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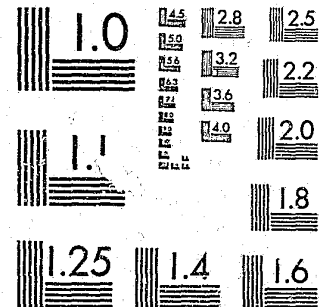

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Criminal Division

Federal Grand Jury Practice

Narcotic and Dangerous Drug Section Monograph

Volume I

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FEDERAL GRAND JURY PRACTICE MANUAL

Volume I

NCJRS

JUN 14 1984

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Class of 1983

March, 1983

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FEDERAL GRAND JURY PRACTICE MANUAL

Volume II

(2)

Vols 1 & 2

U.S. Department of Justice
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FOREWORD

The legal terrain of federal grand jury practice is changing rapidly. The diminished reluctance of the federal courts to look beyond the face of the indictment and their willingness to entertain challenges to government practices before federal grand juries have spawned judicial rulings in areas of grand jury practice that have heretofore not been the subject of judicial review. Although these rulings have not diminished the powers of the federal grand jury, there is sufficient judicial interest in the grand jury practice of federal prosecutors as expressed in these rulings to justify a continuing effort to standardize and refine our grand jury procedures. It is this purpose that prompts our publication of the Federal Grand Jury Practice Manual.

The Manual is an edited collection of materials that have been prepared in recent years as lecture outlines, office manuals, and guidelines of suggested practices on the subject of grand jury practice. The reader will find many statements that forcefully advocate a particular practice be followed. When there is not citation to a judicial opinion, the United States Attorneys' Manual, or some authoritative source from the United States Department of Justice, the suggested practice is advisory only and is not a Department policy. However, we have reserved the right to edit any suggested practices of questionable merit. If we have erred in this regard, the error is completely ours and not that of the original authors.

Edward S.G. Dennis, Jr., Chief
Narcotic and Dangerous Drug Section
Criminal Division
U.S. Department of Justice

PREFACE

The Federal Grand Jury Practice Manual has been compiled from the United States Attorneys' Manual and other outlines and materials in order to have a single sourcebook with forms, procedures and discussion of some of the issues pertaining to federal grand jury practice. This Manual is not a statement of policy of the Criminal Division or the Tax Division of the Department of Justice. Users of the Manual should refer to the United States Attorneys' Manual and to appropriate offices of the Department of Justice for matters of policy regarding grand jury practice.

We acknowledge the contributions made by the lawyers in the Attorney General's Advocacy Institute, the Criminal Division, Tax Division and United States Attorneys' Offices who wrote some of the material which we have included. We specifically acknowledge the contributions made by the United States Attorneys' Offices in the Districts of Maryland, Northern Illinois, Central and Southern California, Eastern Pennsylvania, and Southern New York, for material which lawyers from those offices have prepared in the past and for some of the forms which we have included. There are a number of people who should be specifically mentioned as having played a part in this Manual. We acknowledge Richard E. Carter, Director of the Office of Legal Education and the Attorney General's Advocacy Institute. During the past several years, their excellent course on federal grand jury practice has occasioned the preparation of some of the materials which we have included. We also acknowledge William B. Lytton, First Assistant United States Attorney in Philadelphia, whose materials and lectures have played a part in the success of that effort. Additionally, we mention Greg Jones, Scott Lasar and Chuck Sklarsky, Assistant United States Attorneys in Chicago who published a Grand Jury Practice Manual several years ago. Some of their work has been included in this Manual.

Acknowledgment for specific chapters is as follows:

Chapter V: Much of this chapter was borrowed from a piece written by Michael Ross of the U.S. Attorney's Office in the Southern District of New York in July, 1981, for the Attorney General's Advocacy Institute. The search warrant material was taken from the Bulletin on Economic Crime Enforcement Vol. 3, No. 4, December 1982, Karlyn Stanley, Editor.

Chapter VI: Some of this chapter was borrowed from Michael Ross' article referred to above. We also acknowledge the contribution of Martin C. Carlson of the Criminal Division of the Department of Justice, who researched and wrote the additional material which we have included.

Chapter VII: This chapter was based on materials written by Dale Powell, Assistant United States Attorney for the Northern District of Alabama and Jo Ann M. Harris, Executive Assistant United States Attorney for the Southern District of New York.

Chapter VIII: This chapter was also written by Jo Ann M. Harris.

Chapter IX: This chapter was written by Frederik A. Jacobsen, Assistant United States Attorney for the Central District of California.

Chapter X and Chapter XI: These chapters were taken from materials written by Willard C. McBride, George T. Kelley, Richard H. Kamp and John R. Maney. These individuals were all with the Criminal Section of the Tax Division at the time of the preparation of the materials.

Chapter XII: This chapter was written by Edward M. Vellines of the Criminal Section of the Tax Division.

The editors have written some of the material which has been included. We have attempted to give credit for other contributions which have been made. Any omission which we may have made was not intended and will be corrected if brought to our attention in the event another edition of this Manual should be published.

A table of cases has been included to make it easier to use this Manual, particularly to find case authority applicable in each of the federal circuits. Although several cases may have been cited in support of a particular point of law, the Manual is not a review of all the Courts of Appeals on each point. Care should be taken to ascertain whether additional cases have been decided which address issues discussed herein.

We expect that this Manual will be reviewed periodically and revised. Suggestions for additions and revisions may be sent to William J. Corcoran, United States Department of Justice, Washington, D.C., 20530.

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

We are gratefully indebted to the secretaries in the Narcotic and Dangerous Drug Section of the Criminal Division who have done all the typing for this project. The Manual went through several revisions during the past year before we settled on the final format. Without their efforts, we would not have been able to publish this Manual.

V. M. C.
M. L. K.
W. J. C.
A. F.

Washington, D.C.

March, 1983

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I. INTRODUCTION AND MECHANICS OF THE GRAND JURY

A. When Required

The Fifth Amendment to the Constitution provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury." The Constitution requires a grand jury indictment to shield persons from unfounded or arbitrary criminal charges and to investigate crime unimpeded by the restrictions imposed by the trial court. See, e.g., United States v. Mandujano, 425 U.S. 564, 571 (1976); United States v. Calandra, 414 U.S. 338, 343 (1974). The Fifth Amendment protection is embodied in Fed. R. Crim. P. 7. Under Rule 7(a), an offense punishable by death must be prosecuted by indictment, while an offense punishable by imprisonment for more than one year must be prosecuted by indictment unless indictment is waived. See 18 U.S.C. Section 1; USAM 9-11.030

Because a corporation can only receive a fine and not a term of imprisonment, it is not necessary to use the indictment process to charge a corporation. United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

B. Functions of the Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, it is more accurate to say that a grand jury's function is to conduct an ex parte investigation to determine whether or not there is probable cause to believe that a certain person committed a federal criminal offense within the jurisdiction of the district court.

1. Accusatory function

The grand jury determines whether there is probable cause to believe a certain federal offense has been committed by the defendant.

No federal grand jury can indict without the concurrence of the United States Attorney. For the indictment to be valid, the attorney for the government (usually the U.S. Attorney), must sign the indictment. Fed. R. Crim. P. 7(c); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

A prosecutor's use of presigned indictments is not unduly influential on the grand jury's deliberations. See United States v. Singer, 660 F.2d 1295, 1303 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

2. Investigatory function

The grand jury has been afforded the broadest latitude in conducting its investigations. Such investigations are directed by the U.S. Attorney, while the grand jury is supervised by the district court.

a. In a joint tax and narcotics grand jury investigation approval for the tax investigation must be obtained through the Tax Division. With respect to investigation of possible narcotics violations, Department of Justice approval is not required. However, all indictments for violation of 21 U.S.C. Section 848 (Continuing Criminal Enterprise) must be approved by the Narcotic and Dangerous Drug Section of the Criminal Division. Moreover, approval for RICO charges, 18 U.S.C. Sections 1961 - 1968, must be obtained from the Attorney General or his agent (Organized Crime and Racketeering Section, Criminal Division).

C. Description of Grand Jury

1. General composition

A grand jury is composed of between 16 and 23 members. Fed. R. Crim. P. 6(a). Sixteen members must be present at each session to constitute a quorum.

2. Minimum required concurrence for indictment

The return of an indictment requires a quorum of at least 16 members with 12 members concurring. Fed. R. Crim. P. Rule 7(f).

3. Length of grand jury service

Fed. R. Crim. P. 6(g) provides that a grand jury serves until discharged by the district court, but may serve no longer than 18 months. The 18 months begins to run from the date of empanelment. United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981).
There is a provision in 18 U.S.C. Section 3331 for empaneling "Special Grand Juries" in districts which contain more than four million inhabitants. A "Special Grand Jury" under 18 U.S.C. Section 3331 can remain active for up to 36 months. (See USAM 9-11.400 - 441, for more details on Special Grand Juries.)

The district court may excuse a grand juror upon a showing of undue hardship or other just cause if a

grand juror makes an application to be excused through the foreman or the Clerk's Office. Fed. R. Crim. P. 6(g).

4. Duties of the Foreman and Deputy Foreman

a. Rule 6(c) provides: "The court shall appoint one of the jurors to be foreman and another to be deputy foreman." The rule also provides that the deputy foreman shall act as foreman during the latter's absence. See also USAM 9-11.340.

b. The rule confers on the foreman the power to administer oaths and affirmations. Four different oaths have been provided to the foreman to give to the stenographic reporter (each day), any interpreter, each witness, and each record custodian witness.

c. The foreman presides over the grand jury and serves as its spokesman. Whenever it is necessary to direct a witness to do something (i.e., to answer questions, to return on another day, to provide physical evidence, to appear in a lineup), the foreman (not the assistant) must issue the order. United States v. Germann, 370 F.2d 1019 (2nd Cir. 1967), vacated 389 U.S. 329 (1967).

d. The rule requires the foreman to sign each indictment, although failure to do so does not vitiate the indictment. Frisbie v. United States, 157 U.S. 160 (1895).

e. The rule requires the foreman or another juror (usually the deputy foreman) to keep a record of the jurors voting for each indictment, and to file that record (referred to here as the ballot) with the Clerk's Office when the indictments are returned. The ballot cannot be disclosed without a court order.

f. In addition, a set of minutes is maintained by the grand jury, indicating the votes on all indictments, the names of all witnesses appearing before the grand jury, the assistant who presented them, and the attendance records of the grand jurors. These minutes are turned into the grand jury clerk after each session, and are available for review by the assistants.

5. Who may be present: Rule 6(d)

a. Attorneys for the government - USAM 9-11.351

Fed. R. Crim. P. 54(c) defines the attorney for the government to include, among others, the United States Attorney and Assistant U.S. Attorneys. The authority of the U.S. Attorney and his assistants to conduct grand jury proceedings is 28 U.S.C. Section 515(a). See 28 U.S.C. Section 515(b) (special assistants to the Attorney General), and 28 U.S.C. Sections 543, 544 (special assistants to the U.S. Attorney).

b. Presence of the witness under examination - USAM 9-11.352

Only one witness may appear at a time. See United States v. Bowdach, 324 F. Supp 123 (S.D. Fla. 1971). (agent may not be present to operate a tape recorder while the witness is testifying). But see United States v. Echols, 542 F.2d 948 (5th Cir. 1976) (projectionist, sworn as witness, was a "witness under examination" and thus authorized to be present absent showing of bad faith).

(1) The lawyer for the witness may not be present. United States v. Mandujano, 425 U.S. 564 (1976); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Fitch, 472 F.2d 548 (9th Cir. 1973) (presence before grand jury not adversary proceeding triggering Sixth Amendment right to counsel);

(2) The parent of a child witness may not be present. United States v. Borys, 169 F. Supp. 366 (D. Alas. 1959).

(3) A deputy marshal may not be present to control an unruly witness. United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953).

c. Presence of an interpreter - USAM 9-11.354

Normally, the court interpreters are used in the grand jury. The interpreter is given a special oath by the foreman prior to any questioning of the witness. The assistant should insure that the interpreter understands the secrecy provisions relating to the grand jury.

d. Presence of a stenographer - USAM 9-11.353

Stenographers are sometimes allowed in place of electronic recording devices.

e. Deliberations

No one other than the jurors may be present during deliberations or voting.

D. Recordation

All proceedings before the grand jury must be recorded. Fed. R. Crim. P. 6(e)(1). Effective August 1, 1979, Rule 6(e) was amended to require that: "All proceedings (except deliberation and voting) shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case."

1. What must be recorded

a. The rule is mandatory - "shall be recorded," and does not exempt any proceedings except deliberations and voting.

b. All witness testimony (including agent testimony before accusatory grand jury or summary testimony before investigatory grand jury).

c. All prosecutor's comments.

This includes not only presentation on a particular case, but general comments made at the beginning or end of the day (often non-case related).

2. Transcription of recorded material

The amended rule only requires recordation, not transcription of the recording.

a. Routine accusatory grand jury proceedings

Proceedings related to the routine cases presented to accusatory grand juries by the AUSA in charge of the grand jury will not be transcribed automatically. The AUSA in charge of the

grand jury will request transcripts only in those cases which, in his/her discretion, appear to merit the expense, either because of the relative complexity of the case, or the likelihood of trial. Of course, the AUSA who is subsequently assigned the case for trial may order the transcript from the reporter as he/she desires.

b. Investigative grand jury proceedings

Each AUSA who interrogates witnesses before the grand jury is responsible for ordering the transcripts that he/she desires. This applies to document returns as well as fact witnesses.

c. Instructions to court reporters

Many reporters with whom USA's contract to record grand jury proceedings are instructed to ask each AUSA whether or not he/she desires a transcription of the proceedings. If a particular transcription should be given precedence, the AUSA should so instruct the reporter. Normally, the reporter has ten days to complete and deliver a transcript. If the transcript is needed sooner than that, the AUSA should so instruct the reporter, and notify the Administrative Assistant.

3. Reviewing the transcripts

The AUSA in charge of the grand jury will not review the transcripts for accuracy or completeness. Those transcripts will be routed to the AUSA assigned the case who should complete the evaluation forms. Obviously, each trial AUSA who handles a case before an accusatory grand jury or who questions witnesses before an investigatory grand jury should evaluate the transcripts he/she orders. Any errors should immediately be reported to the grand jury reporter, and a corrected transcript or an erratum should be prepared. Any significant problems must be immediately reported to the Administrative Assistant.

4. Miscellaneous matters related to recordation

a. The AUSA should never go off the record. This includes non-case related matters (i.e., lunch schedules, personal introduction, etc.).

b. If the AUSA reads the indictment (or summarizes repetitive counts), the statute, or the essential elements of the offense to the grand jury, that should be on the record. The AUSA must

insure that the record reflects evidence on each of the essential elements (i.e., that bank is federally insured, specific intent, if required, etc.).

c. Grand jurors upon occasion will ask questions calling for misleading, irrelevant, or prejudicial information (i.e., defendant's record, drug addiction, other investigations, other prejudicial conduct, defendant's race, that defendant has invoked a privilege, etc.).

There are competing concerns in formulating an answer: The recognition that jurors should be allowed the widest latitude in receiving evidence and the recognition that prosecutors have a duty to act as legal advisors to the grand jury and prevent infusion of irrelevant or prejudicial material.

(1) The AUSA may answer the inquiry and then advise the grand jurors of its limited value, if any.

(2) Alternatively, the AUSA may tactfully decline to answer the question, advising the grand jury that the material is not relevant, may be prejudicial, and could cause a claim that the grand jury was being prejudiced.

E. Outline of Procedures before the Grand Jury

1. Voir dire

At the first session of the grand jury, the government attorney, particularly in highly publicized or otherwise noteworthy cases, may want to consider conducting a procedure similar to a voir dire. This would ascertain whether any grand jurors may personally know the anticipated subjects, may be employed by a subject company, may have particular knowledge of previous or collateral investigations, or in any other way is biased toward the investigation. Any grand jurors who cannot fairly judge the case should be excused from participating in the case.

2. Summary of nature and scope of investigation

An introductory statement which summarizes the intended nature and scope of the investigation to the grand jury is usually helpful. This may be done by the AUSA or the case agent. If there are breaks in the

proceedings, it may be of assistance to summarize the evidence to date to refresh recollection or to ascertain what problems the grand jurors have or what additional evidence they desire.

3. Transcript reviews by new or absent jurors

In order to neutralize a post-indictment attack on the indictment based on the issues raised in United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied 452 U.S. 961 (1981),the attorney must develop a procedure to ensure that the record reflects that every grand juror who votes on the indictment has either attended every session of the grand jury or has had an apportunity to read the transcripts of the witnesses he or she missed and be allowed to request that any witness be recalled. United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 103 S.Ct. 492 (1982).

In United States v. Garner, 663 F.2d 834 (9th Cir. 1981), cert. denied, 102 S.Ct. 1750 (1982), the Ninth Circuit held that an indictment is proper even when some grand jurors voting to indict do not directly hear all the evidence, provided that replacement jurors rely on transcripts of all testimony heard by previous jurors. The mere possibility that an absent juror might not hear any evidence on one count is an insufficient basis for challenging the indictment. See also, United States v. Cronic, 675 F.2d 1126, 1130 (10th Cir. 1982) cert. granted, 32 Cr. L. 4193 (Feb. 22, 1983); United States v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); cf. United States v. Barker, 675 F.2d 1055, 1058 (9th Cir. 1982) (per curiam) (court presumes that grand juror voting to indict has heard sufficient evidence).

As the investigation proceeds, the attorney should make available to new or absent grand jurors the transcripts of witnesses whose testimony they missed. The grand jurors should be directed, on the record, to read specifically enumerated transcripts, either before or after that day's session, or during recesses. After the grand juror has read the transcript, the assistant and/or the foreman and the grand juror should so indicate on the record.

If a replacement or absent grand juror has missed a substantial amount of testimony, it may be necessary to have those grand jurors report to the U. S. Attorney's Office on a future occasion to read the appropriate transcripts. At the next session of the

grand jury, that grand juror should indicate on the record the specific transcripts he read and when he did so.

It may also be appropriate in extreme cases, after consultation with the foreman, to suggest that a grand juror who has missed a significant proportion of the testimony abstain from voting, rather than to try to read voluminous or numerous transcripts. If this procedure is followed, the foreman should ensure that his minutes reflect the names of any grand jurors who abstain from voting.

Prior to returning an indictment in a case which resulted from a prolonged grand jury investigation, the assistant should review the grand jury attendance records kept by the foreman, which may be in the custody of the Grand Jury Clerk. The assistant should summarize for the record the fact that specific grand jurors who missed certain witnesses have read those transcripts, and have the foreman and the grand jurors affirm that fact.

4. Record of grand jury subpoenas

A record should be kept of all grand jury subpoenas duces tecum issued during the investigation. Many times the production of subpoenaed records and documents are accepted through the mail or by delivery to the agent, which only complicates the problems of accounting for all subpoenaed records.

Prior to closing the investigation, the attorney should review with the grand jury all subpoenas duces tecum issued in the case and discuss generally what was produced in response to each subpoena. This procedure will foreclose any argument that the AUSA improperly subpoenaed documents without informing the grand jury. Good record keeping in this area is a must. A separate grand jury subpoena file should be kept by the attorney in each investigation.

5. Strategy and tactics: Witnesses

The attorney must also carefully consider how to use the grand jury to perfect the government's case within the limits of the law. Rather than using the grand jury solely to obtain an indictment with the minimum of effort, the AUSA should be prepared to maximize the power of the grand jury to gather as much evidence as possible. There is nothing to be gained simply by the return of a valid indictment if the case cannot be proven beyond a reasonable doubt at trial.

It is virtually impossible to develop any hard and fast rules as to which witnesses should be called before the grand jury. Each case must be evaluated on its own facts. The following illustrations, however, may be helpful.

a. Under some circumstances, the assistant may want to take a witness before the grand jury to "lock in" the witness' testimony. This will usually occur when you have a reluctant or uncooperative witness, or a cooperating defendant who may become uncooperative with the passage of time.

b. If the credibility of a witness is crucial or questionable, that credibility can be tested in the grand jury.

c. If you are aware of potential defense witnesses, you should consider calling them before the grand jury, thereby exposing the nature of the defense so that you can prepare to meet it at trial, or, in some cases, catching the witness before he has a chance to fabricate a defense or conform his testimony to that of the defendant or other defense witnesses. This will effectively neutralize that person as a trial witness.

d. Be careful not to generate unnecessary Jencks Act (18 U.S.C. Section 3500) material. There should be a specific reason for taking each and every witness before the grand jury. Repetitive appearances by the same witness of the same subject before the grand jury can lead to inadvertent inconsistencies which a competent defense attorney will use to impeach the witness at trial. Furthermore, the witness should be given the opportunity in the grand jury to explain any inconsistencies between statements made outside the grand jury and his testimony before the grand jury.

6. Procedures before the grand jury

a. Each AUSA presents the case to the grand jury through sworn testimony.

(1) Before the witness is sworn, the AUSA should tell the grand jury that he/she is presenting a specific case listed on the Partial Report and give the defendant's names and a brief summary of the charges. If it is

an unusual case, a new grand jury, or a statute which the grand jury is not familiar with, then the attorney should read or summarize the statute and set forth the basic elements. It may also be appropriate to read or summarize the entire indictment.

(2) After the witness is sworn, the AUSA should then elicit the essential facts from the witness insuring that the witness sticks to the relevant facts and does not wander from this present testimony. Evidence must be presented to support each count and each overt act (if any).

(3) When the AUSA finishes asking questions of the witness, he may ask the grand jury if they have any questions of the witness.

b. After the AUSA has presented the evidence, the grand jury would be given the opportunity to ask any questions they have of the AUSA. The AUSA should advise the foreman to call the AUSA back into the grand jury room if any problems arise during deliberations that the AUSA may be able to resolve. Thereafter, the witness and the reporter leave the room for the grand jury to deliberate and vote.

(1) The AUSA should wait outside the door in the event that the grand jury has additional questions.

(2) When they have voted, they will knock on the door and advise the AUSA.

c. If the grand jury has voted to return a True Bill, then the AUSA gets the original indictment and the ballot from the foreman and returns them to the Grand Jury Clerk. The AUSA should check to make certain the foreman signed the indictment and the ballot. If the grand jury should return a "No Bill" (less than 12 concur), then the attorney should assist the foreman in advising the court in writing, forthwith if a complaint or information is pending against the defendant. Fed. R. Crim. P. 6(f)

d. When all of the indictments for that day have been presented, the Grand Jury Clerk takes them to the U. S. Attorney for signature, and arranges for a judge or magistrate to take the "Partial Report."

(1) The U. S. Attorney may authorize the Chief Assistant, the Chief of Criminal, the Chief of Fraud, and the Chief of Narcotics to sign indictments in his absence.

e. The designated AUSA (usually the Grand Jury Assistant or the last one on the list) has the duty of having the entire grand jury appear before a judge to return the indictments and the Partial Report. The foreman signs the original Partial Report, the court clerk polls the grand jury, the Partial Report and the indictments are presented to the court, and the AUSA makes appropriate motions.

7. Pre-indictment conference

An attorney representing a target of an investigation will often request a pre-indictment conference. Such a conference offers the AUSA a good chance to learn of possible defenses or mitigating factors. In some cases the attorney may want to have his client cooperate.

If the conference will cause a delay in the investigation, it should be questioned. The AUSA may want to consider declining a conditional request, i.e., "I'd like a pre-indictment conference to talk about cooperation, but only if you intend to indict." Such a conference can be fruitless and result in delay.

At a pre-indictment conference, the AUSA should refrain from disclosing the facts of the investigation, particularly the witnesses cooperating, and confine disclosure to the nature of the charges and statutes being considered.

8. Closing statement

In some cases, it may be appropriate for the AUSA to give a closing statement to the grand jury in order to summarize the evidence. The little case law that exists indicates that there is no impropriety in the government attorney summarizing the evidence or making a closing statement. United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, sub nom Valley Bell Dairy Co., Inc. v. United States, 352 U.S. 981 (1957) (prosecutor may summarize evidence before a previous grand jury and urge grand jury to indict). It seems that few districts give a closing statement. Ad Hoc Task Force of U.S. Attorney's on Rule 6, July 1979. If the attorney makes a summary statement, the grand jury

should be cautioned that the attorney's remarks are not evidence.

9. Instructions

There is no constitutional requirement that the attorney give legal instructions to the grand jury. United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Even if improper instructions are given, the indictment is not invalidated. United States v. Linetsky, 533 F.2d 192, 200-201 (5th Cir. 1976).

In United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982), the Eighth Circuit held that a government prosecutor who explains to the grand jury the elements of the offenses under investigation does not act as an improper witness before the grand jury in violation of Rule 6(d). Such conduct falls within the prosecutor's role as "guiding arm of the grand jury" and is consistent with his responsibility for an orderly and intelligible presentation of the case.

F. Transferring Investigations from Panel to Panel

In some jurisdictions it becomes necessary to transfer an investigation from one grand jury in the district to another grand jury in the district. The transfer may arise when the grand jury expires, or for example, subpoenaed documents have been returned before one grand jury, but the investigation is going to proceed before another grand jury panel.

In effectuating a transfer, consider observing the following:

1. Presentation of evidence to new grand jury

Usually, all documents and testimony before the first grand jury should be presented to the new grand jury. United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975). This is generally the rule and should be followed whenever feasible. See United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979). There is room for some discretion, however, in situations where numerous witnesses were called before the first grand jury in a particular investigation, and only a small percentage were actually necessary for the proposed indictment. However, if the AUSA believes that re-presenting all of the live testimony is not necessary, or that a summary of the evidence would be proper, he/she should first discuss the matter with his/her supervisor. The use of summaries of prior testimony can bias a grand jury and void the

indictment. United States v. Mahoney, 495 F. Supp. 1270 (E.D. Pa. 1980).

2. Use of transcripts

If the case is going to be re-presented via transcripts, the best procedure is to have the foreman or one of the grand jurors read the transcripts aloud to the other members. This prevents any claim or improper inflection, etc., if the prosecutor or agent reads the testimony. The court reporter should note that the foreman read the testimony, but it is not necessary to record the entire testimony. When he finishes reading the transcript the person reading it should state on the record that he/she has accurately read the entire transcript to the other grand jurors.

3. Hearsay nature of transcripts

The new grand jury must be advised of the hearsay nature of the transcripts and be offered the opportunity to recall any witness.

4. Credibility problems

Any specific credibility problem relating to any witness whose transcript has been read to the grand jury should be brought to their attention by the assistant.

5. Any exculpatory evidence must be re-presented

6. Consider whether a disclosure order under Rule 6(e)(3)(C)(i) is necessary

There is no abuse of power where successive grand juries consider matters previously presented to another grand jury. Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1116 (E.D. Pa. 1976). Therefore, you may subpoena documents before one grand jury and thereafter present the case to another grand jury. This often occurs at the beginning of a lengthy investigation where the attorney does not anticipate extensive grand jury work, other than document returns, for some period of time. If this practice is used, be sure the new grand jury is properly advised of all prior grand jury matters. See In re Grand Jury Proceeding (Sutton), 658 F.2d 782 (10th Cir. 1981) (when a grand jury's term expires with a subpoena for documents outstanding, a grand jury may obtain the documents without a court order to transfer the documents).

Normally, evidence should not be presented before several different grand juries at the same time. However, there are exceptions, such as when you wish to subpoena a target and do not know if he/she will refuse to testify under the Fifth Amendment, or it is necessary to present evidence which could be highly prejudicial.

An attorney can re-present a case to a second grand jury when the first grand jury returned a "no-bill". United States v. Thompson, 251 U.S. 407 (1920). To re-present such a case requires advance approval of the responsible Assistant Attorney General. USAM 9-11.220. It may be appropriate to advise the second grand jury that a "no-bill" was returned by a prior grand jury.

G. Superseding Indictments

The procedures for preparing and presenting superseding indictments to the grand jury are the same as for original indictments, with the following exceptions.

1. Caption

When the indictment is being typed, the caption should reflect that it is a superseding indictment, and should reference the case number of the original indictment.

2. The superseding indictment should be presented to the same grand jury that returned the original indictment

a. Under exceptional circumstances (e.g., original grand jury panel has expired, not enough time to bring in original panel, etc.), the case can be re-presented in its entirety to a different panel.

b. Be aware of scheduling problems so that multiple panels are not brought in needlessly.

3. Advice to grand jury

The grand jury should be advised that a superseding indictment is being presented, the date of the original testimony and indictment, the nature of the intended change in the indictment, and the manner in which the case will be re-presented.

4. Live testimony

a. Depending upon the nature of the change, it may be necessary to present live testimony as to some or all of the indictment.

b. Technical changes, such as redrafting of the language of the indictment, correction of typographical errors, or the addition or modification of particular counts, may not require the presentation of any additional witnesses if the prior testimony already supports the anticipated changes.

c. In some cases, the transcripts of prior testimony will suffice.

d. In other cases, it may be necessary to present the entire case again or to present additional witnesses to support the requested changes.

5. Avoid the appearance of vindictiveness

Be careful to avoid any appearance of vindictiveness when adding additional counts to superseding indictments after a hung jury, dismissal, reversal on appeal, etc. See USAM 9-2.141.

H. Bail Recommendations in the Grand Jury

1. Bail recommendations

Bail recommendation procedures vary substantially from district to district, but in the past many districts have followed the procedure discribed below.

a. When the AUSA or the Grand Jury Assistant is preparing the indictment authorization form, a bond recommendation should be included.

b. If the defendant has already been arrested and bail has already been set, the AUSA should adopt the existing bail setting as his/her recommendation, unless special circumstances or new facts exist which were not known to the magistrate when bail was set.

c. If the defendant has not been arrested or bail has not been set, the AUSA should recommend bail in an appropriate amount, considering all relevant circumstances.

2. <u>The bail recommendation will be included on the Partial Report</u>

a. The grand jury is free to set its own bail recommendation if they disagree with the recommendation of the AUSA.

b. The AUSA presenting the case to the grand jury should ensure that the grand jury is advised of the bail recommended by the AUSA.

(1) If the bail recommendation of the AUSA is unusually high or low, the AUSA should explain the reasons for the recommendation to the grand jury.

(2) If the bond information contains facts which could be considered prejudicial to the defendant, then the bond information should be presented after the grand jury has voted on the indictment.

c. If the bond recommendation is unusually high or low, then the AUSA should also make sure that the assistant presenting the Partial Report is aware of the reasons, because the judge will often ask what the reasons are for the recommendations.

d. The grand jury's recommendation becomes a Court Order when the partial is returned, but the defendant is entitled to a bail review [(18 U.S.C. 3146(a))].

I. <u>Secret/Sealed Indictments</u>

When the defendants named in the indictment have not yet been arrested, and there is reason to believe that the defendants will flee if they learn of the indictment, the indictment should be kept secret and be sealed by the judge before whom the indictment and partial report are returned. This may also be appropriate in especially sensitive cases regardless of the likelihood that the defendant would flee.

J. <u>Handbook for Federal Grand Jurors</u>

The Committee on the Operation of the Jury System of the Judicial Conference of the United States publishes a handbook for federal grand jurors. Its purpose is to explain to persons selected for service on a federal grand jury the general nature of their duties and of the institution on which they will serve. It can be consulted for information on many of the points discussed in this chapter. Copies can be obtained from the district court.

<u>CHAPTER II. SECRECY OF GRAND JURY PROCEEDINGS: RULE 6(e)</u>

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II. SECRECY OF GRAND JURY PROCEEDINGS: RULE 6(e)

A. The Obligation of Secrecy

The rule of grand jury secrecy has been upheld consistently by the Supreme Court, which summarized the reasons for safeguarding the confidentiality of grand jury proceedings as follows:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to the indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses ... [;] (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated. _United States v. Proctor & Gamble Co._, 356 U.S. 677, 681-682, n.6 (1958) (citation omitted).

This judicial tradition has been codified in _Fed. R. Crim. P._ 6(e)(2), which imposes an obligation of secrecy on all participants, except witnesses, in grand jury proceedings.

B. Disclosure to Attorneys for the Government: Rule 6(e)(3)(A)(i)

Despite the obligation of secrecy, the rule permits disclosure of matters occurring before the grand jury under certain circumstances.

1. Definition

An "attorney for the government" has free access to grand jury material for use in the performance of the attorney's duties. _Fed. R. Crim. P._ 6(e)(3)(A)(i).

a. An "attorney for the government" is defined in the _Notes of Advisory Committee_ for _Fed. R. Crim. P._ 54(c). This definition includes the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, and an authorized Assistant United States Attorney.

b. The phrase "attorney for the government" includes only attorneys for the United States

governmen' and not for any county or state government. In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973); In re Holovachka, 317 F.2d 834 (7th Cir. 1963); Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598 (N.D. Ill. 1974).

c. An "attorney for the Government" does not include an attorney for an administrative agency. In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962).

d. Disclosure is permitted to a civil AUSA or a civil Department of Justice attorney, for use in the preparation of a civil suit. In re Grand Jury, 583 F.2d 128 (5th Cir. 1978) (following a grand jury investigation, indictment and plea, the U.S. Attorney sought a court order to disclose grand jury matters to Department of Justice attorneys to defend a civil action; the court held that no 6(e) order or notice was necessary). See also, In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971); In re Grand Jury Investigation (Sells, Inc.), 642 F.2d 1184 (9th Cir. 1981), cert. granted, 102 S.Ct. 2034, (1982).

2. Policy

As a matter of policy, however, a non-civil AUSA may not want to disclose grand jury materials to a civil AUSA without first obtaining a court order, especially while the grand jury investigation is still in progress. Without a 6(e) order, discovery to the civil division of the U.S. Attorney's Office should only be made with the approval of the U.S. Attorney.

C. Disclosure to Other Government Personnel: Rules 6(e)(3)(A)(ii) and 6(e)(3)(B)

1. When necessary to assist in enforcing federal criminal law

Rule 6(e)(3)(A)(ii) permits a government attorney to disclose grand jury matter to "such government personnel" as the attorney deems necessary to assist in the performance of the attorney's duty to enforce federal criminal law.

2. Notice to the court

The attorney shall "promptly provide" notice to the court stating the names of the particular government personnel to whom disclosure is made. Rule 6(e)(3)(B).

3. Record of disclosure

The record should reflect that the government personnel have been cautioned to maintain grand jury secrecy and that the materials are for use in the enforcement of federal criminal laws only. Where the officer to whom disclosure is contemplated has administrative duties (such as an IRS agent), the better practice is to write a letter to the officer stating that disclosure is being made in the officer's capacity as an assistant to the U.S. Attorney and the grand jury in the criminal investigation, and that the information disclosed may not be used for any other purpose.

4. Need for outside expertise

Rule 6(e)(3)(ii) thus allows an AUSA to disclose grand jury testimony to investigative personnel from the government agencies "without the time-consuming requirement of prior judicial interposition," and such disclosure will help meet "an increasing need on the part of government attorneys to make use of outside expertise in complex litigation." Notes of Advisory Committee on Rules. Moreover, such agents may use the materials in their interviews. United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979).

5. State and local officials

Whether or not the term "government personnel," as used in Rule 6(e)(3)(A)(ii), is broad enough to include state or local law enforcement officers is open to question.

a. In one case, In re Grand Jury Proceedings, 445 F. Supp. 349 (D. R.I.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978), the court concluded that the term applied only to employees of the federal government; state or local police officers, even if assisting in the criminal investigation, were not within the rule.

b. To the contrary, In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979), concluded that Rule 6(e)(2)(A)(ii) -- now Rule 6(e)(3)(A)(ii) -- authorized disclosure to state and local personnel who were assisting the attorney for the government in the grand jury investigation.

c. In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982), held that the District Attorney was not entitled to complete Grand Jury transcripts but only those parts pertaining to the information generated by the state investigation.

d. Until more definitive rulings are made by the courts, the safest way to proceed when dealing with state or local officers is to seek authorization to disclose.

D. Disclosure Under Court Order: Rule 6(e)(3)(C)(i)

1. General rule

Disclosure of otherwise non-disclosable matter is permitted under Rule 6(e)(3)(C)(i) when the court so directs "preliminarily to or in connection with a judicial proceeding."

Judge Learned Hand, in the seminal case, defined "judicial proceeding" as follows:

> [T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.
>
> Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958)(emphasis added).

Rosenberry held that disclosure of grand jury minutes to the New York City Bar's Grievance Committee for investigation as to whether disciplinary proceedings should be instituted before the Appellate Division of the New York Supreme Court was "preliminary to a judicial proceeding." The holding was framed on the Grievance Committee's

quasi-judicial nature, and on the fact that judicial action on charges predicated on the Committee's findings necessarily followed the Committee's hearings. See also, In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981) (disclosure of grand jury material to IRS as preliminary to a judicial proceeding); In re The Special February 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981), (nondisclosure protection extended to documents not actually read to the grand jury; denied disclosure to IRS of grand jury material used to indict a taxpayer, tax liability too speculative to constitute preliminary to or in connection with a related judicial proceeding; court's supervisory power very limited in this area), cert. granted, 102 S.Ct. 955 (1982); In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) (court allowed disclosure to superintendent of police, holding discipline hearing, of grand jury minutes pertinent to policeman's appearance before grand jury); United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977) (a procedure for the reprimand, supervision, demotion or dismissal of city employees which did not permit any judicial review was not preliminary to or in connection with a judicial proceeding); In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960) (city disciplinary proceedings, nonreviewable, cannot be disclosed).

State judicial proceedings are encompassed by the rule. United States v. Goldman, 439 F. Supp. 337 (S.D.N.Y. 1977).

2. State/Local Law Enforcement Personnel

United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979), upholds disclosure to state law enforcement personnel pursuant to court order. The order should limit use of disclosed material to the enforcement of federal criminal laws. Furthermore, in Stanford, the state personnel were sworn as agents of the grand jury and cautioned about secrecy. The court specifically held that a grand jury proceeding is preliminary to a court proceeding. 589 F.2d at 292. The 6(e) order should name the recipient and limit use of the disclosed materials to the immediate investigation.

a. Stanford is reflective of the policy expressed in the legislative history to Rule 6(e). "There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws." Sen.Rep. No. 95-354, 95th Cong. 1st Sess., at 8, reprinted in [1977] U.S. Code Cong. & Admin. News, at 527. In re 1979 Grand Jury Proceedings, 479 F.Supp. 93, 96-97 (E.D.N.Y. 1979).

b. Several other cases, however, have reached a contrary result. The court in In re Grand Jury Proceedings, 445 F. Supp. 349 (D. R.I.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978), concluded that disclosure under Rule 6(e)(3)(C)(i) to a state police detective who was assisting the grand jury in the investigation of federal crimes was not authorized. The court held that there was no "authority for a court to order disclosure to assist with the present grand jury proceedings." 445 F. Supp. at 350.

Furthermore, more recently, United States v. Tager, 638 F.2d 167 (10th Cir. 1980), held that the rule did not permit court-ordered disclosure to a private investigator (who had initially referred the case to federal investigators), so that he could continue to assist the investigation. Tager rejected the conclusion in United States v. Stanford, supra, that grand jury proceedings are "judicial proceedings" within the meaning of Rule 6(e)(3)(C)(i), and distinguished Stanford because that case dealt with state law enforcement personnel rather than a private investigator.

c. The Tager case casts some doubt on the authority of a court to authorize disclosure to non-law enforcement expert witnesses, such as computer experts, accountants, medical experts, etc., who are deemed necessary by the attorney for the government (and the grand jury) to analyze, examine, or interpret grand jury evidence.

d. Prior to seeking disclosure to state and local law enforcement agents or expert witnesses, an AUSA should consult with the Chief of the criminal division of the U.S. Attorney's office. The assistant should prepare an ex parte application or motion for disclosure, accompanied by an affidavit which demonstrates (1) a compelling need for the disclosure, (2) that the person for whom disclosure is sought has been warned of the secrecy provisions relating to grand jury materials, and (3) that the disclosure is limited to the investigation of federal crimes. A proposed order specifying (1) the name(s) of the persons for whom disclosure is sought, (2) the limitations on the use of the materials to be disclosed, and (3) a description of the materials disclosed should accompany the application and affidavit.

e. A distinction can be drawn between pre-indictment and pre-trial (viz., postindictment) requests for disclosure. The cases and problems discussed above relate specifically to pre-indictment disclosures. Those problems dissipate, and the propriety of disclosure increases, when requesting disclosure to prepare for trial, since such disclosure is clearly "in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i).

3. Unauthorized disclosures

It was improper to release grand jury transcripts to the U.S. Parole Commission and a probation officer to assist them in deciding whether to revoke the probation of the subject under investigation. None of the disclosure provisions of Rule 6(e) permits such disclosure. Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

E. Disclosure to Defendant or Other Parties Under Court Order; Rule 6(e)(3)(C)(ii)

1. Disclosure when grounds for dismissal

Disclosure may be made at a defendant's request "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Rule 6(e)(3)(C)(ii).

a. In some districts, a defendant may file a formal motion for disclosure, or may seek the same relief at the omnibus hearing stage.

b. If disclosure is granted by the court under either procedure, the court should sign an order to that effect to ensure that the record is clear.

c. Mere "unsubstantiated, speculative assertions of improprieties in the grand jury proceedings" are not sufficient to demonstrate the "particularized need" necessary to justify disclosure. United States v. Rubin, 559 F.2d 975, 988 (5th Cir. 1977), vacated on other grounds, 439 U.S. 810 (1978). Accord, United States v. King, 478 F.2d 494, 507 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974). Assertions of impropriety, based only on the speed with which the indictment was returned, do not justify disclosure or necessitate an in camera inspection by the trial judge. United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981).

2. Defendant has a right to a transcript of his testimony

A defendant is entitled to a transcript of his or her own grand jury testimony (Fed. R. Crim. P. 16(a)(3)) and copies of the grand jury testimony of government witnesses after they have testified on direct examination at trial (Jencks Act, 18 U.S.C. §3500(e)(3)).

3. Particularized need test

The court may permit disclosure to a private party only when the requesting party has demonstrated a particularized need that outweighs the policy of grand jury secrecy. Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979). Such disclosure, if ordered, "may include protective limitations on the use of the disclosed material." Id. at 223.

4. Balancing test

Courts generally balance the alleged particularized need against the reasons established for secrecy. As the considerations justifying secrecy become less relevant -- for instance, where the grand jury has ended its activities -- a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. U. S. Industries, Inc. v. United States District Court, 345 F.2d 18, 21 (9th Cir.), cert. denied 382 U.S. 814 (1965).

Examples:

United States v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 102 S.Ct. 2932 (1982) (district court abused discretion by not requiring defendants to show particularized need).

United States v. Mayes, 670 F.2d 126 (9th Cir. 1982) (no abuse of discretion in disclosure to expert witness preparing grand jury testimony).

In re Grand Jury Investigation (New Jersey State Commission of Investigation), 630 F.2d 996 (3d Cir. 1980) cert. denied, 449 U.S. 1081 (1981) (party need not demonstrate compelling need for disclosure when documents sought intended for use in investigation of unrelated matter because all documents reviewed by grand jury are not matters occurring before grand jury).

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977) (plaintiff's need for defendant's grand jury transcripts for use in civil antitrust action outweighed need for secrecy; plaintiff needed transcripts to refresh recollection and impeach witness at trial; secrecy dissipated because criminal investigation terminated, and defendants had received transcripts during criminal discovery).

United States Industries, Inc. v. United States District Court, supra. (Court-ordered disclosure of government report to probation officer for sentencing, which contained recital of grand jury material, to plaintiffs in civil antitrust suit. Criminal case had ended. Need justified by liberal discovery policy.)

United States v. Interstate Dress Carriers Inc., 280 F.2d 52 (2d Cir. 1960). (Rule 6(e) order approved permitting ICC to review grand jury

documents regarding a motor carrier. ICC had independent authority to obtain records; records were being examined for their intrinsic value and not to determine what occurred before grand jury.)

In re Grand Jury Investigation of Ven-Fuel, 441 F.Supp. 1299 (M.D. Fla. 1977). (Rule 6(e) order approved disclosing documents to congressional subcommittee. Indictment had been returned; the subcommittee had independent authority to obtain documents.)

F. Disclosure to Other Grand Jury Panels

Can the prosecutor present grand jury material obtained by one grand jury panel to a second grand jury panel without first obtaining a disclosure order pursuant to Rule 6(e)(3)(C)(i)? Does it matter whether the two grand jury panels are in the same district as opposed to different districts? Is the rule different if the grand jury material consists of documents and records as opposed to transcripts of the testimony of fact witnesses?

1. Cases requiring a court order

a. Two cases have squarely held that a court order pursuant to Rule 6(e)(3)(C)(i) is required. Both cases involved the transfer of transcripts of the testimony of fact witnesses from a grand jury in one district to a grand jury in another. United States v. Stone, 633 F.2d 1272, 1275 (9th Cir. 1979); United States v. Malatesta, 583 F.2d 748, 752-754 (5th Cir. 1978), cert. denied, 444 U.S. 846 (1979).

The analysis of this issue in the Stone case was limited, due to the concession by the government that it had violated the disclosure provisions of Rule 6(e). In Malatesta, however, the court relied upon the literal language of Rule 6(e), refusing to sanction a broader policy of disclosure absent legislative amendment.

Fundamental to both decisions was a judicial concern over possible prosecutorial abuse. Neither court was willing to sanction a procedure which would allow the government unfettered discretion in the re-presentation of material to a second grand jury. Both courts demonstrated a desire to

ensure that a judicial officer controlled the kind and amount of material that would be transferred from grand jury to grand jury.

Both decisions refused to dismiss the indictments, but only because there was no evidence of prosecutorial abuse in the way the material was re-presented to the second grand juries. Both decisions reminded the government that a contempt citation was the appropriate sanction.

While both cases dealt with district-to-district transfers, there is nothing in the language of either case to suggest that the rule would be any different in an intra-district transfer.

b. One other Court of Appeals case, In re Kitzer, 369 F.2d 677 (9th Cir. 1966), implies, but does not hold, that disclosure orders are required when transferring grand jury material (transcripts of fact witnesses) from one district to another. The Rule 6(e) issue was not squarely presented. See Wright, Federal Practice and Procedure, §107 (1982).

c. In United States v. Phillips, 664 F.2d 971, cert. denied 102 S.Ct. 2965 and 103 S.Ct. 208 (1982), the Fifth Circuit held that a government attorney violated Rule 6(e) when he disclosed the grand jury material of a prior grand jury to a successor grand jury without first obtaining a court order, but that the dismissal of the indictment would not necessarily follow because there had been no showing of impairment of the substantial rights of the defendant, nor that the integrity of the grand jury proceedings had been impugned.

d. Other cases requiring a court order include:

- In re Minkoff, 349 F. Supp. 154 (D. R.I. 1972);
- In re Grand Jury Investigation of the Banana Industry, 214 F. Supp. 856 (D. Md. 1963);

- See In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522, 532 (W.D. Tex. 1973).

2. Cases not requiring a court order

a. Two cases have squarely held that a court order is not required when transferring grand jury material from one panel to another, under completely different circumstances.

In United States v. Garcia, 420 F.2d 309 (2d Cir. 1970), a prosecution for perjury, the defendant's testimony before one grand jury was re-presented without a disclosure order to a second grand jury in the same district, which indicted her. In rejecting her argument, the court reasoned:

> If government attorneys have the right to use grand jury minutes to the extent of making them public during a trial, without court approval, it is certainly no less a proper performance of their duties to use them without court approval before another grand jury where the proceedings are secret and the purpose is the enforcement of the perjury and false statement statutes.

420 F.2d at 311.

United States v. Malatesta, supra, distinguished the Garcia case on the grounds that Garcia involved a perjury prosecution.

In United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979), cert. denied, 446 U.S. 917 (1980), two U.S. Attorneys' Offices and two grand juries in adjacent districts were conducting a joint investigation. Documents subpoenaed by one grand jury were turned over by one prosecutor to the other grand jury without a court order for disclosure. The court found no violation of Rule 6(e), since the second grand jury received the documents "in the course of the investigation of the matter at hand." 609 F.2d at 1097.

b. In United States v. E. H. Koester Bakery Co., 334 F. Supp. 377 (D. Md. 1971), documents and records which had been subpoenaed by one grand jury were turned over to a second grand jury in the same district without a disclosure order. After noting that the first grand jury had heard no oral testimony in the case, and had never studied the documents themselves, the court concluded:

> The purpose of a court order in connection with successive grand juries is to guard against prejudice to defendants which might result where one grand jury has failed to indict and government counsel seeks to be selective in the matters to be presented to another grand jury convened to consider the same subject matter. Here there could have been no possible prejudice . . . since the first grand jury saw no documents and heard no testimony and therefore no part of any testimony taken before a previous grand jury nor any documents seen by them were used a second time.

334 F. Supp. at 382.

c. Both United States v. Chanen, 549 F.2d 1306 (9th Cir. 1976), cert. denied, 434 U.S. 825 (1977), and United States v. Samango, 607 F.2d 877 (9th Cir. 1979), involved the intra-district transfer of transcripts of fact witnesses and documents from one grand jury to another, apparently without disclosure orders. However, no Rule 6(e) issue was involved in either case. The issues presented dealt with abuse of the grand jury in the presentation of hearsay (transcripts) rather than live witnesses.

G. Orders for Nondisclosure ("Gag" Orders)

1. General rule

There is no specific rule or statute that creates or permits authority for a "gag" order. In fact, Fed. R. Crim. P. 6(e)(2) provides: "No obligation of secrecy may be imposed on any person except in accordance with this rule." Accordingly,

any witness subpoenaed to appear before a grand jury cannot be compelled to keep secret the fact that he/she is a witness, has been subpoenaed, or what transpired before the grand jury.

2. No rule requiring disclosure

On the other hand, there is no federal rule or statute which requires a witness to disclose to anyone else the fact that the witness has been subpoenaed to appear before a federal grand jury, except the Financial Privacy Act (12 U.S.C. §3401 et seq.) in certain circumstances.

a. Grand jury subpoenaes are expressly excluded from that Act, 12 U.S.C. 3413(i), with certain exceptions not relevant here. Accordingly, the customer disclosure provisions of the Act do not apply when issuing grand jury subpoenas to financial institutions for bank records.

b. By the same token, since the Act does not apply to grand jury subpoenas, neither do the nondisclosure provisions of the Act apply with respect to court ordered delayed notice to the customer (12 U.S.C. §3409).

c. In fact, the legislative history of the Act supports the view that customer notice and disclosure of grand jury subpoenas is contrary to the intent of the Act. See H.Rep. No. 95-1383 at 228, U.S. Code Cong. & Admin. News, at 9358, [1979].

(1) In many cases customer notice would frustrate the investigation or endanger the physical safety of grand jurors, witnesses, and officials working with the grand jury.

(2) Such notice jeopardizes grand jury secrecy.

(3) All duties of customer notification set out in the Act are imposed upon government authorities, not the financial institutions.

(4) No legitimate purpose is served by customer notification since customers have no standing to challenge government access to records pursuant to grand jury subpoena (See United States v. Miller, 425 U.S. 435 (1976)).

Supplement to USAM dated September 21, 1979, Section XV (new USAM 9-4.844a).

3. Issuance of protective orders by the court

While it is by no means clear, and notwithstanding the impediments set forth above, it is the position of the Department of Justice [Supplement to USAM dated September 21, 1979, Section XV (new USAM 9-4.844a)] that the district court has the authority to prohibit customer notice upon ex parte motion of the government. The arguments in support of this position are:

a. The Financial Privacy Act, by authorizing imposition of an obligation of secrecy upon financial institutions in connection with administrative subpoenas, trial subpoenas, and formal written requests, implicitly authorizes a similar obligation in connection with grand jury subpoenas, under 12 U.S.C. Section 3409 and 28 U.S.C. Section 1651.

b. Such orders do not conflict with Rule 6(e) because they are limited to the fact of receipt of a grand jury subpoena rather than to matters occurring before the grand jury.

c. In the alternative, even if Rule 6(e) is found to embrace the fact of receipt of a grand jury subpoena, protective orders directed to financial institutions are not subject to Rule 6(e) because such orders are based upon the institution's status as a record custodian regulated by the Financial Privacy Act rather than upon the financial institution's status as a grand jury witness. Supporting this interpretation is the fact that it would be ironic if courts were empowered to prohibit customer notification in connection with a formal written request but not in connection with a constitutionally contemplated form of legal process which was excepted from the Financial Privacy Act because customer notification in connection therewith would jeopardize grand jury secrecy.

4. Alternatives

Instead of utilizing grand jury subpoenas for financial records, the assistant should consider the feasibility of acquiring the records pursuant to other provisions of the Financial Privacy Act.

a. Administrative subpoenas and summons, 12 U.S.C. Section 3405;

b. Search warrants, 12 U.S.C. Section 3406;

c. Judicial (non-grand jury) subpoenas, 12 U.S.C. Section 3407;

d. Formal written requests, 12 U.S.C. Section 3408.

The delayed notice provisions of 12 U.S.C. Section 3409 apply to each of these alternatives, thus avoiding the problems associated with "gag" orders for grand jury subpoenas.

H. Intrusions

Defense counsel have increasingly begun to challenge indictments on the grounds of unauthorized intrusions on the grand jury in violation of Rule 6(d).

Rule 6(d) lists those persons who may be present during grand jury sessions: "no person other than the jurors may be present while the grand jury is deliberating or voting."

In United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) cert. denied, 32 Cr. L. 4146 (Jan. 10, 1983). the court held that five intrusions by unauthorized persons into the grand jury during a period of eighteen months did not constitute "demonstrable prejudice or substantial threat thereof." Id. at 1185. However, the court noted that "each situation should be addressed on a sui generis basis," id., and warned prosecutors not to interpret the favorable result here as encouragement to depart from "scrupulous compliance with Fed. R. Crm. P. 6(d)." Id. at 1186.

CHAPTER III. EVIDENCE PRESENTED TO THE GRAND JURY

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III. EVIDENCE PRESENTED TO THE GRAND JURY

A. Permissible Evidence

The grand jury is generally not restricted by technical procedure or evidentiary rules. United States v. Calandra, 414 U.S. 338, 343 (1974). The rules of evidence (other than the rule with respect to privileges) do not apply to grand jury proceedings. Fed. R. Evid. 1101(d)(2).

1. Hearsay

Hearsay is permitted before the grand jury. Costello v. United States, 350 U.S. 359 (1956). Care must be taken, however, not to mislead a grand jury concerning the hearsay nature of the evidence presented, United States v. Estepa, 471 F.2d 1132 (2nd Cir. 1972); and an indictment is subject to dismissal if the actions of the prosecutor in presenting evidence undermines the integrity of the judicial process or results in fundamental unfairness. United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.1976), cert. denied, 434 U.S. 825 (1977). Sound judgment should be exercised in determining what evidence to present through direct testimony and what to present through hearsay testimony. Whenever possible, live witnesses should be used rather than hearsay witnesses, especially in assault and rape cases, and any other case which depends substantially on the credibility of lay witnesses. Furthermore, when hearsay is presented, each level of hearsay must be fully explained to the grand jury. As a general rule, a prosecutor should not seek an indictment in other than routine cases unless it is supported by substantial non-hearsay evidence before the grand jury.

2. Illegally obtained or incompetent evidence

Illegally obtained or otherwise incompetent evidence is admissible. United States v. Calandra, supra. Consideration of this evidence does not invalidate an indictment. Costello v. United States, supra. Although illegally obtained evidence is admissible before a grand jury, the grand jury itself may not obtain evidence in an illegal manner. The grand jury must respect any

valid privileges asserted, whether established by the Constitution, statutes, or the common law. United States v. Calandra, supra, at 346. In addition, under 18 U.S.C. Sections 2515 and 3504, a witness may challenge any questioning based on illegal interception of oral or wire communications of the witness. Gelbard v. United States, 408 U.S. 41 (1972). Again, however, the fact that evidence derived from an illegal interception was presented to a grand jury would not invalidate an indictment. Id. at 60.

Pursuant to Department of Justice policy, 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 knows was obtained as a direct result of a constitutional violation.

USAM 9-11.331. Further, the prosecutor should not seek indictments where convictions cannot be obtained because of inadmissible evidence.

3. Evidence derived from intercepted communications (wiretap)

A witness before the grand jury may testify concerning the contents of an intercepted communication or evidence derived therefrom if he obtained that information in a manner authorized by 18 U.S.C. Section 2517(1) or (2). 18 U.S.C. Section 2517(3). However, if the evidence related to an offense not specified in the original interception order, a court order authorizing disclosure is required. 18 U.S.C. Section 2517(5). United States v. Brodson, 528 F.2d 214 (7th Cir. 1975). See USAM 9-7.550.

The method of preparing and presenting such evidence is summarized at USAM 9-7.610.

B. Presentation of Exculpatory Evidence

1. General rule

The prosecutor is under no legal obligation, by statute or case law, to present exculpatory

evidence to a grand jury. United States v. Kennedy, 564 F.2d 1329, 1335-1338 (9th Cir. 1977), cert. denied, sub nom., Meyers v. United States, 435 U.S. 944 (1978); United States v. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976); Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968). Courts will generally not inquire into what evidence was presented to the grand jury. Costello v. United States, supra; United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974).

2. Department of Justice policy

Nevertheless, under Department of Justice policy, the prosecutor should present exculpatory evidence to the grand jury "under many circumstances." USAM 9-11.334. As an example, the manual states:

> when 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.

In cases involving material witnesses, such as immigration cases, the grand jury should be advised if the material witnesses have made inconsistent statements. The case agent should testify concerning any sworn statements made by the material witnesses, and any subsequent statements of which he or the assistant is aware.

The AUSA should evaluate any statements made by the defendant to determine if they are exculpatory (substantial evidence which directly negates guilt).

3. Requests by the defense to present evidence

Often a defendant or defense counsel will request that certain evidence be presented to the grand jury. Such requests should be dealt with on

a case-by-case basis, being mindful of the policy of presenting exculpatory evidence.

If a target or subject wishes to testify or present a written statement, he or she should be given the opportunity, unless it would cause substantial delay. The grand jury should always be advised of the request and be permitted to make the decision.

If the defendant or defense counsel requests that witnesses be allowed to testify, the prosecutor should seek a proffer of the testimony. Unless the prosecutor decides on his own that the proffered testimony should be presented, the grand jury should be advised of the request and the proffered testimony, and be asked if it wants to have the testimony presented. Unless it would cause substantial delay, the prosecutor should honor the request. Tactically, this provides an opportunity for the prosecutor to hear and evaluate the defense in advance.

The presentation of statements in lieu of testimony by third-party witnesses is to be handled on a case-by-case basis, always advising the grand jury of the request. Although the value of cross-examining the witness and having the statement under oath is lost, the advantage of advance notice of the defense is still helpful.

C. Impeaching Government Witnesses

The Seventh Circuit has recognized that the grand jury is not an adversary proceeding and the government need not "produce evidence that undermines the credibility of its witnesses." United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975); Accord, United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977).

> [The defendant] was accorded the full protection of the Fifth and Fourteenth Amendments when, at the trial on the merits, he was permitted to expose all the facts bearing upon his guilt or innocence. Loraine v. United States, 396 F.2d 335, 339 (9th Cir. 1968).

D. Testimonial Privilege: USAM 9-11.224

Pursuant to Fed. R. Evid. 1101(c) and (d)(2), the rules with respect to privileges as set forth in Fed. R. Evid. 501, apply to witnesses before the grand jury. Accordingly, in addition to the constitutional and statutory privileges that may apply, a witness can assert in the grand jury any common law privilege recognized by the federal courts. See United States v. Woodall, 438 F.2d 1317 (5th Cir.), cert. denied, 403 U.S. 933 (1970).

E. Answering Questions about Past Criminal Record

The prosecutor should never answer a juror's questions regarding a defendant's prior criminal record. In addition, where a prior conviction is an essential element of the crime sought to be charged, e.g., a felon in possession of a firearm, the case agent or some other witness should testify as to the defendant's record. Where a subject with a prior record testifies before a grand jury, the Assistant may impeach the subject by questioning him regarding his prior record. In response to questions as to the record of the defendant, the Assistant should advise the jury that generally this type of information is not admissible at trial because it is considered irrelevant and possibly prejudicial, and therefore should not be considered by them in deciding the question of probable cause. If a juror insists upon knowing the record of the defendant, the Assistant should ask the jury first to vote on the question of whether they need to know the record of the defendant. The Assistant should leave while the grand jurors deliberate on the question. If they vote affirmatively, have the agent testify as to the defendant's record. There is some authority to the effect that the jury's knowledge of the defendant's record will not invalidate the indictment. See United States v. Camporeale, 515 F.2d 184 (2nd Cir. 1975)(grand jury's knowledge of a witness' prior criminal record did not preclude filing subsequent perjury indictment).

F. Relating Facts not in Evidence

In answering a grand juror's questions, Assistants should not make it a habit to relate facts of the case to the grand jury. If answering the question requires disclosure of facts not previously presented to the jurors, the Assistant should indicate to them that if they desire he or she will recall the case agent or other witness to answer the question. If a prosecutor

in answering a grand juror's questions or otherwise addressing the jury relates specific facts not previously presented, the Assistant should give a cautionary statement to the effect that his comments are not evidence and should not be considered by the jury in determining probable cause. The Assistant should present the evidence later through a witness.

G. Testimony of the Prosecutor

An Assistant should never testify before a grand jury to which he is presenting evidence in the same case. Functioning as both witness and attorney in the same proceeding is arguably prohibited by Disciplinary Rule 5-101(b) and Ethical Consideration 5-9 of the ABA Code of Professional Responsibility (1975) and may constitute such a conflict of interest that dismissal of the indictment may result. United States v. Birdman, 602 F.2d 547 (3d Cir. 1979); See United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (Leighton, J.); United States v. Treadway, 445 F. Supp. 959 (N.D. Texas 1978).

H. Expression of Personal Opinion by Prosecutor

A prosecutor should avoid expressing his own personal belief as to the guilt of the defendant, the strength of the evidence, or the credibility of witnesses because such opinion arguably might unduly influence the jury and diminish its independence. In those situations in which summarization of the evidence is appropriate, an Assistant may relate how the evidence establishes the credibility of witnesses or probable cause for the charges contained in the recommended indictment.

I. Discussions of Strategy

Particularly in long investigations, it may be necessary to explain questions of "strategy," such as the order of witnesses or the use of hearsay evidence, so that the jury follows the proceedings. The Assistant should not argue, but rather state the matter factually. The jury may have to decide certain questions, such as whether they want to hear live testimony as opposed to having a transcript of prior testimony read to them, or whether they want to subpoena certain documents. The Assistant can discuss the alternatives and help guide the jurors, but the

ultimate decision must be made by the jurors themselves.

J. Disclosure of Internal Office Procedures

An attorney should not initiate a discussion of internal office procedures. If a juror should ask why the jury is not being presented with an indictment at that time or some similar question, the attorney should answer in a general way that internal procedures, which require a certain amount of paperwork, have not been completed. The attorney should caution the jury that neither internal procedures nor delay resulting from internal procedures should influence their vote regarding the existence of probable cause. Details of internal office procedures, such as review of indictments and other case controls and analysis, should not be explained so as to avoid any allegation that discussions of the procedures improperly influenced the jury. The only exception to this general rule is where a defendant or witness in testifying before the jury alleges that internal office procedures or those of the Department of Justice are not being followed.

K. Alternatives to Prosecution or Lesser Included Offenses Offenses

Should grand juries be informed of alternatives to prosecution other than a felony indictment (i.e., misdemeanor, Pre-Trial Diversion, Immunity, etc.)?

It is not necessary to voluntarily advise the grand jury of the alternatives to prosecution or of a lesser included offense. If specifically asked about either area, an Assistant should acknowledge that there are alternatives to prosecution and, where applicable, that a lesser included offense exists, but that the prosecutor is presenting for their determination the question of whether there is probable cause to return the indictment submitted to them. It is their duty alone to determine whether there is probable cause to believe that the crime(s) charged were committed by the proposed defendants. If they do not find probable cause to support the proposed indictment, they should return a "No Bill."

L. Insufficiency of Evidence

Existing authority strongly suggests that an in-depth analysis by the district court of the

sufficiency or adequacy of the evidence presented to the grand jury is improper. The district courts cannot dismiss indictments by substituting their own view of the evidence for that of the grand jury. A determination by the district court that the evidence before the grand jury did not establish probable cause as to an element of the offense would require such review and is contrary to present law. The Supreme Court has explained in Costello v. United States, 350 U.S. 359, 363 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. Accord, Lawn v. United States, 335 U.S. 339, 348-50 (1958); See also Calandra v. United States, 414 U.S. 338, 344-45 (1974).

Although the law appears to disfavor dismissal of indictments because the evidence before the grand jury was insufficient, under extreme circumstances a court might dismiss an indictment. Accordingly, if an Assistant becomes aware prior to trial that all elements of the offense were not proven, he should discuss the matter with his supervisor and consider returning a superseding indictment. Assistants should carry a checklist as to the elements of the offense when they present a case to the grand jury and should make certain that sufficient evidence is presented to avoid this type of challenge.

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IV. WITNESSES BEFORE THE GRAND JURY

A. Rights of the Witness

Except as set forth in Paragraph B, infra, a grand jury witness has:

1. No right to refuse to answer questions

There is no right to refuse to answer questions unless he can assert the right against self-incrimination or establish that some other privilege applies. United States v. Wong, 431 U.S. 174 (1977) (witness who was being investigated for criminal activity, indicted for perjury before grand jury. The Fifth Amendment testimonial privilege does not condone perjury, which is not justified by even the predicament of being forced to choose between incriminatory truth or falsehood, as opposed to a refusal to answer); United States v. Mandujano, 425 U.S. 564, 580 (1976) (grand jury has the right to every person's testimony).

2. No right to refuse to respond on the basis of relevance

There is no right to refuse to respond to a subpoena or refuse to answer questions on the grounds of relevance, Blair v. United States, 250 U.S. 273 (1919); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); or because that testifying may result in physical harm. LaTona v. United States, 449 F.2d 121 (8th Cir. 1971). A witness must respond to a grand jury subpoena even if his compliance results in hardship or inconvenience. United States v. Calandra, 414 U.S. 338, 345 (1974).

3. No right to be advised of Fifth Amendment (Miranda) rights

A witness, who is a prospective or target defendant, has no right to be advised of his or her Fifth Amendment right not to be compelled to be a witness against himself. United States v. Wong, supra; United States v. Washington, 431 U.S.181 (1977).

4. No right to be notified by status

There is no right to be told that he or she is a potential defendant or target of the investigation. United States v. Washington, supra, (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 at the grand jury that he was a putative or potential defendant.) See also United States v. Swacker, 628 F.2d 1250, 1263 (9th Cir. 1980). The prosecutor has no duty to tell a grand jury witness what evidence it may have against him. United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

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

There is no right to be advised that he or she may recant the testimony and thereby avoid a perjury charge under 18 U.S.C. 1623. United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

However, a better and fairer practice, if the AUSA suspects the witness may have perjured himself or herself, is to ask the witness if he or she wishes to retract or correct any testimony and to even advise the witness of the contradictory evidence.

6. Newsmen have no special rights

There is no right, as a newsman, to refuse to testify concerning his news sources. Branzburg v. Hayes, 408 U.S. 665 (1972). However, the Department of Justice has adopted a policy which restricts the authority to issue subpoenas for newsmen. Departmental procedures are set forth in 28 C.F.R. 50.10 (as revised effective November 12, 1980). See USAM 1-5.410.

7. No right to counsel in grand jury room

There is no right to counsel present in the grand jury room. Fed. R. Crim.P. 6(d). However, the witness may leave grand jury room in order to consult with counsel. Compare United States v. Mandujano, supra, at 606 (Brennan, J. concurring) (may consult with attorney at will) with In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (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); United States v. Weinberg, supra.

8. No right to appointed counsel

The Sixth Amendment right to counsel does not attach, because no criminal proceedings have been instituted, nor do the Miranda rights of appointed counsel attach because grand jury is not the equivalent of custodial police interrogation.

a. 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.

b. 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 CJA allowing for counsel when the witness faces loss of liberty (for example, potential contempt charges).

9. Privilege rights

The right to claim privilege. Fed. R. Evid. 1101(c) provides that privileges apply in grand jury proceedings. The rule of privileges is found in Rule 501.

B. Department of Justice Policy Re: Advice of Rights and Target Status

The Department of Justice has established an internal policy of advising grand jury witnesses of their Fifth Amendment rights and of their status as "targets", if that is the case. Under Department of Justice policy (USAM 9-11.250), witnesses before the grand jury will be advised of the following items.

1. General nature of the inquiry

The general nature of the grand jury's inquiry, unless such disclosure would compromise the investigation. For example, if advising the witness that the grand jury is investigating narcotics violations might jeopardize the case,

the AUSA may state that the investigation concerns violations of federal criminal law.

2. Fifth Amendment rights

The witness may refuse to answer any question if a truthful answer would tend to incriminate him or her.

3. That anything said may be used against the witness

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

5. Their target status, if appropriate

a. A "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."

b. A "subject" is defined as "a person whose conduct is within the scope of the grand jury's investigation." USAM 9-11.250.

c. A "nontarget" may subsequently become a "target" and be indicted, even though the "nontarget" claimed the privilege against self-incrimination when first called before the grand jury; that alone is insufficient to show vindictive prosecution. United States v. Linton, 655 F.2d 930 (9th Cir. 1980), cert. denied, 451 U.S. 912 (1981).

6. Warnings

The above warnings should not be given to the following categories of witnesses:

a. a clear victim of a crime;

b. law enforcement personnel testifying about their investigation;

c. a custodian of records;

d. a person from whom physical evidence is sought (handwriting, fingerprints, voice exemplars, etc.);

e. witnesses with no potential criminal liability.

7. Advisement of rights attached to subpoena

The above advisement of rights should be attached to the subpoena; in addition, the witness should acknowledge on the record that he understands his rights. Only targets need be specifically advised on the record of their rights.

C. Obtaining the Testimony of a Target or Subject Before the Grand Jury

1. Subpoenas to targets or subjects

The grand jury may subpoena and question a target or a subject. United States v. Washington, supra. However, under Department of Justice policy, because of possible prejudice in requiring a subject or target to invoke the Fifth Amendment before the grand jury, a target should not be subpoenaed unless the U.S. Attorney or appropriate Assistant Attorney General approves. USAM 9-11.251.

2. Notification of targets

The AUSA should consider notifying the target that he is being investigated in order that he or she may appear before the grand jury if desired. Such notification is not necessary;

a. in a routine clear case; or

b. if it may cause destruction of evidence, intimidation of witnesses; or

c. increase likelihood of flight; or

d. otherwise delay or jeopardize the investigation.

USAM 9-11.253. The target notification letter should indicate a date by which the target must respond concerning his decision.

3. Request by targets to testify

Although there is no legal duty to allow a target to testify before the grand jury, United States v. Leverage Funding System, 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); 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. USAM 9-11.252. Always advise the grand jury of this request.

If the target testifies, the record should reflect:

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

b. waiver of counsel if not represented; and

c. the fact of the voluntary appearance.

Oppose a request by the target to submit a written statement to the grand jury. Advise the grand jury of your position of any such request and seek their concurrence.

4. Advice to grand jury about the Fifth Amendment

Where a subject has been subpoenaed and has indicated that he intends to assert his Fifth Amendment privilege and the grand jury is aware of such subpoena, do not volunteer to the grand jury that the subject intends to assert the Fifth. Obviously, you should not call the subject if you are aware that the subject is going to take the Fifth, but this does not necessarily resolve the question before the grand jury as to why the subject did not show up. If pushed by the grand jury to tell them why the subject is not going to testify, in order to avoid prejudice against the subject the grand jury should be told that the subject has elected not to appear and that they cannot rely on this failure to appear to imply any guilt in the matter.

D. Alternative Procedures for the Questioning of Witnesses by Grand Jurors

Normally, the AUSA conducts the questioning of a grand jury witness. Questions by members of the grand jury to the witness should be deferred until the prosecutor's examination is completed.

1. Procedures

There are alternative procedures that an AUSA may use in taking grand juror's questions:

a. The assistant may allow the grand jurors to ask the questions without prior screening or discussion.

b. The assistant may ask the witness to leave the room, discuss the questions with the grand jury, and screen out wholly improper questions. Upon the witness' return, either the grand jurors or the assistant may pose the question.

2. Considerations

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 which 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.

E. Immunity for a Grand Jury Witness

1. Formal immunity under 18 U.S.C. 6002-6003

a. A witness called before the grand jury can invoke his or her Fifth Amendment privilege against self-incrimination and refuse to answer a question. If the grand jury witness invokes the privilege, the government may request that he or she be granted use immunity, which supplants the privilege. A witness who has been granted use immunity must answer the question of the grand jury or face contempt proceedings. 18 U.S.C. 6002-6003, Kastigar v. United States, 406 U.S. 441, 462 (1972).

b. When use immunity is granted, the immunized testimony and any evidence derived

from it may not be used against the witness in a subsequent criminal proceeding, except in a prosecution for perjury. Further, truthful testimony given under a grant of immunity cannot be used to show that the witness perjured himself or herself on other occasions. United States v. Berardelli, 565 F.2d 24, 28 (2d Cir. 1977)(witness who may have perjured himself before grand jury cannot refuse to testify at trial under grant of immunity).

c. The statute does not prohibit the use of the immunized testimony in either civil or administrative proceedings that may arise in connection with, or as a result of, the criminal investigation.

d. The possibility of the use by a foreign jurisdiction of grand jury testimony compelled by the immunity under Section 6002 does not violate a witness' privilege against self-incrimination. In re Campbell, 628 F.2d 1260, 1262 (9th Cir. 1980); In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979); In re Weir, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974). But see In re Grand Jury Subpoena of Flanagan, 690 F.2d 116 (2d Cir. 1982); In re Baird, 668 F.2d 432 (8th Cir.), cert. denied, 102 S.Ct. 2255 (1982).

e. The witness cannot be forced to answer, nor sanctions imposed for refusal, unless and until ordered by the district court. Therefore, the AUSA must follow the appropriate procedures before a witness can be compelled to testify, or punished for refusing to do so.

f. If the AUSA has been advised by counsel for the witness that he or she will claim the Fifth Amendment privilege and the AUSA is prepared to obtain an immunity order, the witness need not first appear before the grand jury. 18 U.S.C. 6003(b)(2) provides that an immunity order may be requested when the witness "is likely to refuse to testify."

2. <u>Procedures for obtaining use immunity</u>

a. The procedures for obtaining use immunity are set forth in detail at USAM 1-11.000 *et seq.*

b. After a witness has appeared before a grand jury and has refused to testify based on the Fifth Amendment, <u>or</u>, if the AUSA has been advised by the witness or his/her attorney that the witness will invoke the Fifth Amendment if called before the grand jury, the AUSA must complete a "Request For Authorization to Apply for Compulsion Order" (Form OBD-111-A). (The sample form located at USAM 1-11.901 is out-of-date.)

c. The completed form, along with a memorandum containing a narrative summary of the case (<u>see</u> USAM 1-11.902) must be forwarded to the United States Attorney, who must personally sign the request.

d. The completed request form is then sent to the Witness Records Unit of the Criminal Division at the Department of Justice, which will forward the request to the appropriate authority.

e. Allow a minimum of two weeks for normal processing; it often takes much longer.

f. See USAM 1-11.101 for the procedures for emergency requests.

g. If the request is approved, an authorization letter will be signed and sent to the AUSA (see USAM 1-11.903).

h. Upon receipt of the authorization, a motion for an order to compel testimony, or memorandum of points and authorities, <u>and an order to the court to sign</u>, must be prepared. The pleadings, along with a copy of the letter of authorization from DOJ, are then presented to the court *ex parte* for approval.

3. <u>Informal or "letter" immunity</u>

The possibility of offering informal or "letter" immunity should be explored and considered where appropriate.

CHAPTER V. <u>GRAND JURY SUBPOENA POWER</u>

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V. GRAND JURY SUBPOENA POWER

Introduction

The grand jury may subpoena witnesses to appear, answer questions and/or produce documents, records, or physical evidence.

As a general rule, the breadth of the investigative powers of a grand jury justifies the issuance of subpoenas ad testificandum without any requirement of relevancy or materiality of the testimony likely to be adduced. It follows that witnesses cannot resist questioning by a grand jury on the grounds of relevancy or materiality or require any showing of the reasons why individuals were subpoenaed. A grand jury may, for example, subpoena a large number of witnesses in order to obtain voice exemplars without being limited by Fourth Amendment standards. Only if there was a real abuse of the grand jury's powers -- if, for example, the jury were to pry into someone's business or domestic affairs for idle purpose -- would a court exercise its inherent power to control the grand jury's use of subpoenas ad testificandum. United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Doe, 460 F.2d 328 (1st Cir.), cert. denied, 411 U.S. 909 (1972); In re April 1956 Term Grand Jury (Cain), 239 F.2d 263 (7th Cir. 1956).

A. Issuance of Subpoenas

Grand jury subpoenas are governed by Fed. R. Crim. P. 17. The Clerk's Office provides a supply of blank subpoenas which have been presigned and sealed. Rule 17(a); United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974). Generally, subpoenas are served by the U.S. Marshal or the case agent, and can be served anywhere in the United States. Rule 17(d) and (e). A subpoena may be served abroad for a national or resident of the United States, but not for a foreign national. Rule 17(e)(2); 28 U.S.C. Section 1783; USAM 9-11.230.

It has been held that there is no requirement of a preliminary showing of reasonableness or relevancy for the issuance and enforcement of subpoenas. United States v. Dionisio, 410 U.S. 1 (1973); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hergenroeder); 555 F.2d 686 (9th Cir. 1977) (subpoena to produce handwriting).

Since United States v. Dionisio, supra, the Third Circuit, in an often cited case, has required the government

to make a minimal prima facie showing that (1) the item sought is relevant to an investigation; (2) the investigation is properly within the grand jury's jurisdiction; and (3) the item is not sought primarily for another purpose. In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973), and In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1972). This showing is only required when a challenge is made by the witness.

It is the policy of the Department of Justice that an "Advice of Rights" form, including an indication as to the nature of the investigation, must be attached to all grand jury subpoenas. USAM 9-11.250. The subpoena should also identify the possible violations that are being investigated. A reference to the applicable code section is sufficient.

No subpoena should be issued for an attorney to appear before the grand jury without the prior approval of the appropriate Justice Department official. USAM 1-7.100. There are also limitations on the issuance of subpoenas to members of the news media, USAM 1-5.410.

B. Grand Jury Subpoenas v. Claims of Constitutional and Common Law Privilege

A grand jury subpoena is not a search or seizure within the meaning of the Fourth Amendment. United States v. Calandra, supra.

During the course of investigations it is frequently necessary to subpoena financial records from third persons not directly involved in the investigation, e.g., subpoenas to banks for the bank records of a target. The Supreme Court has held that a bank depositor does not have standing to object to a subpoena for his bank docucments by a federal grand jury. United States v. Miller, 425 U.S. 435 (1976). The Court said that the checks and deposit slips sought in Miller were not "confidential communications but negotiable instruments to be used in commercial transactions". The Ninth Circuit has considered this same issue and ruled the same way. In re Grand Jury Subpoena Duces Tecum (Privitera), 549 F.2d 1317 (9th Cir.), cert. denied, 431 U.S. 930 (1977).

However, the district court might entertain a motion to quash a subpoena for bank records if other constitutional improprieties in the conduct of the grand jury are alleged, such as First Amendment grounds. Therefore, do not assume that the prosecutor will always prevail when defending against a motion to quash bank records, solely on the Miller test.

After documents or records have been produced pursuant to subpoena, the person who produced the records may request access to the records, or, in some cases, return of the records. Assuming that reasonable grounds or a legitimate need exists, access should be granted under appropriate safeguards. Alternatively, if such a request is made, you may want to keep the original records and return copies (but not at government expense). For a thorough discussion of constitutional and common law privileges in the grand jury context, see Chapter VI, infra.

C. Grand Jury Subpoena for Documents and Records

1. In general

In the typical grand jury investigation, the assistant will draft a subpoena compelling the production of the documents or records and have it served by the case agent (or the U.S. Marshal). The agent may receive the documents from the witness and make the return before the grand jury on the witness' behalf, if the witness wishes. The best practice is to have the witness request or approve such a procedure in writing.

It used to be a matter of practice to type on the face of the subpoena that the requested documents could be turned over directly to the agent serving the subpoena. That practice is no longer preferred, and should be abandoned. As an alternative, it is appropriate to type on the subpoena a note of the following or similar nature:

> Upon receipt of this subpoena,
> [or] Prior to producing the
> requested documents, please call
> AUSA ____________ at ( ) ___-____.

It is also appropriate to have the agent serving the subpoena inform the person served to call the assistant to discuss the method of compliance with the subpoena.

Even if the grand jury is not sitting at the time of the issuance of the subpoena, the issuance of the subpoena is proper if the return date coincides with the date that the grand jury is actually in session. United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974).

Any grand jury may consider documents and records subpoenaed by a previous grand jury without the

necessity of a new subpoena. United States v. Thompson, 251 U.S. 407 (1920).

The responsibility for the issuance of subpoenas to obtain evidence belongs to the prosecutor. The prosecutor assists the grand jury in bringing evidence to it in the nature of documents, records and witnesses. United States v. Kleen Laundry & Cleaners, Inc., supra, 381 F. Supp at 520.

Although broadly construed, the investigative powers of the grand jury do not justify the issuance of general subpoenas duces tecum. Subpoenas duces tecum must be reasonably specific.

Rule 17 does not require a precise identification of the exact documents sought by the grand jury; a reasonable particularity is all that is necessary. The description is usually given in terms of subjects to which the writings relate, and if a subpoena is broader in one respect (covering for example, a lengthy period of record-keeping), it may have to be narrower or more specific in another. Illustrated cases are collected in Wright, Federal Practice and Procedure; Criminal Section 275.

It is clear from the discussion above that a witness can move, albeit on limited grounds, to quash a grand jury subpoena directing him to produce documents. This is not to say, however, that third parties who may have generated or were the source of documents can move to quash. For the "standing" doctrine, applicable to the Fourth Amendment, has now been grafted onto grand jury practice.

The Fourth Amendment creates a personal right which cannot be vicariously asserted. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963). If a person has no reasonable expectation of privacy in records or documents, he cannot object even if the prosecution acquired them through an invalid subpoena duces tecum. Thus, the Supreme Court held in United States v. Miller, 425 U.S. 435 (1976), that a depositor had no legitimate expectation of privacy in bank records that were obtained through the use of a defective subpoena. The Court held:

> All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees

> in the ordinary course of business.... The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. 425 U.S. at 442-431.

Of course, if there is a privileged relationship between the subpoenaed possessor of the documents and the source of the documents, the narrow standing rule of Miller does not necessarily apply. In addition, the narrow approach to standing will not be applied if it would effectively result in the third party's inability to protect itself from prosecutorial harassment. For example, in In re Grand Jury (C. Schmidt & Sons, Inc.), 619 F.2d 1022 (3d Cir. 1980), the court allowed a corporation to appeal a denial of its motion to quash a subpoena directed at its employees. The court emphasized that, unlike its employees, the corporation, which was claiming governmental harassment, could not obtain appellate review of the subpoena by going into contempt. The court held that the company had standing, and it rejected

> the government's suggestion that the courts limit standing to claims of abuse of the grand jury process to persons whose property interest or privileges have been invaded.... Third party standing to assert claims of grand jury abuse cannot be determined by categorizing the claimed interest as one of property or privilege, but only by examining the nature of the abuse, and asking whether, and in what manner, it impinges upon the legitimate interests of the party allegedly abused. In this case Schmidt claims that the grand jury is not investigating violations of federal law, and that the Strike Force is attempting to harass it. It asserts that it is being deprived of the time and effort of its employees. It has standing to make these claims by moving to quash the subpoenas. 619 F.2d at 1026-27.

See also Katz v. United States, 623 F.2d 122 (2d Cir. 1980) (client may intervene in grand jury proceedings to move to quash subpoena directing his attorney to

produce client's books and records); In re 1979 Grand Jury (Velsicol Chem. Corp.), 616 F.2d 1021 (7th Cir. 1980) (client has standing to intervene to contest document subpoena directed to his attorney).

2. Right to Financial Privacy Act of 1978

The Right to Financial Privacy Act of 1978, (12 U.S.C. Section 3401 et seq.), specifically exempts grand jury subpoenas. 12 U.S.C. Section 3413(i). In general, therefore, the provisions of the Act do not apply when issuing grand jury subpoenas for financial records, even when banks or other financial institutions are the entity to which the subpoena is directed.

However, the Act does require that all grand jury subpoenas to financial institutions be "returned and actually presented to the grand jury." 12 U.S.C Section 3420. Therefore, if the institution has turned over the records to the agent for compliance (versus custodian appearing at the grand jury), or when the records are mailed to the assistant, the AUSA must insure that the agent makes an appearance before the grand jury, or that the records that were mailed in are actually presented to the grand jury, on the return date or as soon thereafter as possible.

Also, at the conclusion of the investigation, the records must be destroyed or returned to the institution if not used in connection with an indictment or disclosed under Rule 6(e). Further, the records (as well as any description of their contents) must be separately maintained, sealed and marked as grand jury exhibits, unless used in prosecuting the case.

The government currently will reimburse certain institutions for reasonable costs of complying with subpoenas for certain types of financial records. Check with the Administrative Office to determine under what circumstances the Government will pay and what procedures ought to be followed. For a detailed discussion of the Financial Privacy Act, see USAM 9-4.810, et seq.

3. Fair Credit Reporting Act

The Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.) authorizes a consumer reporting agency to furnish a consumer report in response to the "order of a court." 15 U.S.C. Section 1681b(1). Otherwise, such an agency may only furnish a governmental agency with

the name, address, former addresses, and present and past places of employment of a consumer. 15 U.S.C Section 1681(f).

The Ninth Circuit has recently held that a grand jury subpoena is not an "order of a court." In re Gren, 633 F.2d 825 (9th Cir. 1980). In so doing, the court limited the decision in United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) to the facts of that case. In re Gren, supra, at 829, n.5.

In re Gren is inconsistent, therefore, with the position of the Department of Justice as reflected at USAM 9-11.230, "Bluesheet" dated August 13, 1980. It would appear necessary, then, to seek a special order of the court under Section 1681(b)(1) to obtain information from a consumer reporting agency.

4. Attorney-Client Privilege/Attorney Work Product Doctrine

See Chapter VI.

5. Handling and marking grand jury exhibits

Following a subpoena return, all documents and records should be marked or inventoried in some manner. This is particularly important for documents received from financial institutions because of the Financial Privacy Act.

There are several acceptable procedures.

a. Have the custodian of records describe, separately or by category (in cases of voluminous records), the documents presented when making the return. After the records are turned over to the case agent, he should inventory and perhaps even mark each exhibit (individually by number or description).

b. Have the custodian of records describe and mark each exhibit. The AUSA may want to have the custodian testify to the foundation of each document before the grand jury.

c. If the records were either delivered to the agent or mailed in, the documents should be described for the record, marked, and then turned over to the prosecutor or the case agent (with the permission of the grand jury). Thereafter, an inventory should be prepared.

Instances where records are not inventoried are more common than they should be, and can only lead to later difficulties.

During a grand jury investigation, witnesses (other than custodians) may be examined about and shown various documents. The AUSA should consider using an exhibit list, similar to that used at trial, in cases where the witness may testify concerning numerous documents. This provides a good record of the testimony and documents shown. The AUSA may want to tag each exhibit separately for each witness testifying.

D. Limitations of Grand Jury Power

1. Power limited by grand jury functions

a. General rule and limitations

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. Costello v. United States, 359 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used to obtain additional evidence against a defendant who has already been indicted for the crime under investigation. United States v. Woods, 554 F.2d 242, 250 (6th Cir. 1976), cert. denied sub nom. Hurt v. United States, 429 U.S. 1062 (1977). After indictment, the grand jury may be utilized if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. In re Grand Jury Proceedings (Pressman), 586 F.2d 724 (9th Cir. 1978).

A grand jury cannot be used for pretrial discovery or trial preparation. United States v. Star, 470 F.2d 1214 (9th Cir. 1972) (where defendant's alibi witnesses were subpoenaed before grand jury after indictment, court condemned the practice but did not reverse conviction).

b. Locating fugitives

The USAM (9-11.220) states that it is a misuse of the grand jury process to use the grand jury to aid in the apprehension of a fugitive. The same section of the USAM also stated that using the grand jury to locate a fugitive where the grand jury wants to hear the fugitive's testimony or is investigating crimes such as

harboring, misprison, accessory, or UFAP's may be permissible but that prior approval of the General Litigation and Legal Advice Section of the Department of Justice Criminal Division is required. The section also clearly states that the grand jury should not be used to locate fugitives in escape and bail jump cases.

c. Subpoenas must be for appearance before grand jury

It is impermissible to use the grand jury subpoena to compel the witness to appear in the U. S. Attorney's Office instead of the grand jury. Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).

However, no rule of law prohibits the government from interviewing a grand jury witness before or after the witness has appeared before the grand jury. United States v. Mandel, 415 F. Supp. 1033, 1039-40 (D. Md. 1976), aff'd., in part, and vacated, and remanded, in part, 591 F.2d 1347 (4th Cir. 1979). If the witness consents to the interview, this procedure is actually preferred. It may expedite the interrogation before the grand jury, especially if there are voluminous records for the witness to review.

If an interview is conducted, the fact that an interview took place, and the witness' consent thereto, should be placed on the record. Furthermore, if, after the interview, the assistant determines that the witness' testimony is not relevant or probative, the witness need not testify. However, the grand jury should be advised of that fact in order to forestall a subsequent claim of grand jury abuse.

d. Naming unindicted co-conspirators

In United States v. Briggs, 514 F.2d 794 (5th Cir. 1975), the court held that the naming of unindicted co-conspirators exceeded the power and authority of the grand jury, and denied persons so named of due process. This rule has been applied in the Ninth Circuit. United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977). It is the policy of the Department of Justice and this office to avoid naming unindicted co-conspirators in indictments absent some sound reason (e.g., where the identity of the unindicted co-conspirator is already a matter of public record, as in superseding or ancillary indictments). USAM 9-11.225.

e. Grand jury reports

While the authority of a federal grand jury to issue a report is ambiguous, the policy of the Department of Justice is clear; the Department must be consulted before the U. S. Attorney can request a report, and should be advised if the grand jury intends to issue a report on its own. USAM 9-2.155.

2. Power limited by venue

Although a matter should not be presented to a grand jury in a district unless it has venue, the grand jury may investigate matters even though they occurred partly outside the district. A witness cannot challenge the right of the grand jury to inquire into events that happened in another district. Blair v. United States, 250 U.S. 273, 282-3 (1919); In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522 (W.D. Tex., 1973).

The grand jury has jurisdiction to investigate a conspiracy if it appears that it was formed in the district or any overt act occurred within the district. 18 U.S.C. Section 3237; Hyde v. Shine, 199 U.S. 62 (1905); Downing v. United States, 348 F.2d 594 (5th Cir.), cert. denied 382 U.S. 901 (1965).

3. Power limited by district court

The grand jury is under the supervision of the courts. The grand jury must rely on the district court's subpoena and contempt powers, because it lacks its own enforcement power. Brown v. United States, 359 U.S. 41 (1959).

It has been said that the grand jury is essentially an agency of the court, and that it exercises its powers under the authority and supervision of the court. United States v. Basurto, 497 F.2d 781, 783 (9th Cir. 1974) (Hufstedler, J., concurring); Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972).

On the other hand, it is sometimes asserted that grand juries are basically law enforcement agencies and are for all practical purposes an investigative and prosecutorial arm of the executive branch of the government. United States v. Doulin, 538 F.2d 466 (2d Cir.), cert. denied, 429 U.S. 895 (1976).

These opposing points of view present a conflict between the executive and judicial branches of the federal government over their respective relationships to the grand jury.

The Ninth Circuit strikes a balance between the two positions. In United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977), the court recognized that "under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." Id. at 1312. The court states [G]iven the constitutionally-based independence of each of the three actors -- court, prosecutor and grand jury -- we believe a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their 'supervisory power' could readily prove subversive of the doctrine of separation of powers." Id. at 1313.

Chanen offers an excellent discussion of the supportive and complementary roles played by court and prosecutor with respect to the work of the grand jury. The discussion supports the description of the grand jury as being "supervised" by the court rather than as an appendage of it.

The district court may properly deny a grand jury use of subpoenas to engage in "the indiscriminate summoning of witnesses with no objective in mind and in the spirit of meddlesome inquiry" and may curb a grand jury when it clearly exceeds its historic authority. Hale v. Henkel, 201 U.S. 43, 63 (1906).

4. Power limited by the prosecutor

In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose function is to insure that justice is done and that the guilty shall not escape nor the innocent suffer. He must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecutions but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors. (USAM 9-11.015).

The authority of the United States Attorney to initiate grand jury proceedings in certain specific instances is limited by the Department of Justice. See generally USAM 9-2.120, and specifically USAM 9-2.130 through 9-2.134.

E. Motions to Quash a Grand Jury Subpoena

A witness can properly challenge a subpoena from the grand jury with a motion to quash. Fed. R. Crim. P. 17(c). It is clear that the courts have jurisdiction to quash and modify any unreasonable and oppressive federal grand jury subpoenas. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956). However, there is a presumption of regularity that attaches to all grand jury subpoenas duces tecum. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972), In re Grand Jury Subpoenas Duces Tecum (M.G. Allen and Associate, Inc.), 391 F. Supp. 991 (D. R.I. 1975). Therefore, an individual who seeks to quash a grand jury subpoena bears a heavy burden in proving that the subpoena is unreasonable and oppressive. In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 994-995.

1. Test for determining whether subpoena is unreasonable or oppressive

Several courts have adopted a three part test to use in determining if a given subpoena is unreasonable and oppressive. First, the subpoena may only require the production of documents relevant to the investigation being pursued. Second, the subpoena must specify the things to be produced with a reasonable particularity. Third, the subpoena can require the production of records covering only a reasonable period of time. United States v. Gurule, 437 F.2d 239 (10th Cir. 1970); In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991 (D. R.I. 1975); In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295 (E.D. Pa. 1974). In re Corrado Brothers, Inc., 367 F. Supp. 1126 (D. Del. 1973).

a. Government's burden

Once the motion to quash has been made, the government must shoulder the initial burden of demonstrating the relevance of the subpoenaed documents to a legitimate grand jury investigation. Once the government makes such a minimal preliminary showing, that prima facie showing of relevance becomes irrebuttable and

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parties opposing the enforcement of the subpoena cannot obtain any further evidence concerning the nature of the grand jury investigation. In re Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977). In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 995. See also, In re Horowitz, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

(1) Demonstration of relevance

In some districts the initial demonstration of relevance can be done with an affidavit by the case agent. This will set forth the nature of the investigation, the fact that there is a grand jury investigation, and the general relevancy of the subpoenaed documents to the investigation. This affidavit should be submitted to the judge in camera.

The government need not demonstrate the relevance and necessity of each document requested. Unlike a trial subpoena, the grand jury subpoena, issued at the initial stages of an investigation, cannot always describe precisely what records exist or are required to prove particular criminal conduct. Schwimmer v. United States, supra; In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295 at 1299 (E.D. Pa. 1974); In re Grand Jury Subpoenas Duces Tecum, supra, 391 F. Supp. at 998.

In motions to quash, typically allegations are made that the grand jury is on a fishing expedition. A grand jury investigation may be triggered by tips, rumors, evidence prompted by the prosecutor or the personal knowledge of the grand jurors. Costello v. United States, 350 U.S. 359 (1956). Some exploration or fishing necessarily is inherent and appropriate in all document production sought by a grand jury. Schwimmer v. United States, supra, at 862.

(2) Test for determining specificity

The second requirement is that the documents be described with the required specificity. Several district courts have

used a two-part examination to determine if this requirement is satisfied. First, is the description of the subpoenaed document sufficiently particular so that a person commanded to comply may in good faith know what he is being asked to produce, and second, is the subpoena so overbroad that a person complying in good faith would be harassed or oppressed to the point that he experiences an unreasonable business detriment. In re Corrado Brothers, Inc., supra, 367 F. Supp. at 1132; In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp at 999.

If the subpoena has been properly drawn, there should be no difficulty with the first problem. However, complaints will arise about the second aspect of this requirement. Frequently, targets complain that their business will be halted or that the volume of records sought is excessive. It should be noted that the volume of records sought is not itself a sufficient basis upon which to quash a subpoena. In re Corrado Brother, Inc., supra, 367 F. Supp. at 1132; In re Grand Jury Investigation (Local 542), 381 F. Supp. 1295, 1298 (E.D. Pa. 1974). The petition must demonstrate why the business will be seriously disrupted if the subpoena is complied with. If the subpoenaed papers are not currently being used for any purpose, the subpoena is not oppressive. In re Horowitz, supra.

(3) Reasonableness of time period covered by subpoena

The third requirement is that the subpoena be restricted to a reasonable time period. The period of time covered by the request should bear a reasonable relation to the nature and scope of the grand jury investigation. In re Corrado Brothers, Inc., supra; In re Horowitz, supra. In one case a subpoena duces tecum requiring the production of voluminous records from the Radio Corporation of America over a period as long as 18 years has been upheld. In re Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952). Subpoenas duces tecum covering periods of 27 and 20 years have also been

upheld. In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); In re Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948). Be advised, however, that if records covering that extensive time period have been requested the assistant must be prepared to justify it to the court.

b. Other grounds

Occasionally other unusual grounds for the motion to quash will arise. Petitioners will sometime claim that other government agencies, such as the SEC, the California Department of Corporation, etc., have already had access to the documents sought, and nothing was done; that it is harassment for the grand jury to subpoena them. A claim similar to this was raised in In re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 1001, and the court ruled that the grand jury was entitled to have the evidence produced before it. See also, In re Motions to Quash Subpoenas Duces Tecum, 30 F. Supp. 527, 531 (S.D. Cal. 1939); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

Petitioners will sometimes assert that they have not been given adequate time to review, assemble and deliver the requested documents. The burden of showing the possibility of prejudice rests heavily on the subpoenaed parties. In re Corrado Brothers, Inc., supra, at 113.

2. Reimbursement for costs of production

The government is generally not required to reimburse the parties for their costs in complying with subpoenas. Obviously, if the subpoenaed party and the records are covered by the Financial Privacy Act, the Act controls and under the proper circumstances the government will reimburse the subpoenaed party for the cost of compliance with the subpoena. 12 U.S.C. Section 3415. Frequently when subpoenaing documents from a business, the Financial Privacy Act will not be applicable, yet the business will seek to require the government to pay the costs of compliance.

a. There is some question as to whether a

district court has the authority to direct the government to pay the cost of complying with a grand jury subpoena. Some courts have said that authority stems from the Fed. R. Crim. P. In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978); In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, 555 F.2d 1306 (5th Cir. 1977); In re Grand Jury Subpoena Duces Tecum, 436 F. Supp. 46 (D. Md. 1977).

b. Assuming arguendo, that the court has jurisdiction to direct the government to pay the costs of compliance with the subpoena, under what circumstances should this occur?

The general principle is beyond dispute that there is a public obligation to provide evidence and that this obligation persists no matter how financially burdensome it may be. Hurtado v. United States, 410 U.S. 578 (1973); United States v. Dionisio, 410 U.S. 1 (1973). On a subpoena to testify before a grand jury the party should not expect reimbursement for the cost of testifying (such as loss of wages or income, etc.). In re Grand Jury Investigation, supra, 459 F. Supp. 1335; In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, supra; Hurtado v. United States, supra. A person who is subpoenaed to produce records before a grand jury has no "right" to be reimbursed for his costs. In re Grand Jury NO. 76-3 (MIA) Subpoena Duces Tecum, supra. (Of course, a grand jury witness, like any other witness, is entitled to a witness fee plus the cost of transportation and per diem.)

c. The courts have exercised the power to quash or modify subpoenas (or to condition enforcement on the advancement of costs) on the grounds of unreasonableness or oppressiveness. In re Grand Jury Investigation, supra, 459 F. Supp. at 1340; In re Morgan, 377 F. Supp.281 (S.D.N.Y. 1974); In re Corrado Brothers, Inc., supra.

d. The subpoena should actually call for originals and not copies, thus negating the claim that the subpoena requires the recipient to do copying work. The Fifth

Circuit has held that in determining whether a subpoena is unreasonable or oppressive a court must first determine what it would cost to produce the documents requested for the government's inspection or use. The cost of reproduction of documents - so that the holder may retain the originals and the government have the copies - is a cost that in all but the most exceptional of cases is undertaken by the holder for his own convenience. Only after a court has determined that production of the original documents is a practical impossiblity may it consider the convenience and cost of reproduction as a necessary consequence of compliance with the subpoena. In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum, supra, 555 F.2d at 1307-1308.

e. When the subpoenaed party is the object of the grand jury investigation the cost of compliance should not be shifted to the government unless those costs would be destructive to the persons subpoenaed. In re Grand Jury Subpoena Duces Tecum, supra, 436 F. Supp. 46; In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975).

There is one case where the court directed the government to advance the costs of compliance to the subpoenaed party. In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975), after a finding by the court that it was virtually impossible for the target to comply with the subpoena at his own expense. The court found that the production of the required documents would entirely disrupt the target's business; therefore, copying of the records was required. The court concluded that since it was virtually impossible for the target to comply, the government would have to pick up the cost or else have the motion to quash granted.

3. Time for filing motion to quash

Unlike Rule 45(b) of the Federal Rules of Civil Procedure, the criminal rule allows for the

consideration of a motion to quash even if made as late as the time set for compliance. See Wright, Federal Practice and Procedure, Criminal Section 275.

4. Government Appeals from motions to quash

Under 18 U.S.C. Section 3731, the government may appeal an order to the district court quashing a grand jury subpoena. In re Special September 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Investigation, 599 F.2d 1224, 1226 (3d Cir. 1979); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); United States v. Calandra, 455 F.2d 750 (6th Cir. 1972).

5. Appeal of orders denying motions to quash

a. General rule

[O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its command or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey...

United States v. Ryan, 402 U.S. 530, 532 (1971). See Cobbledick v. United States, 309 U.S. 323 (1940).

b. Exceptions

United States v. Ryan, supra, at 533, indicated that in a "limited class of cases where denial of immediate review would render impossible any review whatsoever," appellate review would be appropriate.

In Perlman v. United States, 247 U.S. 7 (1918), the court allowed immediate review of an order directing a third party to produce documents which were Perlman's property; to have denied review would have left Perlman "powerless to avert the mischief of the order," for the custodian could not be expected to risk a contempt citation in order to vindicate Perlman's rights. 247 U.S. at 12-13.

A similar exception was recognized in the more recent case of In re Gren, 633 F.2d 825 (9th Cir. 1980). There, a consumer reporting agency which was regulated by the Fair Credit Reporting Act, 15 U.S.C. Section 1681 et seq., was permitted an immediate review of an order denying a motion to quash, since the agency was subject to civil suit for improperly divulging consumer credit information.

F. Enforcement of Grand Jury Subpoenas

Instead of properly moving to quash, the party may simply (1) refuse to appear, or (2) appear and refuse to testify or produce the material. In such cases, the grand jury must rely on the district court's contempt powers to compel attendance and testimony. The grand jury has no power to enforce its own orders; therefore, it must rely on the district court to compel production, attendance or testimony.

1. Available sanctions

Failure to appear or testify can lead to either criminal (18 U.S.C. Section 401, Fed. R. Crim. P. 42) or civil (28 U.S.C. Section 1826) contempt charges. Punishment for contempt includes both fines and imprisonment, but an unwilling witness rarely will be subjected to both sanctions simultaneously. Under normal circumstances, the court will impose the least onerous sanction reasonably calculated to gain compliance with the order. In re Grand Jury Impaneled January 21, 1975, 529 F.2d 543, 551 (3d Cir.), cert. denied, 425 U.S. 992 (1976). If the recalcitrant witness is already serving a sentence when he is held in contempt, the contempt sentence interrupts the existing sentence. In re Garmon, 572 F.2d 1373 (9th Cir. 1978).

2. Deciding how to proceed

If a witness appears before the grand jury and refuses to comply with the subpoena based on some objection to the subpoena, e.g., attorney/client privilege, work product privilege, Fourth, First, or Fifth Amendment objections, Sections 3504, 2515 or Title 18, etc., the prosecutor must consider various alternatives.

a. The prosecutor may decide to proceed directly with a contempt proceeding. The witness and his

lawyer should be taken before a district court judge immediately, and, upon oral motion of the government, be directed to answer the questions. In the alternative, a motion to compel compliance with the subpoena before the district court may be more appropriate. If there are substantial issues of fact or law to be litigated, the latter may be the best way to proceed.

b. This motion should be brought with proper notice under the appropriate ten-day rule and probably should be accompanied by some indication in writing to counsel that if the motion is granted and there is then a lack of compliance with the court's order, the government intends to proceed immediately against the witness in a contempt proceeding under 28 U.S.C. Section 1826.

c. The witness should be forced to raise all possible objections to the subpoena at the hearing on the motion to compel, rather than relitigating new issues at the contempt hearing, and in order to minimize successive hearings to litigate additional objections. Care should be taken to research the case law prior to the hearing on the motion to compel regarding the particular objection because frequently the government does have additional minimal burdens to meet, i.e., if a First Amendment objection is raised the government must make certain showings as to the legitimacy of the grand jury investigation.

3. Notice and opportunity to prepare a defense

Although civil contempt proceedings brought under 28 U.S.C. Section 1826 do not give rise to a constitutional right to a jury trial, courts have held that Fed. R. Crim. P. 42(b) does apply to such procedures and as such a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense. In re Di Bella, 518 F.2d 955 (2d Cir. 1975). United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert, denied, 419 U.S. 1079 (1974); United States v. Alter, 482 F.2d 1016 (9th Cir.1973).

a. What constitutes a reasonable time may vary according to the circumstances in the given case (five days is generally acceptable); however, the time is left to the discretion of the district court. United States v. Hawkins, supra; In re Lewis, 501 F.2d 418 (9th Cir. 1974); United States v. Alter, supra; United States v. Weinberg, 439

F.2d 743 (9th Cir. 1971). The courts have in fact upheld as little as one day as enough notice. United States v. Hawkins, supra. The Ninth Circuit in the Lewis case held that Lewis had adequate notice of the possible contempt proceedings when he had known for more than one week that the government would seek a contempt citation if he did not comply with the subpoena.

b. Furthermore, if the witness had adequate opportunity to raise all the issues prior to the actual contempt proceeding (for example, in a motion to compel), the district court can reasonably find that there was sufficient time to prepare even though there was actually very little time that elapsed between the actual contempt and the contempt hearing. United States v. Hutchinson, 633 F.2d 754, 756 (9th Cir. 1980); United States v. Hawkins, supra; United States v. Alter, supra.

4. Government response

At a contempt proceeding it is helpful to provide the district court with an affidavit setting forth the general relevancy of the subpoenaed documents to the grand jury investigation. In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973). The Ninth Circuit has declined to require Schofield affidavits in grand jury proceedings. In re Liberatore, 574 F.2d 78 (2d Cir. 1978); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977).

5. Defenses

A witness charged with contempt may plead "just cause" in defense of a refusal to testify, but a substantial showing of improper motives on the part of the government is required before a full evidentiary hearing will be ordered. In re Archuleta, 561 F.2d 1059, 1061 (2d Cir. 1977)(witness may not object to question on grounds of incompetency or irrelevance).

a. Wiretaps - Gelbard Doctrine

One exceptional situation is to be noted. A grand jury witness is entitled, by reason of 18 U.S.C. Sections 2515, 3504, to refuse to respond to questions based on illegal interception of oral or wire communications. Gelbard v. United States,

408 U.S. 41 (1972). The decision is based on the statute and not any broader principle.

Gelbard does not confer standing on a grand jury witness to suppress evidence before a grand jury. It merely extends the right not to testify in response to questions based on the illegal interception of his communications. Gelbard v. United States, 408 U.S. at 47. See In re Marcus, 491 F.2d 901 (1st Cir.), vacated, 417 U.S. 942 (1974).

The government's response to such a defense depends on whether any interception occurred. If there was no interception, the assistant should file an affidavit denying that any interception took place. Under some circumstances, the affidavit must be reasonably specific, and conform with the requirements set forth in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

If an interception did occur, the government should so indicate, and provide the court with appropriate documents demonstrating that the interception was pursuant to court order. For a discussion as to what documents are necessary to prove a valid intercept, see USAM 9-7.620.

b. Fear of retaliation (safety of the witness)

Fear of retaliation and for the physical safety of the witness does not constitute just cause. Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975). Even where fears are legitimate, just cause is not always proven. In re Grand Jury Proceedings (Taylor), 509 F.2d 1349 (5th Cir. 1975); LaTona v. United States, 449 F.2d 121 (8th Cir. 1971).

6. Findings of fact

At the time of the contempt hearing or shortly thereafter, prepare findings of fact and conclusions of law for the judge that set forth the legitimacy of the grand jury, the necessary factual findings, and the conclusions of law that lead the judge to conclude that the witness should be held in contempt.

7. Bail

If a witness is jailed on contempt under 28 U.S.C.

Section 1826, the statute provides that the witness shall not be released on bail if the appeal is frivolous or taken for delay. 28 U.S.C. Section 1826(b). The statute also provides that the appeal must be heard and decided by the Court of Appeals within 30 days. There are some cases that hold that the 30-day period is jurisdictional and cannot be waived even if the appellant is released on bail. In re Berry, 521 F.2d 179 (10th Cir.), cert. denied, 423 U.S. 928 (1975). However, the Ninth Circuit has heard and decided cases in longer than 30 days when the witness is on bail. In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979). See In re Grand Jury Proceedings (Smith), 604 F.2d 318 (5th Cir. 1979), for a summary of other cases and circuits.

8. Successive contempt sanctions

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Department of Justice. See USAM 9-11.255. Although the decision in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1965), may authorize successive contempts, the Department has taken a more restrictive stance.

In order to maintain the coercive effect of a possible contempt sanction, a witness expected to refuse to testify should be taken before a grand jury panel which has a period of time left to serve, rather than a panel which is about to expire.

9. Procedures for enforcement

In order to enforce a subpoena or the grand jury's order, the following procedures are necessary:

a. If witness fails to appear after service of subpoena

Because grand jury subpoenas are issued under the authority of Fed. R. Crim. P. 17 and likewise enforceable, United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975), a failure to appear following proper service is a contempt of court. Fed. R. Crim. P. 17(g).

If the witness does not appear, the grand jury foreperson should ascertain by reasonable means that the witness did not appear (call for

witness in the hallways, call to witness' home, etc.). The foreperson, attorney and process server should present evidence to the duty judge or magistrate that

(1) the witness was properly served and had notice of appearance; and

(2) the witness did not appear.

This evidence can be presented by affidavit. The AUSA should then seek an order to show cause re contempt and a warrant for arrest.

b. If the witness fails to answer questions or produce records

Here, the witness appears before the grand jury and fails to answer a question or produce material called for in the subpoena.

The witness should state his refusal on the record before the grand jury. The grand jury, AUSA, the foreperson, the grand jury reporter, and the witness then appear before the judge (usually the chief judge unless the matter relates to a case assigned to another judge). The foreperson should inform the court of the refusal. The court hears the testimony from the reporter. The witness or his attorney states the basis for refusal to testify or comply. If the court rules there is no basis to refuse to answer the question, then the court orders the witness to return to the grand jury and comply. (It is important that the court make this order, as it becomes the order to be enforced.)

The witness returns to the grand jury and is again ordered to testify or otherwise comply. If the witness continues to refuse, all parties return to the judge and report this fact.

The matter then should be set for a hearing on an order to show cause why the witness should not be held in contempt as discussed supra.

c. Material witness warrant

If there is reason to believe that a witness will fail to appear or destroy evidence if served with a grand jury

subpoena, the AUSA may obtain a material witness warrant. Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). The district court (usually the duty magistrate) may issue the warrant if there is probable cause to believe:

(1) that the testimony of the witness is material to the grand jury investigation (Note: AUSA need only state materiality in conclusory terms as there is no requirement of good cause for issuance of grand jury subpoena); and

(2) that it may become impracticable to secure the appearance by subpoena. Sufficient facts must be presented to the judicial officer; a mere assertion is insufficient.

G. Use of "Forthwith" Subpoenas

A forthwith subpoena should only be used in extraordinary circumstances, such as where there is a reasonable likelihood that business records or documents otherwise not subject to a claim of the Fifth Amendment privilege are likely to be concealed or destroyed if an immediate return is not required on the subpoena. Before seeking a forthwith subpoena, careful consideration should be given to the feasibility of obtaining a search warrant.

Although infrequently challenged, courts have indicated that forthwith grand jury subpoenas are proper in certain situations. In United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970), the court held that a forthwith subpoena duces tecum was permissible in circumstances where: the grand jury (government) had reason to fear destruction or alteration of documents; the documents were not too cumbersome to be physically produced forthwith; and there was no ground upon which a motion to quash could have succeeded if more time were allowed. While the court In re Nwamu, 421 F. Supp. 1361 (S.D.N.Y. 1976) apparently accepted the proposition that a grand jury has the power to compel a witness to appear before it and produce certain documents and things forthwith, the court clearly indicated that this power does not authorize an agent of the grand jury serving such a subpoena (e.g., FBI agent, Postal Inspector, etc.) to seize the items sought himself or to demand that the items be

immediately surrendered to him. At most, such a subpoena compels the person served with the subpoena to appear forthwith before the grand jury and to produce such documents called for in the subpoena or raise appropriate objections to their surrender to the grand jury.

Forthwith subpoenas cannot be issued without the prior approval of the U.S. Attorney. The following factors should be considered:

1. the risk of flight;
2. the risk of destruction or fabrication of evidence;
3. the need for the orderly presentation of evidence; and
4. the degree of inconvenience to the witness.

USAM 9-11.230.

It is important for the assistant to lay the proper foundation for the subpoena in the event that a challenge to that subpoena is made. Ideally, he should have the case agent or other appropriate witness testify before the grand jury to relate the facts and circumstances which would justify the issuance of a forthwith subpoena. Thereafter, with the grand jury's approval and at the direction of the foreperson of the grand jury, the Assistant should have the subpoena served by the case agent returnable later that same day before the same grand jury.

H. Use of Search Warrants

The use of a search warrant instead of a grand jury subpoena can be extremely advantageous for several reasons. It saves time and may substantially shorten the investigation; it may produce current, up-to-date evidence of a present violation; and it has enormous psychological impact on the perpetrators. A great benefit is that a warrant does not allow the targets of the investigation time to alter or destroy evidence, which often happens with documents requested through a grand jury subpoena. Use of a warrant also obviates any Fifth Amendment claims available to subjects when documents are subpoenaed.

Certain circumstances must exist to make the use of a search warrant feasible. Evidence already obtained in the investigation must show probable cause to believe the existence of a criminal violation, the existence of documents and property constituting instrumentalities and fruits of the crime, and that the property to be seized is presently at the place to be searched. Searches are ideal in on-going operations such as a Medicare/Medicaid mill, a securities or commodities boiler room, or a current fraud by a government contractor. They are also useful in obtaining evidence of "completed" offenses, such as the seizure of records of a non-corporate private accountant for a labor union.

The drafting and serving of the warrant are crucial to its success in surviving defense challenges. A great concern in the drafting of a warrant is that it specify with particularity the documents to be seized. The warrant must specify not only the types of records, but also the dates or time frame of the documents to be seized. Also, it must be clear that the records are relevant to the probable cause stated in the affidavit. Some cases that illuminate the pitfalls of drafting and executing search warrants in fraud cases are: United States v. Cook, 657 F.2d 730 (5th Cir. 1981) (no guidance for agents on how to determine illegally-obtained films); United States v. Jacob, 657 F.2d 49 (4th Cir. 1981) (Medicare fraud; language of warrant too broad); United States v. Brien, 617 F.2d 299 (1st Cir. 1980) cert. denied, 446 U.S. 919 (1980), (good warrant in commodities case); United States v. Roche, 614 F.2d 6 (1st Cir. 1980) (insurance fraud; overbroad seizure); Montilla Records of Puerto Rico Inc. v. Morales, 575 F.2d 324 (1st Cir. 1978) (probable cause to seize only Motown records but warrant authorized other seizures); In re Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979) (warrant did not incorporate affidavit and was not limited to seizure of student loan program records in HEW fraud case).

The requirement of particularity does not defeat the goal of an effective search. When a searching agent observes either evidence or instrumentalities of the crime that were not described with particularity in the warrant, but which were described in the probable cause affidavit, the items can be seized without the issuance of a new warrant if a saving clause such as

the one described in Andresen v. Maryland, 427 U.S. 463 (1976) has been included in the warrant. The Andresen warrant specified seizure of a list of particular "books, records, documents, papers, memoranda and correspondence, tending to show a fraudulent intent and/or knowledge as elements of the crime of false pretence, in violation of [statute cite] together with other fruits, instrumentalities and evidence of crime at this [time] unknown." Id. at 479. The Supreme Court found the phrase "together with other fruits, instrumentalities and evidence at this [time] unknown" to be acceptable in the context of the warrants because the executing officers were not authorized to conduct a search for evidence of other crimes, but only for evidence relevant to the crime described in the affidavit. Hence, the affidavit must be incorporated by reference in the warrant.

Courts have held that all of the agents in the search party must be familiar with the facts set forth in the search warrant and affidavit for the use of the saving clause to be permissible. Therefore, prior to the search, the government attorney responsible for the search should read the affidavit to the entire search party, give a copy of the affidavit to each searcher and obtain the acknowledgement of each agent that he or she has read the affidavit.

Some important cases that discuss these saving procedures are: United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1448 (1982); In re Search Warrant Dated July 4, 1977, (II), 667 F.2d 117 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1448 (1982); Church of Scientology v. United States, 591 F.2d 533 (9th Cir.), cert. denied, 444 U.S. 1043 (1979). Zurchere v. Stanford Daily, 436 U.S. 547 (1978); In re Search Warrant Dated July 4, 1977,(I), 572 F.2d 321 (D.C. Cir. 1977), cert. denied, 435 U.S. 925 (1978).

The potential liabilities of a search warrant are several. First, if a lack of probable cause can be shown, it will invalidate the search and its fruits and taint the subsequent investigation. Second, an improperly drafted or executed warrant may result in the suppression of all or most of the evidence obtained. Finally, a tactical decision must be made about whether the benefits anticipated from a search warrant outweigh the possibility that disclosure of the

affidavit will give defense counsel unduly premature disclosure of the government's evidence, witnesses, and theories of prosecution.

1. Practical suggestions for the use of search warrants

a. To minimize the risk that all evidence may be tainted if the search warrant is invalidated, identify and date all evidence obtained before the search.

b. To eliminate the risk that documents may have been moved to another location, serve all defendants with a grand jury subpoena for the documents specified in the search warrant.

c. To prevent problems in the execution of the warrant, agents should have a photograph of the location to be searched and an information sheet about what to specifically include and exclude in the search, as well as the responsible attorney's phone number to call with questions. The attorney should stand by at another location during the search to answer questions by telephone about whether or not to seize a certain document.

d. Attorneys should never be present during a search. One reason is that at trial, they may be called as witnesses by the defense.

e. The responsible attorney should instruct the searching agents to inventory everything seized; a copy of the inventory should be given to both the subject of the search and the magistrate who authorized the search.

f. The subject of the search should be informed that if any of the documents are crucial to the operation of the business, he or she may call the government attorney and obtain a photocopy of the document.

g. In situations where records and relevant documents are in a computer, the computer may be placed under constructive seizure until the government's computer expert has the opportunity to read the computer system

operating manual seized under the search warrant. The expert may then proceed to run the computer's programs and generate all the documents and records specified in the search warrant.

Finally, it should be understood that drafting and executing a search warrant is time-consuming and often difficult. However, it can advance an investigation greatly. Since litigation about compliance with a grand jury subpoena may be expected, the government attorney may choose to litigate with the documents obtained by search warrant safely in hand, rather than to wonder whether documents will be destroyed or altered as defendants assert a variety of Constitutional privileges. It should be noted that seizure under search warrant obviates any Fifth Amendment claims. Andresen v. Maryland, 427 U.S. 463 (1976), is the most important case in this area. In Andresen the Court determined that the search of an individual's business records, their seizure and their subsequent admission into evidence did not offend the Fifth Amendment's proscription that "[n]o person... shall be compelled in any criminal case to be a witness against himself." Id. at 477.

I. Foreign Bank Secrecy Acts

If presented with a situation in which foreign bank records are sought from a local branch bank and a foreign bank secrecy act is involved, the following should be considered before issuing a subpoena duces tecum.

1. Check with OIA

Determine from the Justice Department's Office of International Affairs (FTS 724-7600) that no treaty is presently under negotiation with the foreign country, that use of letters rogatory has been unsuccessful in the past, that OIA has no strong opposition to your subpoena duces tecum, or that an existing treaty allows the records to be obtained expeditiously.

2. Foreign Bank Secrecy Act exceptions

Establish whether the particular foreign

bank secrecy act in your case has exceptions which would permit disclosure of the documents in that country. (The Library of Congress in Washington, D.C. has research specialists who are familiar with secrecy acts of all tax haven countries and are able to provide you with copies of the applicable statutes.)

3. Affidavits to establish relevance

Prepare an affidavit for possible in camera submission to the court regarding the relevance of the documents sought should defense counsel raise the objection. The Third Circuit requires such a showing, see In re Grand Jury Proceedings Schofield I, II), supra, but the Fifth and Eleventh Circuits do not. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

4. Comity or due process problems

The Bank of Nova Scotia, supra, concludes that the principle of comity between nations does not preclude enforcement of federal grand jury subpoenas duces tecum. See In re Grand Jury Proceedings United States v. Field, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Nor does the imposition of contempt sanctions for failure to turn the records over violate due process. Compare Societe Internationale v. Rogers, 357 U.S. 197 (1958) and United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Compare, United States v. First National Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

5. Serving subpoenas

There is the possibility of serving a subpoena on appropriate officers of foreign banks if the officers enter the United States. United States v. Field, 532 F.2d 404 rehearing denied 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Before doing this it is necessary to obtain review by the Office of International Affairs of the Criminal Division. Attorneys and

agents for foreign corporations who travel in the United States may be subpoenaed to produce records of foreign corporations. United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982).

CHAPTER VI. PRIVILEGES

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VI. PRIVILEGES

A. Constitutional Privileges

1. Fourth Amendment

Neither the history nor the language of the Fourth Amendment suggests any limits to a grand jury subpoena duces tecum for books and records. Nonetheless, the Supreme Court in Boyd v. United States, 116 U.S. 616 (1886), extended the reach of the amendment to any "compulsory extortion of ... private papers to be used as evidence...." Boyd was followed by Hale v. Henkel, 201 U.S. 43 (1906), in which the Supreme Court held that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment."

The broad view of the grand jury's powers was reaffirmed in United States v. Morton Salt Company, 338 U.S. 632 (1950). There, the Supreme Court compared an administrative investigation to that of the traditional grand jury function. The Court observed that the Federal Trade Commission's power of inquisition is analogous to the grand jury "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id. at 642-43.

a. Fourth Amendment Limitations on a Subpoena Duces Tecum

(1) Particularity

After a number of subsequent decisions that appeared to limit, at least to some degree, the acceptable scope of a subpoena, the Supreme Court in Brown v. United States, 276 U.S. 134 (1928), found that a demand for all written communications covering a span of almost three years and relating to the manufacture and sale of goods in 18 categories was not unreasonable under the Fourth Amendment. Later, in Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 (1946), the Supreme Court observed that the requirement of "particularity"

> comes down to specification of the documents to be produced adequate, but not excessive, for the purpose of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purpose and scope of the inquiry [footnote omitted].

Today, briefly stated, a subpoena for books and records is free from the Fourth Amendment's probable cause requirement and is subject only to the general Fourth Amendment requirement of particularity. United States v. Dionisio, 410 U.S. 1, 10-12 (1973); See, e.g., United States v. Powell, 379 U.S. 48, 56-58 (1964). Even strenuous "particularity" objections to subpoenas are often overcome by the Supreme Court's language in Blair v. United States, 250 U.S. 273, 282 (1919), in which it described the grand jury as

> a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

(2) Reasonable and Relevant

A subpoena duces tecum may be quashed on Fourth Amendment grounds if it is "unreasonable," and Fed. R. Crim. P. 17(c) authorizes the court to quash it if the subpoena is "unreasonable and oppressive." The authority under Rule 17(c) is not dependent on the Fourth Amendment, but courts usually consider them together. See also In re Radio Corp. of America, 13 F.R.D. 167, 171 (S.D.N.Y. 1952). To be reasonable, the

the subpoena must seek materials relevant to the grand jury inquiry. United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied sub nom. In re Corrado Brothers, 367 F. Supp. 1126, 1130 (D. Del. 1973); See In re Grand Jury Subpoena Duces Tecum (Local 627), 203 F. Supp. 575, 578 (S.D.N.Y. 1961); Baker v. United States, 403 U.S. 904 (1971). The courts are split, however, on who bears the burden of proving relevance.

A limited number of courts have held that the government must make a minimal showing of relevance. In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973). See also In re Corrado Brothers, Inc., supra, note 62 at 1131; In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 991, 995, 997 (D.R.I. 1975) (Government's prima facie showing of relevance is irrefutable). The government need only show that there is an investigation and that documents bear some possible relation, however indirect, to the subject of the investigation. The Second Circuit approach, however, is that the witness must show there is no conceivable relevance to any legitimate subject of investigation. See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied, 414 U.S. 867 (1973) (as to older documents, government must make minimal showing; but as to recent documents, witness must show there is no conceivable relevance); In re Morgan, 377 F. Supp. 281, 284 (S.D.N.Y. 1974).

(3) Other grounds to quash a subpoena

A subpoena duces tecum may also be challenged on the grounds that it does not specifically describe the items called for. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Brown v. United States, 276 U.S. 134 (1928); Hale v. Henkel, 201 U.S. 43 (1906). In addition, the documents called for must cover a reasonable time period, In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975), In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947), and the burden

of compliance must not be oppressive, In re United Shoe Machinery Corp., supra; In re Harry Alexander, 8 F.R.D. 559 (S.D.N.Y. 1949); cf. In re Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948) (a subpoena requiring a search of files covering a twenty year period was not unreasonable.)

b. Standing to Raise an Objection to a Subpoena Duces Tecum

It is clear from the discussion above that a witness can move, albeit on limited grounds, to quash a grand jury subpoena directing him to produce documents. This is not to say, however, that third parties who may have generated or were the source of documents can move to quash. For the "standing" doctrine, applicable to the Fourth Amendment, has now been grafted onto grand jury practice.

The Fourth Amendment creates a personal right which cannot be vicariously asserted. See, e.g., WongSun v. United States, 371 U.S. 471 (1963). If a person has no reasonable expectation of privacy in records or documents, he cannot object even if the prosecution acquired them through an invalid subpoena duces tecum. Thus, the Supreme Court held in United States v. Miller, 425 U.S. 435 (1976), that a depositor had no legitimate expectation of privacy in bank records that were obtained through the use of a defective subpoena. The Court held:

> All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.... The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. Id., 425 U.S. at 442-431.

Of course, if there is a privileged relationship between the subpoenaed possessor of the documents and the source

of the documents, the narrow standing rule of Miller does not necessarily apply. In addition, the narrow approach to standing will not be applied if it would effectively result in the third party's inability to protect itself from prosecutorial harassment. For example, in In re Grand Jury (C. Schmidt & Sons, Inc.), 619 F.2d 1022 (3d Cir. 1980), the court allowed a corporation to appeal a denial of its motion to quash a subpoena directed at its employees. The court emphasized that, unlike its employees, the corporation, which was claiming governmental harassment, could not obtain appellate review of the subpoena by going into contempt. The court held that the company had standing, and it rejected

> the government's suggestion that the courts limit standing to claims of abuse of the grand jury process to persons whose property interest or privileges have been invaded.... Third party standing to assert claims of grand jury abuse cannot be determined by categorizing the claimed interest as one of property or privilege, but only by examining the nature of the abuse, and asking whether, and in what manner, it impinges upon the legitimate interests of the party allegedly abused. In this case Schmidt claims that the grand jury is not investigating violations of federal law, and that the Strike Force is attempting to harass it. It asserts that it is being deprived of the time and effort of its employees. It has standing to make these claims by moving to quash the subpoenas. 619 F.2d at 1026-27.

See also Katz v. United States), 623 F.2d 122 (2d Cir. 1980) (client may intervene in grand jury proceedings to move to quash subpoena directing his attorney to produce client's books and records); In re November 1979 Grand Jury (Veliscol Chem. Corp.), 616 F.2d 1021 (7th Cir. 1980) (client has standing to intervene to contest document subpoena directed to his attorney).

c. Remedy

Even if evidence is improperly obtained pursuant to subpoena, or even a search, and subsequently introduced before the grand jury, this will not serve as a basis to dismiss the indictment. An indictment valid on its face ordinarily cannot be challenged on the ground that illegally obtained evidence was presented to the grand jury. United States v. Calandra, 414 U.S. 338, 349-52 (1977) (exclusionary rule does not bar presentation to grand jury of evidence obtained during illegal search and seizure). The sole remedy is to suppress the evidence at trial. See e.g., United States v. Fultz, 602 F.2d 830, 833 (8th Cir. 1979); United States v. Franklin, 598 F.2d 954, 957 (5th Cir.), cert. denied, 444 U.S. 870 (1979). This does not, however, necessarily mean that courts will ignore the abuse of subpoena or search powers in examining the evidence presented to a grand jury. A court may exercise its "supervisory" powers to dismiss an indictment based on illegally obtained or incompetent evidence in order to prevent prejudice to a defendant or to control a pattern of misconduct. Pieper v. United States, 604 F.2d 113, 1133-34 (8th Cir. 1979) (court may exercise equitable jurisdiction to suppress illegally obtained evidence before indictment in order to control improper presentation of evidence and to deter unlawful conduct of law enforcement officers).

2. Fifth Amendment

The Fifth Amendment provides that no person "shall be compelled in a criminal case to be a witness against himself." A claim of privilege which relies upon the Fifth Amendment requires proof of three elements. These are: (1) personal compulsion, (2) of testimonial communication, (3) that is incriminating of the one so claiming.

The Fifth Amendment has frequently been raised as a bar to the compelled production of evidence before the grand jury. Much of the litigation in this area has turned on the definitions of the phrases "incriminating communication" and "testimonial communication." Of these two phrases, it is the latter which

raises the most troubling questions on the context of grand jury proceedings. These two phrases, which define the scope of this privilege, are discussed below.

a. Interpretation of the Term "Incriminating Communication"

The Fifth Amendment provides that no person can be compelled to be a witness against himself in a criminal proceeding. But this constitutional protection is not limited to facially incriminating communications. Rather, courts have uniformly held that the privilege extends to any compelled communications that lead to an incriminating inference. See, e.g., Andresen v. Maryland, 427 U.S. 463, 473-74 (1976) (act of production of subpoenaed personal records may constitute compulsory authentication of incriminating information); United States v. Praetorius, 622 F.2d 1054 (2d Cir.), cert. denied, sub nom. Lebel v. United States, 449 U.S. 860 (1980) (act of production of defendant's passport utilized for corroborating evidence not protected testimony because existence and location of passport not in question and passport nontestimonial in nature), In re Grand Jury (Markowitz), 603 F.2d 469, 476-77 (3d Cir. 1979) (act of production that acknowledges possession and control of subpoenaed documents usually held by attorney for client not compelled testimonial communication, therefore whether contents are incriminatory is not relevant); Walker v. Butterworth, 599 F.2d 1074, 1082-83 (1st Cir.), cert. denied, 444 U.S. 937 (1979) (defendant's Fifth Amendment rights violated when court required defendant to announce preemptory jury selection challenges and prosecutor then used challenges to erode insanity defense).

In applying what has been described by some legal writers as the "frivolous assertion" doctrine, courts have held that a person may invoke this Fifth Amendment privilege when he has reasonable cause to believe that a direct, truthful answer would either furnish evidence or lead to the discovery of evidence needed to prosecute him for a crime. Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (privilege validly invoked if any possibility that response will be self-incriminating); United States v. Neff, 615 F.2d 1235, 1240-41 (9th Cir. 1980), cert. denied, 447 U.S. 925 (1980) (privilege invalidly invoked when defendant declined

to answer questions on tax return because of desire to protest taxes and not because of fear of self-incrimination); Dunbar v. Harris, 612 F.2d 690, 694 (2d Cir. 1979) (witness who refused to answer question whether he has visited scene where three drug sales took place validly invoked privilege because answer would furnish link in chain of evidence needed to prosecute); United States v. Metz, 608 F.2d 147, 156 (5th Cir. 1979) cert. denied, 449 U.S. 821 (1980), (witness convicted under federal narcotics statute entitled to assert Fifth Amendment privilege when substantial possibility of prosecution by state authorities existed); United States v. Jennings, 603 F.2d 650, 652-53 (7th Cir. 1979) (defendant's conviction for misprision violation of Fifth Amendment because disclosure of narcotics sale by third party to co-conspirator would have provided link in chain of evidence that could have led to defendant's criminal prosecution); In re Grand Jury (Markowitz), 603 F.2d 469, 473 (3d Cir. 1979((attorney validly invoked privilege in refusing to reveal client's identity because identification might have linked attorney to conspiracy being investigated by grand jury). Indeed, even if it is not entirely clear that a prosecution based upon the incriminating conversation would be successful, a court must honor the privilege. All that a witness need establish is that the possibility of prosecution is more than "fanciful." In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979).

b. Fear of Foreign Prosecution

In re Baird, 668 F.2d 432 (8th Cir.) cert. denied 102 S.Ct. 2255 (1982) held that Baird failed to show a real and substantial fear that his testimony, compelled under a grant of use immunity (18 U.S.C. Sections 6002 and 6003), would subject him to prosecution on drug-related charges in Canada. The possibility that incriminating testimony will be funneled to foreign officials by government attorneys for use against Baird in a criminal prosecution in Canada was "remote and speculative" because of the secrecy of grand jury proceedings maintained by Rule 6(e). The court did not reach the constitutional question of whether the Fifth Amendment privilege against compelled self-incrimination provides protection for a witness who, although granted immunity from

prosecution, has a real and substantial fear of foreign prosecution.

Similarly, a majority of the U.S. Court of Appeals for the Second Circuit refused to decide if the Fifth Amendment protects an immunized grand jury witness from having to give testimony that would subject him to a substantial risk of foreign prosecution. Instead, the majority held that an alleged co-conspirator in a scheme to run guns to the Irish Republican Army had not shown any "real or substantial risk" of prosecution by the United Kingdom or Ireland if he were compelled to testify under a grant of immunity. In re Grand Jury Subpoena (Flanagan), 691 F.2d 116 (2d Cir. 1982).

The district court had held that an immunized witness may invoke the Fifth Amendment privilege against compelled self-incrimination on the basis of a legitimate fear of foreign prosecution. The majority agreed with the lower court that Fed. R. Crim. P. 6(e), which restricts disclosure of grand jury testimony, doesn't guarantee that such testimony won't be disclosed to officials of another country.

Nevertheless, the circumstances in this case demonstrate that the witness' fear of foreign prosecution would not be reasonable. In reaching this conclusion, the majority cites the following factors: "The absence of any present or prospective foreign prosecution of Flanagan, the limitation of the grand jury's questioning of him to activities in the United States, the failure to proffer any evidence that extraditable crimes might be revealed by the grand jury's investigation, the non-extraditability of Flanagan for the crimes that have been suggested (e.g., membership in the IRA), the government's assurance that it would not reveal his testimony, directly or indirectly, to the U.K. or Republic of Ireland and that it would, on the contrary, oppose any effort to extradite him to face foreign charges that might be derived from his testimony, and the unlikelihood (notwithstanding instances of "leaks" in violation of Rule 6(e) ...) that any of his testimony would be directly or indirectly communicated to Irish or U.K. authorities..."

c. Testimonial Communication -- The Production of Documents Pursuant to Subpoena is Not "Testimonial Communication" Protected by the Fifth Amendment

Originally it was thought that Boyd v. United States, 116 U.S. 616, 630 (1886), would prevent the introduction at trial of private documents held by an individual, and thus the documents themselves were free from production. However, the Supreme Court's trilogy of cases, Andresen v. Maryland, 427 U.S. 463 (1976), Fisher v. United States, 425 U.S. 391 (1976), and Couch v. United States, 409 U.S. 322 (1973) established that generally, the compelled production of documents is not testimony and therefore not privileged. For example, in Fisher, several taxpayers transferred their accountant's papers to their lawyers. When summons were issued for the papers, they were resisted on Fifth Amendment grounds. The Court found that the taxpayers' Fifth Amendment privilege was not violated by the enforcement of a summons issued to a third party. The Court held:

> [W]e are confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them -- the only thing which the taxpayer is compelled to do -- would not in itself involve testimonial self-incrimination.
>
> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him and are the kind usually prepared by an accountant working on tax returns of his client. Surely the government is in no way relying on the 'Truth Telling' of the taxpayer to prove the existence of or his access to the documents. 425 U.S. at 410-11, 96 S.Ct. at 1580 [emphasis added.]

Because not all compelled conduct is testimonial, not only can a corporate document custodian be required to produce documents, but he must also identify and authenticate them before the grand jury even if the documents criminally implicate him. As Judge Friendly observed in United

States v. Beattie, 522 F.2d 267, 271 (2d Cir. 1975), modified on other grounds, 541 F.2d 329 (2d Cir.) cert. denied, 425 U.S. 970 (1976): "It is well settled that the possessor cannot refuse to produce [corporate] records even if the incriminating entries were made by himself..." [emphasis added]. And as the Second Circuit Court of Appeals held in United States v. O'Henry's Film Works, Inc., 598 F.2d 313 (2d Cir. 1979):

> It is well settled that the Fifth Amendment privilege against self-incrimination does not extend to corporations and similar organizations. An agent of such an organization has a duty to produce the organization's records, even where the records might incriminate the corporation or the agent, if a ... valid subpoena has been issued for those records."

In O'Henry's Film Works, the Second Circuit reaffirmed Judge Learned Hand's holding in United States v. Austin-Bagley Corp., 31 F.2d 229 (2d Cir. 1929), that "an agent must identify the documents he does produce because 'testimony auxiliary to the production is as unprivileged as are the documents themselves.'" 598 F.2d at 318 [quoting Austin-Bagley, supra, 31 F.2d at 234].

(1) The Fifth Amendment privilege against self-incrimination does not protect individuals from compelled production of a wide range of of documents, including:

Records of various separate entities where the records are being held in a representative capacity by a custodian, including corporations,

Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911); unincorporated associations, United States v. White, 322 U.S. 694 (1944); and partnerships (other than strict small family owned partnerships), Bellis v. United States, 417 U.S. 85 (1974). This is true even if the records would in fact incriminate the custodian who is producing them.

The Ninth Circuit has interpreted Bellis and said that if the records sought deal with "organized and institutional activity," then the Fifth Amendment privilege is not applicable. In re Grand Jury Witness (Molina), 552 F.2d 898 (9th Cir. 1977). There is no personal Fifth Amendment privilege against the production of the corporate records of a hotel where the witness hotel manager was not merely the custodian but actually prepared the records himself. In re Witness Before Grand Jury (Marlin), 546 F.2d 825 (9th Cir. 1976).

In United States v. Hutchinson, 633 F.2d 754 (9th Cir. 1980), the Court rejected a Fifth Amendment claim by a target of the investigation who was also a trustee of a trust she had created.

Records required to be maintained by law. Grosso v. United States, 390 U.S. 62, 68 (1968); United States v. Rosenberg, 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031 (1975) (doctor had no Fifth Amendment privilege against production of patient records concerning dispensation of narcotic substances).

Physical evidence, i.e. handwriting samples, United States v. Mara, 410 U.S. 19, 21-2 (1973); fingerprints and photographs, In re Grand Jury Proceedings (Balliro), 558 F.2d 1177, 1178 n.1

(5th Cir. 1977); appearance in a lineup, including use of reasonable force to compel this, In re Maguire, 571 F.2d 675 (1st Cir.), cert. denied, 436 U.S. 911 (1978); In re Melvin, 550 F.2d 674 (1st Cir. 1977); voice exemplars, United States v Dionisio, supra; blood samples, Schmerber v. California, 384 U.S. 757 (1966).

(2) Where The Fifth Amendment does apply:

This is not to say that no subpoena duces tecum can trigger the Fifth Amendment's testimonial communications protections. Although the Supreme Court has declined to hold that the Fifth Amendment guarantees against "any invasion of privacy" (see Andresen, supra, 427 U.S. at 477) the Supreme Court in Fisher, supra, left open the question of whether a different result might have been reached if the government had subpoenaed the taxpayer's "private papers." 425 U.S. at 414. Courts which have addressed the issue have been careful to insulate witnesses from a subpoena of their personal documents. For example, in In re Grand Jury Subpoena Duces Tecum (John Doe), 466 F. Supp. 325 (S.D.N.Y. 1979), the court quashed a subpoena served upon an individual, which required production of certain documents in issue. The court, after reviewing the principles laid down in Fisher held that not only can a person not be required to produce his own papers and admit their genuineness (see United States v. Beattie, supra, 522 F.2d at 270), but he cannot be required to produce documents created for his benefit in his possession whose existence is not a "foregone conclusion."

Similarly, even though the Supreme Court has narrowly viewed what types of business entities can claim a privilege as to subpoenaed documents, several courts have held that authentication of business records may nonetheless be testimonial. In In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980), when a grand jury subpoena was issued for a doctor's appointment logs the Court held that because compliance by the doctor would essentially authenticate the records and thus possibly

incriminate him, the doctor could properly refuse to produce them even though the records were not privileged. Accord, United States v. Doe, 628 F.2d 694 (1st Cir. 1980) (in addition to ruling on the privilege issue, the court held that statements made by the subpoenaed witness in his affidavit in support of the motion to quash cannot be used against him).

d. Fifth Amendment Privilege and Access to Corporate and Other Business Documents

Questions regarding the applicability of the Fifth Amendment privilege to documents most frequently arise in the context of grand jury subpoenas calling for business records. This is hardly surprising. Given the pervasiveness of the corporate form of business, a high percentage of grand jury subpoenas in economic crime cases are directed to corporations and their documents. Although corporate document custodians often attempt to refuse to produce documents based upon their personal Fifth Amendment privilege, courts have not been receptive to such claims. As a corollary to the principle that the Fifth Amendment privilege cannot be invoked by corporations, courts have consistently held that even where a corporation is a mere alter ego of its owner it still cannot invoke a Fifth Amendment privilege. Hair Industry Ltd. v. United States, 340 F.2d 510, 511 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965). See also United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972) (even where the witness owns substantially all the stock of a "subchapter S" corporation and its alter ego, he cannot assert a Fifth Amendment privilege to bar production of incriminating records); United States v. Shlom, 420 F.2d 263, 265-66 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970) (court rejected "alter ego" argument made by sole stockholder and treasurer of the corporation, who was the only officer active in corporate affairs); United States v. Fago, 319 F.2d 791, 792-93 (2d Cir.), cert. denied, 375 U.S. 906 (1963). The basis for the rejection of Fifth Amendment claims even by sole

stockholders of corporations was set forth at length more than two decades ago:

> Respondent contends that the test should be whether or not the corporation embodies and represents the purely personal and private interests of the individual and, if it does, then the privilege can be raised. Since the respondent owns all of the capital stock of J. Olson Trading Corp., he contends that he can avail himself of the privilege. Respondent cites United States v. White, 1944, 322 U.S. 694, (1944) ... as support for this contention.
>
> I do not agree with respondent nor do I think the case law supports his position. In United States v. White, 322 U.S. at 700 ... the Supreme Court once again stated that this constitutional privilege was restricted to natural individuals acting in their own private capacity.... The reasons for this are clear. While an individual owes no duty to the state to divulge his business so far as it may tend to incriminate him, the corporation stands on a different basis. It is a creature of the state; its rights to act as a corporation are only good so long as it obeys the laws of its creation. Possessing the privileges of a legal entity, and having records, books, and papers, it is under a duty to produce them when they may properly be required in the administration of justice. In re Greenspan, 187 F. Supp. 177, 178-79 (S.D.N.Y. 1960).

Indeed, in recent years the Supreme Court has taken a narrow view of the Fifth Amendment claims raised by unincorporated as well as incorporated enterprises. In Bellis v. United States, 417 U.S. 85 (1974), the Supreme Court held that a partner in a small law firm had to comply with a subpoena requiring production of the partnership's records. The Court explained that the Fifth Amendment privilege should "be limited to its historic function of protecting only the natural individual from compulsory

incrimination through his own testimony or personal records." Id. at 89-90.

It should be noted that even if certain business records are "personal" in nature, the privilege does not protect them if they are "required" by statute or regulation. In Grasso v. United States, 390 U.S. 62 (1968), the Supreme Court set out the three basic requirements for obtaining information pursuant to the "required records" exception: (1) the purpose of the inquiry must be essentially regulatory; (2) the information requested is contained in documents of a kind which the regulated party has customarily kept; and (3) the records must have assumed "public aspect" which render them analogous to public documents. 390 U.S. at 68-69.

In determining what business entities are so distinct from their owners or stockholders as to preclude a claim of personal privilege in response to a subpoena for business records, courts have examined the relevant facts of each case to determine whether a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. United States v. Silverstein, 314 F.2d 789, 791-92 (2d Cir.), cert. denied, 374 U.S. 807 (1963) (limited partnership of three partners establishes a "close analogy to corporate form"); In re Grand Jury Empanelled January 21, 1975, 529 F.2d 543, 547-48 (3d Cir. 1976) (law firm consisting of two practitioners); United States v. Mahady, 512 F.2d 521, 524 (3d Cir. 1975) (law firm consisting of four brothers).

Apparently, doctors, lawyers, and other professionals doing business as "professional corporations" also lose their ability to raise Fifth Amendment claims against subpoenas. In Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975), the court affirmed a contempt citation against the sole stockholder and sole professional employee of a professional corporation for failing to comply with a grand jury subpoena to produce certain corporate records, relying upon the statement in Bellis, supra, 417 U.S. at 100, that no [Fifth

Amendment] privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." 506 F.2d at 1346.

(e) Sole Proprietorships

The issue often arises whether the records of a sole proprietorship should be treated as personal documents and afforded Fifth Amendment protection or as corporate type business records subject to subpoena. Generally, the records of a sole proprietorship are treated as privileged personal communication. In In re Grand Jury Impanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982) cert. denied, 103 S. Ct. 447 (1983), the Third Circuit upheld the application of Fifth Amendment protection for sole proprietorships even when the proprietorship is a large and complex operation. The government pointed out the inconsistency in affording Fifth Amendment protection to such large and impersonal sole proprietorships while denying it to closely held corporations and partnerships. In rejecting this argument the court noted that the critical factor in recognizing a Fifth Amendment claim is not the size of the business "but rather the nature of the capacity - either personal or representational - with respect to which the privilege is being claimed." Id. at 330. Because sole proprietorships have no separate recognized legal existence, the court reasoned, Fifth Amendment claims by sole proprietors on behalf of their proprietorships are personal.

However, in In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979), the Third Circuit held that a sole proprietor may not quash a grand jury subpoena duces tecum for business records which are not in his possession. The sole proprietor could not claim constructive possession where the subpoena was served on his office manager who prepared and maintained the records even though the records might contain entries made by the owner. The court did not face the question of whether a sole proprietor may deny a business records visitation inspection which is in all respects analogous to a business records subpoena addressed to him. The court considered this question in ICC v. Gould, 629 F.2d 847 (3d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). The court indicated that under Bellis, supra, the Fifth Amendment may be asserted by a sole

proprietor to shield the business records of his sole proprietorship, where there is no organized institutional activity. By contrast, under Andresen, the Fifth Amendment affords no protection against the search and seizure of business records. The court remanded for further findings of fact to determine if the ICC procedure sub judice more nearly resembled a subpoena summons or a search and seizure. "If...the district court concludes that the ICC procedure resembles most closely an agency subpoena, the ICC may be foreclosed from obtaining inspection of documents for which Gould is able to claim Fifth Amendment privilege specifically" rather than as a blanket proposition. Gould, 629 F.2d at 861.

(f) Nature of the documents subpoenaed

The nature of the documents themselves may also be an issue. The Second Circuit recently addressed the problem of classification of a document's character as personal or corporate in the business office setting. The case of Grand Jury Subpoena Duces Tecum dated April 23, 1981 Witness v. United States, 657 F.2d 5 (2d Cir. 1981) involved a personal Fifth Amendment claim asserted by a corporate executive concerning pocket and desk calendars used to record business appointments. The court remanded the case to the district court for clarification of the nature of each item. It proposed a "non-exhaustive list of criteria" to be used in deciding whether production of the calendars would amount to self-incrimination. These criteria included: "who prepared the document, the nature of its contents, the purpose claimed, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation's business." (Id. at 274). The district court held that the desk calendar was a corporate document but that the pocket calendar was more of a personal paper and therefore within the scope of the Fifth Amendment privilege. These cases continue the case-by-case method of determination of the issue. See, e.g., In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980) (individual's pocket-sized appointment books prepared by individual held private papers protected by Fifth Amendment); In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980) Fifth Amendment protects physicians' business

records which pertain to private practice as a sole practitioner and over which physician retained close control).

The few courts that have considered specifically whether documents are personal or corporate find that mixed documents are corporate and outside the privilege. Citing these cases the Ninth Circuit in United States v. MacKey, 647 F.2d 898 (9th Cir. 1981) held that a diary and desk calendar used to record business meetings and transactions, kept in the office, and used in the daily management of the corporation indicate they were properly discoverable corporate papers despite personal non-business notations and lack of corporate possession or ownership.

(g) Possession

The fact of possession or control may itself become an issue. The Supreme Court in United States v. Rylander, 33 Cr L 3007 (April 20, 1983) held that an assertion of the Fifth Amendment privilege is not a substitute for evidence that would assist in meeting a burden of production.

3. First Amendment Privileges

In several instances individuals have raised First Amendment considerations as a limitation on grand jury subpoena power. These claims of a constitutional privilege grounded in the First Amendment have met with little success in the courts. Those courts which have considered this issue have refused to recognize a First Amendment testimonial privilege.

The leading case on this question is Branzburg v. Hayes, 408 U.S. 665 (1972). In Branzburg the petitioner, a newspaper reporter, refused to comply with a grand jury subpoena which called for him to testify regarding criminal activities he had reported. The petitioner's story had been obtained from confidential sources who were themselves involved in these activities.

The petitioner argued that if reporters were compelled to reveal information obtained from confidential sources their ability to gather news would be impeded. Therefore petitioner contended that a grand jury subpoena directed at a journalist

would impair freedom of the press and violate the First Amendment.

The court rejected this argument. Noting that "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order", the court refused to exempt reporters from the general public duty to testify when called by the grand jury. Id. at 703-04. According to the court in the absence of bad faith, harassment or grand jury abuse a newsman must comply with a grand jury subpoena.

Subsequent cases have extended the Branzburg rationale to other claims of testimonial privilege founded on the First Amendment. See In re Possible Violations of 18 U.S.C. 371, 641, 1503 (Maren), 564 F.2d 567 (D.C. Cir. 1977) (Minister of Church of Scientology may not invoke a First Amendment privilege and refuse any response to grand jury); In re Cuetto, 554 F.2d 14 (2d Cir. 1977).

It should be noted, however, that a number of cases have seized upon the language of Justice Powell's concurrence in Branzburg to conclude that a limited First Amendment privilege may exist. See United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied sub nom. Schaffer v. United States, 449 U.S. 1113 (1981); Appeal of Maren, 564 F.2d 567 (D.C. Cir. 1977), (Robinson, J., concurring). This limited privilege would be triggered only by harassment, grand jury abuse or other actions calculated to chill First Amendment freedoms.

B. Common Law Privileges

1. The Attorney-Client Privilege

In recent years, prosecutors have, with increasing frequency, attempted to utilize grand jury subpoenas to obtain information from attorneys concerning their clients. Resistance to such subpoenas has been strong since the privilege is "subjectively for the client's freedom from apprehension in consulting his legal advisor." 8 J. Wigmore, Evidence, Section 3290 (1961). Indeed, the privilege belongs to the client and only the client may waive it; and unless the client does waive it, the attorney must assert it at all proceedings. See United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965).

However, the privilege is not without qualification. As one court has explained:

> [T]he privilege applies only if:
>
> (1) the asserted holder of the privilege has sought to become a client;
>
> (2) the person to whom the communication was made
>
> a) is a member of the bar of a court, or his subordinate and
>
> b) in connection with this communication is acting as a lawyer;
>
> (3) the communication relates to a fact which the attorney was informed
>
> a) by his client,
>
> b) without the presence of strangers,
>
> c) for the purpose of securing primarily either
>
> (i) an opinion on law, or
> (ii) legal services, or
> (iii) assistance in some legal proceeding;
>
> d) and not for the purpose of committing a crime or tort; and
>
> (4) the privilege has been (a) claimed and (b) not waived by the client.
>
> United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950). See also Fed. R. Evid. 501.

It should be noted, however, that the attorney-client privilege does not protect communications which relate to collusion to commit a crime, to continuing illegality or to contemplated future crimes. As Justice Cardoza observed in Clark v. United States, 289 U.S. 1, 15 (1933), "[t]he privilege takes flight if the relation is abused."

The mere assertion of fraudulent or criminal abuse of the attorney-client relationship is not automatically sufficient to "break" the privilege. In Clark, supra, Justice Cardozo observed that in

order to drive the privilege away "there must be prima facie evidence that the attorney-client privilege has been abused." Id.

A client either seeking legal advice or preparing for litigation may give documents and papers in his possession to his attorney. Such documents and papers are not automatically privileged. The Supreme Court, in Fisher v. United States, 425 U.S. 391, 403 (1976), carefully set out the limits of the attorney-client privilege. The court held that the privilege protects only those disclosures necessary to obtain informed legal advice which might not be made absent the privilege. Pre-existing documents which could be obtained from the client can also be obtained from the attorney. The simple act of transferring the papers to the attorney does not give otherwise unprotected documents protection. But, if the documents are unobtainable from the client, they are still protected by the attorney-client privilege. See also Couch v. United States, 409 U.S. 322, 335 (1973).

Recently, the Eleventh Circuit Court of Appeals affirmed an order of the District Court in South Florida holding Nigel Bowe, an attorney who practices law in the Bahamas, in contempt for failing to produce corporate records called for in a grand jury subpoena duces tecum. In re Grand Jury Proceedings, (Bowe), 694 F.2d 1256 (11th Cir. 1982). The subpoena had been served on Bowe while he was in Miami, Florida, and the records sought related to corporations believed to be associated with Bowe and two United States citizens who were under investigation by the grand jury.

Bowe's primary ground for refusing to produce the records was that for him to do so would subject him to sanctions for violation of the attorney-client privilege accorded under Bahamian law. The Evidence Act of the Bahamas contains a statutory privilege for the attorney client relationship - a broader privilege than is found in American common law - and it was Bowe's contention that the records in question would fall within that privilege. Without addressing the applicability of the Bahamian privilege, the Eleventh Circuit held that even if production of the records would subject Bowe to sanctions in the Bahamas, the records still must be produced. Relying on its recent decision in In re Grand Jury Proceedings, Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), the Court of Appeals found that enforcement of the subpoena violates neither the principles of

due process nor comity between nations. "The persons being investigated in this case are United States citizens under suspicion of violations of United States law. A possible conflict with Bahamian standards of privilege cannot protect these records and they must be produced." 694 F.2d at 1258.

Bowe further contended that before the subpoena can be enforced, the government should be required to show that the documents sought by the grand jury are relevant to its investigation. Such a showing was required by the Third Circuit in In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973), and In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975). The Eleventh Circuit, however, refused to impose such a requirement. 694 F.2d at 1258; 691 F.2d at 1387. The court did observe that the records sought from Nigel Bowe are "almost certainly" relevant to the grand jury's ongoing investigation which concerns possible violations of the tax and narcotics laws, 694 F.2d at 1258, but held that no such showing is required. Id.

Finally, Bowe asserted that production of the records would violate his and his client's Fifth Amendment privileges. The court easily disposed of this contention on the ground that the district court's modified order requiring production pertained only to non-privileged corporate records and specifically excused the production of any privileged material.

If faced with a situation where an attorney refuses to produce subpoenaed records on the ground that to do so would violate the attorney-client privilege, remember that it is the attorney's burden to establish not only the existence of the privilege but also that the records sought fall within that privilege. It is possible, for example, that the attorney is holding the records not in his capacity as an attorney but rather as a participant in a business transaction. In that situation, the attorney-client privilege does not protect the records from production. Thus, caution should be exercised in deciding whether to stipulate that an attorney-client relationship exists or that the records sought fall within the attorney-client privilege.

The general rule is that matters involving the identity of clients are not normally protected

by the attorney-client privilege. There is a large body of case law applying the general rule. See, e.g., United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973); In re Semel, 411 F.2d 195 (3d Cir.), cert. denied, 396 U.S. 905 (1969); National Union Fire Ins. Co. of Pittsburgh v. Aetna Casualty and Surety Co., 384 F.2d 316, 317 n.4 (D.C. Cir. 1967). An ambitious collection of the leading cases applying the general rule can be found in In re Grand Jury Proceedings (Jones), 517 F.2d 666, 670 n.2 (5th Cir. 1975).

However, these cases do allow that there may be circumstances where the general rule will not apply and the client's identity will indeed be privileged.

In Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962) the court wrote that the privilege extends only to the substance of matters communicated to an attorney in professional confidence. The identity of the client, or the fact that a given individual has been a client are normally not privileged even if the fact of having retained counsel can be used in evidence against the client. The court provided, however, that "to be sure, there are many circumstances under which the identity of a client may amount to prejudicial disclosure of a confidential communication as where the substance of a disclosure has already been revealed but not its source." Id. at 637.

Similarly, in United States v. Pape, 144 F.2d 778, 783 (2d Cir.), cert. denied, 323 U.S. 752 (1944), the court observed that there may be "situations in which so much has already appeared of the actual communications between an attorney and a client, that the disclosure of the client will result in a breach of the privilege." For a discussion of some of the cases recognizing an exception to the general rule see In re Grand Jury Proceedings (Jones), 517 F.2d 666, 671, 672 n.3 (5th Cir. 1975).

An exception was recognized in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) which involved an IRS summons seeking disclosure of the identity of the client on whose behalf the witness-lawyer had made an anonymous tax payment. The court held that the general rule must be considered on a case-by-case basis, depending on the particular facts of each

case. Each principle, both privilege and disclosure, should be limited to the purpose for which it exists. "If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors." Id. at 632.

The Fifth Circuit applied the exception in In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975). Jones called the exception "only a limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-by-case basis." Id. at p. 671. In Jones the identity was privileged because it would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment.

Recently, the Fifth Circuit appeared to have limited its Jones exception in the case of In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc), reversing 663 F.2d 1057 (5th Cir. 1981). That case held that "where the government makes a prima facie showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies to deny a privilege to the identity of the person paying for the services - even if he himself is a client of the attorney and the attorney is unaware of the improper arrangement." See also, In Re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981).

Thus, the facts and circumstances of the individual case should be examined carefully to determine if it falls within the general rule of no privilege regarding identity or within the narrow exception to the rule which permits the privilege. If revelation of the name of the client is being sought for purposes of indictment of that individual, and the name will indeed provide the last link in a pre-existing chain of criminal conduct about which something is already known, then the identity of the client may fall within the traditional view of privileged confidential communication.

2. Work Product Privilege

The work-product doctrine, recognized initially in Hickman v. Taylor, 329 U.S. 495 (1947), protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible

litigation." Id. at 505. See also Fed. R. Civ. P. 26(b)(3). This doctrine has been extended to criminal and grand jury investigations. See United States v. Nobles, 422 U.S. 225, 236 (1975); In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973). The application of the work-product doctrine is best illustrated by examining how it has been used to thwart prosecutors' attempts to obtain copies of interviews of witnesses conducted by corporate and retained attorneys who have conducted their own "in-house" investigations. Three questions determine the applicability of the work-product doctrine. First, were these materials collected or prepared in preparation for possible litigation so as to qualify as "work product"? Second, if they are entitled to protection as work product, is the protection afforded them absolute or qualified? Third, if the documents are entitled to only qualified protection, has the government made an adequate showing to overcome that protection?

a. "Prepared in the course of preparation for possible litigation."

In Hickman v. Taylor, supra at 505, the Supreme Court held that the work-product doctrine protects materials prepared "in the course of preparation for possible litigation." The term "possible litigation" is sufficiently flexible that the work-product doctrine extends to material prepared or collected before litigation actually commences. On the other hand, some possibility of litigation must exist. Courts and commentators have offered a variety of formulas for the necessary nexus between the creation of the material and the prospect of litigation. See, e.g., Home Insurance Co. v. Ballenger Corp., 74 F.R.D. 93, 101 (N.D. Ga. 1977) (must be a "substantial probability that litigation will occur and that commencement of such litigation is imminent"); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 948 (E.D. Pa. 1976) (threat of litigation must be "real and Imminent"); Stix Products, Inc. v. United Merchants Manufacturers, Inc., 47 F.R.D. 334, 337 (S.D.N.Y. 1969) (prospect of litigation must be "identifiable"); 4 Moore's Federal Practice 26.63[2.-1] at 26-349 (1970) (litigation must "reasonably have been anticipated or apprehended"). Several commentators have suggested that:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is

formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

8 Wright & Miller, Federal Practice and Procedure, Civil Section 2024 at 198 (1970) (emphasis added; footnote omitted).

Thus, in the context of in-house investigations, most corporate and retained attorneys will have to argue that their investigation concerned suspected criminal violations and that further investigation confirmed that suspicion, making litigation of some sort almost inevitable. The most obvious possibilities include criminal prosecutions, derivative suits, and securities litigation. Moreover, the potential for litigation is often intensified by a corporation's legal obligations to report any wrongdoing to its stockholders and to various governmental agencies.

b. Qualified Versus Absolute Work-Product Protection

In Hickman, the Supreme Court examined two categories of work product. The first category related to written witness statements which had only qualified protection. The second category of work product examined in Hickman has been dubbed by some as "absolute." These documents relate to the content of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the attorney. The Hickman Court called for greater protection of this information than it had afforded the written statements:

> "[A]s to oral statements made by witnesses to [defendant's attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the conditions of this case so as to justify production. Under ordinary circumstances, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No

> legitimate purpose is served by such production. The practice forces an attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer. 329 U.S. at 512-13 (emphasis added).

Although there is some language which suggests the posssibility of "rare" exceptions to the absolute nature of the protection (Id. at 513), at least one court has interpreted Hickman as calling for absolute protection of such interview memoranda. In In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943, 949 (E.D. Pa. 1976), the court stated that such memoranda "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure." The Court of Appeals for the Eighth Circuit also has indicated that such memoranda are "absolutely, rather than conditionally, protected." In re Grand Jury Proceedings (Duffy), supra at 848.

However, other courts have still resisted giving the cloak of "absolute" protection to work-product material and have held that "rare" and compelling need would break the privilege. See In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (only in a "rare situation" will interview memoranda be discoverable); In re Grand Jury Subpoena (General Counsel v. United States), 599 F.2d 504, 512 (2d Cir. 1979) (government's claim that it needed memoranda of interviews in order to make immunity decisions was "farfetched" since the government "is not entitled to be served on a silver platter"). Indeed, in the Upjohn case, the Supreme Court held under the work product provisions of Rule 26(b)(3) of the Federal Rules of Civil Procedure that because a memorandum of a witness statement "tends to reveal the attorney's mental processes," the government was required to establish more than mere "substantial need and inability to obtain the equivalent without undue hardship." 101 S.Ct. at 688.

3. Grand Jury Investigation of Corporate Crime -

Attorney-Client and Work Product Privileges

Recently, prosecutors have made efforts to subpoena corporate records relating to interviews with its own employees concerning possible crimes committed by or on behalf of the corporation. While it is well established that a corporation is entitled to claim the attorney-client privilege, courts have repeatedly struggled to decide just which communications are those of the corporate client for purposes of the privilege. With a human client, the question answers itself. But, a corporation acts only through its directors, officers and employees. When corporate employees speak with corporate counsel, which communications, if any, would be privileged? For example, in light of recent allegations that corporate payoffs have been made to both domestic and foreign officials, companies have begun "in-house" investigations in which employees have been interviewed by in-house or outside counsel concerning the illegal activities. In turn, prosecutors have attempted, through grand jury subpoenas, to obtain corporate documents reflecting contact with the company employees.

The subpoenaed corporation generally argues that when a corporation engages legal counsel to obtain legal advice all business-related communications between corporate counsel and corporate employees are absolutely shielded from disclosure by the attorney-client privilege. This would be the result of using the so-called "scope of employment" test. That test was first formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd mem., 400 U.S. 348 (1971). Until recently, prosecutors argued, quite often successfully, that the scope of employment test was inconsistent with the historical purpose of the attorney client privilege, and that the proper test for determining which communications between corporate counsel and corporate employees are privileged is the so-called "control group" test initially enunciated in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963).

These two competing tests reflect efforts to determine who was sufficiently important to the corporation to be its alter ego, and thus have its conversations with corporate counsel protected by the privilege. The control group test "restricts the availability of the privilege to those officers who play a 'substantial role' in deciding and directing a corporation's legal response." Upjohn Co. v. United States, 449 U.S. 383 (1981). The "scope of employment" test provides broader protection because it covers all employees who possess information gleaned within the scope of their employment, i.e., "[m]iddle level -- and indeed lower level -- employees . . ." 101 S.Ct. at 683.

The conflicting court decisions in this area were resolved, at least somewhat, by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1980). In Upjohn, the Government sought, through an IRS summons, corporate attorney memoranda of interviews of employees relating to foreign corrupt practices. While it declined to "lay down a broad rule or series of rules to govern all conceivable future questions" concerning the attorney-client privilege in the corporate context, the Court nonetheless took a significant step in broadening the privilege. The Court rejected the control group test because it protected only communications between a lawyer and those corporate officers and agents who direct the corporation's response to the lawyer's advice. The problem with this, Justice Rehnquist wrote for the majority, was that it overlooked the fact that the privilege protects not only the lawyer's giving of advice, but also the client's giving of information. The information the lawyer needs to formulate his advice is as likely to be possessed by middle or lower level employees as by top management. Justice Rehnquist also stressed the lack of certainty about how "control group" should be defined. This uncertainty made it difficult for corporate attorneys and officers and employees to know whether particular conversations will be protected. The result is "to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." 101 S.Ct. at 684.

With respect to the specific facts before the Court in Upjohn, Justice Rehnquist concluded that the communications were clearly privileged. Upjohn's employees were ordered by their supervisors to respond to questionnaires from in-house counsel, who was to use the information provided solely to formulate legal advice concerning the company's possible involvement in illegal pay-offs. The legal implication of the investigation was made clear to the employees, the matters were within the scope of their duties, and they were told to consider their answers highly confidential.

Of course, even if the corporation could invoke

the attorney-client privilege and refuse to produce statements by its employees to corporate attorneys, the corporation may choose to waive the privilege and "disenfranchise" the employee. A "disenfranchised employee" is the term given to a present or former employee who has spoken to a corporate attorney concerning his personal criminal conduct. The corporation has in turn consented to the attorney's grand jury testimony concerning the conversations and/or his submission to the grand jury of memoranda reflecting the conversations.

A problem from a corporate employee's perspective can arise if the attorney fails to tell him the nature of his engagement -- that is, that he represents the corporation alone. Thus, the questioned employee may not later be able to prevent the waiver of the attorney-client privilege. In re Grand Jury Proceedings (Jackier), 434 F. Supp. 648 (E.D. Mich. 1977), typifies this familiar pattern -- the corporation waived the attorney-client privilege and the attorney was required to testify about employee's incriminating statements. As the court explained, absent a directive by the employee that the lawyer must act in the capacity of the employee's legal representative, he cannot object to the attorney's testimony before the grand jury:

> If the communicating officer seeks legal advice himself and consults a lawyer about his problems, he may have a privilege. If he makes it clear when he is consulting the company lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, he may have a privilege. But, in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from [officers], the privilege is and should remain that of the company and not that of the communicating officer. 434 F. Supp. at 650.

Thus, to the extent that a corporate board of directors believes that it is in the best interests of the corporation to cooperate fully in the investigation, the corporation may be able to make available what would otherwise be privileged matters. The corporation, through its attorney, may be able to readily establish that the attorney's communications with the employee were purely on the corporation's

behalf and hence that any privilege involved may be waived.

Recently there has been a great deal of discussion among attorneys who act as corporate counsel concerning how to "defuse a document bomb" that may be uncovered during in-house investigations. (See, e.g., The National Law Journal, 8/6/79, p.24, article entitled "How To Defuse A Document Bomb....") New strategies are being developed which are aimed at structuring in-house investigations so that the fruits of the investigation will not be subject to grand jury subpoenas due to the work-product and attorney-client privileges.

First, efforts are being made to have all investigations, either through in-house or outside counsel, carried out pursuant to a clear directive from the board of directors, highly placed employees or officers in management structure. The directives specify that it is the attorney's job to uncover violations of law and to give advice on how they should be handled. Second, counsel have been attempting to "set up" a direct attorney-client relationship between the corporate attorney and the present or former employee. Thus, the corporate attorney will inform the employee that the employee was directly involved in the crime and may be or has been granted or offered immunity for his testimony against the corporation.

4. Spousal Privilege

Confidential communications made from one spouse to another in the confidence of the marital relationship are privileged. Trammel v. United States, 445 U.S. 40 (1980); J. Wigmore, Evidence Sections 2332-41 (McNaughton Rev. 1961). This privilege extends even to grand jury proceedings. Fed. R. Evid. 1101(d). Thus, a grand jury witness may choose to withhold testimony that would incriminate his or her spouse if the information sought was gained by the witness in a confidential communication with the spouse.

At common law, the spousal privilege excluded not only private marital communications, but also all other evidence to be given by one spouse that incriminated his or her partner. See Hawkins v. United States, 358 U.S. 74 (1954). This privilege was narrowed in the 1980 Trammel decision, supra, to protect only information privately disclosed between husband and wife in the confidence of the marital relationship." 100 S.Ct. at 913. Trammel sought to confine the breadth of the spousal privilege to the

more limited protection provided by the priest-penitent, attorney-client, and physician-patient privileges. Id.

Under Trammel, the witness spouse retains an option of refusing to testify; the decision to invoke the spousal privilege is left completely with the witness spouse, who neither may be compelled to testify nor foreclosed from testifying. That the witness spouse decides to testify because of a grant of immunity and assurances of lenient treatment does not render the testimony involuntary. 100 S.Ct. at 914.

In addition to Trammel, apparently there are two other exceptions to the spousal privilege. Unlike Trammel, these exceptions allow testimony to be compelled. First, testimony may be compelled when both spouses are granted immunity. United States v. Doe, 478 F.2d 194 (1st Cir. 1973). As neither spouse can be prosecuted for what is then said, the underlying precept of the privilege -- preservation of the family -- is maintained. Second, testimony also may be compelled under the co-conspirator exception. If the husband and wife are co-conspirators or co-participants in a crime, the privilege does not apply and testimony may be compelled. United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974) (where wife was an unindicted participant and was called as a witness by the government, spousal privilege did not extend to instances where wife was a party to crime).

5. Physician-Patient Privilege

Unless there is a specific statute, under Rule 501 of the Federal Rules of Evidence, the physician - patient privilege will generally not be recognized. See, e. g., United States v. Mullings, 364 F.2d 173, 176 n. 2 (2d Cir. 1966).

6. Priest-Penitent Privilege

Another privilege that can be invoked to avoid testifying before a grand jury is that of priest-penitent. While there are few cases on the scope of this privilege, the Second Circuit has held that "[w]hile the privilege has been recognized in the federal courts, it appears to be restricted to

confidential confessions or other confidential communications of a penitent seeking spiritual rehabilitation." United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (letter to priest not privileged because it contained no hint of secrecy and sought no religious advice). See also United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (murder confession to prison chaplain not privileged when prison guard present). Compare Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (admission of defendant to minister that she abused her children was privileged and inadmissible); In re Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (draft counselling services performed by clergyman and staff were privileged ministerial functions).

7. Parent - Child Privilege

The United States District Court for the District of Nevada recently held that children do not have to testify against their parents in criminal proceedings and parents likewise enjoy the right to refuse to testify against their children. In re Grand Jury Proceedings (Agosto), 32 Cr L 2374 (D. Nev. 1983). But see, United States v. Ron Jones, 683 F.2d 817 (4th Cir. 1983) (no family privilege can be asserted by Grand Jury witness to avoid giving incriminating testimony against father.)

C. Developing Principles of Access to Third-Party Records

Although historically the Constitution has limited the grand jury's access to the books and records of the subject of an investigation, in recent years a new body of law has emerged. Court decisions have expanded the grand jury's access to the records of banks and phone companies and to a lesser extent to the records of businesses and professionals. Because these sources of documents can have a dramatic impact upon the prosecution of economic crimes, they will be briefly discussed below.

1. Access to Bank Records

Tracing and analyzing the flow of cash through financial and business records is a significant tool in the investigation of economic crimes. Banks maintain a variety of records that can be utilized by prosecutors. They hold signature cards, periodic account statements listing all deposits and withdrawals, and safe deposit rental contracts and entry slips. In addition, the daily proof sheet kept by tellers recording all purchasers of cashier's checks are significant because many individuals involved in

criminal transactions mistakenly believe that cashier's checks cannot be traced.

Many putative defendants have attempted to utilize the Fourth Amendment to challenge the grand jury's access to their bank records. The Supreme Court answered many questions surrounding a bank's duty to produce its records in United States v. Miller, supra. In Miller, bank records were obtained by a faulty subpoena served on Miller's bank and were used against him at his tax fraud trial. The Court held the records to be admissible because there was no intrusion into any area in which the defendant had a protected Fourth Amendment interest. The Court based its opinion on two grounds: first, the subpoenaed bank records were not Miller's private papers but rather the business records of the bank; and second, Miller had no legitimate expectation of privacy in the bank records concerning him.

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.... This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.... 425 U.S. at 443 [citations omitted].

Furthermore, in Miller the Court held that a probable cause standard similar to a search warrant was not applicable to a subpoena for bank records and only the bank, and not the depositor, can challenge the subpoena. 425 U.S. at 443-444. Because most banks are corporations, they have no Fifth Amendment privilege against self-incrimination and cannot refuse to produce books and records on that ground. See California Bankers Association v. Schultz, 416 U.S. 21, 55 (1974).

Recently the Eleventh Circuit Court of Appeals affirmed the holding of the United States District Court for the Southern District of Florida requiring the Bank of Nova Scotia to comply with a federal grand jury subpoena duces tecum calling for the production of bank records of a grand jury target maintained at the main office or any branch office of the Bank of Nova Scotia in Nassau, Bahamas, even

though the lower court found that disclosure in compliance with the subpoena might subject the bank to criminal charges in the Bahamas for violation of the Bahamian Bank Secrecy Act. The subpoena had been served on the bank of its South Florida branch office. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982).

The case follows a decade of attempts by the Internal Revenue Service to penetrate the secrecy of offshore banks located in "tax haven" countries - where many high-level drug traffickers and other criminals shield their illegal income from disclosure to the IRS through the use of foreign bank accounts and phony corporations. The bank accounts in these countries are protected by bank secrecy laws which subject bank employees and other individuals to criminal prosecution for disclosure of information regarding customer accounts. The first breakthrough in this area occurred in the case of In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 reh. den., 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976). In that case, a Cayman Islands bank official who had travelled to the United States was served with a subpoena and was compelled to answer questions concerning his activities on behalf of the bank and its clients, even though there was a reasonable likelihood that such conduct would subject him to criminal prosecution abroad. The court reached this conclusion after balancing the interests of the United States in obtaining the information sought by the grand jury subpoena against the interests of the Cayman Islands in protecting the privacy rights of its banks and bank customers.

The Court of Appeals in Bank of Nova Scotia stressed the importance of unhindered grand jury inquiries, aside from the impact on foreign relations. As the court stated, "[a]bsent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process." The court also rejected the bank's request that the government be required to show that the documents sought were relevant to an investigation properly within the grand jury's jurisdiction, as was required in the Third Circuit's rulings in In re Grand Jury Proceedings, (Schofield I), 486 F.2d 85 (3d Cir. 1973), and In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975). In reaching its decision on the relevance issue, the Eleventh Circuit noted that the Schofield requirements

were imposed under the Third Circuit's inherent supervisory power; the Eleventh Circuit declined to "impose any undue restrictions upon the grand jury investigative process pursuant to [its] supervisory power."

This decision involves the situation where a foreign bank has a branch which is subject to the jurisdiction of the United States. Nonetheless, it is expected to be an invaluable tool for obtaining the foreign bank records of targets of major criminal investigations. It will further raise the veil of secrecy which surrounds many foreign bank records, and will provide the government with the necessary means for prosecuting many individuals who have relied on foreign bank secrecy laws to elude prosecution for their criminal activities, especially drug trafficking.

Practical Guidelines:

If presented with a similar situation in which foreign bank records are sought from a local branch bank and a foreign bank secrecy act is involved, the following should be considered before issuing a subpoena duces tecum.

- Determine from the Justice Department's Office of International Affairs (FTS 724-7600) that no treaty is presently under negotiation with the foreign country, that use of letters rogatory has been unsuccessful in the past, that OIA has no strong opposition to your subpoena duces tecum, or that an existing treaty allows the records to be obtained expeditiously.

- Establish whether the particular foreign bank secrecy act in your case has exceptions which would permit disclosure of the documents in that country. (The Library of Congress in Washington, D.C. has research specialists who are familiar with secrecy acts of all tax haven countries and are able to provide you with copies of the applicable statutes.)

- Prepare an affidavit for possible in camera submission to the court regarding the relevance of the documents sought should defense counsel raise the objection. The Third Circuit requires such a showing, see In re Grand Jury Proceedings, (Schofield I, II), supra, but the Fifth and Eleventh Circuits do not. In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404, rehearing denied 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

- The Bank of Nova Scotia, supra, concludes that the principle of comity between nations does not preclude enforcement of federal grand jury subpoenas duces tecum. See In re Grand Jury Proceedings (Field), supra,. Nor does the imposition of contempt sanctions for failure to turn the records over violate due process. Compare Societe Internationale v. Rogers, 357 U.S. 197 (1958) and United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

2. Access to Phone Records

Telephone companies maintain a variety of records that are regularly subpoenaed by grand juries. Billing records, for example, show the date, time, duration and destination of all long distance telephone calls and the name and address of the person owning the telephone. MUD (Multiple Unit Dialing) records are also significant in that they provide the destination of local calls from a given phone. This information can be used for investigative leads, to provide probable cause for the issuance of a search warrant, to authorize electronic surveillance or as actual evidence to be presented to a grand jury or at trial. See, e.g., Nolan v. United States, 423 F.2d 1031, 1044-45 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970). The Fourth Amendment's use as a basis to challenge subpoenaed phone company records was substantially undercut in the United States Supreme Court's decision of Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1975). There the Court held that no warrant was required to install a pen register because there was no reasonable expectation of privacy in the records that were produced by a subscriber's use of his phone. While Smith was decided in the context of the use of the phone records as evidence in the trial, other courts have employed the identical approach to challenges to grand jury subpoenas. The Ninth Circuit held that "[n]o one justifiably could expect that the fact that a particular call was placed will remain his private affair when business records necessarily must contain this information." United States v. Fithian, 452 F.2d 505, 506 (9th Cir. 1971). Similarly, courts have held that there is no Fifth Amendment justification for denying a prosecutor access to Western Union telegram records as opposed to mere telephone company records. In United States v. Gross, 416 F.2d 1205, 1213 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970), the court held that Western Union records are "not the property of the customer who has no standing to object ... on Fifth Amendment grounds."

3. Access to Corporate and Commercial Enterprise Records

While bank and phone records provide significant evidence to prosecutors, the most significant source of evidence lies within the realm of the books and records of commercial enterprises. For example, records from credit card companies reveal how and where a suspect spends money; and because card-issuing companies keep monthly accounts for several years, investigators can reconstruct the pattern of the suspect's expenditures over a significant period of time. Similarly, car rental agencies, airlines, hotels, and credit reporting bureaus can provide valuable material.

Law enforcement officials can often obtain commercial records upon oral request alone. Under current law, privacy interests are defined to exclude "information revealed to a third-party..., even if the information is revealed on the assumption that it will be used only for a limited purpose...." Miller, supra, 425 U.S. at 443. As a result, a customer has no standing to object to the surrender of a third-party's records. The only limitation on law enforcement is private commercial policy. Generally, commercial records are obtained through a grand jury subpoena and only the recipient of the subpoena has the right to object to the production of the records. See United States v. Sahley, 526 F.2d 913 (5th Cir. 1976).

For a case in which an attorney was held in contempt for failure to produce corporate records in his possession called for in a grand jury proceeding which he felt were protected by the attorney-clent privilege. See In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982).

CHAPTER VII. CONFLICTS OF INTEREST/MULTIPLE REPRESENTATION

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VII. CONFLICTS OF INTEREST/MULTIPLE REPRESENTATION

A. Introduction

It is important to note that multiple representation is neither unethical nor improper per se. In fact DR 5-105(c) permits multiple representation if the attorney "can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Conflicts will arise when an attorney represents an organization, such as a union, as well as individuals within that organization, such as its officers. The interests of the organization often will not coincide with those of the individuals, and the attorney cannot represent the organization and the individuals.

The attorney who attempts to represent more than one individual before the grand jury is courting conflict of interest problems. An offer of immunity for any one client may prejudice the interests of the other clients (assuming the client to be immunized will give damaging testimony against the others). This situation is the one an AUSA is most likely to meet. When all the witnesses are represented by the same attorney and all invoke their Fifth Amendment privileges before the grand jury, it will be difficult for the AUSA to decide which witness should be offered immunity. The practical matter of actually making the offer of immunity to any one witness is made next to impossible by the attorney's multiple representation.

Each district, as seen below, approaches the problem of conflicts in different ways under their local rules of practice and procedure. It is recommended that you confirm the suggestions offered here with your office.

B. Procedures

1. Informal contacts

The first step to take may be to informally contact the defense attorney who the AUSA thinks may have a conflict or potential conflict of interest. An indication that the government intends to offer immunity to one of the clients should bring the conflict to light, and it is unlikely that the attorney will resist informing the client of the conflict and withdrawing if necessary. This should be followed by a written communication to the lawyer.

2. Motion to the court

If telephone calls and letters are not enough to convince an attorney to withdraw from representation (and again, it should be emphasized that in most cases that will be enough), the AUSA should consider filing a formal motion with the court asking that the attorney be disqualified. The motion should detail the facts supporting the government's contention that a conflict of interest does exist and should recite the efforts that the AUSA has already made to convince the attorney to withdraw. Copies of any letters should be included by way of affidavit.

3. Multiple representation cases

There are relatively few cases dealing with motions to disqualify because of multiple representation at the grand jury stage. These motions are usually made when witnesses are not cooperating with the grand jury investigation (i.e., they are invoking the Fifth Amendment), and are all represented by the same attorney. The government's motion is usually an attempt to break the "stonewall" of silence and facilitate the investigation. The cases seem to agree that the government must show something more than multiple representation and a continued invocation of the privilege in order to force the disqualification.

Pirillo v. Takiff, 341 A.2d 896 (Pa.), aff'd. 352 A.2d 11 (1975) cert. denied, 423 U.S. 1083 (1976) (an often-cited case disqualifying an attorney from representing 12 officers before grand jury. The attorney was paid by the police organization and the court held that the witnesses were deprived of a completely loyal attorney).

In re Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976) (court refused to uphold a disqualification motion based solely on the fact that one attorney represented nine witnesses, each of whom had claimed the Fifth Amendment privilege. There had not been an offer of immunity to any witness).

In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976) (Washington Post pressmen, represented by one attorney, claimed the Fifth before grand jury. The government's motion to disqualify because of the indiscriminate assertions of the Fifth was held to be premature until it was shown that immunity was not feasible due to the conflict).

In re Taylor, 567 F.2d 1183 (2d Cir. 1977) (court refused to uphold motion to disqualify attorney representing witness and target. The motion was premature as witness had not actually claimed the privilege and immunity had not been given. If the witness knowingly waived the conflict, was given immunity and still refused to testify, the contempt power was the appropriate remedy, not disqualification by the court). In re Gopman, 531 F.2d 262 (5th Cir. 1976) (attorney represented the union and several officers who claimed the Fifth Amendment. Disqualification was proper based on the actual conflict and the court's power to regulate the conduct of attorneys).

4. Other multiple representation cases

United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).

United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976).

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

United States v. Garofala, 428 F. Supp. 620 (D.N.J. 1977), aff'd sub nom., United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), cert. granted 32 Cr L 4145 (1983).

C. Appeals from Rulings on Motions to Disqualify

The courts have almost uniformly recognized the rights of defense counsel to appeal from an order granting the United States' motion for disqualification. In re Investigation Before the February, 1977, Lynchberg Grand Jury, 563 F.2d 652 (4th Cir. 1977) cert. denied sub nom. Fairchild Industires Inc. v. Harvey U.S. District Judge, 440 U.S. 971 (1979); In re Grand Jury Empannelled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976). The government may also seek appellate review from an adverse ruling. In re Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978). But see contra In re April 1977 Grand Jury Subpoenas (General Motors Corp.), 584 F.2d 1366 (6th Cir. 1978) cert. denied, 440 U.S. 934 (1979); In re Investigative Grand Jury Proceedings on April 10, 1979 (Wittenberg), 621 F.2d 813 (6th Cir. 1980), cert. denied, 44? U.S. 1124 (1981).

D. Specifics on Multiple Representation

1. The interests involved

a. The prosecutor's - preventing stonewalls.

b. The defense attorney's - controlling and defeating investigations.

c. The client's:

(1) not getting indicted,

(2) the prosecutor going away, and

(3) undivided, loyal legal representation.

(4) See United States v. Mierzwicki, 500 F. Supp. 1331, 1336, (D. Md. 1980) for when multiple representation is advantageous to a defendant.

d. The public's - vigorous, full search for truth.

e. The bar's maintaining ethical standards and the appearance of ethical standards.

2. The problems

There are, at least, three types of conflict situations in the grand jury which are guaranteed to attract a prosecutor's attention and which can serve as the basis for a motion to disqualify. The underlying theory is that these conflict situations are proscribed by ethical considerations.

a. Multiple representation includes:

(1) One lawyer or law firm representing corporation and employees, officers, etc.; or

(2) One lawyer or law firm representing more than one target; or

(3) Each of the above have separate lawyers, but the fees are coming from one interested source.

b. Lawyer who is representing target or witness was participant in events under investigation and is likely to be a witness or a target in same investigation.

c. Lawyer has, in the past, represented parties now adverse to present client's interest (government lawyer in past; or represented someone who is now a government witness).

3. The pertinent ethical standards

ABA Model Code of Professional Responsibility can be read to support all positions, but private lawyers are increasingly urging members of the Bar to take the conservative position and to get out if there is possibility of conflict.

a. Canon 4. A lawyer should preserve the confidences and secrets of a client.

(1) This applies to all three conflict situations.

(2) It is virtually impossible to avoid violation in multiple representation situation even with knowing, voluntary waiver, potential for future conflict great in multiple representation situations, e.g., one of grand jury clients becomes a government witness at trial; or a once represented defendant takes the stand.

b. Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

(1) DR 5-101; 5-102 (Withdrawal as counsel when lawyer becomes a witness)

(2) DR 5-105 (Interests of one client impair independent judgment re another client)

(3) DR 5-107 (Fees paid by some interested party)

(4) EC 5-1 through EC 5-13 (interests of lawyer that may affect his judgment) applies to the lawyer as a subject, participant, possible witness)

(5) EC 5-14 through 5-20 (interests of multiple clients)

c. Canon 9. A lawyer should avoid even the appearance of professional impropriety. Applies to all situations, _but see_, in particular, DR 9-101(B) when you are confronted with an ex-government lawyer who is attempting to represent the other side in a matter with which there was contact during government employment. _See, e.g._, _United States v. Ostrer_, 597 F.2d 337 (2d Cir. 1979). _See_ 28 C.F.R. Sections 45.735-7 (1980).

d. All other canons. Throughout the ABA Model Code, you will find proscriptions useful to bolster the government's claim of conflict based on ethical consideration. _See, e.g._, Canon 1 and DR 1-102(a)(5); and Canon 7 and DR 7-102 which add up to the proposition that it is unethical to advise a client to take the 5th to protect others (of course, it may be criminal as well) _See, e.g._, _United States v. Fayer_, 523 F.2d 661 (2nd Cir. 1975).

4. Basis for bringing motion to disqualify in grand jury setting

a. It is settled that courts have general authority over attorneys, _See, e.g._, _In re Abrams_, 521 F.2d 1094, 1099 (3rd Cir. 1975), _cert. denied_, 423 U.S. 1038 (1975), and over grand jury proceedings, _See, e.g._, _Brown v. United States_, 359 U.S. 41, 49 (1959); _United States v. Calandra_, 414 U.S. 338, 346 n.4 (1974).

b. At the trial stage there have been contradictory court decisions as to whether the court has a duty to inquire, _sua sponte_, regarding an apparent conflict situation, but the Supreme Court appears to have settled the matter in _Cuyler v. Sullivan_, 446 U.S. 335, 345-48 (1980), (unless the state trial court knows or reasonably should know

that a conflict exists the court need not initiate an inquiry into the propriety of multiple representation).

c. In any event, courts cannot identify, sua sponte, conflict situations at the grand jury stage. It is the prosecutor's duty to bring it to the attention of the court. See In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976). Cf. United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978) aff'd 623 F.2d 769 (1980), cert. denied, 449 U.S. 1077 (1981).

5. The foundation for disqualification motions

a. Multiple representation interferes with grand jury's investigation.

(1) Importance of unimpeded grand jury. See, e.g., United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

(2) Balanced against witnesses' due process or First Amendment right to select own counsel. Stronger Sixth Amendment right is not involved. See, e.g., In re Taylor, 567 F.2d 1183 (2d Cir. 1977); See In re Investigation Before the February 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977) cert. denied sub nom. Fairchild Industries, Inc. v. Harvey, U.S. District Judge, 440 U.S. 971 (1979). Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), cert. denied, 423 U.S. 1083 (1976). But see, United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa. 1979) (motion granted, balancing 6th Amendment rights).

(3) Successful motions:

In re Gopman, 531 F.2d 262 (5th Cir. 1976); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), cert. denied, 423 U.S. 1083 (1976). United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa.) order vacated, 599 F.2d 1183 (3d Cir. 1979). In re Investigative Grand Jury Proceedings, 480 F. Supp. 162

(N.D. Ohio 1979), appeal dismissed 621 F.2d 813 (6th Cir. 1980), cert. denied sub nom. Wittenberg v. United States, 449 U.S. 1124 (1981). United States v. Clarkson, 567 F.2d 270 (4th Cir. 1977) (attorney under indictment).

(4) Unsuccessful motions:

See In re Taylor, 567 F.2d 1183 (2d Cir. 1977); In re Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976); In re Investigation Before April 1975 Grand Jury (Rosen), 403 F. Supp. 1176, 1179 (D.D.C. 1975), vacated, 531 F.2d 600 (D.C. Cir. 1976) (for failure to test invocation of Fifth Amendment).

b. Multiple representation is potentially unethical and may mandate disqualification.

(1) Some courts do not hesitate to avoid potential conflict. See, e.g., In re Gopman, 531 F.2d 262 (5th Cir. 1976); In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977), aff'd per curiam by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, sub nom. In re Janavitz, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976).

(2) Proof of an actual conflict is necessary in some courts. These courts have demanded that the government prove a conflict as a condition of disqualifications: proof that the clients would not invoke the Fifth Amendment if separately represented, In re Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600, 607 (D.C. Cir. 1976); proof that the immunized client would incriminate the non-immunized clients; or proof that counsel's advice was contrary to the client's best interest, would not have been given by a different attorney, or was given to obstruct justice, In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980) cert. denied sub nom. Whittenberg v. United States, 449 U.S. 1124 (1981);

In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wisc. 1979); In re Grand Jury, 446 F. Supp. 1132 (N.D. Tex.), Motion for stay denied, 583 F.2d 128 (5th Cir. 1978); In re Special February, 1975 Grand Jury, 406 F. Supp. 194, 199 (N.D. Ill. 1975).

c. Multiple representation in grand jury raises questions which may provide an ultimate defendant with basis for 1) moving to dismiss the indictment; 2) manipulating the trial; or 3) getting the conviction reversed. See, e.g., In re Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980) cert. denied sub nom. Wittenberg v. United States, 449 U.S. 1124 (1981); United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978) aff'd 623 F.2d 769 (1980), cert. denied, 449 U.S. 1077 (1981).

See United States v. Dickson, 508 F. Supp. 732 (S.D.N.Y. 1981) (government motion to disqualify trial counsel granted because he had represented co-defendants and trial witnesses during grand jury proceedings).

See United States v. McDonnell-Douglas Corp., Crim. No. 79-00516 (D.D.C. 1971)(government's motion for a hearing to determine existence of conflict of trial counsel based on multiple representation during grand jury stage)(motion papers available from DOJ Fraud Section).

6. How to establish factual basis for disqualification motion

a. Determine who is paying fees. This is not privileged information.

(1) Fees coming from target? Check Canon 5. See In re Abrams, 56 N.J. 271, 266 A.2d 275, 278 (1970); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 aff'd., 352 A.2d 11 (1975), cert. denied, 423 U.S. 1083 (1976).

(2) Alone, usually not enough. See, e.g., In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wisc. 1979). In re Grand Jury, 446 F. Supp. 1132 (N.D. Tex.), motion for stay denied, 583 F.2d 128 (5th Cir. 1978).

(3) But see, Wood v. Georgia, 450 U.S. 261 (1981).

b. Questions for witnesses who have separate counsel or who are cooperating without counsel about approaches made by lawyers who are attempting to represent multiple witnesses, witnesses and targets, corporation and all employees.

(1) What fee arrangement offered?

(2) What advice re: 5th?

(3) What advice re: what to do if government contacts?

(4) What attempts to learn what cooperating witnesses are saying?

(5) Peer pressure to use same lawyer?

c. Question witnesses who are represented by the offending counsel as to same things, in grand jury.

d. Insist in a writing from lawyer as to precisely who has retained him or her to represent them. Do not accept blanket "all employees," etc.

e. Keep good notes of directions to you by lawyers who purport to represent everyone you reach out for, build record of "stone-wall"; But see, In re FMC Corp., 430 F. Supp. 1108 (S.D. W.Va. 1977).

f. Analyze varying degrees of culpability between people represented jointly and pin down from other witnesses or circumstances what one could say inculpating the other. Be as specific as possible.

g. When your record is good and in your judgment the conflict is clear, notify counsel in writing, advise client in presence of counsel or in grand jury. See United States v. Turkish, 470 F. Supp. 903 (S.D.N.Y. 1978), aff'd 623 F.2d 769 (1980), cert. denied, 449 U.S. 1077 (1981).

h. If notification produces no action consider alternatives to motion. See In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980), cert. denied sub nom. Wittenberg v. United States, 449 U.S. 1124 (1981).

i. Test invocation of 5th Amendment by witnesses. See, e.g., Garner v. United States, 424 U.S. 648, 658 n.11 (1976); Hoffman v. United States, 341 U.S. 479 (1951); Rogers v. United States, 340 U.S. 367 (1951); In re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176 (D.D.C. 1975), vacated, 531 F.2d 600 (D.C. Cir. 1976) (for failure to test invocation of Fifth).

j. Where you can safely do so, offer immunity.

k. Test waivers. May not be the kind court will accept as voluntary and knowing. See, e.g., (1979), supra; In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977); In re Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976); Pirillo v. Takiff, supra. See, generally, Westinghouse Electric Corp. v. Gulf Oil Co., 588 F.2d 221 (7th Cir. 1978).

7. Motion for disqualification

If still no action, make motion for disqualification (in some courts styled as a motion for restraining order), but consider how much information you may be required to share with opposing attorneys. In camera submissions by the Government are possible, but risky. See In re Taylor, 567 F.2d 1183 (2d Cir. 1977). In camera interviews of clients by judge outside presence of government and defense are probably good idea.

8. Make a sufficient record

Be sure good record is made in district court of all factors, or it will be denied as "not ripe," In re Taylor, 567 F.2d 1183 (2d Cir. 1977), or "not fully developed," In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976).

a. File complete affidavit setting forth the record you have built.

b. Counsel and clients should be forced to testify as to

(1) counsel's explanation to client of conflict problem,

(2) client's understanding,

(3) evidence of voluntary waiver, and

(4) all about the attorney - client relationship.

9. Other resources

See suggested voir dire, Tague, "Multiple Representations of Targets and Witnesses During Grand Jury Investigation," 17 Am. Crim. L. Rev. 201, 325 (1980).

CHAPTER VIII. GRAND JURY MOTIONS, (CONTEMPT)

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VIII. GRAND JURY MOTIONS, (CONTEMPT)

A. General Form (check local practice)

1. Two categories

   a. _Ex parte_

   b. Motions with notice, including motions with regular notice and Orders to Show Cause.

2. Judge selection

   Government offensive grand jury motions provide one of the few occasions, in some districts, where you can control the selection of the judge to hear the matter. For instance, in some districts using the Individual Calendar System, judges sit in an Emergency Part (which handles grand jury items) for two week periods on an announced schedule. A grand jury _ex parte_ application, or an Order to Show Cause will be heard by the judge assigned to the Part when the Government's motion is made. However, motions with the ordinary 10-day notice will likely be bounced to the judge sitting on the return date.

3. Oral motions

   Some courts will allow certain motions to be made orally, obviating the necessity for papers.

   a. If motion is made orally, the grand jury reporter should be present to make a record of the application and the court's decision (In some jurisdictions the court reporter is permitted to fill this role).

   b. If oral motion relates to matters occurring before the grand jury, it is wise to have a grand jury officer with you to confirm facts.

4. Motion on paper

   If motion is made on papers it should usually contain:

   a. Notice of motion, or Order to Show Cause which is signed, _ex parte_, by judge who selects the time for appearance and enters it on the face of the order,

b. Affidavit by government lawyer setting forth factual basis for relief sought,

c. Proposed final order, and

d. Memorandum of law.

5. Sealing Order

Whether motion is ex parte, or on notice, the application should contain a request for a protective order sealing the motion papers, or the transcript, any related court entries, and any proceedings which may flow from the application.

6. In Camera Proceedings

If a proceeding of any kind follows the motion, in the ordinary case the proceeding in the district court should be conducted in camera, recorded by a grand jury reporter (or in some jurisdictions, the court reporter) and the reporter's notes and transcript sealed. If the court posts a calendar the identity of the parties should be disguised.

If your motion is with notice, but there is information pertinent to the matter which you do not want to disclose to parties, consider additional in camera, ex parte presentations to court of sensitive matters.

Cf. United States v. Manley, 632 F.2d 978 (2d Cir. 1980), cert. denied, sub nom. Williams v. United States, 449 U.S 1112 (1981). (court must balance any unfairness of non-disclosure with the government's secrecy interest). Of course, the other side has the same opportunity for ex parte review when matters pertain to 5th Amendment privilege or the attorney-client privilege, etc. See, e.g., In re Grand Jury Proceedings, 522 F. Supp. 977 (S.D.N.Y. 1981)(ex parte hearing when evidence is taken, while the government is excluded).

NOTE: Be alert to Department of Justice guidelines on closed proceedings and consult the United States Attorneys' Manual.

B. Ex Parte Motions

1. Generally

There are several types of government motions (applications) which are properly made to the

court, ex parte, in the course of a grand jury investigation. Some are routine; some have been created by imaginative government lawyers faced with particular problems. Defense attorneys and attorneys for third parties can be counted upon to attempt to assert the standing of their clients to receive notice of many of these matters and to be heard. Indeed, some statutes have notice provisions while other statutes specifically support the ex parte nature of the application. If there is no controlling statute, our best arguments against notice and intervention are:

a. No standing.

b. The strong public interest served by the ability of the grand jury to continue its work in secrecy, unimpeded by the inherent delay involved in frivolous mini-hearings. Fed .R .Crim. P. 6; United States v. Johnson, 319 U.S. 503, 513 (1943); United States v. Calandra, 414 U.S. 338 343-44, 350 (1974); United States v. Proctor & Gamble, 356 U.S. 677, 681 (1958).

2. Routine ex parte motions

a. Application for an order authorizing tax disclosure. See, USAM 9-4.900 et seq., for forms and procedures. United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980)(tax disclosure application is ex parte in nature).

b. Application for an order authorizing disclosure of information otherwise protected by privacy statutes, for instance:

1. The Drug Patient Privacy Statute, 21 U.S.C. Section 1175 et seq., and

2. The Fair Credit & Reporting Act, 15 U.S.C. Section 1611 et seq.

See In re Gren, 633 F.2d 825 (9th Cir. 1980)(grand jury subpoena is not a court order within the meaning of the Act). Although DOJ has consistently taken the position that a grand jury subpoena is "an order of court" within the meaning of the Act (see, USAM 9-11.230). DOJ

has decided not to appeal this decision. It is, thus, probably necessary now to obtain a "so ordered" and a judge's signature on the bottom of your subpoena addressed to a credit agency.

c. Application for letters to obtain evidence and testimony abroad. See 28 U.S.C. Section 1781.

d. Application for subpoena compelling appearance in the United States, directed at U.S. national who is abroad. See 28 U.S.C. Sections 1783-84.

e. Application for a material witness warrant and for bail. See, Stein v. New York, 346 U.S. 156, 184 (1953); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); 18 U.S.C. Section 1349; Fed. R. Crim. P. 46(b).

Most courts will require a showing that the witness has information material to the investigation and that the witness' presence cannot be secured by subpoena.

f. Application for arrest warrant in lieu of Order to Show Cause for subpoenaed witness who has failed to appear. Fed. R. Crim. P. 42(b).

g. Application for a Writ of Habeas Corpus Ad Testificandum for production of incarcerated potential witness.

h. Application for a grant of immunity pursuant to 18 U.S.C. Section 6001 et seq. See Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 539-40 (7th Cir.1977), cert. denied, 439 U.S. 820 (1978) (no notice and no opportunity to be heard is required). However, in the ordinary case, it is probably productive and protective of later contempt action to have witness and lawyer, if any, present so that judge can explain consequences of not testifying. See, e.g., Goldberg v. United States, 472 F.2d 513, 514 (2d Cir. 1973).

i. Application for an order authorizing disclosure pursuant to Fed. R. Crim. P. 6(e). There are instances when the public interest in disclosure of grand jury material during

the course of a grand jury investigation outweighs the public interest in secrecy. Nothing precludes the government, for instance, from obtaining these orders in connection with agency civil actions which may be necessary to fire a corrupt employee, or to debar a crooked contractor, or to recoup fast disappearing proceeds of a fraud, or to stop (with a civil injunctive action) an ongoing crime. The value of such disclosure must, of course, be weighed against the potential damage to the criminal case. (See Chapter II, supra).

3. Non-routine ex parte motions

a. Application for a protective order directing a bank not to disclose the existence of a grand jury subpoena for customer records.

This "order" has no basis in the Financial Privacy Act, 12 U.S.C. Section 3401 et seq., because grand jury subpoenas are excepted from the notice requirements of the statute. However, many banks are undertaking to notify customers to the detriment of countless grand jury investigations.

Some districts have obtained court orders directing the banks to maintain secrecy.

(1) Arguments against

(a) Fed. R. Crim. P. 6(e) limits obligations of secrecy and does not provide for this kind of protection against a witness.

(b) The Act doesn't provide for this kind of order in connection with grand jury proceedings.

(2) Arguments for

(a) Inherent power of court to protect integrity of grand jury proceedings.

(b) Legislative history of Act supports view that disclosure is not intended and can be harmful. See H. Rep. No. 95-10383 at 228, U.S. Code Cong. & Admin. News, 9358 (January 1979).

(c) No legitimate purpose served by notice because customers have no standing. United States v. Miller, 425 U.S. 435 (1976). (Query whether this is still good law given standing conferred by some provisions of Financial Privacy Act passed after this decision).

(d) No conflict with the proposition that witnesses cannot be bound by secrecy requirements because orders are limited to fact of receipt of subpoena rather than to "matters occuring before grand jury."

b. Applications for orders permitting disclosure even when requirements of Fed. R. Crim. P. 6(e) are not met, e.g., to state officers assisting in joint investigation; outside contractors or experts necessary to assist in technical matters (for instance, computerization of grand jury transcripts).

(1) It is unclear whether state officers are "government personnel" within the meaning of the rule. Compare In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979) with, In re Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978) appeal dismissed, 580 F.2d 13 (1st Cir. 1978). Therefore, before disclosure to state officers or technicians it is wise to:

(a) try to get order authorizing the disclosure, under Rule 6(e)(3)(A)(ii) (deeming state agents to be "government personnel") and Rule 6(e)(3)(C)(i) (deeming the grand jury to be "preliminary to a judicial proceeding"), and

(b) have the officer or expert sworn as an agent of the grand jury.

See United States v. Stanford, 589 F.2d 285, 292 (7th Cir. 1978) cert. denied, 440 U.S. 983 (1979).

(c) Certain experts, of course, can be exposed to grand jury materials without problems, e.g. expert witnesses.

(2) Beware the private agent and the outside contractor, e.g., the computer people, the photocopy company people. See United States v. Tager, 638 F.2d 167 (10th Cir. 1980) (indictment dismissed in spite of court order).

c. The All Writs Act, 28 U.S.C. Section 1651, is an all purpose basis for creative orders "necessary and appropriate in aid of the court's jurisdiction and agreeable to the usages and principles of law."

(1) To obtain all manner of relief. See, e.g., United States v. New York Telephone Company, 434 U.S. 159 (1977)(telephone company ordered to assist with the installation of a pen register). No visible jurisdiction except Fed. R. Crim. P. 41.

(2) For protective order of all kinds.

C. Adversarial Motions

1. Motions with Notice (or by Order to Show Cause) for orders enforcing subpoenas, compelling testimony, etc.

a. Witness has failed to appear on required date.

b. Witness has failed to produce document on required date.

c. Witness has refused to give:

(1) Testimony, under immunity or after court has ruled that 5th Amendment privilege not valid.

(2) Handwriting. United States v. Mara, 410 U.S. 19 (1973).

(3) Fingerprints.

(4) Voice Exemplars. United States v. Dionisio, 410 U.S. 1 (1973).

(5) Self in line-up. In re Maguire, 571 F.2d 675 (1st Cir. 1978), cert. denied, 436 U.S. 911 (1978).

(6) Any non-testimonial thing properly demanded.

d. Substantive law is the same as in witness' motion to quash. Procedurally, however, you will be asking for a court order directing witness to comply or to be held in contempt of court.

e. Contempt - Civil and Criminal

(1) Civil contempt, pursuant to 28 U.S.C. §1826, allows wherein the witness to be incarcerated until such time as he complies with the court order, or life of the grand jury (not to exceed 18 months). A fine may be imposed although not specifically stated in statute, In re Grand Jury Impaneled January 21, 1975, 529 F.2d 543 (3d Cir.); cert. denied, 425 U.S. 992 (1979). Court must impose sentence for order to be final, In re Stewart, 571 F.2d 958 (5th Cir. 1978); Lewis v. S.S. Baune, 534 F.2d 1115, 1119 (5th Cir. 1976).

Court of appeals must handle within thirty days, conditioned on order of confinement, In re Berry, 521 F.2d 179 (10th Cir.), cert. denied, 423 U.S. 928 (1975). Thirty day rule still applies if witness allowed bail, Id. Contra, In re Grand Jury Proceedings (Gravel), 605 F.2d 750 (5th Cir. 1979) (court allowed itself more than 30 days saying the 30 day rule is non-jurisdictional).

(2) The basis for Criminal contempt is found in 18 U.S.C. §401(3), Fed. R. Crim. P. 42(b). Note that most criminal contempts at the grand jury stage are not 42(a) summary contempts because the actual refusal to obey the order will occur in the grand jury, out of the presence of the court. See Harris v. United States, 382 U.S. 162 (1965). For criminal contempt judge can sentence for any amount of time if case is tried by jury, Frank v. United States, 395 U.S. 147 (1969), but 6 months limit if tried non-jury, see, e.g., Bloom v. Illinois, 391 U.S. 194 (1968).

(3) Fines can be used as sanctions for both civil and criminal contempt and are particularly useful for corporate contemnors. Mitchell v. Fiore, 470 F.2d 1154 (3d Cir. 1972).

(4) Local rules of the court have contempt provisions as well, both civil and criminal.

f. The courts often confuse the two types of contempt. To see the difference look to the purpose. Shillitani v.United States, 384 U.S. 364, 370 (1966).

(1) Overall characteristic of civil contempt is remedial. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911). Civil contempt commitment should have a purge clause. Witness has keys to jailhouse. See, e.g., United States v. Hughey, 571 F.2d 111 (2d Cir. 1978).

(2) Criminal contempt purpose is to punish. It is intended to vindicate authority of court. See Gompers; Hughey, supra.

(3) A person can be charged and "tried" simultaneously for civil and criminal contempt. United States v. Aberbach, 165 F.2d 713 (2d Cir. 1948).

(4) If civil contempt efforts are unsuccessful criminal contempt proceedings may be initiated. No double jeopardy. See, e.g., United States v. Hughey, supra.

(5) A sentenced prisoner's regular term can be interrupted with a civil contempt commitment. See, e.g., United States v. Liddy, 510 F.2d 669 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975). A criminal contempt sentence would go at the end of a regular sentence.

(6) As a matter of policy, courts have held that the civil contempt sanction should be tried before criminal sanctions are applied.

See, e.g., United States v. Doe, 405 F.2d 436 (2d Cir. 1968).

(7) Note that the court has the power to terminate coercive civil contempt confinement if it is not getting anywhere. In re Cueto, 443 F. Supp. 857 (S.D.N.Y. 1978); Matter of Archulella, 446 F. Supp. 68 (S.D.N.Y. 1978).

(8) Note the Department of Justice policy against the use of successive grand juries to extend civil contempt incarceration. USAM 9-11.255.

g. Most civil contempt proceedings fall under 28 U.S.C. §1826. Controlled by statute with developing procedural niceties. See In re Sadin, 509 F.2d 1252 (2d Cir. 1975); United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 419 U.S. 1079 (1974), which held that due process rights created under Fed. R. Crim. P. 42(b) must be observed under 28 U.S.C. §1826.

(1) Counsel

(2) Some sort of notice of proceeding and consequences

(3) Chance to demonstrate "just cause" for refusal to comply.

(a) 5th Amendment

(b) Attorney-Client

(c) Other privileges

(d) Privacy

(e) Illegal wiretaps

(f) Flaw in service

(g) Flaw in grand jury

(h) Prosecutorial abuse, misconduct.

(i) Oppressive

Note: Substantive law is same as if witness had moved to quash on all these items.

Note: Fear is not just cause. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); nor is religious conviction, see Smilow v. United States, 465 F.2d 802 (2d Cir. 1972); nor fear of foreign prosecution. In re Grand Jury Subpoena (Flannagan), 691 F.2d 116 (2d Cir. 1982).

(4) No right to allocute. In re Roshan, 671 F.2d 690 (2d Cir. 1982).

h. The motion itself generally unfolds in four stages:

(1) Judge signs Order to Show Cause, ex parte, indicating date and time when witness is to appear before court, or you make oral application in presence of witness.

(2) The Hearing.

(a) At the resulting appearance, there is a demonstration in some form or other (affidavit, statement by grand jury officer, reading of grand jury transcript) that witness has refused or failed to comply with subpoena or grand jury direction.

(b) At this appearance, witness will normally be given the due process opportunity to show "just cause."

(c) The court will decide there is no "just cause" and order the witness to comply at a time and date certain.

(d) The judge should spell out the consequences of non-compliance and tell the witness that the government can proceed not only in civil contempt but also in criminal contempt.

(e) The witness, then, should be directed to re-appear in grand jury.

(3) If witness does not return to the grand jury, or returns but refuses to comply, he is in violation of court order.

(4) It may take another Order to Show Cause, or an arrest warrant to get the witness back before the judge, where without further ado the judge could find him in civil contempt (or in criminal contempt, providing he has been given notice that he faces that sanction).

(a) Most courts at this point will give the witness yet another opportunity to be heard. This is absolutely unnecessary providing the judge has given a full opportunity to be heard the first time around. In re Fula, 672 F.2d 279 (2d Cir. 1982).

(b) If judge finds the witness to be in contempt, the witness will be instantly remanded.

2. Motions with Notice (or by Order to Show Cause) to seek court assistance against obstructionist tactics.

a. Rely on All Writs Act, 28 U.S.C. §1651, if appropriate, and on the Calandra, Brown argument regarding court's authority over grand jury proceedings.

b. Types of conduct which court may control.

(1) Undue interruptions to consult with counsel. See In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

(2) Tedious note-taking by witness.

(3) Photographing and otherwise seeking to identify or intimidate grand jurors.

(4) Hanging around grand jury room with no apparent purpose.

3. Motions with Notice (or by Order to Show Cause) to seek stays, protective orders, injunctive relief in other courts.

a. When there is a parallel civil case pending between the government and private parties, or a purely private civil action, the occasion can arise when further proceedings in the civil case will prejudice the grand jury investigation, e.g.,

(1) government witness noticed for deposition, and

(2) friendly parties are served with defense subpoenas to turn over all documents given to the prosecutor.

b. There is ample precedent for government intervention in the civil suit to seek protection from these defense tactics. See United States v. Kordel, 397 U.S. 1, 12 n.12 (1970). See Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); United States v. One 1967 Ford Galaxy, 49 F.R.D. 295 (S.D.N.Y. 1970); Federal Deposit Insurance Corp. v. Fireman's Fund Ins. Co., 271 F. Supp. 689 (S.D. Fla. 1967); United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D.N.Y. 1966); United States v. $2,437.00 United States Currency, 36 F.R.D. 257 (E.D.N.Y. 1964); United States v. Steffes, 35 F.R.D. 24 (D. Mont. 1964); United States v. Bridges, 86 F. Supp. 931 (S.D. Cal. 1949); United States v. A.B. Dick Co., 7 F.R.D. 442 (N.D. Ohio 1947).

c. Courts have issued such orders specifically when criminal case is in preindictment stage, e.g., Securities and Exchange Commission v. Control Metals Corp., 57 F.R.D. 56 (S.D.N.Y. 1972); Penn v. Automobile Ins. Co., 27 F. Supp. 336 (D. Ore. 1939).

d. Such an order demands a showing of a clear case of hardship, see Landis v. North American Co., 299 U.S. 248 (1936), which is frequently not difficult in the grand jury context.

CHAPTER IX. GRAND JURY ABUSE ISSUES

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IX. GRAND JURY ABUSE ISSUES

A. Importance of Avoiding "Misconduct" Before Grand Jury

1. Puts prosecutor's credibility in issue at the outset of a case.

2. Generally, the only remedy available to court is dismissal of entire indictment.

B. Nature of Court's Jurisdiction

1. Due Process: *See United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974).

2. Supervisory Powers: *See United States v. Cruz*, 478 F.2d 408 (5th Cir.) *cert. denied*, 414 U.S. 910 (1973); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

3. Under either standard, court's role is to protect integrity of judicial process from unfair prosecutorial conduct. *United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969).

4. Dismissal appropriate only when prosecutor's conduct was flagrant or outrageous.

C. Typical Allegations of Misconduct

1. Use of hearsay evidence

   a. Indictment can be based entirely on hearsay evidence. *Costello v. United States*, 350 U.S. 359 (1956).

   b. Exception (in the Second and Fifth Circuits):

      (1) If the grand jury is misled into believing that hearsay evidence is actually first-hand, direct evidence, and

      (2) If there is a high probability that grand jury would not have indicted if live witnesses testified, dismissal may be appropriate.

      (3) *United States v. Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied*, *sub nom L & A Creative Arts Studio Inc. v. Redevelopment Authority of the City of Philadelphia*, 414 U.S. 910 (1973); *United States v. Estepa* 471 F.2d 1132 (2d Cir. 1972).

2. Use of perjured testimony

a. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) prohibits "knowing use" of perjured testimony before grand jury. See also United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

b. Importance: In Basurto, prosecutor did not become aware of perjury until after indictment (but before trial); indictment was still dismissed.

c. In Basurto, balancing test applied: if perjury discovered by prosecutor after jeopardy has attached or after statute of limitations has expired, dismissal not appropriate because indictment cannot be re-presented.

d. Perjury must be material.

3. Exculpatory evidence

a. Generally, no duty to present such evidence. United States v. Leverage Funding Systems Inc., 637 F.2d 645 (9th Cir. 1980) cert. denied, 452 U.S. 961 (1981); United States v.Ciambrone, 601 F.2d 616 (2d Cir. 1979).

b. No duty to present evidence impeaching government witness, Loraine v. United States, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933 (1968).

c. Some courts have hinted that dismissal is appropriate if exculpatory evidence which was not presented would clearly have negated guilt. See United States v. Mandel, 415 F. Supp. 1033 (D. Md. 1976). aff'd in part and vacated and remanded, in part, 591 F.2d 1347 (4th Cir. 1979).

d. In Mandel and Ciambrone, court considered fact that defendant was invited to testify or make a proffer of exculpatory evidence, and failed to do so.

e. Notwithstanding absence of legal duty to present, there may be tactical reasons for presenting exculpatory evidence.

f. DOJ policy requires prosecutors to present "substantial evidence" known to prosecutor "which directly negates guilt." U.S. Attorney's Manual, Section 9-11.334. However, violation of internal DOJ policies is not a ground for dismissal. United States v. Caceres, 440 U.S. 741 (1979).

4. Use of inadmissible evidence

a. Generally, rules of evidence do not apply in grand jury. Fed. R. Evid. 1101(d)(2); United States v. Blue, 384 U.S. 251 (1966).

b. Evidence obtained in violation of Fourth and Fifth Amendments can be used. United States v. Calandra, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973). But as a matter of policy, this type of evidence should not be used since it will be inadmissible at trial.

c. Exception: Illegally obtained wiretap evidence cannot be used. 18 U.S.C. Section 2515.

5. Privileges

a. Generally, privileges available at trial can also be asserted in grand jury; United States v. Calandra, supra; Fed. R. Evid. 501 and 1101(d).

b. If privilege is violated before grand jury remedy should be suppression of privileged evidence at trial, not dismissal of indictment. See United States v. Colosardo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); United States v. Bonnell, 483 F. Supp. 1070 (D. Minn. 1979); United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975).

c. Work product privilege applies to grand jury proceedings. In re Grand Jury Proceedings (Duffy),473 F.2d 840 (8th Cir. 1973).

6. Statements made by prosecutor

a. Giving opinion as to sufficiency of evidence or credibility of witnesses may result in dismissal. United States v. Samango, 450 F.Supp. 1097 (D. Hawaii 1978) aff'd, 607 F.2d 827 (9th Cir. 1979); United States v. Wells, 163 F.d 313 (D. Idaho 1908).

b. Prosecutor cannot act as witness. United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978); United States v. Treadaway, 445 F. Supp. 959 (N.D. Texas 1978).

1. Prosecutor must be extremely careful in responding to questions that he or she does not give evidence.

c. Instructions on the law

1. Practice differs from district to district.

2. No legal requirement to instruct on the law. United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied 452 U.S. 920 (1981). c.f. United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 102 S.Ct.1030 (1982) (government attorney may explain elements of the offense).

3. Unclear what effect an incorrect legal instruction has. United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976) and United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952) suggest that incorrect instruction should not result in dismissal. cf. United States v. Sousley, 453 F. Supp. 754, 758, fn.1 (W.D. Mo. 1978).

D. Parallel Proceedings and the Use of Agency Lawyers

1. Definition - Successive and/or simultaneous civil, administrative and criminal proceedings dealing with the same course of conduct. See generally, Pickholz and Pickholz, Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards, 36 Wash. & Lee L. Rev. 1027 (1979); Developments, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1340-1365 (1979).

2. General rule - parallel proceedings are permissible. See United States v. Kordel, 397 U.S. 1 (1970); Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52 (1912).

3. Agency Disclosure

Before indictment, an agency may provide the Justice Department with the fruits of its independent concurrent investigation. See SEC v. Dresser Industries, 628 F.2d 1368 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980).

a. Internal Revenue Service - special case.

(1) See United States v. LaSalle National Bank, 437 U.S. 298 (1978).

(2) See Tax Reform Act, 26 U.S.C. Section 6103 et seq.

(a) To Justice - criminal or civil tax case, 26 U.S.C. Section 6103 (1976) (written request).

(b) To Justice - non-tax criminal case, 26 U.S.C. Section 6103(i)(1)(A), (B) (1976); ex parte, court order upon application of Attorney General or Assistant Attorney General.

(c) To Justice - non-tax civil case, 26 U.S.C. Section 6103(i)(5) (1976); only when United States is involved in suit regarding contract negotiations.

4. Strict limits on providing grand jury material to agency, e.g., Fed. R. Crim. P. (6)(e).

a. Cannot use the grand jury solely to prove a civil case. United States v. Proctor & Gamble Co., 356 U.S. 677, 689 (1958); United States v. American Pipe & Construction Co., 41 F.R.D. 59 (S.D. Cal. 1966).

b. No agency access to grand jury material during a grand jury investigation. The rationale for this is:

(a) To prevent the escape of those whose indictment may be contemplated; to insure the utmost freedom to the grand jury in its deliberations; and to prevent persons subject to

indictment or their friends from importuning the grand jurors.

c. Attorney General has authority to designate agency personnel to assist Justice, 28 U.S.C. Sections 515, 548.

d. Rule 6(e) permits such use by the agency.

e. Case law, United States v. Birdman, 602 F.2d 547, (3d Cir.), cert. denied, 444 U.S. 1032 (1979); In re Perlin, 589 F.2d 260 (7th Cir. 1978); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

f. Be careful who gets access. One case indicates that a properly authorized agency attorney could be an unauthorized person, if acting in a dual role as agency lawyer and prosecutor. United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979), (sufficient reason to dismiss indictment.)

   (1) In an opinion that was later withdrawn, the Sixth Circuit dismissed an indictment because an agency (IRS) lawyer, appointed as a Special Assistant United States Attorney, was not sufficiently insulated from the ongoing civil investigation. General Motors Corp. v. United States, 573 F.2d 936 (6th Cir.), appeal dismissed en banc, 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979).

g. Agency lawyers assisting in a grand jury investigation and reviewing material protected by Rule 6 should be insulated from agencies conducting ongoing civil investigations.

   (1) Explicit instructions regarding Rule 6 confidentiality and agency lawyer's special status should be set forth in letter to agency lawyer and head of agency.

   (2) Agency lawyer should not refer to Rule 6 material in reports to his superiors.

E. Conflicts of Interest in the Appointment of a Special Prosecutor

The Seventh Circuit has refused to adopt a per se rule that an appearance of impropriety is sufficient to taint the grand jury where an agency attorney who refers the criminal matter for investigation is subsequently appointed a Special Assistant to assist in the investigation. In re Perlin, 589 F.2d 260 (7th Cir. 1978); accord, United States v. Birdman, 602 F.2d 547 (3d Cir. 1979). An actual conflict of interest resulting in serious misuse of the grand jury or a breach of its secrecy could, however, vitiate the indictment. See United States v. Gold, supra. The Seventh Circuit has stated that "a mere assertion of impropriety by government attorneys is not enough to call for an evidentiary hearing and further inquiry." In re Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977). To avoid charges of a conflict of interest, an agency attorney who has been appointed as a Special Assistant to aid in a criminal investigation must sever all connections with any civil or administrative proceedings relating to the same, or to a related matter. He must be apprised by the Assistant with whom he is working of the seriousness of any violation of Rule 6(e) of the Federal Rules of Criminal Procedure.

While generally only actual conflicts of interest which diminish the independence of the grand jury may result in the dismissal of indictments, it should be noted that a court may use its supervisory powers even absent actual prejudice to correct flagrant or persistent grand jury abuses where the challenged conduct is something other than an isolated incident unmotivated by sinister ends. United States v. Serubo, 604 F.2d 807 (3d Cir. 1979). Every case in which a special assistant is appointed from an agency outside the Department of Justice should be handled with caution.

F. Preventive Measures

1. Make liberal use of limiting instructions to grand jury (e.g., prior similar acts, prior convictions).

2. Inform grand jury when they are receiving hearsay evidence, and instruct them that they have the right to hear live witnesses.

3. Present exculpatory evidence

   a. Insist on such evidence from investigators.

   b. Solicit this evidence from defense counsel.

CONTINUED

2 OF 5

4. Don't hesitate to supersede the indictment if you discover perjury, misstatement of law, etc., this will avoid a motion to dismiss and an issue on appeal.

CHAPTER X. SPECIAL PROCEDURES FOR CRIMINAL TAX GRAND JURIES

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X. SPECIAL PROCEDURES FOR CRIMINAL TAX GRAND JURIES

The use of the grand jury to investigate criminal tax violations must first be approved and authorized by the Tax Division. Decisions will be made on a case-by-case basis.

A. When a grand jury is utilized to investigate criminal tax violations

1. When potential tax crimes are uncovered in other investigations

When the U.S. Attorney or Strike Force Attorney is conducting grand jury investigation of violations of Titles 18, 21 and 31 and potential tax crimes are uncovered, the Tax Division can be requested to authorize a grand jury investigation.

2. When administrative investigative procedures are inadequate

When IRS is unable to complete its investigation through administrative investigative procedures or IRS determines it is not practically feasible to proceed administratively.

a. Instances of public corruption where IRS is unable to define limits of investigation, IRS may refer matter to Tax Division.

b. Inordinate delays in gathering information through summons.

c. Multi-jurisdictional investigation.

B. Grand Jury Authorization

1. Notification of authorization

When a Title 26 grand jury investigation is authorized, the U.S. Attorney or Strike Force Attorney will be notified by letter of authorization from the Tax Division.

2. Procedures to expand grand jury investigations to include tax violators

a. Request the Chief of the District IRS Criminal Investigation Division to analyze grand jury material supporting potential tax crimes and request that they [through IRS

Regional Counsel channels] seek Tax Division authorization. This procedure allows local criminal investigators to utilize their expertise and examine the grand jury material to determine the potential for criminal tax violations. (But see: Paragraphs C 3, 4 infra.)

b. Tax Division will promptly decide the question of grand jury authorization upon receiving request from IRS, Regional Counsel.

3. Post-authorization procedures. (This procedure is under revision and attorneys are advised to consult with the Tax Division on current procedures.)

a. Periodic reports of grand jury progress should be made to the Criminal Section, Tax Division.

b. No indictments are to be returned to information filed without prior authorization of the Tax Division.

c. When investigation has produced sufficient evidence to seek indictments, U.S. Attorney should --

(1) Have the special agent prepare a Special Agent's Report and assemble the relevant exhibits.

(2) Seek a recommendation on Special Agent's proposed charges by Regional Counsel.

(3) Provide the Criminal Section, Tax Division with views and recommendations.

(4) Tax Division should be provided a 60-day time period to review proposed prosecution recommendations. Regional Counsel, IRS has requested it be allowed 90 days to consider in advance of recommendation to Tax Division.

(5) In obtaining expert assistance from IRS, advise them that all grand jury material is supplied under following conditions:

(a) Grand jury material remains under aegis of U.S. Attorney's office and Tax Division.

(b) No disclosure is to be made for anything but criminal purposes and only to IRS personnel assisting in the criminal recommendation.

(c) IRS is to furnish the Tax Division with advice and recommendations whether favorable or unfavorable.

(d) All grand jury materials, including copies, must be returned to the U.S. Attorney or Tax Division.

C. Use of Internal Revenue Service Personnel

1. It is not necessary to obtain a court order to disclose grand jury material to designated IRS personnel. Under Rule 6(e)(3)(A)(ii), disclosure of grand jury material may be made by a government attorney to such government personnel as are deemed necessary by the attorney for the government in the performance of his duty. United States v. Block, 497 F. Supp. 629 (N.D. Ga. 1980), aff'd, 660 F.2d 1086 (5th Cir. 1981).

2. Such disclosure can be made only for the purpose of assisting the government attorney in the performance of his duties to enforce federal criminal law. Such disclosures must not be used for civil, or other purposes.

3. The attorney for the government will promptly provide the district court, before which the grand jury was impaneled, the names of the persons to whom disclosure has been made. Rule 6(e)(3)(B).

4. Persons to whom grand jury material is to be disclosed should be advised in writing that such material is secret and that it may be used only for the purpose of assisting the government attorney in the performance of his duties in enforcing federal criminal law.

5. Suggestion: Request that the District Director of IRS of the particular district involved prepare a memorandum specifically assigning persons who are to assist the government attorney in the grand jury investigation. These persons will most likely include special agents, revenue agents, and necessary secretarial staff.

6. Agents of IRS, assisting the government attorney, may contact witnesses or other third parties

during the grand jury investigation to examine records and to conduct interviews. Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1109-1112 (E.D. Pa. 1976). Care should be taken, however, that no summons is issued, and that records examined and interviews conducted are not done under the threat of a subpoena and are free from harassment: "Information gathering via summons after a case is actually referred to the Department of Justice for prosecution necessarily infringes on the role of the grand jury as the principal tool of federal criminal investigation." United States v. Davis, 636 F.2d 1028, 1036 (5th Cir. 1981).

NOTE: As a practical matter, it is unlikely that employees of the target or persons who deal with the target for a profit will cooperate without being brought before the grand jury by subpoena.

D. Segregate Non-Grand Jury Evidence From Grand Jury Evidence.

Initial and date all documents, workpapers, memos, memos of interviews, question and answer statements, reports, etc., obtained or created prior to the commencement of the grand jury investigation.

Appropriate markings, utilizing a numbering system, should be made on such materials, especially documents, identifying them as non-grand jury material, since such material may be referred to in the grand jury proceedings and may become mixed with subpoenaed material.

E. Subpoenas Duces Tecum -- Large Case Investigation

1. Numbering

Number subpoenas, utilizing the same numbering key upon receipt of documents. Control of documents is essential.

a. Hundreds or thousands of documents or records may be called for in one subpoena to, for example, the Century Manufacturing Company. Later, a second and perhaps a third or fourth subpoena will go to the same corporation.

b. Suggestion: On each subpoena enter the number 1 CMC, 2 CMC, 3 CMC, and 4 CMC (Century Mfg. Co.). Ask by letter to the Century Mfg. Co. to enter on a packing list

or the container, or both, the numbers shown on the respective subpoenas.

As the records are produced relating to subpoena 1 CMC, for example, each could be numbered 1 CMC-1, 1 CMC-2, 1 CMC-3, etc. Similarly, for records produced pertaining to subpoena 2 CMC, each should be numbered 2 CMC-1, 2 CMC-2, 2 CMC-3, etc.

A similar procedure would be followed with respect to records subpoenaed from each corporation or individual using an appropriate numbering system.

Utilizing a type of numbering system suggested above will enable the government personnel to key the documents produced to the documents subpoenaed.

It will enable all concerned to immediately discern records received through the grand jury process from the non-grand jury material.

Numbers assigned to both the non-grand jury documents and the documents received through the grand jury process can be used to identify documents referred to during the grand jury proceedings.

2. Microfilm

Microfilm all records subpoenaed and produced after numbering as noted above. IRS personnel usually have access to microfilming equipment. This provides a permanent record of all documents in the event any are lost, or for later use even though the originals may have been returned.

3. Packing list for each container

Where records subpoenaed are voluminous, request by letter attached to the subpoena that the firm prepare a packing list for each container (carton) reflecting the subpoena number and a general description of the records housed in each container (carton).

4. Affidavit by one who conducted the search

It may well be that the "custodian" of the records who produces them to the grand jury will have had

little or nothing to do with the search that was made to obtain the subpoenaed records. Accordingly, where records that have been subpoenaed are not produced or only partly produced, the person(s) in charge of performing the search should execute an affidavit to the effect that certain records called for in the subpoena (giving the subpoena number) are not maintained or cannot be found.

F. Motion by Target for Discovery of Matters Pertaining to the Grand Jury Investigation.

1. Grounds for discovery

A target may allege that the grand jury process and the process of the court will be abused by the enforcement of subpoenas, and file a motion for discovery seeking access to as much as possible of the government's files. Included in such motion will probably be large numbers of interrogatories.

a. There are few, if any, grounds for discovery during a grand jury investigation (Rule 16) until after indictment. Likewise, Rule 17(c) is not available to anyone but the government until after indictment. The Jencks Act, 18 U.S.C. Section 3500, provides no basis for discovery until after indictment and the witness has testified at a trial. This is likewise true with respect to *Brady* material.

b. Nor are the discovery provisions in the Federal Rules of Civil Procedure applicable, since a grand jury investigation is criminal in nature. [Note: Civil Procedure rules can be invoked for discovery purposes in the contesting of a summons under 26 U.S.C. Sections 7402, 7602, and 7604, but such is civil in nature, not criminal. For an extensive discussion of the scope of required discovery in IRS summons enforcement proceedings *see* *United States v. Harris*, 628 F.2d 875 (5th Cir. 1980).]

c. Cases that imply that a motion for discovery during a grand jury investigation would be denied, include *In re Grand Jury Investigation (General Motors Corporation)*, 32 F.R.D. 175 (S.D.N.Y.) *appeal dismissed*, 318 F.2d 533 (1963), and *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976).

2. Procedure

As a practical matter, the district judge may request that the government file ex parte and under seal, certain documents envisioned by the discovery motion as well as written responses to the interrogatories sought by the target.

G. Motions to Quash Subpoenas

1. When they may be filed based on alleged abuses of grand jury

A motion to quash may be filed based on alleged abuse of the grand jury process in that (1) the open-ended grand jury investigation has been conceived, precipitated, and is dominated by IRS to obtain evidence for IRS in violation of Congressionally imposed limitations; (2) that the procedure, unlike a standard grand jury, violates the constitutional mandate that a grand jury be secret and independent (referring to disclosing grand jury materials to agents of IRS); and (3) that alleged unlawful procedure is being employed as a substitute for a lawful IRS investigation, in that IRS, by the summons power under Title 26, Section 7602, has its own provisions for making an investigation.

a. Such motions to quash can be met and overcome. As to (1) above, see In re April 1956 Term Grand Jury (Cain), 239 F.2d 263, 267-268 (7th Cir. 1956), involving a grand jury investigation into tax offenses where grand jury information had been disclosed to IRS agents: The power of the grand jury is not dependent upon the court, but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the prosecutor, its own members or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court."

In In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978) the court found "totally devoid of merit" the claim that the grand jury process was abused

because the government failed to adhere strictly to its internal procedures for initiating grand jury investigations in tax cases, holding that "[p]etitioner has no entitlement to have any particular internal policy followed with regard to the decision to institute a grand jury investigation."

b. As to objection (2), supra, the independence and secrecy of the grand jury is not infringed upon. It is still their decision whether or not to return an indictment. See In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 476 (E.D. Pa. 1971).

Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, fully provides for disclosure of grand jury materials to agency personnel by the attorney for the government for assistance to him in the performance of his duties in enforcing federal criminal laws.

The Attorney General is the hand of the President in insuring that the laws of the United States are faithfully executed. An attorney for the Government, acting under the direction of those designated by the Attorney General, determines whether or not there shall be a grand jury investigation to seek an indictment. It follows, as an incident of the separation of powers, that the courts are not to interfere with the free exercise of discretionary powers of the attorneys of the United States in their control over criminal investigations or prosecutions. United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

A grand jury's inquiries are "not to be limited narrowly by questions of propriety of forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 282 (1919).

Any holding that would saddle a 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. United States v. Dionisio, 410 U.S. 1, 17 (1973).

c. With respect to objection (3), supra, that a grand jury investigation into Title 26 offenses is an unlawful substitute for an IRS investigation because Section 7602 provides IRS with summons power to investigate, see In re Grand Jury Subpoenas, April, 1978 at Baltimore, 581 F.2d 1103 (4th Cir. 1978). This case affirmed the decision not to quash eight subpoenas in which the government sought certain documents which the petitioner had previously successfully resisted turning over in a summons enforcement proceeding. The court recognized that "if the powers of the grand jury ... are used, not for the purpose of criminal investigation but rather to gather evidence for civil enforcement, there exists an abuse of the grand jury process" but held that no evidentiary hearing into the matter was necessary in light of the affidavit of the prosecutor "attesting to the government's good faith in utilizing the grand jury." 581 F.2d at 1108.

Note: Once a district court has denied a motion to quash subpoenas, generally an appeal will be granted only if the witness or corporation involved refused to appear or produce documents and is found in contempt. Otherwise appellate courts usually find themselves without jurisdiction, holding that the district court's order is not final, or is interlocutory. See United States v. Ryan, 402 U.S. 530, 532 (1971); Cobbledick v. United States, 309 U.S. 323, 326 (1940).

However, if the district court certifies that the matter, under 28 U.S.C. Section 1292(b), involves a controlling question of law as to which there is a substantial ground for difference of opinion, an appeal might be heard as was done in In re April, 1977 Grand Jury Subpoenas, (General Motors Corporation) 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979).

2. Basis for Motions to quash

Motions to quash have been made based on the grounds that: (1) the subpoenaed material is not relevant to the grand jury investgation; (2) the

subpoena lacks specificity or particularity; and (3) the time period covered by the subpoena is unreasonable or oppressive. See United States v. Gurule, 437 F.2d 239 (10th Cir. 1970).

a. As to (1) above, the government can overcome the claim by making "a minimal showing by affidavit that the items sought are relevant to an investigation." In re Grand Jury Proceedings, 579 F.2d 836, 837 (3d Cir. 1978). See also, United States v. Olivia, 611 F.2d 23 (3d Cir. 1979); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir. 1975); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

The affidavit should set forth briefly the nature of the investigation and possible statutes which may have been violated as was done in Schofield II, supra, and Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1112 (E.D. Pa. 1976).

b. As to (2) above, the subpoena duces tecum must properly identify or describe the documents requested. The degree of particularity depends on the scope of the inquiry but the particularity need not be such "as to enable the witness to pick out a certain piece of paper and say, 'Here it is.' However, the request must be sufficiently definite to provide evidence as to what is to be produced by standards or criteria that make clear the duty of the person subpoenaed." In re Grand Jury Proceedings, 601 F.2d 162, 168 (5th Cir. 1979). See In re Grand Jury Subpoenas Duces Tecum, (M. G. Allen & Associates, Inc.), 391 F. Supp. 991, 999-1000, (D.R.I. 1975) and cases cited therein.

c. With respect to (3) above, "[n]o magic figure limits the vintage of documents subject to a grand jury subpoena. The law requires only that the time bear some relation to the subject of the investigation." In re Rabbinical Seminary Netzach Israel Ramailis, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978). See also, In re 1980 United States Grand Jury Subpoena Duces Tecum, 502 F. Supp. 576 (E.D. La. 1980) (ten year period not unreasonable);

In re Grand Jury Subpoena Duces Tecum Local 627, 203 F. Supp. 575, 578-79 (S.D. N.Y. 1961) (collecting cases).

H. Recordation of Grand Jury Proceedings (see Chapter I, supra).

1. Rule 6(e)(1)

Rule 6(e)(1) requires all proceedings, except when the grand jury is deliberating, to be recorded, either stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. Cf. United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. June 16, 1982), cert. denied, 32 Cr. L. 4146 (Jan. 10, 1983).

2. The Jencks Act

The Jencks Act (Section 3500, Title 18 U.S.C.) provides that a witness's recorded statement before a grand jury be made available to the defendant at trial after the witness testifies.

I. Right of Witness To A Transcript of His Grand Jury Testimony.

1. No inherent right

A witness before a grand jury has no inherent right to a transcript of his testimony. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). It is within the discretion of the court to provide a witness with such a transcript under Rule 6(e) where the witness demonstrates a particularized need for the transcript that outweighs the policy of grand jury secrecy. See Douglas Oil Co. of California v. Petro Stops Northwest, 441 U.S. 211 (1979).

2. Particularized need test

An example of a particularized need accepted by a court is when a witness testifies before a grand jury for a second time. Bursey v. United States, 466 F.2d 1059, 1079 (9th Cir. 1972). In re Minkoff, 349 F. Supp. 154 (D.R.I. 1972) (witnesses required to testify only on condition that a

transcript would be furnished to them). Cf. In re Russo, 53 F.R.D. 564 (C.D. Ca. 1971); But see In re Bottari, supra, 453 F.2d 370, 371-372 (1st Cir. 1972); In re Grand Jury Investigation, 424 F. Supp. 802, 806 (E.D. Pa. 1976); In re Alvarez, 351 F. Supp. 1089, 1091 (S.D. Ca. 1972).

3. Balancing approach

Unless a strong, particularized need can be shown, generally a transcript of his testimony will not be given a grand jury witness. In this respect, motion for transcripts were denied in the following cases: In re Bianchi, 542 F.2d 98, 100 (1st Cir. 1976); Bast v. United States, 542 F.2d 893, 895 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548, 549 (9th Cir. 1973); Valenti v. United States Department of Justice, 503 F. Supp. 230 (E.D. La. 1980).

4. FOIA

A witness is not entitled to a transcript of his testimony under the Freedom of Information Act. Valenti v. United States Department of Justice, supra.

5. Fed. R. Crim. P. 16A(1)(a)

Fed. R. Crim. P. 16A(1)(a) provides for a defendant to obtain copies of his own grand jury testimony.

J. Internal Policy of Department of Justice When Subpoenaing Witnesses, Targets and Subjects To Testify Before a Grand Jury.

1. Witnesses' rights

The government attorney will apprise each witness subpoenaed: (1) of the general subject matter of the grand jury's inquiry (if doing so does not compromise the progress of the proceeding); (2) that he may refuse to answer any question if a truthful answer would tend to incriminate him; (3) that anything he says may be used against him; and (4) that the grand jury will give him a reasonable opportunity to step outside the grand jury room and consult with his counsel if he desires.

The substance of these items of advice will be attached to all grand jury subpoenas.

2. Target policies

If a target of the grand jury investigation is subpoenaed and comes before the grand jury, he will be informed on the record that his conduct is being investigated for possible violation of federal criminal law.

Before a target of the grand jury is subpoenaed, an effort should be made to obtain his voluntary appearance (by invitation). If this fails, he should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. If a target or a subject of the grand jury investigation requests the opportunity to tell the grand jury his side of the story, if no undue burden is placed on the grand jury, ordinarily favorable consideration should be given to the request.

However, if this request is granted, the target or subject should explicitly waive his privilege against self-incrimination and consent to full examination under oath without counsel present in the grand jury room.

Generally, if a target has not testified before the grand jury, and has not requested to do so, favorable consideration should be given to notify him in advance before seeking an indictment against him. Of course, this should not be done if notification might jeopardize the prosecution because of flight, destruction of evidence, etc.

3. Use of the Fifth amendment

When a subpoenaed witness, or his attorney, informs the Government attorney that he intends to invoke his Fifth Amendment right and will refuse to testify, to excuse him from appearing would be improper and too convenient for the witness to avoid testifying.

However, if a target of the investigation and his attorney state in writing signed by both that the target will refuse to testify on Fifth Amendment grounds, he should ordinarily be excused from testifying unless the grand jury and the United

States Attorney insist on his appearance, and this insistence should be based on sound reasons.

K. Multiple Representation of Clients During A Grand Jury Investigation (See Chapter VII supra).

1. When it occurs

The multiple representation of clients arises in situations where, during a grand jury investigation, an attorney or a firm of attorneys (or in-house counsel) represents a corporation as well as the corporation's officers and other employees. The same problem is posed in the case of an attorney representing both a labor union and members of that union during a grand jury investigation.

2. When conflict of interest occurs

A conflict of interest occurs where the attorney representing two or more clients may have to make a judgement in the case of one that could or will adversely affect the interest of the other client.

The ABA Code of Professioanl Responsibility, Rule EC-5-15 provides in part: "A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests."

3. Standing of government to challenge multiple representation

The government has standing to challenge an alleged conflict of interest where multiple client representation situations exist. In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).

4. Principles involved

Multiple representation where the various clients want the same attorney to represent them presents two conflicting principles: (1) the entitlement of witnesses to representation by an attorney of their choice in a grand jury proceeding verging on a constitutional right; and (2) the right of a grand jury to pursue its investigative functions, which includes the right to every man's testimony.

In re Investigation Before February 1977, Lynchburg Grand Jury, 563 F.2d 652, 658 (4th Cir. 1977).

a. Cases supporting the proposition that the right of the grand jury to every man's testimony, even if it involves denying a witness the attorney of his choice (where there is a conflict of interest) because not to do so may deprive the public of the testimony of the witness include: In re Investigation Before the February, 1977, Lynchburg Grand Jury, supra, 563 F.2d at 652; In re Grand Jury, (Schofield I), supra, 486 F.2d at 85 and In re Copman, supra, 531 F.2d at 262.

   These cases hold, in effect, that the First Amendment right of freedom of association and the Sixth Amendment right of a witness to obtain counsel of his choice must yield to the overriding public interest of a properly functioning grand jury and to the judge's duty to the grand jury proceeding he supervises.

b. Cases tending to permit multiple representation and holding that a witness has a right to an attorney of his choice include In re Investigation Before the April 1975 Grand Jury (Rosen), 531 F.2d 600 (D. D.C. 1976); In re The Grand Jury Empaneled January 21, 1975, (Curran), 536 F.2d 1009 (3d Cir. 1976).

   In the former case, the D.C. Circuit refused to disqualify the attorney, but suggested, that with more specific information as to the conflict of interest, its ruling might be different. The court stated that it was not passing on the merits of the conflict of interest claim, but held that before bringing the motion to disqualify, the government should have obtained more specific facts.

   Note: Read this case carefully before seeking disqualification orders, so as to avoid the errors of ommissions and ambiguity noted by the court.

   In the latter case the Third Circuit also held that the attorney should not be disqualified because, the government had not elicited sufficient evidence. It noted that

the only evidence to support the motion to disqualify was (1) that the attorney involved represented all nine witnesses; and (2) that all nine witnesses had invoked their Fifth Amendment right against self-incrimination.

L. Attorney-Client Privilege -- Work Product (See Chapter VI, supra).

1. Representing a corporation and its employees

   A problem is posed at times when a corporation and certain of its employees are under a grand jury investigation, wherein the corporation is represented by one attorney and the employees are represented by one or more different attorneys. Before and after witnesses appear before the grand jury they are briefed and debriefed by their attorneys and the attorneys for the corporation exchange their memoranda, notes and thoughts stemming from their interviews with their respective clients. Can the government obtain these memoranda, etc. on the theory that, since they have been disclosed to others, they are no longer privileged?

   a. The answer is, generally, No. "Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation ... the communication is made not for the purpose of allowing unlimited publication and use, but in confidence for the limited and restricted purpose in asserting their common claims ... The recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently cannot be compelled to produce it or disclose its contents." Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). See also American Optical Corporation v. Medtronic, Inc., 56 F.R.D. 426 (D. Mass. 1972).

      This is applicable whether during a grand jury investigation or after indictment. See Continental Oil Co. v. United States, supra.

b. Likewise, where two attorneys and their two clients, who were being investigated for income tax evasion, met to discuss a possible guilty plea by one client which might preclude prosecution of the other client, that which transpired at the meeting and memoranda prepared were privileged. Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965).

2. Examples of work product

Are conversations, memoranda prepared, etc. stemming from communications between in-house counsel (or other counsel) and directors, officers and other employees of a corporation privileged?

a. One court has held that communications of corporate officials to counsel are privileged only if the employee is in a position to control or participate substantially in a decision the corporation might make on the legal advice sought. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). But see In re Grand Jury Proceedings, (Jackier), 434 F. Supp. 648 (E.D. Mich. 1977) aff'd. 570 F.2d 562 (6th Cir. 1978) wherein the court found that a vice-president of a corporation who in his corporate capacity consulted a corporate attorney, could not quash a subpoena on the attorney when the company had waived the attorney- client privilege. Held, "in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from control group personnel, the privilege is and should remain that of the company and not that of the communicating officer." 434 F. Supp. at 650.

In Upjohn Company v. United States, 449 U.S. 383 (1981), the Supreme Court rejected as too narrow the "control group" test first adopted in City of Philadelphia v. Westinghouse, supra. The Court refused to enunciate a new test, however, and left the development of the law in this area to a case-by-case basis. Of future import in the decision is that, in

upholding the privilege with respect to lower level company employees in the case before it, the Court found relevant the fact that the communications at issue were made by company employees to company counsel acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Moreover, "[t]he communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."

c. Where the government makes a prima facie showing that an agreement to furnish legal services was part of a conspiracy, the crime of fraud exception applies to deny a privilege to the identity of the one who pays for those services even though he himself, as well as the other conspirators, is a client of the attorney and the attorney is unaware of the criminal relationship between the parties. In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc), reversing 663 F.2d 1057 (5th Cir. 1981). See also, In re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981).

d. For an example of a subpoena for attorney records concerning files and fee arrangements, see Matter of Walsh, 623 F.2d 489 (7th Cir.), cert. denied 449 U.S. 994 (1980).

M. Pretrial Procedures in Criminal Tax Cases

1. Complaint -- Fed. R. Crim. P. 3

a. A complaint in effect is an application for a warrant of arrest; it does not function as a pleading. It normally is not used in tax cases; however, it has been used to extend the statute of limitations. 8 Moore's Federal Practice, Paragraph 3.02.

b. The complaint is a statement made under oath before a magistrate alleging that a crime has been committed. Such a statement is usually signed by the special agent who knows the facts alleged, although the United States Attorney or an assistant can sign the statement.

c. Warrants of arrest for violations of Internal Revenue law upon complaint may be issued pursuant to 18 U.S.C. Section 3045.

d. A complaint may be used to extend the statute of limitations. 26 U.S.C. Section 6531 provides for an extension of the limitation period for nine months when a complaint is filed within the prescribed time period.

(1) This procedure is intended for use when the violation alleged can be established but an indictment cannot be obtained prior to the expiration of the statute of limitations because the grand jury is not available. Jaben v. United States, 381 U.S. 214, 219, (1965).

(2) The government is not required to call a grand jury into session on a day it is not scheduled to sit before it can proceed by way of complaint. United States v. Miller, 491 F.2d 638, 644 (5th Cir.). cert. denied 419 U.S. 970 (1974).

(3) A complaint used to toll the statute of limitations is an emergency procedure and should relate to the one year which faces expiration under the statute. The government should be cautious to avoid the appearance of deliberate delay in order to proceed by way of complaint to avoid possible due process problems.

2. Warrant

a. A warrant of arrest may be issued by the court based on a written complaint (Rule 3).

b. A warrant may also be issued by the court based upon an indictment or information (Rule 9).

c. In order for a warrant to issue on an information additional evidence must be presented in order to meet the probable cause requirement (Rule 9(a)).

d. The finding of an indictment by a grand jury conclusively establishes the element of probable cause so a warrant of arrest may be issued on an indictment without any additional showing. 8 Moore's Federal Practice, Paragraph 9.02.

e. Special agents of the Internal Revenue Service are authorized to execute and serve warrants pursuant to 26 U.S.C. Section 7602(b). Only special circumstances dictate that a warrant be utilized in a criminal tax case; for example, the taxpayer is about to leave the country.

3. Information and Indictment

a. Any offense punishable by death or imprisonment for a term exceeding one year is a felony and must be prosecuted by indictment; any other offense is a misdemeanor and may be prosecuted by an information. 18 U.S.C. Section 1, Fed. R. Crim. P. 7(a).

b. An information can be amended with leave of court at any time before verdict if no additional or different offense is charged and substantial rights of the defendant are not prejudiced. Fed. R. Crim. P. 7(e).

c. The same basic concepts apply to the drafting of both an indictment and an information. You must know the statute which is being charged. An indictment is sufficient if it contains the elements of the offense charged and fairly informs the defendant of the charge against him. Hamiling v. United States, 418 U.S. 87 (1974).

d. The Tax Division Manual for Criminal Tax Trials includes a section of information and indictment forms for the various Title 26 violations and selected Title 18 violations generally charged in tax cases.

e. An indictment cannot be amended (where the amendment is substantial or material) even though an information could have been filed, i.e., misdemeanor cases are also bound by indictment rules. United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974).

f. When it is doubtful that correct figures are available for indictment or information purposes, it is permissible to use open-ended language.

g. In failure to file cases the defendant should be charged with receiving gross income in excess of the statutory minimum requirement for filing as specified in 26 U.S.C. Section 6012(1)(A).

h. In false return cases brought under Section 7206(1) the defendant can be charged with reporting an amount of income which he did not believe to be true and correct because, "as he then and there well knew and believed, he received substantial income in addition to that heretofore stated." United States v. Grayson, 416 F.2d 1073, 1076 (5th Cir. 1969), cert. denied 396 U.S. 1059 (1970).

i. Open-ended language has also been approved in prosecutions under 26 U.S.C. Section 7201. United States v. Buckner, 610 F.2d 570 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980).

4. Discovery and Disclosure

a. Rule 16

(1) Rule 16(a)(1)(A) provides that a defendant, upon request, shall be permitted to inspect and copy or photograph any of the three following statements:

(a) any written or recorded statements;

(b) any oral statements made by defendant to a person then known to the defendant to be a government agent;

(c) any testimony of a defendant before a grand jury which relates to the events charged.

(2) The defendant is not entitled to be furnished with his statement unless it was made directly to a government agent. United States v. Pollack, 534 F.2d 964, 976 (D.C. Cir.), cert. denied 429 U.S. 924 (1976).

(3) Pre-arrest oral statements made by defendant to an undercover agent, not then known as such to the defendant, do not have to be produced. United States v. Johnson, 562 F.2d 515 (8th Cir. 1977).

(4) Vicarious admissions through the defendant's attorney or accountant should be treated as statements of the defendant and supplied under Rule 16.

(5) Rule 16(a)(1)(C) requires the government, upon request, to permit inspection and copying of books, papers, documents, etc. which were obtained from or belonged to the defendant, or which are material to the defendant's preparation of his case, or are intended for use by the government as evidence during its case-in-chief.

(6) A defendant may, pursuant to Rule 16, attempt to obtain a copy of the summary schedules intended by the government for use at trial. Even if summary schedules are prepared the government should resist this disclosure as Rule 16(a)(2) precludes discovery of reports, memoranda, etc. made by the government in connection with the prosecution of the case unless specifically required in Rule 16(1)(A), (B), or (D).

b. Jencks (18 U.S.C. Section 3500)

(1) After a witness has testified on behalf of the United States, the government, upon request by the defendant must produce any statement made by that witness which is in the possession of the United States and relates to the subject matter to which the witness has testified.

(2) What constitutes a statement within the meaning of Jencks?

(a) If a witness approves notes taken during an interview or approves a more formal interview report prepared thereafter, such approval renders the notes or report the witness's own statement to the same extent as it would if he had written the notes or signed them himself. See Proving Federal Crimes, Pars. 5-6, and 5-7: Goldberg v. United States, 425 U.S. 94 (1976); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied sub nom. Smith v. United States, 424 U.S. 925 (1976); United States v. Pacheco, 489 F.2d 554, 556 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Chitwood, 457 F.2d 676, 678 (6th Cir.), cert. denied 409 U.S. 858 (1972).

(b) Interview reports not signed or otherwise adopted or approved by the witness at the conclusion of the interview, or sometime thereafter are not the witness's statements. Proving Federal Crimes, Para. 5-6 and 5-7, 7; United States v. Shannahan, 605 F.2d 539, 542 (10th Cir. 1979); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979); cert. denied, 444 U.S. 1043 (1980); United States v. Gates, 557 F.2d 1086, 1089 (5th Cir. 1977), cert. denied, 434 U.S. 1017 (1978); United States v. Larson, 555 F.2d 673, 677 (8th Cir. 1977).

(c) Statements, in order to be producible under 18 U.S.C. Section 3500, must be in the possession of the government; possession of the government has been interpreted to mean only those statements possessed by the prosecutorial arm of the Federal government. United States v. Trevino, 556 F.2d 1265, 1271 (5th Cir. 1977); United States v. Dansker, 537 F.2d 40, 61 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

(4) A statement given by a witness to an NLRB official may not have been in the Government's possession within the meaning of the Jencks Act since NLRB is not a prosecutorial agency. Proving Federal Crimes, Para. 5-4; United States v. Weidman, 572 F.2d 1199, 1207 (7th Cir.) cert. denied 439 U.S. 821 (1978).

(5) Statements of prospective witness not called to the stand

(a) Always check for Brady -- whether witness takes stand or not.

(b) Jencks does not require production of exhibits, or statements of a prospective witness who is not called as a witness at the trial. Ayash v. United States, 352 F.2d 1009, 1010 (10th Cir. 1965).

(6) Special Agent's Report

(a) In the Seventh Circuit, it appears that if the special agent testifies in a net worth case, both the special agent's report and all of the case files must be produced. United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974).

(b) The Fifth Circuit in a net worth case permitted the Government to supply a special agent's report where the agent's suggestions for rebutting defenses and his discussion of the defendant's criminal intent had been redacted since these comments were not relevant to the agent's direct testimony at trial. United States v. Medel, 592 F.2d 1305, 1317, rehearing denied 597 F.2d 772 (5th Cir. 1979).

(c) The same principles that apply to the special agent's report also apply to the revenue agent's report.

(7) Jencks and pretrial proceedings.

(a) The statute states that the material will be used, "in the trial of the case." 18 U.S.C. Section 3500(a).

(b) Jencks does not apply to suppression or preliminary hearings. Robbins v. United States, 476 F.2d 26 (10th Cir. 1973); United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v. Montos, 421 F.2d 215 (5th Cir.), cert. denied, 397 U.S. 1022 (1970).

(c) As of December 1, 1980, Rule 26.2, F.R.Cr.P. provides that the government, upon motion, after the witness testifies, may obtain the statement of any defense witness (other than the defendant) which is in the possession of the defense and relates to the witness' testimony on direct examination.

c. Bill of Particulars

(1) Fed. R. Crim. P. 7(f) provides that a defendant may obtain a bill of particulars where the charge is not framed with enough detail to: (1) permit the defendant to enter a plea of double jeopardy in the event of acquittal or (2) to enable him to prepare his defense and not be surprised at trial. Wong Tai v. United States, 273 U.S. 77 (1927); United States v. Giese, 597 F.2d 1170 (9th Cir.), cert. denied 444 U.S. 979 (1979); United States v. Hill, 589 F.2d 1344 (8th Cir.), cert. denied 442 U.S. 919 (1979); United States v. Haas, 583 F.2d 216 (5th Cir. 1978), cert. denied 440 U.S. 981 (1979); United States v. Brimley, 529 F.2d 103 (6th Cir. 1976); Proving Federal Crimes, Para. 4-2.

(2) It is not the function of a bill of particulars to force disclosure of the government's evidence in advance of

trial. United States v. Kilrain, 566 F.2d 979, 985 (5th Cir.), cert. denied 439 U.S. 819 (1978); United States v. Long, 449 F.2d 288 (8th Cir. 1971) cert. denied 405 U.S. 974 (1972).

(3) The Government's response to a bill of particulars tends to restrict the scope of evidence which can be offered at trial. United States v. Haskins, 345 F.2d 111 (6th Cir. 1965); United States v. Neff, 212 F.2d 297 (8th Cir. 1954).

(4) Where the government in response to defendant's motion stated that it was supplying a partial list of payments made to the defendant and where the defendant did not seek more complete particulars the government was not limited to proving only those items listed in its response. United States v. Lacob, 416 F.2d 756 (7th Cir. 1969), cert. denied, 396 U.S. 1059, (1970).

(5) If the government, in response to a bill of particulars, does not have to provide the requested information, but "voluntarily" chooses to respond, the defendant is entitled to rely on the responses until validly amended. The government's departure from its unambiguous response to the defendant's bill was error. United States v. Flom, 558 F.2d 1179, (5th Cir. 1977).

(6) The government is not required to prove exact figures in tax cases. United States v. Johnson, 319 U.S. 503, rehearing denied, 320 U.S. 808 (1943); United States v. Marcus, 401 F.2d 563 (2d Cir. 1968) cert. denied 393 U.S. 1023 (1969); Tinkoff v. United States, 86 F.2d 868 (7th Cir.), cert. denied, 301 U.S. 715 (1937).

(7) Therefore, the government should not in a response to a bill of particulars provide an exact amount of unreported income thereby creating an unnecessary limitation.

(8) Method of Proof

(a) The defense is entitled to this.

(b) The method of proof should be described completely and precisely, viz., net worth plus expenditures and partially corroborated by specific items; or bank deposits plus cash expenditures, etc.

(c) If specific items are used in addition to an indirect method of proof, but only as evidence of intent, this should be set out.

(d) Every item disclosed through a bill of particulars need not be proven. On the other hand, going beyond the bill of particulars in the case-in-chief may be fatal if the court refuses to permit an amendment.

The contrary is permissible, and the government can prove less than the bill alleges. United States v. Mackey, 345 F.2d 499 (7th Cir. 1965).

d. The Brady Rule

(1) "The suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." Brady v. Maryland, 373 U.S. 83 (1963).

(2) In Augurs v. United States, 427 U.S. 97 (1976), the Court stated that the disclosure rule provided for in Brady applied in the following different situations:

(a) Where the undisclosed evidence case includes perjured testimony, any conviction obtained using this evidence, must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103.

(b) Where there is a pretrial request for specific evidence. If such evidence is withheld, any conviction will be reversed if the withheld evidence is determined to be material; and materiality is defined as that evidence which "might have affected the outcome of the trial. 427 U.S. at 104."

(c) Where there has only been a general request for "Brady material." If exculpatory evidence is not disclosed under these circumstances, a guilty verdict is reversed only if it is found that the undisclosed evidence creates a reasonable doubt that did not otherwise exist. 427 U.S. at 112.

(3) The government does not have a burden to minutely comb their files for bits and pieces of evidence, but has a continuing burden to turn over Brady material as it is discovered. North American Rockwell Corporation v. N.L.R.B., 389 F.2d 866 (10th Cir. 1968).

(4) The prosecutor is generally not held to a duty of disclosure of evidence for witnesses who are already known or are accessible to the defendant. United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), cert. denied, 442 U.S. 909 (1979); United States v. Craig, 573 F.2d 455, 492 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977); Proving Federal Crimes, para. 4-16.

(5) Exculpatory material should be provided even if no request has been made by the Defense.

5. Motions to Suppress

a. A Revenue Agent conducting an audit does not have to advise the taxpayer the cases could be referred for criminal investigations.

(1) The government however cannot affirmatively mislead the taxpayer, as this constitutes deceit.

(2) A taxpayer's ignorance of his "right" is not sufficient to establish fraud and deceit. United States v. Mancuso, 378 F.2d 612 (4th Cir. 1967) cert. denied, 390 U.S. 955 (1968); United States v. Spomar, 339 F.2d 941 (7th Cir. 1965).

(3) The defendant's burden to establish fraud and deceit is "clear and convincing." United States v. Marra, 481 F.2d 1196 (6th Cir.) cert. denied, 414 U.S. 1004 (1973); United States v. Prudden, 424 F.2d 1021 (5th Cir.), cert. denied 400 U.S. 831 (1970).

b. Miranda and Escobedo

Miranda v. Arizona, 384 U.S. 486 (1966).

Escobedo v. Illinois, 378 U.S. 478 (1964).

Miranda warnings are not required in criminal tax cases unless the taxpayer is in custody.

Beckwith v. United States, 425 U.S. 341 (1976).

Mathis v. United States, 391 U.S. 1 (1967).

c. I.R.S. Warnings.

See: I.R.S. News Release No. I.R. 897, October 3, 1967. I.R.S. News Release No. I.R. 949, November 26, 1968.

(1) By these News Releases, the Internal Revenue Service volunteered warnings to prospective targets of criminal tax investigations.

(2) The first News Release required only that the agent identify himself as a criminal investigator stating his function in that capacity on the initial contact.

(3) The second News Release went beyond the first in that it required the following warning by the special agent on initial contact with the taxpayer:

(a) Identification.

(b) Description of the function of a special agent.

(c) That the taxpayer did not have to answer questions.

(d) That anything that was said or any documents provided could be used in any proceeding against the taxpayer.

(e) That the taxpayer had the right to seek counsel.

d. Custodial interrogations where the taxpayer is under arrest or his actions are otherwise restricted require a full Miranda warning which informs the taxpayer that an attorney will be appointed if he cannot afford one.

e. The rule has been that evidence must be suppressed when an I.R.S. special agent fails to give the taxpayer warnings required by published I.R.S. rules. United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Heffner, 420 F.2d 809 (4th Cir. 1970); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970). But earlier this year the First Circuit overruled these holdings in United States v. Irvine, 699 F.2d 43 (1st Cir. 1983).

f. News Release warnings should be given as a matter of practice. However, it can now, under certain circumstances be argued that such warnings are not mandated by law. United States v. Caceres, 440 U.S. 741 (1979); Beckwith v. United States, 425 U.S. 341 (1976); United States v. Nuth, 605 F.2d 229 (6th Cir. 1979).

g. However, if there is deliberate deception by the agent, evidence obtained as a result of this deception will be suppressed. United States v. Tweel, 550 F.2d 297 (5th Cir. 1977).

h. Where there is no trickery or misrepresentation by the auditor, evidence obtained during the course of the audit will not be suppressed. United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973).

United States v. Prudden, 424 F.2d 1021 (5th Cir.), cert. denied 400 U.S. 831 (1970).

i. The fact that information originated with the Criminal Investigation Division and was forwarded to the Audit Division does not give the audit a criminal complexion requiring disclosure of such to the investigated taxpayer. Truitt v. Lenahan, 529 F.2d 230 (6th Cir.), cert. denied, 427 U.S. 912 (1976); United States v. McCorkle, 511 F.2d 482 (7th Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); United States v. Robson, 477 F.2d 13 (9th Cir. 1973).

j. The Audit Division may do an in-depth audit prior to transferring the case to the Intelligence Division. United States v. Lockyer, 448 F.2d 417 (10th Cir. 1971).

k. However, where the court determined that the revenue agent had possessed "firm indications of fraud" six months before referring the case to the Criminal Investigation Division and had, during these six months, worked on the case intensively, the evidence was suppressed because the court found these actions to have been an intentional violation of Audit Regulations requiring referral upon a firm indication of fraud. United States v. Toussaint, 456 F. Supp. 1069 (S.D. Tex. 1978).

l. Hearing on Motion to Suppress.

(1) A hearing is not necessary unless an issue of fact is presented. United States v. Marra, 481 F.2d 1196 (6th Cir.); cert. denied, 414 U.S. 1004 (1973). United States v. Hickok, 481 F.2d 377 (9th Cir. 1973).

(2) The burden is on the defense. United States v. Thompson, 409 F.2d 113 (6th Cir. 1969).

(3) The defendant's burden is a preponderance of the evidence, not reasonable doubt. Alego v. Toomey, 404 U.S. 477 (1972); United States v. Lehman, 468 F.2d 993 (7th Cir.), cert. denied, 409 U.S. 967 (1972).

m. Suppressed Material.

(1) Statements suppressed are still available for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971).

(2) The so-called poisonous tree doctrine is not necessarily applicable and the Government may be able to use the leads obtained from the suppressed statements. Michigan v. Tucker, 417 U.S. 433 (1974).

n. Appeals.

(1) The government has direct appeal from a pretrial order, 18 U.S.C. Section 3731.

(2) Fed. R. Crim. P. 12(b)(3) requires that motions to suppress be raised prior to trial.

(3) There is no appeal from a motion to suppress once the trial is under way. Therefore, it is important to insist that motions to suppress be raised prior to trial.

CHAPTER XI. CIVIL USE OF GRAND JURY MATERIAL

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XI. CIVIL USE OF GRAND JURY MATERIALS

A. Fed. R. Crim. P. 6(e)'s secrecy provisions (viz., (e)(2) and (e)(3)) do not except the civil use of grand jury material from the general rule of grand jury secrecy, and therefore there should be no civil use of such material without a court order.

B. Rule 6(e)(C)(i) provides:

"Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made...when so directed by a court preliminarily to or in connection with a judicial proceeding."

1. [(Sen. Rep. No. 95-354)] The Senate Report on Rule 6(e) states, in part:

* * * There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.

2. IRS disclosure report

IRS will undoubtedly request disclosure in aid of a civil determination of tax liability or to support a tax claim involved in a proceeding.

a. A court order allowing disclosure will obviate the need for a costly investigation and audit independent of the grand jury.

b. The ability to obtain disclosure at the proper time may deter IRS reluctance to participate in grand jury investigations.

3. Leading court decisions --

a. The leading decision is Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). The Court noted that a court determining whether grand jury transcripts should be released "necessarily is infused with substantial discretion," but should be guided by the principle "that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy." The court added that the burden of demonstrating this balance rests upon the private party seeking disclosure, but stated that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. 441 U.S. at 223.

The Court also enumerated the traditional considerations justifying secrecy.

(1) If pre-indictment proceedings were made public, many perspective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of the testimony.

(2) Witnesses might be less likely to testify fully and frankly as they would be open to retribution as well as inducements.

(3) There is a risk that those about to be indicted would flee or attempt to influence the grand jury.

(4) Persons accused but exonerated will not be held up to public ridicule.

b. Note that "[o]nce a grand jury has completed its work, indictments having been brought, the reasons for secrecy become less compelling." Wisconsin v. Schaffer, 565 F.2d 961, 967 (7th Cir. 1977). See also In re Disclosure of Testimony Before the Grand Jury, 580 F.2d 281 (8th Cir. 1978); cf. In re Grand Jury Proceedings, 613 F.2d 501 (5th Cir. 1980).

c. Interpretation of "Preliminary to a Judicial Proceeding"

(1) Prior to Douglas, this term was given a liberal interpretation. See, e.g. In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958).

(2) In Patrick v. United States, 524 F.2d 1109, 1117 (7th Cir. 1975), the court found it was reasonable for the district court to anticipate that judicial proceedings would arise out of grand jury testimony admitting the receipt of gambling income where no gambling returns were filed.

(3) Douglas hinted that the particularized need may be related to a functional use at trial -- e.g. "to impeach a witness, to refresh his recollection, to test his credibility and the like." 441 U.S. at 222 n. 12.

(4) District Courts are now taking a more narrow view. See United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980).

(5) One court flatly held that disclosure of grand jury evidence to the IRS for civil proceedings is "purely administrative." In re 1978-1980 Grand Jury Proceedings, 503 F. Supp. 47 (N.D. Ohio 1980). The court reasoned that the IRS is authorized to calculate a deficiency and send notice to the taxpayer, and it is only when and if the taxpayer chooses neither to pay the deficiency nor to contest the assessment that the IRS may initiate proceedings to collect it. The Department of Justice disagrees with the decision.

(6) A better reasoned decision is In re December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978).

(a) The court, after an extensive analysis of the legislative history of the amendments to Rule 6(e), found that there was no congressional intent that Rule

[6(e)(3)(C)(i)] is intended to permit disclosure by court order to government agency personnel for civil law enforcement use where the grand jury was utilized for the legitimate purpose of a criminal investigation.

(b) The court then established the following procedure:

First, there must be a showing under oath by a responsible official of the government that the grand jury proceeding has not been used as a subterfuge for obtaining records for a civil investigation or proceeding. In this case, this would appear easily demonstrated by virtue of the indictment and successful prosecution of the taxpayer. Further a general description of the materials sought to be disclosed should be provided in order that the court can intelligently determine that the materials sought to be disclosed have some rational connection with the specific existing or contemplated judicial proceeding as envisioned by Rule [6(e)(3)(C)(i)] ... [Then]

An _ex parte_ hearing will be scheduled at which the government will be expected to satisfy the requirements set forth above. _Id_.

(c) This procedure was cited with approval by the Fourth Circuit. _In re Grand Jury Subpoenas, April, 1978, at Baltimore_, 581 F.2d 1103, 1110 (4th Cir. 1978).

(Note: The issues discussed in this chapter have also been discussed in length in Chapter II, _supra_.) At the time this Manual went to print the Supreme Court had not yet issued their opinions in _In re Grand Jury Investigation (Sells, Inc.)_, 642 F.2d 1184 (9th Cir. 1981), _cert. granted_, 102 S.Ct. 2034 (1982) and _In re Special February 1977 Grand Jury_, 662 F.2d 1232 (7th Cir. 1981), _cert. granted_, 102 S.Ct. 2955 (1982). These decisions will significantly affect the material in Chapter X and XI.)

CHAPTER XII. IMMUNITY PROCEDURES AND CONSIDERATIONS

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XII. IMMUNITY PROCEDURES AND CONSIDERATIONS

A. Prosecutorial Discretion

1. Federal system

a. Consideration of the methods used by federal prosecutors in exercising prosecutorial discretion is a natural prerequisite to a discussion of the federal immunity statutes.

b. Under the criminal justice system as it exists at the federal level, the prosecutor has wide latitude in determining when, who, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas, has been recognized on numerous occasions by the courts. E.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966). This discretion is based on the U.S. Attorney's status as a member of the executive branch, which is charged under the Constitution with ensuring that the laws of the United States are "faithfully executed." U.S. Const., Art. II, Sec. 3. See Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

2. Means and methods utilized to exercise prosecutorial discretion

a. Initiation, declination, or dismissal of criminal charges,

b. Selection of charges,

c. Plea Agreements, and

d. Immunity Conferral.

(1) Informal

(2) Formal - statutory

e. The government may confer transactional or use immunity.

B. Criminal Tax Considerations

1. Non-prosecution agreements

a. Conferral of transactional immunity is prohibited when the proposed agreement would preclude prosecution on tax charges.

b. Authority regarding the handling of cases referred to the Department of Justice for criminal proceedings arising under the revenue laws is assigned to the Assistant Attorney General for the Tax Division (28 C.F.R. 0.70).

c. The Tax Division utilizes the following procedures for handling of criminal tax matters in carrying out its assigned responsibilities under federal regulations. These procedures further suggest restrictions on the non-statutory modes of conferring immunity concerning possible criminal tax charges.

(1) Authorization of Tax Prosecutions

Proposed tax prosecutions, with the exception of "direct referral" cases, are reviewed and processed by the Criminal Section of the Tax Division. The final decision whether to initiate prosecution is made by or on behalf of the Assistant Attorney General, Tax Division.

(2) Authority to Decline Prosecution

Except in cases referred directly to United States Attorneys, the final decision whether to initiate prosecution is made by or on behalf of the Assistant Attorney General, Tax Division. (28 C.F.R. 0.70). In the event that the United States Attorney does not desire to prosecute a criminal tax case, this decision should be communicated to the Assistant Attorney General, Tax Division. The Assistant Attorney General for the Tax Division shall decide whether to decline or to proceed with prosecution by attorneys from the Tax Division.

(3) Dismissals

Indictments returned, or informations or complaints filed in criminal tax cases, including those cases directly referred to the United States Attorney, are within the general supervisory responsibility of the Tax Division. Accordingly, indictments, informations or complaints should not be dismissed without prior approval of the Tax Division, except when a superseding indictment has been returned, or information or complaint has been filed against the same particular defendant or the defendant has died. (U.S.A.M. 6-2.420)

(4) Prohibition on Civil Tax Negotiations

Prior to final disposition of the criminal liability, no negotiations with the taxpayer for the separate settlement of any civil tax liability are authorized. (U.S.A.M. 6-2.380)

2. Agreements to obtain witness cooperation

a. Considerations

(1) Non-culpability (person is reasonably viewed solely as a potential witness).

(2) Willing to cooperate (waive privilege) if given appropriate assurances.

b. Procedures

(1) Provide a Letter of Assurance. This does not not preclude prosecution on completely independent information.

(2) Present oral agreements, etc.

C. Federal Statutory Immunity to Compel Testimony or the Production of Other Information

1. Authority

Organized Crime Control Act of 1970. Pub.L. 91-452, Title II, Section 201(a), enacted October 15, 1970 (18 U.S.C. Sections 6001-6005).

a. The Organized Crime Control Act of 1970 added sections 6001-6005 to Title 18 of the United States Code, creating a single comprehensive provision to govern immunity grants in judicial, administrative, and congressional proceedings, and amending or repealing all prior immunity provisions. The immunity granted under this provision is that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case...." 18 U.S.C. Section 6002.

The act was designed to reflect the "use" and "derivative use" immunity concept of Murphy v. Waterfront Commission, 378 U.S. 52 (1964), rather than the "transactional" immunity concept of Counselman v. Hitchcock, 142 U.S. 547 (1892).... In addition to granting only use and derivative use immunity, these provisions differ from prior immunity statutes in three ways: (1) the immunity may be granted without regard to the particular federal violation at issue; (2) the witness must claim his privilege; and (3) use of the immunity provisions must be approved in advance by the Attorney General or certain other designated persons.

Before application to the court, the United States Attorney must make a judgment that the testimony or information sought may be necessary and in the public interest and that the witness has refused or is likely to refuse to testify. 18 U.S.C. Section 6003(b). The immunity authorized by the statute is not self-executing; the witness must physically appear and claim the privilege before he can be held in contempt for refusing to testify. United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971). (Excerpts from Proving Federal Crimes, pp. 3-15 through 3-17).

2. Immunity provisions - statute summary

a. Section 6001. Definitions as used in this part:

(1) "agency of the United States" means any executive department as defined in section 101 of Title 5, United States Code;

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court ..., the Tax Court of the United States,....

b. Section 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

(4) and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information

indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added)

c. Section 6003. Court and grand jury proceedings

(1) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court for the judicial district in which the proceeding is or may be held shall issue, of the United States or a grand jury of the United States, the United States district court in accordance with subsection (b) of this section, upon the request of the United States [A]ttorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(2) A United States [A]ttorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment --

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

d. Section 6004. Certain administrative proceedings

(1) In the case of any individual who has been or who may be called to testify or provide other information at any

proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(2) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment --

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

e. Section 6005. Congressional proceedings

3. Impact of statute on criminal tax cases

a. Note: Title 18 U.S.C. Section 6001, *et seq.*, is the first federal statute whereby authority to grant immunity extends to criminal tax offenses. The statute prohibits the "use" of compelled information "in any criminal case" against the witness ordered to comply. Statutory language obviously precludes "use" against the witness in criminal tax prosecutions.

b. Previous federal immunity statutes which provided authorization for "transactional" type immunity with regard to certain offenses enunciated by statute did not include tax violations among the list of such offenses. See, *e.g.*, 18 U.S.C. Section 2514 (repealed effective December 14, 1974). Prior to enactment of 18 U.S.C. Section 6001, *et seq.*,

grants of immunity in criminal tax cases were a rarity, as such action was considered tantamount to a determination that prosecution should be declined, requiring approval of the Assistant Attorney General, Tax Division.

4. <u>Delegation of authority to authorize applications for orders compelling testimony</u>

   a. Under 28 C.F.R. 0.175(a)-(c), the Attorney General's authority in 18 U.S.C. Sections 6001-6004 is delegated to the Assistant Attorneys General, including the Assistant Attorney General for the Tax Division, when 18 U.S.C. Section 6001, <u>et seq</u>., is utilized in matters in the cognizance of their respective Divisions, "[p]rovided, however, that no approval shall be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity."

   b. 28 C.F.R. Subpart W (Sections 0-130-0.132)- Additional Assignments of Functions and Designation of Officials to Perform the Duties of Certain Offices in Case of Vacancy, or Absence Therein or in Case of Inability or Disqualification to Act:

      (1) Section 0.131 - Designation of Acting United States Attorneys.

      Each U.S. Attorney is authorized to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, or with respect to any matter from which he has recused himself, and to sign all necessary documents and papers, including indictments, as Acting U.S. Attorney while performing such functions and duties.

      (2) Section 0.132 - Designating officials to perform the functions and duties of certain offices in case of absence, disability or vacancy.

      In the event of a vacancy in the office of head of any other organizational unit, the ranking deputy (or an equivalent official) in such unit who is available shall perform the functions and duties of and act as such head, unless the Attorney except as otherwise provided by law, if there is no ranking deputy available, the Attorney General shall designate another official of the Department to perform the functions and duties of and act as such head.

      The head of each organizational unit of the Department is authorized, in case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the unit who is available to act as head. If there is no deputy available to act, any other official in such unit may be so designated.

   c. 28 C.F.R. 0.178 - Redelegation to respective Deputy Assistant Attorneys General to be exercised solely during the absence of such Assistant Attorneys General from the City of Washington.

5. <u>Scope of protection from federal prosecution afforded by 18 U.S.C. Section 6001, et seq</u>.

   a. The statutory prohibition against use is obviously broad in scope and general in nature (i.e., not limited to enumerated offenses but rather "any criminal case"). Nevertheless, some limitations are said to exist, in that the "use" type immunity does allow for prosecution of the witness for the same offenses related to the compelled information <u>provided</u> such a prosecution results from <u>completely independent</u> information. Therefore, in theory at least, there exists some basis for viewing "use" type immunity as more limited in scope than "transactional" immunity.

b. Even after a witness has been granted "derivative use" immunity, he may still be prosecuted for crimes about which he has testified. Such prosecutions, however, face two hurdles. First, because it is the policy of the Department of Justice to avoid future prosecutions of witnesses for offenses disclosed under a grant of immunity, any such prosecution must be personally authorized by the Attorney General. Second, the immunity prohibits the prosecution from using the compelled testimony in any respect. The testimony therefore may not be used either for investigative leads or to focus investigation on the witness. Once the defendant establishes that he has testified under a grant of immunity to matters related to the federal prosecution, the government has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source testimony. Kastigar v. United States, 406 U.S. 441, 453-60 (1972). That is, the government cannot satisfy its burden merely by denying that immunized testimony was used; it must affirmatively prove an independent source of evidence, United States v. Nemes, 555 F.2d 51 (2d Cir. 1977).

Where immunity is conferred on a potential defendant, the government has been strongly advised to make a written certification, prior to the testimony, stating what evidence it already has. Goldberg v. United States, 472 F.2d 513, 516 n. 5 (2d Cir. 1973). If testimony relevant to the charges is compelled from a witness before a grand jury, and the government then seeks his indictment, it may be appropriate to present the case to a different grand jury. Id. at 516 n. 4. But see United States v. Calandra, 414 U.S. 338 (1974). In the view of some courts that have adopted a highly attenuated notion of "taint" in connection with use immunity statutes even these procedures may be insufficient. United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir.), cert. denied, 419 U.S. 872 (1974). But see United States v. Bianco, 534 F.2d 501, 511 n.14 (2d Cir.), cert. denied, 429 U.S. 822 (1976).

c. The burden of the government on establishing a completely independent source is so great that in most situations there is very little basis on which to distinguish the scope of "use" vs. "transactional" immunity.

(1) United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

Federal conviction of a defendant who had previously testified under a grant of immunity before a state grand jury overturned: Though U.S. Attorney was unaware, after reading the state grand jury transcript, that he had read McDaniel's immunized testimony, he could not have obliterated it from his mind while preparing for trial. Government could thus not establish that the federal conviction was based on sources wholly independent of McDaniel's immunized testimony.

(2) United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

Where a defendant's indictment was in part a product of testimony from a witness against whom defendant had previously testified pursuant to 18 U.S.C. Section 6002, the witness' testimony would not be considered a source completely independent of defendant's immunized testimony if it is considered that the witness, in testifying against the defendant, was influenced by the fact that the defendant had previously testified against him.

(3) United States v. Bianco, 534 F.2d 501 (2d Cir.), cert. denied, 492 U.S. 822 (1976).

In a 26 U.S.C. Section 7203 prosecution of Bianco, where federal prosecutors had no knowledge of or access to Bianco's prior immunized state grand jury testimony, and where the contents of the immunized statements were already known to federal prosecutors before Bianco's appearance before the state grand jury, prosecution on Section 7203 charges was not barred, as it arose from completely independent sources of evidence.

(4) The use immunity statute applies only to past offenses. It does not protect the witness against the subsequent use by the government of falsehoods or willful evasion in his immunized testimony. United States v. Traumunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). The Fifth Amendment clause itself would not protect a witness's refusal to answer questions which would incriminate him in the future as to crimes about to be committed. See United States v. Freed, 401 U.S. 601, 606-607 (1971).

(5) A deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of §6002, and may not be compelled over a valid assertion of his Fifth Amendment privilege. Pillsbury Co. v. Conboy, 32 Cr 1 3007 (January 12, 1983).

(6) In New Jersey v. Portash, 440 U.S. 450 (1979), the Supreme Court ruled that testimony compelled pursuant to a grant of immunity could not be used to impeach a defendant in a later trial.

See also United States v. Frumento, 552 F.2d 534 (3d Cir. 1977); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). Truthful immunized testimony cannot be used to prove earlier or later perjury. United States v. Berardelli, 565 F.2d 24 (2d Cir. 1977); United States v. Housand, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977).

D. Tax Division Practices and Procedures

1. Initiating request

a. Follow Department Guidelines (U.S.A.M., Title 1, Chapter 11).

b. Fully complete and forward Application (Form No. OBD-111).

c. Forward application to Witness Records Unit, Criminal Division. (Suggest cc of Application be sent to Criminal Section, Tax Division simultaneous to forwarding original to Witness Records Unit, Criminal Division when justified need to accelerate normal processing exists.)

d. Witness Records Unit performs a Criminal Division check in order to determine whether the Criminal Division has any objection to the proposed request for a compulsion order, and routes the application to the appropriate Division for consideration and review.

e. The normal processing time for a request for authorization to apply for a compulsion order is two weeks from the time the Department receives a request. Conscientious case preparation usually enables the requester to make the request in sufficient time to allow for the two-week processing period before the witness is scheduled to testify. However, situations inevitably arise where an important witness unexpectedly refuses to testify, asserting his privilege against self-incrimination. In such situations, the necessary application can be made to the Department by

teletype or magnafax, and the review process is accelerated; in such situations the Tax Division should be directly advised of the need for expeditious review prior to the submission of the request.

2. Administrative tax purpose An application to compel testimony in proceedings which come within the cognizance of the Tax Division will not be considered unless the subject proceeding concerns a matter wherein either:

   a. Prosecution for tax offenses was approved by Tax Division.

   b. Grand Jury Investigation concerning tax administration matters was approved by Tax Division.

   These prerequisites are necessary to assure the subject proceeding is in a proper posture to negate certain attack on the validity of the immunity authorization while also assuring that the proceeding is fully in compliance with the tax disclosure provisions (Section 6103) of the Tax Reform Act of 1976.

3. Tax Division procedures

   a. Secure documented "no objection" to the proposed immunity authorization from the Criminal Division (28 C.F.R. 0.175).

   b. Secure and document the views of the appropriate Internal Revenue Service officials concerning the proposed immunity authorization.

   c. It is the requester's responsibility to contact and receive clearance from any other governmental agency which can reasonably be anticipated to have an interest in the immunity authorization under consideration. In the event agencies considered pertinent have not been contacted, the immunity application, at the discretion of the Tax Division, will be held in abeyance until it is determined whether the involved agencies have any objection to the subject request.

   d. Assemble back-up materials and prepare detailed recommendation memoranda for consideration by the Assistant Attorney General, Tax Division.

   e. If approved, an immunity authorization letter for each witness, signed by either the Assistant Attorney General, Tax Division, or an appropriate official "acting" in that capacity, will be forwarded to the requesting office.

   f. A follow-up questionnaire for each witness for whom an application has been approved will also be forwarded to the requesting office with instructions that it be completed after the witness has been compelled to testify, or after it has been determined that the Department's authorization should not be utilized.

E. Tax Division Policy and Criteria

1. Tax Division policy

   The Tax Division's policy regarding the utilization of 18 U.S.C. Section 6001, *et seq.*, is two-fold, mandating that:

   a. Restraint and selectivity be used in authorizing requests to apply for or issue compulsion orders; and

   b. All available information regarding the extent of the witness' involvement in the matter under investigation, and the nature of the expected testimony, be sought in the evaluation process in order to make an informed and objective assessment of the advantages and risks involved in compelling the witness to testify.

2. Tax Division critera

   The following situations are areas of particular concern:

   a. Requests for authorization to compel testimony of individuals currently designated as a target of the on-going grand jury investigation will not be considered as long as the

individual remains a designated target (culpability issues). If the proposed witness is the "target" of a separate investigation, Tax Division will consider the relationship of the matters involved and potential effects of the immunity grant. In such situations, unless it is clearly established that compliance with the compulsion order will not adversely impact on the other investigation, the request will be denied (insure integrity of any future prosecution).

b. Requests for authorization to compel testimony from close family relatives of a proposed target of an investigation will not be entertained unless the requester affirmatively establishes those exigent and extraordinary circumstances which may justify departure from this policy (if such a request is approved, the Tax Division may inform the requester that the witness shall not be prosecuted on contempt charges if he refuses to testify).

c. The Tax Division is extremely reluctant to authorize applications for orders compelling testimony from witnesses who are perceived to be in a position whereby they are likely to exculpate the target (for example, bookkeepers and return preparers known to be close associates of the target who, under the circumstances of the case, might accept responsibility for any wrongdoing).

d. It should be noted that an order compelling testimony will not prevent or obviate the witness's reliance on the attorney-client privilege or other legal privilege that might apply. Therefore, if a request is submitted in a situation where a legal privilege other than the Fifth Amendment might apply, a statement should be included as to the possible effect of that privilege on the government's attempts to obtain the witness' testimony.

e. Applications for witnesses who have been convicted, but not yet sentenced, on criminal charges will not be approved unless arrangements can be made to insure that the witness' compelled testimony will not be brought to the

attention of the sentencing judge without the witness' consent, or that the witness will be sentenced by a different judge than the judge who hears his compelled testimony.

F. Department Guidelines - Procedures

1. Chapter 11 U.S. Attorneys' Manual

Chapter 11, Title 1, of the United States Attorneys' Manual sets forth the considerations found in the Attorney General's January 14, 1977 guidelines for the utilization of 18 U.S.C. Section 6001, *et seq.*, for determining that authorization should be sought to compel a witness to testify or provide other information. Also found in Chapter 11 are the procedures for requesting and utilizing such authorization.

2. Detailed Table Of Contents for Chapter 11, Title 1

1-11.000 "IMMUNITY" - COMPELLED TESTIMONY

1-11.100 AUTHORIZATION PROCEDURES
1-11.101 Procedure Under Exigent Circumstances

1-11.110 Requests By Assistant United States Attorney

1-11.120 Requests By Legal Division Attorney; Approval of U.S. Attorney

1-11.130 Approval By Assistant Attorney General

1-11.200 THE DECISION TO SEEK AUTHORIZATION

1-11.210 The Public Interest

1-11.211 Seriousness Of Offense and Importance of Case
1-11.212 Value Of The Testimony Or Information
1-11.213 Likelihood Of Prompt And Complete Compliance

1-11.214 Relative Culpability And Criminal History
1-11.215 Conviction Prior To Compulsion
1-11.216 Adverse Consequence To Witness

1-11.220 Availability Of The Privilege

1-11.230 Immunity On Behalf Of Defendant

1-11.300 PROCEDURE UPON RECEIPT OF AUTHORIZATION

1-11.310 Obtaining The Court Order

1-11.320 Where Subject Of Order Is Awaiting Sentencing

1-11.330 Ensuring Integrity Of Any Future Prosecution

1-11.340 Refusal Of Witness To Comply With Order

1-11.341 Ground For Refusal
1-11.342 Civil Contempt
1-11.343 Criminal Contempt

1-11.350 Arguments And Instructions Offered By Defense

1-11.360 Follow-Up Report

1-11.400 PROSECUTION AFTER COMPULSION

1-11.500 INFORMAL IMMUNITY [Policies governing informal immunities are fully set forth at U.S.A.M. 9-27.000, "Principles of Federal Prosecution in "Part F: Entering into Non-Prosecution Agreements in Return for Cooperation."]

1-11.600-800 [Reserved]

1-11.900 FORMS AND DOCUMENTS

1-11.901 Request for Authorization To Apply For Compulsion Order (18 U.S.C. Sections 6001-6003; 28 C.F.R. 0.175-0-0.178)
1-11.902 Sample Information Memo To U.S. Attorney From Attorney For The Government
1-11.903 Sample Authorization Letter

1-11.904 Sample Motion
1-11.905 Sample Order
1-11.906 Witness Follow-Up Report (18 U.S.C. Sections 6001-6005; 28 C.F.R. 0.175-0.178)

3. Proving Federal Crimes (May 1980, Edition)

   a. The Grand Jury and Immunity (Chapter 3)

   b. Statutory Immunity Summary (Id. pp. 13-16)

G. Issues of Law Raised on Behalf of Compelled Witness (In an Attempt to Defend Noncompliance) and/or the Defense

1. Constitutionality of statute

   Validity of "use" type immunity upheld in Kastigar v. United States, 406 U.S. 441 (1972).

2. Whether utilization of statutory provisions should be restricted to organized crime cases

   Held that although" use" immunity statute was enacted under Organized Crime Act of 1970, the statute is for general use. See In re Kilgo, 484 F.2d 1215 (4th Cir. 1973).

3. No showing of public interest

   Court precluded from reviewing propriety of immunity grant. Court's only function is to see that procedures enumerated in the statute are complied with. In re Kilgo, supra.

4. Fourth Amendment issue (grand jury witness)

   Grand jury witness cannot invoke exclusionary rule. United States v. Calandra, 414 U.S. 338 1973), reversing 465 F.2d 1218 (6th Cir. 1972).

5. Electronic surveillance (grand jury witness)

   If there is only a mere claim, witness must still testify. See In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

(a) Government denial of illegal surveillance by affidavit is sufficient. United States v. Fitch, 472 F.2d 548 (9th Cir. 1973).

(b) If Government concedes illegal wiretap, see Gelbard v. United States, 408 U.S. 41 (1972).

6. Foreign witness

Foreign Witness' compelled testimony might result either in violation of a foreign country's secrecy laws, or in the disclosure of crimes committed for which the witness has no assurance of immunity in a foreign country.

a. United States v. Field, 532 F.2d 404, rehearing denied, 535 F.2d 660 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

A Canadian citizen who is a director of a Grand Cayman bank was compelled to testify pursuant to 18 U.S.C. Section 6002, and the witness refused to do so on the ground that, by the very act of testifying as to bank matters he would violate the bank secrecy laws of the Cayman Islands (here witness did not contend that the contents of his answers would subject him to prosecution in the Cayman Islands). Fifth Circuit held that the act of testifying was not within the scope of the Fifth Amendment, which protects only against the use of testimony. Cf. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982).

b. In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

The secrecy of grand jury proceedings mandated by Fed. R. Crim. P. 6(e) is sufficient to guard against a "substantial risk" of foreign prosecution based on the use of the compelled testimony, even if the Fifth Amendment privilege were assumed to extend that far.

7. Defense witness immunity

a. Claims for defense witness use immunity have been uniformly rejected by United States v. Praetorious, 622 F.2d 1054, (2d Cir.),

cert. denied, sub nom. Lebel v. United States, 449 U.S. 860 (1980); United States v. Gleason, 616 F.2d 2 (2d Cir. 1979), cert. denied 444 U.S. 1082 (1980); United States v. Lang, 589 F.2d 92, 96 n. 1 (2d Cir. 1978); United States v. Wright, 588 F.2d 31, 33-37 (2d Cir. 1978); cert. denied, 440 U.S. 917 (1979); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); see also United States v. Lenz, 616 F.2d 960 (6th Cir.) cert. denied, 447 U.S. 929 (1980); United States v. Housand, 550 F.2d 818, 823-824 (2d Cir.), cert. denied, 431 U.S. 979 (1977); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976); United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.), cert. denied, 426 U.S. 948 (1976); Thompson v. Gerrison, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967) (transactional immunity). The claim is a matter of divided opinion in the Third Circuit, compare United States v. Rocco, 587 F.2d 144 (3d Cir. 1978), cert. denied sub nom. LaDuca v. United States, 440 U.S. 972 (1979); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), with Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1203-04 (3rd Cir. 1978), cert. denied, 411 U.S. 913 (1979); United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976). Additional support for the claim has been expressed by the former Chief Judge of the District of Columbia Circuit, see United States v. Gaither, 539 F.2d 753 (D.C. Cir.) (Bazelon, C.J., concurring in denial of rehearing en banc); cert. denied, 429 U.S. 961, (1976); United States v. Leonard, 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (Bazelon, C.J. concurring and dissenting), and by two District Courts, United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), and United States v. LaDuca, 447 F. Supp. 779 (D. N.J.), aff'd 587 F.2d 144 (3d Cir. 1978), cert. denied, 440 U.S. 972 (1979).

The only federal appellate decisions ruling in favor of defense witness immunity appear to be the Third Circuit decisions in Morrison and Smith. For the most recent discussion of the issues involved see United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S.1077 (1981).

b. United States v. Turkish, supra.

The appellant in Turkish sought to overturn his conviction on the ground that he was denied due process by the government's failure to grant use immunity to seventeen prospective defense witnesses who, according to appellant, would otherwise refuse to testify. The panel, after an exhaustive analysis of the concept of reverse (defense witness) immunity, concluded that due process considerations of fairness seldom, if ever, require immunization of potential defense witnesses. While not ruling out the possibility that in some extreme situations the government's refusal to grant use immunity to defense witnesses might pose constitutional problems, the panel held that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." Id. at 778.

Judge Lumbard filed a separate opinion in Turkish, concurring in the result, but dissenting from that portion of the majority opinion that implied "that under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness." Id. at 779.

8. Fear of State Prosecution

The Ninth Circuit, relying on Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) held that the defendant did not have just cause to refuse to testify before the grand jury on the basis that the federal grant of immunity did not adequately protect him against use of his testimony in any subsequent state prosecution and the defendant could be held in contempt for his failure to testify. In re Grand Jury Proceedings (Mena), 662 F.2d 532 (9th Cir. 1981).

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Criminal Division

Federal Grand Jury Practice

Narcotic and Dangerous Drug Section Monograph

Volume II

FEDERAL GRAND JURY PRACTICE MANUAL

Volume II

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Class of 1983

March, 1983

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Form No: 1

Use of Grand Jury for Continuing Investigation Memo

To: Grand Jury Clerk

1. This memo confirms that I will be using the following Grand Jury for a continuing investigation:

a. Grand Jury ______________________

b. Name of Investigation: (Leave blank if necessary)

____

____

c. Anticipated length of investigation (in months):

____

d. Anticipated number of Grand Jury sessions which will be required:

____

e. Anticipated length of time required at each Grand Jury session (or give more detailed estimate of time you will use the Grand Jury, if you can):

____

Form No: 2

REQUEST FORM FOR GRAND JURY SUBPOENA

To be completed by Agent

1. Agent Requesting ____________ Agency ____________
2. Has this matter been discussed with an Assistant U.S. Attorney? ________
3. Subject(s) of investigation ____________
4. Suspected offense ____________
5. Short summary of predicate facts showing probable statutory violation

   ____
6. Party or institution to be subpoenaed ____________
7. Records requested ____________

   ____
8. Brief statement of how records will assist investigation ____________

   ____
9. Time and date when subpoena is needed ____________
10. If the existence of the subpoena is disclosed, will the investigation be jeopardized? Yes ___ No ___ Why? ____________
11. Telephone number where agent can be reached ____________

____
Signature of Agent

FOR GRAND JURY ON:

____ ____
(Date) (Time)

Approved by:

____
Assistant U.S. Attorney

NOTE: THE U.S. ATTORNEY'S OFFICE MUST BE ADVISED WHEN THE SUBPOENA IS SERVED.

The following shall be completed by AUSA: YES NO

1. Is Convenience-Turnover letter to be attached to subpoena?
2. Is Advice of Rights letter to be attached to the subpoena?
3. Is Non-Disclosure Request letter to be attached to subpoena?
4. Is Financial Privacy Act Payment letter to be prepared with the subpoena?

GRAND JURY NO. ________

FORM 3

(MODEL TARGET LETTER)

(INSERT TARGET'S NAME AND ADDRESS)

Dear (INSERT TARGET's NAME):

This letter is to advise you that you are now one of the subjects of a federal grand jury investigation in this District into (INSERT BRIEF, GENERAL DESCRIPTION OF THE SUBJECT MATTER OF THE INVESTIGATION), and other matters, in possible violation of federal criminal law.

The grand jury has asked me to extend to you an invitation to appear before the grand jury at 10:00 a.m., (INSERT DAY), to testify about the matters that are now under investigation. The grand jury has also requested documents described in the attachment to this letter. n/ You or your authorized representative may deliver those documents to the grand jury at 10:00 a.m. on (INSERT DAY), (INSERT DATE), or if you wish, you may have those documents delivered to the office of the United States Attorney, as agent for the grand jury, at any earlier time that is convenient to you.

____

n/ Attachments should describe the documents which are sought with the same specifically otherwise employed in a subpoena *duces tecum*.

You must understand that a decision by you to testify and/or to produce the documents requested will be a completely voluntary decision by you and that your testimony and documents could be used against you if any criminal charges should be returned against you.

I would appreciate it if you would ask your attorney to notify me in writing by (INSERT DAY), (INSERT DATE), as to whether or not you will accept the grand jury's invitation to testify and produce the requested documents. If your attorney has not contacted this office by that date, I will assume that you do not wish to testify.

Very truly yours,

United States Attorney

By: ____________________
(INSERT NAME)

Assistant U.S. Attorney

FORM 4

United States District Court

FOR THE

To

You are hereby commanded to appear in the United States District Court for the District of at in the city of on the day of 19 at o'clock M. to testify before the Grand Jury and bring with you[1]

This subpoena is issued on application of the

.... *Clerk.*

Date ...., 19........

By .... *Deputy Clerk.*

1. Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at on and on at I served it on the within named by delivering a copy to and tendering[2] to the fee for one day's attendance and the mileage allowed by law.

....

Date ...., 19........

By ....

Service Fees
Travel .... $
Services ....
Total .... $

FORM: 5

ADVICE OF RIGHTS

In accordance with Department of Justice regulations, this form is attached to all federal grand jury subpoenas, regardless of the status, culpability, or involvement of the person who receives a subpoena.

1. The grand jury is conducting an investigation of possible violations of federal criminal law involving:

[INSERT TWO OR THREE WORD DESCRIPTION OF SUBJECT MATTER OF INVESTIGATION, e.g. "ZONING IN BALTIMORE COUNTY, MARYLAND" OR "TAX OFFENSES"] and related matters.

2. A witness before the grand jury may refuse to answer any question if a truthful answer to the question would tend to incriminate the witness.

3. Anything said by a witness before the grand jury may be used against the witness by the grand jury or in a subsequent legal proceedings.

4. If a witness has retained counsel, the grand jury will permit the witness a reasonable opportunity to step outside the grand jury to consult with counsel if the witness so desires.

Form No.: 6

Sample Advice of Rights Questions

1. You are now appearing before a Federal Grand Jury which is investigating allegations of (simple statement of investigation's scope). The various possible violations of the criminal laws of the United States under investigation by this Grand Jury include, but are not necessarily limited to [insert code].

2. You are (or are not) a subject or a target of this investigation but this investigation is an on-going one and it is possible that you could be named as a defendant in an indictment arising out of this investigation. Do you understand? Did you receive a subpoena to testify before this Grand Jury? Did you read and understand the letter attached to the subpoena adivising you of your rights as a Grand Jury witness? Before you are asked any questions, I will again advise you of your constitutional rights and your responsibilities as a Grand Jury witness:

(A) Under the Fifth Amendment of the United States Constitution, you have a right to refuse to answer any question if you believe that the truthful answer to that question might tend to incriminate you.

You may answer some questions and you may refuse to answer other questions which you believe may incriminate you. Do you understand?

(B) If you answer any questions, the answers which you give may be used against you in a court of law or other proceedings. Do you understand?

(C) If you decide to answer questions which are asked of you, you may also therafter stop answering at any time and invoke your privilege against self-incrimination as I have already explained to you. Do you understand?

(D) Under the Sixth Amendment, you have the right to consult with an attorney of your choice before answering any questions. Further, although an attorney cannot be with you in this Grand Jury chamber, because its proceedings are secret, your attorney may be present outside the Grand Jury room and you may request permission to leave the Grand Jury room, at any time, to confer with your attorney before answering any questions. Do you understand? Are you represented by an attorney? What is your attorney's name? Have you consulted with your attorney prior to appearing here today regarding your rights before this Grand Jury? Is your attorney present here today outside the Grand Jury to advise you?

(E) You are under oath -- that is, you have sworn or affirmed to tell the truth. If you lie to this Grand Jury -- that is, if you make a knowing misstatement of a material fact to the Grand Jury, you could be charged with perjury. Do you understand?

(F) Do you understand each and all of your rights as I have explained them to you?

(G) Do you have any question about any of your rights which I may attempt to answer for you?

If it appears that a witness is hostile or is likely to be equivocal or one to dodge direct questions and answers, consider asking the following question:

> You must truthfully and completely answer questions which are directed to you which you believe might not tend to incriminate you. If you are evasive in any answer which you give to any question you do subject yourself to a possible charge of Obstructing Justice or of contempt of court. Do you understand?

Where a witness refuses to answer frivolously claiming a privilege, consider asking the following question:

> If you improperly claim a privilege and do refuse to answer a question, you do subject yourself to a possible charge of contempt of court or of Obstruction of Justice. Do you understand?

FORM: 7

LETTER TO WITNESS EXPLAINING THE GRAND JURY

Dear

This letter is supplied to a witness scheduled to appear before the Federal Grand Jury in order to provide helpful background information about the Grand Jury.

The Grand Jury consists of from sixteen to twenty-three persons from the ________ Judicial District of ________. It is their responsibility to inquire into federal crimes which may have been committed in this District.

As a Grand Jury witness you will be asked to testify and answer questions concerning records you are ordered to produce. Only the members of the Grand Jury, attorneys for the United States, and a stenographer are permitted in the Grand Jury room while you testify.

As a matter of good practice we advise you that the Grand Jury is conducting an investigation of possible violations of Federal criminal laws involving, but not necessarily limited to, ____.

You may refuse to answer any question if a truthful answer to the question would tend to incriminate you. Anything that you do or say may be used against you by the Grand Jury or in a subsequent legal proceeding. If you have retained counsel, who represents you personally, the Grand Jury will permit you a reasonable opportunity to step outside the Grand Jury room and confer with counsel if you so desire.

Very truly yours,

United States Attorney

____
Assistant U.S. Attorney

Form No: 8

UNITED STATES DISTRICT COURT
________ DISTRICT OF ________
________ DIVISION

IN RE:	:	NO: ________
WITNESS BEFORE THE GRAND JURY	:	PETITION FOR COURT ORDER DIRECTING WARRANT TO ISSUE FOR ARREST OF GRAND JURY WITNESS WHO FAILED TO APPEAR

- - - - - - - - - - - - - -

The United States, through the United States Attorney for the ________ District of ______, petitions the Court for an Order directing the Clerk of this Court to issue a warrant for the arrest of _________________________ who was personally served with subpoena on _________ ___, 19__, to appear before the Grand Jury of the United States District Court for the ________ District of _______, on the _____ day of ____________, 19__, and who failed to appear, as ordered,

1. The Grand Jury for the ________ District of _______, __________ Division, is now conducting an investigation of alleged illegal activities in this District; said investigation involves possible violations of _________________. _____________ _____________ has been subpoenaed, aforesaid, by said Grand Jury and fully advised that _____ is (or is not) a potential defendant in its investigation.

2. It is essential and necessary to the aforesaid Grand Jury investigation that ____________________________ appear and testify before the Grand Jury as to matters within his knowledge.

WHEREFORE, the United States Attorney prays that this Court enter an Order directing the Clerk of this Court to issue a warrant for the arrest of ______________________ and that the United States Marshal for the _______ District of _______ thereupon bring the said ______________________ before this Court.

Respectfully submitted,

____
United States Attorney

____
Assistant U.S. Attorney

Form No: 9

UNITED STATES DISTRICT COURT
_______ DISTRICT OF _______
_______ DIVISION

IN RE: : NO: _______

WITNESS BEFORE THE GRAND JURY : ORDER FOR WARRANT

:

- - - - - - - - - - - - - -

On petition of the United States Attorney for the _______ District of _______, the Court having considered said petition finds:

1. The Grand Jury for the _______ District of _______, _______ Division, is now conducting an investigation involving possible violations of _________________________________
____.

2. The witness, ______________________, has been duly subpoenaed on the __ day of ________, 19__, and has failed to appear before the Grand Jury of this District Court on the __ day of ________, 19__, as ordered.

IT IS, THEREFORE, ORDERED that the Clerk of this Court issue a warrant for the arrest of ________________ and the United States Marshal for the _______ District of _______ shall bring the said ________________ before this Court.

So Ordered.

United States District Judge

United States Attorney

Assistant U.S. Attorney

FORM 10

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ____________

IN RE: GRAND JURY INVESTIGATION:
OF (INSERT TITLE OF INVESTIGATION): MISC. NO. _________

MOTION TO ENFORCE A GRAND JURY SUBPOENA

The government respectfully moves the Court for an order commanding (INSERT NAME OF WITNESS) to show cause why he should not be held in contempt of this Court for refusing to comply with a Grand Jury subpoena requiring him to give testimony before the United States Grand Jury presently empaneled in this District, and states as follows:

1. On (INSERT DATE), a subpoena *duces tecum* was issued, calling for the appearance of (INSERT NAME OF WITNESS) before the Grand Jury for the District of Maryland and for the production of certain documents. That subpoena was served upon (INSERT WITNESS SURNAME) on or about (INSERT DATE), by agents of the (INSERT NAME OF AGENCY) who are assisting the Grand Jury in its investigation of (INSERT BRIEF DESCRIPTION OF NATURE OF INVESTIGATION). A copy of the subpoena is attached hereto as Exhibit A.

2. (INSERT WITNESS SURNAME) appeared before the Grand Jury, as required by the subpoena on (INSERT DATE), and,

after being advised of his rights, was asked a series of questions concerning (INSERT DESCRIPTION OF QUESTIONS AS TO WHICH THE PRIVILEGE WAS WRONGLY ASSERTED), and concerning certain other matters not relevant to this motion. In response to those questions concerning (INSERT DESCRIPTION OF QUESTIONS), (INSERT WITNESS SURNAME) stated that he respectfully declined to answer for fear that his answers might tend to incriminate him. A copy of the transcript of (INSERT WITNESS SURNAME)'s testimony before the Grand Jury is attached hereto as Exhibit B.

3. (INSERT DESCRIPTION OF TESTIMONY GIVEN BY WITNESS ON PREVIOUS OCCASION WHERE WITNESS WAS ASKED QUESTIONS, CONCERNING WHICH THE WITNESS NOW ASSERTS HIS OR HER PRIVILEGE AGAINST SELF-INCRIMINATION, AND THE ANSWERS WHICH DID NOT INCRIMINATE THE WITNESS WHEN GIVEN, OR INSERT OTHER INFORMATION DEMONSTRATING WHY THE WITNESS' CLAIM OF PRIVILEGE IS OTHERWISE UNFOUNDED.)

4. On or about (INSERT DATE), (INSERT WITNESS SURNAME) was interviewed by agents of the (INSERT NAME OF AGENY) who were then assisting the office of the United States Attorney for this District, prior to referral of this matter to the Grand Jury, but in preparation for that event. (INSERT WITNESS SURNAME) was questioned concering (INSERT DESCRIPTION OF QUESTIONS), and gave answers (INSERT DESCRIPTION OF ANSWERS, SHOWING HOW THEY WERE NOT INCRIMINATING OF THE WITNESS). A copy of the memorandum prepared by one of the agents of the (INSERT NAME OF AGENCY), following the interview of (INSERT WITNESS SURNAME) is attached hereto as Exhibit C.

5. From (INSERT BASIS FOR CONCLUSION), it is clear that none of the questions put to (¯NSERT WITNESS SURNAME) before the Grand Jury would, in any way, tend to incriminate (INSERT WITNESS SURNAME) or implicate him in any scheme or conspiracy to violate the laws of the United States. His claim of privilege to refuse to testify is unfounded and based on a purely fanciful apprehension of possible selfincrimination. Nevertheless, the testimony and other information which (INSERT WITNESS SURNAME) may give or provide in response to those questions is of substantial interest to the Grand Jury in its present investigation of (INSERT DESCRIPTION OF INVESTIGATION) and is necessary to the public interest.

WHEREFORE, the United States respectfully requests this Court enter an Order compelling (INSERT WITNESS NAME) to give answers to the questions put to him before the Grand

Jury for the District of Maryland, or to show cause why he should not be held in contempt of this Court for refusing to do so.

Respectfully submitted,

United States Attorney

By: ________________

(INSERT NAME)

Assistant U. S. Attorney

FORM 11

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ________

IN RE: GRAND JURY INVESTIGATION:

OF (INSERT TITLE OF INVESTIGATION): MISC. NO. _____

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION TO ENFORCE A GRAND JURY SUBPOENA

The Grand Jury is entitled to every man's evidence. United States v. Dionisio, 410 U.S. 0 , 9-11 (1973). "Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege." Brown v. Walker, 161 U.S. 591, 600 (1896). The Fifth Amendment to the United States Constitution affords witnesses before a Grand Jury the privilege to refuse to answer any questions, if a truthful answer would tend to incriminate the witness. Blau v. United States, 340 U.S.

159 (1959); Hoffman v. United States, 341 U.S. 479 (1951). But, the "constitutional protection against self-incrimination is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." Mason v. United States, 244 U.S. 362. 365 (1917), cited in United States v. Goodman, 289 F.2d 256, 260 (4th Cir. 1961).

While the Courts have manifested "extreme concern for safeguarding the privilege against self-incrimination and implementing its policies", Ellis v. United States, 416 F.2d 791, 802 (D.C. Cir. 1969), they have refused uniformly to uphold claims of privilege where "the claimant is confronted by ... merely trifling or imaginary, hazards of incrimination", and not by "substantial and 'real' hazards". Marchetti v. United States, 340 U.S. 367, 374 (1951); Hoffman v. United States, supra at 484, 486-87; Ellis v. United States, supra. An assertion of privilege will not be sustained where the danger of incrimination is simply "fanciful," Hoffman v. United States, supra at 484, since "it would be to convert a salutary protection into a means of abuse it it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." Mason v. United States, supra at 366 cited in United States v. Goodman, supra at 260. See also United States v. Goodman, supra at 262.

In the present case, the witness (INSERT WITNESS SURNAME) asserted his privilege against self-incrimination in response to questions put to him before the Grand Jury which have no tendency to establish his guilt of any criminal offense. To the contrary, a his prior statements concerning the same subject matter clearly indicate, (INSERT WITNESS SURNAME) declined to participate in any such offense. Nevertheless, the testimony which he may offer may tend to incriminate the person or persons, whose conduct is the subject of the Grand Jury's inquiry, if only by corroborating the testimony of other witnesses.

In any event, if the "fanciful" possibility of prosecution resulting from his testimony before the Grand Jury is ever realized, (INSERT WITNESS SURNAME) will be protected, by the Order which this Court may issue, from prosecution for any offense in which he may have been involved, except perjury in his testimony before the Grand Jury. Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

The Grand Jury is entitled to hear (INSERT WITNESS SURNAME)'s responses to the questions put to him before the Grand Jury and to other questions relating to the same subject. Cf. Rogers v. United States 340 U.S. 367, 374

(1951). The motion to compel him to answer those questions should be granted.

Respectfully submitted,

United States Attorney

By: ________________

(INSERT NAME)

Assistant U.S. Attorney

FORM 12

ORDER TO SHOW CAUSE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ________

IN RE: GRAND JURY INVESTIGATION:

OF (INSERT TITLE OF INVESTIGATION): MISC. NO.________

ORDER

The government having moved this Court for an Order commanding (INSERT WITNESS NAME) to show cause why he should not be held in contempt for refusing to comply with a Grand Jury subpoena _duces tecum_ lawfully issued and served upon him; and it appearing to the Court that (INSERT WITNESS NAME) has refused to comply with such a subpoena by declining to give testimony or produce documents before the Grand Jury; and it appearing to the Court that (INSERT WITNESS NAME) was and is not justified in refusing to give such testimony or to provide such documents, it is this_____ day of (INSERT MONTH AND YEAR),

ORDERED that on or before the ____ day of (INSERT MONTH AND YEAR), (INSERT NAME OF WITNESS) shall appear before this Court and show any cause why he should not be held in

contempt of this Court for refusing to comply with the Grand Jury subpoena _duces tecum_ lawfully issued and served upon him by declining to answer questions or produce documents before the Grand Jury, provided that a copy of this Order is served upon (INSERT NAME OF WITNESS) or his counsel on or before the _____ day of (INSERT MONTH AND YEAR).

____

UNITED STATES DISTRICT JUDGE

DATED: ____________________

FORM 13

ORDER TO ENFORCE A GRAND JURY SUBPOENA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

IN RE: GRAND JURY INVESTIGATION:
OF (INSERT TITLE OF INVESTIGATION): MISC. NO. _____

ORDER

Upon motion of the government to enforce the Grand Jury subpoena _duces tecum_ served upon (INSERT NAME OF WITNESS) on or about (INSERT DATE), and the Court having considered the pleadings and arguments of the United States and the witness, and it appearing to the Court that the witness has no proper basis for asserting his Fifth Amendment privilege against self-incrimination as a bar to questions (INSERT DESCRIPTION OF QUESTIONS AS TO WHICH THE WITNESS PREVIOUSLY ASSERTED THE PRIVILEGE AGAINST SELF-INCRIMINATION), it is therefore this _____ day of (INSERT MONTH AND YEAR),

ORDERED that motion of the United States be, and the same is hereby GRANTED; and it is further

ORDERED that (INSERT NAME OF WITNESS) shall comply with the terms of the Grand Jury subpoena _duces tecum_ served upon him and shall give testimony before the Grand Jury and provide documents to the Grand Jury, in response to the subpoenas, concerning the aforesaid matter; and it is further

ORDERED that (INSERT WITNESS NAME) shall comply with the terms of the Grand Jury subpoena duces tecum by appearing before the Grand Jury on (INSERT DATE), and at such further meetings of the Grand Jury as may be necessary to complete his testimony before the Grand Jury, under pain of contempt for his failure or refusal to doso, provided that a copy of this Order be served upon (INSERT WITNESS NAME) or his counsel on or before the ____ day of (INSERT MONTH AND YEAR).

____

UNITED STATES DISTRICT JUDGE

Form No: 14

UNITED STATES DISTRICT COURT
________ DISTRICT OF ________
________ DIVISION

IN RE:	:	NO: ________
WITNESS BEFORE THE GRAND JURY	:	PETITION FOR COURT ORDER DIRECTING WITNESS TO ANSWER QUESTIONS BEFORE THE GRAND JURY
	:	

\- - - - - - - - - - - - -

The United States, through the United States Attorney for the ________ District of ________, petitions the Court for an Order directing ____________________to appear and testify before the Grand Jury of the United States District Court for the ________ District of ________, ________ Division, and in support thereof states the following:

1. The Grand Jury for the ________ District of ________, ________ Division, is now conducting an investigation of alleged illegal activities in this District; said investigation involves possible violations of Title ____, United States Code, Section ______. ____________________ has been subpoenaed by said Grand Jury and fully advised that ____ is (or is not) a potential defendant in its investigation.

2. It is essential and necessary to the aforesaid Grand Jury investigation that ____________________ give testimony before and to the Grand Jury. Such testimony will be used to determine the full extent of violations of Federal criminal law and the entire involvement of all persons therein.

3. ______________________ appeared pursuant to subpoena before the Grand Jury on ________ __, 19__. At that time, the witness was directed by the foreman of the Grand Jury to answer questions directed by the Assistant United States Attorney to the witness, which questions were: _____________
____
____.
The witness refused, asserting constitutional privilege.

4. The United States Attorney, petitioner in this matter, contends that the answers to such questions are outside the protection of the Fifth Amendment. The United States Attorney further contends that the witness has no constitutional privilege whatsoever to refuse to answer said questions as demanded by the Grand Jury. Hoffman v. United States, 341 U.S. 479; Murphy v. Waterfront Commission, 378 U.S. 52; United States v. Harmon, 339 F.2d 354 (6th Cir. 1964).

WHEREFORE, the United States Attorney prays that this Court enter an order directing ______________ to testify before the Grand Jury of the United States District Court for the ______ District of ______, ______ Division, and to answer the aforesaid questions directed to him.

Respectfully submitted,

____
United States Attorney

____
Assistant U.S. Attorney

Form No: 15

UNITED STATES DISTRICT COURT
______ DISTRICT OF ______
______ DIVISION

IN RE:	:	NO: ______
WITNESS BEFORE THE GRAND JURY	:	ORDER DIRECTING WITNESS TO ANSWER QUESTIONS BEFORE THE GRAND JURY
	:	

- - - - - - - - - - - - -

On petition of the United States Attorney for the ______ District of ______, the Court having considered said petition finds:

1. The Grand Jury for the ______ District of ______, ______ Division, is now conducting an investigation involving possible violations of ______________________.

2. The witness, ________________, has been duly subpoenaed and has appeared before the Grand Jury of this District Court on ______ __, 19__. On that occasion, the foreman of the Grand Jury directed the witness to answer the questions set forth in the petition of the United States Attorney. On that occasion, the witness refused to answer said questions asserting ___ constitutional privilege. Said privilege was improperly asserted by the witness. The witness has no constitutional privilege to refuse to answer the questions demanded by the Grand Jury.

IT IS, THEREFORE, ORDERED that ________________ forthwith appear before and answer the questions demanded by the

Grand Jury of the United States District Court for the ________

District of ________.

So Ordered.

____
United States District Judge

____
United States Attorney

____
Assistant U.S. Attorney

Form No: 16

UNITED STATES DISTRICT COURT
________ DISTRICT OF ________
________ DIVISION

IN RE:	:	No.: __________
WITNESS BEFORE THE GRAND JURY	:	JUDGMENT AND COMMITMENT FOR CONTEMPT
	:	

- - - - - - - - - - - -

On Motion of the United States Attorney for the ________ District of ________, for an Order by the Court to enforce its Order of ________________, heretofore entered in the above-entitled matter, the witness, ________________________, appearing before the Court in person and with counsel, and said witness having admitted that ___ had refused and would continue to refuse to answer the questions directed to him, as set forth in the petition of the United States Attorney, before the Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that ____________________ is in direct and continuing contempt of this Court for ___ failure to obey the Order of this Court, dated _________ __, 19__, heretofore entered herein.

IT IS, THEREFORE, ORDERED that ______________________ be and hereby is committed to the custody of the United States Marshal for the ________ District of ________ until such time as ___ shall obey said Order.

So Ordered.

United States District Judge

United States Attorney

Assistant U.S. Attorney

FORM: 17

IMMUNITY REQUEST FORM

INSTRUCTIONS: PREPARE AND SUBMIT ORIGINAL, ANSWER EACH QUESTION AS ACCURATELY AND COMPLETELY AS POSSIBLE.

TO: Witness Records Unit
Criminal Division, Room 2704
U.S. Department of Justice
Washington, D.C. 20530

FROM:

(1) Name of Witness:

(2) District:

(3) Nature of Proceedings: ( ) Trial
( ) Grand Jury
( ) Other:

(4) Name of Subject(s) or Defendant(s):

(5) Date of Expected Testimony:

(6) Proffer of Anticipated Testimony from Witness or Counsel:
( ) None Obtained ( ) Proffer by Witness ( ) Debriefing of Witness

(7) Summary of Case or Proceeding:

(8) Witnesses' Background and Role in Case or Matter and Summary of Anticipated Testimony or Information:

(9) List Assurances or Promises, if any, made to Witness in Return for His Testimony:

(10) Has this Witness Acted in any way which could be considered as a waiver of his Fifth Amendment privilege?

(11) Are there means other than immunity to obtain this testimony? If so, what are they?

(12) What other means are available to establish the evidence sought from this witness?

(13) If no proffer information has been obtained from the witness or his counsel, what is the basis of your summary of anticipated testimony?

(14) Relative culpability of witness as compared to that of subject(s) or defendants(s).

(15) Why is this immunity to the public interest? State Facts.

(16) Basis of your belief that witness will assert his Fifth Amendment privilege?

(17) Is the witness likely to testify or produce information if immunity is granted?

(18) Has this witness been indicted for his part in this case or matter?

( ) Yes ( ) No ( ) Acquitted ( ) Convicted

( ) Plea

If not convicted, why not? If convicted, explain how his privilege survives.

If convicted, has the witness been sentenced?

(19) Is witness presently incarcerated? ( ) Yes ( ) No
If yes, give details:

(20) Are there federal or local charges pending against this witness?

( ) Yes ( ) No If yes, give details:

(21) Federal and State offenses committed by the witness which he is likely to disclose if he testifies under a grant of immunity:

(22) Is there any opposition to granting immunity to the witness on the part of investigative agencies in your District or State or Local prosecuting officials?

(23) Could this witness be convicted of any of these offenses on evidence other than his testimony?

( ) Yes ( ) No If yes, give details:

(24) Violations (Statutes and Description) by subject(s) or defendant(s).

(25) Has this witness been immunized before?

(26) List other witnesses for whom immunity has been authorized in this proceeding, and whether immunity was given:

(27) How Long has the investigation been going on?

(28) To the knowledge of the investigative agencies in your District, has the witness been the subject of electronic surveillance?

(29) Birthdate of Witness:

(30) Birthplace:

(31) Alias:

(32) FBI I.D. No.:

(33) Local Police No.:

(34) Address of Witness:

____

Signature of Requestor

Approved for Transmittal,

____

Signature of United States Attorney

PART I FOR USE OF WITNESS RECORD UNIT

Refer to: Type:

WRU #: Prior immunity authorization for this

Index #: witness: ( ) Yes ( ) No

Date(s)

District(s)

PART II FOR SECTION USE

TO: ______________________

Deputy Asst. Attorney General

Criminal Division

FROM:

Chief, Section:

(1) This Section has reviewed the above request, and has made name checks of the witness with the following agencies:

( ) FBI ( ) IRS ( ) DEA ( ) Others:

( ) IRS ( ) Sec. Serv. ( ) AT&F

Who report: ( ) no records ( ) Other:

(2) This request has been cleared with:

( ) All Sections Except:

( ) Divisions:

( ) The following units have not responded:

(3) Based upon the information proviced by the requestor, this Section recommends that the request be:

( ) Approved ( ) Disapproved

( ) Approved with the following instructions:

( ) Other

(4) Comments:

Signatures: Attorney ______________

Section Chief: __________

FORM 18

SAMPLE AUTHORIZATION LETTER

Honorable Russell T. Baker, Jr.
United States Attorney
District of Maryland
Baltimore, Maryland 21201

Attention: (NAME OF ASSISTANT U.S. ATTORNEY)
Assistant United States Attorney

RE: Grand Jury Investigation
NAME OF GRAND JURY TARGET)

Dear Mr. Baker:

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a) I hereby approve your request for authority to apply to the United States District Court for the District of Maryland for an order pursuant to 18 U.S.C. 600P-6003 requiring WITNESS' NAME) to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

D. Lowell Jensen
Assistant Attorney General
Criminal Division

FORM 19

MOTION TO COMPEL TESTIMONY PURSUANT
TO 18 U.S.C. 6001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

IN RE: GRAND JURY INVESTIGATION:
OF (INSERT NAME OF INVESTIGATION): MISC. NO. ________

MOTION

The government respectully moves the Court, pursuant to Title 18, United States Coder, Section 6001 et seq., for an Order compelling (INSERT NAME OF WITNESS) to give testimony and provide other information as to all matters about which he may be interrogated before the United States Grand Jury presently empaneled in this District, and states as follows:

1. (INSERT NAME OF WITNESS) has been called to testify and provide other information before the Grand Jury.

2. In the judgment of the undersigned, the testimony or other information which (INSERT NAME OF WITNESS) may give or provide is, or may be, necessary to the public interest.

3. In the judgment of the undersigned, (INSERT NAME OF WITNESS) has refused to testify or provide other information before the Grand Jury, relying upon his privilege against self-incrimination.

4. This application is made with the approval of (INSERT NAME), Acting Assistant Attorney General of the United States Department of Justice, pursuant to the

authority vested in him by Title 18, United States Code, Section 6003 and Title 28, C.F.R., Section 0.175(a) and 0.132. A copy of the letter from said Acting Assistant Attorney General expressing such approval is attached hereto.

Respectfully submitted,

United States Attorney

By: ____________________

(INSERT NAME)

Assistant U.S. Attorney

FORM 20

ORDER TO COMPEL TESTIMONY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF_________

IN RE: GRAND JURY INVESTIGATION:

OF (INSERT NAME OF INVESTIGATION): MISC. NO. ______

ORDER

On motion of the government filed in this matter on the____ day of (INSERT MONTH AND YEAR), and it appearing to the satisfaction of the Court that:

1. (INSERT NAME OF WITNESS) has been called to testify and provide other information before the Grand Jury; and

2. In the judgment of the United States Attorney (INSERT NAME OF WITNESS) has refused to testify or provide other information before the Grand Jury, on the basis of his privilege against self-incrimination; and

3. In the judgment of the United States Attorney, the testimony or other information which he may give provide, is or may be, necesary to the public interest; and

4. This motion filed herein has been made with the approval of (INSERT NAME), (Acting), Assistant Attorney General of the United States Department of Justice, pursuant

to the authority vested in him by Title 18, United States Code, Section 6003 and Title 18, C.F.R., Sections o.175 and 18.10.132; now, therefore, it is hereby

ORDERED, pursuant to Title 18, United States Code, Section 6002, that (INSERT NAME OF WITNESS) give testimony or provide other information, which she refuses to give or to provide on the basis of her privilege against self-incrimination, as to all matters about which she may be interrogated before said Grand Jury.

____

UNITED STATES DISTRICT JUDGE

DATED: ______________

FORM: 21

WITNESS ASSURANCE LETTERS

Dear (Witness):

Pursuant to a subpoena (insert here data as to date of service, etc.), you have been directed to appear and give testimony before a duly authorized federal grand jury in the ______________ District of ___________________. The proceedings in which you are called to tesify and provide information involves an investigation concerning potential violations of the federal revenue laws regarding _________; however, the grand jury can inquire into other violations of federal laws committed in the _________ District of ___________________, as it deems appropriate. You have indicated that you will refuse to testify or provide information on the basis of your privilege against self-incrimination unless given assurances that the testimony and/or information provided by you remains protected under the Fifth Amendment. This letter is to assure you that your status before the grand jury is that of a witness and that you are not a target of the investigation. It is agreed that no testimony or other information given by you in compliance with the grand jury subpoena (or any information directly or indirectly derived from such testimony or other information) will be used against you in any criminal case, except a prosecution for perjury or giving a false statement.

FORM: 22

GUIDELINES FOR WRITTEN AGREEMENTS
WITH COOPERATING DEFENDANTS

John Doe, Esq.
[Address]

Re: [Name of Cooperating Witness]

Dear Mr. Doe:

On the understandings specified below, the United States will accept a guilty plea(s) from [name of Cooperating Witness] to Count(s) ______________________________ of Indictment (Information) charging [a] violation(s) of _______ USC Section [ ] ___________________________, carrying a maximum sentence of ____ years and a $ _________fine on each count. If he fully complies with these understandings, [Cooperating Witness] will not be prosecuted by this office for [Set forth the specific criminal acts or factual areas to which the immunity applies]:

The understandings are that [Cooperating Witness] shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this office inquires of him, and, further, shall truthfully testify before the grand jury and/or at any trial or other court proceeding with respect to any matters about which this office may request his testimony.

FORM: 23

GUIDELINES FOR WRITTEN AGREEMENTS
WITH PERSONS NOT TO BE PROSECUTED

John Doe, Esq.
[Address]

Re: [Name of Cooperating Witness]

Dear Mr. Doe:

If [Cooperating Witness] fully complies with the understandings specified below, he will not be prosecuted by this office for [set forth the specific areas to which the promise of nonprosecution applies;]

The understandings are that [Cooperating Witness] shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this office inquired of him, shall cooperate fully with agents of the [applicable agency] and, truthfully testify before the grand jury and/or at any trial or other court proceeding with respect to any matters about which this office may request his testimony.

It is further understood that this agreement is limited to the United States Attorney's Office for the ___________ of ______ and cannot bind any other federal, state or local prosecuting authorities, although this office will bring the cooperation of [Cooperating Witness] to the attention of other prosecuting office if requested.

It is further understood that [Cooperating Witness] shall at all times give complete, thruthful and accurate information and testimony, and must not commit any crimes whatsoever. Should

[Cooperating Witness] commit any crimes or should it be judged by this office that [Cooperating Witness] has given false, incomplete or misleading testimony or information, or has otherwise violated any provision of this agreement, [Cooperating Witness] shall thereafter be subject to prosecution for any federal criminal violation of which this office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information, statement or testimony provided by [Cooperating Witness] and such information, and leads derived therefrom, may be used against him/her.

No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

United States Attorney

Assistant U.S. Attorney

AGREED AND CONSENTED TO:

[Cooperating Witness]

JOHN DOE, Esq.
[Attorney for cooperating witness]

Form No.: 24

ADDITIONAL GUIDELINES FOR SPECIFIC SITUATIONS

(1) It is further understood that because [Cooperating Witness'] truthful cooperation with this office may reveal activities of individuals who in the view of this office might use violence, force and intimidation against [Cooperating Witness] and his family for the purpose of retaliation or otherwise, this office will take all reasonable steps to ensure that any period of imprisonment on [Cooperating Witness] will be served in a federal prison institution at which he will be protected from bodily harm. Further, if necessary and appropriate in the view of this office, arrangements may be made whereby [Cooperating Witness], his wife and children can be relocated under a new identity in order that no harm comes to any of them as a result of [Cooperating Witness'] cooperation. It is further understood by [Cooperating Witness] that such protection or relocation is under the direction and control of the United States Marshal and not of this office. It is further understood that, from time to time, other steps and measures which in the judgment of this office are necessary for the health, safety and well-being of [Cooperating Witness] and his family, may be taken with or without [Cooperating Witness] consent.

(2) It is further understood that this office will bring the cooperation of [Cooperating Witness] to the attention of Federal Parole authorities at the appropriate time upon request, but such information will be transmitted without any recommendation as to what action the parole authorities should take.

FORM: 25

PRELIMINARY GRAND JURY INTERROGATION

Generally the statements below should be made to all grand jury witnesses, is applicable. Statement 2-9 are applicable to all grand jury witnesses except (a) clear victims of the offense under investigation, (b) federal, state and local law enforcement agents who are testifying as such, (c) custodians of subpoenaed records who will not be asked to give substantive testimony, and (d) witnesses who have been subpoenaed only for purposes of handwriting exemplars, fingerprints, or other nontestimonial purposes. Assistants, however, are authorized to depart from this form in those unusual circumstances where it would not be appropriate to make a particular statement. This form is not intended to benefit grand jury witnesses or protect their interests, and the existence of this form is not intended to create any right in any such witness. Rather, this form is designed as guide to Assistants in this office; its sole purpose is to promote and protect the interests of the Government.

A grand jury witness is first sworn by the foreman of the grand jury. Thereafter the witness should be asked the following questions by the prosecutor:

1. Please state and spell your name and give your home and business addresses and telephone numbers.

2. This is (give full title of grand jury), a federal grand jury that is investigating possible violations of federal criminal law involving (state the subject matter of the grand jury's investigation in general terms), and related matters. You have just been sworn by the foreman of the grand jury and have taken an oath to testify truthfully. Do you understand that?

3. You are under a legal obligation to testify truthfully. You must give truthful answers today in response to all of the questions put to you, either by me or by members of the grand jury. Do you understand that?

4. If you should lie knowingly make a false statement in your testimomny, you could be prosecuted for the crimes of perjury or making a false declaration. If you are convicted of such an offense, you could be sentenced to imprisonment and fined. Do you understand that?

5. You do not have a right to remain silent, but you do have a constitutional right to refuse to answer any question if a truthful answer to the question would tend to incriminate you. Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding. Do you understand that?

6. You have the right to be represented by an attorney. Are you represented by an attorney?

7. What is his name?

8. Is he here today?

9. If you want to consult with your attorney outside the grand jury room before answering any questions, you will be given a reasonable opportunity to do so. Do you understand that?

10. (If applicable) You are testifying here today under an order signed by Judge ________ that requires you to testify despite the fact that you have asserted your constitutional

privilege against self-incrimination. That order compels you to testify on the condition that your testimony may not be used against you in a criminal case. You do not have immunity from perjury or making a false statement in your testimony today, however, if you commit perjury or make a false statement, you can be prosecuted and your testimony can be used against you in that prosecution . Do you understand that?

11. (If applicable) you are testifying here today under an agreement that you have reached with the government. (Read letter agreement to grand jury and mark a copy of an exhibit). Is that your signature on the letter agreement?

12. Under that agreement you have no immunity whatsoever from perjury or making a false statement in your testimony today. If you commit perjury or make a false statement, you can be prosecuted and your testimony can be used against you in that prosecution. Do you understand that?

<u>Recantation Advise to be Directed to the Witness at the Conclusion of His Testimony</u>

13. We are now about to excuse you. If after leaving here today, you decide or conclude that anything you have said is incorrect, incomplete, or untrue in any way, or if you remember something that is relevant to your testimony, or if you otherwise wish to make any additions or modifications, you may be given an opportunity to correct that testimony. Any such correction, however, must be made before the grand jury acts upon the testimony that you have given. Accordingly, if you want to make such a correction or change, you should contact me immediately. (Where an indictment is imminent, the witness should be given a specific deadline for recantation.) Do you have any questions about what I have said?

You are excused. Thank you.

[INSERT NAME]

L O G

(ALL RECORDS OBTAINED BY GRAND JURY SUBPOENA INCLUDING ALL FINANCIAL RECORDS)

ISSUED TO	DATE ISSUED	RETURN DATE	DATE SERVED	AGENCY/AGENT WHO SERVED	WHERE RECORDS OBTAINED	DATE OBTAINED	HOW OBTAINED	RULE 6(e) DISCLOSURE	DATE OF PRESENTMENT TO GRAND JURY

FORM NO. 26 LOG

FORM: 27

GRAND JURY SUBPOENA LOG (ALTERNATE FORM)

LEAD SUBJECT ____________________ FGJ ___________ AUSA __________

Organization or Party Subpoenaed: ___________________________________

____

____

____

Date Subpoena Issued: ___________________________________

Date Subpoena Served: ___________________________________

Date Documents Received: ___________________________________

Inventory of Documents Received: ___________________________________

____

____

____

____

____

Date Subpoena Returned: ___________________________________

Identity of Grand Jury Agent: ___________________________________

Date Documents turned over to Grand Jury Agent: ___________________________________

Method of Disposition of Subpoenaed Records: ___________________________________

____

____

____

____

____

Date of Disposition of Records: ___________________________________

FORM: 28

COVER LETTER FOR RETURNING SUBPOENAED DOCUMENTS

Dear [INSERT NAME]:

Some time ago you produced documents in compliance with a Federal Grand Jury subpoena in connection with an investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. We have now had an opportunity to examine and evaluate those documents.

You have requested that we return the documents subpoenaed from you. We are now prepared to do so, and to return those documents to your physical custody for your convenience. The returned documents remain under Federal Grand Jury subpoena and must not be destroyed or otherwise disturbed in any way. They are restored to you only on the understanding that you will immediately return them to the grand jury upon request and without need for any further subpoena.

If you agree to the terms set forth in this letter, I would appreciate your signing the enclosed copy of this letter and returning it to tme in the enclosed envelope. Then please contact [INSERT NAME OF AGENT] of this office (301/539-2940) and arrange for the return of the documents.

Thank you for your cooperation.

Very truly yours,

[INSERT NAME OF USA]
United States Attorney

By: ______________________
[INSERT NAME]
Assistant U.S. Attorney

I agree to the terms and conditions under which these documents are to be returned to me.

DATE:__________ Signature______________________________

FORM: 29

LETTER ADVISING WITNESS OF PROCEDURE
FOR DELIVERY OF DOCUMENT

Custodian of Records
[INSERT NAME AND ADDRESS
OF SUBPOENAED INSTITUTION]

Dear Sir or Madam:

Special Agents of the [INSERT NAME OR AGENCY] have served you with a special federal grand jury subpoena duces tecum that requires you to produce the documents specified in that subpoena by [INSERT DAY AND DATE]. The special grand jury is investigating possible violations of federal criminal law involving [INSERT BRIEF DESCRIPTION OF NATURE OF INVESTIGATION] and related matters. The subpoena does not require you to appear to testify before the special grand jury on [INSERT DATE]. It merely requires the production by that date of the documents specified in the subpoena.

If you wish personally to deliver the subpoenaed records to the special grand jury on [INSERT DATE], you may do so. The special grand jury has authorized this office, however, to make arrangements with you for the delivery of the subpoenaed records of this office or its representatives on or before [INSERT DATE] in lieu of a personal appearance by you before the special grand jury on that date. If you wish to make such arrangements or if you wish personally to deliver the records to the special grand jury, you should advise Assistant United States Attorney [INSERT NAME] at ________ at some time prior to [INSERT DATE].

We realize that some of the records called for by the subpoena are for the year [INSERT YEAR] and therefore may be needed by you to prepare your federal and state income tax returns. It will still be necessary for you to produce those records by [INSERT DATE], but we would be willing within two weeks to provide you with a copy of any document or record that you specify is needed by you in connection with the preparation of your tax returns. In addition, you or your authorized representative may have access to your records in this office at any time during normal business hours.

[INSERT DATE]

If you have any questions with respect to the subpoena or with the procedurew outlined in this letter, you should call Assistant United States Attorney [INSERT NAME].

Very truly yours,

[INSERT NAME]
United States Attorney

____
[INSERT NAME]
Assistant U.S. Attorney

FORM: 30

ALTERNATE FORM OF LETTER ADVISING WITNESS OF PROCEDURE FOR DELIVERY OF DOCUMENTS

RE: Grand Jury Subpoena

Dear Sir:

The attached subpoena requires the appearance of you or an authorized custodain of the records of your firm before a Federal Grand Jury in [INSERT CITY AND STATE] at the date and time specified. However, if you prefer, you may comply with the requirements of the subpoena without the need to actually appear before the grand jury by either of the following procedures:

(1) by turning over all the subpoenaed documents to the Federal Agent who serves this subpoena upon you and requesting that he cause them to be returned to the grand jury for you, or

(2) by compiling the documents and mailing them to the undersigned by certified mail to [INSERT ADDRESS] again requesting that the documents be returned to the grand jury for you.

If you choose to follow either of the foregoing courses of action it will be unnecessary for you or anyone associated with your company to physically appear before the Grand Jury on the subpoena date. Additionally you will find enclosed a document inventory form which you should complete as soon as possible to insure that at the conclusion of the case all of your documents may be returned to you. If additional pages are required to complete the inventory simply xerox additional pages of this form. You should retain a copy of the completed receipt for your records.

Sincerely,

United States Attorney

By:
Assistant U.S. Attorney

FORM: 31

UNITED STATES ATTORNEY
________ DISTRICT OF ________

DOCUMENT RECEIPT

1. I ______________________________ of ______________________ have custody and control of the documents listed below, which I have submitted to Special Agent ________________ voluntarily.

2. The documents submitted are as follows:

____
____
____
____
____
____
____
____
____
____
____
____
____
____
____
____
____
____

Signature and Title of Persons Submitting Documents ____________

____

Signature of Agents Receiving Documents ____________________

____

Form No. 32

UNITED STATES DISTRICT COURT
________ DISTRICT OF ________
__________ DIVISION

IN RE:	:	NO.________
WITNESS' BEFORE THE GRAND JURY:	:	PETITION FOR COURT ORDER DIRECTING WITNESS TO FURNISH RECORDS, DOCUMENTS AND PAPERS TO THE GRAND JURY

The United States, through the United States Attorney for the ________ District of ________, petitions the Court for an Order directing ______________ to furnish before and to the Grand Jury of the United States District Court for the ________ District of ________, ________ Division, the following described records, documents and papers, to-wit: ______________________________
____
____

1. The Grand Jury for the ________ District of __________, __________ Division, is now conducting an investigation of alleged illegal activities in this District; said investigation involves possible violations of Title ___, United States Code, Section ________. ______________ has been subpoenaed duces tecum

by said Grand Jury and fully advised that _______ is (or is not) a potential defendant in its investigation and has been ordered to produce the aforesaid records, documents and papers.

2. It is essential and necessary to the aforesaid Grand Jury investigation that ______________ furnish before and to the Grand Jury all of said records, documents and papers for review, analysis, comparison with other records, documents and papers in the possession of the Grand Jury so as to aid and assist the Grand Jury in determining the entire nature and scope of all violations of Federal criminal laws.

3. ______________ appeared pursuant to subpoena before the Grand Jury on ______________, 19 __. At that time, the witness failed and refused to produce the records, documents and papers aforesaid. The witness was directed by the foreman of the Grand Jury to produce, forthwith, all of said records, documents and papers. The witness refused, asserting constitutional privilege.

4. The United States Attorney, petitioner in this matter, contends that all of said records, documents and papers are not personal, private, presently owned and possessed records, documents and papers of the witness and are, therefore, outside the protection of the Fifth Amendment. The United States Attorney further contends that the witness has no constitutional privilege whatsoever to refuse to produce such records, documents and papers as demanded by the Grand Jury. United States v. White, 322 U.S. 694; Rogers v. United States, 340 U.S. 367; Curcio v. United States, 354 U.S. 118; Bellis v. United States, 417 U.S. 85.

WHEREFORE, the United States Attorney prays that this Court enter an Order directing _______________ to furnish before and to the Grand Jury of the United States District Court for the ______ District of _____, ______ Division, the records, documents and papers, hereinbefore described.

Respectfully submitted,

United States Attorney

____
Assistant U.S. Attorney

CONTINUED

4 OF 5

ORDER DIRECTING WITNESS TO FURNISH RECORDS, DOCUMENTS AND PAPERS TO THE GRAND JURY

Form No.: 33

UNITED STATES DISTRICT COURT
______ DISTRICT OF ______
__________ DIVISION

IN RE: : MISCELLANEOUS NO.: _____

WITNESS BEFORE THE GRAND JURY: ORDER

On petition of the United States Attorney for the ________ District of _______, the Court having considered said petition finds:

1. The Grand Jury for the _________ District of _______, _______ Division, is now conducting an investigation involving possible violations of ____
____.

2. The witness, __________________, has been duly subpoenaed duces tecum and has appeared before the Grand Jury of this District Court on ________________, 19__. On that occasion, the foreman of the Grand Jury directed the witness to produce the records, documents and papers the witness was directed to furnish, as more fully set forth in the petition of the United States Attorney. On that occasion, the witness refused to furnish said records, documents and papers asserting ______ constitutional privilege. Said privilege was improperly asserted by the witness. The witness has no constitutional privilege to refuse to furnish the records, documents and papers demanded by the Grand Jury.

IT IS, THEREFORE, ORDERED that ____________________ furnish forthwith before and to the Grand Jury of the United States District Court for the ________ District of _________, the records, documents and papers, to wit: ___________________________
____
____

So Ordered.

____
United States District Judge

United States Attorney

____
Assistant U.S. Attorney

Form No.: 34

UNITED STATES DISTRICT COURT
__________ DISTRICT OF ________
__________ DIVISION

IN RE: : MISCELLANEOUS NO.: ________

WITNESS BEFORE THE GRAND JURY : JUDGMENT AND COMMITMENT

On Motion of the United States Attorney for the ________ District of ______, for an Order by the Court to enforce its Order of ______________, heretofore entered in the above-entitled matter, the witness ________________________, appearing before the Court in person and with counsel, and said witness having admitted that _______ had refused and would continue to refuse to furnish the records, documents and papers, described with particularly in this Court's Order before and to the Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that ________________ is in direct and continuing contempt of this Court for _________ failure to obey the Order of this Court, dated ___________, 19__, heretofore entered herein.

IT IS, THEREFORE, ORDERED that ______________________ be and hereby is committed to the custody of the United States Marshal for the __________ District of _______ until such time as _______ shall obey said Order.

So Ordered.

____
United States District Judge

United States Attorney

____
Assistant U.S. Attorney

Form No.: 35

UNITED STATES DISTRICT COURT
_________ DISTRICT OF _______
________ DIVISION

IN RE: : MISCELLANEOUS NO.:________

WITNESS BEFORE THE GRAND JURY: : PETITION FOR COURT ORDER DIRECTING WITNESS TO FURNISH EXEMPLARS OF HANDWRITING, PRINTING, FINGER AND PALM PRINTS BEFORE AND TO THE GRAND JURY

The United States, through the United States Attorney for the _______ District of ______, petitions the Court for an Order directing ______________________ to furnish before and to the Grand Jury of the United States District Court for the ________ District of ________, __________ Division, such exemplars of __________________ handwriting, printing, finger and pale prints, as the Grand Jury deems necessary, and in support thereof states the following:

1. The Grand Jury for the __________ District of _________, ____________ Division, is now conducting an investigation of alleged illegal activities in this District; said investigation involves possible violations of Title ____, United States Code, Section ____________. ___________________________ has been subpoenaed by said Grand Jury and fully advised that _________ is (or is not) a potential defendant in its investigation.

2. It is essential and necessary to the aforesaid Grand Jury investigation that ______________________ furnish before and to the Grand Jury exemplars of _____________handwriting, printing, finger and palm prints. Such exemplars will be used solely as a standard of comparison in order to determine whether the witness is the author of certain writings and for identification of certain finger and palm prints.

3. ________________________ appeared pursuant to subpoena before the Grand Jury on _____________, 19__. At that time, the wintess was directed by the foreman of the Grand Jury to furnish such exemplars out of the presence of the Grand Jury, under the supervision of the Grand Jury's duly designated agents. The witness refused, asserting constitutional privilege.

4. The United States Attorney, petitioner in this matter contends that handwriting and printing exemplars and finger and palm prints are identifying physical characteristics outside the protection of the Fifth Amendment. The United States Attorney further contends that the witness has no constitutional privilege whatsoever to refuse to furnish exemplars of handwriting, printing, finger and palm prints as demanded by the Grand Jury. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973); Gilbert v. California, 388 U.S. 263, 265-267 (1967); Schmerber v. California, 384 U.S. 757-761, 764 (1966).

WHEREFORE, the United States Attorney prays that this Court enter an order directing ______________ to furnish before and to the Grand Jury of the United States District Court for the _______ District of ______, ________ Division, such exemplars of _____ handwriting, printing, finger and palm prints as the Grand Jury deems necessary.

Respectfully submitted,

United States Attorney

____
Assistant U.S. Attorney

ORDER DIRECTING WITNESS TO FURNISH EXEMPLARS OF HANDWRITING, PRINTING, FINGER AND PALM PRINTS BEFORE AND TO THE GRAND JURY

Form No.: 36

UNITED STATES DISTRICT COURT
_________ DISTRICT OF _________
____________ DIVISION

IN RE:	:	MISCELLANEOUS NO.:______
WITNESS BEFORE THE GRAND JURY	:	O R D E R
	:	

On petition of the United States Attorney for the _______ District of _______, the Court having considered said petition finds:

1. The Grand Jury for the ________ District of ______, _________ Division, is now conducting an investigation involving possible violations of ____________________________________
____.

2. The witness, ________________, has been duly subpoenaed and has appeared before the Grand Jury of this District Court on _______________, 19__. On that occasion, the foreman of the Grand Jury directed the witness to furnish exemplars of handwriting, printing, finger and palm prints, as more fully set

forth in the petition of the United States Attorney. On that occasion, the witness refused to furnish said exemplars asserting _____ constitutional privilege. Said privilege was improperly asserted by the witness. The witness has no constitutional privilege to refuse to furnish the handwriting, printing, finger and palm print exemplars demanded by the Grand Jury.

IT IS, THEREFORE, ORDERED that ____________________ furnish forthwith before and to the Grand Jury of the United States District Court for the _________ District of _______, such exemplars of handwriting and printing as the said Grand Jury deems necessary.

So Ordered.

____
United States District Judge

United States Attorney

____
Assistant U.S. Attorney

Form No.: 37

UNITED STATES DISTRICT COURT
__________ DISTRICT OF ________
___________ DIVISION

IN RE:	:	MISCELLANEOUS NO.: ______
WITNESS BEFORE THE GRAND JURY	:	JUDGMENT AND COMMITMENT
	:	

JUDGMENT AND COMMITMENT ON ORDER DIRECTING WITNESS TO FURNISH EXEMPLARS OF HANDWRITING, PRINTING, FINGER AND PALM PRINTS BEFORE AND TO THE GRAND JURY

On Motion of the United States Attorney for the __________ District of ____________, for an Order by the Court to enforce its Order of _______________________, heretofore entered in the above-entitled matter, the witness, _______________________, appearing before the Court in person and with counsel, and said witness having admitted that _____ had refused and would continue to refuse to furnish exemplars of ______ handwriting, printing, finger and palm prints before and to the Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that __________________ is in direct and continuing contempt of this Court for ______ failure to obey the Order of this Court, dated __________, 19__, heretofore entered herein.

IT IS, THEREFORE, ORDERED that ________________ be and hereby is committed to the custody of the United States Marshal for the __________ District of _______ until such time as _________ shall obey said Order.

So Ordered.

____
United States District Judge

United States Attorney

____
Assistant U.S. Attorney

FORM NO.: 38

LETTER TO CUSTODIAN OF BANK RECORDS

Custodian of Records
[INSERT NAME AND ADDRESS
OF BANK]

Re: Grand Jury Subpoena Duces Tecum

Dear Sir of Madam:

You are being served with a subpoena for records which requires that certain records be delivered to the United States Grand Jury for the District of __________. Please contact Assistant U.S. Attorney [INSERT NAME] upon receipt of this subpoena.

You have the right to present the records, whose production is commanded by the subpoena, directly to the Grand Jury. However, in lieu of personally appearing before the Grand Jury, you may, if you wish, comply with the subpoena by turning over the records described in the subpoena to any duly authorized agent of the Grand Jury or to me, prior to the date of your appearance.

You will also find enclosed a form upon which you may request reimbursement by the Department of Justice of authorized expenses incurred by you in producing records under the terms of the subpoena. You must complete and sign the form in order to obtain any reimbursement. Requests for reimbursement will not be honored if the Department of Justice reimbursement form is not returned as requested. Finally, you will find enclosed a notice containing information about the expenses for which you may be authorized to obtain reimbursement, under the terms of the Right to Financial Privacy Act of 1978.

Very truly yours,

United States Attorney

By: ____________________
[INSERT NAME]
Assistant U.S. Attorney

U.S. Department of Justice
Washington, D.C. 20530

FORM 39

Request for Financial Information (Authorization, Purchase Order, Receiving Report)

This form shall only be used when requesting financial records of individuals and partnerships of five or fewer individuals.

1 Purchase Order Number: 127600	2 Date Order Prepared:	3 Case Number: *(Optional)*

Section A—Authorization and Purchase Order

4 Name and Address of Financial Institution:

5 Deliver To:

6 Return Date:

7 Remarks:

8 Name of Requestor: *(Type or Print)*

9 Telephone Number:

10 Date of Request:

Section B—Financial Institution Invoice

No Payment Shall Be Made Unless Expenses Are Itemized Below Or On Your Form To Be Attached.

11 Service/Financial Records Provided:	Quantity	Unit Price		Amount
		Cost	Per	

12 Signature of Financial Institution Official:

13 Date Signed:

Total Amount Claimed By Financial Institution

Section C—Receiving Report

16 Disallowance *(See Attached)*

14 I certify that the articles and services listed were received

15 Date Received:

17 Net To Financial Institution

18 Right to Financial Privacy Act—Public Law 95-630
(12 U.S.C. 3401-3422) Request Pursuant To: *(Check One Only)*

SECTION		OBJECT CLASS
☐ 3404	Customer Authorization	2540
☐ 3405	Administrative Subpoena or Summons	2541
☐ 3406	Search Warrant	2542
☐ 3407	Judicial Subpoena	2543
☐ 3408	Formal Written Request	2544
☐ 3413	Grand Jury Subpoena	2545
☐ 3414	Special Procedures	2546

19 Signature of Approving Official

20 Accounting Classification Code

FY	FC	1	2	3	4	5	PROJ

21 Schedule and Voucher Number

22 Remarks:

Original—~~Payment~~ Copy

FORM OBD-211
MAY 81

GENERAL

This is a multi-purpose form designed to serve as an Authorization, Purchase Order, Itemized Invoice, Receiving Report and Payment Voucher in conjunction with "requests for financial information," pursuant to the Right to Financial Privacy Act of 1978, P.L. 95-630, Title XI, 12 U.S.C. 3415.

PREPARATION INSTRUCTIONS

ITEM 1 - A Purchase Order Number will be preprinted on each form. This number will be used for reference purposes on any correspondence relating to this specific request for financial information.

ITEM 2 - Self-explanatory

ITEM 3 - This block may be used to identify the specific case for which the financial information is required. This block may be left blank.

SECTION A - AUTHORIZATION AND PURCHASE ORDER (To be completed by the requesting official).

ITEM 4 - Enter the name and mailing address of the financial institution being requested to furnish financial information.

ITEM 5 - Enter the name and address to which the financial information is to be sent by the financial institution. This will normally be the name and address of the requesting official.

ITEM 6 - Enter the date the financial information is required.

ITEM 7 - Include, if appropriate, any pertinent information related to the purchase order not provided for elsewhere on the form.

ITEMS 8, 9 and 10 - Self-explanatory.

SECTION B - FINANCIAL INSTITUTION INVOICE (To be completed by the financial institution).

ITEM 11 - Self-explanatory. Completion of this block constitutes an itemized bill or invoice for reimbursement for the costs incurred in providing the information requested.

ITEM 12 and 13 - Self-explanatory.

SECTION C - RECEIVING REPORT (To be completed by the requesting official, when the requested financial information has been delivered).

ITEM 14 and 15 - Self-explanatory.

ITEM 16 - This block should be used to reflect any differences between the amount claimed by the financial institution and the correct amount to be reimbursed. Differences may result from computation errors, or failure of the financial institution to deliver information requested.

ITEM 17 - Enter the amount certified to be proper for payment.

ITEM 18 - Check the box which identifies the appropriate procedure authorized by the Act, which necessitates the request for financial information.

ITEM 19 and 20 - These blocks must be signed and dated by an official of the organization whose funds will be charged. His or her signature constitutes a statement that the records to which the invoice refers were required for official business and were provided by the financial institution in accordance with the ordering instrument.

ITEM 21 - The Schedule and Voucher Number will be entered by the office which actually schedules the approved amount for payment by the Treasury Department.

ITEM 22 - Enter, if appropriate, any data not provided for elsewhere on the receiving report, such as, reasons for any claim amounts disallowed.

Form No.: 40

NOTICE OF RIGHT TO REIMBURSEMENT

You have been servied with a subpoena that requires the production of certain financial records. Pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. Section 3401 et seq., the United States Department of Justice is required to reimburse a financial instituion for certain costs that it incurs in locating, reproducing, and/or transporting financial records of a customer in order to comply with a subpoena. This Notice explains the extent to which reimbursement is authorized by the Act. For a complete explanation you should consult the Act and your attorney.

Covered Expenses and Rate of Reimbursement

Reimbursement of reasonably necessary costs that have been directly incurred in complying with the subpoena shall be paid according to the following schedule:

1. Search and Processing Costs

Costs are limited to the total amount of personnel time incurred in locating, retrieving, reproducing, packaging, and preparing the requested financial records for shipment. The rate of reimbursement will be computed on the basis of $2.50 per person per quarter hour or fraction thereof. If itemized separately, those costs may also include computer time and necessary supplies.

2. Reproduction Costs

Reimbursement for copies of documents shall be at the rate of 15¢ per page. Photographs, films, and other materials will be reimbursed at actual cost.

3. Transportation Costs

Reimbursement shall be made for direct costs incurred to transport employees, to locate and retrieve material and for direct costs incurred to transport the materials to the place of examination. Before incurring the expense of sending exployees out of state to gather records, you should consult with the Assistant U.S. Attorney whose name appears on the subpoena.

Conditions for Reimbursement

Reimbursement of expenses shall be made only when all of the following requirements are met:

1. The entity seeking reimbursement must be a "financial institution" within the meaning of the Act. Banks, trust companies, savings and loan or building and loan companies, consumer finance institutions, industrial loan companies,

homestead associations, credit card issuses as defined in Section 103 of the Consumer Credit Protection Act 15 U.S.C. Section 1602(N), and credit unions are all "financial institutions" within the meaning of the Act. The financial institution must be located in any state or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa or the Virgin Islands. Foreign offices are not covered by the Act.

Entities such as bonding companies, insurance companies, brokerage firms, real estate sales firms, auctioneers, accounting forms, credit reporting bureaus, small business investment companies, government-operated lending agencies (e.g., SBA), and financial institution supervisory or regulatory agencies (e.g., FDIC) are not "financial institutions" within the meaning of the Act. Accordingly, reimbursement of costs incurred by such entities in complying with the subpoena cannot be authorized.

2. Reimbursement may be made only where the records called for by the subpoena are checking, savings, share, loan, or credit card account records that pertain to accounts of (a) individuals or (b) partnerships with five or fewer partners. Reimbursement cannot be made where the records called for by the subpoena pertain to the accounts of corporations, associations, trusts, government agencies, or partnerships with more than five partners.

3. The financial records must be held by a specific financial institution, must pertain to a customer's utilization of the services of the specific financial instituion in question, and must relate to an account maintained by that customer at that institution, which account is in the true name of the customer. Consequently, the Act does not cover reimbursement for such items as forged or counterfeit financial instruments, records relating to an account under a fictitious name, contents of a safe deposit box sought pursuant to search warrant, or financial records in the possesion of an instituion other than one at which the person maintains an account. Nor can reimbursement be made for expenses incurred in producing records pertaining to functions that do not invlove an account relationship, such as a teller's shortages or overages, employment and other internal records.

4. Reimbursement shall not be made until the financial institution satisfactorily complies with the attached subpoena. If you find you are unable to comply with the subpoena by the return date, it is imperative that you contact the Assistant U.S. Attorney whose name appears on the subpoena prior to the return date to arrange for an extension.

Exceptions

A financial institution is not entitled to reimbursement under the Act for costs incurred in assembling or providing the following financial records or information:

1. Financial records sought by a government authority in connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of the records or at a legal entity which is not a customer.

2. Financial records sought by a government authority under the Federal Rules of Criminal or Civil Procedure, or comparable rules of other courts in connection with litigation to which the government authority and the customer are parties.

3. Financial records required to be reported in accordance with any federal statute or rule promulgated thereunder.

4. Finanical information sought by a government authority in accordance with the Right to Financial Privacy Act procedures, and for a legitimate law enforcement inquiry, and limited only to the name, address, account number and type of account fo any customer or ascertainable group of customers associated (a) with a financial transaction or class of financial transactions or (b) with a foreign country or subdivision thereof, in the case of a government authority exercising financial controls over foreign accounts in the United States under Section 5(b) of the Trading with the Enemy Act, the International Emergency Economic Powers Act, or Section 5 of the United Nations Participation Act.

5. Financial records that are not identified with or identifiable as being derived from the financial records of a particular customer.

Payment Procedure

In order to receive reimbursement, the financial institution must, upon full compliance with the subpoena, complete Section B (Financial Institution Invoice) of Form ________ which is attached hereto, itemizing search and processing costs, the reproduction costs and any transportation costs incurred, and forward it to:

Office of the United States Attorney
[INSERT ADDRESS OF U.S. ATTORNEY]

Attn: (the Assistant U.S. Attorney whose name appears on the subpoena)

Form No.: 41

LETTER REGARDING REIMBURSEMENTS FOR PROVIDING FINANCIAL RECORDS

RE: Grand Jury Subpoena for records of account(s) of:

Dear Sir:

The United States Attorney hereby advises you that pursuant to the Right to Financial Privacy Act, 12 U.S.C. Section 3401, et seq., you are entitled to financial reimbursement of reasonably necessary costs directly incurred by your institution in assembling or providing the above-referenced financial records.

In order for reimbursement to be made, it is necessary that you submit an itemized bill or invoice showing specific details concerning the cost your institution has incurred for the search, processing, reproduction and transportation of these records. The itemized bill or invoice must include the following:

1. Search and Processing Costs

a. Reimbursement of search and processing costs shall be the total amount of personnel direct time incurred in locating and retrieving, reproducing, packaging and preparing financial records for shipment. The rate of search and processing cost is computed on the basis of $2.50 per quarter hour or fraction thereof, and is limited to the total amount of personnel time spent in locating and retrieving documents, or reproducing, packaging and preparing those documents for shipment.

2. Reproduction Cost

a. The rate for reproduction costs for making copies is 15¢ for each page, including copies produced by reader-printer reproduction processes. Photographs, films, and other materials are reimbursed at actual cost.

3. Transportation Reimbursement

a. Reimbursement for transportation costs shall be for necessary costs directly incurred in transporting personnel to locate and retrieve the information requested, and necessary costs directly incurred solely by the need to convey the requested material to the place of examination.

It should also be noted that no payment will be made by the United States until your institution satisfactorily complies with the legal process previously served upon it.

Should you have any questions concerning reimbursement under the Right to Financial Privacy Act, please contact me.

Yours very truly,

United States Attorney

Assistant U.S. Attorney

Form No.: 42

LETTER DENYING REIMBURSEMENT

RE: Allowable Cost Reimbursement-
The Right to Financial Privacy Act

Dear Sir:

Receipt is acknowledged of your statement for reimbursement for the production of financial records pursuant to a grand jury subpoena.

Please be advised that The Right to Financial Privacy Act (Title 12 United States Code, Section 3401 et. seq.) and the regulations of the Federal Reserve Board enacted in accordance with specific provisions of this act, permit reimbursement only for records of individuals or partnerships of five (5) or fewer partners. Reimbursement cannot be made for records relating to the accounts of corporations, large partnerships, associations and other legal entities.

Accordingly, we return herewith your statement.

Very truly yours,

UNITED STATES ATTORNEY

By:
Assistant U.S. Attorney

FORM: 43

SAMPLE PERSONAL RECORDS SUBPOENA ATTACHMENT

1. Any and all originals of the following documents (and copies thereof made before service of this subpoena), in your possession or subject to your control, for the period [INSER TIME PERIOD DESIRED]:

A. Retained copies of your federal, state, and local income and other tax returns filed by you for the years [INSERT YEARS DESIRED], and workpapers used in the preparation of such returns.

B. Retaines copies of any federal, state, and local income and other tax returns filed by any corporations and partnerships in which you have or had a financial interest during the years [INSERT YEARS DESIRED], and workpapers used in the preparation of such returns.

C. All records in any way relating to any bank account maintained by you or any member of your immediate family, or over which you or they have exercised control, or as to which you or they are or were a signatory, or in which you or they had or have a financial interest (including: (a) checking account statements, cancelled checks, checkbooks, checkstubs or registers, check vouchers, and deposit slips; (b) all savings account records; (c) all records of loans made or received; (d) all records of certificates of deposit and other time deposit items purchased or redeemed; and (e) records of all safe deposit boxes).

D. All records of purchase, ownership, and sale of stocks, bonds, and other securities either made by you or any member of your immediate family, or by anyone else on your or their behalf (including securities account statements, margin account statements, checks, check stubs, deposit slips, correspondence, notes, and memoranda).

E. All records of purchse, ownership, and sale of real or leasehold property, either by you or any member of your family, or by anyone else on your or their behalf (including purchase contracts, settlement sheets, contracts of sale, notes, mortgages, deeds of trust, leases, correspondence, memoranda, and notes of meetings and/or telephone calls).

F. All records of purchase, ownership, and sale of any legal or equitable interest in any partnership or sale proprietorship, either by you or any member of your family, or by anyone else on your or their behalf.

G. All records of loans recieved and made by you or by any member of your family, or by anyone else on your or their behalf.

H. All records of gifts received by you or any member of your family, or by anyone else on your or their behalf, or at your direction or request.

I. All financial statements prepared by you or on your behalf (including financial statements prepared and submitted in connection with any application, made by you for any loan, either directly or indirectly, and either individually or as guarantor or accomodation party for any other individual or entity).

J. All receipts, bills, invoices, vouchers, statements of account, and other records used by you, or by anyone else on your behalf, used in determining your gross income, adjusted gross income, and taxable income, on your federal income tax return.

K. All diaries, calendars, chron files, and similar collections of information concerning your whereabouts and activities.

L. All telephone records showing long distance telephone toll calls made by you or by anyone else using any telephone to which you are the subscriber.

M. All airline, plane, and other tickets for travel by you and by the members of your family.

N. All records of credit card or other charge account purchases made by you or any member of your family, or by anyone else on your or their behalf.

O. All records of reimbursement of expense received by you from any source.

P. All records of inheritances, bequests, and other such gifts received by you or any member of your family.

Q. All records of insurance claims made by you or any member of your family for or on account of any death or any injury to person or property (including insurance policies, binders, riders, claims, claim forms, medical reports, investigative reports, checks, deposit slips, correspondence, notes, and memoranda).

2. Any and all original documents (and copies thereof made before service of this subpoena), in any way relating to any transaction between you, and any of the following individuals and entities, or any entity of which any such individual is an owner, officer, director, manager, partner, or employee, during the period [INSERT TIME PERIOD DESIRED]:

[INSERT NAMES OF INDIVIDUALS AND ENTITIES]

3. [OTHER PARAGRAPHS, AS APPROPRIATE, DESCRIBING SPECIFIC SUBPOENAED MATERIALS].

FORM: 44

SAMPLE PARTNERSHIP RECORDS SUBPOENA ATTACHMENT

Any and all originals of the following documents (and copies thereof made before service of this subpoena), in your custody or subject to your control, for the period [INSERT TIME PERIOD DESIRED]:

1. Names and addresses of all individuals and/or entities that now have or have ever had any direct or indirect financial or ownership interest in the [INSERT NAME OR PARTNERSHIP] (hereinafter referred to as the "partnership").

2. Copies of partnership agreements including any amendments thereto, and all minutes or other records of partnership meetings.

3. Retained copies of all federal, state and local partnership as information returns filed for the years [INSERT YEARS DESIRED], and workpapers used in the preparation of such returns.

4. All banking records (including (a) checking account bank statements, cancelled checks, checkbooks, check stubs or registers, check vouchers, and deposit slips; (b) all savings account records; (c) all records of loans made or received; (d) all records of certificates of deposit and other time deposits purchased or redeemed; and (e) records of all safe deposit boxes).

5. All partnership ledgers and journals (including the general ledger, cash receipts journal, sales journal, cash disbursements, journal, voucher register, and any other ledgers and journals maintained by the partnership).

6. All records of capital contributions and cash or property withdrawals from any and all partners' capital accounts.

7. All financial statements prepared by or on behalf of the partnership.

8. All vendor invoices and statements of accounts, customer billing invoices and statements of account, vouchers, and any other records used in determing gross income, deductions, and the balance sheet reflected on the partnerhship tax infor- mation returns.

FORM: 45 SAMPLE CORPORATE RECORDS SUBPOENA ATTACHMENT

Any and all originals of the following documents (and copies thereof made before service of this subpoena), in your custody or subject to your control, for the period [INSERT TIME PERIOD DESIRED]:

1. All corporate ledgers and journals of the [INSERT NAME OF CORPORATION] (hereinafter referred to as the "corporation") (including the general ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporation).

2. All banking records of the corporation (including (a) bank statements, cancelled checks, checkbooks, check stubs or registers, check vouchers, and deposit clips; (b) all savings account records; (c) all records of certificates of deposit and other time deposits purchased or redeemed; and (d) records of all safe deposit boxes).

3. All records of loans received and made by the corporation, including any and all correspondence related to such loans.

4. All corporate minutes and/or other records or recordings, of any kind whatsoever, of corporate meetings and the corporate charter and by-laws, including any revisions and amendments thereto.

5. All financial statements prepared by or on behalf of the corporation.

6. All retained copies of federal, state and local tax returns for the years [INSERT YEARS DESIRED], and workpapers used in the preparation of such returns.

7. Corporate stock ledgers.

8. All vendor invoices and statements of accounts, customer billing invoices and statements of account, vouchers, and other records used in determining gross income deductions, and the balance sheet reflected on the corporate income tax returns.

9. All records in any way connected with the acquisition or sale of real and/or leasehold property by the partnership, either improved or unimproved (including purchase contracts, settlement sheets, contracts of sale, deeds, notes, mortgages, deeds of trust, leases, correspondence, memoranda, and notes of meetings and/or telephone calls).

10. All records of tangible and intangible personal property legally or equitably owned by the partnership (including, for example, stock and bonds).

11. All records relating to partnership construction loan agreements and mortgages, draws, fees, and permanent financing commitments and mortgages (including all correspondence, memoranda, notes, and other materials relating thereto).

12. All personnel files of current and former employees and consultants.

13. All U.S. Information Returns (Form 1096 and 1099), Employer's Quarterly Federal Tax Returns (Form 941) and Employer's Annual Federal Unemployment Tax Returns (Form 940) filed by the partnership.

14. All travel and entertainment records.

15. All records of commissions, rebates, discounts, bonuses, gifts, or other payments made by the partnership or by any of its members, to any person or entity who is not an officer, director, manager, member, or employee of the partnership.

16. All agreements, contracts, memoranda of understanding, and other such documents, reflecting or containing any agreement between the partnership, on the one hand, and any of the following individuals or entities, or any entity of which any such individual is an owner, officer, director, manager, partner, or employee, on the other hand:

[INSERT NAMES OF INDIVIDUALS AND ENTITIES]

FORM: 46 SAMPLE BANK SUBPOENA ATTACHMENT

Any and all original documents (or microfilm copies where originals are not available), in the bank's custody or subject to its control, that, in any way relate to any of the following persons and entities, or to any checking, savings, or loan accounts for, by, or on behalf of them either individually or on behalf of, in trust for, or in combination with any other person or entity for the period [INSERT TIME PERIOD]:

[INSERT LIST OF NAMES OF PERSONS AND ENTITIES WHOSE RECORDS ARE SUBPOENAED]

including, but not limited to the following documents:

1. Signature cards of all accounts.
2. Monthly checking statements.
3. Copies of all cancelled checks.
4. Transcripts of savings accounts.
5. Copies of deposit slips for checking and savings accounts, and deposit items to which those slips relate.
6. Loan records, including collateral loan records.
7. Loan ledger sheets.
8. Safe deposit box records of access.
9. Financial statements and credit reports.
10. Copies of Promissory notes.
11. Mortgage records and applications.
12. Copies of Certificates of deposit.
13. Investment and/or custodian accounts.

14. Records of purchase of bearer bonds.
15. Safe keeping register records.
16. Records of transfer of funds by wire or collection.
17. Receipts of delivery of securities.
18. Copies of application for purchase of manager's checks, cashier's checks and/or treasurer's checks together with the checks that were purchased.

FORM: 47 SAMPLE ACCOUNTANT'S RECORDS SUBPOENA ATTACHMENTS

Any and all original documents (and copies thereof made before service of this subpoena), in your custody or subject to your control, whether owned by you or by anyone else, that in any way relate to the following persons and entities, whether individually or in combination with any other person or entity, for ther period [INSERT TIME PERIOD DESIRED]:

[INSERT NAMES OF PERSONS AND ENTITIES WHOSE RECORDS ARE SUBPOENAED]

including but not limited to the following materials: federal and state tax returns (including retained copies thereof), work-papers, finacial statements, check spreads, audit reports and other records of financial examinations, correspondence, memoranda, notes, and copies of documents prepared for filing with any agency of the federal government, any state or local government, or any bank or other financial institutions.

FORM: 48 SAMPLE STOCKBROKER'S RECORDS SUBPOENA ATTACHMENTS

Any and all original documents, in your custody or subject to your control, that in any way relate to the following persons and entities, whether individually or in combination with any other person or entity, for the period [INSERT TIME PERIOD DESIRED]:

[INSERT NAMES OF PERSONS AND ENTITIES WHOSE RECORDS ARE SUBPOENAED].

including but not limited to the following materials: applications for accounts, account statements and other records of securities purchases and sales (including records of margin accounts and cash proceeds kept or maintained by you for or on behalf of any of the individuals or entities described above), stock ledger sheets, checks, check stubs, deposit slips, correspondence, notes, and memoranda.

FORM: 49 LETTER REGARDING NONDISCLOSURE TO BANK'S CUSTOMER

RE: Grand Jury Subpoena

Dear Sir:

Pursuant to an official criminal investigation of a suspected federal offense being conducted by the federal grand jury in the _________ District of _________ it is requested that your institution furnish the documents and information requested on the attached subpoena.

As you are aware subpoenas issued in connection with proceedings before a grand jury are specifically excluded from the customer notification provision of the Financial Privacy Act (see 12 U.S.C. Section 3413 (i)).

You are not to disclose the existence of this subpoena or the fact of your compliance for a period of 90 days from the date of the subpoena. Any such disclosure could seriously impede the investigation being conducted and, thereby, interfere with the enforcement of the federal criminal law.

Sincerely,

UNITED STATES ATTORNEY

BY:
Assistant United States Attorney

FORM: 50   LETTER REGARDING EXTENSION OF NONDISCLOSURE TIME

Custodian of Records

Re: Subpoena Duces Tecum Dated [INSERT DATE]

Dear Sir or Madam:

You were previously served with a Grand Jury subpoena duces tecum, dated [INSERT DATE], which required [YOUR COMPANY] to produce certain records before the United States Grand Jury for the District of [INSERT STATE]. That subpoena was issued as part of an official criminal investigation _________ conducted by the Grand Jury concerning allegations of _____________federal criminal offenses. In particular, the subpoena required that your company furnish to the Grand Jury telephone toll billing records pertaining to telephoen numbers [INSERT PHONE NUMBERS] for the period [INSERT TIME PERIOD SUBPOENAED], inclusive.

By letter, dated [INSERT DATE], you were requested not to disclose the subpoena to your customer for a period of 90 days. The purpose of this letter is to request that you not disclose the service upon you of the Grand Jury subpoena, or of the nature of the documents requested or produced, for an additional period of 90 days from [INSERT DATE]. Any such disclosure might impede the investigation being conducted by the Grand Jury, and thereby interfere with the enforcement of federal law.

Very truly yours,

UNITED STATES ATTORNEY

BY:

[INSERT NAME]
Assistant U.S. Attorney

FORM: 51

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT STATE]

IN RE: GRAND JURY SUBPOENAS :
DUCES TECUM, DATED : MISC. NO. ____________
[INSERT DATE] :

MOTION FOR ORDERS PROHIBITING NOTIFICATION OF
SERVICE OF GRAND JURY SUBPOENAS DUCES TECUM

The government respectfully moves the Court, pursuant to 12 U.S.C. Section 3409, and 28 U.S.C. Section 1651, and pursuant to the Federal Rules of Criminal Procedure, for an Order prohibiting [INSERT NAME OF BANK] (hereinafter, the "Bank") from serving upon its customers notification of the service upon that institution of a Grand Jury subpoena duces tecum, and states as follows:

1. On [INSERT MONTH AND YEAR], this Court assigned to the [INSERT MONTH AND YEAR] Term, Special Grand Jury, an investigation of [INSERT BRIEF DESCRIPTION OF NATURE OF INVESTIGATION]. [On [INSERT DATE] that investigation was transferred by the Court to the [INSERT MONTH AND YEAR] Term Special Grand Jury No. 1].

2. On or about [INSET DATE OR SUBPOENA], a subpoena duces tecum was issued, on behalf of the Grand Jury, addressed to the custodian of records of the Bank, and calling for production of certain financial records before the Grand Jury. A copy of that subpoena is attached hereto. There is reason to believe that the records, whose production is sought under the terms of the subpoena, are relevant to the Special Grand Jury's present investigation.

3. The custodian of records of the Bank has notified the Government that, if served with a Grand Jury subpoena, in accordance with the Bank's policy [and applicable [INSERT STATE NAME] state law], the Bank will undertake immediately to notify its customers of the fact of service of that subpoena, despite the fact such notice is not required by the Right to Financial Privacy Act. Such disclosure to the customers of the financial institution subpoenaed will result in serious prejudice to the Special Grand Jury's ongoing investigation. In particular, notification of those customers of the service of that subpoena may seriously jeopardize the Special Grand Jury's investigation by impairing its ability to obtain the testimony of other potential witnesses, [and will seriously jeopardize an ongoing undercover investigative effort presently being conducted by the (INSERT NAME OF AGENCY)].

WHEREFORE, the Government respectfully requests this Court issue an order as follows:

1. Directing that, for a period not to exceed 90 days, the Bank shall not provide its customers, either directly or indirectly, with notice of the fact of service of the Grand Jury subpoenas duces tecum dated [INSERT DATE OF SUBPOENA], or notice of the nature of the documents whose production is commanded under the terms of the subpoena, or notice of the fact that such documents have been produced before the Grand Jury in compliance with the subpoena's terms: and

2. Commanding that this motion and the order issued pursuant hereto shall remain sealed for a period of time not to exceed 90 days, or until further order of this Court, whichever shall first occur, and providing that a copy of the order issued pursuant hereto may be served upon the custodian of records of the Bank; and

3. Commanding that a copy of the Grand Jury subpoena duces tecum dated [INSERT DATE OF SUBPOENA], attached hereto, shall remain sealed until the Special Grand Jury concludes its present investigation or until further order of this Court, whichever shall first occur.

Respectfully submitted,

United States Attorney

By: ______________________
[INSERT NAME]
Assistant U.S. Attorney

[Attach a copy of Grand Jury Subpoena Duces Tecum].

FORM: 52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

IN RE: GRAND JURY SUBPOENAS :
DUCES TECUM, DATED : MISC. NO. ________________
[INSERT DATE OF SUBPOENA] :

MEMORANDUM IN SUPPORT OF MOTION FOR
FOR AN ORDER PROHIBITING NOTIFICATION
OF THE SERVICE OF GRAND JURY SUBPOENA

The United States has moved the Court to prohibit [INSERT NAME OF BANK] (hereinafter, the "Bank") from disclosing to its customers, for a period of ninety days, that the bank has been served with a Grand Jury subpoena duces tecum. The motion is filed under the terms of the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq., pursuant to the Court's inherent powers, and under the provisions of the All Writs Act, 28 U.S.C. 1651. See United States v. N.Y. Tel. Co., 434 U.S. 159, 172-178 (1977). The Order is drawn so that no one will be prohibited from relating "facts within their knowledge acquired beyond the grand jury room." United States v. Central Supply Association, 34 F. Supp. 241, 245 (N.D. Ohio 1940). Rather, by the least restrictive available means, the Order will simply defer the time at which the Bank will become free to disclose publicly what it stated to or learned from the Grand Jury. King v. Jones, 319 F. Supp. at 658, 659.

In pertinent part, Rule 6(e) of the Federal Rules of Criminal Procedure provides that "No obligation of secrecy may be imposed upon any person except in accordance with this rule." Although seemingly absolute on its face, those parts of Rule 6(e) were designed to ameliorate the "unnecessary hardship" of prohibiting a grand jury witness from imposing an oath of secrecy upon the witness concerning testimony before the grand jury. F.R.CR.P., Rule 6(e), Advisory Committee Note 2 (emphasis supplied).

Both prior and subsequent to the enactment of Rule 6(e), the courts have recognized that some circumstances exist in which some appropriate limitation upon disclosure of matters may be imposed upon grand jury witnesses, despite the seemingly absolute language of the Rule. In Goodman v. United States, 108 F.2d 215 (9th Cir. 1939), the court found it "well within the discretionary power of the court to impose an obligation of secrecy not alone upon grand jurors, but upon the witnesses, if the court believes the precaution necessary in the investigation of crime." Id. at 520. And, in United States v. Central Supply Association, 34 F. Supp. 241, 245 (N.D.Ohio 1940), the court enumerated at least five circumstances in which such a precaution might be found "necessary in the investigation of crime." See King v. Jones, 319 F. Supp. 653, 658 (N.D.Ohio 1970).

Following the enactment of Rule 6(e) in 1940, 5 F.R.D. 573, 583 (1946), the witness secrecy provision of Rule 6(e) was not subjected to judicial scrutiny until the decision in United States v. Smyth, 104 F. Supp. 279 (N.D.Cal. 1952). Finding that the rule enunciated in Goodman survived the enactment of Rule 6(e) the Smyth court noted that:

> . . .the secrecy of grand jury proceedings is of

> substance and not of procedure. The power of the trial court to enforce secrecy is jurisdictional and a necessity if grand juries are to function.
> The Federal Constitution encysted the common law grand jury with all its incidents. The Rules could not change the Constitution nor prevent the court from imposing secrecy upon everyone in connection with such a proceeding in the public interest. See also United States v. Central Supply Association, D.C., 34 F. Supp. 241.

(104 F. Supp. at 780-81 n.5).

The same conclusion has been reached by each of the other courts that have considered the courts' powers to impose some appropriate limitations upon the disclosures which federal grand jury witnesses are able to make. See In re Proceedings Before The Grand Jury Summoned October 12, 1970, 321 F. Supp. 238, 240 (N.D.Ohio 1970); King v. Jones, 319 F. Supp. 653, 657 (N.D.Ohio 1970); In re Grand Jury Witnesses, 370 F. Supp. 1282, 1285 n.5 (S.D. Fla. 1974).

Furthermore, the entry of an Order such as that requested here is well within the powers of the Court. The grand jury is an arm of the court, which exercises jurisdiction of persons ans subjects under the authority and supervison of the Court. In re Long Visitor, 523 F.2d 443, 446-47 (8th Cir. 1975), and In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976). As the Supreme Court noted in Brown v. United States, 359 U.S. 41, 49 (1958):

> A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the tesimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to justify if, after appearing, he refused to do so.

See also O'Bryan v. Chandler, 352 F.2d 987, 990 (10th Cir. 1965); In re A & M Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963); In re Seiffert, 446 F. Supp. 1153 (N.D.N.Y. 1978). The power of a district court to enforce secrecy is jurisdictional and an incident of the court's supervisory authority over grand juries "encysted" by the Consitution. United States v. Smyth, 104 F. Supp. at 280-81 n.5.

Federal courts are endowed by the All Writs Act, Title 28, United States Code, Section 1651, with "the power to issue such commands. . .as be necessary to effectuate and prevent the frustration of orders. . .previously issued in [the] exercise jurisdiction otherwise obtained." United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). While "the power of federal courts to impose duties upon third parties is not without limits," id., the district courts should be "trusted to exercise their powers under the All Writs Act only in cases of clear necessity and to balance the burden imposed upon the party required to render assistance against the necessity." Id. at 165 n.5. Though "unreasonable burdens may not be imposed," the power conferred by the All Writs Act is available "as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'" Id. at 172, citing Harris v. Nelson, 394 U.S. 286, 299 (1969), and Price v. Johnston, 334 U.S. 266, 282 (1948).

The requested Order is sought under the terms of the All Writs Act, to render effective the process of this grand jury. That process consists in the subpoena duces tecum to which

this Order relates. The subpoena is no more than "orders. . . previously issued in [the] exercise of jurisdiction otherwise obtained" and properly exercised, either directly by the district court or through its investigative arm, the grand jury. The requested Order is simply a "command" issued by the court, in the exercise of its discretion, "necessary to effectuate and prevent the frustration" of the grand jury's process. Appropriately balancing "the burden imposed upon the party required to render assistance against the necessity" presented by the facts with compelled the government to seek issuance of the Order, the governement contends that the Court should find the Order both permissible and necessary under these circumstances; essential to preserve the legitimate functions of the grand jury; rationally related to the reasons for which it is sought; and not overly burdensome of those subject to the Order or on the customers of the Bank. Compare United States v. New York Telephone Co., supra.

Finally, the Court should note that the entry of an Order such as that sought here is not without precedent. Indeed, in a recent decision, the Fourth Circuit implicitly approved the entry of such an Order under similar circumstances. See In re Searingen Aviation Corporation, Etc., 486 F. Supp. 9 (D.Md.), affid 605 F.2d 125 (4th Cir. 1979).

Respectfully submitted,

United States Attorney

By: ______________________
[INSERT NAME OF AUSA]
Assistant U.S. Attorney

FORM: 53

AFFIDAVIT IN SUPPPORT OF MOTION FOR ORDERS PROHIBITING NOTIFICATION OF SERVICES OF GRAND JURY SUBPOENAS DUCES TECUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT NAME]

IN RE: GRAND JURY SUBPOENAS :
DUCES TECUM, DATED : MISC. NO. ______________
[INSERT DATE] :

SAMPLE

A F F I D A V I T

I HEREBY CERTIFY that on this _____ day of ______________, before me, a Notary Public in and for the City of [INSERT NAME OF CITY AND STATE], personally appeared [NAME OF AFFIANT] and made oath in due form of alw as follows:

1. The affiant is a Criminal Investigator employed by the [INSERT NAME OF AGENCY] and assigned the responsibility of assisting the [INSERT MONTH AND YEAR] Term Special Grand Jury in this investigation of certain offenses against the Federal criminal laws involving [INSERT BRIEF DESCRIPTION OF NATURE OF INVESTIGATION].

2. With the assistance of the affiant, the United States Attorney, and Assistant United States Attorney [INSERT NAME OF AUSA], the Grand Jury is continuing an investigation begun by the [INSERT NAME OF AGENCY] into allegations that [DESCRIBE ALLEGATIONS UNDER INVESTIGATION BY THE GRAND JURY].

3. Notification of service of the subpoena <u>duces tecum</u> upon the [INSERT NAME OF BANK] will directly alert several persons, including [INSERT NAME], to the existence, and perhaps to the nature, of the Grand Jury's investigation. Such notification will seriously jeopardize the undercover investigative efforts presently conducted by the [INSERT NAME OF AGENCY] and will impair the ability of the Grand Jury to obtain testimony and collect evidence concerning the violations of Federal law now under investigation. Consequently, the Government has sought the issuance of an Order, under the terms of the Right To Financial Privacy Act, Title 12, United States Code, Section 3401, <u>et seq.</u>, the Court's inherent powers, and the All Writs Act, Title 28, United States Code, Section 1651, to delay for 90 days the notification of any customer of the financial institution of the fact of service of the subpoena; of the nature of the documents subpoenaed; and of the fact that such records have been produced in compliance with the terms of the subpoena.

4. The Government will move the Court to vacate the Order as expeditiously as practicable to limit as much as possible the potential infringement upon the rights of the Bank to speak freely about the subpoena with which it has been served.

____
[INSERT NAME OF AFFIANT]

____
NOTARY PUBLIC

FORM: 54

ORDER PROHIBITING BANK FROM NOTIFYING CUSTOMER OF DISCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT NAME]

IN RE: GRAND JURY SUBPOENA :
DUCES TECUM, : MISC. NO. ____________
[INSERT DATE OF SUBPOENA] :

O R D E R

The United States of America, having moved that the [INSERT NAME OF BANK] be prohibited from disclosing to its customers certain information concerning service upon it of a Grand Jury subpoena duces tecum, dated [INSERT DATE OF SUBPOENA] and good cause having been shown that (1) the investigation being conducted is within the lawful jurisdiction of the [INSERT MONTH AND YEAR] Term, Special Grand Jury; (2) there is reason to believe that the records being sought are relevant to a legitimate inquiry by the Special Grand Jury; and (3) there is reason be believe that notification to the customer will result in seriously jeopardizing the Special Grand Jury's investigation, it is hereby

ORDERED that the [INSERT NAME OF BANK] shall not provide its customer, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum, dated [INSERT DATE OF SUBPOENA], or of the nature of the documents whose production is commanded under the terms of the subpoena, or of the fact that such documents have been produced before the

Grand Jury in compliance with the subpoena's terms, for a period of 90 days from the date of service of this Order upon the [INSERT NAME OF BANK]; and it is further

ORDERED that this Order and the Government's Motion pursuant to which this Order has been issued shall remain sealed for a period not to exceed 90 days from the date of service of _______ Order, or until further Order of this Court, whichever shall first occur, except that copies of this Order may be served upon the [INSERT NAME OF BANK] and the United States Attorney for the District of [INSERT NAME OF STATE]; and it is further

ORDERED that the copy of the Grand Jury subpoena duces tecum, dated [INSERT DATE OF SUBPOENA], addressed to the [INSERT NAME OF BANK], attached to the Government's Motion seeking issuance of this Order shall remain sealed until the Special Grand Jury, [INSERT MONTH AND YEAR] Term, concludes the investigation pursuant to which the subpoena has been issued, or until further Order of this Court, whichever shall first occur.

____

UNITED STATES DISTRICT JUDGE

DATED: _______________________

FORM: 55

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT]

IN RE: GRAND JURY SUBPOENA :
DUCES TECUM, DATED : MISC. NO. ____________
[INSERT DATE OF SUBPOENA :

MOTION FOR EXTENSION OF ORDER PROHIBITING NOTIFICATION OF SERVICE OF A GRAND JURY SUBPOENA DUCES TECUM

The United States of America, by [INSERT NAME], United States Attorney for the District of [INSERT NAME] and [INSERT NAME OF AUSA], Assistant United States Attorney for said District, moves the Court pursuant to 12 U.S.C. 3409, 28 U.S.C. 1651, and the Federal Rules of Criminal Procedure for an extension of its order prohibiting the [INSERT NAME OF BANK] from serving upon its custoemer notification of the service upon it of the Grand Jury subpoena duces tecum and states as follows:

1. On or about [INSERT DATE OF SUBPOENA], a subpoena duces tecum addressed to the Custodian of Records, [INSERT NAME OF BANK], and calling for production of certain records, was issued on behalf of the [INSERT MONTH AND YEAR] Term Special Grand Jury. The subpoena, a copy of which is attached hereto at Exhibit A, was served upon the Custodian of Records, [INSERT NAME OF BANK], in [INSERT NAME OF CITY AND STATE], on [INSERT DATE OF SERVICE].

2. While serving the Grand Jury's subpoena, agents of the Grand Jury were informed that, in compliance with the policy of the [INSERT NAME OF BANK], and out of regard for applicable local law concerning bank secrecy, the bank would undertake immediately to notify its customer of the fact of service of the subpoena.

3. The subpoena commanded production of documents relevant to the Grand Jury's present investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. In compliance with the terms of the subpoena, the Custodian of Records of the bank, has produced before the Grand Jury the records in his possession whose production was commanded.

4. There is continuing reason to believe that disclosure by the Custodian of Records of the [INSERT NAME OF BANK] to its customer of the fact of service of the Grand Jury's subpoena duces tecum will result in serious prejudice to the Grand Jury's ongoing investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. In particular, there is reason to believe that notification to the customer of the service of the subpoena upon the bank would seriously jeopardize the Grand Jury's investigation by impairing its ability to obtain the testimony of other potential witnesses, whose testimony is likely to concern the transactions to which the subpoenaed documents relate, [and may result in departure from the United States of the target of the investigation].

5. Because of the prejudice which such disclosure might inflict upon the Grand Jury's ongoing investigation of [INSERT INVESTIGATION DESCRIPTION], upon motion of the United States, this Court issued an order on or about [INSERT DATE OF FIRST ORDER], a copy of which is attached hereto as Exhibits B, directing that, for a period not to exceed 90 days, the [INSERT NAME OF BANK] shall not provide its customers, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum. By its own terms, the effect of the [INSERT DATE OF FIRST ORDER] order is to expire on [INSERT DATE OF EXPIRATION OF FIRST ORDER].

WHEREFORE, the Government respectfully requests this Court issue an Order extending, for an additional period not to exceed 90 days, the effect and terms of the Order of this Court, dated [INSERT DATE OF FIRST ORDER], directing that the [INSERT NAME OF BANK] shall not provide its customers, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum, date [INSERT DATE OF SUBPOENA].

Respectfully submitted,

[INSERT NAME OF USA]
United States Attorney

By: ______________________
[INSERT NAME OF AUSA]
Assistant U.S. Attorney

FORM: 56

ORDER FOR PROHIBITION OF NOTIFICATION OF SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT NAME]

IN RE: GRAND JURY SUBPOENA :
DUCES TECUM, DATED : MISC. NO. ____________
[INSERT DATE OF SUBPOENA] :

O R D E R

The United States of America, having moved that the [INSERT NAME OF BANK] be prohibited from disclosing to its customer certain information concerning service upon it of a Grand Jury subpoena duces tecum, dated [INSERT DATE OF SUBPOENA], and good cause having been shown therefor, it is hereby

ORDERED, that the terms of the Order issued by this Court on [INSERT DATE OF FIRST ORDER], directly that the [INSERT NAME OF BANK] shall not provide it s customer, either directly or indirectly, with notice of the fact of service upon it of the Grand Jury subpoena duces tecum, dated [INSERT DATE OF SUBPOENA], or of the nature of the documents whose production was commanded under the terms of the subpoena or of the fact that such documents had been produced before the Grand Jury in compliance with the subpoena's terms, shall be extended in full for an additional period not to exceed 90 days from [INSERT DATE OF EXPIRATION OF FIRST ORDER]; and it is further

ORDERED that this Order, and the Government's Motion pursuant to which this Order has been issued, shall remain sealed for a period not to exceed 90 days from the date of this Order, or until [INSERT DATE OF EXPIRATION OF THIS ORDER], or until further Order of this Court, whichever shall first occur, except that a copy of this Order may be served upon the [INSERT NAME OF BANK], and except that a copy of this Order shall be furnished to the Office of the United States Attorney for the District of [INSERT NAME OF STATE].

UNITED STATES DISTRICT JUDGE

DATED: ____________________

Form No. 57

Sample Questions for
Return of Subpoena Duces Tecum
by Case Agent

1. State your name and spell your last name.
2. What is your profession?
3. Are you currently involved in a particular investigation?
4. What does this investigation concern?
5. Summarize the probable violations of federal law of which you are now aware.
6. Did you serve a subpoena in this investigation?
7. When and upon whom did you serve this subpoena?
8. Why was this subpoena issued?
9. Why are these documents required?
10. Identify each document which you received from the witnesses.
11. Have you received all other records and documents described in this subpoena?
12. What items were not delivered to you?

In cases where additional time is required for the witness to search for an/or copy documents which will be voluntarily surrendered, or when some but not all of the documents have been delivered with the promise that the remainder would be forthcoming, the Case Agent should be asked:

1. Will you be prepared to report to this Grand Jury on this subpoena the next time it meets?
2. Will you bring with you to the next session of this Grand Jury the documents which you receive which you do not now have?

Then request the Foreman to excuse the Case Agent witness and to instruct him to return at the next session.

Form No.: 58

Sample Questions for
Record Custodian Witness

1. State your name, address, and occupation.
2. Did you (or did the Managing Officer of your employer) receive a subpoena to bring to this Grand Jury certain documents and records?
3. Were you directed or instructed by your employer to appear today with the records and documents described in the subpoena?
4. Have you read the subpoena?
5. Did you understand what you read?
6. Did you discuss this subpoena with an attorney -- if so, identify the attorney.
7. Did you search for the records described in the subpoena?
8. How did you conduct your search for these records?
9. Did anyone assist you in this search? Who?
10. Did you locate all of the records described in the subpoena?
11. Is there any record described in the subpoena which you could not or did not find?
12. Do you now have with you each, every, and all records and documents which are to be produced before the Grand Jury? If not, why not?
13. Identify each document you have with you.
14. Does this Grand Jury now have every document and record which the subpoena directed you to produce?

Then request the Foreman to designate the Case Agent as the Agent of the Grand Jury to take possession of the documents and to retain all of the same, subject to further order of the Grand Jury.

FORM: 59

MOTION FOR DISCLOSURE OF GRAND JURY EVIDENCE TO STATE AGENCY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT NAME]

IN RE: [INSERT MONTH & YEAR] :

TERM SPECIAL GRAND JURY : MISC. NO. ____________

M O T I O N

The Government respectfully requests the Court to issue an Order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure authorizing the disclosure of evidence obtained in connection with the investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS'NAMES] conducted by the Special Grand Jury, [INSERT MONTH AND YEAR] Term to agents of the [INSERT NAME OF STATE AGENCY TO WHICH DISCLOSURE IS TO BE MADE], for their use in assisting the federal grand jury in its investigation of possible federal criminal violations by the subjects of that investigation.

As grounds therefor, the Government states as follows:

[INSERT GROUNDS FOR MOTION, FOR EXAMPLE]:

1. Virtually since its inception, this matter has been jointly investigated by the [INSERT NAME OF U.S. AGENCY] and by the [INSERT NAME OF STATE AGENCY].

As is more fully reflected in the previously executed federal search warrant for the premises of [INSERT SUBJECT'S NAMES], the State Police assigned to the [INSERT NAME OF STATE AGENCY] have been of substantial assistance in conducting surveillance and in providing expertise regarding practices and procedures of such companies.

2. The records which, it is contemplated, are to be reviewed by auditors with the [INSERT NAME OF STATE AGENCY], are records to which the auditors would normally have access pursuant to law. [INCLUDE CITATION TO STATE CODE].

3. By letters dated [INSERT DATE], the State Prosecutor and [INSERT NAME OF STATE AGENCY] of the State of____________ have been informed that any evidence obtained by the federal grand jury which is disclosed to State officials may be used by them only to the extent expressly authorized by Rule 6(e) order.

WHEREFORE, the Government respectfully requests the Court to issue an order authorizing disclosure of evidence obtained in connection with the investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS' NAMES], being conducted by the [INSERT MONTH AND YEAR] Special Grand Jury, to the __________State Prosecutor, to the ________State Police, and to auditors assigned to [INSERT NAME OF STATE AGENCY].

Respectfully submitted,

____
[INSERT NAME]

FORM: 60

MEMORANDUM IN SUPPORT OF MOTION FOR DISCLOSURE
OF GRAND JURY EVIDENCE TO STATE AGENCY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _________

IN RE: [INSERT MONTH & YEAR] :

TERM SPECIAL GRAND JURY : MISC. NO. ____________

MEMORANDUM IN SUPPORT OF MOTION

Approximately [INSERT TIME PERIOD] ago, the federal government began an investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. The investigation, was conducted by the [INSERT NAME OF U.S. AGENCY], with the assistance of _________ State Police officers assigned to [INSERT NAME OF STATE AGENCY] of the State of _________. The State Police were acting under the supervision of the __________ State Special Prosecutor, who was interested in prosecution of possible state offenses which might be discovered during the course of the investigation.

[INSERT DESCRIPTION OF COURSE AND RESULTS OF INVESTIGATION].

The records which have been subpoenaed by the federal grand jury are records which could have been subpoenaed by the State, either by a state grand jury or by [INSERT NAME OF STATE AGENCY] under ______ law. [INSERT CITATION TO STATE CODE].

Under these circumstances, the United States Attorney's Office requests that the records now physically in the custody of [INSERT NAME OF AGENT], who is assisting the federal grand jury, be disclosed to [INSERT NAME OF AGENCY]. Disclosure is requested as to records only and not as to testimony or other proceedings before the Grand Jury. The purpose of the disclosure is to allow personnel employed by the State of _________ to assist the United States Attorney's Office and the federal grand jury in its investigation and to enable the State Special Prosecutor to undertake an investigation of possible state criminal law violations. Continuance of their assistance in the future requires that they have access to the records produced to the grand jury pursuant to such subpoenas.

Since state law enforcement officers are not "government personnel" within the meaning of Rule 6(e)(3)(A)(ii), this motion is made under the terms of Rule 6(e)(3)(c)(i), which provides for disclosure of grand jury materials under court order, where such disclosure is made preliminary to or in connection with a "judicial proceeding." A grand jury investigation is such a judicial proceeding. See Doe v. Rosenberry, 255 F.2d 118 (2nd Cir. 1958), (discussing the meaning of the term, "judicial proceedings").

Since state personnel are to be used to provide assistance to the government attorney as contemplated by Rule 6 (e)(2)(A)(ii), it is appropriate to impose upon the Government the same obligation which the Congress imposed where federal personnel are involved. The proposed Order submitted with the Government's motion thus contains a provision that names of the persons to whom disclosure is made will be furnished to the Court. In addition, the proposed Order requires that those to whom grand jury matters are disclosed shall utilize that material

only in assisting the attorney for the government in enforcing federal law (or in state criminal prosecutions as provided for in a related Order recently entered by the Court.)

The United States Distrcit Court for the District of Rhode Island has held that a Rhode Island State Police detective could not be authorized to assist in a federal grand jury investigation. In re Grand Jury Proceedings, 445 F. Supp. 349 (D.R.I. 1978). That decision was apparently premised on the belief that disclosure authorized by a court order was not, under the terms of Rule 6(e)(3)(C) accompanied by an obligation of secrecy. However, this Court may, by the terms of its Order, impose the use restrictions provided in Rule 6(e)(3)(B), and any violation of this requirement would be punishable as contempt of Court. See United States v. Dunahm Concrete Products, Inc., 475 F.2d 1241, 1249 (5th Cir. 1973), cert. denied, 414 U.S. 832 (1973), citing United States v. United States District Court, 283 F.2d 713, 721 (4th Cir. 1956), cert. denied sub nom. Valley Bell Dairy Co., Inc. v. United States, 352 U.S. 981 (1957).

Extensive restrictions on the access of IRS personnel to grand jury material were imposed by the Court in Robert Hawthorne, Inc. v. Director of Internal Revenue, et al., 404 F. Supp. 1098 (E.D.Pa. 1976). It should be noted, however, that Hawthorne was decided prior to adoption of the 1977 amendments to Rule 6(e), which allowed access to grand jury material by government personnel, subject only to the restrictions set forth in Rule 6(e)(3)(B). Those statutory restrictions would, therefore, be the appropriate standards to impose on state personnel authorized to assist government attorneys in enforcing federal criminal law.

The courts have held that a state prosecutor is entitled to disclosure of grand jury proceedings for use in his criminal investigation, pursuant to Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure. United States v. Salanito, 437 F. Supp. 240 (D. Neb. 1977); In the Matter of the Grand Jury, 377 F. Supp. 1282 (W.D.Okla. 1974); In Re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D.Va. 1969), Contra, In re Grand Jury Proceedings, supra. Significantly, in the case of In the Matter of the Grand Jury, 377 F. Supp. 1281 (W.D. Okla. 1974), the Court stated that it would be "improper to withhold evidence of an alleged violation of state law from state prosecutors." Id. at 1283 n1.

Prior to ordering disclosure, however, the courts have required a showing of "compelling and particularized need" for the grand jury material. United States v. Proctor & Gamble, 356 U.S. 677 (1958). This degree of need has been held to be satisfied where the grand jury transcript would show the prosecutor which individuals have relevant information, United States v. Salanito, 437 F. Supp. 240, 245 (D. Neb. 1977); where the state prosecutor would be "primarily assisted" and saved "time and effort" by seeing grand jury evidence, In re Petition for Disclosure of Evidence, 184 F. Supp. 38, 43 (E.D. Va. 1960); where disclosure of testimony to a police disciplinary board

would "facilitate efficient adjudication" by that board, In re Special February 1971 Grand Jury v. Conlish, 490 F.2d 894, 898 (7th Cir. 1973). "Simple convenience" to the state prosecutor, In re Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1977); or the need for grand jury materials to refresh a witness' recollection in a subsequent civil case where other, more reliable means of refreshing his recollection existed, In re Grand Jury Investigation No. M11 - 188 (MP); 431 F. Supp. 563 (S.D.N.Y. 1976) have been held not to meet the compelling need standard.

There has also been a trend in certain cases to distinguish between documentary evidence presented to the grand jury and other evidence which would reveal the grand jury processes. In United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (1960), the Second Circuit held that Rule 6(e) did not cover an Interstate Commerce Commission request for grand jury records. The Court found that the ICC had a legal right to inspect the records which, by happenstance, were in the custody of the Grand Jury. It noted that the ICC sought the records for its own purposes and that release of the records did not constitute a breach of grand jury secrecy. Similarly, in United States v. Saks & Company, et al., 426 F. Supp. 812 (S.D.N.Y. 1976), the Court held that the Federal Trade Commission could inspect and copy grand jury materials where its purpose was to further an FTC investigation and not "merely to learn what took place before the Grand Jury." Id. at 815. Although the Court granted an order requested pursuant to Rule 6(e), it did not require a showing of compelling need before the disclosure could be made noting that the FTC had the power to inspect and copy the requested documents under its own enabling law. Id.

In a recent case in the Middle District of Florida, the Chairman of a Congressional subcommittee moved for an order authorizing disclosure of grand jury documents. In re Grand Jury Investigation of Ven-Tuel, 441 F. Supp. 1299 (M.D.Fla. 1977). The Court set forth the purpose of the Rule 6(e) secrecy provisions:

> "Rule 6(e), however, was not intended to insulate from disclosure all information once it is presented to a grand jury. United States v. Saks & Co., 426 F. Supp. 812, 814 (S.D.N.Y. 1976). The aim of the rule is to prevent disclosure of the way in which information was presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicion focuses, and specific details of what took place before the grand jury."

(441 F. Supp. at 1303). It continued to hold that "mere documentary information presented to the grand jury does not constitute matters occurring before the Grand Jury" for the purposes of Rule 6(e) and, that, even assuming that the information was covered by the provisions of the Rule, the Chairman and the subcommittee had made "an independent showing of their legal right to obtain the documentary information desired" based on Congressional power to conduct investigations. Id. at 1304.

Given the state's independent right of access to the subpoenaed documents and the undertaking on the part of the State

Special Prosecutor that the records will be used only for the purpose of undertaking a state criminal prosecution, disclosure of grand jury materials pursuant to Rule 6(e)(3)(C) is appropriate.

____
[INSERT NAME]

FORM: 61

ORDER FOR DISCLOSURE OF GRAND JURY EVIDENCE TO STATE AGENCY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [INSERT NAME]

IN RE: [INSERT MONTH & YEAR] :
TERM SPECIAL GRAND JURY : MISC. NO. ____________

O R D E R

The Court having considered the Government's motion pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure requesting authorization to disclose evidence obtained in connection with the investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECT'S NAMES] being conducted by the Special Grand Jury [INSERT MONTH AND YEAR] Term to [INSERT NAME OF STATE AGENCY TO WHICH DISCLOSURE IS TO BE MADE] for use by its personnel in assisting the federal grand jury in its investigation of possible criminal violations, it is this ______ day of [INSERT MONTH AND YEAR OF THIS ORDER],

ORDERED that evidence obtained by the [INSERT MONTH AND YEAR] Term Special Grand Jury, in connection with the investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS' NAMES] being conducted by the said grand jury may be disclosed to [INSERT NAME OF STATE AGENCY TO WHICH DISCLOSURE IS TO BE MADE] in order that its personnel may assist the federal grand jury in that investigation and in related matters; and it is further

ORDERED that the evidence disclosed pursuant to this Order will be used only for the purpose of assisting the United States

Attorney in the investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS' NAMES], and for the purpose of conducting any state criminal prosecutions which the ______State Prosecutor or a State Grand Jury may deem appropriate under the terms of an Order of this Court dated [INSERT DATE]; and it is further

ORDERED that the names of all person to whom disclosure is made pursuant to this Order be furnished to the Court; and it is further

ORDERED that the motion and order herein shall be sealed.

[INSERT NAME]
U.S. District Judge

FORM: 62

DISCLOSURE REPORT

DATE: ____________

REPLY TO ATTN OF: [INSERT NAME], U.S. Attonrey
by: Assistant U.S. Attorney [INSERT NAME]

SUBJECT: Rule 6(e)(3)(B) Disclosure Report

TO: Honorable [INSERT NAME]
Chief Judge, U.S. District Court

On [INSERT DATE], this Court assigned to the Special Grand Jury [INSERT TITLE OF GRAND JURY], an investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION]. In accordance with Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure, this memorandum will serve to report to the Court that, pursuant to Rule 6 (e)(3)(A)(ii), disclosure of Grand Jury information has been and will be made to the following Government personnel, as necessary, for the purpose of assisting this office and the Grand Jury in the performance of our duty to enforce Federal criminal law:

Internal Revenue Service

Special Agent [INSERT NAME OF AGENTS]
Investigative Aid [INSERT NAME]
Revenue Agent [INSERT NAME]

Federal Bureau of Investigation

Special Agent [INSERT NAME]
Technical Aid [INSERT NAME]

United States Postal Service

Postal Inspector [INSERT NAME]

Drug Enforcement Administration

Special Agent [INSERT NAME]

(List any other individuals and any other agencies)

Consistent with the previous practice of this office, we will advise all personnel to whom disclosure is made that any Grand Jury material disclosed to them may not be utilized for any purpose other then assisting this office and the Grand Jury in the performance of our duty to enforce Federal criminal law.

In accordance with Rule 6(e), we request that this report be sealed.

FORM: 63

LETTER TO AGENT REGARDING HIS ROLE ON DISCLOSED EVIDENCE

[INSERT DATE]

[INSERT NAME AND ADDRESS OF AGENT]

Dear [INSERT NAME OF AGENT]:

Your name has been disclosed to the United States District Court for the District of ____________ as a person who has been and will be given access to materials, including documentary and testimonial evidence, obtained through the powers of a Federal Grand Jury inquiring into possible Federal criminal violations by [INSERT NAME OF INDIVIDUALS OR ENTITIES BEING INVESTIGATED].

In accordance with Rule 6(e)(3)(A)(ii), you are being given access to those materials for the sole purpose of assisting the Government attorneys involved in the grand jury investigation in the performance of their duties to enforce Federal Criminal law.

The grand jury investigation is criminal in nature, and grand jury proceedings are secret. The unauthorized disclosure of grand jury matters is punishable by contempt proceedings. Grand jury matters include the identities of witnesses, their testimony and the nature and content of documents and physical evidence obtained through the grand jury investigation.

No grand jury material may be disclosed or used for any civil or administrative purpose or for any purpose other than for the grand jury investigation, except by order of the Court.

You are further informed that no subpoenas may be issued or served which have not been approved by a Government attorney participating in this investigation. All grand jury materials and all transcripts of testimony will be maintained in the office space provided by the United States Attorney and will be under his control and are made available to you for the sole purpose of assisting the assigned Government attorneys.

Very truly yours,

[INSERT NAME OF USA]
United States Attorney

By: ____________________
[INSERT NAME OF AUSA]
Assistant U.S. Attorney

Form No: 64

UNITED STATES DISTRICT COURT
________ DISTRICT ______
____________ DIVISION

IN RE: :
: MISCELLANEOUS NO.: ______
GRAND JURY INVESTIGATION :

NOTICE OF DISCLOSURE PURSUANT TO RULE 6(e)
OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMES NOW, the United States of America, by its attorneys, ________________, United States Attorney, and ______________, Assistant United States Attorney, and represents as follows:

1. Grand Jury empanelled ____________________ (date of empanellment) is presently conducting an investigation into alleged violations of Federal criminal law, including, but not limited to, Title ____, United States Code, Section __________.

2. Assistant United States Attorney _______________ has been assigned to participate in this investigation.

3. Disclosure of Grand Jury material on a continuing basis to the following government personnel is deemed necessary to assist the above-named attorney in the performance of that attorney's duty to enforce Federal criminal law.

Agent ________________, if necessary, may share the information with other agents, supervisors, and non-agent personnel within the agency in order to assist ____________ (him or her) in the investigation. (In the case of IRS, insert the phrase - Information may also be disclosed to IRS District Counsel for legal review.) Records of ______________________ (insert name of agency) will be kept to reflect what individuals have received the information.

____
United States Attorney

____
Assistant U.S. Attorney

Form No.: 65

UNITED STATES DISTRICT COURT
____________ DISTRICT OF ___________

IN RE: : Grand Jury Case No. _______

MEMORANDUM OF NOTICE OF DISCLOSURE OF GRAND JURY MATERIALS AND ORDER SEALING NOTICE

____

Pursuant to Rule 6(e)(3)(B), Federal Rules of Criminal Procedure, the court is hereby notified that material presented to Grand Jury No. ________________ has been disclosed to ________

____

____

____

____

pursuant to the provisions of Rule 6(e)(3)(A)(ii), Federal Rules of Criminal Procedure.

It is requested that this notice be sealed until further order of this court.

DATED: _____________________.

____
Assistant U.S. Attorney

IT IS SO ORDERED.

DATED: ___________________.

____
United States District Judge

ORDER TO SEAL NOTICE OF DISCLOSURE

FORM NO.: 66

UNITED STATES DISTRICT COURT
__________ DISTRICT OF __________
__________ DIVISION

IN RE: :

GRAND JURY INVESTIGATION : MISCELLANEOUS NO.: _______

AND NOW, to wit, this ______ day of _____________, 19__, it is hereby

O R D E R E D

that the within Notice of Disclosure be Sealed and Impounded.

BY THE COURT:

____

FORM NO.: 67

UNITED STATES DISTRICT COURT
__________ DISTRICT OF __________

IN RE GRAND JURY INVESTIGATION TITLE ( ), UNITED STATES CODE SECTION ( )	: : : : :	Grand Jury No. ____ EX PARTE MOTION FOR RULE 6(e)(3)(C)(1) DISCLOSURE

The UNITED STATES OF AMERICA, by its attorneys, __________ United States Attorney, and ____________ Assistant U.S. Attorney, hereby moves the court for an order pursuant to Rule 6(e)(3)(C)(i), Federal Rules of Criminal Procedure, permitting disclosure of grand jury matters to [name(s) of persons to whom disclosure is sought].

DATED:

Respectfully submitted,

United States Attorney

____
Assistant U.S. Attorney

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE DISCLOSURE MOTION

Form No.: 68

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 6(e)(2) mandates the general rule of grand jury secrecy. Rule 6(e)(3) provides exceptions to the secrecy rule. These exceptions include:

(1) disclosure to an attorney for the government for use in the performance of the attorney's duty;

(2) disclosure to government personnel deemed necessary by the attorney for the Government to assist the attorney, Rule 6(e)(3)(A)(ii);

(3) disclosure when directed by a court preliminarily to or in connection with a judicial proceeding, Rule 6(e)(3)(C)(i).

In the instant matter the United States seeks a court order permitting disclosures of grand jury matters pursuant to Rule 6(e)(3)(C)(i). The person to whom disclosure is sought is __________. Disclosure is sought of tangible evidence subpoenaed by the grand jury and testimony given in the grand jury for use in the enforcement of federal criminal laws only.

The grand jury has been conducting an investigation into (summary of the investigation.)

______________ has been informed and understands that such materials are for use in this investigation of violation of the federal criminal laws only and for no other purpose.

In order fully to ensure that the rule of grand jury secrecy if not violated, but also to provide for the possibility of a full investigation of_______________, the United States moves the court for an ex parte order permitting disclosure to __________ of grand jury materials. Such disclosure is within the clear authority of this court. United States v. Stanford, 589 F.2d 285 (7th Cir. 1978). The legislative history states: "There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws." S. Rep., No. 95-354, at 7, U.S. Code Cong. & Admin. News, supra, at 530.

Therefore, pursuant to Rule 6(e)(3)(C)(i), the United States moves this court for an ex parte order permitting future disclosure of grand jury materials to __________ for use in the federal investigation and prosecutions only and subject to whatever appropriate additional restrictions the court may impose.

FORM NO. 69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY INVESTIGATION TITLE ( ), UNITED STATES CODE, SECTION ( )	:	Grand Jury No. _____ ORDER FOP RULE 6(e) (C)(1) DISCLOSURE

IT IS HEREBY ORDERED, pursuant to Rule 6(e)(3)(C)(i), that grand jury materials may be disclosed to (   ), as deemed necessary by the United States Attorney in the course of federal investigation of possible violation of (   ).

Any such disclosures are subject to the following restriction: Any grand jury materials may be used only for the purpose of assisting the United States Attorney in the enforcement and investigation of federal criminal laws.

IT IS FURTHER ORDERED that this order be sealed.

DATED:

____
UNITED STATES DISTRICT JUDGE

FORM: 70

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ___________

IN RE: GRAND JURY INVESTIGATION
OF [INSERT BRIEF DESCRIPTION
INVESTIGATION OR SUBJECTS' NAMES]

MISC. NO. _______

MOTION FOR DISCLOSURE OF MATTERS
OCCURRING BEFORE THE GRAND JURY TO IRS

The government respectfully moves the Court, pursuant to Rule 6 (e)(3)(C)(i) of the Federal Rules of Criminal Procedure, for an Order authorizing disclosure to the Internal Revenue Service of matters occurring before the [INSERT MONTH AND YEAR] Term Special Grand Jury, and in support thereof states as follows:

1. On [INSERT DATE], the [INSERT MONTH AND YEAR] Term Special Grand Jury, returned an indictment of [INSERT NAME OF DEFENDANT], charging him with [NUMBER] counts of tax evasion, in violation of Title 26, United States Code Section 7201 and with [INSERT DESCRIPTION OF OTHER OFFENSES CHARGED].

2. On [INSERT DATE], [INSERT NAME OF DEFENDANT] plead quilty to one count of tax evasion and [INSERT DESCRIPTION OF ANY OTHER PLEA]. On [INSERT DATE] [INSERT NAME OF DEFENDANT] was sentenced to [INSERT DESCRIPTION OF SENTENCE].

3. The grand jury investigation relating to [INSERT NAME OF DEFENDANT] has ended.

4. Examination of documents subpoenaed by the grand jury by special agents of the Internal Revenue Service has indicated that there may be substantial civil tax liabilities due and owing to the United States by [INSERT NAME OF DEFENDANT]. However, the IRS agents who have reviewed these documents did so solely for the purpose of assisting the United States Attorney in the criminal investigation of [INSERT NAME OF DEFENDANT]. No documents have been subpoenaed nor have any records relating to [INSERT NAME OF DEFENDANT] been reviewed for civil tax purposes.

5. In addition, the documents subpoenaed by the grand jury were used by special agents of the IRS to prepare special agent reports, income tax computations, analysis and related documents to assist the United States Attorney in the preparation and trial of the criminal charges.

6. Access to the documents and work product in question would be of material assistance to revenue agents of the Internal Revenue Service in determining the amount of the civil tax liabilities owing to the United States by [INSERT NAME OF DEFENDANT].

7. The grand jury materials disclosed pursuant to this motion will remain under the aegis of the United States Attorney's Office for the District of __________.

8. In order to fully preserve the secrecy of the grand jury process in the matter, the government requests the court to consider this motion *in camera* and *ex parte*.

WHEREFORE, the government respectfully requests the Court to issue an Order, pursuant to Rule 6(e)(3)(c)(j) of the Federal Rules of Criminal Procedure, authorizing the United States Attorney for this District to disclose and make available to the Internal Revenue Service the books, records, documents, evidence, transcripts of testimony, and other materials obtained by the [INSERT MONTH AND YEAR] Term Special Grand Jury for the District of ___________ in connection with its investigation of [INSERT NAME OF DEFENDANT], for use by the Internal Revenue Service in connection with its investigation of civil violations of the Internal Revenue Code committed by [INSERT NAME OF DEFENDANT], preliminary to and in connection with judicial proceedings that may be instituted by the Internal Revenue Service against [INSERT NAME OF DEFENDANT] under the terms of the Internal Revenue Code, and the regulations promulgated thereunder.

Respectfully submitted,

United States Attorney

____
[INSERT NAME]
Assistant U.S. Attorney

FORM: 71

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ___________

IN RE: [INSERT MONTH AND YEAR]
SPECIAL GRAND JURY
INVESTIGATION

NO.__________

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY TO IRS AGENTS

STATEMENTS OF FACTS

Beginning in [INSERT MONTH AND YEAR], the [INSERT MONTH AND YEAR] Term Special Grand Jury, conducted a criminal investigation of [INSERT DESCRIPTION OF INVESTIGATION], centering on possible criminal violations of various provisions of Titles 18 and 26 of the United States Code. Numerous documents were subpoenaed by the grand jury, including records relating to the financial affairs of [INSERT NAME OF DEFENDANT].

[INSERT NAME OF DEFENDANT] was ultimately indicted on [INSERT DATE] and was charged with [NUMBER] counts of tax evasion, in violation of Title 26, United States Code, Section 7201, and with [INSERT DESCRIPTION OF OTHER CHARGES]. On [INSERT DATE], [INSERT NAME OF DEFENDANT] plead guilty to one count to tax evasion and [INSERT DESCRIPTION OF PLEA]. On [INSERT DATE] [INSERT NAME OF DEFENDANT] was sentenced to [INSERT DESCRIPTION OF SENTENCE].

The [INSERT MONTH AND YEAR] Term Special Grand Jury, ended in [INSERT MONTH AND YEAR]. Likewise, the criminal investigation

and prosecution of [INSERT NAME OF DEFENDANT] has ended. At no time during the grand jury's term or thereafter were any subpoenas issued or any records reviewed to assist in any civil tax investigation of [INSERT NAME OF DEFENDANT]. In this motion and attached affidavits the government seeks a disclosure order to permit the documents originally subpoenaed, to aid in the criminal investigation of the defendant which has now ended, to be reviewed by Internal Revenue Service agents to determine what civil liability may have been incurred by [INSERT NAME OF DEFENDANT].

II.

LEGAL DISCUSSION

The government has petitioned this court for an ex parte order authorizing disclosure to Internal Revenue Service agents of documents subpoenaed by a federal grand jury and transcripts of grand jury testimony for the purpose of determining if [INSERT NAME OF DEFENDANT] has incurred civil tax liabilities.

Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure provides that disclosure of grand jury material may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding." The Senate report on that portion of the rule noted:

> "There is ... no intent to preclude the use grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use if improper, assuming that purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions." (S. Rep. No. 95-354, 95th Cong., 1st Sess. at 8 (1977), reprinted in (1977) U.S. Code Cong. & Ad. News, 527, 531-32).

The Fourth Circuit has recently held that this portion of the Rule specifically permits the disclosure of grand jury information to the IRS for civil tax purposes. In re: Grand Jury Subpoenas: April, 1978 at Baltimore, 581 F.2d 1103 (4th Cir. 1978). The Fourth Circuit in that opinion specifically approved Judge Miller's opinion in In Re: December 1974 Grand Jury Investigation, 449 F. Supp. 743, 751 (D. Md. 1978). The Fourth Circuit required that the government must provide "a general description of the materials sought in order to allow the court intelligently to determine if such materials are rationally related to an existing or contemplated civil proceeding." In addition, the government is required to satisfy the court that "the grand jury proceeding has not been used as a subterfuge for obtaining records for a civil investigation or proceeding."

The government has fully satisfied those two tests in this matter. The petition here describes the documents and transcripts in questions with specificity that is comparable to that which Judge Miller found sufficient and which adequately reveals a "rational connection" with the civil tax liability. Secondly, the fact that [INSERT NAME OF DEFENDANT] has been indicted and

has plead guilty is more than sufficient to demonstrate that the grand jury investigation in this matter was not merely a "subterfuge". The affidavits are identical to those presented to Judge Miller and found sufficient by him.

For these reasons the petition for disclosure satisfied the requirements of Rule 6(e)(3)(C)(i) and therefore the government respectfully requests that the petition be granted.

Respectfully submitted,

United States Attorney

[INSERT NAME]
Assistant U.S. Attorney

FORM 72 AFFIDAVIT IN SUPPORT OF MOTION FOR DISCLOSURE TO IRS AGENTS

FORM IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF____________

IN RE: (INSERT MONTH AND YEAR)

TERM SPECIAL GRAND JURY NO. _________

INVESTIGATION

AFFIDAVIT

STATE OF)
) TO WIT:
CITY OF:)

IN, (INSERT NAME), of full age, being duly sworn according to law hereby depose and say:

1. I am a Group Manager, Criminal Investigation Division, for the Maryland District Director's Office, Internal Revenue Service, and in that capacity I am familiar with the subject matter set forth in the government's motion for disclosure of matters occurring before the grand jury, pursuant to Federal Rule of Criminal Procedure 6(e).

2. I HEREBY CERTIFY that the grand jury proceeding in which information was gathered concerning the taxpayer in

question was not used by the Internal Revenue Service as a subterfuge for obtaining records for any civil investigation or proceeding. The information was gathered and reviewed solely for criminal prosecution purposes. The date, there has been no civil investigation or proceeding with respect to the taxpayer in questions utilizing any information or records procured through the grand jury investigation.

____
(INSERT NAME)
Group Manager
Criminal Investigation Division
District of Director's Office of
(INSERT STATE)
Internal Revenue Service

SWORN AND SUBSCRIBED to me before me this ____ day of (INSERT MONTH AND YEAR).

____
Notary Public
My Commission Expires:

FORM 73

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ___________

IN RE: (INSERT MONTH AND YEAR)
TERM SPECIAL GRAND JURY MISC. NO. ______
INVESTIGATION

ORDER FOR DISCLOSURE TO IRS AGENTS

Upon consideration of the Motion made by the government pursuant to Rule 6(e)(3)(C)(I) of the Federal Rules of Criminal Procedure, for authorization to disclose certain matters which occurred before the (INSERT MONTH AND YEAR), Term Special Grand Jury for the District of Maryland, and it appearing to the Court that such disclosure should be authorized, now therefore it is hereby

ORDERED that the United States Attorney for this District is authorized to disclose and make available to the Internal Revenue Service any and all books, records, documents, evidence, transcripts of testimony, an other materials, obtained by the (INSERT MONTH AND YEAR) Term Special Grand Jury for the District of Maryland, in connection with their investigation of (INSERT DESCRIPTION OF INVESTIGATION), for use by the Internal Revenue Service in connection with its investigation of civil violations of

the Internal Revenue Code, committed by (INSERT NAME OF DEFENDANT), preliminary to and in connection with judicial proceedings that may be instituted by the Internal Revenue Service under the terms of the Internal Revenue Code and regulations promulgated thereunder; and it is hereby further

ORDERED that any and all documents disclosed and made available to the Internal Revenue Service under the terms of this Order shall be kept segregated from, and shall not be co-mingled with, any other records dept by the Internal Revenue Service; and it is further

ORDERED that any and all documents disclosed and made available to the Internal Revenue Service under the terms of this Order shall remain under the aegis of the United States Attorney for the District of Maryland, and shall be returned to the said United States Attorney upon conclusion of the civil investigation which the Internal Revenue Service may conduct, except that the Internal Revenue Service may retain custody of such documents as may be needed by the Internal Revenue Service, for use as evidence in any civil judicial proceedings that may be instituted by the Internal Revenue Service as a result of its investigation, until the conclusion of such judicial proceedings; and it is further

ORDERED that this Order, the motion, memorandum, and other pleadings pursuant to which this Order has been issued, and any transcript of the proceedings held by the Court in considering this matter, shall be and remain sealed until further order of this court, except that two copies of this Order shall be delivered to the United States Attorney for this District, including one copy for his own use and one copy to be delivered by him to the Internal Revenue Service.

____
(INSERT NAME)
United States District Judge

Form No.: 74

UNITED STATES DISTRICT COURT
__________ DISTRICT __________

IN RE GRAND JURY INVESTIGATION OF VIOLATIONS OF TITLE ( ), UNITED STATES CODE, SECTION ( )	:	Grand Jury No. ________ EX PARTE MOTION TO DISCLOSE GRAND JURY TRANSCRIPTS

COMES NOW the UNITED STATES OF AMERICA, by and through its attorneys, ______________, United States Attorney, and ____________, Assistant U.S. Attorney, and moves this court _ex parte_ for an order authorizing disclosure of matters occurring before the grand jury, pursuant to Rule 6(e)(3)(C)(i), Federal Rules of Criminal Procedure. The reasons for this motion are stated in the attached affidavit of __________________, Assistant U.S. Attorney.

DATED:

Respectfully submitted,

United States Attorney

____
Assistant U.S. Attorney

FORM: 75

AFFIDAVIT IN SUPPORT OF _EX PARTE_ MOTION TO DISCLOSE GRAND JURY TRANSCRIPTS

UNITED STATES DISTRICT COURT
DISTRICT OF [INSERT NAME]

IN RE GRAND JURY INVESTIGATION OF VIOLATIONS OF TITLE [ ], UNITED STATES CODE, SECTION [ ]	)	Grand Jury No. _________ AFFIDAVIT OF ASSISTANT U.S. ATTORNEY [ ]

I, ____________________, being first duly sworn, depose and say:

1. That I am an Assistant U.S. Attorney and have been assigned to investigate violations of federal law arising out of, and related to, the above-captioned case.

2. On ________________, the Federal Grand Jury for the ___________ District of _____________ returned a two-count indictment against: _______________________, charging them with violations _____ U.S.C. Section _____, conspiracy and possession of approximately ____________ with intent to distribute. The case against all _______ these codefendants has since been resolved.

3. The federal grand jury has been conducting a continuing investigation in an attempt to identify and prosecute other previously unknown coconspirators who either supplied or distributed, or aided and abetted the supply and distribution of, controlled substances in violation of federal law.

4. The following witnesses have testified before this grand jury on the following occasions:

(a) [Name] [Date]

(b) [Name] [Date]

(c) [Name] [Date]

(d) [Name] [Date]

5. Various grand jury subpoenas have been served, resulting in the production of documents and business records which have been or will be considered by the grand jury.

6. It is anticipated that additional witnesses, and additional documents and records, will be subpoenaed to appear before the grand jury.

7. ______________ is a police officer employed by the ______________ Department. He has been assigned to the ________ __________________________________ years. In this capacity, ___________________ participated as the case agent in the investigation, arrest, and prosecution of the ______________ defendants named in Criminal Case No. ______. Futhermore, he has continued to participate in the ongoing investigation of these narcotics offenses as the principal case agent. ____________ has testified before the grand jury on two occasions.

8. It is essential to the success of the grand jury investigation, and to me as the attorney assigned to this case, that _______________ have access to the testimony and documents produced before the grand jury so that additional witnesses and investigative leads be identified.

9. I have fully advised _______________ of the federal law relating to the secrecy of grand jury proceedings, and of his obligation to refrain from disclosure of any information he may learn from any grand jury materials he may be authorized to review.

DATED:

____
Assistant U.S. Attorney

SUBSCRIBED AND SWORN TO before me this [ ] day of [ ], 19[ ].

____
Notary Public in and for said State and County

Form No: 76

UNITED STATES DISTRICT COURT
________ DISTRICT OF ________

IN RE GRAND JURY INVESTIGATION OF VIOLATIONS OF TITLE [ ], UNITED STATES CODE, SECTION [ ]	)	Grand Jury No. ________ ORDER FOR DISCLOSURE

IT IS HEREBY ORDERED that the grand jury testimony of any and all witnesses who have testified, or who may testify subsequent to the date of this order, and all documents subpoenaed before the grand jury, in connection with the grand jury investigation of possible violations of federal law relating to this investigation, may be disclosed to [ ].

IT IS FURTHER ORDERED that this motion, affidavit, and order be sealed until further order of the court.

DATED:

____
[ ]
United States District Judge

FORM: 77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

IN RE: [INSERT MONTH AND YEAR EXPIRING GRAND JURY] TERM

MISC. NO. ______

SPECIAL GRAND JURY

MOTION FOR ORDER PERMITTING DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY TO A SUCCESSOR GRAND JURY

The government respectfully moves the Court, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for an Order permitting disclosure of matters presented to the [INSERT MONTH AND YEAR] Term Special Grand Jury for the District of __________, to a successor Grand Jury, and in support thereof states as follows:

1. In [INSERT MONTH AND YEAR THE INVESTIGATION WAS ASSIGNED TO THE OUTGOING GRAND JURY] and [INSERT MONTH AND YEAR OF G. J. TERM] Term Special Grand Jury commenced an investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECT'S NAME]. With the assistance of the Office of the United States Attorney for the District of ____________, the Special Grand Jury conducted an investigation of certain criminal violations of the federal (CRIMINAL, TAX, NARCOTICS, ETC.) laws by [INSERT NAMES AND SUBJECTS]. Although the statutory term of the Special Grand Jury has expired, the investigation of [INSERT SUBJECTS' NAMES] conducted by the Special Grand Jury has not yet been complete.

2. To continue the several investigations begun by the [INSERT MONTH AND YEAR] Term Special Grand Jury, and for other matters, on or about [INSERT DATE], a Special Grand Jury was empaneled by this Court. That Grand Jury is continuing the

investigation of [INSERT SUBJECTS' NAMES], begun by the [INSERT MONTH AND YEAR] Term Special Grand Jury. Consequently, the documents subpoenaed by the [INSERT MONTH AND YEAR] Term Special Grand Jury in connection with its investigation of [INSERT SUBJECTS' NAMES], and transcripts of testimony of witnesses appearing before that Grand Jury in connection with that investigation, are materials relevant to the continuing investigative work to be conducted by the newly empaneled Grand Jury.

3. To require witnesses to appear before the newly empaneled Grand Jury solely to repeat verbatim the testimony which they gave before the [INSERT MONTH AND YEAR] Term Special Grand Jury, and to require the return of documentary materials subpoenaed by the [INSERT MONTH AND YEAR] Term Special Grand Jury only so that they might immediately be subpoenaed again by the newly empaneled Grand Jury, would be repetitious, impractical, time-consuming, and unnecessarily expensive. Furthermore, to do so might provide them with an opportunity to destroy or to tamper with documentary materials returned to them only temporarily.

WHEREFORE, the government respectfully requests the Court issue an Order authorizing the Office of the United States Attorney for the District of ________ to disclose and to read to the newly empaneled Special Grand Jury the transcripts of any and all testimony presented to the [INSERT MONTH AND YEAR] Term Special Grand Jury in connection with its continuing investigation of [INSERT BRIEF DESCRIPTION OF INVESTIGATION AND/OR SUBJECTS' NAMES], and to disclose and transfer to the custody and control of the newly empaneled Grand Jury any and all documentary materials subpoenaed by the [INSERT MONTH AND YEAR] Term Special Grand Jury in connection with that investigation.

Respectfully submitted,

United States Attorney

By: ________________________

[INSERT NAME]
Assistant U.S. Attorney

FORM 78

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ____________

IN RE: (INSERT MONTH AND YEAR)
OF EXPIRING GRAND JURY) TERM

MISC. NO. ________

SPECIAL GRAND JURY

MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER OF DOCUMENTS AND TESTIMONY

The government has moved this Court to enter an Order permitting it to transfer documents subpoenaed by, and transcripts of the testimony of witnesses who appeared before the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury to the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury. That such documents and testimony are transferrable is a proposition uncontroverted and of long standing practice in this District and elsewhere.

The (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury completed its eighteen-month term prior to completion of all its investigative activities. The Government now seeks permission by the Court to allow the newly empaneled Grand Jury to review expeditiously the evidence previously produced in the course of one of those investigations.

The Order whose issuance is proposed by the Government specifies precisely the manner in which transcripts of witness testimony will be presented to the new Special Grand Jury. The Order is sought to modify, for the present situation, certain of the procedures for transfer of witness from one grand jury to another outlined by Judge Thomsen in In Re: Grand Jury Investigation of the Banana Industry, 214 F. Supp. 856 (D. Md. 1963).

In that case the Antitrust Division of the Department of Justice moved the Court for an Order to permit the documents and testimony from a grand jury in the District of Maryland to one in California. Judge Thomsen held that if any part of the testimony of a witness is to be read to another grand jury, the entire testimony of that witness should be read to that grand jury. Id. at 860. But, Judge Thomsen went further, concluding that because "live testimony, if available, is better and fairer than recorded testimony," the Government should produce for the successor grand jury live testimony of all witnesses who the Court did not find for some reaon to be unavailable.

The procedure set forth in Banana Industry went beyond any procedure outlined in other reported decisions, in its requirement that witnesses,' if found to be available,

should be recalled before a successor grand jury By way of contrast, the Court in United States v. Braniff Airways, 428 F. Supp. 579, 583-4 (W.D. Texas 1977), condemned the use of summaries and excerpts of testimony before a successor grand jury, but required only a reading of the entire transcript of the witnesses' testimony. No appearance before a successor grand jury of "available" witnesses was required. Id. at 589. The same procedure was found acceptable in In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522, 533 (W.D. Texas 1973). 1/

To recall before the newly empaneled grand jury all witnesses who testified before the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Grand Jury and who are not otherwise unavailable would present the Governemnt with logistical and tactical problems. Some of the those difficulties might well hinder the investigation itself. Specifically, much of the initial work of the newly empanelled grand jury would be consumed with rehearing witnesses whose testimony could be read more quickly. The witnesses themselves, many of whom had to readjust crowded schedules to appear once, would have to do so again in many instances with great personal inconvenience.

In addition, some witnesses who are essentially hostile to the Government, if recalled by the Government to the newly empaneled grand jury, would be given an effective second opportunity to refine and refashion their testimony in light of conversations they might have had with other witnesses who appeared before the (INSERT NONTH AND YEAR OF OLD GRAND JURY), or with others who may have some personal interest in the investigation. This type of subtle shifting of testimony cannot always be countered effectively by confronting the witnesses with their prior testimony.

To avoid these problems, the Government urges the Court to approve a procedure similar to that adopted by other courts--the reading to the successor grand jury of the entire transcript of any witness who appeared before the first grand jury and whose testimony the Government wishes to present to the second grand jury. 2/ At the end of this process, the grand jurors will be given the opportunity to request the recall for live testimony of those witnesses whose transcripts have been read to them. 3/

The procedure suggested by the government is fundamentally fair to the United States and to anyone who may be indicted by the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury.

FOOTNOTES

n/ If prior grand juries were also involed in the investigation, that involvement should also be disclosed to the Court.

1/ Likewise, Banana Industry was distinguished in several other decisions as a decision involving transfer of testimony and documents to a grand jury sitting in another judicial circuit. See United States v. E. E. Koester Bakery Co., 334 F. Supp. 377, 382 (D. Md. 1971).

2/ The only exception to this procedure would be in those infrequent instances where the witness was asked about several distinct areas of investigation, some of which may no longer be under active investigation by the government and about which the grand jury will presumably not be asked to return indictments. In such situations, the government proposes to read only that portion of the witness's testimony relevant to the pending investigation.

3/ The government will not elect to read to the new grand jury the transcripts of all witnesses who appeared before the first grand jury. Some of those witnesses produced no testimony of any relevance to the continuing investigation, of either an exculpatory of inculpatory nature. Most of those witnesses whose testimony the government will not present testified on aspects of the investigation no longer under active review. In some insances, the government may desire to recall a witness. In any event, when a witness' transcript is read, all testimony by that witness will be included, subject only to the qualifications outlined in footnote two, above.

FORM 79 ORDER FOR DISCLOSURE TO SUCCESSOR GRAND JURY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ____________

IN RE: INSERT MONTH AND YEAR

OF EXPIRING GRAND JURY) TERM

MISC. NO.________

SPECIAL GRAND JURY

ORDER

The government having moved the Court, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for an Order authorizing the Office of the United States Attorney for the District of Maryland to disclose and to read to the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury the testimony of witnesses who appeared before the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury in connection with its investigation of (INSERT BRIEF DESCRIPTION OF INVESTIGATION, and to disclose and transfer to the custody and control of the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury documentary materials subpoenaed by the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury in connection with that investigation, and good cause having been shown therefor,

IT IS HEREBY ORDERED that the Office of the United States Attorney for the District of Maryland be authorized to disclose and transfer to the custody and control of the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury documentary materials subpoenaed by the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury in connection with its investigation of (INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS' NAMES), and

IT IS HEREBY ORDERED that the Office of the United States Attorney for the District of Maryland be authorized to disclose and to read to the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury the testimony of witnesses who appeared before the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury in connection with its investigation of (INSERT BRIEF DESCRIPTION OF INVESTIGATION OR SUBJECTS' NAMES) and

IT IS HEREBY ORDERED that in presenting to the (INSERT MONTH AND YEAR OF NEW GRAND JURY) Term Special Grand Jury the testimony of any witnesses who appeared before the (INSERT MONTH AND YEAR OF OLD GRAND JURY) Term Special Grand Jury in connection with its investigation of (INSERT BRIEF DESCRIPTION OF INVESTIGATION) the United States Attorney or one of his assistants shall read to the (INSERT MONTH AND YEAR OF NEW GRAND JURY) TERM Special Grand Jury the entire transcript of testimony given by each witness with respect to matters under continuing investigation; and

IT IS HEREBY FURTHER ORDERED that this Order, and the pleadings filed by the United States in connection with its issuance, be and shall remain sealed until further Order of this Court.

____

UNITED STATES DISTRICT JUDGE

GRAND JURY EXHIBIT LIST

NAME OF INVESTIGATION:______________________ USAO NO. ______________

GRAND JURY PANEL:___________________ FOREPERSON:____________________

EXHIBIT NUMBER	DATE INITIALLY PRESENTED TO GRAND JURY	SOURCE OF EXHIBIT	DESCRIPTION	OTHER WITNESSES TESTIFYING ABOUT EXHIBIT	DATE	COMMENTS

FORM: 81

GRAND JURY SCRIPT

1. (Witness sworn by Foreperson.) State and spell name for record.
2. Are you here (pursuant to a subpoena) (voluntarily)?
3. Do you understand that everything that is said during these proceedings is being recorded by the reporter?
4. You are appearing before a duly impanelled Federal Grand Jury inquiring into possible violations of federal law, including, but not limited to, [Cite specific sections and violations unless harmful to the investigation and supported by memo to file].

   ____

   ____

   You are appearing because it is believed you may have certain information (and/or documents) relevant to that investigation. Do you understand that?
5. You have certain rights as a witness before this Grand Jury which I am about to explain to you.
   a. First, you have the right, under the Sixth Amendment, to advice of counsel. That is, you may be represented by an attorney. Your attorney, if you have one, cannot be in the Grand Jury room with you but you may, at any time, advise the Foreperson that you would like to consult with your attorney. You may then leave the Grand Jury room, consult with your attorney, and return.

Do you understand that right?

Do you presently have an attorney?

If yes: What is your attorney's name?

Have you consulted with your attorney?

Is your attorney outside?

Do you want time to arrange for your attorney to be here?

Do you have any questions regarding your right to advice of counsel?

b. Secondly, you have the Fifth Amendment right to refuse to answer any question asked of you if you honestly and truly believe the answer may tend to incriminate you. An answer may tend to incriminate you if it can provide or lead to information regarding a crime for which you can be prosecuted.

Do you understand that right?

Do you understand that anything you may say can be used against you?

[ALTERNATE -- A witness normally has a privilege to refuse to answer questions which may tend to incriminate him or her. However, the District Court has issued an order of immunity whereby any statement you give in these proceedings may not be used against you nor may any statement be used to obtain other information against you.

Do you understand that you have immunity?

Do you understand that anything you say cannot be used against you?]

6. You are advised that you are a: [see U.S. Attorney's Manual §9-11.250, Ch. 11, p. 12].

"Target" of this investigation. That means we have substantial evidence linking you to a crime and you are considered to be someone who may be indicted.

7. Have any promises or threats been made by the government, either directly by its agents and attorneys or indirectly through your attorney?

[OR]

The following (written) (oral) agreement has been entered into between you and the government: [read or recite agreement]. Is that the complete agreement?

Have any other promises or agreements or any threats been made?

8. Besides the rights you have as a witness, you also have an obligation. That obligation is to answer any questions put to you forthrightly and truthfully because you are under oath before this Grand Jury and are subject to the penalties for perjury.

Do you understand that?

Do you understand that perjury is the making of a statement which you know to be materially false?

Do you understand that you could be subject to a fine of up to $10,000 and imprisonment for up to five years?

9. Do you have any questions about anything I have said thus far?

INDICTMENT PRESENTATION TO GRAND JURY

A. Brief Synopsis of Assistant United States Attorney

1. Introduction: "We are now commencing the case of United States of America v. ______________."

It is necessary to begin and end each case with a phrase which will allow the court reporter to know where to begin and end the transcript for that case. The reporters will prepare a separate transcript for each case and an additional transcript for miscellaneous proceedings not related to a specific case.

2. Type of Case: This is a [bank robbery] case. I am going to ask Agent _____ some questions. At the close of my questions, I will ask the members of the grand jury if you have any questions to ask me or Agent ______. At the end of all the questions, we will leave the room and I will ask you to deliberate on the proposed indictment against ________________."

B. Presenting Indictment by Assistant United States Attorney

1. The proposed indictment:

a. The indictment contains _____ counts.
b. All of the counts charge a violation of [18 U.S.C. §2113(a); Robbery of a Federally Insured Bank]

[OR]

Counts _____ charge a violation of __________.
Counts _____ charge a violation of __________.

2. Statute:

a. Are you familiar with each of those statutes?

b. Do any of you want me to read those statutes?

3. Elements of Offense

a. Are you familiar with the elements of the offense[s] charged?

b. Do any of you want me to read to you the elements of the offense[s] charged?" [Read if requested.]

4. Read the Indictment: [If counts are identical except for date, place, bank robbed, etc., only the first count need be read verbatim. Other counts can be paraphrased.]

C. Questions to the Agent

1. Agent's Role in the Case:

a) Question: "Did you participate in the investigation which led to this proposed indictment?"

Answer: "Yes."

b) Question: "Were you the case agent?"

Answer: "Yes." [Except in highly unusual circumstances, the case agent should present the case to the grand jury. Any exceptions to this rule must be requested by the agent before the time the case is to be presented to the grand jury. If the case agent cannot present the case, the testifying agent should explain why.]

2. Agent's Presentation of Facts of Case

a) Question: "Are you familiar with the facts of this case?"

Answer: "Yes."

b) Question: "Please relate those facts to the grand jury."

Answer: Agent should then narrate the facts of the case, being careful to state the sources of his information. [For example - "On [date] I interviewed John Doe. Doe stated that he was at the Bank of America on [date] employed as a teller . . ." "On [date] I spoke to Los Angeles Police Department Officer Smith who stated that on [date] he interviewed Jack Jones who said . ." Agent should make certain that he covers all the necessary elements of the offense.]

c) Confession/Admission: [If the agent does not mention a defendant's confession/admission, be sure to ask the agent if the defendant has made any statements.]

d) <u>Exculpatory Evidence</u>:

Question by Assistant United States Attorney: "Are you aware of any information which points directly to the innocence of this defendant?"

Answer: Example- "Yes." On May 15, 1979, I showed victim teller Ann Jones a spread of six photographs, one of which was a photograph of the defendant. She was unable to identify the defendant as the person who robbed her and in fact she stated that a picture of someone else strongly resembled the robber."

[Note to AUSA: It is good practice to tell the agent in advance that this question will be asked. If the agent has any doubts as to what is exculpatory, he and the AUSA can resolve those doubts beforehand.]

C. <u>Cautionary Instructions by Assistant United States Attorney</u>

If an agent makes a statement which is unduly prejudicial or which should not be considered by the grand jury, the Assistant United States Attorney should caution the grand jury not to consider it.

Examples: (1) "The defendant is a known narcotic addict," (2) "The defendant has a long record--he's been-arrested twenty times." (3) If the agent states that the defendant was "Uncooperative" and "would not confess," the Assistant United States Attorney should caution the grand jury that the "defendant has a constitutional right to remain silent and that the grand jury should infer nothing from a defendant's silence."

E. <u>Questions by the Grand Jury</u>

AUSA: "Do the members of the grand jury have any questions--either of fact for the witness or questions of law for myself?"

F. <u>Leaving Room While Grand Jury Deliberates</u>

AUSA: "Ladies and Gentlemen of the grand jury. Agent ______ and I are going to leave the grand jury room while you deliberate. I ask that you review the testimony presented to you and that you deliberate regarding whether there is probable cause to believe that the defendant committed the acts alleged in the proposed indictment. The agent and I will remain available outside. If you have any questions concerning this case, please call us in. If you cannot determine if there is probable cause without additional investigation, please advise us prior to voting on the indictment."

G. <u>Closing the Case</u>

a. "The record should reflect that the grand jury has deliberated and returned a true bill with ________ jurors voting to indict. The foreperson has signed the ballot and the indictment. Is that correct?"

Foreperson: "Yes."

b. "That concludes the case of United States of America v. __________________."

DOCUMENT RETURN

A. Introduction by Assistant United States Attorney

1. Example: "This is a return of documents on a subpoena issued by the United States Attorney's Office on behalf of the grand jury."

2. If the subpoena is on an open United States Attorney's case assigned to an Assistant United States Attorney, state, "The investigation is being supervised by [(me) or (name)] and the reporter should prepare a separate transcript for these proceedings and send it to [(me) or (name).]" Otherwise, the proceedings will be included within a miscellaneous transcript for that day.

B. Summary of Subpoena by Assistant United States Attorney

1. Party Subpoenaed:

Example: "This subpoena is directed to the Custodian of Records, Crocker National Bank, 600 West 6th Street, Los Angeles, California."

2. Date Issued:

Example: "The subpoena was issued by our office on behalf of the grand jury on June 15, 1979."

3. Date of Appearance and Production of Documents

Example: "The subpoena directs the Custodian of Records to appear before the grand jury on August 2, 1979, and to bring the following documents." [The Assistant United States Attorney should then read the list of subpoenaed documents or summarize the documents if the list is too long and/or complicated.]

C. Questions by AUSA if Custodian is Returning the Documents

1. Service of Subpoena

Q. "Were you" [or] "Was your employer served with the subpoena which I have just described?"

A. "Yes, I was."

Q. "Are you the custodian of the records requested in the subpoena?"

A. "Yes, I am."

2. Obtaining Documents

Q. "Have you obtained the documents demanded in the subpoena?"

A. "Yes, I have."

3. Presentation of Documents

Q. "Do you have the documents with you?"

A. "Yes, I do."

Q. "Please describe the documents you have with you."

A. [Witness should describe documents with some particularity to ensure compliance with the subpoena and to make a record of what was produced.] "I have ten bank statements in the name of [ ] for the period [ ]." Or, "I have a box containing forty escrow files relating to transactions in 1980 in the name of [ ]."

Q. "Were you unable to locate any of the documents demanded by the subpoena?"

A. "No." [or] "Yes."

Q. [If yes] "Explain why you were unable to locate the documents."

A. "The documents have been stored on micro-film and we will need more time to search."

Q. "Will you be able to provide the documents by [ ]?"

A. "Yes."

4. Directing Witness to Comply

AUSA: "I request that the foreperson direct the witness to appear on [ ] and produce the missing documents."

5. Marking Documents

AUSA: "I request the foreperson to mark these documents as Grand Jury Exhibit [ ]."

D. Questions by AUSA for Agent who has Received Documents

1. Service of Subpoena

Q. "Have you caused this subpoena to be served on the Custodian of Records at Crocker National Bank?"

A. "Yes, I have."

2. Obtaining Documents

Q. "Have you obtained the documents demanded in the subpoena?"

A. "Yes, I have."

3. Compliance with Subpoena

Q. "Are you satisfied that the bank has complied with this subpoena?"

A. "Yes, I am satisfied with the bank's compliance," [or] "No, Jack Jones, the Branch Manager stated to me that the copies of microfilmed checks cannot be provided for another two weeks." [If additional records will be provided in the future, the agent should be instructed to arrange for the records to be returned to the same grand jury when they are received.]

4. Presentation of Documents to Grand Jury

Q. "Do you have the documents with you?"

A. "Yes, I do." [Agent should then exhibit the packet of documents to the grand jury.]

[As a general rule, the agent should have the documents with him at the time of the return. If the documents are too bulky, the agent should bring a sample to the grand jury and tell the grand jury that the remaining documents will be made available to the grand jury upon its request.]

5. Relevance of Documents to the Investigation

Q. "Could you describe for the grand jury the relevance of the documents subpoenaed to an investigation that you are conducting?"

A. [Agent should briefly describe the investigation and how the documents subpoenaed related to that investigation.]

E. Questions by Grand Jury

[The Assistant United States Attorney should ask the grand jury if they have any questions for the agent about the documents subpoenaed or about the investigation.]

F. Custodianship of Records

[The Assistant United States Attorney should ask the agent if he is willing to be the custodian of records. After the agent responds affirmatively, the Assistant United States Attorney should then ask the foreperson of the grand jury to designate the agent as the custodian of records.]

1. Question by Assistant United States Attorney to Agent:
"Are you willing to be the custodian of records that you obtained pursuant to this grand jury subpoena?"

2. Answer by Agent: "Yes, I am."

3. Joint Custodian of Records: [If another agent besides the witness plans to review the records, that agent should also be named as a joint custodian of records. That second agent need not be present at the grand jury, however.]

4. Request by Assistant United States Attorney:

"I request that the foreperson appoint Agent(s) [ ] as custodian for subpoenaed records and authorize [(him) (her) (them)] to utilize the records in conducting their investigation."

FORM NO. 82: REQUEST FOR COURT ORDER
AFTER RETURN OF TRUE BILL

YOUR HONOR:

The grand jury has met and heard evidence today. The jurors have returned _____ True Bills of indictment and prepared a Pretrial Report.

The U. S. Attorney moves the Court for an <u>Order</u>.

1. Filing the True Bills of Indictment;
2. Filing the Partial Report;
3. Issuing Bench Warrant(s) as recommended by the grand jury in its Partial Report;
4. Setting Bonds as recommended by the grand jury in its Partial Report; and
5. Instructing the grand jury to return on

_______________________.
(Date)

Form No: 83

AUTHORIZATION FORM

INDICTMENT ____________

INFORMATION ____________

DATE: ______________________ BY: ________________, AUSA

	DEFENDANTS	BOND	WARRANT	CUSTODY
1.				
2.				
3.				
4.				
5.				
6.				

STATUTES	VIOLATIONS
________ USC § ________	
________ USC § ________	
________ USC § ________	
________ USC § ________	

COUNT	DEFENDANTS	DATE	INSTRUCTIONS

Form No: 84

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. ______
[INSERT DEFENDANT'S NAME] :
:

MOTION TO SEAL INDICTMENT PURSUANT TO
RULE 6(a), FEDERAL RULES OF CRIMINAL PROCEDURE

The government moves the Court, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, to order and direct that the indictment returned by the Grand Jury on [INSERT DATE], charging [INSERT NAME] with violations of [INSERT STATUTES VIOLATED], be kept secret until the defendants named in that indictment are either in custody or have given bail; and further order that until such time as those defendants are in custody or have given bail, that no person shall disclose the finding of the indictment or any warrant issued pursuant thereto, except when necessary for the issuance and execution of the warrant.

Respectfully submitted,

By: ______________________
[INSERT NAME]

ORDER

ORDERED as prayed this ___ day of [INSERT MONTH AND YEAR.]

____
UNITED STATES DISTRICT JUDGE

Form No: 85

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. ________
[INSERT DEFENDANT'S NAME] :
:

ORDER TO UNSEAL INDICTMENT

The indictment in this case having been sealed by Order of this Court pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, and it appearing that [INSERT NAME OF DEFENDANT] are now in custody, so that it is not necessary for the indictment to remain sealed, it is hereby

ORDERED this ___ day of [INSERT MONTH AND YEAR], that the indictment be unsealed and made public record.

____
UNITED STATES DISTRICT JUDGE
DISTRICT OF

FORM: 86

BENCH WARRANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ____________

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. ________

:

:

Mr. Clerk:

Please issue a Bench Warrant for the arrest of the above-named defendant, who is charged with ciolation of Title ________, United States Code, Section ________, and who may presently be residing in

____

O R D E R

It is this ________ day of ________, 198 , hereby

ORDERED, that a Bench Warrant be issued for the arrest of the above-named defendant as prayed.

____

Judge
U.S. District Court for the
District of ____________

FORM 87

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF____________

UNITED STATES OF AMERICA

v. CRIMINAL NO.______

____

WAIVER OF LOCAL RULE 30 REQUIREMENTS

The defendant named above, who is now in custody, pending the disposition of this case, having been advised (by the Court and) by counsel, of the right to a prompt disposition of this case, hereby waives the time requirements from plea or conviction to sentencing (60 days).

DATE: ____________

____

Counsel for Defendant

____

Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF __________

UNITED STATES OF AMERICA

v. CRIMINAL NO. ______

[INSERT DEFENDANT'S NAME]

MOTION FOR CONTINUANCE
UNDER THE SPEEDY TRIAL ACT

The government respectfully moves that this court grant a continuance under the Speedy Trial Act, 18 U.S.C. Sec. 3161 [INSERT SUBSECTION UNDER WHICH CONTINUANCE IS JUSTIFIED]. The facts supporting this motion are as follows:

[INSERT FACTS SUPPORTING REQUEST UNDER EXCLUSABLE TIME EXCEPTION INVOKED], FOR EXAMPLE:

1. The defendant's arraignment was scheduled in this court for [INSERT DATE]. At that time the defendant appeared without counsel, but indicated that he had retained [INSERT NAME OF LAWYER], Esquire, as his attorney.

2. In a telephone conversation with Government counsel, [INSERT NAME OF LAWYER] verified that the defendant had retained him on [INSERT DATE] but stated that he was unable to be present at the time and on the date scheduled for the arraignment because [INSERT REASON]. [INSERT LAWYER'S NAME] indicated that he would represent the defendant in this case if the arraignment were postponed for a couple of weeks.

3. As a result of [INSERT LAWYER'S NAME] request, the court rescheduled the arraignment for [INSERT NEW TIME AND DATE].

4. Under the above-stated circumstances, the failure to grant a continuance to allow defense counsel to be present might have rendered a continuation of the proceeding impossible or resulted in a miscarriage of justice.

5. Counsel for the defendant has indicated to the Government that he concurs in this motion.

WHEREFORE, the Government requests that, pursuant to 18 U.S.C. Sec. 3161(h)(8) this court excludes the period [INSERT DATES ASKED TO BE EXCLUDED], inclusive from the computation of time under the Speedy Trial Act.

Respectfully submitted,

United States Attorney

By: ______________________
[INSERT NAME]
Assistant U.S. Attorney

FORM: 89

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________

UNITED STATES OF AMERICA

v.

CRIMINAL NO. ______

____

OFER OF CONTINUANCE UNDER THE SPEEDY TRIAL ACT, 18 U.S.C. Sec. 3161(h)(8).

Upon the motion of ( ) the Court
( ) the Defendant
( ) the United States

the Court finds that the ends of justice served by a continuance outweigh the best interest of the public and the defendant in a speedy trial, in that

( ) the failure to grant a continuance is likely to make a continuation of this proceeding impossible.

( ) the failure to grant a continuance is likely to result in a miscarriage of justice.

( ) the case taken as a whole is so unusual and so complex, due to the number of defendants and the nature of the prosecution that it is unreasonable to expect adequate preparation within the periods of time established by 18 U.S.C., Section 3161.

( ) delay after the grand jury proceedings commenced is caused by the unusual complexity of the factual determination on to be made by the grand jury and by events beyond the control of the Government.

( ) ____________________

____

____

and it is therefore ORDERED
that the time for ( ) filing indictment or information
( ) conducting arraignment of the defendant
( ) beginning the trial of this case
be and the same is hereby continued
to ____________________
until the further order of this Court.

Date: ____________________

____
United States District Judge

Oral order by the Court recorded by

____
Deputy Clerk

FORM: 90

EVALUATION OF GRAND JURY OR DEPOSITION REPORTER

We request your assistance in evaluating the reporter service recently provided to you. This will alllow us to identify poor service or reporters, and have the situation corrected or the reporter removed. Please be brief.

DATE OF GRAND JURY PROCEEDING OR DEPOSITION:

NAME OF REPORTER:

1. STATE ANY PROBLEMS THAT OCCURRED DURING GRAND JURY PROCEEDING OR DEPOSITION.

2. EVALUATE THE TRANSCRIPT.

TIMELINESS

DATE ORDERED:

DATE DELIVERY WAS REQUIRED:

DATE RECEIVED:

ACCURACY OF TRANSCRIPTION:

GENERAL APPEARANCE OF FORMAT:

LIST ANY OTHER PROBLEMS:

GPO 900-178

END