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IV. PRESENTING EVIDENCE TO THE GRAND JURY

A. Initial Session

At the first grand jury session, the staff introduces itself to the grand jurors, explains the nature of the investigation and the applicable antitrust laws, and, if appropriate, conducts a voir dire of the grand jurors. Additionally, the staff should discuss housekeeping details, such as scheduling future grand jury sessions.(1) Copies of the Federal Handbook for Grand Jurors are distributed at this meeting, if they have not been received earlier. The first session also can be used to take testimony or to have documents returned.

This initial session is critical because it is usually the first time the grand jurors meet the Antitrust Division staff and form their first impressions of the staff's competence and professionalism. This meeting also provides an opportunity for the staff to begin to develop a rapport with the grand jurors(2) by letting them know that the staff works for them and demonstrating concern for their needs.

At the beginning of a new grand jury investigation, the lead attorney should identify himself by stating his name and purpose in appearing before the grand jury. For example:

> My name is _____. I am an attorney for the Antitrust Division of the United States Department of Justice. I am here today to present for your consideration evidence regarding a possible violation of the United States Code, committed by _____.

All other Division attorneys appearing before the grand jury should be introduced and identified for the record.(3) A brief explanation of the general makeup and function of the

Antitrust Division might also be appropriate. A short explanation that the grand jury's purpose is to investigate alleged antitrust violations in a particular industry should be given. A description of the antitrust laws, including their prohibitions and purposes, and the benefits of competition usually follows. Then the elements of the relevant statute can be explained. For example, when discussing Section 1, the concepts of "agreement", "two or more people", "conspiracy", and "interstate commerce" should be discussed. It is also helpful to give examples of prohibited behavior such as price-fixing, bid-rigging or allocation schemes. If the grand jury is being shared with a United States Attorney, it is prudent to explain the difference between an antitrust investigation and other matters, such as the large amount of documents antitrust cases typically involve and the need to use the grand jury as an investigative tool.

Once the basic legal framework is set forth, the grand jurors can be told generally about the way the investigation will proceed. They should understand that the evidence will consist of both testimony and documents, and should be informed of any actions already taken, such as the issuance of subpoenas duces tecum or ad testificandum, and the entry of impounding, transfer, or any other orders. A copy of the subpoenas issued may be provided and the types of documents requested may be discussed.(4) The jurors should be advised that they can review any documents they wish and request that additional documents be obtained. This is also a good time to explain that some witnesses may receive immunity. What immunity is, why it is necessary, the process used for obtaining it, and its significance should be covered.

If it has not already been covered by the district court judge or the U.S. Attorney, the burden of proof should be discussed, as well as the role of the grand jurors. Point out that their function is different from that of a trial jury and that the burden of proof is different. Explain what they will be asked to do at the completion of the investigation.

The grand jury should be told how and why the grand jury is important, and why attendance at every session is critical. The attorney should explain that he is there to assist them in their jobs, and that their help is essential to the process. A reminder about the secrecy of the proceeding is usually appropriate.

If the investigation is being conducted by a previously-empaneled grand jury, or if the grand jurors were not asked enough information before the empanelment to ensure that they can fairly and impartially consider the evidence presented, a voir dire-like procedure may be used. Practices vary in different districts, so consultation with the U.S. Attorney prior to the session is necessary. One way of proceeding is for the attorney to ask questions about 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 him from rendering a fair, impartial and just verdict based solely upon the evidence presented. 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 verdict should be questioned at length, and if the staff is convinced a juror should

be removed, the appropriate steps should be taken.(5)

The staff should also address administrative matters at this initial session. A discussion of how sessions will be scheduled and the anticipated length of the sessions is necessary. (Keep in mind that the grand jury may be needed for other investigations, so coordination with the local U.S. Attorney is essential.) To the extent that the judge, the clerk, or the U.S. Attorney have not already established the schedule, the staff should discuss breaks, lunch hours, and any rules about smoking, eating or drinking in the grand jury room. The grand jurors should be consulted if the staff believes that some change in the schedule is needed. Whether there should be note-taking, and any safeguards to be adopted to protect those notes should also be covered.

The grand jurors will want to know when and how they can ask questions. Most attorneys request that the grand jurors hold their questions until after the attorney's examination has been completed. Sometimes, however, especially during long examinations, questions are handled after particular subject areas.

B. Note-taking by Grand Jurors

18 U.S.C. § 1508 forbids the recording of the proceedings of a grand jury while it is deliberating or voting. However, the statute also states that "nothing in paragraph (a) of 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."

In essence, the 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. Note-taking by grand jurors enhances the opportunities for a violation of grand jury secrecy(6) 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 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 and 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 session and collected at the end of the session, by either the foreman or the attorney conducting the investigation, and deposited under lock with the court clerk. 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 for prompt destruction.

It is essential that the grand jurors understand the importance of grand jury secrecy. However, tact should be used in attempting to limit or restrain note-taking so that the

grand jurors are not alienated. In difficult situations, the court should always be consulted.

C. Statements by the Prosecutor Before the Grand Jury

The responsibility of the prosecutor is "to advise the grand jury on the law and to present evidence for its consideration."(7) This section defines the parameters of permissible conduct by a prosecutor before the grand jury.

1. All discussions with grand jurors must be recorded

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.

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. The Division practice, however, is to obtain the transcripts as soon as they are ready after a session. The court reporter should be requested to transmit the stenographic notes and tape recordings to the appropriate Division office upon completion of the investigation.

The court reporter should be advised 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. Prosecutors should not engage in any conversation or answer 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 prior to the commencement of a session or after a session has been concluded, the Division attorney should politely advise the grand juror that it is not proper for the attorney to answer the question until the session is properly being recorded.(8) Attorneys should not state that they are going "off the record" on non-case-related matters, such as lunch schedules. 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.

Any 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. Rule 6(e)(1) 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.

2. Opening

Since most grand jurors are not familiar with the Division or the antitrust laws, it generally is useful to describe where the Division fits in the Justice Department's organizational structure and the laws the Division is primarily responsible for enforcing. Similarly, since the Division's grand jury investigations tend to be more complex and last longer than the typical presentation by the local U.S. Attorney's office, it may be useful to describe to the grand jury the nature of the investigation and the way in which you expect to conduct it. For example, in a typical investigation of bid-rigging in a specific industry, you might tell the grand jury that the first step in the investigation will be issuance of subpoenas duces tecum to industry members; that the next step will be general testimony from a knowledgeable individual about the bidding process; and, thereafter, that more specific testimony from individual industry participants will be presented. You should also tell the grand jury how long you expect the investigation to continue.

A brief general summary of the evidence may be given at the outset of an investigation to introduce a case to the grand jury. If you decide to give such a statement, you should be careful to treat this like an opening statement at trial. Do not overstate the evidence. You should caution the grand jury that "you expect" they will hear certain evidence and that what you say is not evidence and should not be considered by the grand jury in any subsequent voting on proposed indictments.(9)

3. 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,(10) the prosecutor is authorized to assist the grand jury in conducting its inquiry by advising the grand jury on the applicable law.(11) 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.(12)

Since most grand jurors are not familiar with the Sherman Act or with conspiracy law, it generally is useful to instruct the jury completely on the elements of each charged offense. If improper instructions are given, the indictment should not be invalidated because courts generally have held 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.(13) Nonetheless, Division attorneys should be careful to give accurate instructions.

4. Discussions of strategy

Because of the length of Division grand jury investigations, it often is advisable to discuss the Government's strategy in subpoenaing documents and the order and nature of witnesses to be called. Occasionally, the jury may have to decide certain questions, for example, whether they want to hear live testimony or to have a transcript of prior testimony read to them. The Division attorney conducting the investigation may discuss the alternatives in a non-argumentative way, but the final decision as to how to proceed must be made by the jurors.

Attorneys should not initiate discussions of internal Division procedures and should as tactfully as possible try to avoid answering questions about such procedures. If questions concerning internal Division 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.

5. Review of plans for a session

It is sometimes important, at the start of a session or a series of sessions, 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, it generally is wise to advise the grand jury of the day's witnesses and why they are being called. A brief background sketch of each witness may be useful. While it is normally improper for an attorney to introduce facts not already in the record, providing the grand jury with a brief background description of a witness should not be objectionable.(14)

At the close of each session, the staff should advise the jurors when to return for the next session, if this is known, and may wish to briefly advise the jurors as to what will occur at the next session.

6. Responding 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 staff and make observations. Staff may also find it useful to respond to questions at the conclusion of each witness' testimony. Such questions may concern either legal or factual matters and the staff should be fully prepared to answer them.

Responding to grand jurors' questions is clearly a permissible practice by the prosecutor.(15) The prosecutor may explain the law and necessary burden of proof and weight of evidence issues.(16) He may respond to questions by stating facts that are already part of the record.(17) 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 should avoid a response that is, in effect, new testimony.(18) If the question calls for an opinion, the attorney may politely decline to respond to the question or respond, making 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.(19)

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 responsibility to prevent the introduction of irrelevant and prejudicial information. In responding to such questions, Division attorneys should either respond 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.

7. Advising grand jury on hearsay

Hearsay evidence is admissible in grand jury proceedings.(20) However, the Second Circuit in United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972), established a rule that hearsay is admissible only if "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.'" The Estepa rule is highly questionable in light of United States v. Calandra, 414 U.S. 338 (1974), Costello v. United States, 350 U.S. 359 (1956), and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and has been met by a general lack of enthusiasm by other circuits. Nonetheless, as a practical matter, Division attorneys can avoid application of the Estepa rule by informing the grand jury of the hearsay nature of the testimony it is hearing and by offering to present eyewitness testimony if necessary.(21) Further, when transcripts from a prior grand jury are presented to a new grand jury, the grand jurors should be advised of the hearsay nature of the transcripts and should be given the opportunity to recall any witnesses.

The Department disagrees with the rule in Estepa. Nonetheless, Department policy provides that "hearsay evidence should be presented on its merits so that jurors are not misled into believing that the witness is giving his/her own personal account."(22)

8. Advising grand jury on 5th Amendment

Frequently, the subject of an investigation is given the opportunity to testify before the grand jury but does not do so because of his 5th Amendment privilege against self-incrimination. If a grand juror asks why a subject has not appeared to testify, he should be advised that the subject has chosen not to appear and that the grand jury should make no inferences with regard to guilt from this act.(23)

9. Use of summaries

Summarizing evidence for the grand jury is a common and useful practice. It is often important to review and summarize the evidence at the start of a series of grand jury sessions. This is particularly important 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. Finally, the evidence in general and the evidence implicating each proposed defendant should normally be summarized at the final grand jury session before the grand jury is requested to vote on the proposed indictment.

The practice of summarizing evidence produced before a grand jury has a long history of judicial approval. In United States v. Rintelen, 235 F. 787 (S.D.N.Y. 1916), Judge Augustus Hand concluded that an attorney before a grand jury "may question witnesses,

advise as to the law and explain the relation of the testimony to the law of the case. In doing this, he may review the evidence." Judge Hand further noted that no reasonable objection could be urged against allowing the man who prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken perhaps over weeks or months, since in a complicated case, such a practice would prevent confusion on the part of the jurors.(24)

Attorneys should be careful when summarizing evidence to refrain from unduly influencing or coercing the grand jurors. Caution must be exercised to avoid becoming overzealous in presenting the case to the grand jury. Remarks made by a prosecutor may justify dismissal where "such remarks so biased the grand jurors that their votes were based upon their bias."(25) To avoid any problems, attorneys should inform the grand jurors that their remarks are not evidence.

Defendants frequently object to the use of summaries in presenting testimony from prior grand juries(26) or in presenting compilations of documentary evidence.(27) However, dismissal on such grounds is extremely rare. Summaries are generally considered a form of hearsay testimony and indictments based on such summaries will not be dismissed absent a showing that the use of the summary amounted to a flagrant abuse of the grand jury process. 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.

Attorneys should generally check with the U.S. Attorney's office in the district in which the grand jury is sitting to determine whether there are any special requirements for the use of summaries in that jurisdiction. For example, some courts have held that the use of summaries is permissible provided that the individual presenting the summary is sworn.(28) Another court has stated that the use of a summary is improper if it is "misleading or incomplete."(29) In any event, the use of summaries of evidence should not invalidate an indictment unless there is a showing of actual prejudice to the defendants.(30)

10. Presentation of indictment

When presenting a proposed indictment to a grand jury for its vote, care should be taken to insure that the grand jurors are aware that the decision as to returning an indictment is their own and that they are not obliged to follow any opinions or recommendations that may have been expressed by the Government's attorneys. To avoid any later charge of improper influence, attorneys should be careful to avoid stating any opinions as to guilt. If an opinion is unavoidable, it should be clearly expressed only as the attorney's opinion based upon the evidence before the grand jury.(31) 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.

According to an April 17, 1969 memorandum of the Director of Operations, Division attorneys are directed to use the following procedures when presenting an indictment to the grand jury:

1. Before the grand jury begins its final deliberations, the attorney for the Government should either read verbatim, or summarize in some detail, the various charges contained in the indictment under each count, including the defendants proposed for indictment, and the interstate commerce allegations.

2. At the conclusion of the presentation, the attorney for the Government should leave the original or a copy of the proposed indictment with the grand jury so that it is available to all the jurors during the course of their deliberations.

3. The indictment should be signed by the foreman of the grand jury in the presence of the grand jurors and the attorney for the Government, before presentment to the court.

There is some disagreement as to whether the grand jury should be presented with a signed or unsigned indictment. The preferred practice in the Division is to provide the jurors with a copy of the proposed indictment with the signature page omitted. The original of the indictment containing the signatures of everyone except the foreman is 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, he is given the original indictment which he signs. Some Division attorneys leave the original signed indictment with the jurors during their deliberations. This is not ordinarily a good practice and is frowned upon in a number of jurisdictions.(32) 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.(33)

When leaving the grand jurors to allow them to deliberate, the staff normally should arrange to have all grand jury transcripts and documentary evidence in the grand jury room. The grand jurors should be advised that they are free to review this material during their deliberations.

11. Disclosing facts not in evidence

A prosecutor should not disclose facts not in evidence to the grand jury. By disclosing facts not in evidence, the prosecutor, in effect, becomes an unsworn witness.(34)

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.(35) Courts generally will not criticize the disclosure of 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 material to the indictment.(36) The more substantial the fact, the more likely a court will find fault and consider some form of sanction. Nonetheless, attorneys should caution the grand jury that what they say is not evidence and should not be considered in any subsequent voting on a proposed indictment.

12. Presenting evidence from a prior grand jury - limitations and requirements

Attorneys may present evidence from a prior grand jury to a subsequent grand jury in the same district or a different district.(37) The procedures, limitations and requirements for presenting evidence from a prior grand jury vary from jurisdiction to jurisdiction. Thus, the U.S. Attorney's Office and the local case law should be consulted before presenting such evidence. The discussion that follows is intended to highlight the major variables affecting the presentation of evidence from prior grand juries.

The preferred practice in the Division is to present the new grand jury with all transcripts of testimony and documentary evidence from the prior grand jury. Most jurisdictions prefer a complete record to be presented to the subsequent grand jury but would not dismiss an indictment for failing to do so.(38) A few jurisdictions permit the presentation of only a selected amount of prior grand jury evidence.(39) Such jurisdictions usually permit this practice only if the sitting grand jury will not be significantly misled.(40)

A frequently used practice of Division attorneys is to read selected grand jury transcripts or portions thereof to a new grand jury. This generally is considered to be permissible. 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 Estepa,(41) the attorney should explain the hearsay nature of the prior transcript and should advise that live witnesses will be called if desired.(42) Most jurisdictions permit the attorney for the Government to read the transcripts,(43) while others prefer that the transcripts be read to the grand jury by someone other than one of the presenting attorneys.(44) One Circuit urges that any reading of transcripts by a Government agent be supervised by a presenting attorney.(45) A practice that is followed by other components of the Department is to have the foreman or one of the other grand jurors read the transcript.(46)

Another frequently used method of presenting evidence from prior grand juries is the use of summaries. Summarizing prior grand jury testimony(47) or documentary evidence(48) is perfectly acceptable. Some courts have suggested that the use of summaries would be improper if they were misleading or incomplete(49) or unduly prejudicial.(50) The practice usually followed by the Division and preferred by some courts is to have available for examination by the grand jury the transcripts of those witnesses whose testimony is

summarized.(51)

In general, attorneys 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 is rare, it does happen and attorneys should be fully aware of the requirements in their jurisdiction.(52)

13. Expressing 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.(53) If a prosecutor expresses a personal opinion, he 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 that courts particularly dislike is that of vouching for or commenting on the credibility of a witness.(54) On the other hand, commenting on the ultimate guilt or innocence of a proposed defendant is not generally considered to be improper.(55) While many courts have cautioned prosecutors about expressing personal opinions, few indictments have been dismissed on this basis. As with other areas of grand jury abuse, an indictment will be dismissed only if the expression of the prosecutor's personal opinions "so biased the grand jury that their votes were based upon their bias."(56)

14. Testimony by a prosecutor

A Division attorney may not be both an attorney before the grand jury and a witness. If an attorney appearing before the grand jury must testify before the grand jury, he should immediately cease performing his prosecutorial function. In United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978), an attorney for the Division testified before the grand jury as a witness and then remained in the grand jury room as the lead attorney presenting evidence to the grand jury. The judge held that where a Government attorney provided independent substantive testimony before the grand jury yet remained as presenting attorney, the resulting indictment must be dismissed. The judge's decision was based in large part upon the questionable notion that after the attorney testified and then remained in the grand jury room, he became an unauthorized person before the grand jury.

At least one circuit has declined to automatically dismiss an indictment where the attorney's testimony was procedural in nature. In United States v. Birdman, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), 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, summarizing parts of the investigation and outlining the proposed indictment. He later took the witness stand and was questioned by another attorney. The court condemned this practice in principle but refused to dismiss the indictment in the absence of any evidence of actual prejudice to the defendants.(57) In light of recent Supreme Court decisions, it is unlikely that the conduct admonished in Treadway would result in the dismissal of an indictment.(58)

Although a Division attorney should not act as a prosecutor and a witness, an attorney may provide a variety of information to the grand jury without thereby becoming a witness. For example, an attorney may provide basic identifying information to the grand jurors so that they are clear as to the identity of the subject of an investigation,(59) summarize prior testimony,(60) explain elements of the law and applicable legal theories,(61) and respond to grand jurors' questions.(62) The key element that seems to determine whether a prosecutor's statements are testimony is whether the prosecutor has placed his credibility on the line. If he has done so, then he may have become an improper witness.(63)

15. Discussions with grand jurors outside of session

Division attorneys should be cordial with grand jurors both inside and outside the grand jury room. However, they should be careful not to discuss any of the matters under consideration by the grand jury except in the grand jury room. Failure to do so could be considered improper conduct by the attorney and is potentially 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 a grand juror asks a question outside of the session, the attorney should politely decline to answer the question and suggest that the question be repeated when the grand jury is again in session.

If an attorney inadvertently makes off-the-record comments to a grand juror concerning the matter under investigation, it is unlikely to result in dismissal of an indictment, absent other prosecutorial misconduct, unless the comments were prejudicial and material to the grand jury's decision to return an indictment. A wise practice is to have any off-the-record conversations repeated for the record.(64)

D. Permissible Evidence

1. Admissible evidence

Grand juries may initiate and conduct investigations based on tips, rumors, hearsay, speculation, evidence offered by the prosecutor, and the grand juror's own personal knowledge.(65) 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".(66) To allow attacks on evidence would relax grand jury secrecy and complicate pretrial procedures. The clear import of the Supreme Court cases dealing with this issue is that grand jury proceedings should not be burdened with the delay and disruption that would result from recognizing a right to review the evidence considered by the grand jury.(67) In addition, such attacks may impede the work of the grand jury by limiting access to relevant evidence and may make witnesses more reluctant to testify. Finally, the grand jury is permitted such broad discovery because it does not adjudicate guilt or innocence but is purely an investigative body.(68) Consequently, the grand jury possesses broad investigative power and may draw its information from a wide variety of sources to carry out its function.(69)

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), in which the Supreme Court held that:

> 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.(70)

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. . .(71)

Courts have permitted indictments to stand that were based largely, if not entirely, upon hearsay,(72) illegally obtained or incompetent evidence,(73) irrelevant or false testimony,(74) or other evidence that would not otherwise be admissible at trial.(75)

2. Hearsay

As with other types of evidence that would be inadmissible at trial, 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 based solely on hearsay.(76) Nevertheless, some courts have cautioned that the use of hearsay should be avoided when possible,(77) and a few courts have suggested that the excessive use of hearsay may be viewed as a form of prosecutorial misconduct.(78)

In choosing to present hearsay evidence before the grand jury, Division attorneys should

appropriately consider factors such as efficiency and the burden on both the Government and the witness of presenting eyewitness rather than hearsay evidence. This issue arises most often when using investigative agents, economists or other experts to summarize evidence or when summarizing evidence of or presenting transcripts from prior grand jury proceedings.

The Second Circuit attempted to limit the use of hearsay in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). 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".(79) However, the court also stated that the grand jury must not be "misled into thinking it is actually getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed."(80) 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'."(81) As a practical matter, Division attorneys can avoid application of the Estepa rule by informing the grand jury of the hearsay nature of the testimony it is hearing.(82)

The Second Circuit's use of its supervisory power to review the nature of the evidence presented to a grand jury is highly questionable in light of the Supreme Court's decisions in United States v. Calandra, 414 U.S. 338 (1974), United States v. Costello, 350 U.S. 359 (1956), and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and has been met by a general lack of enthusiasm by other circuits. 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.(83) The Eighth Circuit indicated that it might apply the Estepa rule but also focused on the first part of the rule.(84) The Fifth Circuit has stated that it will dismiss an indictment based on hearsay only if the use of hearsay has "impaired the integrity of the grand jury proceeding".(85) The Sixth and Ninth Circuits have expressly rejected the Estepa rule.(86) The Sixth Circuit would permit a challenge to an indictment because of the use of hearsay "only on a showing of demonstrated and longstanding prosecutorial misconduct".(87)

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

> 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. . . 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.(88)

3. Illegally obtained or incompetent evidence

As a general rule, a grand jury may consider inadequate or incompetent evidence(89) or even illegally obtained evidence.(90) 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.(91) The Court explained that the exclusionary rule was designed for its deterrent effect on overzealous prosecutors and that its extension to grand jury proceedings would not greatly increase this deterrent effect. 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".(92)

In addition to permitting grand juries to hear evidence obtained in violation of a person's 4th Amendment rights, courts have also permitted the use of evidence obtained in violation of a person's 5th Amendment rights,(93) information covered by the Speech or Debate Clause,(94) illegally obtained tax return information,(95) lie detector results,(96) information regarding a target's prior convictions or his refusal to testify(97) and perjured testimony.(98) As to perjured testimony, certain courts have suggested a rule similar to the rule in Estepa governing the use of hearsay evidence: that the knowing use of perjured testimony by a prosecutor to obtain an indictment that would not have been issued without it is grounds for dismissal.(99) Moreover, while a grand jury may be presented with illegally obtained or incompetent evidence, the grand jury may not violate a valid privilege itself.(100)

The current status of the law in this area is summarized in the U.S.A.M. 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.(101)

4. 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 the use of recorded 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 system for regulating the interception and subsequent use of oral, wire and radio communications.(102) In general, Division attorneys may use evidence derived from lawfully intercepted communications and may present such evidence to the grand jury in the same manner the attorney would use any other item of 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 should check with the local United States Attorney's office before deciding to make any such disclosure to the grand jury.

Recorded communications and evidence derived therefrom that were not lawfully obtained may not be presented to a grand jury. 18 U.S.C. § 2515 provides:

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

Therefore, Division attorneys must carefully follow the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and should generally contact the local U.S. Attorney to make sure that all recorded communications are lawful and admissible.

Because the suppression provisions of 18 U.S.C. § 2518(10) are not applicable to grand jury proceedings,(103) the remedy normally available for improper use of recorded communications before the grand jury is dismissal of the indictment.(104)

Occasionally, a grand jury witness will make a claim that his testimony is based on illegal electronic surveillance and invoke the prohibition of 18 U.S.C. § 2515 as "just cause" for his refusal to testify. In Gelbard v. United States, 408 U.S. 41 (1972), the Supreme Court held that a witness has the right not to testify in response to interrogation based on the illegal interception of his communication.(105) Most circuits require a positive statement by the witness with at least some colorable basis to suggest that illegal electronic surveillance has occurred.(106)

Faced with a claim by a witness that his interrogation is based on the illegal interception of his communications, the Government must either confirm or deny the allegation. The different circuits vary as to the required specificity of a denial, but as a general rule, most circuits apply a balancing test; the greater the specificity of the allegation, the more detailed the Government's denial must be.(107) For example, a mere unsupported allegation of illegal surveillance requires only a simple affidavit from Government counsel denying the allegation. A detailed allegation might require affidavits from Government counsel and the investigatory agents that include, among other items, a detailed description of the steps that were taken to determine that there was no illegal surveillance. If there was in fact surveillance, the Department's view is that in camera inspection of the court order authorizing the surveillance should preclude further inquiry into the legality of the surveillance.(108) Since the circuits that have considered the question have applied different criteria for responding to a witness' claim, Division attorneys should carefully examine the case law in the circuit in which they are appearing before responding to a witness' illegal surveillance accusation.

The most frequently-occurring form of electronic surveillance conducted by the Division is done with the consent of one of the parties to the conversation or is performed by a party to the communication without direct involvement by the Division. Such consensual monitoring is legal and is not subject to Title III procedures; interception orders under 18 U.S.C. § 2518 are not necessary.(109) Consensual monitoring of this type is governed by 18 U.S.C. § 2511(2)(c), (d). The Attorney General issued policy guidance regarding consensual monitoring in a November 7, 1983 Memorandum which is contained in the United States Attorney's Manual 9-7.300. It should be consulted whenever consensual monitoring is used.

E. Use of Subpoenaed Documents

1. Impounding Order

An impounding order commits the custody of grand jury documents to the Government attorneys or other custodian, such as the FBI, and permits the documents to be removed for study and review by the Government attorneys. Standard Division procedure is to move the court to impound documentary material produced in response to subpoenas duces tecum so that the Government attorneys may, in their offices, keep, study, analyze, and work with such materials.(110)

a. Legal authority for impoundment

The power of the courts to impound is well established. As stated in United States v. Ponder, 238 F.2d 825, 827 (4th Cir. 1956):

> The power to impound is inherent in a court as an institution of law enforcement; it may be exercised originally, as well as auxiliary to pending suits or actions. . . .

Applications for impounding orders are almost always made on an ex parte basis. The application should, of course, be made to the court in the district in which the grand jury is sitting.(111)

b. Government attorneys may examine documents to assist grand jury

It is equally well-established that Government counsel, in the performance of their duties, may assist the grand jury by examining, analyzing, and reviewing voluminous material produced before the grand jury and that such assistance may form the basis for obtaining an impounding order.(112)

In assisting the grand jury, Government counsel are entitled to examine documents outside the presence of the grand jury.(113) To facilitate this examination process, the courts have permitted removal of documents to Government counsel's office in another district.(114) In In re Grand Jury Proceedings (General Dynamics Corp.), 1961 Trade Cas. (CCH) ¶ 70,027, at 78,091 (S.D.N.Y.), Judge Ryan noted that in antitrust proceedings, an order of this kind is usually entered to facilitate Government counsel's preparation of the proceedings.

c. Timing of impounding order

Although obtaining an impounding order for subpoenaed documents is standard procedure, the time when one is obtained and the form thereof have varied considerably within the Division. The preferred practice is to obtain the impounding order at the initiation of the grand jury proceedings. An impounding order is sometimes obtained only when the documents are to be removed from the jurisdiction in which the grand jury is sitting.

Despite the historical differences, it is strongly recommended that an impounding order be obtained at the initiation of the grand jury investigation (or at least before the return of any documents to the grand jury) and that it impound the documents at least for the life of that grand jury. 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.(115) If the documents are already impounded, especially if they are impounded for the life of the grand jury, then such a claim cannot be sustained.

Obtaining an impounding order at the initiation of the grand jury proceeding also serves two other purposes: First, it protects the Government attorney when he takes the documents out of the grand jury room and to his office (which may be out of the district)(116) by notifying the court of such a possibility. Thus, the court is made fully aware that the staff may remove the documents from the room in which the grand jury is sitting (this may be new to the court if it has only dealt with United States Attorney's grand juries in the past or has no experience with antitrust grand juries), and examine and utilize such documents in the Field Office and/or in Washington. An impounding order will eliminate surprise on the part of the court to any objections later raised by any

subpoenaed party regarding such removal.

Second, the application for an impounding order will acquaint the staff with the practice and attitudes of the court vis-a-vis grand jury documents. Different judges may have different practices and procedures regarding the custody and removal of grand jury documents (e.g., one court required that an up-to-date index be supplied to the clerk).

Few problems have been experienced when seeking an impounding order early in the investigation. At most, some courts have stated that an impounding order was not needed, but usually signed one anyway. On the other hand, without an impounding order, later objections to removal of documents have created problems which have required otherwise unnecessary staff time.

d. An impounding order should specify who will have custody of documents and where they will be maintained.

Many orders impound documents at a specific location. However, it may be necessary, during the course of the investigation, to remove some or all of the documents from that location, such as to the FBI for a handwriting analysis, or to Washington to prepare a price study. Language precluding this possibility should be avoided, if possible; otherwise it may be necessary to obtain a modification of the order.(117)

The application for an impounding order should clearly specify that the subpoenaed documents may be removed from the district in which the grand jury is sitting if, in fact, that is the case. Some orders contain a separate provision to this effect. Other orders merely set forth the location where the documents are to be impounded. The location will show, on its face, whether it is out of the district.

It is suggested that when documents are to be removed from the district, consideration be given to including a provision in the order stating, in substance, that the documents will be returned upon notice from the court. Such a provision may be superfluous. However, it may make the order more acceptable to the court. Similarly, consideration should be given to including a provision that the documents removed from the district remain subject to all provisions of the order and the jurisdiction of the court.

e. Access to documents by their owners

1) Inspection of documents. Generally, impounding orders provide that the party producing the impounded documents shall have the right to inspect them. It is suggested that if the documents are impounded far from the site of the grand jury, consideration be given to the place of inspection. Generally, the subpoenaed party is given the option, in the order, of inspecting the documents in the staff's office or in the office of the United States Attorney for the district in which the grand jury is sitting.

Care should be taken to insure that the order is worded so that a party producing impounded documents may, at his request, allow designated third parties to inspect the documents. Not infrequently, treble damage litigation will be instituted while the

documents are impounded and the plaintiff will make arrangements with the subpoenaed party to inspect his documents which have been impounded; or, as sometimes happens, investigations will be instituted by other Government agencies involving the subpoenaed party and the subpoenaed party will arrange to have the documents examined by such agencies.

2) Return of documents. Most impounding orders contain a provision that the Government attorneys may return impounded documents without further order of the court. Such a provision should be simply worded and language such as "irrelevant and immaterial documents may be returned" should be avoided. This language suggests that the subpoena was overbroad and implies that all documents retained may be material and relevant and may possibly be used by the defendants in a subsequent Fed. R. Crim. P. 16 motion.

f. FOIA issues

In general, Division policy is that documents produced to the grand jury are not subject to the disclosure requirements of the Freedom of Information Act (FOIA). There are several reasons for this. First, such documents may constitute matters occurring before the grand jury that are subject to the secrecy requirements of Fed. R. Crim. P. 6(e). Second, the impounding order should separately prevent disclosure to a third party, absent authorization by the subpoena recipient. Third, other exemptions of the FOIA are likely to cover grand jury documents. Obviously, the important business of the grand jury would be severely disrupted if grand jury documents could be obtained by FOIA requests.[(118)]

g. Time period to be covered by impounding order

The impounding order should ordinarily cover the documents for the life of the grand jury then sitting, any subsequent grand jury or juries which may continue the investigation, and for any litigation to which the United States is a party arising from such investigation. The advantages of such an impounding order are that (1) if the investigation is not concluded before the first grand jury is discharged, the documents may be retained in the Government's possession without obtaining a new impounding order while the second grand jury is being convened; (2) a second impounding order is not necessary to retain the documents during the proceedings of the second grand jury; and (3) it is not necessary to obtain an impounding order after the indictment has been returned and the case is being prepared for trial.

In some instances, the possible use of a successor grand jury has been clearly spelled out in a separate paragraph of the application; in other instances, the application has merely sought the impoundment of documents for use by attorneys in connection with the investigation "before this grand jury or any other grand jury in this district"; and in still other instances, the application has merely sought to impound documents for use in conducting "grand jury proceedings." If the possible use of a successor grand jury is emphasized by the use of a special paragraph, it may convey an erroneous impression to the court that the investigation will extend an unusually long time and thus create some

doubt on its part as to whether the order should be granted.

Insofar as proceedings arising from the investigation are concerned, it is suggested that attorneys use language impounding the documents for "legal proceedings to which the United States is a party". Even with this language, it is by no means certain that a defendant cannot obtain the return of his documents after the criminal case has been concluded and notwithstanding the fact that a civil case is pending.

If the order impounds documents for legal proceedings arising from the grand jury investigation, consideration should be given to including such proceedings in the reason for impoundment. That is, language such as "it is necessary for the Government to work with the documents to make an orderly presentation to the grand jury" should be broadened in scope to include the legal proceedings.

h. Order should impound those documents produced to the offices of Division staff

A provision that the subpoenaed party may produce the documentary material by mail or in person at the offices of the investigating staff is sometimes used in impounding orders. Such a provision would not seem to be absolutely necessary since, if this procedure is followed, it will be at the option of the subpoenaed party, and third parties would have no standing to object. Nevertheless, it may be advisable to include such a provision where the court is unfamiliar with grand jury proceedings in antitrust matters or where the court's feelings as to the procedure are unknown.

In any event, the application and order should be drafted so that it is clear that documents produced in the offices of the staff are impounded, as well as those physically produced before the grand jury.

2. Negotiating Strategy for Document Return

Each staff attorney responsible for document returns to the grand jury should be thoroughly familiar with all paragraphs of the subpoena, precisely what items are sought and why they are sought. Invariably, counsel for the subpoena recipient will call the Government counsel contact noted on the subpoena to discuss subpoena compliance. Typical topics include extensions of time for production, whether originals or copies are called for, clarification of certain subpoena requests, numbering of the documents, whether documents maintained by certain members of the corporation are corporate or "personal" documents, burdensomeness, etc. Staff attorneys should be prepared for such calls as they are an important aspect of obtaining good subpoena compliance. It is recommended that the staff attorneys meet and discuss each paragraph of the subpoenas in advance of their issuance. This discussion should include what documents are sought, the importance of each category, what compromises or concessions you will make, whether you will accept piecemeal production, etc. In other words, you should brainstorm possible objections, problems and difficulties counsel may raise and be ready to address and solve them.

Negotiating sessions with counsel for the subpoenaed company may be an important source of information for you, particularly if you can get counsel to describe his problems specifically. In doing so, you can frequently gain information about (a) the recipient's company; (b) how it conducts its business; and (c) the industry in general.

Your approach should be cordial, firm and fair. Counsel will generally be more cooperative if you can accommodate him or at least make the effort to do so. It may also avoid unnecessary work such as litigating the scope and burdensomeness of the subpoena or some of its parts. While Government counsel generally are successful in such matters, they can be time consuming and generally should be avoided.

To the extent possible, you should attempt to treat each company the same. This will create fewer problems for you not only in terms of keeping track of any modifications or compromises in subpoena compliance(119) but also in avoiding complaints of uneven handed treatment by the subpoena recipients.

Finally, you should consider stipulations, affidavits and admissions where you are only seeking documents to establish a particular fact, such as interstate commerce. The number of documents needed to establish interstate commerce may be voluminous. Frequently, the subpoena recipient is willing to admit or stipulate to that issue rather than to produce all the underlying documents. Such documents are generally of little probative value to other issues. Consequently, the chances of missing a hot document by so stipulating are small. However, if this approach is used, make sure that the stipulation/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. 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 return of the documents by production to the office of the Antitrust Division attorneys conducting the investigation. The subpoena recipient has a right to produce its 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 to its own offices if the subpoena recipient does not agree. However, the Government may give the subpoena recipient the option of producing the documents to the Government's offices. This is generally done for the convenience of both parties. When this option is chosen, it is generally accompanied by the requirement that the subpoena recipient provide an affidavit of search and production compliance in lieu of the grand jury testimony of a document custodian.(120)

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 staff believes the affidavit is inadequate or inaccurate, it can always subpoena the

document custodian to elaborate before the grand jury. Moreover, the representations in the affidavit, if false, can be the basis for a possible false statements or obstruction charge. Further, it is frequently much easier and more productive to ask relevant questions of the document custodian after the staff has reviewed the documents.

Where the option of a return to the offices of the Division is chosen, the grand jury should be advised that that option has been selected and that the documents have been received, because the power to subpoena documents resides in the grand jury, not in the Antitrust Division. Also, timely disclosure to the grand jury can help defeat any subsequent claims of grand jury abuse.

4. Handling of grand jury documents

Once documents have been received in response to subpoenas duces tecum, the staff encounters one of its most difficult and important tasks in developing a criminal investigation. This includes the reading, selecting, numbering, filing, and segregating of the documents received.

a. Document identification - numbering

As documents are received during the grand jury investigation, they should be placed into separate packets or boxes to prevent co-mingling with the documents of others. The documents should then be clearly marked with different identification symbols (usually a letter) and numbered consecutively.[(121)] Complex numbering (e.g., DB-21-C-150-2) should be avoided; it is difficult to cite in the record and increases the chance of reporter error. Further, the initials of the corporation submitting documents should not be used to identify that corporation if confidentiality as to the ownership of the documents is desired.

The precise numbering system is usually left to the desires of the staff (e.g., some attorneys prefer coding by paragraph number of the subpoena) unless a document control system has been installed in a particular office or section. In the latter situation, the practice in the office or section is followed. The important thing is to have an effective control over the documents.

The identification of documents, in a simplified manner, should eliminate any confusion as to which company supplied particular documents. The numbering will also permit the examiner to easily identify the document as he uses it to examine a witness.

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 huge amounts of documents, it may not be feasible to number every document given the size of the staff and time required. In such huge submissions, those documents that likely will not be used should be segregated and kept in a carefully identified file.

You can request (but not compel) the subpoena recipient to number the documents

before they are submitted. The company or its counsel are generally happy to 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 staff suggests. The system the staff desires 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 recipient will start to number in some way that is not useful to the staff.

The staff may be tempted to number the documents further after receipt for its own internal organizational and working purposes, for example, to identify hot document topics. This practice should be avoided. The better practice to accomplish the same objective is to use separate file folders for each hot document topic. This avoids cluttering the documents with additional symbols. If some of those symbols should have to be removed, it avoids the problem of having to eradicate them.

b. Indexing/organization

To make effective use of 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 company-by-company, box-by-box-basis. This will facilitate ready access.

Thereafter, the staff 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 antitrust violations, e.g., horizontal price-fixing, vertical price-fixing, group boycotts; (4) having to do with particular sections or areas of the country; (5) "hot documents"; or (6) referring to specific companies.

This type of organization may be company-by-company or for all the companies subpoenaed. In either case and with whatever system used, it is good practice to handle the originals as little as possible.

c. Copying/microfilming

As noted above, the staff should work with copies of the original submissions insofar as practicable. The number of copies to be made depends on the files the staff wants to maintain. For example, the staff may want to have a chronological file, a hot documents file and specific individual files. In that case, you might make as many as three copies of certain documents. Because of security and control problems, as well as expense, the staff should avoid an undue proliferation of copies.

In certain cases, where the document submissions are particularly voluminous, the staff may wish to microfilm the documents to conserve space. However, this is time-consuming and expensive. It also requires the use of a microfilm printout machine when

you want to use a copy of a specific document, or retrieving the original for copying.

After copying, the original documents, as selected and marked, should be placed and maintained in an "Original File" until such time as their use is necessary. Usually, such use is essential only at trial or if a witness cannot identify or read a copied document or if he refuses to believe that the copy represents a true copy of the original and his testimony with respect to the document is believed vital.

d. Logs/document control

Some Division Field Offices and Sections have document clerks who receive and log in each company's document submissions. Generally, a separate log book is maintained for each grand jury or each grand jury matter. This log will give the name of the subpoena recipient, the number of cartons of documents submitted, 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. It may also note additional information, such as the addresses of the recipients; name, address and telephone number of the 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.

Staff members may then be assigned to review the documents of certain of the subpoenaed companies. With the above control system in place, the staff member can then sign for or log out the documents he is to examine. This type of system provides maximum control over the document review phase of the investigation.

e. 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. For trial use, it is recommended (and in most courts required) that the exhibits be pre-marked. The practice may differ for grand jury use. Since the grand jury is an investigative proceeding, staff may not be able to anticipate a witness' testimony at this stage. Consequently, it may be necessary to mark the exhibits as they are used. Whenever or however they are marked, they should be clearly identified for the record so that it is clear that the witness is testifying about that particular document and no other. This is especially important if you subsequently need to impeach that witness with respect to his testimony about that document. It is also useful in refreshing recollections. Further, it will assist the grand jurors and eliminate ambiguity.

The practice regarding the handling of grand jury exhibits varies widely within the Division. Some attorneys attach the exhibit to the transcript of the witness who first discussed or identified it. The disadvantage of this method is that the staff must remember to which transcript a particular exhibit is attached. 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 are easily located and retrieved. Some staffs maintain the original exhibits in the document storage area and leave copies of each in the grand jury room or with the U.S. Attorney's office so the originals do not have to be transported to each session.

f. Chain of custody

Sometimes a subpoena recipient will produce a certain type of document which 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. If you are not able to establish the chain of custody and to account for all the time the materials were in your possession, such 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. Logs and the testimony of document custodians are the best safeguards.

5. Computerized document control

a. Description

The uses of computers for grand jury investigations vary with the type and size of the investigation. Lower volume document indexing applications can usually be performed on the Wang using data processing software. Larger document indexing applications and applications requiring numeric computations must usually be performed on mainframe computers at the Division's computer center. Data may be entered for both Wang and mainframe applications on the Wang by section clericals or at contractor facilities by contract keying vendors. Computerized data obtained in machine readable form from target companies must usually be processed on a mainframe computer.(122) Applications which require minimal retrieval and sorting capabilities can often be accomplished using Wang word processing sort utilities. Examples of recent grand jury support applications include the following:

1. Expense report databases into which information from expense reports, credit card receipts, diaries, and airline tickets are entered. Reports are generated showing the travel and expense history of particular firms or groups of firms.

2. Bid tabulation databases are created from information, (often retained in machine readable form), by states, municipalities, and federal agencies. Reports are generated showing the bidding history of particular firms or groups of firms.

3. Price analysis databases are created by entering invoice information from invoices, price lists, rate schedules or price quotation documents. Reports are generated showing the effective price charged by or paid by each company on a daily basis.

4. Document index databases are created containing bibliographic information, (date, author, recipients, source, document number, document type), and subject codes

and/or brief descriptions of content. Reports are generated to group all documents authored or received by a witness in date order, sorted by subject code, or, in any useful grouping and order.

5. Telephone databases are created from selected calls appearing on target company telephone bills. Reports are generated showing telephone activity between target phones numbers by date. As this is a particularly time-consuming analysis, it is recommended that bills first be processed for a highly suspect period for one company on a test basis. Only if it appears that further analysis will be fruitful should larger sets of telephone bills be processed.

6. Transcript digest databases are created to allow searching for subject and witness information.

7. Full text transcript databases are created from machine readable copies of testimony provided by court reporters who employ adaptable systems.

8. Screening of very large 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.

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

10. Enlargements of computer-generated graphics created on a Division plotter and of maps and subpoenaed documents have frequently been used to depict pricing and bidding information for grand jury and trial presentation. Enlargements and color copies are provided by the FBI graphics shop.

b. Advantages/caveats

The time/cost benefits of a computerized system are usually realized at the conclusion of a process or series of processes. For example, a manual system of 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. 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 design and implementation to ensure useful retrieval and to protect work-product claims should post-indictment discovery of a system be sought. 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. Application development and training will be more time-intensive for the first application utilized by a staff.

As with manual systems, overly ambitious projects may be completed too late to be useful. Attention must be given to planning resource requirements and realistic task schedules. Since a computerized system is dependent on hardware and software reliability, attention to backup and reporting procedures is required.

Use of a computerized system requires discipline and planning. While a system can provide retrieval of information not considered significant at the beginning of an investigation, (for example, all documents authored by James T. Smith), retrieval of those documents is precise only if all 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 efficiently manually or with combinations of manual and computerized systems.

c. Availability of Division and contract resources

The Information Systems Support Group (ISSG) is the office within the Division responsible for providing automated litigation support services. ISSG is an arm of the Executive Office of the Division; the group consists of three units: Litigation Support, Systems Support, and Office Automation. The three units work closely together to provide the Division automated litigation support services.

In addition to professional Government personnel, ISSG has access to additional assistance through various contracts for both systems and litigation support. Through these contracts, ISSG can staff projects with both professional personnel (systems analysts, paralegals, etc.) and clerical personnel (coders, keyers, etc.) on an "as needed" basis.

Antitrust Division Directive ATR 2850.1 outlines the formal procedures for obtaining litigation support from ISSG. The procedures are discussed in detail below.

The initial request for litigation support should be made to the chief of the Litigation Support Unit (LSU). The request should be made as soon as the staff has an idea of what types of information they will receive. Often, the initial request is simply a phone call informing ISSG that subpoenas have been served, and that ISSG support may be required to computerize sales or bid data, or to abstract documents, or to process data received in computer form. In some instances, ISSG advice is requested while the staff is drafting the subpoena, especially in those instances when data is requested in computer form. In other cases, the initial phone call is just a general discussion of "what the computer can do for you", and may result in the decision that automated support is not required. In sum, an attorney should contact the chief of LSU whenever he has any questions at all regarding litigation support for a particular investigation.

Once the initial phone call is made, and it is determined that support is warranted, the chief of LSU will assign a case manager to the investigation. The case manager, with the chief of LSU, will meet with the legal staff to discuss preliminary strategies and deadlines. The case manager acts as a "consultant", with the legal staff as his "client". The case manager is not just another paralegal assigned to the investigation. Each case manager is experienced in the logistical and technical problems normally associated with Division matters. It is the case manager's responsibility to determine the most cost efficient way to provide support for a particular investigation. The case manager works very closely with the legal staff to determine the methodology that best meets all budget and time constraints while providing a quality product. It is important to remember that ISSG has no "standard" way of providing assistance. Each investigation presents a different set of requirements and problems. For example, while it may be feasible for section personnel to computerize sales information for one case, it may not be feasible for another case because of workload or time constraints.

Initially, the case manager is responsible for preparing a "support plan". The plan should outline, among other things, the type of assistance required and whether Government or contract personnel, or both, will perform the required tasks. Once the case manager has prepared the support plan, the contact attorney will receive an "estimate memo" from the chief of LSU, which summarizes the support plan agreed upon and estimates the contract costs and Government time necessary to complete the project requirements known at the time. If the estimate is under $20,000 for contract costs and requires less than 320 hours of ISSG personnel time, section chief approval is sufficient. If the estimate exceeds either the contract cost or ISSG personnel time limit, the Director of Operations must approve the expenditure of resources. The preferred method of receiving Operations' approval is via a short memo from the section chief, with the estimate memo attached, justifying the expenditures. In most cases, work on the project does not begin until a copy of the estimate, with the appropriate signatures, has been returned to the chief of LSU. However, in those instances with severe time constraints, oral approval, or approval via Wang Office, is sufficient.

Once the project begins, the case manager is responsible for directing and monitoring all aspects of the litigation support process, and for keeping the legal staff apprised of potential problems which may delay completion of the project. The case manager is also responsible for keeping the legal staff apprised of the status of the project on a regular basis.

6. Access to Documents by Owner

The subpoenaed party should be accorded reasonable access to his own documents, although he 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.

Generally, the subpoenaed party is given the option, in the impounding order, of inspecting the documents in the staff's office or in the office of the United States Attorney for the district in which the grand jury is sitting. In addition, the impounding order usually

is worded so that a party producing documents is not precluded, at his request, from having the documents inspected by a third party.(123)

Sometimes a dispute may develop regarding whether or not a subpoena recipient was accorded reasonable access to his documents. To meet such allegations, it is advisable to keep a record of the date(s) and time(s) of such access. It is suggested that this record be maintained by the document custodian or document clerk in your office or by someone else who can, if 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 had to be denied at that time.

7. Return of Documents at Close of Investigation

Documents are usually retained by the Government until the purpose for which they were obtained has been accomplished. Documents lawfully obtained during a grand jury investigation are normally kept until the conclusion of any civil actions arising out of the grand jury proceedings. However, it should be noted that "documents, 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 has been completed."(124) 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 therefrom. Accordingly, the importance of obtaining an impounding order as discussed previously cannot be overemphasized.

Copies of subpoenaed documents may be made by the Government and retained.(125) However, if the subpoenaed documents were obtained by an illegally constituted grand jury, the Division may have to return the copies.(126)

Division policy is to return or destroy subpoenaed documents when they are no longer of use to the Division, even absent a specific request from the document submitter.(127) When the documents are to be returned, staff should contact counsel for the subpoena recipient and make appropriate arrangements. Some companies may not want the documents back and will authorize the staff to shred or otherwise destroy them. Obviously, this would save staff some time. However, most companies will want their documents back. Some will pick them up. Others will accept return by mail. The staff should keep accurate written records of the date and method of return for each submission.

F. Witnesses

1. Target/subject definition

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."(128)

2. Rights of witness

A grand jury witness does not have the same rights as someone who is arrested and then interrogated by the police. As a result, a grand jury witness does not have to be advised of his constitutional rights.

a. No right to refuse to answer questions

There is no right to refuse to answer questions unless the witness can assert the right against self-incrimination or establish that some other privilege applies.(129) A witness may also refuse to answer questions based on illegal electronic surveillance.(130)

b. No right to be advised of 5th Amendment (Miranda) rights

A witness has no recognized right to be advised of his 5th Amendment right not to be compelled to be a witness against himself. However, the practice of not advising a witness of his 5th Amendment privilege has not been expressly approved. The Supreme Court in United States v. Washington, 431 U.S. 181 (1977), and United States v. Mandujano, 425 U.S. 564 (1976), declined to decide whether a grand jury witness must have been warned prior to testifying of his 5th Amendment privilege against compulsory self-incrimination before such testimony can be used against the witness in a later prosecution for a substantive criminal offense.(131) In Mandujano, the Court took cognizance of the fact that federal prosecutors customarily warn "targets" of their 5th Amendment rights before grand jury questioning begins. Similarly, in Washington, the Court pointed to the fact that 5th Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting.(132)

Some lower courts appear to have developed the view that if the grand jury witness is a defendant or virtually a defendant (i.e., target or prosecutor has reason to believe he may be indicted), then warnings must be given.(133) But where the Government has not entertained the idea of bringing criminal charges against a witness, it has no duty to warn him.(134)

Based on the above, it is the policy of the Department of Justice to advise a witness of his 5th Amendment privilege, notwithstanding the lack of a clear Constitutional imperative. Division attorneys typically attach an "advice of rights" form to each witness subpoena and reiterate those rights before the grand jury.(135)

c. No right to be notified of status

A witness has no right to be told that he is a potential defendant or target of the investigation.(136) The prosecutor has no duty to tell a grand jury witness what evidence it

may have against him.(137) Again, however, it is the policy of the Department of Justice to advise a witness of his "target" status if such is the case.

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

A witness has no right to be advised that he may recant testimony and, thereby, avoid a perjury charge under 18 U.S.C. § 1623.(138)

e. No right to counsel in grand jury room

There is no right to have counsel present in the grand jury room.(139) A witness may leave the grand jury room to consult with counsel.(140) Such consultations should not be allowed to interfere unduly with the grand jury proceedings and may be appropriately regulated.(141)

f. No right to appointed counsel

The 6th Amendment right to counsel does not attach at the grand jury stage because no criminal proceedings have been instituted, nor do the Miranda rights of appointed counsel attach because the grand jury is not the equivalent of custodial police interrogation. Similarly, the Criminal Justice Act, 18 U.S.C. § 3006A, authorizing appointment and payment of counsel in indigent cases, does not provide for appointment of counsel for an indigent grand jury witness.

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

g. Newsmen have no special rights

There is no right, as a newsman, to refuse to testify concerning news sources.(142) However, the Department of Justice has adopted a policy which restricts the authority to issue subpoenas to newsmen. Departmental procedures are set forth in 28 C.F.R. 50.10.(143)

3. Department of Justice policy re: advice of rights and target status

The Department of Justice has an internal policy for advising grand jury witnesses of their 5th Amendment rights and of their status as "targets," if that is the case.(144) Under Department of Justice policy (U.S.A.M. 9-11.153), witnesses before the grand jury will generally be advised of the following items:

a. Nature of the inquiry

This information should not be provided if it would compromise the investigation. For example, if advising the witness that the grand jury is investigating a specific antitrust violation might jeopardize the case, the Division attorney may more generally state that the investigation concerns violations of federal antitrust law.

b. 5th Amendment rights

The witness is told that he may refuse to answer any question if a truthful answer would tend to incriminate him.

c. Anything said may be used against the witness

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

e. If appropriate, that they are a target of the investigation

f. Advice concerning counsel's potential or actual conflict of interest

It is the Division's policy, where appropriate, to advise the witness that he is entitled to retain counsel who does not suffer from a potential or actual conflict of interest.

g. Advice of rights attachment to subpoena

The rights set forth in Sections a.-d. above should be attached to the subpoena directing the witness to appear.(145) The witness should acknowledge on the record that he understands his rights. Although Division practice is to advise all witnesses who are expected to assert their 5th Amendment privileges of their rights, only targets need be specifically advised of their rights on the record.

4. Subpoenaing a subject or target

a. Department of Justice policy

The grand jury may subpoena and question a target or a subject.(146) However, because of possible prejudice in requiring a target to invoke the 5th Amendment before the grand jury, a target should not be subpoenaed unless the United States Attorney or appropriate Assistant Attorney General specifically approves.(147) Moreover, if both the target and his attorney signify in writing that the target will invoke his 5th Amendment privilege if called, then ordinarily, the target should be excused from testifying.(148)

b. Target letters

In most cases, the Division attorney should notify a target of an antitrust investigation a reasonable time prior to seeking an indictment to afford him an opportunity to testify before the grand jury. 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 5th Amendment privilege against self-incrimination explicitly prior to testifying; (iv) that, should he testify, the target will have to consent to a full examination under oath, to be conducted by attorneys for the Government and/or by the grand jurors themselves; and (v) that anything the target says before the grand jury may be used against him.(149)

The Government is under no obligation to notify a target prior to indictment and, of course, should not do so in the rare case 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 otherwise would be inconsistent with the ends of justice.(150)

c. Request by targets to testify

Although there is no legal duty to allow a target to testify before the grand jury,(151) as a matter of policy, any such person so requesting should be permitted to testify, unless it will cause delay or otherwise burden the grand jury.(152) Always advise the grand jury of this request.

If the target testifies, the record should reflect:

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

2. waiver of counsel, if not represented; and

3. the fact of the voluntary appearance.

d. Request by target to read written or prepared statements

The Division will 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' credibility, and cannot ordinarily be used to develop a case for perjury or false declaration, unless the statement is made under penalty of perjury.(153) Advise the grand jury of your position on any such request and seek their concurrence, for the decision whether to accommodate such a request is left to the sound discretion of the grand jury.(154)

5. Interviewing grand jury witnesses

a. Timing/subject matter

It is often useful to interview a grand jury witness prior to his testimony. Such an interview, however, must be voluntary. The witness' counsel often requests such an interview.

A grand jury witness interview is most helpful when the staff is not certain of the extent of

a witness' knowledge. For example, an estimator may be subpoenaed to testify about bidding on public utility projects, when in reality he bids only private work. An interview in such a situation may save time before the grand jury.

An interview's subject matter is left to the discretion of the staff. If a witness has an attorney present, the subject matter may be limited so that the true direction or targets of the grand jury are not disclosed. An attorney taking notes can recall much more than can a witness appearing by himself before the grand jury.

The staff may also want to confront a potential witness with incriminating evidence to prevent the witness from perjuring himself before the grand jury. There are drawbacks, however, to confronting a witness with evidence in an interview. If a witness has knowledge of such evidence before he appears before the grand jury, he will have time to fabricate a credible story. When revealing information to a witness in an interview, keep in mind that "forewarned is forearmed."

The timing of witness interviews must balance several considerations. On the 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. There are no savings of time, money or effort if the grand jury is assembled and the staff decides not to require an appearance before the grand jury. 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 it is thought the witness may not be candid. If a witness is inclined to testify falsely, questioning him cold before the grand jury may result in such obviously false testimony that he will be unattractive as a defense witness at any subsequent trial.

b. Cannot subpoena a witness for an interview

A witness should never be subpoenaed for an interview. "Neither 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."[(155)] Consistent with the case law, "request subpoenas" directing a witness to appear before the United States Attorney or his assistants are not permissible under departmental regulations.[(156)] Thus, while the execution of a subpoena ad testificandum may result in an interview with a witness, such an interview must be voluntary.

It is suggested that when a grand jury witness is interviewed, arrangements for the interview be memorialized in writing, showing the voluntary nature of the interview.[(157)] Otherwise, the staff may be faced with claims of grand jury abuse.[(158)]

6. Questioning witnesses

a. By attorney

Typically, one attorney is designated as a witness' lead examiner. Before substantive questions are posed, several preliminary matters should be addressed.

Initially, the witness should be sworn by the grand jury foreperson. If the staff wishes to make the witness more comfortable, the nature of the proceeding may be explained and the individuals present identified. While not legally mandated, the staff may choose to read a witness his rights. Thus, each witness may be advised: (1) that his testimony is given under oath and is being recorded; (2) that he can be prosecuted for perjury or for making false statements if he fails to testify truthfully; and when extra emphasis is desired, (3) that perjury is a felony punishable by up to five years imprisonment.

In the area of substantive questioning, preparation is vital. The staff should be fully aware of every document that bears on the testimony of a witness, although for tactical purposes, a witness may not be confronted with every document. The staff should also be familiar with prior grand jury testimony connecting the witness to the matters under investigation and any information about the witness gained from interviews or other sources.

The lead attorney should also develop an outline of areas that should be covered during the questioning with references to relevant documentary material. The outline should fully develop the witness' knowledge of the matters under investigation as well as all relevant implications and inferences to be drawn from the documents. The outline should further elicit information in a form that is both logical and easy for the grand jury to understand.(159) The outline is very important since the testimony may not follow the order anticipated by the attorney. Use of an outline will allow the attorney to pay close attention to the witness' answers instead of thinking about the next line of inquiry. A witness' answers may suggest certain avenues that demand immediate follow-up questions, regardless of whether they fit into the order of the outline. An outline enables the attorney to consider and respond to every answer given by the witness, while his checklist ensures that all desired areas are covered.

The attorney's questions should be clear and unambiguous and kept as short as possible. The questions should not be leading unless the questioning is in preliminary areas or the witness becomes evasive, recalcitrant or hostile. They should not be argumentative. Questions such as "explain," "go on," "describe the meeting" are best. There are several reasons for this. First, the witness cannot later claim he did not understand the question. Second, when used for impeachment later at trial, a witness' 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 lie. There is no doubt that many witnesses make slips when answering questions in narrative form.

Questioning must be detailed and thorough in an effort to obtain all of the witness' affirmative knowledge and to indicate the boundaries beyond which he is merely speculating. 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. This is particularly true regarding statements of conspiracy where the initial inclination may be to accept generalized admissions of culpability. For example, if a witness is testifying

concerning certain conspiratorial meetings, it is essential to obtain his recollections of the dates and locations, the names of the participants, the exact nature of the discussions, the specific decisions or agreements which were made, and the subsequent actions of the participants.

If a hostile witness provides affirmative information as to events, it is usually best to develop the details of these events to the fullest extent possible. If a hostile witness is not locked into who, what, when, why and where answers in his grand jury testimony, it is unlikely that those details can be developed for trial. The staff should know if a witness will not or cannot provide specifics before an indictment is sought.

There are some situations, however, where it is unwise to press a witness to give too many details to the grand jury. For example, in a long-term conspiracy, if each witness is pushed for dates, times and places of every meeting, inconsistencies and errors are inevitable. Thus, if a witness gives "good" testimony before the grand jury, it may be wise to delay asking specific questions until the witness has had his memory refreshed in an interview. This approach depends on how cooperative a witness is viewed. This is a judgment call that should be made by an experienced attorney.

When examining the witness, the attorney should have in mind three general objectives. The first and most important is to obtain from the witness all the affirmative knowledge that he 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 subsequently testifies for the defense in any case, the transcript can be used on cross-examination to confront any "improved memory" of the witness with his lack of memory before the grand jury. Third, the questioning should proceed in a manner whereby the attorney and the jury can evaluate the witness' credibility. When the attorney is satisfied that the witness has been questioned sufficiently so that his credibility or lack thereof is apparent, and the other two objectives have been satisfied, the witness should be excused. If a witness decides not to disclose what he knows, it will be rare that even the most skillful questioning will change his decision.

To this end, some of the best aids available to an examining attorney are documents. Initially, documents should be given grand jury exhibit numbers that the examining attorney should note for the record immediately prior to showing them to the witness. The examining attorney should then, as a preliminary matter, elicit from the witness sufficient identifying information concerning the document so that it is clear to the grand jury and for the record exactly what document is being discussed. For instance, in the case of a memorandum, the examining attorney may ask the witness the date of the document, the names of the company and individual who created the document, its general subject matter, and the identity of any addressees. 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 easily followed by both the witness and grand jurors as questioning progresses. Once these steps have been taken and the record is clear, substantive questioning can begin.[(160)]

The examining attorney should, if at all possible, have another staff attorney with him during grand jury sessions. This attorney should be present during all important witness interviews conducted by the examining attorney 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 attorneys should then agree on the procedures they will follow during the examination. It is suggested that the attorney not doing the examination closely follow the examining attorney's outline during questioning so that all areas are covered. The listening attorney should make notes of answers and of any areas not fully developed. He should then consult with the examining attorney either at the termination of an area of questioning or at a break to suggest additional or clarifying questions so that any gaps in the examination can be filled. The listening attorney should generally not interrupt the examining attorney's questions or pass notes to him during questioning as this can interfere with the flow of testimony and distract both the witness and the examining attorney.

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 his questions may form the basis for a later charge of perjury (18 U.S.C. § 1621) or false declarations (18 U.S.C. § 1623) and construct a record accordingly.(161)

Initially, all of the admonitions concerning proper questioning techniques apply to the examination of a witness who may be committing perjury. 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 has been misled, so the examining attorney may wish to define terminology again or ask the witness if he 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 in an effort to coax the witness into the commission of perjury or false statements as such conduct may be abuse of the grand jury process.(162)

b. By grand jurors

An attentive and interested grand jury will usually have questions for the witness. Whenever possible, questions by members of the grand jury should be deferred until the attorney's examination is completed.

There are at least two procedures that may be used in taking grand juror questions:

1. The attorney may allow the grand jurors to ask the questions without prior screening or discussion.

2. The attorney may ask the witness to leave the room, discuss the questions with the grand jury, and, if necessary, discuss why certain questions may be improper. Upon the witness' return, either the grand jurors or the attorney may pose the

question.

In some jurisdictions, it is the practice of the United States Attorney to prescreen grand juror's questions. The following considerations should be kept in mind when determining whether a question to a witness is appropriate:

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

b. whether the witness is hostile;

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

Even if not mandated by local practices, prescreening questions may be useful if a "runaway" grand jury is adversely affecting the record.

In many cases, the jurors ask excellent questions and their participation may aid the attorneys. Thus, the staff may also want to consider 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. Grand jurors have expressed their appreciation for this practice as a help in their understanding of the testimony. It also furthers their feeling of involvement.

7. Access by witness to counsel

An immunized witness has no clear-cut right to consult with counsel, but reasonable consultation is usually permitted and looked upon with approval by the courts.(163) In the opening remarks to the witness, the Government attorney will often tell the witness to ask for a brief recess if he has a need to consult with counsel. It is prudent to ask the court reporter to note the time the witness leaves the room and the time he returns in case these interruptions become disruptive of the grand jury process.

An immunized witness who insists upon leaving the grand jury room frequently and consulting 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.(164) 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 right is not clear.(165) Unreasonable consultations should not be permitted to obstruct the orderly questioning of the witness.

Alternatively, where there is abuse of the right to consult with counsel, the attorney in charge of the grand jury may simply decline to permit consultation. If the witness then refuses to answer questions, the attorney for the Government should take the matter before the court for a ruling on the propriety of the questions. As stated in People v. Ianiello, 21 N.Y.2d 418, 235 N.E.2d 439, 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 [civil] contempt proceedings.

Questioning a witness about his conversations with counsel to ensure that he has been apprised of rights and responsibilities is perfectly permissible.(166) Care should be taken not to examine the witness as to these conversations with counsel in a manner that would violate the witness' attorney-client privilege.

8. Note-Taking by witness

There are no cases addressing the question of whether a witness may take notes of the questions asked during his grand jury appearance. It is preferable to discourage a witness from taking notes for several reasons. First, it will lengthen and delay the grand jury proceedings if he takes notes on every question he is asked before answering. This delay is compounded if the witness also consults with his attorney before answering the question. Second, it undermines the secrecy of the grand jury proceedings. It allows the witness and his attorney to track more accurately the direction and progress of an investigation than if the witness only has his memory to rely on in reporting what occurred during his appearance before the grand jury. Because the witness and his attorney are under no secrecy obligation under Fed. R. Crim. P. 6(e), they are free to circulate notes to other defense attorneys and prospective witnesses. Finally, verbatim notes essentially provide a witness with a transcript of his testimony. Fed. R. Crim. P. 6(e)(1) provides that the court reporter and Government attorneys are the only people 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 is inconsistent with the majority of case law that denies a witness automatic access to a transcript of his own testimony before the grand jury.(167)

In attempting to prevent witness note-taking, it is best to consult with the U.S. Attorney's Office in the district where the grand jury sits to see if they have encountered this problem before going to the court. The best approach to use with most courts is to emphasize the delay the note-taking is causing and the potential for compromising the secrecy of the grand jury's proceedings.

9. Abuse of witness

a. Appropriate treatment of witnesses

Every witness should be treated firmly but with courtesy and consideration. Each witness should be examined as if his testimony and your examination will become public. In the event that it becomes necessary to cross-examine a witness vigorously, do not be abusive. Such abuse is improper, will not be productive and will alienate the grand jury.

Do not examine the witness as to his conversations with his counsel in a manner that would violate the witness' attorney-client privilege.(168) Unnecessary, repetitious questioning should be avoided. If the court determines that the purpose of repetitious questioning is to coax the witness into the commission of perjury or contempt of court, such conduct will be held an abuse of the grand jury process.(169)

Do not attempt to "trick" the witness by asking his reaction to testimony that does not exist, or by advising him that documents are available that demonstrate a certain point when, in fact, the documents do not exist or the documents do not support the examiner's characterization. Should the witness testify on the basis of such confrontation, he will be in a position to retract such testimony at trial. Further, the Government will be embarrassed if the court and jury become aware of the "trick."

b. What constitutes abuse?

Intimidation of the witness by actual threats of criminal proceedings (as distinguished from "cautions" or reminding him of his legal obligation to be truthful) is abusive conduct. Bullying a witness, that is, forcefully questioning in such a manner as to make it obvious that the witness should give certain answers, could constitute abuse. Tone or inflection of the examiner's voice, although not discoverable from the transcripts, can be abusive as well. Such conduct by the staff, if sufficiently excessive, may so bias the jury as to deny a later-indicted defendant the right of due process of law. It may also have the opposite effect of making the grand jury hostile to the Government.

c. Appearance of abuse

Care should be taken to avoid even the appearance of abuse. Motions attacking the grand jury on such grounds can only result in harm to the Government; for example, by delaying the investigation. Further, the court, in the exercise of its inherent power to supervise the grand jury, conceivably could halt the examination of any given witness who is allegedly being abused, or even the investigation itself, in a flagrant case. While the court might be reversed on appeal, such a ruling should be avoided.

Of course, the Government attorney should take care that he is not abused by the witness. Obnoxious, recalcitrant witnesses should be dealt with firmly and the Government attorney should make it clear that he is in control of the situation. While experience is the only true teacher, where appropriate, the Government lawyer should not be afraid to cut off the witness, admonish the witness or otherwise control the situation if the witness is not addressing the questions posed.

d. Effect of abuse

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 if the defendant can show he suffered actual prejudice because of the abuse of a witness before the grand jury.(170) 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.(171) However, the continued validity of these cases is highly suspect in light of 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.

An example of an unsuccessful motion alleging a denial of due process because of witness abuse is found in United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967). Bruzgo moved for dismissal of the indictment because the prosecuting attorney threatened a witness before the grand jury, who was associated with Bruzgo, with loss of United States citizenship, five years imprisonment and a $10,000 fine. The witness was also referred to as a "thief" and "racketeer" by the prosecuting attorney. The court stated:

> On this issue the case comes down to the point that the prosecutors improperly made threats or used abusive language toward a witness connected with defendant in his business and thereby influenced the grand jurors with such a bias toward the defendant that he was not afforded his constitutional right to be indicted by an "unbiased" grand jury.
>
> Without considering the full sweep of the term "unbiased" we turn to an evaluation of the evidence on this question. The grand jurors knew of Miss Williams' business connection with defendant. They also knew that she successfully invoked the 5th Amendment before them. They had evidence which it is not denied was sufficient to support an indictment. In these premises the threats could hardly have had independent material significance in the jurors' minds when they considered whether they wanted to indict defendant. Their "hissing" does not nullify their action in view of what they had properly before them . . .(172)

The thrust of the cases is that the courts will review grand jury transcripts provided that a sufficient preliminary showing of grand jury abuse has been made, to determine if non-defendant witnesses have been abused, but will not find the defendant's due process rights violated if there is sufficient evidence to support the indictment. Under Bank of Nova Scotia and Bruzgo, a defendant must show actual prejudice to prevail on a due process theory.

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, for example, 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. The court stated that "where a defendant can show actual prejudice resulting from the misconduct of the prosecutor before the grand jury, suppression would be proper."(173) The court also went on to say that:

> . . . dismissal of the indictment may be proper even where no actual

> prejudice has been shown, if there 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.(174)

Thus, under Serubo, an indictment may be dismissed based on witness abuse, even if there is 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. Such conduct should always be avoided.

10. Advising witness of inconsistent evidence

There is no obligation to advise the witness of evidence inconsistent with his testimony. However, it is sometimes a good practice to tell the witness of such evidence. The witness may not have understood the question and may take advantage of the opportunity to clarify his answer. Additionally, it is often helpful for the attorney to be able to weigh the merits of contradictory evidence at this stage of the investigation.

11. Opportunity to correct or recant testimony

A witness has no right to be advised that he 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.(175) A good practice, if the attorney suspects the witness may have perjured himself, is to ask the witness if he wishes to retract or correct any testimony and, if appropriate, to advise the witness of the contradictory evidence.

12. Advising witness of perjury statute

At the beginning of the session, it is the practice of the Antitrust Division to warn the witness about the danger of prosecution for perjury and false statements. It is sometimes appropriate to remind the witness that he is under oath and of the possible penalties for untruthful testimony. If the attorney is convinced that the witness is lying, consideration should be given to developing a record for possible indictment.

G. Exculpatory Evidence

1. Legal standards

No provision of the Constitution, statute, or court rule imposes a legal obligation on the prosecutor to present exculpatory evidence (substantial evidence which directly negates guilt) to the grand jury. The majority of courts that have addressed the question have found no obligation to present exculpatory evidence.(176) However, some courts have

suggested that in some circumstances a prosecutor has a limited duty to present exculpatory evidence to the grand jury, based on constitutional, legal or ethical principles.

In United States v. Page, 808 F.2d 723, 727-28 (10th Cir.), cert. denied, 482 U.S. 918 (1987), the court found that a prosecutor had a duty to disclose evidence that clearly negates the guilt of the target of the grand jury investigation.(177) The Second Circuit, in United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979), recognized that there is no obligation to present such evidence, but advised that prosecutors should make exculpatory evidence known to the grand jury, citing ABA Project on Standards for Criminal Justice - The Prosecution Function, § 3.6, pp. 90-91.(178) More recently, the court in United States v. Dorfman, 532 F. Supp. 1118, 1131-33 (N.D. Ill. 1981), dismissed an indictment, holding that a prosecutor has a constitutional duty to present evidence that clearly negates guilt. At least one panel of the Seventh Circuit has expressed its concurrence with the principle enunciated in Dorfman.(179)

2. Department of Justice policy

Department of Justice policy regarding the presentation of exculpatory evidence is contained in U.S.A.M. 9-11.233 which states:

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

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

Division attorneys should carefully consider whether the grand jury should be advised of inconsistent statements made by material witnesses. If appropriate, the grand jury should be provided with the substance of such statements. The attorney should also evaluate any statements made by the defendant to determine if they are exculpatory.

3. Requests by subjects or targets to testify or present evidence to the grand jury

In antitrust cases, where it is common practice to advise individuals of their status as targets of the grand jury investigation, a defendant or defense counsel may request an opportunity to have the target testify before the grand jury, have a third party testify, or have a statement or other written information presented to the grand jury. While the prosecutor has no legal obligation to permit this(180), such opportunities may be granted in some circumstances so as to obviate any appearance of unfairness that a refusal would create. Target appearances may allow the prosecutor to preview a potential defense case, as well.

As a matter of policy, any subject or target who requests the opportunity to personally

testify should be permitted to do so, unless it will cause delay or otherwise burden the grand jury.(181) The grand jury should always be informed of such a request.(182)

Requests by a target to submit a written statement to the grand jury should be opposed. It may be wise to advise the grand jury of such a request and the prosecutor's reasons for opposing it.(183)

If a subject or target wants to have the testimony of a third party presented to the grand jury and the potential testimony is arguably relevant to the grand jury's inquiry, the prosecutor should attempt to obtain a proffer of the testimony. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either a first-stage adversary proceeding, or the arbiter of guilt or innocence.(184)

H. Grand Jury Abuse

1. Nature of the problem and its effect

A grand jury possesses extraordinary investigative powers that are dependent on and supervised by the prosecuting attorney. Prosecutors should not abuse this serious responsibility or otherwise engage in prosecutorial misconduct before the grand jury. Attorneys should not violate the Federal Rules of Criminal Procedure, the local rules nor the case law as it applies to grand jury practice. Attorneys should also follow all appropriate Division and Department guidelines, although, failure to do so does not create any enforceable rights for a defendant or putative defendant.(185) Further, to the extent possible, attorneys should attempt to avoid even the appearance of impropriety before the grand jury. Given the wide range of permissible conduct that defendants allege as an abuse, the latter is often impossible.

As a general matter, the Department of Justice tries to maintain the highest standards for its attorneys and, therefore, its attorneys should abide by all of the appropriate rules. More specifically, misconduct before the grand jury can adversely affect the conduct of the grand jury and any subsequent prosecution. Although there is a strong presumption of regularity surrounding a grand jury proceeding,(186) sufficiently outrageous misconduct may lead a court to dismiss an indictment on due process grounds(187) or as an exercise of its supervisory powers.(188) Even if the 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. Other sanctions used by the courts to remedy grand jury abuse include: quashing subpoenas or issuing protective orders,(189) suppressing grand jury testimony,(190) expunging prejudicial language from indictments,(191) and recommending disciplinary actions against the prosecutor.(192) In any event, engaging in abusive conduct inevitably leads to defending abuse motions and puts a prosecutor's credibility in issue at the outset of a case.

2. 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, the general rule of secrecy of grand jury proceedings, particularly while an investigation is ongoing, makes courts reluctant to interfere with grand jury proceedings. 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 on occasion dismissed indictments on either due process grounds or as an exercise of their supervisory powers.

a. 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.(193) A very few courts have dismissed indictments on due process grounds because of the knowing use of perjured testimony.(194) However, the weight of authority in this area is that dismissal, if justified at all, is only justified in flagrant cases.(195) As discussed more fully below, the Supreme Court's decision in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), has, at a minimum, established that a due process claim requires a showing that the alleged abuse "substantially influenced the grand jury's decision to indict."(196)

b. Supervisory powers

On occasion, courts have dismissed an indictment based on grand jury abuse as an exercise of the court's inherent supervisory powers. Courts have reasoned that, as inherent supervisor of the grand jury process, they are empowered to 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.(197)

Courts have exercised their supervisory power to dismiss indictments based on grand jury abuse to remedy the abuse, to preserve the integrity of the grand jury and to deter similar conduct in the future.(198) Courts have dismissed indictments or reversed convictions where the prosecutor's conduct before the grand jury was flagrant and extremely prejudicial;(199) where the particular misconduct had become repetitive and entrenched;(200) where the result of the misconduct was unequal treatment of the accused;(201) or where there was a need to formulate procedural rules governing proper prosecutorial conduct.(202)

The case law noted above has always been suspect because there is no clear authority for the courts' exercise of their supervisory powers and because grand juries are inherently independent bodies. This case law has become even more suspect in light of the decision in Bank of Nova Scotia in which the Supreme Court required a showing of actual prejudice to the defendant before an indictment could be dismissed on non-constitutional grounds.(203)

3. 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. The Supreme Court has been unwilling to subject grand jury proceedings with the delay and disruption that would be the inevitable result of judicial review.

Typical of this attitude are the Supreme Court's decisions in Costello v. United States, 350 U.S. 359 (1956), and United States v. Calandra, 414 U.S. 338 (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."(204) In Calandra, the Supreme Court declined to apply the 4th 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.'"(205) 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.

More recently, the Supreme Court has further curtailed a defendant's or putative defendant's ability to challenge prosecutorial misconduct before the grand jury. In United States v. Mechanik, 475 U.S. 66 (1986), the Supreme 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 (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 (1988). In Bank of Nova Scotia, the district court

dismissed the indictment because of a 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, for a non-constitutional grand jury challenge, a dismissal of an indictment is appropriate only if the violation "substantially influenced the grand jury's decision to indict." In other words, the Supreme Court established a requirement of actual prejudice before dismissal could be considered an appropriate remedy.

The combined effect of the Supreme Court cases noted above is to severely limit a defendant's ability to attack the validity of an indictment, valid on its face, that is returned by a legally constituted grand jury.

4. Typical allegations of misconduct

Although the case law severely limits a defendant's ability to successfully attack an indictment based on a prosecutor's misconduct before the grand jury, such attacks are frequently made based either on true misconduct or allegations of misconduct. The following is a listing of typical allegations of misconduct. Additional information on each allegation can be found elsewhere in this manual. Other valuable sources of information in this area include: Criminal Antitrust Litigation Manual, American Bar Association, 1983; Grand Jury Law and Practice, Beale and Bryson, Ch. 10; and Moore's Federal Practice, Volume 8, ¶ 6.04.

a. Allegations relating to nature of evidence

1) hearsay evidence

2) use of perjured testimony

3) lack of exculpatory evidence

4) use of inadmissible evidence

5) illegal use of recorded communications

6) use of privileged information

b. Allegations relating to conduct of prosecutor

1) abusing witnesses

2) presenting summaries of evidence

3) improperly instructing grand jury in the law

4) improperly inflaming or influencing the grand jury

5) presenting a signed indictment to the grand jury

6) stating personal opinion

7) use of grand jury agents

8) having an unauthorized person in the grand jury room

9) improperly disclosing grand jury information

c. Allegations involving abuse of the grand jury process

1) use of grand jury for a civil investigation

2) delay in presenting indictment or selective prosecution

3) obtaining evidence against defendants that have already been indicted

5. Preventative Measures

The most important practice to follow to avoid allegations of prosecutorial misconduct is for the prosecuting attorney to be fully aware of the rules in the jurisdiction in which he is practicing and conforming his behavior to those rules. Further, as discussed in § F.9., supra, witnesses should be treated firmly but politely. They should never be abused, harassed or improperly influenced.

Limiting instructions should be liberally used. 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. In those jurisdictions that have special evidentiary requirements, special instructions to the grand jury should be used. For example, in those jurisdictions that follow Estepa, the grand jurors should be informed whenever they are receiving hearsay evidence and should be instructed that they have the right to hear live witnesses.

Special care should be exercised as to any local requirements regarding exculpatory evidence. Where appropriate, it should be solicited from defense counsel and presented to the grand jury.

Finally, if an attorney becomes aware of significant prosecutorial misconduct that would not prejudice a new grand jury, he should consider the possibility of dismissing the pending indictment and seeking a superceding indictment. This will avoid a motion to dismiss and a possible issue on appeal. 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.(206)

FOOTNOTES

1. These details will vary by district, requiring careful coordination with the clerk, the marshal, the court, and the United States Attorney.

2. Obtaining a list of the names, addresses and telephone numbers of the grand jurors is useful, if that is permissible in the district.

3. Although not required by statute or case law, at the beginning of each session and each time the grand jury reconvenes, the foreperson should state on the record that only the authorized jurors, Government attorneys and reporters are present, and that a quorum of grand jurors is present.

4. Staff 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.

5. See Chapter I § C.4.

6. A grand juror taking notes and deliberately releasing them would violate grand jury secrecy and be subject to punishment by contempt. However, such a breach of secrecy should not invalidate any subsequent indictment. Cf. United States v. Thomas, 593 F.2d 615 (5th Cir.), modified, 604 F.2d 450 (5th Cir. 1979), cert. denied, 449 U.S. 841 (1980); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966).

7. U.S.A.M. 9-11.020.

8. See § C.15., infra.

9. See § C.11., infra.

10. Stirone v. United States, 361 U.S. 212, 218 (1960).

11. United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

12. See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

13. See United States v. Linetsky, 533 F.2d 192, 200 (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).

14. See United States v. Civella, 666 F.2d 1122, 1127 (8th Cir. 1981).

15. United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983); United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979); United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983); United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

16. United States v. Linton, 502 F. Supp. 861 (D. Nev. 1980).

17. United States v. Ogden, 703 F.2d at 636-37.

18. United States v. Bettencourt, 614 F.2d 214 (9th Cir. 1980).

19. United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979).

20. See § D.2., infra.

21. See United States v. Bari, 750 F.2d 1169 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985).

22. U.S.A.M. 9-11.232.

23. See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

24. 235 F. at 791-92; see also 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. Birdman, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957); United States v. Heffington, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983).

25. United States v. Heffington, 682 F.2d at 1080; see also United States v. Al Mudarris, 695 F.2d 1182 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983).

26. See Costello v. United States, 350 U.S. 359 (1956); United States v. Schlesinger, 598 F.2d 722 (2d Cir.), cert. denied, 440 U.S. 880 (1979); United States v. Litton Sys., Inc., 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Brown, 574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Long, 706 F.2d 1044 (9th Cir. 1983).

27. See 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. Universal Mfg. Co., 525 F.2d 808 (8th Cir. 1975).

28. See United States v. Hodge, 496 F.2d 87 (5th Cir. 1974). But see United States v. Schlesinger, 598 F.2d supra; United States v. Birdman, 602 F.2d supra.

29. United States v. Long, 706 F.2d at 1050.

30. See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

31. 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 (9th Cir. 1981).

32. See United States v. Civella, 666 F.2d 1122, 1129-30 (8th Cir. 1981).

33. See 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. Cederquist, 641 F.2d at 1353; United States v. Levine, 457 F.2d 1186 (10th Cir. 1972); United States v. Brown, 684

F.2d 841 (11th Cir. 1982); United States v. Climatemp, 482 F. Supp. 376 (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).

34. See United States v. Hogan, 712 F.2d 757 (2d Cir. 1983).

35. See United States v. Cathey, 591 F.2d 268 (5th Cir. 1979); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983).

36. See United States v. Civella, 666 F.2d 1122 (8th Cir. 1981), United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

37. See Chapter II § G., Rule 6(e)(3)(iii); United States v. Contenti, 735 F.2d 628 (1st Cir. 1984); In re Grand Jury Proceedings (Sutton), 658 F.2d 782 (10th Cir. 1981); United States v. Kabbaby, 672 F.2d 857 (11th Cir. 1982).

38. See United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Al Mudarris, 695 F.2d 1182, 1185-86 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

39. See United States v. West, 549 F.2d 545 (8th Cir. 1977).

40. See United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982).

41. See §§ C.7., supra and D.2., infra.

42. See United States v. Schlesinger, 598 F.2d 722, 726 (2d Cir.), cert. denied, 440 U.S. 880 (1979); United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

43. See United States v. Blitz, 533 F.2d 1329 (2d Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Wander, 601 F.2d 1251 (3d Cir. 1979); United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970).

44. See United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

45. United States v. Kilpatrick, 821 F.2d 1456, 1467-68 (10th Cir. 1987), aff'd sub nom. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

46. See Federal Grand Jury Practice, Narcotics and Dangerous Drug Section monograph Chapter I § F.2, p. 17.

47. See United States v. Kington, 801 F.2d 733 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

48. See United States v. Schlesinger, 598 F.2d supra; United States v. Litton Sys., Inc., 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Brown,

574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Al Mudarris, 695 F.2d at 1185-86; United States v. Kilpatrick, 821 F.2d at 1470.

49. See United States v. Long, 706 F.2d 1044 (9th Cir. 1983); United States v. Kouba, 632 F. Supp. 937 (D.N.D. 1986).

50. See 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 (D. Md. 1983).

51. See United States v. Schlesinger, 598 F.2d at 725; United States v. Al Mudarris, 695 F.2d at 1186.

52. See United States v. Samango, 607 F.2d 877 (9th Cir. 1979).

53. See United States v. Wells, 163 F. 313 (D. Idaho 1908).

54. See United States v. Al Mudarris, 695 F.2d 1182, 1187-88 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

55. See United States v. McKenzie, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983).

56. United States v. Cathey, 591 F.2d 268, 273-74 (5th Cir. 1979); see also United States v. Al Mudarris, 695 F.2d at 1185.

57. See also United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); and ABA Code of Professional Responsibility (1975) Disciplinary Rule 5-101(b) and Ethical Consideration 5-9.

58. See § I., infra.

59. See United States v. Civella, 666 F.2d 1122 (8th Cir. 1981).

60. See United States v. Blitz, 533 F.2d 1329 (2d Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Heffington, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983).

61. See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

62. See United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987). But see United States v. Martin, 561 F.2d 135 (8th Cir. 1977).

63. See United States v. Blitz, 533 F.2d at 1344.

64. See United States v. Venegas, 800 F.2d 868 (9th Cir. 1986), cert. denied, 479 U.S. 1100 (1987).

65. See United States v. Dionisio, 410 U.S. 1, 15 (1972); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 214 (3d Cir. 1981); United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); In re Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977).

66. 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.

67. See United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956).

68. See United States v. Calandra, 414 U.S. 338, 349 (1974).

69. See Lawn v. United States, 355 U.S. 339 (1958); United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 214 (3d Cir. 1981); United States v. Wilson, 732 F.2d 404, 409 (5th Cir.), cert. denied, 469 U.S. 1099 (1984).

70. See also United States v. Ciambrone, 601 F.2d at 622; United States v. Wilson, 732 F.2d at 409; United States v. Lame, 716 F.2d 515, 518 (8th Cir. 1983); United States v. Reed, 726 F.2d 570, 579 (9th Cir.), cert. denied, 469 U.S. 871 (1984).

71. 414 U.S. at 344-45; see also Costello v. United States, 350 U.S. 359, 362 (1956); United States v. Friedland, 444 F.2d 710, 713 (1st Cir. 1971); United States v. Wilson, 732 F.2d at 409; In re Grand Jury Investigation, 696 F.2d 449, 450 (6th Cir. 1982); United States v. Malsom, 779 F.2d 1228, 1241 (7th Cir. 1985); United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983); United States v. Tham, 665 F.2d 855, 863 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); United States v. Beery, 678 F.2d 856, 859 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985); United States v. DiBernardo, 775 F.2d 1470, 1478 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

72. See § D.2.

73. See § D.3.

74. See United States v. DiBernardo, 775 F.2d supra.

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

76. See also United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974); United States v. Ginsberg, 758 F.2d 823 (2d Cir. 1985); United States v. Steele, 685 F.2d 793 (3d Cir.), cert. denied, 459 U.S. 908 (1982); United States v. Alexander, 789 F.2d 1046 (4th Cir. 1986), United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1248 (5th Cir.), cert. denied, 414 U.S. 832 (1973); United States v. Markey, 693 F.2d 594 (6th Cir. 1982); United States v. Murphy, 768 F.2d 1518, 1533-34 (7th Cir. 1985),

cert. denied, 475 U.S. 1012 (1986); United States v. Boykin, 679 F.2d 1240 (8th Cir. 1982); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Rogers, 652 F.2d 972, 975 (10th Cir. 1981).

77. See United States v. Jett, 491 F.2d at 1081-82; United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973); United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

78. See United States v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967).

79. 471 F.2d at 1136.

80. Id.

81. Id. at 1137.

82. United States v. Bari, 750 F.2d 1169 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985).

83. See United States v. Rodriguez-Ramos, 704 F.2d 17 (1st Cir.), cert. denied, 463 U.S. 1209 (1983); United States v. Wander, 601 F.2d 1251 (3d Cir. 1979); United States v. Murphy, 768 F.2d at 1533-34; United States v. Rogers, 652 F.2d at 975.

84. See United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977).

85. See United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

86. See United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Al Mudarris, 695 F.2d at 1185.

87. United States v. Markey, 693 F.2d at 596.

88. U.S.A.M. 9-11.232.

89. See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Johnson, 419 F.2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); United States v. Adamo, 742 F.2d 927, 939 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Roth, 777 F.2d 1200 (7th Cir. 1985); United States v. Levine, 700 F.2d 1176 (8th Cir. 1983); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Gutierrez, 696 F.2d 753, 754-55 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983); United States v. DiBernardo, 775 F.2d 1470 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

90. See Lawn v. United States, 355 U.S. 339 (1958); United States v. Ocanas, 628 F.2d 353, 357 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981); In re Grand Jury Investigation, 696 F.2d 449 (6th Cir. 1982); United States v. Roth, 777 F.2d at 1203; United States v. Fultz, 602 F.2d 830, 833 (8th Cir. 1979).

91. See also United States v. Blue, 384 U.S. 251 (1966); United States v. Busk, 730 F.2d 129 (3d Cir. 1984); United States v. Ocanas, 628 F.2d at 357; United States v. Fultz, 602 F.2d at 833.

92. United States v. Calandra, 414 U.S. at 350.

93. See United States v. Blue, 384 U.S. 251 (1966).

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

95. See In re Grand Jury Investigation, 696 F.2d supra.

96. See United States v. Morano, 697 F.2d 923 (11th Cir. 1983).

97. See United States v. Levine, 700 F.2d supra.

98. See Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963); United States v. Adamo, 742 F.2d at 939-42; United States v. Roth, 777 F.2d 1200, 1203-04 (7th Cir. 1985).

99. See United States v. Roth, 777 F.2d at 1203-04; United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978).

100. See United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); In re Grand Jury Investigation, 696 F.2d 449 (6th Cir. 1982); United States v. Garrett, 797 F.2d 656 (8th Cir. 1986).

101. U.S.A.M. 9-11.231.

102. See U.S.A.M. 9-7.000, et seq.

103. See Gelbard v. United States, 408 U.S. 41, 54 (1972).

104. See United States v. Brodson, 528 F.2d 214 (7th Cir. 1975).

105. See also United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); In re Grand Jury Matter (Doe), 798 F.2d 91 (3d Cir. 1986); In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. Unit B Nov. 1981), cert. denied, 455 U.S. 1000 (1982); In re Grand Jury Proceedings, 773 F.2d 1071 (9th Cir. 1985).

106. See United States v. James, 609 F.2d 36, 51 (2d Cir. 1979), cert. denied, 445

U.S. 905 (1980); United States v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977), cert. denied, 444 U.S. 864 (1979); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); In re Baker, 680 F.2d 721, 722 (11th Cir. 1982).

107. See United States v. Yanagita, 552 F.2d supra; In re Grand Jury Proceedings, 664 F.2d at 427; In re DeMonte, 667 F.2d 590, 599 (7th Cir. 1981); In re Grand Jury Proceedings, 773 F.2d at 1072-73; United States v. Alvillar, 575 F.2d 1316 (10th Cir. 1978).

108. U.S.A.M. 9-7.410.

109. United States v. White, 401 U.S. 745 (1971); United States v. Haimowitz, 725 F.2d 1561, 1582 (11th Cir.), cert. denied, 725 U.S. 1561 (1984).

110. See Appendix IV-1 for an example of an application for an impounding order.

111. In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

112. United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

113. United States v. United States Dist. Court, 283 F.2d at 720.

114. See, e.g., In re Petroleum Indus. Investigation, 152 F. Supp. 646 (E.D. Va. 1957).

115. See In re Mesta Mach. Co., 184 F.2d 375 (3d Cir. 1950); In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

116. This would in effect remove the documents from the court's jurisdiction. An impounding order should always be obtained in such cases at the initiation of the investigation.

117. See In re Grand Jury Proceedings, 1973 Trade Cas. (CCH) ¶ 74,389 (S.D. Cal.), where Chief Judge Schwartz denied a motion of respondent to impound documents in the custody of the Clerk of Court and granted the Government's motion permitting Government counsel to remove the grand jury documents to their Los Angeles office. In response to respondent's demand, Government counsel agreed to keep a record of every grand jury document sent outside the Los Angeles Field Office.

118. See Ch. II § B.2. for a more detailed discussion of the application of Fed. R. Crim. P. 6(e) to subpoenaed documents.

119. Obviously, all modifications or compromises must immediately be reduced to writing.

120. See Ch. III § E.1. for a discussion of the relative merits of production directly to the grand jury or to the staff and the contents of the compliance affidavit.

121. This presupposes that the documents are not identified and numbered by the party submitting them. That is frequently done at the request of the staff.

122. Staff members from the 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. ISSG should be contacted whenever it is anticipated that machine readable data will be included within the scope of a subpoena.

123. See § E.1.e., supra.

124. In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945); In re Petroleum Indus. Investigation, 152 F. Supp. 646 (E.D. Va. 1957).

125. In re Petroleum Indus. Investigation, 152 F. Supp. supra; Maryland and Virginia Milk Producers Ass'n v. United States, 250 F.2d 425 (D.C. Cir. 1957).

126. United States v. Wallace & Tiernan Co., 336 U.S. 793, 800 (1949).

127. Division Directive ATR 2710.1.

128. U.S.A.M. 9-11.150.

129. United States v. Mandujano, 425 U.S. 564, 581 (1976) (grand jury witness has absolute duty to answer all questions, subject only to a valid 5th Amendment claim).

130. See § D.4., supra.

131. A grand jury witness who was not advised of his 5th Amendment right may, however, have his grand jury testimony used against him in a subsequent perjury prosecution. United States v. Wong, 431 U.S. 174 (1977).

132. 431 U.S. at 188.

133. United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967).

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

135. See § G.3., infra.

136. United States v. Washington, 431 U.S. 181 (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 5th Amendment privilege but not advised of target status).

137. See United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

138. See United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

139. Fed. R. Crim. P. 6(d).

140. See United States v. Mandujano, 425 U.S. 564, 606 (1976) (Brennan, J. concurring) (may consult with attorney at will).

141. In re Tierney, 465 F.2d 806, 810 (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); In re Lowry, 713 F.2d 616 (11th Cir. 1983) (no right to consult after each question); United States v. Soto, 574 F. Supp. 986 (D. Conn. 1983) (immunized witness may leave grand jury room every 20 minutes to consult with counsel for ten minutes, although witness may write down neither questions nor his answers to them).

142. Branzburg v. Hayes, 408 U.S. 665 (1972).

143. See Ch. III § A.2.l. and U.S.A.M. 9-2.161; see also ATD Manual III-82.

144. Division attorneys should also check the local rules in the district where the grand jury is sitting and consult with the U.S. Attorney about any local policies.

145. See Appendix IV-2 for a sample advice of rights attachment.

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

147. U.S.A.M. 9-11.151.

148. See Ch. V § D.3.

149. See Appendix IV-3 for a sample target letter; see also ATD Manual III-0.

150. U.S.A.M. 9-11.163.

151. See United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975); United States v. Leverage Funding Sys., Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

152. U.S.A.M. 9-11.152.

153. See 18 U.S.C. §§ 1621, 1623.

154. U.S.A.M. 9-11.152.

155. United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); see also Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954) (the statutes do not recognize the United States Attorney's Office as a proper substitute for the grand jury room).

156. U.S.A.M. 1-14.111.

157. See Ch. V § H.

158. See, e.g., Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962).

159. At this stage, 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 for such will have to be clearly defined so that both the witness and the grand jury understand the examination.

160. It is extremely helpful in fully developing grand jury testimony to interview cooperating witnesses beforehand and to review with them not only their expected testimony, but also the documents they will be asked to identify. In cases where a number of documents will be used, they should be reviewed with the witness in the order in which the examining attorney intends to use them during questioning. Such a procedure not only allows the witness to understand the interrelationship of the documents and the full import of the attorney's questions concerning them, but frequently reassures the witness concerning his appearance so that the testimony is more coherent and complete.

161. For elements of these offenses, see Ch. VIII.

162. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

163. 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 re Lowry, 713 F.2d 616 (11th Cir. 1983) (witness has no right to disrupt grand jury to consult with counsel after every question).

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

165. 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).

166. United States v. E.H. Koester Bakery Co., 344 F. Supp. 377 (D. Md. 1971).

167. See Ch. II § E.1.

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

169. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

170. United States v. Serubo, 604 F.2d 807, 816-17 (3d Cir. 1979).

171. Id. See also United States v. DiGregorio, 605 F.2d 1184, 1189 (1st Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Estepa, 471 F.2d 1132, 1136-37 (2d Cir. 1972).

172. 373 F.2d at 386; see also Beck v. Washington, 369 U.S. 541, 555 (1962); Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir.), cert. denied, 373 U.S. 904 (1963).

173. 604 F.2d at 817.

174. Id.

175. United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

176. See United States v. Wilson, 798 F.2d 509 (1st Cir. 1986); United States v. Adamo, 742 F.2d 927, 936-38 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Al Mudarris, 695 F.2d 1182, 1185-86 (9th Cir.), cert. denied, 461 U.S. 932 (1983); see also United States v. Hyder, 732 F.2d 841, 844-45 (11th Cir. 1984).

177. See also United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

178. See also United States v. Raineri, 521 F. Supp. 16, 19 (W.D. Wis. 1980) (possible duty to present evidence that clearly negates guilt); United States v. Boffa, 89 F.R.D. 523, 530 (D. Del. 1980) (citing Ciambrone, prosecutor may be obligated to make known substantial evidence negating guilt).

179. See United States v. Flomenhoft, 714 F.2d at 712; see also United States v. Prevor, 583 F. Supp. 259, 261 (D.P.R. 1984).

180. United States v. Leverage Funding Sys., Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975).

181. U.S.A.M. 9-11.152.

182. See § F.4. for a more detailed discussion of procedures to be followed when a target testifies.

183. See U.S.A.M. 9-11.262

184. See, e.g., United States v. Calandra, 414 U.S. 338, 343 (1974).

185. United States v. Caceres, 440 U.S. 741 (1979).

186. See In re Inzirillo, 542 F.2d 90, 91 (1st Cir. 1976); In re Grand Jury Proceedings, Johanson, 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.), cert. denied, 458 U.S. 1107 (1982); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 430 U.S. 969 (1977).

187. See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

188. See United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

189. In re Grand Jury Subpoena Duces Tecum (Model Magazine), 829 F.2d 1291 (4th Cir. 1987), cert. denied, U.S. (1990).

190. United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909 (1976).

191. United States v. Briggs, 514 F.2d 794 (5th Cir. 1975).

192. United States v. Serubo, 604 F.2d 807 (3d Cir. 1979).

193. See Bracy v. United States, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., on application for stay).

194. See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

195. See United States v. Richman, 600 F.2d 286 (1st Cir. 1979) (prosecutorial negligence in not knowing of false testimony is insufficient for dismissal); United States v. Cathey, 591 F.2d 268 (5th Cir. 1979) (use of perjured testimony does not automatically require dismissal); United States v. Kennedy, 564 F.2d 1329 (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 (D.C. Cir. 1962) (Burger, J.) (perjury does not require dismissal if sufficient competent evidence is presented), cert. denied, 373 U.S. 946 (1963).

196. 487 U.S. at 256.

197. United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

198. See United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979).

199. See United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); Brown v. United States, 245 F.2d 549 (8th Cir. 1957); United States v. Samango, 607 F.2d supra.

200. 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).

201. See United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909

(1976).

202. See United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

203. 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 does 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").

204. 350 U.S. at 363.

205. 414 U.S. at 350.

206. United States v. Serubo, 604 F.2d 807, 818-19 (3d Cir. 1979).