DOJ MANUAL // US Atty's Manual

DETAILED
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FOR CHAPTER 11

9-11.000 GRAND JURY

9-11.001 Additional Materials

Additional materials that may be helpful include treatises, especially Beale and Bryson, *Grand Jury Law and Practice*. In addition, the Narcotic and Dangerous Drug Section has prepared a monograph entitled ''Federal Grand Jury Practice (Volumes I and II). Copies may be obtained from that Section.

9-11.010 Grand Jury Indictment Required by the Fifth Amendment

The Fifth Amendment to the Constitution of the United States provides, in part, that ''no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.''

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

9-11.020 The Role of the Prosecutor

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

9-11.100 POWERS AND LIMITATIONS OF GRAND JURIES

9-11.101 The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, it is particularly useful to say that a grand

jury's function is to determine whether or not there is probable cause to believe that a certain person committed a certain federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a "no-bill," *see* Wright, *Federal Practice and Procedure*, Criminal § 110. It is useful to look upon the functions of a grand jury in this way because, in general, a grand jury may not perform any different function. The investigative grand jury works toward such an end, although some investigations are never brought to fruition.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed fully at USAM 9-11.330, *infra*. It would seem that a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure also has a power to issue reports on non-criminal matters. *See Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). Whether and in what form a grand jury report should be issued is in all events a difficult and complex question. Consultation should be had with the Criminal Division before any grand jury report is initiated, whether by a regular or special grand jury. *See* USAM 9-11.331, *infra*.

9-11.110 The Investigative Powers of a Grand Jury

The grand jury has always been accorded the broadest latitude in conducting its investigations. The proceedings are conducted *ex parte*, in secret, and without any judicial officer in attendance to monitor them, and there is no exclusionary rule or standard of relevancy or materiality to inhibit grand jury inquiry. A grand juror's own information, newspaper reports, rumors, or whatever, may properly be used to trigger an investigation. The grand jury may act upon mere suspicion that the law has been violated, or with the objective of seeking assurance that it has not. The grand jury may investigate a field of fact with no defendant or criminal charge specifically in mind and with no duty to measure its steps according to predictions about the outcome. Thus the grand jury may conduct the broadest kind of investigation before stopping to determine whether an indictment should be found. *See Calandra, supra; Branzburg, supra; United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Blair v. United States*, 250 U.S. 273 (1919); *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Smyth*, 104 F.Supp. 283 (N.D.Cal.1952).

9-11.120 Power of a Grand Jury Limited by Its Function

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350

U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir.1976), *cert. denied sub nom., Hurt v. United States*, 429 U.S. 1062 (1977); nor can it be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir.1972). After indictment, the grand jury may be used *if* its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir.1978).

A. Approval Required Prior to Resubmission of Same Matter to Grand Jury

Once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (*i.e.*, the same transaction or event and the same putative defendant) should not be presented to another grand jury or presented again to the same grand jury without first securing the approval of the responsible Assistant Attorney General.

B. Use of Grand Jury to Locate Fugitives

It is improper to utilize the grand jury *solely* as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest. *In re Pedro Archuleta*, 432 F.Supp. 583 (S.D.N.Y.1977); *In re Wood*, 430 F.Supp. 41 (S.D.N.Y.1977), *aff'd, In re Cueto*, 554 F.2d 14 (2d Cir.1977).

If, however, the grand jury has a legitimate interest in the testimony of a fugitive, it may subpoena other witnesses and records in an effort to locate the fugitive. *Wood, supra*, citing *Hoffman v. United States*, 341 U.S. 479 (1951). Similarly, it is the Criminal Division's view that if the present whereabouts of a fugitive is related to a legitimate grand jury investigation of offenses such as harboring, 18 U.S.C. §§ 1071, 1072, 1381, misprision of felony, 18 U.S.C. § 4, accessory after the fact, 18 U.S.C. § 3, escape from custody, 18 U.S.C. §§ 751, 752, or failure to appear, 18 U.S.C. § 3146, the grand jury properly may inquire as to the fugitive's whereabouts. *See In re Grusse*, 402 F.Supp. 1232 (D.Conn.1975). Unless such collateral interests are present, the grand jury should generally not be employed in locating fugitives in bail-jumping and escape cases since, as a rule, the gist of those offenses is the circumstances of defendant's disappearance rather than his or her current whereabouts.

Generally, grand jury subpoenas should not be used to locate fugitives in investigations of unlawful flight to avoid prosecution, 18 U.S.C. § 1073. Normally an unlawful flight complaint will be dismissed when a fugitive is apprehended and turned over to state authorities to await extradition. Prosecutions for unlawful flight are rare and the statute requires prior written approval of the Attorney General or Assistant Attorney General. Since indictments for unlawful flight are rarely sought,

it would be improper to routinely use the grand jury in an effort to locate unlawful flight fugitives.

C. Obtaining Records to Aid in Location of Federal Fugitives—Alternatives to Use of Grand Jury Subpoenas

The Criminal Division recognizes the importance of providing to federal investigative agencies a means of obtaining records which would aid in the search of federal fugitives. Usually the records sought are telephone toll records of relatives and close associates of the fugitive, although other kinds of records might also be valuable in ascertaining the fugitive's whereabouts.

With the enactment of the Electronic Communications Privacy Act of 1986, Public Law No. 99-508, law enforcement access to telephone toll records will now be covered by federal statute.

Pursuant to 18 U.S.C. §§ 2703(c)(1)(B) and 2703(c)(2) the government may obtain a ''record or other information pertaining to a subscriber'' (telephone toll records) without notice to the subscriber by obtaining: (1) an administrative or grand jury subpoena; (2) a search warrant pursuant to state or federal law; or (3) a court order pursuant to 18 U.S.C. § 2703(d) based on a finding that the information is relevant to a legitimate law enforcement inquiry.

For an analysis of the Electronic Communications Privacy Act of 1986 *see* USAM 9-7.2000.

Occasionally, there may be records, other than telephone toll records, which might be useful in a fugitive investigation but which cannot be obtained by grand jury subpoena, administrative subpoena, or search warrant. In such situations, it may be appropriate to seek a court order for production of the records pursuant to the All Writs Act, 28 U.S.C. § 1651. The All Writs Act provides:

> The Supreme Court and all courts established by the Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Supreme Court has recognized the power of a federal court to issue orders under the All Writs Act ''as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of its jurisdiction.'' *See United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

Because the purpose of the All Writs Act is to aid the court in the exercise of its jurisdiction, an application for an order under the act must be sought only from the United States District Court in which the complaint or indictment is pending.

The use of the All Writs Act to obtain records in a fugitive investigation is not a procedure to be used in every fugitive case. The willingness of courts to issue such orders will depend in the selectivity with which such applications are made, and the courts will not condone a wholesale use of the act for this purpose. Thus, the procedure should be used only in important cases where a strong showing can be made that the records are likely to lead to the whereabouts of the fugitive.

9-11.121 Venue Limitations

A case should not be presented to a grand jury in a district unless venue for the offense lies in that district. Nevertheless, it is common for a grand jury to investigate matters occurring at least partly outside its own district, because federal offenses are often prosecutable in more than one district, and a grand jury is under no obligation to determine venue early in its investigation. A witness should not be heard to challenge the right of a grand jury to inquire into events that happened in other districts. As a general matter, a witness has a duty to testify if the grand jury has a *de facto* existence and cannot resist questions on the grounds of relevancy or materiality.

9-11.122 Limitations Set by the District Court

It is often said that the grand jury is an arm or appendage of the court. This has a certain significance but is also misleading. The grand jury is dependent on the court in certain respects and independent in other respects.

Lacking powers of its own, the grand jury must rely upon the district court's subpoena and contempt powers if witnesses are to be compelled to attend and to testify in grand jury sessions. *See Brown v. United States*, 359 U.S. 41 (1959). This presents no problems in the ordinary course. But a court may properly deny a grand jury the use of subpoenas to engage in ''the indiscriminate summoning of witnesses with no definite object in mind and in a spirit of meddlesome inquiry.'' The court may curb a grand jury when it clearly exceeds ''its historic authority.'' *See Hale v. Henkel, supra*. In any event, the district court has broad authority to discharge a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure, and rather than monitor the issuance of grand jury subpoenas in situations involving a flagrant abuse, the court might more likely put an end to the grand jury by discharging it. *See* Fed.R.Crim.P. 6(g).

There is a counterbalancing principle. Since the grand jury enjoys Constitutional status, the district court must neither control nor interfere with the grand jury in ''the exercise of its essential functions.'' *See United States v. United States District Court for the Southern District of West Virginia*, 238 F.2d 713 (4th Cir.1956), *cert. denied, sub nom.*,

Valley Bell Dairy Co. v. United States, 352 U.S. 981 (1957). In that case, the district court was held to have interfered improperly with the grand jury by denying government counsel the use of the grand jury transcript and by instructing the jurors to vote without the benefit of government counsel's summarization of the evidence.

The government attorney also enjoys a constitutionally-based independence. Court, prosecutor, and grand jury—each has its own authority; and a court may not exercise its supervisory power over the grand jury in such a way as to encroach upon the jurors' or the prosecutor's prerogatives, unless there is a clear basis in law and fact for doing so. *See United States v. Chanen*, 549 F.2d 1306 (9th Cir.1977).

9-11.123 Limitations Arising From the Role of the Government Attorney

No federal grand jury can indict without the concurrence of the attorney for the government. He/she must sign the indictment under Rule 7(c) of the Fed.R.Cr.P. for the indictment to be valid, and the judiciary cannot compel the attorney for the government to sign any indictment. In signing an indictment, the attorney for the government is not just complying with Rule 7; the attorney is exercising a power belonging to the executive branch of the government. *See Cox, supra*; *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 391 U.S. 841 (1967).

9-11.124 Testimonial Privilege as Limiting Power of Grand Jury

A witness before a grand jury enjoys the same testimonial privilege he/she would have at any stage of a criminal proceeding. The single rule in the Fed.R.Evid. that is made applicable to grand jury proceedings is Rule 501 on testimonial privileges; *see* Fed.R.Evid. 101 and 1101(c) and (d). Fed.R.Evid. 501 provides that, except as otherwise required by the Constitution, statute, or rules, the testimonial privileges of witnesses ''shall be governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'' The subject is thus left for case law development. But Rule 501 is clear: federal law (not state law) is controlling on the matter of testimonial privilege before grand juries. *See United States v. Woodall*, 438 F.2d 1317 (5th Cir.1970), *cert. denied*, 403 U.S. 933 (1971). It is emphasized, however, that Rule 501 is only a rule for the witness and does not set a standard for what may be heard and used as a basis for indictment. *See* the Advisory Committee's Note to Rule 1101 of the Fed.R.Evid. In short, a grand jury may consider and indict on the basis of testimony that will not necessarily be admissible at trial; and the indictment will not be vitiated because evidence was obtained in violation of a testimonial privilege. *See, e.g., United States v. Fultz*, 602 F.2d 830 (8th Cir.1979); *United States v. Colasurdo*, 453 F.2d 585 (2d Cir.1971), *cert. denied*, 406 U.S. 917

(1972); *cf. United States v. Franklin*, 598 F.2d 954 (5th Cir.), *cert. denied* 444 U.S. 870 (1970.)

When a grand jury witness invokes a testimonial privilege, the attorney for the government will want to examine the claim very carefully to ascertain whether the privilege, although perhaps available in that state, is properly invoked in a federal proceeding. Each witness is under a broad duty to answer questions; the witness has no privilege to protect others. *See United States v. Mandujano*, 425 U.S. 564 (1976). To compel a witness to give testimony, resort may be had to the civil contempt remedy under 18 U.S.C. § 401, and Rule 42 of the Federal Rules of Criminal Procedure is utilized for punitive purposes. If the privilege against self-incrimination is invoked in appropriate circumstances, it may be necessary to consider whether to seek authority for obtaining an order to compel testimony under 18 U.S.C. § 6003, which may be enforced by use of the civil testimony under 18 U.S.C. § 6003, which may be enforced by use of the civil contempt remedy.

One exceptional situation is to be noted. A grand jury witness is entitled, by reason of 18 U.S.C. § 2515, 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.

9-11.130 Limitation on Naming Persons Unindicted Co-Conspirators

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in *United States v. Briggs*, 514 F.2d 794 (5th Cir.1974), and other cases.

As the court in *Briggs* pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with ''another person or persons known.'' The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

Accordingly, in the absence of some sound reason (*e.g.*, where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for U.S. Attorneys to identify unindicted co-conspirators in conspiracy indictments.

9-11.140 Limitation on Grand Jury Subpoenas

Subpoenas in federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Fed.R.Cr.P.

Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him/her may be deemed a contempt of the court.

Grand jury subpoenas may be issued, to be served abroad, to compel the appearance before the grand jury of a national or resident of the United States and the production of "a specified document or other thing by him." The decision to the contrary in *United States v. Thompson*, 313 F.2d 665 (2d Cir.1963), was overcome by an amendment of 28 U.S.C. § 1783. *See* Wright, *Federal Practice and Procedure*, Criminal § 277. However, before issuing a subpoena to a witness abroad, the district court is required under 28 U.S.C. § 1783(a) to make certain findings regarding the necessity for subpoenaing the witness. The issuance of a grand jury subpoena to an American citizen in a foreign country may at times be obviated by presenting the person's statement to the grand jury in the form of hearsay.

There can be enormous difficulties involved in investigating any matter abroad and in seeking to obtain the testimony of persons located in other countries, even if they are citizens of the United States. *See Jones, International Judicial Assistance: Procedural Chaos And A Program For Reform.* 62 Yale L.J. 515. Subpoenas cannot be issued and served abroad upon foreign nationals; even to request a foreign national to appear in this country may involve sensitive problems. Accordingly, before making any effort or initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required. Inquiries should be directed to the Office of International Affairs.

All grand jury witnesses should be accorded reasonable advance notice of their appearance before the grand jury. "Forthwith" or "*eo instanter*" subpoenas should be used only when swift action is important and then only with the prior approval of the U.S. Attorney. Considerations, among others, which bear upon the desirability of using such subpoenas include the following: (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 of the witness.

Policies regarding the issuance of subpoenas to members of the news media and subpoenas for telephone toll records of members of the news media are discussed elsewhere in the USAM.

9-11.141 Fair Credit Reporting Act and Grand Jury Subpoenas—Special Handling Necessary

The Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*) prohibits credit reporting agencies from furnishing consumer reports except, *inter alia*, "in response to the order of a court" of competent jurisdiction. Authorities are divided on the question whether grand jury subpoenas are court

orders within the meaning of the quoted language (at 15 U.S.C. § 1681(b)(1). The cases are collected in *Matter of Application to Quash Grand Jury Subpoena*, 526 F.Supp. 1253 (D.Md.1981). The only circuit court to rule on the issue held that a subpoena is not a court order within the meaning of the act. *See In re Gren*, 633 F.2d 825 (9th Cir.1980); *accord, Doe v. DiGenova*, 779 F.2d 74 (D.C.Cir.1985).

Because of the division of opinion on the legal issue and the resulting differences in practices in the various districts, credit reporting agencies are often constrained to resist grand jury subpoenas which they would promptly obey if the subpoenas were specially issued by the district courts. The trouble, expense and delay involved for the agencies and the government seem particularly unwarranted when no definitive resolution of the legal issue is foreseeable at an early date. Heretofore, in order to try to minimize these problems, and the need for litigation, U.S. Attorneys were given discretion to seek court approval of a grand jury subpoena. This policy, however, has not been completely successful in resolving the issue. Accordingly, to provide consistency and uniformity in the various districts, the Department of Justice has determined that henceforth attorneys for the government in seeking to obtain credit reporting agency records, should seek court orders or the endorsement or other special handling of subpoenas by the district court so as to obviate the legal difficulties. *See, e.g., In re Gren, supra*, at n. 3.

It should be sufficient simply to make an *in camera, ex parte* showing that the information sought from the credit reporting agency is or may be relevant to an ongoing investigation, that it is properly within the grand jury's jurisdiction and that it is not sought primarily for any other purpose. *Cf. In re Grand Jury Proceedings* (Larry Smith), 579 F.2d 836 (3d Cir.1978).

9-11.150 Advice of ''Rights'' of Grand Jury Witnesses

It is the Department's policy to advise a grand jury witness of the rights described below only if such witness is a ''target'' or ''subject'' (as hereinafter defined) of a grand jury investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his/her Fifth Amendment privilege against compulsory self-incrimination before his/her grand jury testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 186 and 190-191 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *Mandujano, supra*, at 582 n. 7. It is important to note, however, that in *Mandujano* the Court took cognizance of the fact that federal prosecutors customarily warn ''targets'' of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington* the Court pointed to the fact that Fifth Amendment warnings were administered as negating ''any possible compul-

sion to self-incrimination which might otherwise exist'' in the grand jury setting. *See Washington, supra*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department that an ''Advice of Rights'' form, as set forth below, be appended to all grand jury subpoenas to be served on any ''target'' or ''subject'' (as hereinafter defined) of an investigation:

Advice of Rights

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

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

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

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

In addition, these ''warnings'' should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

A ''target'' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target. Although the Court in *Washington, supra*, held that ''targets'' of the grand jury's investigation are entitled to no special warnings relative to their status as ''potential defendant[s]'', the Department continues its longstanding internal practice to advise witnesses who are known ''targets'' of the investigation that their conduct is being investigated for possible violation of federal criminal law. This supplemental ''warning'' will be administered on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

A ''subject'' of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

Where a local district court insists that the notice of rights may not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

9-11.151 Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question him/her about his/her involvement in the crime under investigation. *See Wong, supra*, at 179 n. 8; *Washington, supra*, at 190 n. 6; *Mandujano, supra*, at 573-75 and 584 n. 9; *United States v. Dionisio*, 410 U.S. 1, 10 n. 8 (1973). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known ''target'' (as defined in USAM 9-11.150, *supra*) is subpoenaed to testify before the grand jury about his/her involvement in the crime under investigation, an effort should be made to secure his/her voluntary appearance. If a voluntary appearance cannot be obtained, he/she should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a ''target,'' careful attention will be paid to the following considerations:

A. The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;

B. Whether the substance of the testimony or other information sought could be provided by other witnesses; and

C. Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.152 Requests by Subjects and Targets to Testify Before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify *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.1975), *cert. denied*, 423 U.S. 861 (1976)) a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a ''subject'' or ''target'' of an investigation (as defined in USAM 9-11.150, *supra*) personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his/her privilege against

self-incrimination and to be represented by counsel or will, if any, who knowingly appears without counsel and consents to full examination under oath.

Some such witnesses ordinarily will wish to supplement their testimony with the testimony of others. The decision whether to accommodate such wishes, subject them after hearing to the testimony of the target or the subject, or to seek statements from the suggested witnesses is a matter which is left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g., Calandra, supra*, at 343.

9-11.153 Notification of Targets

Where a target is not called to testify pursuant to USAM 9-11.151, *supra*, and does not request to testify on his/her own motion (*see* USAM 9-11.152, *supra*), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him/her an opportunity to testify (subject to the conditions set forth in USAM 9-11.152, *supra*) before the grand jury. Of course, notification would not be appropriate in routine clear cases nor where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154 Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he/she will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself/herself. However, if a ''target'' of the investigation (as defined in USAM 9-11.150, *supra*) and his/her attorney state in a writing, signed by both, that the ''target'' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the

applicability of the Fifth Amendment privilege to the likely areas of inquiry.

9-11.155 Notification to Targets when Target Status Ends

The United States Attorney shall have discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

It is suggested that the discontinuation of target status notification will most generally be obtainable when:

a. The target previously has been notified by the government that he or she was a target of the investigation; and,

b. The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide the detargeting notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the detargeting notification is appropriate, the language of the notification may be tailored to the particular case. In any particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a ''clean bill of health'' or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution.

The foregoing provisions are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-11.160 Limitation on Resubpoenaing Contumacious Witnesses Before Successive Grand Juries

While the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, [illegible] n. 3 (1965), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the general policy of the Department not to subpoena and seek contempt citations in a successor grand jury against a witness who refused to testify before the prior grand jury and was consequently incarcerated for such refusal. The resubpoenaing of a contumacious witness may, however, be justified in certain limited situations such as when the questions to be asked the witness relate to matters not covered in the previous proceedings or when there is an indication from the witness or his/her legal counsel that the witness will in fact testify if called before the new grand jury. If the witness is believed to possess information essential to the investigation, resubpoenaing may also be justified when the witness himself/herself is involved to a significant degree in the criminality about which he/she can testify. In such cases, prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to subpoena the witness before the successive grand jury as well as to seek civil contempt sanctions if the witness continues to persist in his/her refusal to testify.

Since the coercive effect of a civil contempt adjudication is substantially diluted when the grand jury's term is about to expire, it is recommended that a subpoena ordinarily not be issued to a witness who it is anticipated will refuse to testify before such grand jury. This, of course, is a matter of judgment for the U.S. Attorney and there may well be situations when it is necessary to subpoena a witness and institute contempt proceedings for recalcitrance in such circumstances. In most situations, however, it would seem preferable to subpoena the witness before a new grand jury.

9-11.200 THE PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 6

9-11.210 Summoning Grand Juries (Fed.R.Crim.P. 6(a))

Rule 6(a) of the Federal Rules of Criminal Procedure authorizes courts to impanel as many grand juries ''as the public interest requires.'' Each grand jury must consist of not less than 16 nor more than 23 members. The jury selection process is discussed at USAM 9-11.223, *infra*. Either the clerk of the court or a jury commission (depending upon the type of plan adopted for the random selection of jurors) manages the jury selection process under the Jury Selection and Service Act.

Rule 6 of the Federal Rules of Criminal Procedure does not state explicitly what constitutes a quorum to enable a grand jury to operate. However, since a grand jury cannot be impaneled with less than sixteen members, it [illegible]

considered that 16 jurors constitute a quorum. A grand jury should not function with less than 16 members in attendance.

9-11.220 Objection to Grand Jury and to Grand Jurors (Fed.R.Crim.P. 6(b))

The U.S. Attorney's primary concern with the grand jury selection process arises under Rule 6(b) of the Fed.R.Cr.P. That rule allows for the making of two basic types of objections. The first are objections to the array (that the jurors were not selected, drawn, or summoned in accordance with law). The second are objections to individual jurors (that they are not legally qualified to serve). The rule provides two methods for making these objections.

9-11.221 Challenges

Rule 6(b)(1) of the Fed.R.Cr.P. permits the attorney for the government or a defendant held to answer in the district court to make challenges before the administration of the oath to the grand jurors. The rule was recognized, when framed, as being of limited practical value and was not meant to prevent objections being made instead by means of motions to dismiss. *See* the original note to subdivision (b) of Fed.R.Cr.P. 6.

9-11.222 Motions to Dismiss, in General

If not previously determined upon challenge, objections to the array or to individual jurors may be made under Rule 6(b)(2) of the Fed.R.Cr.P. by means of motions to dismiss the indictment. Objections will usually be raised by this method. It is expressly provided in the rule that such motions to dismiss should be made and granted as provided in 28 U.S.C. § 1867(e).

9-11.223 Motions to Dismiss Based on Objections to the Array

It is declared federal policy under the Jury Selection and Service Act (specifically 28 U.S.C. §§ 1861 and 1862) that grand and petit jurors shall be ''selected at random from a fair cross section of the community in the district or division wherein the court convenes,'' and no citizen shall be excluded from serving on account of race, color, religion, sex, national origin, or economic status. Pursuant to 28 U.S.C. § 1863, each U.S. District Court has placed into operation a written plan for random selection of jurors. This jury selection plan generates, in accordance with 28 U.S.C. §§ 1864 to 1866, first a ''master jury wheel'' of names selected at random from particular sources (generally voter registration lists and certain supplemental sources); and then (on the basis of juror qualification forms executed by the persons on the master jury wheel, and ''other competent evidence'') a ''qualified jury wheel'' of names of legally qualified and nonexempt persons. From time to time, random (and usually public) drawings are conducted and subpoenas issued to a certain number of

jurors on the qualified jury wheel. These prospective jurors are examined further in court and, as needed, grand and petit juries are impaneled. (18 U.S.C. § 3321 of Title 18 allows for the summoning of additional jurors to complete a grand jury when less than sixteen of the persons summoned attend or remain after the court rules on challenges.) It is a practice in certain districts to designate alternate grand jurors, but they do not sit like their counterparts on petit juries: they sit only to replace a grand juror who is permanently excused.

While U.S. Attorneys have no responsibility for administering the Jury Selection and Service Act, they have an obvious stake in the act's being properly administered. The requirement in 28 U.S.C. § 1863(b)(4) that the master jury wheel be emptied and refilled periodically (at least every four years) affords an opportunity for reflecting upon the jury selection system and the possible effect of changed circumstances in the community. *See, e.g., United States v. Gooding*, 473 F.2d 425 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Guzman*, 468 F.2d 1245 (2d Cir.1972), *cert. denied*, 410 U.S. 937 (1973). While it is contemplated that voter lists will be the primary sources of jurors, it is also contemplated that supplemental sources will be used at times as a corrective in the system. *See United States v. Ross*, 468 F.2d 1213 (9th Cir.1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Lewis*, 472 F.2d 252 (3d Cir.1973); 1968 U.S.Code Congressional and Administrative News, 1974.

9-11.224 Giving the Court Information Pertinent to Jury Selection

It is important for a U.S. Attorney to inform the district court of all facts that may be pertinent to the matter of excluding jurors under 28 U.S.C. § 1866(c), especially when a grand jury is to be selected to conduct a highly sensitive investigation. Particular care should be taken to prevent the impaneling of a juror who might ''be unable to render impartial jury service.'' If provided for in the jury selection plan, in accordance with 28 U.S.C. § 1863(b)(8), the court may vary from its customary practice and keep the names drawn from the qualified jury wheel confidential ''in any case where the interests of justice so require.''

9-11.230 Objections to Grand Jury Proceedings

There are few principles of more importance in the administration of criminal justice than the principle announced in *Costello v. United States*, 350 U.S. 359, 363 (1956); an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to call for trial of the charges on the merits.

9-11.231 Motions to Dismiss Due to Illegally Obtained Evidence Before a Grand Jury

The fact that illegally obtained, privileged, or otherwise incompetent evidence was presented to the grand jury is no cause for abating the

prosecution under the indictment, or for inquiring into the sufficiency of the competent evidence before the grand jury, even if the defendant may be expected to have the illegally obtained evidence suppressed or incompetent evidence excluded at trial. *See Dionisio, supra.* Despite some argument that the *Costello* rule has been eroded by cases calling for a more limited use of hearsay in grand jury proceedings, it appears that the rule is entitled to its full force today in light of the broad bases for decision in *Calandra, supra.*

In *Calandra*, the Supreme Court held that a grand jury witness cannot properly refuse to answer questions based upon evidence obtained from an unlawful search and seizure. The court reasoned that a contrary rule would deter police misconduct in only a speculative and minimal way while it would exact a prohibitive price by impeding the grand jury's investigation.

The Court cited *Dionisio, supra*, as reaffirming ''our disinclination to allow litigious interference with grand jury proceedings.'' The Court also recognized the existence of an internal control in that prosecutors will hardly seek indictments where convictions cannot be obtained. *Calandra, supra*, at 349-351.

It is in recognition of this principle that the Department has formulated the following internal policy of self-restraint regarding presentation to the grand jury of unconstitutionally obtained evidence: A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.

9-11.232 Use of Hearsay in a Grand Jury Proceeding

There has been considerable criticism voiced that hearsay evidence is relied upon too much in grand jury proceedings. From the perspective, however, that a grand jury is a layman's inquiry, conducted *ex parte* to determine probable cause rather than guilt or innocence, and that in certain forms hearsay is highly creditable evidence, there is a justification for using hearsay in grand jury proceedings. Each U.S. Attorney should be accountable to himself/herself in this regard and to the grand jurors. Worthy of consideration are guidelines on the use of hearsay in grand jury proceedings set out in *A.B.A. Standards For Criminal Justice, Standards Relating To The Prosecution Function* 3.6(a) (Approved Draft, 1971). Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. *See United States v. Leibowitz,* 420 F.2d 39 (2d Cir. 1969); *but see United States v. Trass*, 644 F.2d 791 (9th Cir.1981). The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional

obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment. Government attorneys are charged with a high duty in presenting matters to grand juries but are also entitled to a constitutionally based independence. *See United States v. Chanen*, 549 F.2d 1306 (9th Cir.1977).

9-11.233 Presentation of Exculpatory Evidence

Although neither statutory nor case law imposes upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury (*Leverage Funding System, Inc., supra*; *United States v. Y. 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), it is the Department's internal policy to do so under many circumstances. For example, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

9-11.240 Who May be Present at Grand Jury Sessions (Fed.R.Crim.P. 6(d))

Under Rule 6(d) of the Federal Rules of Criminal Procedure, no person may be present while a grand jury is in session other than attorneys for the government, the witness under examination, interpreters when needed, and stenographers or operators of recording devices who are making a record of the evidence. No one at all other than the jurors may be present while the grand jury is deliberating or voting. *See United States v. Mechanik*, 475 U.S. 66 (1986). Eavesdropping upon the deliberations or voting of a grand jury is punishable as an obstruction of justice under 18 U.S.C. § 1508.

9-11.241 DOJ Attorneys Authorized to Conduct Grand Jury Proceedings

Federal Rule of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of that rule, ''attorney for the government'' is defined in Fed.R.Cr.P. 54(c) as the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, an authorized assistant of a U.S. Attorney, and certain other persons in cases arising under the laws of Guam.

The authority for a U.S. Attorney to conduct grand jury proceedings is set forth in the statute establishing U.S. Attorney duties, 28 U.S.C. § 547. U.S. Attorneys are directed in that statute to ''prosecute for all offenses against the United States.'' Assistant U.S. Attorneys similarly derive their authority to conduct grand jury proceedings in the district of their appointment from their appointment statute, 28 U.S.C. § 542.

When a U.S. Attorney or Assistant U.S. Attorney needs to appear before a grand jury in a district other than the district in which he/she is appointed, the U.S. Attorney for either the district of appointment or the district of the grand jury should submit a request to the Executive Office for U.S. Attorneys for an appointment as a Special Assistant U.S. Attorney. The request should identify the attorney, and the reasons therefor. The Executive Office will send the notice of appointment to the U.S. Attorney in the district in which the grand jury is sitting.

Departmental attorneys, other than U.S. Attorneys and Assistant U.S. Attorneys, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegee pursuant to 28 U.S.C. § 515(a). The Attorney General has delegated this authority to direct Department of Justice Attorneys to conduct grand jury proceedings to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters supervised by them. (Order No. 725-77.)

9-11.242 Non-Department of Justice Government Attorneys

Federal Rule of Criminal Procedure 6(d) provides that the only prosecutional personnel who may be present while the grand jury is in session are ''attorneys for the government.'' Rule 54(c) defines attorney for the government for Federal Rules of Criminal Procedure purposes as ''the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, (and) an authorized assistant of a United States Attorney.''

An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. § 515, or a Special Assistant to a U.S. Attorney, pursuant to 28 U.S.C. § 543, in order to appear before a grand jury in the district of appointment. Normally the Special Assistant to a U.S. Attorney appointment is employed. Where the less common Special Assistant or Special Assistant to the Attorney General appointment is to be used in cases or matters within the jurisdiction of the Criminal Division, the Office of Enforcement Operations should be contacted for information.

Appointments as Special Assistants to U.S. Attorneys are made by the Associate Attorney General. A letter of appointment is executed and the oath of office as a Special Assistant to a U.S. Attorney must be taken (*see* 28 U.S.C. §§ 543, 544). Requests for such appointments must be made in writing through the Director of the Executive Office for U.S. Attorneys and must include the following information:

A. The facts and circumstances of the case;

B. The reasons supporting the appointment;

C. The duration and any special conditions of the appointment;

D. Whether the appointee may be called as a witness before the grand jury. If such a possibility exists, it ordinarily would be unwise to make the appointment;

E. How the attorney has been informed of the grand jury secrecy requirements in Federal Rule of Criminal Procedure 6(e).

F. If the appointee is an agency attorney, whether the agency from which the attorney comes is conducting or may conduct contemporaneous administrative or other civil proceedings. If so, a full description of the substance and status of such proceedings should be included; and

G. If the appointee is an agency attorney, a full description of the arrangements that have been made to prevent the attorney's agency from obtaining access through the attorney to grand jury materials in the case.

The request must also state that the agency attorney will be accompanied at all times while before the grand jury by an experienced Department of Justice attorney, the U.S. Attorney, or an Assistant U.S. Attorney. Finally, the request must contain the following statement, signed by the agency attorney:

> I understand the restrictions on the grand jury secrecy obligations of this appointment as a Special Assistant to the United States Attorney and do hereby certify that I will adhere to the requirements contained in this letter.

The use of agency attorneys as Special Assistants before the grand jury has been upheld by the courts. *See United States v. Wencke*, 604 F.2d 607 (9th Cir.1979); *United States v. Birdman*, 602 F.2d 547 (3rd Cir.1979); *In re Perlin*, 589 F.2d 260 (7th Cir.1978). The U.S. Attorney or Departmental attorney with responsibility for the case retains such full responsibility. *Cf.* D.C.Cir.1979 Judicial Conference Proceedings, 85 F.R.D. 180-181.

9-11.243 Presence of Stenographer—Recording Required

Federal Rule of Criminal Procedure 6(e)(1) requires that all grand jury proceedings be recorded except when the grand jury is deliberating or voting. Government attorneys should not have any conversations, even of a casual nature, with grand jurors unless they are being recorded. The recording, however, is not required to be transcribed and transcripts should not be prepared unless there is a specific need for them. Reporters and stenographers are bound by the secrecy requirements of Rule 6(e)(2). It is important that they be made aware of that rule.

9-11.244 Presence of an Interpreter

Federal Rule of Criminal Procedure 6(d) permits the presence of an interpreter when needed in grand jury proceedings. Interpreters should be

obtained in accordance with 28 U.S.C. § 1827 and Rule 28. An interpreter is bound not to disclose matters occurring before the grand jury without judicial authority. Attorneys for the government should make sure that any interpreter used in a grand jury proceeding is aware of his/her secrecy obligation.

9-11.245 No Exceptions

Federal Rule of Criminal Procedure 6(d) does not admit any exception under which persons not usually authorized to be present are allowed to attend a grand jury session under extraordinary circumstances. Indeed, the presence of any unauthorized person during a grand jury session may be grounds for dismissal of the indictment. Thus, a parent may not accompany a child who is to testify, nor may a marshal be present to control a potentially unruly witness. *United States v. Borys*, 169 F.Supp. 366 (D.Alaska 1959); *see United States v. Carper*, 116 F.Supp. 817 (D.D.C.1953).

9-11.250 Disclosure Under Fed.R.Crim.P. 6(e): To Attorneys for the Government, Including for Civil Use

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made ''to an attorney for the government for use in the performance of such attorney's duty.'' *See* Fed.R.Cr.P. 6(e)(3)(A)(i). ''Attorney for the government'' is defined in Fed.R.Cr.P. 54(c). Disclosure to government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i). *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). *See Guide on Rule 6(e) after Sells and Baggot* 6-8, 18-32 (January 1984).

From the Federal Rule of Criminal Procedure 54(c) definition it is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies. *See United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir.1980). Nor is disclosure permitted under this section to attorneys for state or local governments. *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).

When disclosure is authorized by court order under Rule 6(e)(3)(C)(i), of the Federal Rules of Criminal Procedure, for use in civil proceedings, there is a danger of misuse, or the appearance thereof, when such disclosure is made during the pendency of the grand jury investigation. There is no rule of law that would require a civil disclosure within the Department to be deferred until the relevant criminal investigation has been completed; but unless there is a genuine need for disclosure during the pendency of the grand jury investigation, it is the better practice to forestall the disclosure until the criminal investigation is completed.

9-11.251 Disclosure Under Fed.R.Crim.P. 6(e): To Other Government Personnel

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made to ''government personnel ... to assist an attorney for the government ... to enforce federal criminal law.'' ''Government personnel'' includes not only federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the prosecutor. *See* S.Rep. No. 354, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Ad.News 530. The decision to use government personnel to assist the grand jury investigation is within the discretion of the prosecutor and need not be justified. *Perlin, supra* at 268. Such personnel may use the material disclosed in conducting interviews. *Cf United States v. Stanford*, 589 F.2d 285 (7th Cir.1978), *cert. denied*, 440 U.S. 983 (1979).

Strict precautions should be taken when employing personnel from agencies which have a civil function, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service, to ensure that knowledge of the grand jury investigation or documents subpoenaed by the grand jury are not used improperly for civil purposes by the agency. Grand jury documents should be segregated and personnel assisting the grand jury investigation should not work on a civil matter involving the same subjects unless a court order has been obtained authorizing such use. It may be valuable to issue written precautionary instructions which can be used in any hearing challenging the grand jury procedures. *See Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098, 1126 (E.D.Pa.1975).

9-11.252 Disclosure Under Fed.R.Crim.P. 6(e): Preliminarily to or in Connection With a Judicial Proceeding

Under subsection (3)(C)(i) of Fed.R.Cr.P. 6(e), grand jury materials may be disclosed by order of a court preliminarily to or in connection with a judicial proceeding. A court must make two determinations before entering such an order.

The first is whether the requested disclosure is indeed preliminary to or in connection with a judicial proceeding. The leading definition of judicial proceeding is that provided by Judge Learned Hand:

> The 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. An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be

imputed to the Rule. *Poe v. Rosenberg*, 255 F.2d 118, 120 (2d Cir.1958).

Because IRS has unique powers to assess and collect taxes without resort to litigation, its tax audits and other proceedings may not qualify for disclosure under Rule 6(e)(3)(C)(i) of the Fed.R.Cr.P. *United States v. Baggot*, 463 U.S. 476 (1983).

The second determination the courts make before authorizing disclosure of grand jury materials to private parties is to weigh the particularized need of the party seeking disclosure against the public interest in grand jury secrecy. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 216-219 (1979); *Guide on Rule 6(e) after Sells and Baggot* at 22-27 (January 1984). A failure to demonstrate sufficient need can result in the denial of a request for otherwise permissible disclosure. *See In re Grand Jury Proceedings*, 483 F.Supp. 422 (E.D.Pa 1979) (state prosecutor). The Department takes the position that the particularized need requirement is inapplicable when grand jury materials are sought for federal law enforcement purposes. *See In re Grand Jury Subpoenas, April 1978*, 581 F.2d 1103, 1110 (4th Cir.1978), *cert. denied*, 440 U.S. 971 (1979); *In re Grand Jury (LTV)*, 583 F.2d 128, 130-131 (5th Cir.1978).

As with disclosure to Department of Justice attorneys for use in civil proceedings, discussed *supra*, it is preferable to await the completion of a grand jury investigation before seeking disclosure to another government agency for civil purposes. *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F.Supp. 929 (D.Mass.1975).

9-11.253 Who is Not Covered by Fed.R.Crim.P. 6(e): Only Witnesses

One of the purposes of grand jury secrecy is to foster the cooperation of witnesses. Only by making witnesses aware of the protection afforded them can the full value of grand jury secrecy be realized. It is suggested that in an appropriate situation the witness be told that the proceeding will remain secret until such time as disclosure is required in court, and, therefore, that the witness' cooperation with or appearance before the grand jury will not be known publicly unless the witness chooses to make it known.

In communicating with a witness regarding grand jury secrecy, it is important to make clear that Federal Rule of Criminal Procedure 6(e) specifically prohibits any obligation of secrecy from being imposed ''upon any person except in accordance with this rule.'' Witnesses, therefore, cannot be put under any obligation of secrecy. *See Application of Eisenberg*, 654 F.2d 1107, 1113 n. 9 (5th Cir.1981).

However, a suggestion or request that a witness not disclose matters occurring before the grand jury may be made where necessary to protect the integrity of the grand jury's investigation or the safety of witnesses and

other individuals mentioned in testimony. Letters or statements to witnesses cautioning them regarding disclosure should make it clear that no obligation of secrecy can be imposed. In addition, it should be made clear that the witness has an absolute right to consult with his or her attorney.

9-11.260 Amendment to Rule 6(e) Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials

The Supreme Court added a new subdivision, 6(e)(3)(C)(iv), in an amendment effective August 1, 1985. Its purpose, as stated in the Advisory Committee (on Criminal Rules of the Judicial Conference) notes, was to eliminate ''an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws ... [by allowing] a court to permit disclosure to a state or local official for the purpose of enforcing state law when an attorney for the government so requests and makes the requisite showing.''

The new subdivision reads as follows: ''(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made ...

> (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.''

It is both the intent of the amended rule, and the policy of the Department of Justice, to share such grand jury information wherever it is appropriate to do so. Thus, the phrase ''appropriate official of a state or subdivision of a state'' shall be interpreted to mean any official whose official duties include enforcement of the state criminal law whose violation is indicated in the matters for which permission to disclose is to be sought. This policy is, however, subject to the caution in the Advisory Committee notes that ''[t]here is no intention ... to have Federal grand juries act as an arm of the state.''

It is thus clear that the decision to release or withhold such information may have significant effects upon relations between federal prosecutors and their state and local counterparts, and that disclosure may raise issues which go to the heart of the federal grand jury process. In this respect, the Assistant Attorney General in charge of the Criminal Division (who is a member of the Advisory Committee) promised the Advisory Committee that prior to any request to a court for permission to disclose such grand jury information, authorization would be required from the Assistant At-

torney General in charge of the Division having jurisdiction over the matters that were presented to the grand jury. In the case of a multiple-jurisdiction investigation (*e.g.*, tax, non-tax) requests should be made to the Assistant Attorney General of the Division having supervisory responsibility for the principal offense(s) being investigated. It is the policy of the Department that such prior authorization be requested in writing in all cases. A copy of such requests shall be sent to all investigating agencies involved in the grand jury investigation.

To insure that grand jury secrecy requirements are not violated in the submitting of such requests, place the following legend at the top and bottom of each page of the request:

GRAND JURY INFORMATION:

Disclosure restricted by

Rule 6(e), Federal Rules

of Criminal Procedure

In addition, the entire packet shall be covered with a plain white sheet having the word ''SENSITIVE'' stamped or typed at the top left and bottom right corners.

United States Attorneys seeking permission to apply for a disclosure order shall request that permission from the Assistant Attorney General of the Division having jurisdiction over the matter that was before the grand jury by submitting a written request in which they shall address expressly all elements necessary for these officials to comply with the standards set forth below in making their decision. Requests submitted to the Criminal Division shall be sent to the Head, Legal Support Unit, Office of Enforcement Operations. Ones submitted to other Divisions shall be sent to the appropriate contact person listed at the conclusion of this memorandum. There is no requirement that a ''particularized need'' be established for the disclosure, but there should be a substantial one. The need to prosecute or to investigate ongoing or completed state or local felony offenses will generally be deemed substantial.

Persons making requests for authorization should provide the following information:

1. Title of grand jury investigation and involved target(s);

2. Origin of grand jury investigation;

3. General nature of investigation;

4. Status of grand jury investigation;

5. State(s) for which authorization to disclose grand jury matters is sought;

6. Nature and summary of information sought to be disclosed;

7. General nature of potential state offenses;

8. Impact of disclosure to state(s) on ongoing federal grand jury investigative efforts or prosecutions;

9. Extent of prior state involvement, if any, in federal grand jury proceedings under Rule 6(e)(3)(A)(ii);

10. Extent, if any, of state knowledge or awareness of federal grand jury investigation;

11. Existence, if any, of ongoing state investigations or efforts regarding grand jury matters sought to be disclosed; and

12. Any additional material necessary to enable the Assistant Attorney General to evaluate fully the factors which the following paragraph requires them to consider in making a decision.

In making a determination on whether to authorize the seeking of permission to disclose each Assistant Attorney General shall consider all relevant factors including whether:

1. The state has a substantial need for the information;

2. The grand jury was convened for a legitimate federal investigative purpose;

3. Disclosure would impair an ongoing federal trial or investigation;

4. Disclosure would violate a federal statute (*e.g.*, 26 U.S.C. 6103) or regulation;

5. Disclosure would violate a specific Departmental policy;

6. Disclosure would reveal classified information to persons without an appropriate security clearance;

7. Disclosure would compromise the government's ability to protect an informant;

8. Disclosure would improperly reveal trade secrets; and

9. Reasonable alternative means exist for obtaining the information contained in the grand jury materials to be disclosed.

If the request is authorized, the government attorney who seeks permission to disclose shall include in the proposed order a provision that further disclosures by the state officials involved shall be limited to those required in the enforcement of state criminal laws.

It is requested that a copy of any order *denying* a request for permission to disclose be sent to the Assistant Attorney General who authorized the filing of the request.

The following divisions of the Department have designated the listed individuals to answer questions regarding Rule 6(e)(3)(C)(iv).

Antitrust Division	Director of Operations	Joe Widmar 514-3543
Civil Rights Division	Deputy Chief Criminal Section	Dan Bell 514-4071
	Deputy Chief Criminal Section	Barry Kowalski 514-4067
Criminal Division	Head, Legal Support Unit Office of Enforcement Operations	David Simonson 724-6672
Lands Division	Director, Environmental Crimes Unit Environmental Enforcement Section	Judson Starr 514-2490
Tax Division	Senior Assistant Chief Office of Policy and Tax Enforcement Analysis Criminal Section	Ed Vellines 514-3011

9-11.300 THE SPECIAL GRAND JURY—18 U.S.C. § 3331

It was once common for investigative grand juries and for grand juries other than the first of two or more impaneled in a district to be called ''special'' grand juries. The term is now ambiguous. Legislation enacted in 1970 created ''special'' grand juries primarily to meet the special needs of organized crime investigations. These statutory grand juries differ in several significant respects from grand juries impaneled under Federal Rule of Criminal Procedure 6. Care should be taken in using the term special grand jury to avoid any misunderstanding. The term may be used, for example, with a parenthetical reference to the statute or the rule, if the meaning is not otherwise clear from the context.

The distinctive features of special grand juries are discussed below. To the extent these distinctive features permit, the special grand juries are governed by the same statutes, rules, and case law applicable to regular grand juries. *See* 18 U.S.C. § 3334. In a very large measure, special grand juries and regular grand juries are alike.

9-11.310 Impaneling Special Grand Juries

As provided in 18 U.S.C. § 3334(a), the district court in every judicial district having more than four million inhabitants must impanel a special grand jury at least once every eighteen months (unless a special grand jury is then sitting); and the district court must also impanel a special grand jury when the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General certifies in writing to the chief judge of the district that in his/her judgment, a special grand jury is necessary ''because of criminal activity in the district.'' (*See* 28 C.F.R. § 0.59

under which the Assistant Attorney General in charge of the Criminal Division is designated to make certifications under 18 U.S.C. § 3331.)

9-11.311 Request for Certification

U.S. Attorneys who want certification made to cause the impaneling of special grand juries should direct their requests for certification to the Chief of the Organized Crime and Racketeering Section of the Criminal Division, explaining briefly the reasons for the request and the nature and scope of the criminal activities to be investigated.

9-11.312 Additional Special Grand Juries

District courts are authorized under 18 U.S.C. § 3332(b) to impanel additional special grand juries when the special grand juries already impaneled have more business than they can properly handle. When impaneling additional special grand juries, a court should make a finding as to the need; and a court should always make it clear that the special grand jury is being impaneled under 18 U.S.C. § 3331 (and is therefore not subject to the limitations of a regular grand jury). *See Wax v. Motley*, 510 F.2d 318 (2d Cir.1975).

9-11.320 Special Duties Imposed Upon Attorneys for the Government

The special grand jury has a duty under 18 U.S.C. § 3332(a) ''to inquire into offenses against the criminal laws of the United States alleged to have been committed within the district.'' Such alleged offenses may be brought to the jury's attention by the court or by any attorney appearing for the United States to present evidence to the jury. It is incumbent upon any such government attorney to whom it is reported that a federal offense was committed within the district, if the source of information so requests, to refer the information to the special grand jury, naming the source and apprising the jury of the attorney's action or recommendation regarding the information.

9-11.330 Reports of Special Grand Juries

At the conclusion of its service, a special grand jury is authorized under 18 U.S.C. § 3333, by a majority vote of its members, to submit to the district court, potentially for public release, a grand jury report, which must concern either: (1) noncriminal misconduct, malfeasance, or misfeasance in office involving organized crime activity by an appointed public officer or employee, as the basis for a recommendation for removal or disciplinary action; or (2) organized crime conditions in the district, without however being critical of any identified person. (''Public officer or employee'' is defined broadly in 18 U.S.C. § 3333(f) to include federal, state and local officials.)

Upon receiving a report from a special grand jury, the district court must examine it, together with the minutes of the special grand jury, and accept it, for eventual filing as a public record, if the report is: (1) one of the two types authorized by 18 U.S.C. § 3333(a); (2) based upon facts discovered in the course of an authorized criminal investigation; (3) supported by a preponderance of the evidence; and (4) if each public officer or employee named in the report was afforded a reasonable opportunity to testify and present witnesses on his/her own behalf before the special grand jury, prior to its filing the report. (It would seem that 18 U.S.C. § 3333(a) necessitates a recording of the proceedings if a special grand jury may issue a grand jury report.)

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

The ''misconduct,'' ''malfeasance,'' or ''misfeasance'' that may be the subject of a report (provided it is related to organized criminal activity) must, to some degree, involve willful wrongdoing as distinguished from mere inaction or lack of diligence on the part of the public official. Nonfeasance in office, however, if it is of such serious dimensions as to be equitable with misconduct, may be a basis for a special grand jury report. *See* S.Rep. No. 617, 91st Cong., 1st Sess. (1969); 1970 U.S.Code Cong. & Ad.News 4007.

Reports involving public officials must connect ''misconduct,'' ''malfeasance,'' or ''misfeasance'' with ''organized criminal activity.'' ''Organized criminal activity'' should be interpreted as being much broader than ''organized crime;'' it includes ''any criminal activity collectively undertaken.'' This statement is based upon the legislative history of 18 U.S.C. § 3503(a), not of 18 U.S.C. § 3333, but both sections were part of the Organized Crime Control Act of 1970, making it logical to construe the term the same way for both sections. *See* 116 Cong.Rec. 35293 (October 7, 1970).

Before the district court may enter as a public record a special grand jury report concerning appointed public officers or employees, a complex procedure must be followed as set down in 18 U.S.C. § 3333(c).

If a court decides that a report submitted to it by a special grand jury regarding a public officer or employee does not comply with the law, the court may seal the report and keep it secret or, for remedial purposes,

order the same grand jury to take additional testimony. For purposes of taking additional testimony, a special grand jury may be extended to serve for longer than thirty-six months (but this is the only exception to the thirty-six months limitation .

If the district court feels that the filing of a special grand jury report as public record would prejudice the fair consideration of a pending criminal matter, the court is authorized under 18 U.S.C. § 3333(d) to keep the report sealed during the pendency of that matter. Sealed for such a reason, the report would not be subject to subpoena.

When appropriate, U.S. Attorneys will deliver copies of grand jury reports, together with the appendices, to the governmental bodies having jurisdiction to discipline the appointed officers and employees whose involvement in ''organized criminal activity'' is the subject of the report. *See* 18 U.S.C. § 3333(c)(3). (The prospect of such disciplinary action does not prevent the officer's or employee's being compelled to testify under a grant of immunity; *see In re Reno*, 331 F.Supp. 507 (E.D. Mich.1971)).

9-11.331 Consultation With the Criminal Division About Reports

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

It is not clear what remedy the government would have if a court was wrong in sealing a special grand jury report and refusing to make it public. The Chief of the Organized Crime and Racketeering Section should be notified promptly if a court finally determines for any reason that a grand jury report is deficient or not properly to be released, so that consideration may be given to the possibility of taking the matter to the court of appeals.