financial records are entitled to such reimbursement for some of the costs involved in responding to grand jury requests. Reimbursement may be made only in connection with the following types of financial records: checking, savings, share, loan or credit card account records pertaining to accounts of individuals or partnerships of five or fewer partners. Please note that under the Act, the Department of Justice will not reimburse expenses incurred when the request is for records relating to accounts of corporations or partnerships (if more than five partners), associations, trusts,

government agencies, or other legal entities. The following rates have been established for such reimbursement:

1. Search and processing costs may be reimbursed at the rate of $2.50 per quarter hour or fraction thereof, for time spent by employees in locating and retrieving documents, reproducing documents, or packaging and preparing documents for shipment.

2. Computer time and necessary supplies may billed if itemized separately.

3. Reproduction costs will be reimbursed at the rate of .15 cents per page.

4. Transportation costs may be reimbursed for direct costs involved in transporting employees to locate and retrieving the materials requested. Direct costs incurred for delivering the materials to the grand jury may also be reimbursed if employees of the financial institution deliver the items personally.

No reimbursements will be made unless there is a full and complete itemized statement for all costs on the enclosed form OBD-211. When a subpoena requests records for several individuals as well as corporations, the invoice must make clear that the expenses being billed are only for records related to the individual accounts not the corporate accounts. Moreover, no reimbursements will be paid for partial compliance with the grand jury request. No invoices should be submitted to this office until the grand jury request is completely filled, and the accompanying <u>invoice is a final and complete invoice</u> for all costs involved in filling the request. Please submit all invoices directly to the Grand Jury Coordinator at the United States Attorney's office.

As noted on the OBD-211, if you anticipate services to exceed $300.00, please call the requestor and obtain authorization to proceed.

I appreciate your cooperation in this matter. If you have any questions, please feel free to contact this office at (703)557-9100.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: (name of Assistant)
Assistant United States Attorney

Note: No invoice will be processed unless your taxpayer identification number is on the invoice. Also, please attach a copy of the subpoena to the invoice (OBD-211).

FORM 48: FINANCIAL LETTER

Date

Custodian of Records
(Name of Financial Institution)

Re: United States v. John Doe No. ____

Dear Sir:

You have been served with a subpoena that has been issued by a federal grand jury in connection with a criminal investigation being conducted in this District. That subpoena directs you to produce the records on DATE before the grand jury in Alexandria, Virginia.

As a convenience to you, you may, if you wish, deliver copies of the requested documents to Agent , of the (Agency) (Address), in lieu of appearing personally before the grand jury. Any questions pertaining to the records under subpoena should be directed to Special Agent at (Tel. No.)

It is requested that you not disclose the existence of this subpoena. Any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law.

Under the Right to Financial Privacy Act, financial institutions responding to a grand jury request issued requesting production of certain financial records are entitled to such reimbursement for some of the costs involved in responding to grand jury requests. Reimbursement may be made only in connection with the following types of financial records: checking, savings, share, loan or credit card account records pertaining to accounts of individuals or partnerships of five or fewer partners. Please note that under the Act, the Department of Justice will not reimburse expenses incurred when the request is for corporate or partnership records (if more than five partners), associations, trusts, government agencies, other legal entities. The following rates have been established for such reimbursement:

1. Search and processing costs may be reimbursed at the rate

of $2.50 per quarter hour or fraction thereof, for time spent by employees in locating and retrieving documents, reproducing documents, or packaging and preparing documents for shipment.

2. Computer time and necessary supplies may billed if itemized separately.

3. Reproduction costs will be reimbursed at the rate of .15 cents per page.

4. Transportation costs may be reimbursed for direct costs involved in transporting employees to locate and retrieving the materials requested. Direct costs incurred for delivering the materials to the grand jury, if employees of the financial institution deliver the items personally, may also be reimbursed.

No reimbursements will be made unless there is a full and complete itemized statement for all costs on the enclosed form OBD-211. When a subpoena requests records for several individuals as well as corporations, the invoice must make clear that the expenses being billed are only for records related to the individual accounts not the corporate accounts. Moreover, no reimbursements will be paid for partial compliance with the grand jury requests. No invoices should be submitted to this office until the grand jury request is completely filled, and the accompanying <u>invoice is a final and complete invoice</u> for all costs involved in filling the request.

As noted on the OBD-211, if you anticipate services to exceed $300.00, please call the requestor and obtain authorization to proceed.

I appreciate your cooperation in this matter. If you have any questions, please feel free to contact this office at (703)706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

Note: No invoice will be processed unless your taxpayer identification number is on the invoice. Also, please attached a copy of the subpoena to the invoice (OBD-211).

FORM 46: FINANCIAL LETTER, (REIMBURSEMENT OF A FINANCIAL INSTITUTION)

Date

Bank Name
Bank Address

Re: John Doe No.

Dear Sir/Madam:

Upon issuance of the attached subpoena a letter was sent to you stating the conditions under which the government can reimburse a financial institution for costs incurred by complying with a grand jury subpoena duces tecum. The attached invoice reflects reimbursement for corporate records which are not reimbursable by the government and are to be considered cost incurred in the regular course of doing business. Said conditions are further set forth in Title 12, United States Code, Section 3401 et seq and in Title 12, Code of Federal Regulations, Sections 219.1 et seq.

If there are any questions with regard to this, please feel free to contact me at (703)706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:

Assistant United States Attorney

FORM 47: FINANCIAL LETTER, (NO REIMBURSEMENT OF A NON-FINANCIAL INSTITUTION)

Date

Western Union
Financial Services Inc.
Post Office Box 859
Bridgeton, MO 63044

Re: John Doe No.
Grand Jury No.

Dear Sir/Madam:

Pursuant to the Right to Financial Privacy Act, Title 12, United States Code, Section 3415, in some instances reimbursement may be made to financial institutions in the course of complying with legal process obtained by their offices. Western Union, however, is not a "financial institution" within the meaning of the Act. Therefore, when records are obtained from Western Union, no reimbursement is authorized even if the records obtained are financial records. Expense of producing records in compliance with judicial subpoenas is considered an expense incurred in the usual course of business.

If you have any questions, please feel free to contact me at (703)706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Julia Simmonds
Grand Jury Clerk

FORM 44: DISCHARGE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF)
GRAND JURY NO.)

ORDER

It appearing to the Court that the business of Grand Jury has been concluded and there being no representations to the contrary by either the Foreman of the respective Grand Jury or the United States Attorney, it is

ORDERED that Grand Jury is discharged.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

I ASK FOR THIS:

RICHARD CULLEN
UNITED STATES ATORNEY

_____
Kenneth E. Melson
First Assistant United States Attorney

FORM 45: DOCUMENT LETTER

Re:

Dear

You have been served with a subpoena issued by a federal grand jury in connection with a criminal investigation being conducted in this district. That subpoena directs you to produce certain records on before the grand jury in Alexandria, Virginia.

As a convenience to you, you may, if you wish, deliver the requested documents to in lieu of appearing personally before the grand jury.

If you have any questions, please feel free to contact me at (703) 706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

FORM 43: BANK ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE:	)	GRAND JURY NO. _____
	)	
JOHN DOE NO. _____	)	
GRAND JURY SUBPOENA	)	
DUCES TECUM, DATED	)	
_____	)	

O R D E R

The United States of America, having moved that _____ _____ be prohibited from disclosing to its customers certain information concerning service upon it of a Grand Jury subpoena duces tecum, dated _____, and good cause having been shown that (1) the investigation being conducted is within the lawful jurisdiction of the Grand Jury No. _____; (2) there is reason to believe that the records being sought are relevant to a legitimate inquiry by the Grand Jury; and (3) there is reason to believe that notification to the customer will result in seriously jeopardizing the Grand Jury's investigation, it is hereby;

ORDERED that _____ shall not provide its customer, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum, dated _____, or of the nature of the documents or information whose production is commanded under the terms of the subpoena, or of the fact that such documents or

information have been produced before the Grand Jury in compliance with the subpoena's terms, for a period of 90 days from the date of service of this Order upon _____; and it is further

ORDERED that this Order and the Government's Motion pursuant to which this Order has been issued shall remain sealed for a period not to exceed 90 days, or until further Order of this Court, whichever shall first occur, except that a copy of this Order may be served upon _____; and it is further

ORDERED that the copy of the Grand Jury subpoena duces tecum, dated _____, addressed to _____ _____ being attached to the Government's Motion seeking issuance of this Order shall remain sealed until the Grand Jury No. _____, concludes the investigation pursuant to which the subpoena has been issued, or until further Order of this Court, whichever shall first occur.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

2. On or about _____, a subpoena duces tecum was issued on behalf of the Grand Jury, addressed to the Custodian of Records of a financial institution, and calling for production by them of certain financial records before the _____ Term of Grand Jury No. _____. Copies of this subpoena is attached hereto. There is reason to believe that the records, whose production is sought under the terms of the subpoena, are relevant to the Grand Jury's present investigation of _____ and others.

3. There is reason to believe that, when served with the subpoena, copy of which is attached hereto, the custodian of records to whom the subpoena is addressed will undertake immediately to notify the customers of the financial institution of the fact of service of the subpoena, despite the fact that such notice is not required by the Right to Financial Privacy Act. Such disclosure to the customers of the financial institution subpoenaed will result in serious prejudice to the Grand Jury's ongoing investigation of _____ and others. In particular, notification to those customers of the service of the subpoena will seriously jeopardize the Grand Jury's investigation by impairing its ability to obtain the testimony of other potential witnesses, and execute search warrants.

WHEREFORE, the Government respectfully requests this Court issue orders as follows:

1. Directing that, for a period not to exceed 90 days, the subpoenaed financial institutions shall not provide their

customers, either directly or indirectly, with notice of the fact of service of the Grand Jury subpoena duces tecum dated _____ or notice of the nature of the information or documents whose production is commanded under the terms of the subpoena, or notice of the fact that such information or documents have been produced before the Grand Jury in compliance with the subpoena's terms; and

2. Commanding that this motion and the order issued pursuant hereto shall remain sealed for a period of time not to exceed 90 days, or until further order of this Court, whichever shall first occur, and providing that copies of the orders issued pursuant hereto may be serviced upon the custodians of records of the subpoenaed financial institutions; and

3. Commanding that the copies of the Grand Jury subpoena duces tecum dated _____, attached hereto, shall remain sealed until the Grand Jury No. _____, concludes its present investigation of _____ and others, or until further order of this Court, whichever shall first occur.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____

Assistant United States Attorney

(c) Is witness a target or subject of any investigation or is there a basis to believe that witness will become one:

( ) Yes ( ) No Explain: _____

_____

_____

15) Basis for belief that information is not privileged:

16) Attach copy of subpoena.

17) Date by which subpoena authorization is needed: _____

_____
Signature of Requestor

_____
Signature of United States Attorney

FORM 42: MOTION FOR AN ORDER PROHIBITING NOTIFICATION OF SERVICE OF GRAND JURY SUBPOENA DUCES TECUM

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE:	)	GRAND JURY NO. _____
	)	
JOHN DOE NO. _____	)	
GRAND JURY SUBPOENA	)	
DUCES TECUM, DATED	)	
_____	)	

MOTION FOR ORDER PROHIBITING NOTIFICATION OF
SERVICE OF GRAND JURY SUBPOENA DUCES TECUM

The United States of America, by and through its attorneys Richard Cullen, United States Attorney for the Eastern District of Virginia, and _____, Assistant United States Attorney, moves the Court, pursuant to Title 12, United States Code, Section 3409, and Title 28, United States Code, Section 1651, and pursuant to the Federal Rules of Criminal Procedure, for Orders prohibiting certain financial institutions from serving upon their customers notification of the service upon those institutions of Grand Jury subpoenas duces tecum, and states as follows:

1. In _____, Grand Jury No. _____, initiated an investigation of _____ and others. With the assistance of the Office of the United States Attorney for the Eastern District of Virginia, the Grand Jury is presently conducting an investigation of certain violations of the federal criminal violations by _____ and others.

FORM 41: REQUEST FOR AUTHORIZATION TO ISSUE A SUBPOENA TO AN ATTORNEY

REQUEST FOR AUTHORIZATION
TO ISSUE A SUBPOENA TO AN ATTORNEY
FOR INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT

To: Edgar N. Brown, Chief
Witness Records Unit
Room 2746
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530
FTS No.: 202-514-5541
TELEFAX No.: 202-514-1468

From:

(FTS)

1) Name of Attorney Witness:

2) District:

3) Nature of Subpoena: ( ) Trial ( ) Grand Jury

4) Name of Case or Investigation:

5) Nature of Case:

( ) Criminal
( ) Civil

_____ Tax _____ Forfeiture

_____ Other _____

6) Name of Client: _____

( ) Defendant in Criminal Case
( ) Defendant in Civil Case
( ) Subject
( ) Target of Grand Jury Investigation
( ) Other _____

7) Relationship of attorney witness to subjects or defendants or targets (specifically indicate whether the witness currently represents any defendants or subjects in the matter in which the subpoena is to be issued):

8) Information sought by the subpoena (if subpoena calls for testimony, indicate the nature of the anticipated testimony):

9) Summary of case or proceeding (include a citation to the charges pending or under investigation in a criminal case):

10) Relevancy of the information sought to the case or proceeding:

11) Factual statement of the need for the information to the successful completion of the case or proceeding:

12) Are there alternative sources for the information?

( ) Yes ( ) No

13) If there are alternative sources for the information, have attempts been made to obtain information from them:

( ) Yes, but with no success.

( ) Yes, with success. Explain below why the subpoena is necessary.

( ) No. Explain below why the alternative sources have not been pursued.

14) Statement as to adverse impact on attorney-client relationship:

(a) Has witness agreed to comply with the subpoena?

( ) Yes ( ) No ( ) Unknown

(b) Will witness be disqualified from representation of the client as a result of the subpoena being issued and enforced?

( ) Yes ( ) No Explain: _____

_____

_____

FORM 40: ASSURANCE OF IMMUNITY LETTER

Date

Dear

This letter will set forth the terms of the agreement entered into between you and this office.

You have agreed, in exchange for the promises set forth below, to cooperate fully with this office, and with all law enforcement agencies assisting this office, in conducting a grand jury investigation concerning the activities of _____ _____. Specifically, you agree to testify fully and truthfully at any grand jury presentations and trials arising out of this investigation.

In exchange for the cooperation set forth above, the United States Government agrees that no testimony or other information given in compliance with this agreement (or any information directly or indirectly derived from such testimony or information) will be used against you in any criminal case, except that should any information provided by you prove to have been knowingly and willfully false or deceptive you may be prosecuted for perjury, obstruction of justice, making a false statement to a federal agent, or willfully concealing by any trick, scheme or device a material fact from the investigation.

No additional promises, agreements, or conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

If the foregoing accurately reflects the agreement entered into between this office and yourself, it is requested that you sign the letter as provided below.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

SEEN AND AGREED TO:

_____

FORM 38: GRAND JURY SUBPOENA DUCES TECUM REPORT

PLEASE ATTACH A COPY OF THE SUBPOENA

TO: Requesting Agent
Enclosed with this subpoena for records is the Grand Jury Subpoena Duces Tecum Report which MUST be completed and returned to the U.S. Attorney's office upon receipt of the subpoenaed records or return of the subpoena. Your cooperation is appreciated.

Please return the completed form to:

U.S. Attorney's office
1101 King Street,
Suite 502
Alexandria, VA 22314
Attn: Julia Simmonds

GRAND JURY SUBPOENA DUCES TECUM REPORT

FROM: _____ AGENCY: _____

RE: JOHN DOE NO. _____ **C&P File No.** _____
GRAND JURY DATE AND NUMBER _____
DATE SUBPOENA ISSUED _____
PERSON/COMPANY SUBPOENAED _____
_____
_____

DISPOSITION OF SUBPOENA

DATE SUBPOENA RETURNED TO USAO: _____

_____ Unable to Serve
_____ Subpoena Reissued
_____ Other (Subpoena cancelled, etc.) - Explain:
_____

STATUS OF COMPLIANCE:

_____ NO RECORDS EXIST
_____ All Records Received on _____ [date]
_____ Partial Receipt of Records on _____ [date]
with more records to follow
_____ Partial Receipt of Records _____ [date]
with no more records to follow

DISPOSITION OF RECORDS RECEIVED: _____
_____

HOW RECORDS RECEIVED:

_____ In Mail to AUSA
_____ In Mail to Agent
_____ Agent Picked up from:
_____
_____ Before Grand Jury
_____ Other - Explain: _____
_____

FORM 39: ALTERNATE GRAND JUROR ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF)
GRAND JURY NO.)

ORDER

WHEREAS grand juror _____ has been excused from further service in Grand Jury No. _____, and

WHEREAS the United States Attorney has requested that the first alternate grand juror, _____, selected on _____, 1992 for Grand Jury _____, be summoned by the clerk to begin service as a regular grand juror for the remainder of the grand jury's term, it is therefore

ORDERED that grand juror _____ be and hereby is discharged from further service as a grand juror in Grand Jury No. _____, and it is further

ORDERED that the Clerk of the Court summons the first alternate grand juror, _____, to commence regular service as a grand juror in Grand Jury _____ beginning at 9:30 a.m. on _____.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

FORM 36: 90 DAY EXTENSION

C&P File No. _____
Re:

Dear

On you were served with a grand jury subpoena requesting subscriber and toll information for the following telephone number(s):

At that time you were advised not to disclose the existence of that request for ninety days.

This letter is to inform you that the investigation for which that subpoena was issued is still continuing. It is, therefore, important that you not disclose the existence of the requests made in that subpoena for an additional ninety days. Any such disclosure may impede and delay the investigation.

If you have any questions concerning this request, please contact me immediately at (703) 706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By:
Assistant United States Attorney

FROM 37: ADDITIONAL GRAND JURORS

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF)
GRAND JURY NO.)

WHEREAS the United States Attorney has requested that additional grand jurors be empaneled to serve on Grand Jury ____ to bring the number of grand jurors sitting to twenty-three, and that alternate grand jurors be selected, it is, pursuant to Federal Rules of Criminal Procedure 6,

ORDERED that persons be drawn from the remainder of those persons' names previously drawn from the Jury Wheel to serve on Grand Jury _____who were present on the empanelment date, July __, 19__, but who were not otherwise selected on the empanelment date to serve on Grand Jury ____, for service as grand jurors beginning on July __, 19__, and to serve until the expiration of Grand Jury ____. And, pursuant to Local Rule 26, it is further

ORDERED that the persons whose names are drawn be summoned by the Clerk to appear before this Court at 9:00 a.m. on May _, 19__, and thereafter to commence service at 9:30 a.m. on May _, 19__, and it is expected that this session of Grand Jury _____will be for two consecutive days.

_____
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: _____

FORM 34: NOTICE OF DISCLOSURE OF GRAND JURY MATERIALS

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	JOHN DOE NO. ABC-123
	)	
JOHN DOE	)	

NOTICE OF DISCLOSURE OF GRAND JURY MATERIALS

Pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, counsel for the United States hereby advises the Court that materials subpoenaed by and/or presented to the Grand Jury for the Eastern District of Virginia, Alexandria Division, in the above-styled matter have been and will be disclosed to James Jones, Special Agent of the Internal Revenue Service, Jane Jones, Special Agent of the F.B.I., Robert Roe, Supervisory Special Agent of the F.B.I., and Meredith Malone, Group Manager, Internal Revenue Service, to assist the attorney for the government in the performance of duty to enforce federal criminal law. The aforementioned individuals have been advised of their obligation of secrecy under Rule 6(e), Fed. R. Crim. P.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____
Assistant United States Attorney

FORM 35: 90 DAY LETTER

Date

Custodian of Records
(C&P Telephone Co. of Maryland
Security Office - LEL
York and Shawan Roads
Cockeysville, Maryland 21030)
(example)

Re: John Doe No. _____

Dear Sir/Madam:

You have been served with a subpoena issued by a federal grand jury in connection with a criminal investigation being conducted in this district. That subpoena directs you to produce certain records on (date) before the grand jury in Alexandria, Virginia.

As a convenience to you, you may, if you wish, deliver the requested documents to Special Agent _____ (Address) in lieu of appearing personally before the grand jury.

Because premature disclosure of this request might impede the investigation in this case, you are requested not to disclose the existence of this subpoena for a period of ninety days from the date of this letter.

I appreciate your cooperation in this matter. If you have any questions, please feel free to contact me at (703) 706-3700.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

BY:
Name of Assistant
Assistant United States Attorney

Access to the information will be limited to: (STATE NAMES, TITLES AND ADDRESSES OF ATTORNEYS WORKING ON THE INVESTIGATION OR PROSECUTION):

NAME:
TITLE:
AGENCY:

or such other officers and employees of a Federal agency as shall be specifically assigned to participate in the investigation, preparation for trial, or trial, of this matter. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. § 6103 and 26 C.F.R. 301.6103(i)-1.

At this time it is authorized that the disclosed material will be used (STATE INTENDED USE, i.e., WHETHER THE MATERIAL IS SOUGHT SOLELY FOR INVESTIGATIVE PURPOSES AT THE TIME OF THE REQUEST OR WHETHER THE REQUESTER CURRENTLY ANTICIPATES USING THE INFORMATION IN A JUDICIAL PROCEEDING AND AN ESTIMATED TIME TABLE).

Therefore, disclosure is required on or before (DATE).

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____
(Name of Assistant)
Assistant United States Attorney

FORM 33: DISCLOSURE LETTER

(Date)

Special Agent John Smith
Internal Revenue Service

Re: John Doe No. ABC-123

Dear Agent Smith:

In accordance with Federal Rules of Criminal Procedure, 6(e)(3)(A)(ii), your name is listed in a Notice of Disclosure regarding the above-captioned case. Please note Rule 6(e)(3)(B) imposes the following obligation of secrecy:

> Any person to whom matters are disclosed under Subparagraph (A)(ii) of this paragraph shall not utilize that 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. 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 under this Rule.

This is your notice of the secrecy requirement; please retain it in your files. Violations of this requirement are punishable by contempt proceedings. If you have any questions about that obligation contact the undersigned Assistant United States Attorney.

Sincerely,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____
Assistant United States Attorney

fugitive, and that no disclosure be made to any other person except in accordance with the provision of 26 U.S.C. § 6103.

UNITED STATES DISTRICT JUDGE

DATED: _____

FORM 32: LETTER, RE: TAX DISCLOSURE PURSUANT TO 26 U.S.C. § 6103 (i) (2)

[date]

District Director
Internal Revenue Service
P.O. Box 10107
Richmond, Virginia 23240

ATTN: Disclosure Officer

RE: Tax Disclosure Pursuant to 26 U.S.C. § 6103(i)(2)
(NAME OF CASE and NUMBER)

Dear Sir:

Pursuant to 26 U.S.C. § 6103(i)(2), the Department of Justice requests the Internal Revenue Service to furnish return information, other than taxpayer return information, for the taxable period(s) (STATE YEARS FOR WHICH DISCLOSURE IS SOUGHT) _____ regarding:

NAME:
ADDRESS:
SOCIAL SECURITY NUMBER:
EMPLOYER IDENTIFICATION NUMBER:

The subject(s) of this request is/are the subject(s) of an investigation/indictment regarding possible violations of ____ U.S.C. _____.

Involved in this investigation/prosecution (STATE FACTS)
_____
_____.

Disclosure of the requested return information is or may be relevant to the investigation/indictment in establishing (STATE REASONS FOR RELEVANCY) _____
_____.

FORM 31: ORDER FOR DISCLOSURE OF RETURNS AND RETURN INFORMATION

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	
	)	

ORDER FOR DISCLOSURE OF
RETURNS AND RETURN INFORMATION

On this _____ day of _____, 19____, comes for the attention of the Court the application of the United States Attorney for the Eastern District of Virginia for an ex parte order, pursuant to 26 U.S.C. 6103(i)(5), directing the Internal Revenue Service to disclose returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NUMBER:

for taxable period(s) of _____. After examining the application the Court finds:

(1) A federal arrest warrant relating to the commission of the Federal felony offense (s) of (LIST OFFENSE(s) _____

_____

has been issued for the individual named above who is a fugitive from justice.

(2) There is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual.

IT IS THEREFORE ORDERED that the Internal Revenue Service:

(1) disclose such returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NUMBER:

for the taxable period(s) _____ as have been filed and are on file with the Internal Revenue Service;

(2) disclose such returns and return information described above as come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than 90 days thereafter;

(3) disclose such returns and return information only to applicant and

NAME:
TITLE:
AGENCY:

and to no other person;

(4) disclose no returns or return information not described above.

It is further ORDERED that applicant and

NAME:
TITLE:
AGENCY:

and any officer or employee of any Federal agency who may be subsequently assigned in this matter shall use the returns and return information disclosed solely in locating the above-named

has been issued for the individual named above who is a fugitive from justice.

(2) There is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual. (STATE FACTS SUFFICIENT TO ALLOW THE COURT TO SO FIND.)

3. The returns of such individual or return information with respect to such individual is sought exclusively for use in locating such individual. No disclosure will be made except in accordance with the provisions of 26 U.S.C. § 6103.

Applicant further alleges and states that:

NAME:
TITLE:
AGENCY:

is involved in locating the fugitive.

This application is authorized by Richard Cullen, United States Attorney.

Therefore, applicant prays that this Court enter an order, ex parte, on this application granting disclosure by the Internal Revenue Service of the returns and return information specified in this application.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____
Assistant United States Attorney

FORM 30: AUTHORIZATION FOR APPLICATION FOR EX-PARTE ORDER FOR DISCLOSURE OF TAX RETURNS AND RETURN INFORMATION

AUTHORIZATION FOR APPLICATION
FOR EX PARTE ORDER FOR DISCLOSURE
OF TAX RETURNS AND RETURN INFORMATION

I, RICHARD CULLEN, United States Attorney for the Eastern District of Virginia, pursuant to 26 U.S.C. 6103(i)(5), hereby authorize the attached Application for Ex Parte Order for Disclosure of Tax Returns and Return Information of _____-_____ for the taxable periods _____-_____ made by _____,
Assistant United States Attorney for the Alexandria Division of the Eastern District of Virginia.

_____ Date

_____
RICHARD CULLEN
UNITED STATES ATTORNEY

FORM 28: VERIFICATION

VERIFICATION

I, _____, being first duly sworn, depose and say that I am an Assistant United States Attorney for the Eastern District of Virginia and that the foregoing Application is made on the basis of information officially furnished and upon the basis that such information is true as I verily believe.

_____
Assistant United States Attorney

Subscribed and sworn to before
me this _____ day of _____,
19_____.

My Commission Expires:

_____
Notary Public

FORM 29: APPLICATION FOR EX-PARTE ORDER TO DISCLOSE RETURNS AND RETURN INFORMATION

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	MISCELLANEOUS NO.
	)	

APPLICATION FOR EX PARTE ORDER TO
DISCLOSE RETURNS AND RETURN INFORMATION

Comes now the United States of America, through its attorneys Richard Cullen, United States Attorney for the Eastern District of Virginia, and _____, Assistant United States Attorney, pursuant to 26 U.S.C. 6103(i)(5), and makes application to the Court for an ex parte order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NUMBER:

which returns and return information are described as those returns and return information for the taxable period(s) _____ _____.

In support of its application applicant alleges and states the following:

(1) A federal arrest warrant relating to the commission of the Federal felony offense(s) of (LIST OF OFFENSE(S)) _____

_____

_____

(3) The returns and return information are sought exclusively for use in a Federal criminal proceeding concerning such acts.

(4) The information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

The Court further finds that applicant is an employee of the United States Attorney's Office for the Eastern District of Virginia and is primarily and directly engaged in, and the information sought is solely for their use in, investigating the above-mentioned violations of U.S.C. Section , and that the application is authorized by the United States Attorney for the Eastern District of Virginia.

It is further ORDERED that the Internal Revenue Service (1) disclose such returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NO.:

for the taxable period as have been filed and are on file with the Internal Revenue Service; (2) certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service that no such returns and return information have been filed or are on file; (3) disclose such returns and return information described above as come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than 90 days thereafter; (4) disclose such returns and return information and

make such certification only to applicant, to Special Agent _____ and to no other person; (5) disclose no returns or return information not described above.

It is further ORDERED that applicant and any officer or employee of any Federal agency who may be subsequently assigned in this matter shall use the returns and return information disclosed solely in investigating the above-mentioned violations of U.S.C. Section , and such other violations of any Federal criminal statutes, although presently unknown, as are discovered in the course of this investigation of , and preparing the matter for trial, and that no disclosure be made to any other person except in accordance with the provision of 26 U.S.C. 6103 and 26 C.F.R. 301.6103(i)(1).

_____
UNITED STATES DISTRICT JUDGE

DATED: _____

FORM 26: AUTHORIZATION FOR APPLICATION FOR EX-PARTE ORDER FOR DISCLOSURE OF TAX RETURNS AND RETURN INFORMATION

AUTHORIZATION FOR APPLICATION
FOR EX PARTE ORDER FOR DISCLOSURE
OF TAX RETURNS AND RETURN INFORMATION

I, Richard Cullen, United States Attorney for the Eastern District of Virginia, pursuant to 26 U.S.C. 6103(i)(1), hereby authorize the attached Application for Ex Parte Order for Disclosure of Tax Returns and Return Information of (name of subject(s)) for the taxable periods of _____ through _____ made by _____, Assistant United States Attorney, for the Alexandria Division of the Eastern District of Virginia.

_____
Date

_____
RICHARD CULLEN
UNITED STATES ATTORNEY

FORM 27: ORDER FOR DISCLOSURE OF RETURNS AND RETURN INFORMATION

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	GRAND JURY NO.
	)	
JOHN DOE NO.		

ORDER FOR DISCLOSURE OF
RETURNS AND RETURN INFORMATION

On this _____ day of _____, 19___, comes for the attention of the Court the application of the United States Attorney for the Eastern District of Virginia for an ex parte order, pursuant to 26 U.S.C. 6103(i)(1), directing the Internal Revenue Service to disclose returns and return information of:

NAME:
ADDRESS:
SOCIAL SECURITY NO.:

for taxable period _____. After examining the application the Court finds:

(1) There is reasonable cause to believe, based upon information believed to be reliable, that violations of Federal criminal statutes, namely U.S.C. Section ; U.S.C. Section ; U.S.C. Section ; U.S.C. Section , have been committed.

(2) There is reasonable cause to believe that the returns and return information are or may be relevant to a matter relating to the commission of such acts.

information believed to be reliable, that violations of Title ____ U.S.C. Section _____ have been committed.

* (2) There is reasonable cause to believe that the above-described returns and return information are or may be relevant to a matter relating to the commission of such acts.

(3) The returns and return information are sought exclusively for use in a Federal criminal investigation or proceeding concerning such acts.

(4) The information sought to be disclosed cannot reasonably be obtained, under the circumstances, from other sources.

Applicant further alleges and states that he/she is an Assistant United States Attorney for the Eastern District of Virginia and is personally and directly engaged in investigation and preparation for trial of matters relating to the enforcement of the above-mentioned violations of Title __ U.S.C. Sections _____ to which the United States is a party. The information sought herein is solely for our use for that purpose. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. 6103 and 26 C.F.R. 301.6103(i)-1.

This application is authorized by Richard Cullen, United States Attorney.

Therefore, applicant prays that this Court enter an order, ex parte, on this application granting disclosure by the Internal

* Note: Prosecutors should set forth in this application sufficient facts to enable the court to find reasonable cause to believe that particular criminal violations have been committed and that the specified returns and return information may be relevant to a matter relating to the commission of such acts.

Revenue Service of the returns and return information specified in this application.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: _____
Assistant United States Attorney