GRAND JURY PRACTICE

Prof. Gerald H. Goldstein

St. Mary's University
Advanced Criminal Law

TABLE OF CONTENTS

Part I: Grand Jury Practice

GRAND JURY PRACTICE 1

THE GRAND JURY'S COMPOSITION 2

MOTION TO QUASH GRAND JURY 2

ESTABLISHING A PRIMA FACIE SHOWING OF DISCRIMINATION 4

BURDEN THEN SHIFTS TO THE GOVERNMENT 5

IDENTIFIABLE GROUPS 6

African Americans: 6

Women: 6

Young adults: 6

Others: 7

SELECTION OF GRAND JURY FOREPERSON MAY ALSO CONSTITUTE SUCH A DEPRIVATION: 7

STANDING TO COMPLAIN OF SYSTEMATIC EXCLUSION 8

An evidentiary hearing must be provided: 9

TIMELINESS OF THE CHALLENGE 9

PARTICULAR GRAND JUROR NEED NOT BE PRESENT AT EVERY SESSION TO VOTE DEFENDANT TRUE BILL 11

PRESENCE OF UNAUTHORIZED PERSONS 11

REQUIREMENT TO PRESENT EXCULPATORY EVIDENCE 12

ABUSE OF GRAND JURY 12

SECRECY 13

FEDERAL: 13

GOVERNMENT USE OF GRAND JURY MATERIALS TO DETERMINE WHETHER TO PROCEED IN A CIVIL ACTION 14

GOVERNMENT'S USE OF GRAND JURY INFORMATION TO PURSUE CRIMINAL INVESTIGATION ELSEWHERE 15

NO INTERLOCUTORY APPEAL FOR A VIOLATION OF THE RULE OF SECRECY 16

FEDERAL: 16

STATE: 16

FIRST AMENDMENT ISSUES AND THE RIGHT OF A GRAND JURY WITNESSES TO

THEIR OWN TESTIMONY 17
RIGHT TO COPY OF TRANSCRIPT 18
RIGHT TO HAVE WITNESS' GRAND JURY TESTIMONY TRANSCRIBED 18
FEDERAL: 19
STATE: 19
PROBLEMS REGARDING GRAND JURY SUBPOENAS 19
PLACE TO APPEAR 19
SPECIFICITY IN SUBPOENA IS NOT REQUIRED 21
SERVICE OF GRAND JURY SUBPOENA 21
WHO MAY BE SUBPOENAED? 21
"Targets" of Investigations 22
Lawyers 22
WHERE GOVERNMENT REFUSES TO FOLLOW INTERNAL GUIDELINES 22
SUBPOENA DUCES TECUM: ITEMS SOUGHT MUST BE ADEQUATELY DESCRIBED 23
"OPPRESSIVENESS", NOT "RELEVANCY", IS THE TEST 24
RULE 17 APPLICABLE IN PART TO GRAND JURY SUBPOENAS 25
POST INDICTMENT GRAND JURY INVESTIGATION 25
THE GENERAL RULE: 25
IMPERMISSIBLE TO EMPLOY THE NON-RECIPROCAL BENEFITS OF A GRAND JURY INVESTIGATION FOR DISCOVERY AGAINST AN INDICTED DEFENDANT 27
STANDARD APPLIED 28
INCIDENTAL USE OF INFORMATION OBTAINED THROUGH GRAND JURY IN PENDING TRIALS 29
BY HOOK OR BY CROOK 30
THE FIFTH AMENDMENT AS APPLICABLE TO GRAND JURY PROCEEDINGS 30
ANSWER NEED ONLY BE "ADVERSE" 31
REQUIRING A WITNESS TO INVOKE PRIVILEGE BEFORE GRAND JURY 32
IT IS THE COMPELLED PRODUCTION WHICH IS PROTECTED BY THE PRIVILEGE 34
FIFTH AMENDMENT PRIVILEGE PROTECTS AGAINST COMPELLED PRODUCTION OF RECORDS OF SOLE PROPRIETORSHIP 35
SIZE OR DIVERSITY OF SOLE PROPRIETORSHIP NOT RELEVANT 36
CUSTODIAN OF "CORPORATE RECORDS" HAS NO "ACT OF PRODUCTION" FIFTH AMENDMENT PRIVILEGE 37
REQUIRED RECORDS 39
MUST HAVE "JURISDICTION" OVER CORPORATION 39

SOLE PROPRIETOR MAY RETAIN RIGHT TO INTERVENE AND PRECLUDE COMPELLED PRODUCTION OF RECORDS FROM EMPLOYEE....40

GRAND JURY WITNESS: 41

MATERIAL WITNESSES....41

SANCTION AND APPEAL FOR CONTEMPT....43

REFUSAL TO COMPLY....43

CONTEMPT POWER LIMITED....43

ENTITLED TO "ONE BITE" THEORY....44

MOTION TO INTERVENE....44

INTERVENOR HAS RIGHT TO INTERLOCUTORY APPEAL....47

"CONTENT" VS. "ACT OF PRODUCTION" ANALYSIS TO SUBPOENAS DUCES TECUM....48

EFFECT OF GUILTY PLEA ON ABILITY TO INVOKE FIFTH AMENDMENT PRIVILEGE 50

IMMUNIZING GRAND JURY WITNESSES....51

FEDERAL:....51

TEXAS:....52

USE IMMUNITY STATUTE [28 U.S.C. § 6002] PROHIBITS USING COMPELLED TESTIMONY IN "ANY RESPECT"....52

CERTIFICATION OF EVIDENCE OBTAINED INDEPENDENTLY OF GRAND JURY TESTIMONY....53

GRAND JURY HEARING COMPELLED TESTIMONY SHOULD NOT THEREAFTER INDICT THE WITNESS....54

HEARING REQUIRED PRIOR TO ISSUANCE OF ORDER GRANTING IMMUNITY?....55

JUSTICE DEPARTMENT OFFICIAL MUST EXPRESSLY APPROVE GRANT OF IMMUNITY....56

DISTRICT COURT HAS DISCRETION TO DENY AN ORDER WHERE SAME WOULD INFRINGE UPON CONSTITUTIONAL RIGHTS....57

FEAR OF FOREIGN PROSECUTION....58

IMMUNITY STATEMENT EXPRESSLY EXEMPTS "FALSE STATEMENTS" PROSECUTION....58

PRIOR STATEMENTS TO FEDERAL OFFICER....59

PRIOR INCONSISTENT STATEMENTS COULD BE USED TO PROVE INCONSISTENT TESTIMONY BEFORE GRAND JURY WAS PERJUROUS:....60

THE IMMUNIZED WITNESS....60

SEALING OF PROSECUTION'S EVIDENCE PRIOR TO TAKING IMMUNIZED TESTIMONY....61

NOT SEEK INDICTMENT FROM SAME GRAND JURY HEARING THAT COMPELLED TESTIMONY....61

RIGHT TO COUNSEL....61

NO ADVERSE INFERENCE FROM EXERCISE OF RIGHT TO COUNSEL....61
CONSEQUENCES TO WITNESS OF COMPELLED TESTIMONY....61
GRAND JURY'S RIGHT NOT TO COMPEL TESTIMONY....61
OTHER TESTIMONIAL PRIVILEGES APPLICABLE TO GRAND JURY PROCEEDINGS **62**
ATTORNEY-CLIENT....63
WHERE THE VERY EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP MIGHT BE INCRIMINATING TO A CLIENT, SAME MAY UNDER LIMITED CIRCUMSTANCES BE PRIVILEGED....63
COURTS AND COMMENTATORS OFTEN SEPARATE THE EXCEPTIONS INTO ONE OF THREE CATEGORIES:....66
1. THE "LAST LINK EXCEPTION":....66
2. THE "LEGAL ADVICE" EXCEPTION:....66
3. THE CONFIDENTIAL COMMUNICATION EXCEPTION:....67
CLIENT WITH PENDING CASE....67
TIMING IS EVERYTHING....68
DISCUSSIONS BETWEEN AN INDIVIDUAL AND "A LAWYER REPRESENTING ANOTHER IN A MATTER OF COMMON INTEREST" ARE PRIVILEGED....69
JOINT DEFENSE/REPRESENTATION....69
PRIVILEGE PROTECTS COMMUNICATIONS AT MEETING BETWEEN "PERSONS SUBJECT TO POSSIBLE INDICTMENT" AND THEIR LAWYER....70
CRIME-FRAUD EXCEPTION....71
IN CAMERA EXAMINATION....73
MAY "PRIVILEGED COMMUNICATION" ITSELF BE CONSIDERED IN....73
PRELIMINARY REQUIREMENT OF RELEVANCY....73
PRELIMINARY REQUIREMENT OF NEED....74
ATTORNEY SELF-DEFENSE EXCEPTION....75
GRANT OF IMMUNITY TO CLIENT DOES NOT DESTROY ATTORNEY-CLIENT PRIVILEGE....75
STATE CHALLENGE OF ATTORNEY'S GRAND JURY SUBPOENA....75
CODE OF PROFESSIONAL RESPONSIBILITY....77
DISTINCT PRIVILEGE UNDER "WORK-PRODUCT DOCTRINE"....77
DOCTRINE PROTECTS ADVERSARY PROCESS ITSELF....78
WORK-PRODUCT DOCTRINE BROADER THAN ATTORNEY-CLIENT PRIVILEGE....78
DOCTRINE PROTECTS ATTORNEY NOT CLIENT....79
DOCTRINE APPLICABLE TO CRIMINAL PROCEEDINGS....79
DOCTRINE APPLIES TO TESTIMONY RESPECTING A WITNESS' ORAL STATEMENTS TO AN ATTORNEY PREPARING HIS CASE FOR TRIAL....79

CRIME-FRAUD EXCEPTION....80
CLIENT'S LOCATION MAY BE A PRIVILEGED COMMUNICATION....80
FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED PRODUCTION OF "PRIVATE PAPERS"....81
FOREIGN LAW....82
MARITAL PRIVILEGES....82
[ADVERSE SPOUSAL TESTIMONY VS. MARITAL COMMUNICATIONS]....82
ADVERSE TESTIMONIAL PRIVILEGE VESTS IN TESTIFYING SPOUSE....83
COVERS ACTS AND COMMUNICATIONS....83
NEED NOT BE CONFIDENTIAL....83
NO PRIVILEGE IF MARRIAGE DEFUNCT....84
CRIMINAL ENTERPRISE EXCEPTION APPLIES ONLY TO "CONFIDENTIAL COMMUNICATIONS PRIVILEGE" NOT "ADVERSE TESTIMONIAL PRIVILEGE"....84
TESTIMONY NEED NOT BE TECHNICALLY INCRIMINATING TO BE "ADVERSE"....84
CRUEL TRILEMMA....85
ESTABLISHING PRIVILEGE BY IN CAMERA PROFFER....85
FAMILY PRIVILEGE....86
PSYCHOTHERAPIST-PATIENT PRIVILEGE....87

RIGHT TO COUNSEL....87
DEFENDANT'S GRAND JURY TESTIMONY....89
GRAND JURY TRANSCRIPTS OF OTHER WITNESSES....90
REQUESTS FOR DOCUMENTS OBTAINED BY GRAND JURY....91
POOR MEMORY....91
ELECTRONIC SURVEILLANCE....92
WHAT MATTERS MAY GRAND JURY INVESTIGATE?....92
"INEFFECTIVE" BY DEFINITION....93
ADVICE OF "RIGHTS" OF GRAND JURY WITNESSES....93
GRAND JURY REFORMS....94

GRAND JURY PRACTICE

The United States Constitution provides that:

> "No person shall be held to answer for a capitol or otherwise infamous crime, unless on a presentment or indictment of a grand jury". U.S. Const. amend. V.

The purpose of the grand jury is to act as a bulwark to protect citizens from unwarranted prosecution. *In Re Grand Jury 01-4042,* 286 F.3d 153, 159 (3rd Cir. 2002). In reality, because the Supreme Court has held the grand jury's function is not only to investigate whether crime has occurred, but also to assure itself that crime is not occurring, it has become a powerful investigative body which affords citizens little protection. The defendant has no right to appear before the grand jury and no right to counsel if he does appear. *Conn. v. Gabbert,* 526 U.S. 286 (1999). Its proceedings are kept in secret and are for the most part unreviewable. Thus the grand jury has become an often oppressive process open to abuse.

Under the rules of Federal Criminal Procedure the Grand jury is comprised of a group of 16-23 citizens before whom Federal prosecutors appear and present evidence. 18 U.S.C § 3321. This monograph addresses the limits and powers of the grand jury and the rights and obligations of those who appear before it.

To the prosecutor, the grand jury, with its broad reaching authority, subpoena power and cloak of secrecy is an invaluable investigative tool. Couple this with the executive's power to compel production of records, documents and immunized testimony and it is no wonder that with increasing frequency federal prosecutors and investigators are utilizing the grand jury room for lengthy investigations of individuals and groups "targeted" for indictment.

Proponents of grand jury reform or abolition, who had complained that the grand jury served as a "rubber stamp" for the prosecutorial branch, now express the fear that this process provides an overbearing, one-sided discovery device which is fraught with potential for manipulation and abuse. In fact, the National Association of Criminal Defense Lawyers, in conjunction with the Commission to reform the Federal Grand Jury, proposes specific reforms discussed elsewhere in this paper.

To the defense lawyer, The Grand Jury, like its predecessor The Star Chamber, is totally devoid of those minimal protections thought to be required to insure fairness. Even

in procedures to terminate a welfare recipient's benefits[1], one has more rights that before the grand jury. And for the "target" or "putative defendant" called before this inquisitorial body there is no right to the presence of counsel, to cross-examine the witnesses, to present witnesses on their own behalf, or even to remain silent if granted immunity.

> *"No judge presides to monitor the grand jury's proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. It is 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".*
> ***United States v. Sells Engineering**, 463 U.S. 418 (1983), quoting **United States v. Calandra**, 414 U.S. 338 (1974).*

Representation of witnesses called before such bodies presents the criminal practitioner with unique problems and few solutions. What follows are brief discussions of some of these problems and a few suggestions to help ease the pain.

THE GRAND JURY'S COMPOSITION

Perhaps the most fundamental objection raised regarding grand juries concerns their composition and selection. Courts have uniformly recognized the right of a *defendant* (as opposed to a mere grand jury *witness*) to raise the issues of grand jury composition. *See, e.g., **Alexander v. Louisiana***, 405 U.S. 625 (1972); ***Carter v. Jury Commission***, 396 U.S. 320 (1970). A successful challenge to a grand jury's composition or selection is a particularly potent defense inasmuch as any indictment issued by an improperly composed jury is considered invalid. Therefore, though such challenges are rarely successful and often very difficult to maintain, they are worth considering.

MOTION TO QUASH GRAND JURY

[1] *See **Goldberg v. Kelly***, 397 US 254 (1970).

Systematic exclusion of an identifiable group from the Grand Jury constitutes a denial of "due process" and equal protection. In the case of a "petit jury", the same denies the accused his Sixth Amendment right to a jury comprised of a representative cross-section of the community.

Coleman v. Alabama, 389 U.S. 22 (1967);
Jones v. Georgia, 389 U.S. 24 (1967) (burden upon state to explain disparity);
Sims v. Georgia, 389 U.S. 404 (1967);
Castaneda v. Partida, 430 U.S. 482 (1977) (three-prong test);
Vasquez v. Hillery, 474 U.S. 254 (1986).

Even though a fair trial cures many defects in the grand jury process, it does not correct systematic underrepresentation of an identifiable group on the grand jury. *U.S. v. Mechanick*, 475 U.S. 66 (1986) [Trial cures many defects but does not cure systematic underrepresentation.]

> "[The State] urges this Court to find that discrimination in the grand jury amounted to harmless error in this case, claiming that the evidence against respondent was overwhelming and ...the [R]espondent's conviction after a fair trial, we are told, purged any taint attributable to the indictment process. Our acceptance of this theory would require abandonment of more than a century of consistent precedent . . . .
>
> [We are not], persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained'. . . . Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did

> not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." ***Vasquez v. Hillery***, 474 U.S. 254, 262-263 (1986).

ESTABLISHING A *PRIMA FACIE* SHOWING OF DISCRIMINATION

The party establishing the composition of a grand jury must make a *prima facie* showing that the jury selection procedure systematically produces a group that is not representative of a fair cross section of the community. ***See Jefferson v. Morgan,*** 962 F.2d 1185 (9th Cir. 1992). This showing can be made for as little as a year but requires more than a showing that the defendant's particular grand jury was under representative of some identifiable group. *Duren v. Missouri*, 439 U.S 357, 366 (1979); *U.S. v. Hyde*, 448 F.2d (5th Cir. 1971).

The Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979), identified the elements of a *prima facie* violation of the fair cross section:

> "[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this representation is due to the systematic exclusion of the group in the jury-selection process."
> ***See also Atwell v. Blackburn***, 800 F.2d 502 (5th Cir. 1986) (stating defendant failed to prove members of group were purposely excluded).

The *prima facie* test for an equal protection claim is nearly identical. The Supreme Court in ***Castaneda v. Partida,*** 430 U.S. 482 (1977), explained the requirements for proving an equal protection violation:

> "The first step is to establish that the group is one that is a recognizable, distinct class. . . . Next, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, a selection procedure that is susceptible of abuse or is

not racially neutral supports the presumption of discrimination raised by the statistical showing." ***Id.*** at 494.

A sufficient statistical showing is made when an identifiable group is under represented by over 10%. ***Id.*** at 495; ***U.S. ex rel Barksdale v. Blackburn***, 610 F.2d 253, 268 (5th Cir. 1980); ***Bryant v. Wainwright***, 686 F.2d 1373 (11th Cir. 1982) (noting variance of 7.4 percentage points between general population of blacks in country and black grand jurors held not to demonstrate discrimination in selection of grand jurors). **But see *Gutierrez v. State***, 954 S.W.2d 86, 88 (Tex.App. – San Antonio 1997), *rev'd on other grounds* 979 S.W.2d 659 (Tex. Crim. App. 1998) (stating that 10.1 percent is not a legally sufficient amount and does not justify a more stringent standard). ***U.S. v. Duran de Amesquita***, 582 F.Supp. 1326 (S.D. Fla. 1984) (holding that Hispanics are not a distinct cognizable group, at least for purposes of meeting the Sixth Amendment requisite of a jury comprised of a "fair cross-section" of the community).

BURDEN THEN SHIFTS TO THE GOVERNMENT

Once a "presumption of discrimination" is raised by such a "statistical showing" the burden shifts to the prosecution to rebut the same.

"Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facia case of discriminatory purpose, and the burden shifts to the state to rebut that case."

Castaneda v. Partida, 430 U.S. 482, 494 (1977);
Davis v. State, 374 S.W.2d 242, 242-44 (Tex.Cr.App. 1964);
Flores v. State, 783 S.W.2d 793, (Tex.App. – El Paso 1990).

The government must overcome the presumption that the grand jury was composed unconstitutionally, and that the procedure "manifestly and primarily advances a significant state interest". Prosecutors may do so by showing they employed proper procedures that produced the underrepresentation and that the procedures manifestly and primarily advance a significant state interest

Protestations that racial bias played no part in the selection are insufficient to meet this burden. Nor it is sufficient to claim that a particular group is similarly not available for service.

Furthermore, when the excluded group is one to which stricter scrutiny applies under equal protection analysis, then the government's burden of proof and the quality

of its evidence must be greater to show underrepresentation was not intentional or systematic.

Castaneda v. Partida, 430 U.S. 482, 498 n.136;
Alexander v. Louisiana, 405 U.S. 625 (1972);
Hernandez v. Texas, 347 U.S. 475 (1945);

IDENTIFIABLE GROUPS

The exclusion of invidious groups readily gives rise to a motion to dismiss. The exclusion of other groups may also qualify.

African Americans:

The Fifth Circuit has held that a grand jury selection process violated a black defendant's right to equal protection under the Fourteenth Amendment where no blacks had served as grand jury foreman over a significant period of time. ***Johnson v. Puckett***, 929 F.2d 1067 (5th Cir. 1991).

Women:

Systematic exclusion or exemption of females from petit jury service denies a defendant's Fifth Amendment right to "due process" and Sixth Amendment right to a jury comprised of a representative cross-section of his community.

Taylor v. Louisiana, 419 U.S. 522 (1975) (showing Louisiana statute exempted women unless they volunteered);
Duren v. Missouri, 439 U.S. 357 (1979).

Young adults:

LaRoche v. Perin, 718 F.2d 500 (1st Cir. 1983) (noting unexplained "shortfall of youth" on jury venire states a valid Sixth Amendment Claim under ***Duren v. Missouri*), *but see Barber v. Ponte,*** 772 F.2d 982 (5th Cir. 1985) (“young adults” not a sufficiently distinctive group to require proportionate representation in the venire, overruling *LaRoche*);
Willis v. Zant, 720 F.2d 1212 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 3548 (1984) (remanding for hearing to determine whether underrepresentation of young adults

who "were reared and educated in a desegregated society" and who therefore would "more easily understand and relate to ...a twenty-three year old black" defendant stated a claim under ***Duren***)

Others:

"Although, the distinctiveness of a group for Sixth Amendment purposes is a question of fact", some groups would clearly not qualify as a matter of law.

Willis v. Zant, 720 F.2d 1212 (5th Cir. 1983) (stating "[f]or example, no evidentiary hearing would be needed to determine that redheads or vegetarians are not distinctive classes within the Sixth Amendment fair cross-section analysis.").

Carle v. United States, 705 A.2d 682, 683 (D.C. Cir. Jan. 15, 1998) (holding ex-felons not a distinctive group protected by fair-cross-section requirement).

Selection of grand jury foreperson may also constitute such a deprivation:

Guice v. Forenberry, 661 F.2d 496 (5th Cir. 1981) (en banc);
U.S. v. Perez-Hernandez, 672 F.2d 1380, 1386 (11th Cir. 1982).

See also ***Rose v. Mitchell***, 443 U.S. 545, 551 n.4 (1979) (noting the court assumed, without deciding that "discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire jury venire").

But see ***U.S. v. Hobby***, 702 F.2d 466, 740-41 (4th Cir. 1983), *affirmed*, ***Hobby v. U.S.***, 104 S.Ct. 3093, 3096, 3097 (1984). The Court held that as to federal grand jury forepersons:

> "Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a *federal* grand jury is not so significant to the administration of justice that discrimination in the appointment of

> that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." ***U.S. v. Hobby,*** 468 U.S. 339, 346 (1984)

Cf ***U.S. v. Cronn***, 559 F. Supp. 125 (N.D. Tex. 1982), *affirmed on other grounds*, 717 F.2d 164, 166 (5th Cir. 1983) (stating, "the position of a *federal* grand jury foreman is not constitutionally significant" because his powers are merely ministerial).

STANDING TO COMPLAIN OF SYSTEMATIC EXCLUSION

A defendant is not required to be a member of the class to complain of systematic exclusion.

Campbell v. Louisiana, 523 U.S. 392 (1998).

> "[A] white defendant has standing to raise equal protection challenge to discrimination against black persons in the selection of grand jurors." ***Campbell v. Louisiana***, 523 U.S. 392, 401 (1998).

Peters v. Kiff, 407 U.S. 493 (1972) (emphasizing white Anglo *has standing* to complain of systematic exclusion of blacks). The Court recognized:

> "the exclusion of a discernable class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community". ***Peters v. Kiff,*** 407 U.S. 493, 500 (1972).

> "Accordingly, we hold that whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race and thereby denies him due process of law". (emphasis supplied). ***Peters v. Kiff***, 407 U.S. 493, 504 (1972).

This principle also applies to the petit juries for purposes of a ***Batson*** challenge. Citizens not a member of the offended class are entitled to make a ***Batson*** challenge to a prosecutor's use of peremptory petit jury strikes against jurors not of the defendant's race or class under ***Batson v. Kentucky***, 476 U.S. 79 (1986).

> "The Court permitted *white* defendant to challenge the systematic exclusion of b*lack* persons from *grand* and petit juries. While Peters did not produce a single majority opinion, six of the Justices agreed that racial discrimination in the jury selection process cannot be tolerated and that the race of the defendant has no relevance to his or her standing to raise the claim." ***Powers v. Ohio***, 499 U.S. 400, 408-409 (1991)(emphasis supplied).

Taylor v. Louisiana, 419 U.S. 522 (1975) (male has standing to complain of systematic exclusion of women from petit jury);
Willis v. Zant, 720 F.2d 1212, 1217 (5th Cir. 1983) (Older African American male had standing to complain about underrepresented young white jurors).

Defendant's have an unqualified right to inspect the lists from which jurors are drawn in order to raise such Constitutional challenges.

Test v. U.S., 95 S.Ct. 749 (1975).

See also 28 U.S.C. § 1861,
28 U.S.C. § 1867(f).

<u>An evidentiary hearing must be provided</u>:

The Supreme Court held that it was improper to refuse the defendant a chance to offer evidence to support his claim that Negroes had been arbitrarily and systematically excluded from sitting on the Grand Jury that indicted him. ***Coleman v. Alabama***, 377 U.S. 129 (1964).

<u>TIMELINESS OF THE CHALLENGE</u>

A federal prisoner who failed to make a timely challenge to the composition of the Grand Jury that indicted him may not after his conviction assert that challenge by motion under 28 U.S.C. § 2255. Pursuant to 28 U.S.C. § 1867(e) such challenge must be made "seven days after the defendant discovered or could have discovered. . . the grounds therefore".

Davis v. U.S., 411 U.S. 233 (1973).

See also ***Tollett v. Henderson***, 411 U.S. 258 (1973);
Francis v. Henderson, 425 U.S. 536 (1976).

In Texas, an individual must challenge the array when he has the "opportunity". Tex. Code Crim. Pro. arts. 19.27 and 27.03; ***Armentront v. State***, 135 S.W.2d 479 (Tex.Cr.App. 1939); ***Muniz v. State***, 573 S.W.2d 792, 796 (Tex.Cr.App. 1978), *cert. denied*, 442 U.S. 924 (1979); ***Seay v. State***, 286 S.2d 532 (1973) (holding failure to challenge prior to empanelment waives defect). The accused has been held to have such "opportunity" when he or she is incarcerated or on bail at the time the grand jury is impaneled. Tex. Code Crim. Pro. art. 19.27; ***Hicks v. State***, 493 S.W.2d 833, 834-35 (Tex.Cr.App. 1973). This may occur as early as the time when the grand jury is impaneled. However, relief is available to state prisoners under 28 U.S.C. § 2254 even if the challenge is raised years after a conviction.

Vasquez v. Hillery, 474 U.S. 254, (1986); *reaffirming*, ***Rose v. Mitchell***, 443 U.S. 1545 (1979).

"Petitioner argues here that requiring a State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial. Yet intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century - the only effective remedy for this violation - is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it." ***Vasquez v. Hillery***, 474 U.S. 254, 263 (1986)(footnote omitted).

PARTICULAR GRAND JUROR NEED NOT BE PRESENT AT EVERY SESSION TO VOTE DEFENDANT TRUE BILL

The requirements of FED. R. CRIM. PRO. Rule 6 do not impose a perfect attendance requirement upon the grand jury but only that a quorum be present at every session.

U.S. v. Provenzano, 688 F.2d 194, 201(3d Cir. 1982); United States v. Williams, CRIMINAL ACTION No. 20-55 SECTION "F" (E.D. La. Aug. 10, 2020); *Cf. Breese v. United States,* 33 S. Ct. 1 (1912) (Grand Jury Clause does not require the indictment to be presented to the court by the entire "body" of the grand jury).

It is true that grand jurors may vote upon an indictment if they are not present at every session.

PRESENCE OF UNAUTHORIZED PERSONS

FED. R. CRIM. PRO. Rule 6 sets out who may be present while the grand jury is in session and provides that

> "[N]o person other than the jurors may be present while the grand jury is deliberating or voting."

The Supreme Court has held that a violation of Rule 6(d) prohibition against an unauthorized person's presence in the grand jury room may result in harmless error. ***U.S. v. Mechanik***, 475 U.S. 66 (1986) (determining that issue of such Rule 6(d) "irregularities" are cured by a guilty verdict from a fair trial before a petit jury); ***U.S. v. Kilpatrick***, 821 F.2d 1456, 1468 (10th Cir. 1987) (holding violations of rule 6(d) do not mandate dismissal of the indictment unless the violation resulted in prejudice or infringed on the independent functioning of the grand jury).

See also ***U.S. v. Fulmer***, 722 F.2d 1192 (5th Cir. 1983) (holding a dismissal "with prejudice" only warranted where government misconduct or negligence in prosecuting case has actually prejudiced defendant);
General Motors Corp. v. U.S., 473 F.2d 436 (6th Cir. 1978);
U.S. v. Braniff, 428 F. Supp. 579 (W.D. Tex. 1977);
Ray v. State, 561 S.W.2d 480, 481 (Tex.Cr.App. 1977);

Milton v. State, 468 S.W.2d 426, 432 (Tex.Cr.App. 1976);
U.S. v. Echols, 542 F.2d 948 (5th Cir.), *cert. denied*, 431 U.S. 904 (1976) (holding that a qualified projectionist who was sworn as a witness available for grand jury questions who showed films as instructed, and who was not present during presentation of other evidence or during deliberations, was a proper "witness under examination" by grand jury and thus could remain in room).

But see ***Rudd v. State ex rel. Christian***, 310 So.2d 295 (Fla. 1975) (holding that the presence of unauthorized person in grand jury room does not render indictment *ipso facto* void).

REQUIREMENT TO PRESENT EXCULPATORY EVIDENCE

Some courts have held that where a prosecutor discovers substantial exculpatory evidence in the course of an investigation, the prosecution must disclose such evidence to the grand jury. Other courts have held that there is no right to have exculpatory evidence presented before the grand jury.

U.S. v. Adamo, 742 F.2d 927 (6th Cir. 1944) (dismissing the indictment automatically where false evidence is presented);
U.S. v. Williams, 671 F. Supp. 1 (D. Mass. 1987);
Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988) (stating district court did not err in dismissing bank fraud indictment where government failed to provide grand jury documents indicating defendant used unorthodox valuation methods).

However, the Supreme Court held in ***U.S. v. Williams***, 504 US 36 (1992), that

> "[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."

Texas, however, requires prosecutors to present exculpatory evidence to the grand jury. Tex. Code Crim. Pro. Ann. § 2.01.

ABUSE OF GRAND JURY

The knowing presentation of perjured testimony in order to secure a conviction violates due process. ***Miller v. Pate***, 386 U.S. 1 (1967) [deliberate misrepresentation at trial]; ***Napue v. Illinois***, 360 U.S. 264 (1959) [witness testified falsely he did not have a deal which the prosecutor did not correct]; ***U.S. v. Anderson,*** 574 F.2d 1347 (5th Cir. 1978) [false testimony cannot be used to support a conviction]; ***U.S. v. Martinez-Mercado***, 888 F.2d 1484 (5th Cir. 1989) [presentation of evidence which the prosecution knows is false sets out a due process violation].

Several Circuits have reversed the defendant's convictions based upon presentation of perjured testimony before the grand jury where the prosecutor was aware of the perjured testimony. Dismissal is necessary to protect the integrity of the judicial process. See ***U.S. v. Basurto***, 497 F.2d 781 (9th Cir. 1974); ***U.S. v. Giorgi,*** 840 F.2d 1022 (1st Cir. 1988); *U.S. v. Page*, 808 F.2d 723 (10th Cir. 1987); ***U.S. v. Thibideau***, 671 F.2d 75 (2nd Cir. 1982). The Fifth Circuit has also stated that it will dismiss an indictment with prejudice if the government conduct rises to the level of deliberate misconduct or even gross negligence. See ***U.S. v. Fulmer***, 722 F.2d 1192 (5th Cir. 1983); ***U.S. v. Campagnulo***, 592 F.2d 852 (5th Cir. 1979). If the indictment was obtained by the presentation of testimony the prosecutor knew to be perjured, the court should reverse the conviction. See ***U.S. v. Baskes***, 433 F.Supp. 799, 804-807 (N.D. Ill. 197)[cited with approval in ***U.S. v. Campagnuolo,*** 592 F.2d 852, 865 (5th Cir. 1979)

Recently, several courts have raised questions regarding the use and/or abuse of the federal grand jury process by Independent Counsel In the investigation of whether President Clinton committed perjury in a civil deposition concerning his sexual relationship with Monica Lewinsky the Office of Independent Counsel apparently leaked secret information about the investigation to the press. *In re: Sealed Case No: 99-3091*, 192 F.3d 995 (D.C. Cir. 1999).

SECRECY
FEDERAL:

Grand Jury proceedings are kept secret pursuant to Rule 6 of the Federal rules of Criminal Procedure. The policy reasons for grand jury secrecy are to encourage untrammeled disclosure by future grand jury witnesses and discourage witness tampering. *Douglas Oil Company of California v. Petrol Stops Northwestern et al*, 441 U.S. 211, 222 (1979). Thus**,** disclosure of grand jury material is appropriate only when the public interest in secrecy is outweighed by the need for disclosure. ***In Re Lynde***, 922 F.2d 1448, 1452 (10th Cir. 1991). The party seeking disclosure has the burden of demonstrating a "particular need" for the disclosure. *Id*. The secrecy of the proceeding may only be lifted

to the extent necessary to fulfill the narrowly tailored and compelling need. ***In Re Grand Jury 89-4-72***, 932 F.2d 481, 489 (6th Cir. 1991).

FED. R. CRIM. PRO. Rule 6 ["General Rule of Secrecy"] expressly provides that any grand juror, interpreter, typist or attorney for the government "shall not disclose matters occurring before the grand jury" and that a "knowing violation of [the] Rule . . . may be punished as contempt of court". ***U.S. v. Duff,*** 529 F. Supp. 148 (N.D. Ill. 1981) (noting that the secrecy of grand jury proceedings serves to encourage unhampered investigation of criminal charges and protect the innocent from negative inferences that might be drawn from mere initiation of grand jury proceedings); ***Pigman v. Evansville Press***, 537 N.E.2d 547 (Ind. App. 1989) (denying a news reporter's right to grand jury subpoena's through Indiana's public records act because, otherwise, the function of future grand juries and willingness of witnesses to testify would be affected by such a disclosure-the court cited cases interpreting Rule 6(e)(2) to mean that grand jury subpoenas were "matters occurring before the grand jury**");** The proper remedy for such violations of grand jury secrecy is not per se a dismissal of the indictment but rather a contempt of court citation**.** ***U.S. v. Kilpatrick***, 821 F.2d 1456, 1468 (10th Cir. 1988); ***Flores v. Executive Office of the United States Attorney, Freedom of Information/Privacy Act Unit, No.CIV.A. 99-1930(RMU)***, 121 F.Supp.2d 14 (D.C. Cir. 2000) [Grand jury ballots are matters occurring before the grand jury].

The rule of secrecy applies to defendant, grand jurors, and prosecutors, however it does not apply to grand jury witnesses. These witnesses each have a First Amendment Right to speak about the substance of their testimony. ***Butterworth v. Smith*****,** 494 U.S. 624 (1990). Also, persons who have not appeared before the grand Jury may reveal information about the investigation. Thus lawyers may reveal the existence of grand jury subpoena to persons with whom their client shares a common interest. ***In re Grand Jury Subpoenas 89-3 & 89-4, (John Doe), 89-129,*** 902 F.2d 244, 249 (4th Cir. 1990); ***U.S. v. Eastern Air Lines, Inc.,*** 923 F.2d 241 (2d Cir. 1991) (stating Rule 6(e)(2) covers anything that may reveal what transpired before grand jury, but does not preclude disclosing information from persons who have neither testified nor had their knowledge placed before grand jury through hearsay evidence). And the fact that a grand jury exists is not, without more, protected by the rule of secrecy**.** ***In Re Complaint Against Circuit Judge Cudahy*****,** 294 F.3d 947 (7th Cir. 2002).

<u>GOVERNMENT USE OF GRAND JURY MATERIALS TO DETERMINE WHETHER TO PROCEED IN A CIVIL ACTION</u>

However, government use of grand jury materials by government attorneys who were present during the proceedings has been found permissible under certain circumstances.

U.S. v. John Doe, Inc. I, 481 U.S. 102 (1987).

Justice Stephens, writing the majority opinion, explained that use of these materials was not disclosure when the attorneys who were involved in the proceedings were requesting use of said materials to determine whether to proceed with a civil action. ***U.S. v. John Doe, Inc. I***, 481 U.S. 102 (1987). The Court went further to say that the "particularized need" test is not as rigorous when government attorneys are seeking disclosure versus when a private party seeks the same.

> ". . . it seems plain to us that Rule 6(e) prohibits those with information about the workings of the grand jury from revealing such information to other persons who are not authorized to have access to it under the Rule. The Rule does not contain a prohibition against the continued use of information by attorneys who legitimately obtained access to the information through the grand jury investigation. ...It is indeed fictional - and not just 'at first glance' - to interpret the word 'disclose' to embrace a solitary reexamination of material in the privacy of an attorney's office. ...the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys." ***John Doe, Inc. I***, 481 U.S. at 108, 112.

However, it is an abuse of the grand jury for the government to utilize the grand jury information to investigate and prosecute civil cases. ***U.S. v. Sells Engineering Inc.,*** 463 U.S. 418, 440 (1983).

GOVERNMENT'S USE OF GRAND JURY INFORMATION TO PURSUE CRIMINAL INVESTIGATION ELSEWHERE

With prior court approval, federal prosecutors may share grand jury information with state and local law enforcement authorities, or any other government personnel, in order to assist the prosecutors in enforcing federal laws. Fed. R. Crim. P. 6 3(a)(ii). Furthermore, the USA Patriot Act expands the powers of the federal Prosecutor by

allowing him or her to share grand jury information with officials of federal law enforcement agencies, immigration agencies, protective agencies, national defense or national security agencies if the information relates to foreign intelligence or foreign counter intelligence activities or foreign intelligence information. Fed. R. Crim. P. 6(c)(v) (remarkably this is permitted without prior court approval). The Federal Rules of Criminal Procedure defines foreign intelligence information as information that relates to the ability of the United States to protect itself against potential or actual attacks by foreign powers, international terrorism acts and clandestine intelligence activities. Fed. R. Crim. P. 6(a)(iv)(I)

NO INTERLOCUTORY APPEAL FOR A VIOLATION OF THE RULE OF SECRECY

FEDERAL:

Title 28 U.S.C. § 1291 provides that federal appellate courts "shall have jurisdiction of appeals from all *final* decisions of the district courts". In criminal cases this prohibits appellate review until after conviction and imposition of sentence, ***Midland Asphalt Corp. v. U.S.***, 489 U.S. 794 (1989), unless there is an issue that involves an asserted legal right that would be destroyed if not addressed immediately. ***Midland Asphalt Corp. v. U.S.***, 489 U.S. 794, 799 (1989). However, the Supreme Court held that a violation of rule 6(e) is not one of those rights. ***Midland Asphalt Corp. v. U.S.***, 489 U.S. 794, 799 (1989).

STATE:

Under Texas law, however, each witness takes an oath to keep the proceedings secret . *See* TEX. CODE CRIM. PRO. Art. 20.16. Nevertheless, the Supreme Court held that such a proscription in a Florida statute violated the First Amendment to the United States Constitution where the restriction precluded a witness from revealing his own testimony after the investigation was completed. ***Butterworth v. Smith***, 494 U.S. 624 (1990).

While the Texas Attorney General has by Opinion approved of counsel communicating with the Grand Jury in writing, so long as the State's Attorney is provided a copy of same, under Federal law such procedure might be considered an attempt to "influence" the action of the Grand Jury in violation of 18 U.S.C. § 1504 [punishable by six months confinement and/or a fine of up to $1,000.00].

FIRST AMENDMENT ISSUES AND THE RIGHT OF A GRAND JURY WITNESSES TO THEIR OWN TESTIMONY

Some cases have held that a grand jury witness has a due process right to see his or her testimony and a presumptive right to obtain a transcript of same. The most recent case in the federal system to address this issue, the Court of Appeals for the D.C. Circuit, held that witness had the right to access to the transcripts to their own testimony, however it did not rule whether the witness has a right to a copy of it. ***In re Grand Jury***, 490 F.3d 978 (C.A. D.C. 2007) (*per curium*).

See ***In re Grand Jury***, 490 F.3d 978 (C.A. D.C. 2007);
In Re Grand Jury Subpoena (John Doe), 72 F.3d 271, 275 (2d Cir. 1995);
In Re Heimerle, 788 F. Supp. 700 (E.D.N.Y. 1992);
Bursey v. U.S., 466 F.2d 1059, 1079-81 (9th Cir. 1972).

But see ***U.S. v. John Doe, Inc.***, 481 U.S. 102, 125, 107 S. Ct. 1656, 1669, 95 L.Ed.2d 94 (1987);
In Re Grand Jury Matter (Bachiel), 906 F.2d 78 (1990).

> "[A] witness is not entitled to a copy of his grand jury testimony *on demand . . . .*"

Subject to a balancing test, the Government's need to preserve the secrecy of an ongoing grand jury investigation is weighed against the interest the witness has in reviewing his or her own testimony. ***In re Grand Jury***, 490 F.3d 978 (C.A. D.C. 2007). *See also* ***Douglas Oil Company v. Petrol Stops NW***, 441 U.S. 211 (1979); ***In Re Grand Jury Subpoena (John Doe)***, 72 F.3d 271, 276 (2d Cir. 1995). Particular attention is paid to the reasons for needing the transcript. ***In Re Grand Jury Subpoena (John Doe)***, 72 F.3d at 276.

In ***In re Motions of Dow Jones***, press organizations moved for access to district court proceedings ancillary to grand jury investigation of whether violations of federal law occurred in relation to witnesses or others associated with Paula Jones' civil case against President Clinton. ***In re Motions of Dow Jones***, 142 F.3d 496 (D.C. Cir. 1998). The Court stated:

> "Press organizations did not have First Amendment right of access to ancillary proceedings, even insofar as such proceedings did not involve matters occurring before the grand

jury within the meaning of grand jury Secrecy rule." ***In Re Motions of Dow Jones***, 142 F.3d 496 (D.C. Cir. 1998).

RIGHT TO COPY OF TRANSCRIPT

In light of the possibility of prosecution even for "inconsistent" answers before the grand jury, and since neither the spirit nor letter of FED. R. CRIM. PRO. Rule 6(e) precludes a witness from obtaining a transcript of his *own* testimony, the witness who is recalled before a grand jury should be provided a transcription of that testimony.

Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972);
In re Minkoff, 346 F.Supp. 154 (D.R.I. 1972);
In re Russo, 53 F.R.D. 564 (C.D. Cal. 1971).
See also ***Brown v. U.S.***, 245 F.2d 549 (8th Cir. 1957).

A witness should be entitled to a transcript of his *own* testimony, otherwise he cannot be held in contempt for refusal to testify. ***In re Ferris***, 512 F. Supp. 91 (D.C. Nev. 1981) (permitting a witness to disclose his own testimony will not interfere with a grand juror's ability to deliberate and vote in secret).

RIGHT TO HAVE WITNESS' GRAND JURY TESTIMONY TRANSCRIBED

The need for an accurate record of what the witness actually said before the grand jury is highlighted by the increasing number of prosecutions for perjury based upon grand jury testimony. The immunity statute [18 U.S.C. § 6002], expressly excepts perjury and false statements from its protection, and 18 U.S.C. § 1623(c) allows a mere showing that two declarations are inconsistent to the degree that one of them is necessarily false, in order to support a perjury conviction without any necessity that the prosecution allege or prove which statement was false. ***U.S. v. Apfelbaum***, 445 U.S. 115 (1980).[2]

[2]But the testimony must be compelled grand jury testimony, which is false in order to support a conviction. ***In re Grand Jury Proceedings (Greentree)***, 644 F.2d 348 (5th Cir. 1981).

"If telling the truth creates inconsistency with his prior testimony ...the prior testimony is not admissible under § 1623(c)."

QUERY: Then how can it be presented under § 1623(c) which requires no showing of what particular testimony is false?

FEDERAL:

FED. R. CRIM. PRO. Rule 6(e)(1) now requires that "all proceedings except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device".

STATE:

In Texas, there is also a requirement to record proceedings by electronic device or sound recording. Art. 20.12 of the Tex. Code Crim. Pro provides that:

> "Questions propounded by the grand jury or the attorney representing the state to a person accused or suspected and the testimony of that person to the grand jury shall be recorded either by a stenographer or by use of an electronic device capable of recording sound". Tex. Code Crim. Pro. Art 20.012(a).

Accordingly, Counsel for a subpoenaed witness should file a written request for a court reporter and offer to pay such expenses. ***U.S. v. Thorensen***, 428 F.2d 654, 666 (9th Cir. 1970); s*ee also* ***Dyche v. State***, 490 S.W.2d 568 (Tex.Cr.App. 1973).

PROBLEMS REGARDING GRAND JURY SUBPOENAS

Chronologically, the first problem that may arise regarding grand jury proceedings often concerns the subpoena itself. Recurring problems include:

PLACE TO APPEAR

FED. R. CRIM. PRO. Rule 17 "...does not authorize the Government or the defense to subpoena a witness and require him to report at some time or place other than where the hearing is to be held at which he is to testify". ***Durkin v. U.S.***, 221 F.2d 520, 522 (D.C. Cir. 1954); ***U.S. v. Standard Oil Co.***, 316 F.2d 884, 897 (7th Cir. 1963); ***U.S. v. Keen***, 509 F.2d 1273 (6th Cir. 1975); WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §273 at 546-47; 4A BENDER'S FEDERAL PRACTICE FORM 316 n.1;

See also ***U.S. v. Thomas***, 320 F.2d 527 (D.C. Cir. 1970);

U.S. v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952);
U.S. v. Hedge, 462 F.2d 220, 222-23 (5th Cir. 1972);
Buie v. U.S., 420 F.2d 1207 (5th Cir. 1969);
U.S. v. Johnson-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962) (suggesting disciplinary action against the U.S. Attorney as a means of correcting such practice of abusing the grand jury subpoena);
U.S. v. Stirone, 158 F. Supp. 490, 497 (W.D. Pa. 1957), *aff'd*, 262 F.2d 571 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960) (noting the Court's "disapproval" of the Government's practice of issuing subpoenas commanding the appearance of witnesses to testify at "the offices of the United States Attorney" even if only for purpose of collecting witness fee);
In re: Grand Jury Subpoena (Thomas P. Lauterstein), No. 76-188 (W.D. Tex. 1976) (granting the Motion to Quash, the Court notes its "disapproval" of such practice, ordering that future subpoenas issue only for the "Clerk's Office or the Grand Jury Room");
Durbin v. U.S., 221 F.2d 520, 521 (D.C. Cir. 1954) (stating neither the Constitution, the statutes nor the deep rooted "traditions of our law" recognize "the United States Attorney's *Office* as a proper substitute for the Grand Jury *Room*" holding that it was "clearly an improper use of the District court's process for the U.S. Attorney to issue a subpoena returnable to his office").

In addition, the subpoenaed documents must be delivered to the grand jury and not to the government attorneys. The problem is cured if the attorneys subsequently transfer the documents to the grand jury. However, if this is not done, the proper sanction is contempt. ***U.S. v. Kington***, 801 F.2d 733 (5th Cir. 1986).

Where a prosecutor issues a grand jury subpoena on his own initiative without any ongoing grand jury investigation in progress, the target of the subpoena may immediately appeal the district court's denial of a motion to quash. ***In re Grand Jury Subpoena Duces Tecum***, 725 F.2d 1110 (7th Cir. 1984); *Cf.* ***In re Grand Jury Proceedings (Kelly)***, 491 F. Supp. 211 (D.D.C. 1980);

> "The subpoena at issue here commanded Mr. Cardin. . . to room #2124 in this courthouse. Though room #2124 is not identified in the subpoena, it is in fact an office of the U.S. Attorney. On the face of it, this would appear to be a misuse

> of the subpoena power. Subpoenas under Rule 17 are for the purpose of compelling witnesses to appear at the "time and place" of the grand jury and for no other purpose. But as the record in this case now stands, this court has no basis to hold that the subpoena amounts to an abuse of grand jury process. According to the statements of government counsel at oral argument, the use of an office of the United States Attorney as a "check-in" point for witnesses serves two purposes. It allows for the witness to be directed to the room in which the grand jury is located, a logistical factor often not known at the time the subpoena is issued. It also allows the government attorneys to interview the witness, identify the nature of the proposed testimony or documentary submissions, and use this information to prepare an orderly presentation before the grand jury. Government counsel emphasized that these interviews are consensual; no witness is obligated to speak to a government attorney prior to appearing before the grand jury." ***In re Grand Jury Proceedings (Kelly)***, 491 F. Supp. 211 (D.D.C. 1980).

Likewise, it has been held that a prosecutor may not give blank subpoenas to Federal Agents to complete, although the prosecutor himself would have been entitled to do so. ***In re Grand Jury Proceedings***, 593 F. Supp. 92 (S.D. Fla. 1984).

SPECIFICITY IN SUBPOENA IS NOT REQUIRED

There is no requirement that grand jury subpoenas state the subject matter of the investigation, or cite the statute that gave the grand jury authority to convene. ***See In re Grand Jury Proceedings***, 514 F. Supp. 90 (E.D. Pa. 1981).

SERVICE OF GRAND JURY SUBPOENA

It has been held that service of a grand jury subpoena must be "personal", or the subpoena will be quashed. ***U.S. v. Davenport***, 312 F.2d 303 (7th Cir. 1943), *cert. denied*, 320 U.S. 760. However, failure to move to quash the subpoena for defective service or form may constitute waiver. ***In re Meckley***, 137 F.2d 310 (3d Cir. 1943), *cert. denied*, 320 U.S. 760.

WHO MAY BE SUBPOENAED?

"Targets" of Investigations

The current U.S. ATTORNEY MANUAL, § 9-11.251 provides that:

(1) "targets" of a grand jury investigation should not be subpoenaed,

(2) if subpoenaed they should be notified of their status as "targets", and

(3) upon written assertion of their intent to invoke the privilege against self-incrimination a "target" should be excused.

Lawyers

The ABA House of Delegates has added a paragraph to Rule 3.8 of the ABA's Model Rules of Professional Conduct. The paragraph forbids prosecutors from seeking grand jury subpoenas of attorney's except in specified circumstances.

WHERE GOVERNMENT REFUSES TO FOLLOW INTERNAL GUIDELINES

In the event Government Counsel refuses to follow their own guidelines and insists upon calling the "target" of an investigation before the Grand Jury a claim may be made under the "*Accardi* Doctrine," that, having proscribed such valid regulations for the benefit of the individual, the Government must follow them.

U.S. ex rel Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1975);
Service v. Dulles, 354 U.S. 363, 372 (1957);
Morton v. Ruiz, 415 U.S. 199 (1974);
School Board of Broward County v. HEW, 525 F.2d 900, 908 (5th Cir. 1976).

> "Where the rights of individuals are affected it is incumbent upon agencies to follow their own procedures. This is so even where internal procedures are possibly more rigorous than otherwise would be required." ***Morton v. Ruiz,*** 415 U.S. at 235.

U.S. v. Jacobs, 547 F.2d 772, 774 (2d Cir. 1976) (applying the "*Accardi* Doctrine" to Justice Department Guidelines). ***Morton v. Ruiz,*** 415 U.S. at 235.

> "The Attorney General has promulgated guidelines governing interrelationships between Strike Forces and United States Attorney's Offices. . . . we think that this prescribed direction by the United States Attorney applies to this case. . . .
>
> We did not [in an earlier opinion] specifically refer to the analogy of an agency being required to adhere to its own regulations, ***Service v. Dulles***, 354 U.S. 363, 732 (1957), because we recognized that the Attorney general in his prosecutorial function may be, strictly speaking, less restricted than the Secretary of State. However, the analogy is persuasive when the Attorney General actually promulgates Guidelines for supervision by the United States Attorney in specific circumstances, *see* ***United States v. Leahey***, 434 F.2d 7 (1st Cir. 1970); ***United States v. Heffner***, 420 F.2d 809 (4th Cir. 1969) (non-constitutional ground), and inconsistent treatment results therefrom." ***Morton v. Ruiz,*** 415 U.S. at 235.

With regard to following their own guidelines explaining petit policies at least one court has held that:

> "The Fifth Amendment does not require that the prosecution present information concerning a prior State prosecution and conviction and the government's petite policy to the grand jury when presenting a charge that has been the subject of a previous State prosecution." ***U.S. v. Hyder***, 732 F.2d 841, 845 (11th Cir. 1984).

SUBPOENA DUCES TECUM: ITEMS SOUGHT MUST BE ADEQUATELY DESCRIBED

Subpoenas duces tecum must not be "unreasonable and oppressive," Fed. R. Crim. Pro. 17, rather they must identify and describe the items sought with particularity. ***U.S. v. Komisaruk***, 885 F.2d 490 (9th Cir. 1989).

U.S. v. Morton Salt Co., 338 U.S. 632 (1958);

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946);
In re Grand Jury Proceedings (McCoy), 601 F.2d 162 (5th Cir. 1979).

"OPPRESSIVENESS", NOT "RELEVANCY", IS THE TEST

The Supreme Court has held that the ***U.S. v. Nixon*** enforcement of Rule 17 trial subpoenas, requiring the Government to demonstrate that the evidence sought is relevant, admissible and specific, is not applicable to a subpoena in the grand jury context. *See* ***U.S. v. Nixon***, 418 U.S. 683, 699-700 (1974). *See also* ***U.S. v. R. Enterprises, Inc***., 498 U.S. 292 (1991). Since the purpose of the grand jury is to find out if there is enough information in the first place, to begin an investigation.

> "The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not'. ...The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. . . .
>
> A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged.... In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists." ***U.S. v. R. Enterprises, Inc***., 498 U.S. 292, 297 (1991).

However, In ***R. Enterprises***, the Supreme Court did recognize that where a challenge to the subpoenas "reasonableness" is raised, a court may require the Government to first reveal the "'general subject of the grand jury's investigation", prior

to requiring the accused to demonstrate its unreasonableness. ***U.S. v. R. Enterprises, Inc***., 498 U.S. 292 (1991). "It seems unlikely, of course, that a challenging party who does not know the general subject matter of the grand jury's investigation, no matter how valid that party's claim, will be able to make the necessary showing that compliance would be unreasonable. . . . Consequently, a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." In addition the subpoenaed documents must be delivered to the grand jury and not to the government attorneys. The problem is cured if the attorneys subsequently transfer the documents to the grand jury. However, if this is not done, the proper sanction is contempt." ***U.S. v. R. Enterprises, Inc***., 498 U.S. 292 (1991).

RULE 17 APPLICABLE IN PART TO GRAND JURY SUBPOENAS

The Supreme Court, however, did hold that FED. R. CRIM. PRO. Rule 17(c), governing subpoenas *duces tecum* in criminal proceedings, is applicable to grand jury subpoenas to the extent that it provides a remedy from requests that are "unreasonable or oppressive".

> "The investigatory powers of the grand jury are nevertheless not unlimited...Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. In this case the focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. The Rule provides that 'the court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

The test is whether "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation".

POST INDICTMENT GRAND JURY INVESTIGATION

The General Rule:

The general, and *well-accepted*, rule is that once an individual has been indicted and the adversary roles have been established, the grand jury's investigative function should cease as to such pending cause and the Government relegated to the discovery devices provided adversaries under the statutes and rules. *See* FED. R. CRIM. PRO. Rules 16 and 26.2.

U.S. v. Doss, 545 F.2d 548, 552 (6th Cir. 1976), *affirmed*, 563 F.2d 265, 274-76 (6th Cir. 1977) (en banc) (holding "the function of the grand jury clearly terminates with the issuance of an indictment");
U.S. v. Kovaleski, 406 F. Supp. 267 (E.D. Mich. 1976);
U.S. v. Doe, 455 F.2d 1270 (1st Cir. 1972);
U.S. v. Fisher, 455 F.2d 1101 (2d Cir. 1972);
In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 91 (3d Cir. 1973) (stating, "In the grand jury context a court will not enforce a subpoena if its purpose is to gather evidence for a pending criminal indictment or information");
In re National Window Glass Workers, 287 F. 219 (N.D. Ohio, 1922);
U.S. v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964), *cert. denied*, 579 U.S. 845;
Beverly v. U.S., 468 F.2d 732, 743 (5th Cir. 1972) (stating," it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial");
U.S. v. Ruppel, 666 F.2d 261, 268 (5th Cir. 1983) (holding that "the Government may not use the grand jury in place of discovery for the purpose of preparing a pending indictment for trial");
In re Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980);
U.S. v. Fahey, 510 F.2d 302, 306 (2d Cir. 1974);
U.S. v. Beasley, 550 F.2d 261, 266 (5th Cir. 1977) (emphasizing "prosecutorial agents may not use the grand jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery");
U.S. v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972) (stating that "the government should not use the grand jury for the sole purpose of pretrial discovery in cases in which an indictment has already been returned. . . . We condemn any such conduct by the United States Attorney");
U.S. v. Bloom, 586 F.Supp. 939 (S.D. Fla. 1984).

> "It is firmly entrenched rule that once a defendant has been indicted, a prosecutor may not use a grand jury's investigative powers for the purpose of securing additional evidence against the defendant for use in the upcoming trial." ***In re***

Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980).

In ***U.S. v. Doss,*** the Third Circuit recognized the danger in permitting the grand jury to be employed as a discovery device for the prosecution. ***U.S. v. Doss***, 563 F.2d 265, 276 (6th Cir. 1977)

> "The function of the grand jury clearly terminates with the issuance of the indictment. It has no relationship to the trial itself. We find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already indicted defendant. Such a use of the grand jury would pervert its constitutional and historic function." ***U.S. v. Doss***, 563 F.2d 265, 276 (6th Cir. 1977). *See also* ***U.S. v. Lawn***, 115 F. Supp. 674, 677 (S.D.N.Y. 1953).

IMPERMISSIBLE TO EMPLOY THE NON-RECIPROCAL BENEFITS OF A GRAND JURY INVESTIGATION FOR DISCOVERY AGAINST AN INDICTED DEFENDANT

The unfairness of the prosecution utilizing the grand jury as a discovery device, flows from that body's "broad investigative powers."

> WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL: §1.01 at 197;
> ***Branzburg v. Hayes***, 408 U.S. 665, 688 (1972);
> ***U.S. v. Calandra***, 414 U.S. 338, 343-44(1974);
> ***Blair v. U.S.***, 250 U.S. 273, 282 (1919) (holding that "It is a grand ...inquest" when compared to the meager discovery afforded the criminally accused under FED. R. CRIM. PRO. Rule 16(a)).

For all practical purposes, the grand jury is the prosecutorial tool of the executive branch;

> ***In re Grand Jury Proceeding***, 486 F.2d 85, 90 (3d Cir. 1973);
> ***U.S. v. Cleary***, 265 F.2d 459, 461 (2d Cir. 1959), *cert. denied*, 360 U.S. 936 (holding that "Basically the grand jury is a law enforcement agency").
> ***In re Grand Jury Proceedings***, 613 F.2d 501 (5th Cir. 1980);

and the use of this non-reciprocal device for the sole and exclusive benefit of the prosecution would create an intolerable disparity in the pretrial discovery rights between the accused and his accuser. The adversary process having been initiated by the return of the grand jury's indictment, both sides should be relegated to the avenues of discovery provided for in the Rules and Statutes. *See* FED. R. CRIM. PRO. Rules 12, 12.1, 12.2, 16. *See also* 18 U.S.C. § 3500.

> "The Government's ability to obtain pretrial discovery is a function of statute or rule, *see, e.g.*, FED. R. CRIM. PRO. Rule 16, which may not be enlarged through conversion of the grand jury, an arm of the judiciary, into a tool of the executive". REEF, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES (1978).

This is especially true, where, as here, there is no reciprocal discovery mechanism available to the defendant to call and compel testimony from witnesses prior to trial.

Wardius v. Oregon, 412 U.S. 470 (1973).

In ***Wardius,*** the Supreme Court recognized the inherent disparity in resources between even an affluent accused and his accuser, noting that the Fifth Amendment "...does speak to the balance of forces between the accused and his accuser". ***Wardius,*** 412 U.S. 470, 472 (1973)

> "[t]he [prosecution's] inherent information gathering advantages suggest that if there is to be an imbalance in discovery rights, it should work in the defendant's favor." ***Wardius***, 412 U.S. 470, 472 (1973).

STANDARD APPLIED

Most Courts have applied the test that a grand jury subpoena will be quashed only "where the *sole* or *principal* purpose in further inquiry of appellants is to gather information for the trial of "an indicted witness" (emphasis supplied).

Beverly v. U.S., 468 F.2d 732, 743 (5th Cir. 1972);
U.S. v. Doss, 563 F.2d 265, 267 (6th Cir. 1976).

And the burden is upon the subpoenaed witness to demonstrate that the "sole or dominant purpose of seeking the evidence post indictment is to prepare for the pending trial."

In re Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1041 (3d Cir. 1980).

INCIDENTAL USE OF INFORMATION OBTAINED THROUGH GRAND JURY IN PENDING TRIALS

Courts have indicated that so long as it is not the prosecutor's "sole or principle" purpose in obtaining evidence through a grand jury, the evidence thereby obtained may be incidentally used in a pending trial.

> "It is firmly entrenched that once a defendant has been indicted, a prosecutor may not use a grand jury's investigative powers for the purpose of securing additional evidence against the defendant for use in the upcoming trial.... But a good faith inquiry into other charges within the scope of the grand jury's lawful authority is not prohibited *even if it uncovers further evidence against an indicted person."* (emphasis supplied). ***In re Grand Jury Proceedings (Johanson)***, 632 F.2d 1033, 1041 (3d Cir. 1980).

In ***U.S. v. Beasley***, the Court stated:

> "There is nothing improper about the government continuing its investigation after an indictment is filed, with obvious limitations, of course.... Similarly, prosecutorial agents may not use the grand jury for the primary purpose of strengthening its case on a pending indictment, or as a substitute for discovery, *although this may be an incidental benefit."* (emphasis supplied). ***U.S. v. Beasley***, 550 F.2d 261 (5th Cir. 1977).

See also ***U.S. v. Briasch***, 505 F.2d 139, 147 (7th Cir. 1974) (holding that "[t]he government has every right to interrogate witnesses on subjects relevant to a continuing grand jury investigation even when the evidence received may also relate to a pending indictment");

U.S. v. Dyer, 722 F.2d 174 (5th Cir. 1983) (reasoning that "the requested information was in connection with a new offense");
In re Grand Jury Proceedings, 632 F.2d 1033, 1042 (3d Cir. 1980) (holding "investigation of other persons");
U.S. v. Ruppel, 666 F.2d 261, 268 (5th Cir. 1983)("discovering ...the identity of ...alleged 'unknown persons'");
U.S. v. Sellaro, 514 F.2d 114, 121 (8th Cir. 1973)(stating, "the testimony was taken in connection with the investigation of the " . . . "activities of *other* persons").

BY HOOK OR BY CROOK

On rather strained analysis, one court has permitted the prosecution to seize by search warrant, subpoenaed documents in the possession of a witness who appeared with them in his possession at a hearing on his motion to quash the subpoena. The court held that an order denying a motion to quash is not an appealable order a motion for return of property under Rule 41 will not lie where the property is in any "way tied to a criminal prosecution ...against movant".

In re Grand Jury Proceedings (Uresti), 724 F.2d 1157 (5th Cir. 1984):

> "Uresti had brought the subpoenaed documents to court that morning, intending to refuse to deliver them to the grand jury if his motion to quash was denied. While Uresti awaited his grand jury appearance, and after the hearing of his motion to quash was taken under advisement, a local Federal Magistrate issued a search warrant for the documents sought by the grand jury subpoena. The box of documents Uresti brought to court that morning was seized pursuant to the warrant as he waited in the grand jury witness room."

THE FIFTH AMENDMENT AS APPLICABLE TO GRAND JURY PROCEEDINGS

By far the most frequent issue encountered in the grand jury is the witness's assertion of his or her Fifth Amendment privilege against self-incrimination. The Supreme Court has pointed out that the privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be used".

Kastigar v. U.S., 406 U.S. 411, 445 (1972).

ANSWER NEED ONLY BE "ADVERSE"

The witness need not be guilty nor need the answer in fact incriminate the witness in order for him or her to invoke the Fifth Amendment privilege.

In ***Hoffman v. U.S.***, 341 U.S. 479 (1951), the Court held:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." ***Hoffman v. U.S.***, 341 U.S. 479, 485 (1951).

Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964) (holding that "[The Fifth Amendment] protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used");
Isaacs v. U.S., 256 F.2d 654 (8th Cir. 1958) (protesting of innocence does not bar claim of privilege);
Slochower v. Bd. of Education of N.Y., 350 U.S. 551, 557-58 (stating, "as we pointed out in ***Ullman***, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise *might be embarrassed by ambiguous circumstances"*);
Ex Parte Butler, 522 S.W.2d 196, 198 (Tex.Sup.Ct. 1975).

> "A witness need only show that an answer to the question is likely to be hazardous to him." ***Ex Parte Butler***, 522 S.W.2d 196, 198 (Tex.Sup.Ct. 1975).

U.S. v. Parente, 449 F. Supp. 905, 907 (D.Conn. 1978);
U.S. v. U.S. Currency, 626 F.2d 11, 15 (6th Cir. 1980).

> "It is settled that 'a witness in a civil " . . . "'proceeding may decline to answer questions when to do so would involve a substantial risk of self-incrimination'."

Wehling v. Columbia Broadcasting Systems, 608 F.2d 1084, 1087 n.5 (5th Cir. 1979) (noting that a civil litigant can invoke the privilege against self-incrimination whenever he "reasonably apprehends a risk of self-incrimination, 'though no criminal charges are pending against him ...and even if the risk of prosecution is remote'");
In re Corrugated Container Antitrust Litigation, 620 F.2d 1086 (5th Cir. 1980);
In re Folding Carton Anti-Trust Litigation, 609 F.2d 867 (7th Cir. 1979);

> "[This determination does not depend] upon a judge's prediction of the likelihood of prosecution. Rather, ...it is only when there is but a fanciful possibility of prosecution that a claim of Fifth Amendment privilege is not well taken.... When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster."

However, compelling an accused to sign a consent form for the release of the document from institutions holding them has been held not to fit within the act of production doctrine.

U.S. v. Ghidoni, 732 F.2d 814, 816 (11th Cir. 1984);
In re Grand Jury Proceedings (Thier), 767 F.2d 1133, 1134 (5th Cir. 1985);
John Doe v. U.S., 487 U.S. 201, 108 S. Ct. 2341, 101 L.Ed.2d 184 (1988) (holding that a grand jury target may be compelled to sign a consent form authorizing foreign banks to disclose records where such consent is general in nature without specifying or identifying the documents for acknowledging their existence).

<u>REQUIRING A WITNESS TO INVOKE PRIVILEGE BEFORE GRAND JURY</u>

A grand jury witness may be compelled to invoke his or her Fifth Amendment privilege before a grand jury.
U.S. v. Washington, 431 U.S. 181, 191 (1977);

Appeal of Angiulo, 579 F.2d 104, 106-07 (1st Cir. 1978);
U.S. v. Wolfson, 405 F.2d 779, 784-85 (2d Cir. 1968), *cert. denied*, 394 U.S. 940 (1969).

However, counsel might argue that the same considerations apply which prohibits calling a witness before a petit jury for the sole purpose of invoking his or her privilege against self-incrimination. The almost universal prohibition **is based upon** judicial concern that a petit jury will consider such assertion as admission of guilt.
U.S. v. Beecham, 582 F.2d 898, 908 (5th Cir. 1978), *cert. denied* 440 U.S. 920 (1979);
U.S. v. Lacouture, 495 F.2d 1237, 1240 (5th Cir. 1974);
U.S. v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973), *cert. denied*, 419 U.S. 1053, 95 S. Ct. 631, 42 L.Ed.2d 648 (1974);
Bowles v. U.S., 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc), *cert. denied*, 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533 (1971);
U.S. v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975);
Horner v. State, 508 S.W.2d 371 (Tex.Cr.App. 1974);
U.S. v. Lyons, 703 F.2d 815 (5th Cir. 1983).

> "It is, of course, 'impermissibly prejudicial for the government to attempt to influence the jury by calling a witness it knows will invoke the fifth amendment'." ABA Project on Standards for Criminal Justice, U.S. ATTORNEYS MANUAL, § 9-11.261 (June 1984); NEB. REV. STAT. ANN., § 29-14111(9); N.M. STAT. ANN., § 31-6-12(b).

The privilege is personal and, generally, may not be asserted vicariously on behalf of another or on behalf of a partnership or collective group.

Hale v. Henkel, 201 U.S. 43 (1906);
Wilson v. U.S., 221 U.S. 361 (1911) (regarding a corporation);
U.S. v. White, 322 U.S. 694 (1944) (regarding a collective group);
Bellis v. U.S., 417 U.S. 85 (1974).

Likewise, non-testimonial evidence is not protected by the Fifth Amendment even without a grant of immunity.

South Dakota v. Neville, 459 U.S. 553, 564 (1983) (compelling production of voice exemplars not Fifth Amendment violation);
U.S. v. Dionisio, 410 U.S. 1, 5 (1973) (using voice exemplars);
Gilbert v. California, 388 U.S. 263 (1967) (using handwriting exemplars).

IT IS THE COMPELLED PRODUCTION WHICH IS PROTECTED BY THE PRIVILEGE

The act of production doctrine extends the Fifth Amendment privilege to documents; however, because of the testimonial component involved in an act of production, the testimonial component can be described as the witness' assurance, that the articles produced are the ones demanded. By producing them, the person is, in essence, vouching for them.

In re Grand Jury Subpoena (Kent), 646 F.2d 963, 968 (5th Cir. 1981);
U.S. v. Doe, ***U.S. v. Doe***, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed. 552 (1984).
Craib v. Bulmash, 243 Cal. Rptr. 567, 198 Cal.App.3d 20 (Cal.App. 2 Dist. 1988), *review granted*, 246 Cal. Rptr. 5, 752 P.2d 443 (Cal. 1988) (stating Fifth Amendment privilege against self-incrimination applies where trustee of a personal, family trust was subpoenaed to produce time and payroll records, since the trust was not "an organized collective entity").

In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 946 (1Oth Cir. 1984).

See also ***In re Katz***, 623 F.2d 122, 126 (2d Cir. 1980);
In re Grand Jury Subpoena Duces Tecum Dated June 13, 1983, 722 F.2d 981, 987 (2d Cir. 1983);
U.S. v. Fox, 721 F.2d 32, 36 (2d Cir. 1983).

As the Fifth Circuit noted in ***In re Grand Jury Subpoena (Kent)***, 646 F.2d 963 (5th Cir. 1981):

> "The prevailing justification for the fifth amendment's application to documentary subpoenas is the 'implicit authentication' rationale ...the testimonial component involved in compliance with an order for production of documents 'is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones

> demanded.... 'A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness.' There would then be 'testimonial compulsion'." ***In re Grand Jury Subpoena (Kent)***, 646 F.2d 963, 968 (5th Cir. 1981).

It is the communicative inferences that may be drawn from the production of the requested documents include the existence of the documents, possession of the documents, and the belief that the documents produced are the ones requested. ***U.S. v. Hubbell,*** 530 U.S. 27, 36 (2000). When these inferences are testimonial and incriminating, the Fifth Amendment privilege against self-incrimination attaches. Whether a subpoena implicates the Fifth Amendment depends on "the facts and circumstances of particular cases or classes thereof." *Id.* The critical inquiry is whether the government can show it had such "prior knowledge of either the existence or the whereabouts" of the produced documents, that their existence and location is a "foregone conclusion." ***Fisher v. United States,*** 425 U.S. at 411 (1976); ***Hubbell,*** 530 U.S. at 43-45.

FIFTH AMENDMENT PRIVILEGE PROTECTS AGAINST COMPELLED PRODUCTION OF RECORDS OF SOLE PROPRIETORSHIP

While there is no Fifth Amendment privilege as to corporations . . .

See ***Wilson v. U.S.***, 221 U.S. 361 (1911);
U.S. v. White, 322 U.S. 694 (1944) [labor union], or as to partnerships,
Bellis v. U.S., 417 U.S. 85, 88 (1974);
U.S. v. Alderson, 646 F.2d 421 (9th Cir. 1981),

> . . . "[t]he privilege applies to the business records of the sole proprietor". ***Bellis v. U.S.***, 417 U.S. at 87-88;

Blair v. City of Chicago., 201 U.S. 431 (1906);
In re Grand Jury Proceedings (McCoy), 601 F.2d 162 (5th Cir. 1979);
In re Oswalt, 607 F.2d 645 (5th Cir. 1979);
In re Grand Jury (Calluggi), 597 F.2d 851, 859 (3d Cir. 1979);
In re Grand Jury Subpoena (Kent), 646 F.2d 963, 968 (5th Cir. 1981);

Matter of Grand Jury Empanelled March 29, 1980, 680 F.2d 327, 332 (3d Cir. 1982);
I.C.C. v. Gould, 629 F.2d 847, 859 (3d Cir. 1980);
U.S. v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed. 552 (1984).

> "The Fifth Amendment protection applicable to a sole proprietor's business records is the same as the protection applicable to the records of an individual. ...[a] sole proprietor's Fifth Amendment privilege against self-incrimination protects the ...records of the proprietorship from compelled production in response to a grand jury subpoena to a sole proprietor." ***In re Grand Jury Subpoena (Kent)***, 646 F.2d 963, 968 (5th Cir. 1981).

The Supreme Court affirmed a lower court holding that compulsory production of a sole proprietorship's business records is protected by the Fifth Amendment:

> "[t]he business records of a sole Proprietorship are no different from the individual owner's personal records.... The turning over of the subpoenaed documents to the grand jury would admit their existence and authenticity. Accordingly, respondent was entitled to assert his Fifth Amendment privilege rather than produce the subpoenaed documents." ***U.S. v. Doe***, 456 U.S. 605, 608, 104 S.Ct. 1237, 79 L.Ed. 552 (1984).

Furthermore, the district court has held that a passport is protected by the Fifth Amendment. ***In Re Candiotti***, 729 F. Supp. 840 (S.D. Fla. 1990).

SIZE OR DIVERSITY OF SOLE PROPRIETORSHIP NOT RELEVANT

It "is also clear that ...the Fifth Amendment may be invoked by a sole proprietor regardless of the magnitude of his business", "the size of the organization,"

See ***Matter of Grand Jury Impaneled March 19, 1980***, 680 F.2d 327, 330 (3d Cir. 1982);

or its "longevity."

See ***Matter of Grand Jury Impanelled***, 597 F.2d 851, 859 (3d Cir. 1979); ***U.S. v. Doe***, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (holding Fifth Amendment applicable to preclude compelled production of records from "several sole proprietorships" maintained by one individual).

The Supreme Court has stated that forcing a defendant to produce the business document himself automatically authenticates the documents and proves possession, thus relieving the government of the burden of authenticating the document and proving that the document was in the defendant's possession.. ***U.S. v. Doe***, 465 U.S. 605, 613, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984).

> "Although the contents of a document may not be privileged, the act of producing the document may be. ***U.S. v. Doe***, 465 U.S. 605, 612, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. As we noted in ***Fisher***.
>
> Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena."
> ***U.S. v. Doe***, 465 U.S. 605, 612, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984).

At least one court has applied the "Act of Production" Doctrine to a professional corporation's records.

In re Grand Jury Matters, 745 F.2d 834 (4th Cir. 1984).

<u>CUSTODIAN OF "CORPORATE RECORDS" HAS NO "ACT OF PRODUCTION" FIFTH AMENDMENT PRIVILEGE</u>

However, the Supreme Court holds that a corporate representative [the company president] may not interpose his own Fifth Amendment privilege to refuse compelled

production of corporate records, even though the "act of production" might be personally incriminating. ***Braswell v. U.S.***, 487 U.S. 99, 108 S. Ct. 2284, 101 L.Ed.2d 98 (1988).

> "We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime', one of the most serious problems confronting law enforcement authorities. 'The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible."
> ***Braswell v. U.S.***, 487 U.S. 99, 115 (1988) (relying on ***U.S. v. White***, 322 U.S. 694, 700 (1944)).
>
> " If custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations." ***Braswell v. U.S.***, 487 U.S. 99, 116 (1988).

See also ***In re Grand Jury Impaneled March 17, 1987***, 836 F.2d 150 (3d Cir. 1987) (holding that a contrary ruling would provide an easy means for corporation suspected of criminal activity to place their documents beyond a grand jury's reach).

But see ***Braswell v. U.S.***, 487 U.S. at 117 n.11, which states:

> "We reject the limitation on the evidentiary use of the custodian's act of production is the equivalent of constructive use immunity barred under our decision in [***U.S. v. Doe***, 465 U.S. 605, 616-17, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984)]. Rather, the limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity. We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records."

The "act of production" doctrine, which precludes compelling an individual from producing records where that very act may have incrimination aspects, *see* ***Fisher; Doe; Braswell***, has not eliminated the "required records" exception to the privilege.

REQUIRED RECORDS

Such protection from compelled production of records of a sole proprietorship does not extend to "required records" [e.g. records required by law to be kept in order that there may be suitable information as to matters subject to the Government regulation].

Shapiro v. U.S., 335 U.S. 1 (1948);
Davis v. U.S., 328 U.S. 582 (1946);
In re Grand Jury Proceedings (McCoy), 601 F.2d 162 (5th Cir. 1979).

So long as such records have "public aspects".

Grosso v. U.S., 390 U.S. 62 (1968);
Spevach v. Klein, 385 U.S. 511 (1967).

But the "required records" exception does not operate where the subpoena is utilized as a pretext to investigate a group suspected of criminal activity unrelated to the governmental purpose of requiring the maintenance of those records or the regulation of that industry, then such compulsion may constitute an abuse of the Grand Jury.

Albertson v. Subversion Activities Control Board, 382 U.S. 70 (1965);
In re Grand Jury Proceeding (McCoy), 601 F.2d 162 (5th Cir. 1979).

U.S. v. Lehman, 887 F.2d 1328, 1333 (7th Cir. 1989) (stating "[i]f the Supreme Court in its landmark Fifth Amendment cases intended to disarm many of the regulatory enactments of the federal government, it would have addressed the question directly.").

MUST HAVE "JURISDICTION" OVER CORPORATION

A grand jury may not subpoena corporate records of a corporation not subject to the jurisdiction of the district court empanelling that grand jury.

In re Sealed Cases, 832 F.2d 1268 (D.C. Cir. 1987) (holding that even though the court had jurisdiction over the "custodian" of those corporate records).

SOLE PROPRIETOR MAY RETAIN RIGHT TO INTERVENE AND PRECLUDE COMPELLED PRODUCTION OF RECORDS FROM EMPLOYEE

A sole proprietor may intervene to prevent an employee from producing records.

Couch v. U.S., 409 U.S. 322, 333 (1973);
In re Grand Jury Proceedings (Clinton Manges), 745 F.2d 1250, 1251 (9th Cir. 1984);
In re Grand Jury (Kent), 646 F.2d 963, 968-9 (5th Cir. 1981) (granting subpoena to "comptroller" of sole proprietorship quashed).

> "The Government argues that access of an employee is all that is required. Hence, says the government, because Allen or some other employee could authenticate the records [the sole proprietor's] testimonial compulsion is not implicated. That position, however, would swallow the privilege. Persons conducting business as sole proprietorships, under the government's contended-for-rule, would lose the privilege before the grand jury the moment they hired any employee whose functions would require access to records."

> "The government insists on its right to use [employees] subpoena as a vehicle to obtain [the employer's] records, thereby circumventing Kent's exercise of his Fifth Amendment privilege. That reach, however, has been foreclosed. In ***Couch v. United States,*** 409 U.S. 322, 333, 93 S.Ct. 611, 618, 34 L.Ed.2d 548 (1973), as in ***Fisher v. U.S.***, 425 U.S. 391 (1976), the Court was careful, in upholding a summons for records of which the accused had given up all possession, to distinguish situations 'where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact'.

> When the subpoena was served on Allen, she was the comptroller of Kent Oil. Although Kent hired employees to assist in the operation of his business, he never relinquished control of the records to any employee. That Allen had access to the records is irrelevant, for mere access is not possession, custody or control. Whether Kent be viewed as having clearly retained constructive possession, or as having relinquished possession to the temporary and insignificant extent necessary to enable his employees to perform their functions, delivery of his records in response to the Allen subpoena would 'leave the personal compulsions upon [him] substantially intact'. ***Couch v. United States,*** 409 U.S. 322, 333 (1973). To hold that service on Allen meant an absence of personal compulsion upon Kent, would thus be to honor form over substance and to render meaningless Kent's Fifth Amendment privilege." ***In re Grand Jury (Kent)***, 646 F.2d 963, 968-69 (5th Cir. 1981).

But see ***In re Grand Jury (Colluggi)***, 597 F.2d 851 (3d Cir. 1979) (bookkeeper).

Not so if custody of records has been relinquished to another, non-employee off the employer's premises.

Couch v. U.S., 409 U.S. 322 (1973) (accountant);
Fisher v. U.S., 425 U.S. 391 (1976) (attorney).

GRAND JURY WITNESS:

MATERIAL WITNESSES

18 USC§ 3144 allows for the detention of a material witness: a person who is material in a criminal proceeding whose presence is impracticable to secure by subpoena. Under these circumstances the witness may be arrested on a showing of probable cause to believe both elements above exist. Although a court has held that a grand jury constitutes a criminal proceeding for which a material witness warrant may issue**, *In the matter of the Petition of Bacon v. US*, 449 F.2d 933 (9th Cir. 1971).** However, the district court for the Southern District of New York departed from the ninth circuit's analysis in *Bacon* and held that the detainment of a material witness under 18 U.S.C. § 3144 does not apply to grand jury proceedings**. *US v.Awadallah,* 202 F.Supp.2d 55 (S.D.N.Y. 2002)** [September 11

detainee].

The District Court found that the language of 18 U.S.C. § 3144 specifically the phrase "criminal proceeding" did not include a grand jury proceeding. ***US v. Awadallah*, 202 F.Supp 2d 55, 62 (S.D. N.Y. 2002).** The language of the statute, according to the District Court, was meant for an adversarial proceeding, which is not the case in a grand jury. ***US v. Awadallah*, 202 F.Supp 2d 55, 62 (S.D.N.Y. 2002).** Furthermore, since it is up to a judge to decide if a witness is a material witness, it is difficult for a judge to make that determination in a grand jury proceeding, which is secret. ***US v. Awadallah,* 202 F. Supp 2d 55, 63 (S.D. N.Y. 2002).** Finally, the factors listed in 18 U.S.C §3142 that the judge must take into account when determining if a witness is material or not[3], are only relevant if an offense might have been committed or not. ***US v. Awadallah*, 202 F.Supp 2d 55, 65 (S.D. N.Y. 2002).**

However, in ***In Re the Application of the United States for a Material Witness Warrant,* 213 F.Supp. 2d 287 (S.D. N.Y. July, 2002)**, the District Court declined to follow ***U.S. v. Awadallah*,** and relied on ***Bacon v. United States,* 449 F.2d 933 (9th Cir. 1971)** in reaching its decision that 3144 did apply to grand jury witnesses**.** ***In Re the Application of the United States for a Material Witness Warrant,* 213 F.Supp. 2d 287 (S.D. N.Y. July, 2002**). The District Court deemed that "[T]he relevant language in what is now section 3144 was interpreted in *Bacon* to include grand jury witnesses, and that language was reenacted as part of the current statute. A well recognized canon of statutory construction requires that a court deem congress both to have been aware of such existing appellate authority, and to have intended reenacted language to mean what that authority said it meant**"[4]. *In Re the Application of the United States for a Material Witness Warrant, 213* F.Supp. 2d 287 (S.D. N.Y. July, 2002).** Furthermore, the district Court reasoned that a judge could determine the materiality of a witness, "based on the representation of the prosecutor…[or] sealed submissions" and that the difficulty of determining materiality was not necessarily easier in a grand jury context than in a trial. ***In Re the Application of the United States for a Material Witness Warrant, 213* F.Supp. 2d 287 (S.D. N.Y. July, 2002).**

Although ***U.S. v. Awadallah*** was subsequently reversed in the Second Circuit, 349 F.3d 42 (2d Cir. 2003), the Second Circuit has seemingly softened its stance, recognizing that material witness warrants are capable of being abused, and that consequently the Fourth

---

3 1) The nature and circumstances of the offense charged…2) the weight of the evidence against the person; 3) the history and characteristics of the person; 4) the nature and seriousness of the danger to any person …that would be posed by the person's release. 18 U.S.C § 3141.

4 In regard to legislative history, the Court found that there was "direct evidence that a relevant Congressional committee, and anyone who read its report, was aware of *Bacon's* holding, and also that the new statute would apply to grand jury proceedings. [S.Rep. No. 98-225, at 28, n.88 (1983).]" *In Re the Application of the United States for a Material Witness Warrant,*__F.Supp. 2d_ (S.D. N.Y. July, 2002).

Amendment governs their issuance. ***Simon v. City of N.Y.,*** 893 F.3d 83, 97 (2d Cir. 2018) ("Any warrant must be executed in reasonable conformity with its terms – a rule so integral to Fourth Amendment doctrine that we are untroubled that no case has previously applied it to a material witness warrant. *See, e.g. Matias,* 836 F.2d at 747; *O'Rourke,* 875 F.2d at 1474-75").

SANCTION AND APPEAL FOR CONTEMPT

Refusal to comply with a court order to testify pursuant to a grand jury subpoena may result in an order of confinement under Title 28 U.S.C. § 1826(a). In the event of such confinement, the statute requires an expedited appeal that must be heard within 30 days of filing of the notice of appeal. However, where the "contemnor" remains at liberty during pendency of his or her appeal, this expedited procedure is not applicable.

In re Sealed Case, 829 F.2d 189 (D.C. Cir. 1987);
In re Witness Before Special October Grand Jury, 722 F.2d 349, 353 (7th Cir. 1983);
In re Grand Jury Proceedings Re: Larson, 785 F.2d 629, 631 n.4 (8th Cir. 1986);
In re Weiss, 703 F.2d 653, 660 n.6 (2d Cir. 1983).

REFUSAL TO COMPLY

Under limited circumstances, a witness may refuse to comply without suffering contempt where "compliance could cause irreparable injury, because appellate courts cannot always 'unring the bell' once the information has been released."

Maness v. Meyers, 419 U.S. 449, 460 (1975);
Gelbard v. U.S., 408 U.S. 41 (1972);
In re Grand Jury Proceedings (McCoy), 601 F.2d 162, 169 (5th Cir. 1979) (stating, "if an order 'requires an irreversible and permanent surrender of a constitutional right, it cannot be enforced by the contempt power").

CONTEMPT POWER LIMITED

The First Circuit has held that a federal district court's contempt power to levy daily fines against non-cooperative witnesses continues no longer than the end of the grand jury's term. ***In re Grand Jury Proceedings (Caucus Distributors, Inc.)***, 871 F.2d 156 (1st Cir. 1989). The court reasoned that since such a rule already existed for incarceration under 28 U.S.C. §1826(a) (2), practical considerations mandated the same rule for fines. ***In re Grand Jury Proceedings***, 871 F.2d 156 (1st Cir. 1989) (holding grand jury's work, and therefore, the

district court's coercive power to enable the grand jury to do its work, ends with life of grand jury). The "civil fine meter," however, can begin anew with the beginning of a successor grand jury's term. ***In re Grand Jury Proceedings***, 871 F.2d 156 (1st Cir. 1989).

ENTITLED TO "ONE BITE" THEORY

A witness should be entitled to have the court decide the applicability of the claimed privilege and an opportunity to answer if same is held inapplicable.

U.S. Ex Rel Berry v. Monahan, 681 F. Supp. 490, 498 (N.D. Ill. 1988) (stating that if a witness invokes his Fifth Amendment privilege against self-incrimination, the trial court must first rule the witness' Fifth Amendment privilege inapplicable and afford the witness *another* opportunity to answer, before holding the witness in contempt).

MOTION TO INTERVENE

A non-witness should be allowed to intervene where the production of documents or testimony by the witness would substantially affect the non-witnesses' ability to assert his privilege as to the materials or matters sought. FED. R. Civ. PRO. Rule 24(a) allows intervention "when (s)he claims an interest relating to the property or transaction and (s)he is so situated that the disposition of the action may as a practical matter impair or impede his [or her] ability to protect the interest, unless the [individual's] interest is adequately represented by existing parties".

Consequently, a non-witness should be allowed to intervene where the production of documents or testimony by the witness would substantially affect the non-witness' ability to assert privilege as to the materials or matters sought.

Perlman v. U.S., 247 U.S. 7, 13 (1918);
U.S. v. Cuthbertson, 651 F.2d 189, 193-94 (3d Cir. 1981);
U.S. v. R.M.I. Co., 599 F.2d 1183, 1186-87 (3d Cir. 1979);
Gravel v. U.S., 408 U.S. 606, 608 n.1 (1972);
In re Grand Jury Investigation (Intervenor A), 587 F.2d 589 (3d Cir. 1978);
In re Grand Jury Proceedings (Fine), 641 F.2d 199, 201-02 (5th Cir. 1981);
In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 673-74 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979);
In re Katz, 623 F.2d 122 (2nd Cir. 1980);

In re Grand Jury Proceeding (Freeman), 708 F.2d 1571 (11th Cir. 1983).

"In ***Perlman v. United States***, 247 U.S. 7 (1918), the Court held that the owner of exhibits could intervene in a criminal grand jury Proceeding to object to their disclosure on a ground of privilege, even when the exhibits were in the possession of a third party. Moreover, the Court held that the order denying intervention and privilege was collaterally final for purposes of appeal." *See* ***U.S. v. R.M.I.***, 599 F.2d 1183, 1186 (3d Cir. 1979).

Accordingly, legislators have been held to have the right to intervene where their legislative assistants have been subpoenaed.

Gravel v. U.S., 408 U.S. 606 (1972);
In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977);

or Clerks of their office or branch;

In re Grand Jury Investigation (Eilberg), 587 F.2d 589 (3d Cir. 1978).

See also U.S. v. Doe (Ellsberg), 455 F.2d 1270 (1st Cir. 1972);
Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), *rev.'d on other grounds*, 434 F.2d 1081 (9th Cir. 1970).

Likewise, where the attorney-client privilege is at stake, courts have uniformly permitted the intervener/client to step in and protect his attorney-client relationship since while it is the attorney's obligation to do so unless the privilege is waived, it is in fact the client's privilege.

In re Grand Jury Proceedings (Fine), 641 F.2d 199, 201-2 (5th Cir. 1981);
In re Grand Jury Proceedings (Katz), 623 F.2d 122 (2d Cir. 1980);
In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798 (3d Cir. 1979);
In re Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1574-75 (11th Cir. 1983).

Clients have also been allowed to intervene to protect the "work-product privilege".

In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801-02 (3d Cir. 1979);
Appeal of Hughes, 633 F.2d 282, 285-86 (3d Cir. 1980);
In re Grand Jury Proceedings (John Doe), 575 F. Supp. 197 (N.D. Ohio, 1983).

Similarly, intervention by third parties has been be allowed to assert and protect the

following:

The rights of an employer of a subpoenaed witness, ***In re Grand Jury (Schmidt)***, 619 F.2d 1022 (3d Cir. 1980), the "adverse spousal privilege", ***In re Grand Jury Matter***, 673 F.2d 688, 692 (3d Cir. 1982),"News reporter's privilege", ***U.S. v. Cuthbertson***, 651 F.2d 189, 193 (3d Cir. 1981), corporation's confidential records, ***U.S. v. R.M.I.***, 599 F.2d 1183, 1186-7 (3d Cir. 1979), ***State v. Illinois v. Sarbaugh***, 552 F.2d 768 (7th Cir. 1977), and grand jury transcripts, ***U.S. v. Armco Steel Co.***, 458 F.Supp. 784, 788 (W.D. Mo. 1978), ***U.S. v Feeney,*** 641 F.2d 821, 824 (10th Cir. 1981).

"We have held that a third party may intervene 'to challenge production of subpoenaed documents on the ground of privilege and may appeal from an order granting less protection than that claimed'." ***U.S. v. Cuthbertson***, 651 F.2d 189, 193 (3d Cir. 1981).

Intervention has also been permitted to allow third parties to assert their Fifth Amendment claims with respect to subpoenaed documents and testimony.

U.S. v. Jones, 630 F.2d 1073, 1076 (5th Cir. 1980);
In re Grand Jury (Kent), 646 F.2d 963 (5th Cir. 1981) (by implication);
In re Grand Jury Subpoena Duces Tecum, 342 F. Supp. 709, 710 (D. Md. 1972) (combining with attorney-client privilege);
Couch v. U.S., 409 U.S. 322, 327 (1973);
Perlman v. U.S., 247 U.S. 7, 12 (1918).

The problem is that the Intervener has a "more direct interest in preventing the compelled production of the records sought by the grand jury than [the individual] to whom the subpoena was directed".

In re Grand Jury Proceedings (Fine), 641 F.2d at 202 (5th Cir. 1981);
Perlman v. U.S., 247 U.S. 7 (1918).

See also ***In re Grand Jury Subpoena (Kent)***, 646 F.2d 963, 968-69 (5th Cir. 1981).

The subpoenaed party, to avoid contempt, may choose to violate the privilege and provide the information, thereby depriving the real party in interest of a protected right, or any opportunity to have judicial review of his asserted privilege. It "...is unlikely that a third party, even an employee, would risk a contempt citation in order to provide ...immediate review" of another's privilege.
In re Grand Jury (Schmidt), 619 F.2d 1022, 1024-25 (3d Cir. 1980).

Courts have regularly recognized the implicit fairness in allowing intervention in such situations:

In re Grand Jury Proceedings (Subpoena Duces Tecum "A"), 563 F.2d 577 (3d Cir. 1977).

"Reasoning pragmatically ...a witness will not usually undergo the penalties of contempt in order to preserve someone else's privilege".

However, the Fifth Circuit has held that a "target" of a grand jury investigation is not entitled to notification that subpoenas have been issued to third parties in order that the "target" might intervene to protect his or her interest.

Securities and Exchange Commission v. O'Brien, 467 U.S. 735, 104 S. Ct. 2720, 81 L.Ed.2d 615 (1984).

INTERVENOR HAS RIGHT TO INTERLOCUTORY APPEAL

The intervening client is entitled to appeal an order directing his attorney to testify *prior to* requiring the attorney's testimony or holding him in contempt:

In re Grand Jury Proceedings in Matter in Fine, 641 F.2d 199, 201 (5th Cir. 1981).

"Although we cannot say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney.... If the price of protecting the right of appeal of client-intervenors is an occasional frivolous appeal for the sake of delay, we will process such appeals with all the expediency their posture merits. The issues of fact and law related to attorney-client privilege are rarely complex and may be disposed of without oral argument in nearly all cases."

In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983).

"All that is required, after the attorney-witness or the client-intervenor pleads the existence

of an attorney-client privilege, is a reasonable opportunity to be heard and prompt appellate review if the court orders the attorney to testify."

In re Grand Jury Proceedings, 563 F.2d 577, 580 (3d Cir. 1977);
In re Grand Jury Proceedings (Clinton Manges), 745 F.2d 1250, 1251 (9th Cir. 1984).

Interestingly, the intervenor's interlocutory appeal has been held to be a *civil* appeal "governed by the ...60 day notice requirement of FED. R. APP. PRO. 4(2)", rather than the 10 day requirement for criminal appeals under Rule 4(b), with its accelerated consideration for incarcerated witnesses.

But see ***U.S. v. Larouche Campaign***, 829 F.2d 250 (1st Cir. 1987) (noting immediate appeal not permitted when abuses in grand jury process were such that post conviction relief was probably not foreclosed).

"CONTENT" VS. "ACT OF PRODUCTION" ANALYSIS TO SUBPOENAS DUCES TECUM

There has been a noticeable shift in historical Fifth Amendment analysis concerning the "content oriented" inquiry of ***Boyd v. U.S.*** in ***Boyd v. U.S.***, 116 U.S. 616 (1886) (the Court focused upon whether the subpoenaed papers were "private" or "personal" in nature. And today, the Court questions whether ordering the individual to produce the documents amounts to a compelled testimonial act).

In re Grand Jury Subpoenas Duces Tecum dated June 13, 1983, 722 F.2d 981, 984-86 (2d Cir. 1983);
In re Kave, 760 F.2d 343 (1st Cir. 1985).

Recognizing this shift in emphasis some courts had rejected the Government's argument that the "act of production doctrine" does not apply to the compelled production of corporate records.

"The district court [chose] to accept the government's position that the ***Fisher*** act of production doctrine simply does not apply to corporate records. We believe that the district court erred in rejecting this contention out of hand solely on the ground that corporate documents were demanded by the subpoena. Under the ***Fisher*** standard is not the potential incriminating nature and contents of the documents subpoenaed but whether their mere production would itself tend to incriminate the possessor." ***In re Grand Jury Subpoena***

Duces Tecum Dated June 13, 1983, 722 F.2d 981, 986 (2d Cir. 1983).

See also ***In re Grand Jury Matters***, 745 F.2d 834 (4th Cir. 1984) (applying "act of production" doctrine to a professional corporation's records).

Other courts have continued to apply a "content" oriented approach looking to whether the records are "personal" or "business" in nature.

U.S. v. Meeks, 719 F.2d 809, 811 (5th Cir. 1983).

"It is well established that individuals issued a summons to supply business records cannot claim a privilege against self incrimination as against furnishing such records." ***Id.***

In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988) (holding that "In a prosecution for conspiracy to obstruct grand jury investigation, the Fifth Amendment privilege against self incrimination was held not to extend to compelled production of 'records of a regularly conducted activity', rather only to records containing 'personal entry'").

If the "act of production doctrine" applies to one type of otherwise unprivileged document at least one court had held that. " . . . it can as well apply to corporate records":

"For the purpose of determining the extent to which a natural person may invoke his Fifth Amendment privilege under Fisher, the fact that the subpoenaed documents in his possession were prepared by a corporation is not directly relevant. The ***Fisher*** doctrine simply does not turn on either content or authorship of the documents, of possession that are controlling. ***Couch v. U.S.,*** 409 U.S. 322, 327 (1973). If, as the Supreme Court indicated in ***Fisher***, the act of production doctrine applies to one type of otherwise unprivileged document (accountant's work papers) it can apply as well to corporate records in an individual's possession." ***In re Grand Jury Subpoena Duces Tecum***, 727 F.2d 981, 986 (2d Cir. 1983) (noting that the question of the "act of production" doctrine's applicability may turn on whether the corporate officer or custodian is subpoenaed in his or her "individual" or representative capacity).

"There would rarely be any dispute over possession [of corporate records] when the person subpoenaed is required to respond in his representative capacity. In producing records as an officer of the company he would not be attesting to his personal possession by them but to their existence and possession by the corporation, which is not entitled to claim a Fifth Amendment privilege with respect to them."

In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 946 (10th Cir. 1984).

"While ***Doe*** clearly recognizes that the production of personal papers may be a testimonial act protected by the Fifth Amendment, that case does not involve papers held by one in a representative capacity . . . As the Supreme Court made clear in ***Fisher v. United States***, 425 U.S. 391, 413 (1976), even though the production of papers held in a representative capacity may be a testimonial act, such production is not protected by the Fifth Amendment."

Where the act of producing may be incriminating to the subpoenaed corporate officer or custodian an alternative would be to allow the corporate or business partnership to select another to produce and verify the records who is not so encumbered.

See U.S. v. Kordel, 397 U.S. 1, 8-9 (1970).

And while one federal court of appeals consistently requires collective entities faced with a subpoena duces tecum to appoint a custodian to produce the documents,

In re Two Grand Jury Subpoenas Duces Tecum, 769 F.2d 52 (2d Cir. 1985);
In re Grand Jury Subpoenas Issued to 13 Corporations, 775 F.2d 43 (2d Cir. 1985).

the sole practitioner need not do so.

(Under Seal) v. U.S., 634 F. Supp. 732 (E.D. N.Y. 1986).

EFFECT OF GUILTY PLEA ON ABILITY TO INVOKE FIFTH AMENDMENT PRIVILEGE

Those who Plead Guilty or Those Convicted:

The Supreme Court has held that "[c]itizens generally are not constitutionally immune from grand jury subpoenas". ***Branzburg v. Hayes***, 408 U.S. 665, 682, 33 L.Ed.2d 626 (1972). And at least one district court has held that ". . . everyone, including those who have plead guilty, must testify when subpoenaed to do so before a grand jury unless privileged otherwise". ***In re Grand Jury Investigation***, 681 F. Supp. 1113 (E.D. N.C. 1988) (holding that a defendant's guilty plea did not give him ability to avoid grand jury subpoena; no government agreement to such).

However, in absence of immunity, a guilty plea does not necessarily waive a later assertion of the Fifth Amendment.

U.S. v. Lyons, 731 F.2d 243 (5th Cir. 1983) (stating a guilty plea to state charges did not waive Fifth Amendment in Federal Court):

"Ms. Cook's plea waived only the privilege with respect to state charges to which she pleaded guilty.... So long as Ms. Cook could be charged with other crimes because of her participation in the events in question, she could still assert her privilege against self-incrimination." ***U.S. v. Lyons***, 731 F.2d at 243 n. 2.

U.S. v. Kahn, 728 F.2d 676, 680 (5th Cir. 1984);
U.S. v. Gloria, 494 F.2d 477, 480 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974);
U.S. v. Barham, 625 F.2d 1221, 1225 (5th Cir.), *cert. denied*, 450 U.S. 1002 (1980);
In re Bryan, 645 F.2d 331, 333 (5th Cir. 1981).

"[Ilf the witness is still subject to other crimes which he[r] testimony might tend to reveal, the privilege remains."

IMMUNIZING GRAND JURY WITNESSES

Even where a witness asserts a valid Fifth Amendment privilege, the prosecution may nevertheless seek to compel their testimony by granting the witness immunity.

FEDERAL:

Where a witness asserts his or her Fifth Amendment privilege, Title 18 U.S.C. §§ 6002 & 6003 provides for a grant of "use" as opposed to transactional immunity thereby compelling the witnesses' testimony over any claim of Fifth Amendment privilege.

Under "transactional" immunity, prosecution of the witness would be precluded for any criminal conduct or transactions about which the witness gave testimony. *See* 10 U.S.C. § 2514 (repealed (1974)).

"Use" immunity, on the other hand, prohibits only the "use in any respect, either direct or indirect, of the compelled testimony". And while the government has a "substantial" and heavy burden of showing it has made no such "use" of any compelled testimony, it is otherwise free to prosecute the witness. 18 U.S.C. § 6002.

Kastigar v. U.S., 406 U.S. 441, 461 (1972).
Zicarelli v. New Jersey Commission, 406 U.S. 472 (1972);
U.S. v. Dorman, 359 F. Supp. 684 (D.C. N.Y. 1973); *reversed on other grounds by 491 F.2d 473;*
U.S. v. Hampton, 775 F.2d 1479 (11th Cir. 1985) (holding that government failed to establish an independent source for each link in the investigative chain leading to indictment and therefore defendant was entitled to dismissal).

The continued viability of what had been described as "pocket immunity" or "informal immunity", accomplished by informal agreement has been put in question.

U.S. v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984);
U.S. v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984); *reversed by 821 F.2d 1456*
U.S. v. Skalsky, 857 F.2d 172 (3d Cir. 1988) (stating an "informal immunity" agreement was not a grant of full use and derivative use testimony but merely agreement not to prosecute; breached by witness' misleading testimony).

TEXAS:

While Texas has no general statutory scheme for conferring immunity upon a witness, it has been held that only the prosecution and court have the authority to grant the judicially created creature:

State v. Huff, 491 S.W.2d 216, 221 (Tex.Civ.App.--Amarillo, 1973);
Tischmacker v. State, 176 S.W.2d 188 (Tex.Cr.App. 1946).

USE IMMUNITY STATUTE [28 U.S.C. § 6002] PROHIBITS USING COMPELLED TESTIMONY IN "ANY RESPECT"

Section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect" except a prosecution for perjury, giving false statement, or otherwise failing to comply with the compulsion order.

Kastigar v. U.S., 406 U.S. 441, 453 (1972);
U.S. v. Patrick, 542 F.2d 381 (7th Cir. 1976);
Goldberg v. U.S., 472 F.2d 513, 516 (2d Cir. 1973) (noting that the government's "burden of showing that it is not using the compelled testimony (or any information directly or

indirectly derived from such testimony or other information) in 'any respect' will be substantial").

But see ***U.S. v. Crowson***, 828 F.2d 1427 (9th Cir. 1987) (holding that the Government is not prevented from use of substantive immunized testimony through previous independent sources).

CAVEAT: Use immunity can be lost if the defendant will not cooperate.

U.S. v. Doe, 671 F. Supp. 205 (E.D.N.Y. 1987).

Cf. ***U.S. v. Henderson***, 406 F. Supp. 417, 421-27 (D. Del. 1975).

CERTIFICATION OF EVIDENCE OBTAINED INDEPENDENTLY OF GRAND JURY TESTIMONY

Since section 6002's "use-of-immunity" protects a witness against even direct "use" of any compelled testimony, including any evidence come at by exploitation of that compelled testimony, some courts have indicated the Government should be required to itemize and certify[5] any, independent evidence the Government has compiled prior to compelling any testimony. This procedure will insure the integrity of such process and prevent exploitation of the compelled testimony in violation of 18 U.S.C. § 6002.

Goldberg v. U.S., 472 F.2d 513, 516 n.5 (2d Cir. 1973).

---

[5]In the alternative, a request might be made for such certification to be submitted to the Court *in camera* to be sealed and made a part of the record in order to afford a meaningful appellate review. *See* ***US v. Henderson***, 406 F. Supp 417 (D. Del. 1975). The Court noted:

> "[t]he government [has] submitted to the court an envelope containing copies of certain evidence of violations of federal law by Henderson. The government requested the court to receive and seal this envelope so as to preserve a record of its possession of this evidence prior to Henderson's testimony...."

This prophylactic procedure was suggested in Note, *Standards for Exclusion in Immunity Cases After* Kastigar *and* Zicarelli, 82 YALE L.J. 171, 182 (1977) and endorsed in ***Goldberg v. US***, 472 F.2d 513, 516 (1973).

See also Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972); *see also* 86 HARV. L. REV. 187-89 (1972):

"[w]e would think that prosecutors, both in their own interest and in fairness to the defendant, would do well to consider the certification of evidence available prior to the compulsion of testimony." ***Goldberg v. U.S.,*** 472 F.2d 513 (2d Cir. 1973).

Courts have noted that "[i]f the government has any thought of one day prosecuting [a grand jury] witnesses, the requested certification [of presently existing evidence implicating the witnesses] would certainly aid it in establishing its burden of demonstrating that no use had been made" or derivative use was made of the compelled testimony".

In re Grusse, 402 F. Supp. 1232, 1237 (D. Conn. 1975) (noting that the "government today elected to file, under seal, the evidence presently available against the [grand jury] witnesses");
In re Weir, 377 F. Supp. 919, 924 (S.D. Cal. 1974).

Moreover, courts have indicated "that any future prosecution [of a grand jury witness who has given compelled testimony] is limited to the evidence so certified".

In re Weir, 377 F. Supp. 919, 924 (S.D. Cal. 1974).

Even the "indirect use" of an immunized witness' compelled grand jury testimony in obtaining an indictment, should warrant its dismissal.

U.S. v. McDaniel, 352 F. Supp. 585 (N.D. 1972), *aff'd.,* 482 F.2d 305, 312 (8th Cir. 1973);
U.S. v. Dornau, 359 F. Supp. 584, 687 (S.D. N.Y. 1973), *rev'd. on other grounds*, 491 F.2d 473 (2nd Cir. 1973).

See also ***New Jersey v. Portash***, 440 U.S. 450 (1979) (prohibiting the use of such compelled testimony even for impeachment).

Contra ***U.S. v. Henderson***, 406 F. Supp. 417, 421-27 (D. Del. 1975).

GRAND JURY HEARING COMPELLED TESTIMONY SHOULD NOT THEREAFTER INDICT THE WITNESS

Accordingly, the prosecution should not seek an indictment of a witness before the same

grand jury that heard his or her compelled testimony,

U.S. v. Hinton, 543 F.2d 1002, 1011 (2d Cir. 1976);
Goldberg v. U.S., 474 F.2d 513, 516 n.5 (2d Cir. 1973);

given "consideration of the immunized testimony by that jury is a virtual certainty",

U.S. v. Hinton, 543 F.2d 1002, 1008 (2nd Cir. 1976)

in violation of the mandate of ***Kastigar v. U.S.***, 406 U.S. 441 (1972).

To allow otherwise, violates a witness' constitutionally protected rights to "due process" and "fundamental fairness" guaranteed under the Fifth Amendment. Furthermore, the Canons of Ethics would be contravened [*A.B.A. Standards for Criminal Justice Relating to the Prosecution Function*. *Quality and Scope of Evidence before the Grand Juries*, Section 3.6(d)]."

However, *see* ***U.S. v. Zielezinski***, 740 F.2d 727 (9th Cir. 1984), where the Court held that such prohibition is not constitutionally mandated. Nonetheless, where an immunized witness has been indicted by the same grand jury before which (s)he testified, the Government has an affirmative duty to establish its independent source for the evidence upon which it claims the indictment rests.

US v. Zielezinski, 740 F.2d 727 (9th Cir. 1984).

The grant of immunity also expressly exempts perjury. It follows that courts have refused to apply the prohibition where the immunized testimony used by the grand jury is that which forms the basis for the indictment for perjury before the grand jury.

U.S. v. Pisani, 590 F. Supp. 1326 (S.D. N.Y. 1984).

See also ***U.S. v. Garrett***, 797 F.2d 656 (8th Cir. 1986) (stating a Defendant's challenge to indictment returned by grand jury against defendant who had testified under a grant of immunity before same grand jury was proper).

HEARING REQUIRED PRIOR TO ISSUANCE OF ORDER GRANTING IMMUNITY?

Some courts have required a hearing conducted by the court from which immunity has

been sought prior to the grant of immunity.

In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972);
In re Vericker, 446 F.2d 244 (2d Cir. 1971);
U.S. v. DiMauro, 441 F.2d 428 (8th Cir. 1971);
In re Bart, 304 F.2d 631 (D.C. Cir. 1962);
In re Tierney, 465 F.2d 806 (5th Cir. 1972);
In re Grand Jury Investigation (Frank), 317 F. Supp. 792, 796 (E.D. Pa. 1970).

"[Tlhe witness is entitled to notice and must be given an opportunity to be heard before being compelled to testify." ***In re Bart,*** 304 F.2d at 637.

Contra ***U.S. v. Weinberg,*** 439 F.2d 743 (9th Cir. 1971);

But see ***U.S. v. Alter***, 482 F.2d 1016 (9th Cir. 1973) (holding where the Ninth Circuit more recently held that the notice provisions of FED. R. CRIM. PRO. Rule 6 must be followed in connection with contempt proceedings and by analogy to grant of immunity as well).

JUSTICE DEPARTMENT OFFICIAL MUST EXPRESSLY APPROVE GRANT OF IMMUNITY

Title 18 U.S.C. § 6002(b) expressly requires that approval for a grant of immunity be given by "the Attorney General, the Deputy Attorney General" or a "*designated* Assistant Attorney General".

Under a similar requirement of the Federal Wiretap Statute [18 U.S.C. § 2516(1)], the Supreme Court in ***U.S. v. Giordano*** held that such power must be *specifically* delegated. ***U.S. v. Giordano***, 416 U.S. 505 (1974). But, *how* specific Congress must be is a different matter. Amendments to the wiretap statute since *Giordano* was decided have acknowledged the legitimacy of delegating the power to authorize wiretaps to nonpolitically accountable officials such as assistant attorneys general or deputy assistant attorneys general. *U.S. v. Anderson,* 39 F.3d 331, 340 (D.C. Cir. 1994), *overruled on other grounds by Richardson v. United States,* 526 U.S. 813, 816 (1999).

See U.S. v. Acon, 513 F.2d 513 (3d Cir. 1975).

"Here the matter of delegation is expressly addressed ...and the power of the Attorney

General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General'.... Congress does not always contemplate that the duties assigned to the Attorney General may be freely read delegated.... [W]e think [the statute] fairly read, was intended to limit the power to authorize to the Attorney General himself " . . . "and to any Assistant Attorney General he might designate." ***U.S. v. Giordano***,416 U.S 505, 514 (1974).

Like the wiretap statute, the "matter of delegation is expressly addressed" in the immunity statute [18 U.S.C. § 6003(b)] and therefore should be similarly limited.

DISTRICT COURT HAS DISCRETION TO DENY AN ORDER WHERE SAME WOULD INFRINGE UPON CONSTITUTIONAL RIGHTS

While the Court may have no discretion to deny an order [for immunity] on the ground that the "public interest does not warrant it", ***In re Lochiatto***, 497 F.2d 803, 804 n.2 (1st Cir. 1974); ***In re Kilgo***, 484 F.2d 1215 (4th Cir. 1975); ***U.S. v. Leyva***, 513 F.2d 774, 776 (5th Cir.1975); it does have authority to consider whether the grant of immunity would pass Constitutional muster.

In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973);
Matter of Doe, 410 F. Supp. 1163 (E.D. Mich. 1976).

See also Legislative History of H.R. 11157 and H.R. 12041.[6]

"The Court's duties in granting the requested [immunity] order are largely ministerial and when an order is properly requested the judge has no discretion to deny it.... However, *the court may exercise its discretion in denying an immunity order in the face of a violation* of a witness' *constitutional* rights." (emphasis supplied). ***Matter of Doe,*** 410 F. Supp.1163, 1165 (E.D. Mich. 1976).

Additionally, the Court "plays a general supervisory role in the fair administration of justice".

6

The legislative history of the Federal Immunity of Witnesses Act [with identical form and language as 18 U.S.C. § 6002] reflects that said legislation could not preclude judicial review to insure there is no "...overreaching in the process of immunizing somebody ...as a matter of due process hearings on H.R. 11157 and H.R. 12041, Cong., 1st Sess., at 1972.

Matter of Doe, 410 F. Supp. 1163, 1165 (E.D. Mich. 1976);
U.S. v. Rodman, 519 F.2d 1058, 1060 (5th Cir. 1975).

And retains "a residuum of supervisory power and a responsibility to curb its improper use".

Matter of Doe, 410 F. Supp. At 1165;
U.S. v. Dionisio, 410 U.S. 1, 9 (1973);
Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (stating that "the powers of the grand jury are not unlimited and are subject to the supervision of a judge");

FEAR OF FOREIGN PROSECUTION

Grant of immunity under § 6002 is not an adequate substitute for the protection offered by the Fifth Amendment, where the witness has a real and substantial fear of foreign prosecution.

This issue was expressly left open in ***Zicarello v. New Jersey State Commission of Investigation***, 406 U.S. 472, 480-81 (1972).

U.S. v. Yanagita, 552 F.2d 940, 946 (2d Cir. 1977).

IMMUNITY STATEMENT EXPRESSLY EXEMPTS "FALSE STATEMENTS" PROSECUTION

Making a false statement to a federal officer is an offense under 18 U.S.C. section 1001.

See U.S. v. Bedore, 455 F.2d 1109, 1110-1111 (9th Cir. 1972);
U.S. v. Adler, 380 F.2d 917, 922 (2nd Cir.), *cert. denied*, 389 U.S. 1006 (1967);
Neely v. U.S., 300 F.2d 67, 71-2 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962).

Title 18 U.S.C. § 6002 expressly provides an exception from immunity *not* only for perjury during the course of the testimony compelled by the immunity order but for "giving a false statement" as well.

"No testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, *giving a false* statement, or otherwise failing to comply with the order". (emphasis supplied). 18 U.S.C. section 6002.

PRIOR STATEMENTS TO FEDERAL OFFICER

Where the witness has given previous statements to federal agents with regard to the very subject matter under investigation by the grand jury several courts have indicated that a grant of immunity under § 6002 will afford no protection from prosecution for "false statements' under § 1001 [in the event the grand jury testimony is inconsistent with those prior statements].

In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973) (holding that the "false statements" exception to § 6002 immunity allows the Government to use compelled Grand Jury testimony as evidence against the witness in a prosecution for violating the "false statement" statute (18 U.S.C. § 1001) where the witness' compelled grand jury testimony differs or is inconsistent with prior statements to federal officers).
U.S. v. Hoffman, 260 F. Supp. 566, 567 (M.D. Pa. 1966).
"The proposed order in this case would violate the Fifth Amendment rights of the witness. Section 1001 provides for a prosecution for oral statements, which are false. In order to obtain a conviction [the witness's] statements before a grand jury could be used in evidence against her. Her compelled testimony given under oath and truthful could be used in a prosecution for making statements contrary to her Grand Jury testimony.

Kastigar [406 U.S. 441 (1972)] held that the Fifth Amendment privilege against self - incrimination is violated if the government uses the compelled testimony to prosecute the witness for a past criminal offense. Under the exception to use immunity contained in the proposed order in this case, if the court grants the order compelling [the witness] to testify, the government may use her testimony before the grand jury to prosecute her for having made false statements to the F.B.I. Agents. This is because, under the exception, the grand of immunity does not apply to a prosecution for '...giving a false statement'....

In the context of this case, the immunity order that the government would have the court grant would do exactly what the Supreme Court held that it must not do. It would allow the *Government to use the compelled testimony to prove that the witness may be guilty of having made false statements at a prior point in time, and it would ...lead to the infliction of criminal penalties for prior conduct of the witness.*

Thus for the very reasons that the court in ***Kastigar*** held the use immunity statute on its face to be Constitutional, this Court must hold that granting the proposed immunity order in this case would violate the witness' Fifth Amendment rights." ***In re Baldinger***, 356 F. Supp. 153 (C.D. Cal. 1973).

While several courts have held to the contrary,

U.S. v. Alter, 482 F.2d 1016 (9th Cir. 1973);
In re Grand Jury Proceedings, 509 F.2d 1134 (5th Cir. 1975);
Application of Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D. Col. 1973),

the Supreme Court has refused to adopt such a position with respect to later non-immunized statements. ***New Jersey v. Portash***, 440 U.S. 450, 99 S.Ct. 1292 (1979).

"We express no view as to whether possibly truthful immunized testimony may be used in a subsequent false declarations prosecution premised on an inconsistency between the testimony and later non-immunized, testimony." ***New Jersey v. Portash***, 440 U.S. 450 at n.9.

See also ***U.S. v. Apfelbaum***, 445 U.S. 115 (1980).

PRIOR INCONSISTENT STATEMENTS COULD BE USED TO PROVE INCONSISTENT TESTIMONY BEFORE GRAND JURY WAS PERJUROUS:

Likewise, a prior statement to a federal officer, if inconsistent, could be used in a perjury prosecution in the event a grand jury believes the prior statements over the compelled testimony before the grand jury. 18 U.S.C. § 6002 (exempting "perjury" before the grand jury from the scope of the protection provided by the Federal "use immunity" statute).

But see ***In re Grand Jury Proceedings (Greentree)***, 644 F.2d 348 (5th Cir. 1981).

THE IMMUNIZED WITNESS

In an attempt to "educate" the grand jurors of their independent role, and to protect the immunized witness against the direct or indirect use of their testimony, their attorney may wish to request the following prior to any appearance before the grand jury.

SEALING OF PROSECUTION'S EVIDENCE PRIOR TO TAKING IMMUNIZED TESTIMONY

1. That any and all evidence the prosecution has accumulated be itemized and sealed by the court prior to any testimony by the witness in order to insure that no "use" is made of the immunized witness' testimony against that witness. *See* Order in Appendix.

NOT SEEK INDICTMENT FROM SAME GRAND JURY HEARING THAT COMPELLED TESTIMONY

2. That the Government be instructed not to seek an indictment of the immunized witness before the same grand jury before whom compelled testimony is sought, as such a grand jury would be hard pressed not to "use" such testimony in its considerations.

RIGHT TO COUNSEL

3. That while the grand jury witness may not have a constitutional right to counsel during testimony inside the grand jury room, the grand jury may direct same or hear from counsel in order to insure fairness to the witness during such proceedings.

NO ADVERSE INFERENCE FROM EXERCISE OF RIGHT TO COUNSEL

4. That a grand jury witness has a right to consult counsel outside the grand jury room after each question is impounded but prior to any answer and that no adverse inference whatsoever should be taken from the exercise of that right to counsel, and that the awkwardness and time consuming nature necessitated by such procedure is required by the rules governing such proceedings, not by the witness.

CONSEQUENCES TO WITNESS OF COMPELLED TESTIMONY

5. That as a consequence of refusing to answer questions, a witness who has been granted immunity may be held by the District Court to be in contempt of the grand jury and be sentenced or required to serve a period of time in jail.

GRAND JURY'S RIGHT NOT TO COMPEL TESTIMONY

6. That just as the grand jury has a right to inquire of person's having knowledge of

matters pertinent to an investigation, the grand jury also has a right not to require a witness called by them to testify or go to jail for contempt. Especially where such evidence is available elsewhere or prior statements by the witness to Government agents taking part in said investigation indicate a lack of knowledge as to the specific incriminating matters under consideration.

OTHER TESTIMONIAL PRIVILEGES APPLICABLE TO GRAND JURY PROCEEDINGS

Privileges, such as the marital and attorney-client privileges, apply in grand jury proceedings. *See* FED. R. EVID. Rule 501; 2 LOUISELL, FEDERAL EVIDENCE § 218 at 631. While a grand jury "may consider incompetent evidence, ...it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law".

U.S. v. Calandra, 414 U.S. 338, 346 (1974).

This is important because "use" immunity under section 6002 is coextensive with the witness' Fifth Amendment privilege. ***Kastigar v. U.S.***, 406 U.S. 441 (1972). That is, the compulsion only removes one's protection under the Fifth Amendment, it does not preclude assertion of other valid privileges which may be applicable.

"Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts." *In Re Bruce Lindsey*, Nos. 98-3060, 98-3062, and 98-3072, 1998 WL 418780 (July 27, 1998) (stating that much of the litigation in this area stems from the Freedom of Information Act, exemption 5).

See **5 U.S.C. section 552(b)(5)(1994)**

"Intra-agency memorandums or letters which would not
be available by law to a party other than an agency in litigation
with the agency are excused from mandatory disclosure with
the public."

However**, *See In Re Sealed Case*, No. 98-3069, 1998 WL 370584 (D.C. Cir. July 7, 1998)** (affirming the District Court's opinion that Secret Service agents do not hold a privilege and may be compelled to testify before a grand jury)**; *In Re Sealed Case*, No. 98-3069, 1998 WL 394652 (July 16, 1998)** (holding that the Department of Justice was not entitled to a stay postponing the testimony of secret service officers before grand jury).

Regarding grand jury subpoenas, courts have required invocation of the attorney-client

privilege on a document-by-document basis. ***In re Grand Jury Subpoena***, 831 F.2d 225 (11th Cir. 1987).

ATTORNEY-CLIENT

WHERE THE VERY EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP MIGHT BE INCRIMINATING TO A CLIENT, SAME MAY UNDER LIMITED CIRCUMSTANCES BE PRIVILEGED

While generally the identity and information concerning the fee arrangement between an attorney and his client is not privileged,

Frank v. Tomlinson, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966);
U.S. v. Finley, 434 F.2d 596 (5th Cir. 1970);
In re Michaelson, 511 F.2d 882, 889 (9th Cir. 1975);
Colton v. U.S., 306 F.2d 633, 638 (2d Cir. 1962);
In re Osterhoudt, 722 F.2d 591, 592 (9th Cir. 1983);
In re Shargel, 742 F.2d 61, 64 (2d Cir. 1984);
In the Matter of Witness Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984).

an exception has been made where the very existence of the attorney-client relationship might be incriminating in the very matter in which advise has been sought.

In re Semel, 411 F.2d 195, 197 (3d Cir. 1969) (stating, "[A]n exception is made for cases where the existence of the attorney-client relationship might be incriminating to a client");
In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975);
In re Grand Jury Subpoena for Attorneys Representing Criminal Defendant, Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990).

But see ***In re Grand Jury Proceedings (Pavlick)***, 680 F.2d 1026, 1028-29 (5th Cir. 1982);
In re Grand Jury Proceedings (Damore), 689 F.2d 1351, 1352 (11th Cir. 1982);
In re Grand Jury Proceedings (Slaughter), 694 F.2d 1258 (4th Cir. 1982).

The Seventh Circuit has held that the identity of a person paying legal fees to represent a defendant is protected by the attorney-client privilege under certain circumstances. ***Matter of Grand Jury Proceeding (Cherney)***, 898 F.2d 565, 568 (7th Cir. 1990).

The Eleventh Circuit has now limited the applicability of this exception to the general rule requiring disclosure of the client's identity and fee, to situations where that disclosure would supply the "last link in an existing chain of incriminating evidence likely to lead to the client's indictment".

In re Slaughter, 694 F.2d 1258, 1259 (11th Cir. 1982) (describing same as a "limited and rarely available 'exception ...involv[ing] situations where the disclosure of free information would give the identity of a previously undisclosed client/suspect").

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982).

"In [our ***Jones***] holding, we expressly noted that our decision rested on the peculiar facts of that case.... Among those 'peculiar facts' was that the six attorneys drawn before the grand jury in ***Jones*** represented a generous portion of the criminal law bar of the lower Rio Grande Valley area, and the project was a rather broad attempt to canvass that portion for information detrimental to certain of its clients: that each had paid an attorney or attorneys amounts greater than this reported gross income during the year of payment. This and other features distinguish Jones from our case, including that the identity sought here was by no means the last link in any chain of inculpatory events or transactions, rather the contrary." ***In re Grand Jury Proceedings (Pavlick)***, 680 F.2d at 1027.

Furthermore, the Fifth Circuit, at least intimates such "conspiratorial agreement" by the clients to prospectively provide counsel for those arrested, may be inferred from "custom or a prior course of conduct toward other apprehendees". ***In re Grand Jury Proceedings (Pavlick)***, 680 F.2d 1026, 1029 (5th Cir. 1981).

"...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 him who foots the bill -and this even though he be a client of the attorney and the attorney unaware of the improper arrangement. Such an agreement, of course, need only be an effective one, need not be express, and might in a proper case be found to arise even from a custom or a prior course of conduct toward other apprehendees." ***In re Grand Jury Proceedings (Pavlick)***, 680 F.2d at 1029.

In 1990, the Fifth Circuit took this trend one step further, all but overruling the ***Jones*** exception. Citing *The Return of the Pink Panther*, the Court held that ***Jones*** only applies where the payment of the fee is coupled with confidential attorney-client communications, which would necessarily be revealed if the fee arrangement were disclosed.

"Jones is not unlike the actor Peter Sellers' famous character Inspector Clouseau: it has been misunderstood because it invited misunderstanding. We conclude that a proper reading of ***Jones*** followed by ***Pavlick*** demonstrates that those cases did not fashion "a last link" or "affirmative link" attorney-client privilege independent of the privileged communications between an attorney and his client. Thus, "the last link" or "affirmative link" language in these cases did not significantly amend the normal scope of the attorney-client privilege, nor is it applicable to the case before us . . .

[D]espite the opinion's frequent references to the potentially incriminating nature of the testimony sought from the attorneys, ***Jones*** does not seem to rest on that fact *apart from* its necessary, simultaneous revelation of confidential communications." ***In re Grand Jury subpoena for Reyes-Requena,*** 913 F.2d 1118, 1124 (5th Cir. 1990) **(*Reyes-Requena I)***.

The Court also held that in order to receive ***Jones*** Protection, the attorney must first demonstrate that the fees were either paid by the client, or by a third party *who is also a client*. The problem with the ***Reyes-Requena*** approach is that the rule swallows the exception. That is, confidential communications between clients and their attorneys have *always* been protected. Thus, an "exception" which continues to protect those communications when they are coupled with a fee agreement would not seem to be an exception at all, but rather a mechanical application of the general rule. What was unique about the ***Jones*** exception was that it protected from disclosure not only confidential communications, but also the existence of the attorney-client relationship itself.

In a later, closely connected case, the Fifth Circuit reopened the ***Jones*** umbrella. ***In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena***, 926 F.2d 1423 (5th Cir. 1991) ***(Reyes-Requena II)***. The defendant's attorney submitted affidavits *in camera* demonstrating that Intervenor, the anonymous third party fee payer, had indeed sought legal advice on Intervenor's own behalf, in conjunction with the payment of Reyes-Requena's fee. The Court intimated that the "inextricable intertwining" of the fee payer's identity with "confidential communications" might be easier to demonstrate than it would at first appear:

"The government is not credible when it asserts that it sought only the fact of intervenor's identify rather than confidential communications. The government admits that it sought Intervenor's identity because DeGeurin was representing a man of meager means caught while serving in a lower echelon role in a drug trafficking operation of substantial proportion. The government clearly sought Intervenor's identity in hopes of broadening their investigation, which was limited to Reyes-Requena, by adding more charges against Reyes-Requena and by obtaining more defendants to charge in a conspiracy. In these

circumstances, the government cannot credibly argue that it seeks merely neutral facts." 926 F.2d at 1432.

COURTS AND COMMENTATORS OFTEN SEPARATE THE EXCEPTIONS INTO ONE OF THREE CATEGORIES:

1. THE "LAST LINK EXCEPTION":

Attorney-client privilege applies to a client's identity and fee arrangements only where disclosure of same would supply the "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment".

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982);
In re Grand Jury Proceedings for Attorney Representing Criminal Defendant, Reyes-Requena, 724 F. Supp. 458, 464 (S.D. Tex. 1989)

Rejected by ***U.S. v. Liebman***, 742 F.2d 807, 810, n. 2 (3d Cir. 1984);
In re Shargel, 742 F.2d 61, 62-3 (2d Cir. 1984);
In re Witness Before Special March 1980 Grand Jury, 729 F.2d 489, 491-95 (7th Cir. 1984);
In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 454 (6th Cir. 1983).

"LAST LINK" RESURRECTED AND EXHUMED

At least one Federal District Court has recently found that the amount of fees paid to defense counsel were protected from disclosure by the attorney-client privilege, on the ground that such information, based upon the limited fact situation presented by that case, constituted ***Pavlick's*** "last link" of incriminating evidence. There the focus of the investigation was upon the defendants' financial resources, and abundance of cash from unexplained sources in a RICO investigation. ***In re Douglas Willams***, 717 F. Supp. 1502 (S.D. Fla. 1989).

2. THE "LEGAL ADVICE" EXCEPTION:

The exception to required disclosure of a client's identity and fee arrangements applies only where the disclosure of such information would implicate the client in the very matter for which he sought advice.

In re Grand Jury Investigation, 723 F.2d 447, 452 (6th Cir. 1983);

U.S. v. Strahl, 590 F.2d 10, 12 (1st Cir. 1978);
In re Grand Jury (Harvey), 676 F.2d 1005, 1009, *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982) (en banc).

3. THE CONFIDENTIAL COMMUNICATION EXCEPTION:

Exception applies only where disclosure of client's identity and fee arrangements would reveal "the substance of confidential professional communications" between attorney and client.

In re Grand Jury Proceedings (Osterhoudt), 722 F.2d 591, 594 (9th Cir. 1983).

Some courts have combined or confused these theories.

See In re Grand Jury Proceedings (John Doe), Misc. No. XP (D.R.I., Jan. 7, 1985);
In re Grand Jury Investigation, 723 F.2d 447, 452 (6th Cir. 1983);
In re Grand Jury Subpoena Duces Tecum (Margen), 695 F.2d 363, 365 (9th Cir. 1982).

CLIENT WITH PENDING CASE

In one recent case the court held that calling an attorney before a grand jury to testify regarding his fee arrangements with a client he represents in "cases pending for trial" violates the client's Sixth Amendment right to counsel.

In re Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H.), *affirmed*, 751 F.2d 13, 17 (1st Cir. 1984) (noting "the importance that the federal constitution places upon the right to counsel in criminal prosecutions" and that "in these circumstances ...the *timing* of the subpoenas unduly and unnecessarily burdens that right").

"The actions of the U.S. Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law.... The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguards." ***In re grand Jury Matters***, 593 F. Supp. 103, 107 (D. N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984).

See also In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Payden),

767 F.2d 26 (2d Cir. 1985).

"The law is settled in this circuit and elsewhere that '[i]t is improper to "utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial,' ***United States v. Dardi***, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845, 85 S.Ct. 40, 13 L.Ed.2d 50 (1964). *See* 8 J. MOORE, MOORE'S FEDERAL PRACTICE § 6.04(5) at 6-86 (1984).

But see ***In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick)***, 781 F.2d 238 (2d Cir. 1986).

"The Sixth Amendment protects Colombo's right to be free from unduly burdensome interruption of his counsel's trial preparation and protects him from any unnecessary or arbitrary disqualification of his counsel. Assessment of whether the subpoena is unreasonable or burdensome can be determined under Rule 17(c). While involuntary disqualification of counsel may prevent an accused from retaining counsel of his choice, courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right.

...And, as with the pre-indictment claim, the possibility of disqualification is not a basis for declining to enforce the subpoena; it is an issue for the trial judge if disqualification should arise." ***In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick)***, 781 F.2d 238 (2d Cir. 1986).

TIMING IS EVERYTHING

When a lawyer and his/her client are called before the same grand jury, the subpoena's timing is key.

"In the instant case, the Government has subpoenaed a defense attorney during the pendency of indictment proceedings. The subpoena here impinges upon the attorney-client relationship and, by diverting attention from the preparation of the client's defense, severely hinders the attorney's effectiveness in representing him. Accordingly, apart from the issue of privilege, the Court would quash the subpoena given the timing of, and circumstances surrounding, its issuance." ***In Re Grand Jury for Attorney, Reyes-Requena***, 729 F. Supp. 458 (S.D. Tex. 1989), *rev'd and remanded as moot.*

However, the Fifth Circuit recognized that the "oppressive timing" of a subpoena may require the district court to quash the subpoena." ***In Re Grand Jury Subpoena for Attorney, Reyes-Requena***, 913 F.2d 1118, 1122 (5th Cir. 1990).

DISCUSSIONS BETWEEN AN INDIVIDUAL AND "A LAWYER REPRESENTING ANOTHER IN A MATTER OF COMMON INTEREST" ARE PRIVILEGED

Recognizing that the privilege rules promulgated by the Supreme Court "remain of considerable utility as standards", the United States District Court for the Eastern District of New York noted that the attorney-client privilege would attach to prevent disclosure of communications by an individual "to a lawyer representing another in a matter of common interest".

U.S. v. Mackey, 405 F. Supp. 854, 858 (E.D. N.Y. 1975).

However, disclosures to third parties who do not have a common interest with the client waives the privilege.

Oak Industries v. Zenith Industries, 532 N.E.2d 298 (Ill. 1988).

"Sharing confidential information with a third party who had a 'common legal interest' does not waive the attorney-client privilege. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." ***Oak Industries v. Zenith Industries,*** 532 N.E.2d 298 (Ill. 1988).

JOINT DEFENSE/REPRESENTATION

The "sharing of information between counsel for parties having common interest should not destroy the work product privilege".

See In Re Auclair, 961 F.2d 65, 70 (5th Cir. 1992).

"It necessarily follows that when more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume that the parties are seeking representation of a joint matter . . . [as such] communication is protected by attorney-client

privilege . . . ." ***In Re Auclair***, 961 F.2d at 70.

Duplan Corporation v. Deering Milliben, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974);
Continental Oil Company v. U.S., 330 F.2d 347 (9th Cir. 1964);
Hunydee v. U.S., 355 F.2d 183, 185 (9th Cir. 1965);
Hyd Const. Co. v. Coehring Co., 455 F.2d 337 (5th Cir. 1972);
U.S. v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) (covering communications with attorney for common interest party in joint effort);
In re Grand Jury Subpoena, 406 F. Supp. 381 (S.D.N.Y. 1975);
In re LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

"An examination of the few cases dealing directly with the question of privilege based upon the attorney-client relationship would seem to indicate that persons represented by different attorneys but conducting a 'joint defense' may pool information without waiving this privilege." ***Transmirra Products Corp. v. Monsanto Chemical Co.***, 26 F.R.D. 572, 576-77 (S.D.N.Y. 1960).

This privilege applies to all attorneys and all clients who share confidential information.

Wilson P. Abraham Copstruction Corp. v. Armco Steel Corp, 559 F.2d 250 (5th Cir. 1977).

Indeed, the main purpose for-the creation of the attorney-client privilege is to allow just such communications to be made in the interest of establishing a legal defense".

Duplan Corporation v. Deering Milliben, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974).

PRIVILEGE PROTECTS COMMUNICATIONS AT MEETING BETWEEN "PERSONS SUBJECT TO POSSIBLE INDICTMENT" AND THEIR LAWYER

It is well recognized that the privilege protects communications "[w]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys".

Hunydee v. U.S., 355 F.2d 183, 185 (9th Cir. 1965).

"How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration...?" ***In re Grand Jury Subpoena***, 406 F.Supp. 381 (S.D. N.Y. 1975).

And such "privilege belongs to each and all of the clients and should not be viewed to have been waived without the consent of all of them". ***Chahoon v. Commonwealth***, 62 Va. 1036, 142 (Va. 1871).

CRIME-FRAUD EXCEPTION

The attorney-client privilege has generally been held inapplicable where advice is sought to assist, further, or induce a crime.

U.S. v. Berry, 627 F.2d 193 (9th Cir. 1980);
U.S. v. Aldridge, 484 F.2d 655 (7th Cir. 1973);
U.S. v. Freidman, 445 F.2d 1076 (9th Cir. 1971);
Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).

But see ***BP Alaska Exploration, Inc. v. Superior Court***, 245 Cal.Rptr. 682, 199 Cal. App.3d 1240 (Cal.App. 5 Dist. 1988) (holding under California state law, crime fraud exception to attorney-client privilege does not apply to documents containing attorney work-product).

This exception has been held to render the attorney-client privilege inapplicable even where the attorney is unaware of any ongoing criminal or fraudulent purpose on the part of the client.

U.S. v. Hodge and Zwieg, 548 F.2d 1347 (9th Cir. 197);
In re Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199 (5th Cir. 1981);
U.S. v. Pavlick, 680 F.2d 1026, 1028 (5th Cir. 1982) (en banc);
In re Grand Jury Proceedings (Damore), 689 F.2d 135 (11th Cir. 1982).

But see ***State v. Robinson***, 537 So.2d 1128 (Fla. App. [2d Dist.] 1979) (stating the very unlawful nature of the defendant's conduct gave rise to the conclusion that it must have been undertaken in reliance on the confidential marital communication privilege).

The "crime-fraud" exception to the attorney-client privilege applies, exposing the client's communications with his or her attorney, even though the "crime" or "fraud" is that of the law firm, unrelated to the client.

In re Impounded Case (Law Firm), 879 F.2d 124 (3d Cir. 1989).

The Government bears the burden of demonstrating the existence of the crime or fraud and

that the communications were made with respect to, in furtherance of, or to induce the illegal acts involved.

Clark v. U.S., 289 U.S. 1, 15 (1933);
Matter of Walsh, 623 F.2d 489 (7th Cir. 1980);
In re Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199 (5th Cir. 1981);
U.S. v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).

The standard has been held to be a "prima facie showing that [the attorney] was retained in order to promote intended or continuing criminal or fraudulent activity".

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc);
In re Grand Jury Proceedings (Damore), 689 F.2d 1351, 1352 (11th Cir. 1982) (stating "[t]his Court is not bound by ***Pavlick*** . . . but we approve its reasoning").

At the very least, the Government must be able to demonstrate a connection between the attorney's services sought by this client and the criminal enterprise.

In re Grand Jury Proceedings (Fine), 641 F.2d 199, 204 (5th Cir. 1981).

A strong suspicious appearance that the attorney's services are somehow connected with the crime or fraud is insufficient to destroy the attorney-client privilege.

In re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981);
In re Grand Jury Proceedings (Lawson), 600 F.2d 215, 218-19 (9th Cir. 1979).

"As a matter of law, these ...facts alone are inadequate to serve as the basis for a prima facie showing that [advice was sought] to further a criminal enterprise. These facts may support a strong suspicion, which is often enough for police and prosecutors, but it is not enough for courts." ***In re Grand Jury Proceedings***, 600 F.2d 215, 218-9 (9th Cir. 1979).
In re Grand Jury Proceedings (Fine), 641 F.2d 199, 204 (5th Cir. 1981).

However, the Fifth Circuit, at least intimates such "conspiratorial agreement" by the clients to prospectively provided counsel may be inferred from "custom or a prior course of conduct toward other apprehendees".

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1981).

" 'where the government takes 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 him who foots the bill and this even though he be a client of the attorney and the attorney unaware of the improper arrangement. Such an agreement, of course, need only be an effective one, need not be express, and might in a proper case be found to arise even from a custom or a prior course of conduct toward other apprehendees." ***In re Grand Jury Proceedings (Pavlick),*** 680 F.2d at 1029.

One circuit has even held that carrying the name and address of a criminal defense attorney when arrested is circumstantial evidence of consciousness of guilt.

U.S. v. Tille, 729 F.2d 615 (9th Cir. 1984).

IN CAMERA EXAMINATION

MAY "PRIVILEGED COMMUNICATION" ITSELF BE CONSIDERED IN DETERMINING ITS OWN ADMISSIBILITY?

The United States Supreme Court recently addressed the issue of whether a court may consider the privileged material itself in determining whether it is admissibility in ***U.S. v. Zolin,*** 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989). The Court held that an "*in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception ...however ...before a district court may engage in "*in camera"* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that established showing ...may be met by using any relevant evidence, lawfully obtained, privileged." ***Zolin***, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed. 2d 469 (1989) (emphasis supplied).

See In re Grand Jury Proceedings, 867 F.2d 539 (9th Cir. 1989) (holding an *in camera* inspection available for attorney-client privilege *and* work product privilege; target of grand jury subpoena need not be alerted to inspection).

PRELIMINARY REQUIREMENT OF RELEVANCY

While some circuits require a preliminary showing of the relevancy of any testimony regarding such matters,

In re Grand Jury Proceedings (Schofield, II), 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975) (stating subpoenaed items are required to be (1) relevant to an investigation, (2) property within the grand jury's jurisdiction, and (3) not sought primarily

for another purpose);
In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958, 963 (D.C. Mass. 1985).

others have not required such a showing as a prerequisite to compelling counsel's testimony.

U.S. v. Guerrero, 567 F.2d 281 (5th Cir. 1978);
In re Grand Jury Proceedings, 694 F.2d 1258 (11th Cir. 1982);
In re Grand Jury Subpoena (Battle), 748 F.2d 327, 330 (6th Cir. 1984).

PRELIMINARY REQUIREMENT OF NEED

In addition to a "relevancy" requirement the Fourth Circuit has required a showing that there exists "an important need for the information sought".

In re Special Grand Jury (Harvey), 676 F.2d 1005, 1011 (4th Cir. 1982).

The prosecution must address two inquiries when making a showing of need:

(1) Is the information sought necessary or important to the grand jury investigation? and

(2) Is the subpoenaed attorney the best or only source for the information? ***Supra, In re Special Grand Jury (Harvey)***, 676 F.2d at 1011 n.6.

See also ***In re Grand Jury Subpoena (Legal Services Center),*** 615 F. Supp. 958, 963 (D.C. Mass. 1985);
In the Matter of Joseph Nackson, Esq., 534 A.2d 65 (N.J.App. 1987) (Stern, J.) (finding that the attorney-client privilege and coinciding need for confidentiality presented issues of Constitutional dimensions directly involving the right to effective assistance of counsel).

"[W]hen there are less intrusive means for obtaining information necessary to return an indictment against the client of an attorney, those means must be pursued to avoid any infringement on the cherished Sixth Amendment and State Constitutional right to counsel . . . ." ***Id.***

But see ***In re Grand Jury Subpoena Served Upon John Doe, Esq.***, 781 F.2d 238 (en banc) overturning a panel decision, ***In re Grand Jury Proceedings (Doe)***, 759 F.2d 968 (2d Cir. 1985) (noting *panel* had imposed requirements of a particularized need and the

information's unavailability from a non-attorney source).

ATTORNEY SELF-DEFENSE EXCEPTION

This exception "includes the attorney's right to disclose confidential attorney-client communications where and to the extent necessary in defense of a civil charge of wrongdoing asserted by a third party, i.e. not the client". ***In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation***, 857 F.2d 1238 (9th Cir. 1988) (stating law firm and client charged with fraud arising out of client's business activities).

GRANT OF IMMUNITY TO CLIENT DOES NOT DESTROY ATTORNEY-CLIENT PRIVILEGE

Since the policies underlying the attorney-client privilege go beyond merely the client's Fifth Amendment privilege against self-incrimination [i.e. to encourage frank discussions between client and counsel], the privilege should not be destroyed by any grant of immunity to the client.

U.S. v. Pappadio, 346 F.2d 5 (2d Cir. 1965), *vacated on other grounds by Shillitani v. United States,* 384 U.S. 364, 365 (1966).

But see ***In re Witness Before the Grand Jury***, 631 F. Supp. 32 (E.D. Wis. 1985) (stating privilege not a basis for client's refusal to testify in grand jury investigation of his attorney).

Further, for the same reason that a grand jury who hears a witness' immunized testimony should not be able to indict; a grand jury that hears incompetent testimony may not itself violate a valid privilege.

U.S. v. Garrett, 797 F.2d 656 (8th Cir. 1986);
U.S. v. Beery, 678 F.2d 856, 859-60 (10th Cir. 1982), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2142 (1985);
U.S. v. Helstoski, 635 F.2d 200, 203-05 (3d Cir. 1980).

STATE CHALLENGE OF ATTORNEY'S GRAND JURY SUBPOENA

In Texas, an attorney is *incompetent* to testify as to any fact which came to his knowledge

by reason of the attorney-client relationship. However, the attorney has been required by one **federal** court to assert the attorney-client privilege on a document by document basis.

In re Grand Jury Subpoena, 831 F.2d 225 (11th Cir. 1987).

TEX. CODE CRIM. PRO. Art. 38.10 provides in part:

"All Other Competent Witness.

All other persons ...whatever may be the relationship between the defendant and witness, are competent to testify, *except that an attorney at law shall not disclose* a communication made to him by his client during the existence of that relationship, *nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship."* (emphasis added).

"A client has a privilege to prevent the lawyer or the lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney client relationship."

Courts in Texas have applied this principle, holding that knowledge of an attorney as to the location of a Deed of Trust relevant to a criminal trial was privileged in a criminal trial.

Downing v. State, 136 SW 471 (Tex.Cr.App. 1911).

Texas Courts have held that the payment and amount of attorney's fees is within the proscription prohibiting such testimony.

Holden v. State, 71 SW 600 (Tex.Cr.App. 1903).

"Appellant ...excepted to the action of the court, requiring M.C. Cullen, an attorney at law, and who had previously represented defendant in this case as her counsel and attorney, to testify that when defendant employed him she gave him $10 as a fee. She paid him two $5 bills. This was objected to on the ground that it was a privileged communication between attorney and client. The court overruled this objection, and witness was compelled to testify.... This testimony should not have been admitted. There was no dispute as to the relation of attorney and client, and the evidence introduced was in fact transpiring by virtue of that employment.... And it has been expressly held that it does not matter whether the information has been derived from a client's words, actions, or personal appearance." ***Holden v. State***, 71 SW 600, 601 (Tex.Cr.App. 1903).

This rule, has been codified in the *Goldstein privilege* at *Art 38.38* of the *Texas Code of Criminal Procedure*.

Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense in a criminal case, neither the judge nor the attorney representing the state may comment o n the fact that the defendant has contacted an attorney in the case

Cf. Braesfield v. State, 600 S.W.2d 288, 295 (Tex.Cr.App. 1980) (holding that there the attorney had given no incriminating testimony, and that testimony relating to the "fact" that the witness' client was in a particular city was "harmless" since several others had testified to same).

CODE OF PROFESSIONAL RESPONSIBILITY

In Massachusetts the local rule of professional conduct was amended in 1997 to impose a requirement on the prosecutor seeking to subpoena an attorney for information regarding a past or present client. The local rule (3.8(f)) stated that a prosecutor could only seek out the information concerning an attorney's client if the information was essential and could not be obtained anywhere else, and court approval was obtained. ***See Stern v. District Court for District of Massachusetts,* 214. F.3d 4, 8 (1st Cir. 2000).** However, the 1st Circuit in *Stern* held that rule 3.8(f) altered the grand jury's historic role, by placing it under overly intrusive court supervision, curbing its broad investigative powers, reversing the presumption of validity given to grand jury subpoenas, undermining secrecy of the proceedings and creating procedural delays**.** ***Stern v. District Court for District of Massachusetts*, 214 F.3d 4, 16 (1st Cir. 2000).**

See generally*US Court upholds ruling on lawyers: subpoenas seeking information on clients need judicial approval*, BOSTON GLOBE, Nov. 3, 1987, at 26.

DISTINCT PRIVILEGE UNDER "WORK-PRODUCT DOCTRINE"

The "work-product doctrine" precludes compelled disclosure of notes, work product, witness statements and interviews conducted by an attorney preparing for trial, or the adversary proceeding. This is the rare circumstance of the presidential pardon process, a district court held that the attorney's work papers used to prepare a pardon application were not protected by the work product doctrine. The court reasoned that in such circumstances the lawyers were acting as lobbyists who had no adversary and thus the work product did not apply. The lawyers were not acting as legal counsel or providing legal advice in the

traditional sense. ***In Re Grand Jury Subpoena date March 9, 2002, M-11-189 (D.C.),*** **179 F.Supp.2d 270 (S.D. N.Y. 2001)**

In ***Hickman v. Taylor***, the Supreme Court recognized that for an attorney to faithfully perform his duties in protecting the rights and interests of his client it is essential that the lawyer work with a degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. ***Hickman v. Taylor***, 329 U.S. 495, 507 (1947).

See also ***F.T.C. v. Grolier, Inc.***, 103 S. Ct. 2209 (1983).

An attorney must be entitled to adequately prepare his case by interviewing relevant witness.

Hickman v. Taylor, 329 U.S. 495, 510, 511 (1947);
Kent Corp. v. N.L.R.B., 530 F.2d 612 (5th Cir. 1976);
U.S. v. Nobles, 422 U.S. 225 (1975);
Upjohn v. U.S., 101 S. Ct. 677 (1981).

WORK PRODUCT DOCTRINE PROTECTS ADVERSARY PROCESS ITSELF

The doctrine focuses upon the integrity of the adversary process itself, safeguarding the vigorous representation of a client's cause from the debilitating effects by counsel.

U.S. v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980);
Hercules v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977).

WORK-PRODUCT DOCTRINE BROADER THAN ATTORNEY-CLIENT PRIVILEGE

"Work-product doctrine" is broader than the "attorney-client privilege" in that the communication may be immune from disclosure as work product even though it was not made to the attorney by his or her client.

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977);
In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) (stating even if not communicated in confidence).

See also Notes of Advisory Committee to 1970 Amendments to FED. R. CRIM. PRO.

Rule 26.

DOCTRINE PROTECTS ATTORNEY NOT CLIENT

Unlike the attorney-client privilege[7], the "work-product doctrine" is designed to protect the attorney, not the client.

In re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979);
First Wisc. Mortgage v. First Wisc. Corp., 86 F.R.D. 160 (E.D. Wis. 1980).

DOCTRINE APPLICABLE TO CRIMINAL PROCEEDINGS

As one commentator has noted, "[i]n criminal litigation, the role of the doctrine in insuring the proper functioning of the judicial system is even more vital than in the civil area",

U.S. v. Nobles, 422 U.S. 225, 238 (1975);
In re Special Sept. 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980), reflecting both Fifth and Sixth Amendment concerns;

Matter of Rosenblum, 401 F. Supp. 807 (S.D.N.Y. 1975).

DOCTRINE APPLIES TO TESTIMONY RESPECTING A WITNESS' ORAL STATEMENTS TO AN ATTORNEY PREPARING HIS CASE FOR TRIAL

In addition to the documents and “tangible things" specifically set out in FED. R. CRIM. PRO. Rule 26 the "work-product doctrine" is applicable to protect against disclosure of oral statement made by a witness to an attorney in anticipation of litigation.

Hickman v. Taylor, 329 U.S 495, 512 (1947);
Phoenix Nat. Corp. v. Bowater United King Paper, 98 F.R.D. 669 (N.D. Ga. 1980);
Ford v. Phillips Electrical Instruments Co., 82 F.R.D. 359 (E.D. Pa. 1979);
In re Anthracite Coal Antitrust Litigation, 81 F.R.D. 516, 522 (M.D. Pa. 1979);
Upjohn v. U.S., 101 S. Ct. 677 (1981).

"But as to oral statements made by witnesses [to an attorney] ...we do not believe that any

[7]The "attorney-client privilege" belongs to the client, not his attorney. ***US v. Juarez***, 573 F.2d 267 (5th Cir. 1978); ***Hett v. US***, 353 F.2d 761 (9th Cir. 1965); ***US v. Hankins***, 581 F.2d 431 (5th Cir. 1978).

showing of necessity can be made under the circumstances of this case so as to justify production." ***Hickman v. Taylor***, 329 U.S. 495, 512-13 (1947) (noting that to require an attorney to testify or respect what witnesses have told him would cause the standards of the profession to suffer).

In fact, the ***Jenks*** Act [18 U.S.C. § 3500] as well as FED. R. CRIM. PRO. Rule 26 which provide for disclosure of a witness' written or recorded statement, expressly excludes summarized notes of a witness interview.

In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973);
In re Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976);
In re Grand Jury Subpoena, 599 F.2d 504, 511-512 (2d Cir. 1979).

CRIME-FRAUD EXCEPTION

To apply, the party raising the exception must show prima facie that a crime or fraud exists, and that there is a relationship between the work product sought and the alleged crime or fraud. ***Pandick, Inc. v. Rooney***, F.2d (Ill. 1988).

CLIENT'S LOCATION MAY BE A PRIVILEGED COMMUNICATION

With regard to whether the client's location is a communication covered by attorney-client privilege, the answer appears to be the proverbial "that depends." For example, in ***Matter of Grand Jury Subpoenas Served Upon Field***, 408 F. Supp. 1169 (S.D.N.Y. 1976), the Court noted that:

"In this Court's view, a determination of whether the client's whereabouts must be disclosed will depend on an analysis of the facts of the case and the nature of the communication."
Matter of Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169, 1172-73 (S.D. N.Y. 1976).

The ***Field*** court went on to hold that there the:

" . . . attorneys learned of [the client's] whereabouts precisely because he sought their advice with respect to that matter. The Court concludes that on the facts of the case, the residence and whereabouts of [the client] were communicated to these attorneys in confidence, as an incident to the obtaining of legal advice and

as part of an attorney-client relationship. Therefore, this is a Communication within the scope of the privilege." ***Matter of Grand Jury Subpoenas Served Upon Field,*** 408 F. Supp. 1169, 1172-73 (S.D. N.Y. 1976).

Again, in ***In Re Stolar***, the Court held that:

"During the course of that conversation [with his lawyer], Shepard gave the attorney his telephone number. As part of the attorney-client discussions which thereafter took place. Sheppard also disclosed his home address . . . . The Court is of the opinion that the information sought was communicated to the attorney confidentially and solely for the purpose of receiving legal advice. Under the circumstances, Shepard had a legitimate basis to expect that such information disclosed to his attorney would not be revealed." ***In Re Stolar***, 397 F. Supp. 520, 524 (S.D. N.Y. 1975).

But see ***Sullivan v. Carrigan***, 10 F.R.Serv.3d 431 (E.D. Pa. 1988) (holding that a client's whereabouts did not "go to the heart of the legal advice sought").

FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED PRODUCTION OF "PRIVATE PAPERS"

While the content of voluntarily prepared business records is not privileged, ***U.S. v. Doe***, 465 U.S. 605 (1984); ***Fisher v. U.S.***, 425 U.S. 391 (1976), the privilege may apply to the act of producing them.

"A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." ***U.S. v. Doe***, 465 U.S. 605, 612 (1984).

In re Grand Jury Subpoena Duces Tecum, 754 F.2d 918 (11th Cir. 1985).

"[tlhe Fifth Amendment .--does not alone preclude production by an attorney of documents concerning his client. *See* ***Fisher,*** 425 U.S. at 396-97; ***Couch v. United States***, 409 U.S. 322, 328 (1973); however, ...if under the circumstances the attorney client privilege is also implicated, the Fifth Amendment can operate to provide a basis for quashing a subpoena of certain types of materials . . .
'when the client himself would be privileged from production of the document, either as a

party to common law . . . or as exempt from self-incrimination . . . .'"

If a subpoena compels production by a collective entity, one circuit requires that it appoint a custodian to produce the documents.

In re Two Grand Jury Subpoenas Duces Tecum, 769 F.2d (2d Cir. 1985);
In re Grand Jury Subpoenas Issued to 13 Corporations, 775 F.2d 43 (2d Cir. 1985).

But, the sole practitioner need not do so.

(Under Seal) v. U.S., No. 86-883 (E.D. N.Y. 1986).

However, compelling an accused to sign a consent form has been held not to fall within the act of production doctrine.

U.S. v. Ghidoni, 732 F.2d 814, 816 (11th Cir. 1984);
In re Grand Jury Proceedings (Thier), 767 F.2d 1133, 1134 (5th Cir. 1985).

FOREIGN LAW

Even where foreign law provides "a broader privilege for the attorney-client relationship than is found in American Law", and even though foreign counsel may be subjected to sanctions for violation of that privilege, same does not prevent enforcement of a federal grand jury subpoena. ***In re Grand Jury Proceedings (Bowl)***, 694 F.2d 1256 (11th Cir. 1982).

See also ***In re Bank of Nova Scotia***, 186 F.2d 817 (11th Cir. 1984).

And an immunized witness may only refuse to answer on the grounds that the answer might incriminate him or her under foreign law where a foreign prosecution is pending or imminent.

In re Grand Jury Proceedings (Chevrier), 748 F.2d 100 (2d Cir. 1984).

MARITAL PRIVILEGES
[ADVERSE SPOUSAL TESTIMONY VS. MARITAL COMMUNICATIONS]

The so-called marital or spousal privilege could be said to encompass two distinct protections: the "privilege against adverse spousal testimony" which is separate and apart

from "...the independent rule protecting confidential marital communications".

Trammel v. U.S., 445 U.S. 40 (1980);
In re Grand Jury Proceedings (Hermann), 664 F.2d 423 (5th Cir. 1981);
U.S. v. Burton, 631 F.2d 280, 281-82 (4th Cir. 1980);
U.S. v. Cameron, 556 F.2d 752, 755 (5th Cir. 1977);
U.S. v. Mendoza, 574 F.2d 1373, 1379 (5th Cir. 1979);
U.S. v. Entreben, 624 F.2d 597, 598 (5th Cir.), *reh. denied*, 629 F.2d 1350 (1980).

"This Court previously has held "that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications." ***U.S. v. Entreben***, 624 F.2d 597, 598 (5th Cir. 1980).

ADVERSE TESTIMONIAL PRIVILEGE VESTS IN TESTIFYING SPOUSE

The privilege against adverse spousal testimony belongs to the witness spouse. ***Trammel v. U.S.***, 445 U.S. 40, 53 (1980).

"We conclude that the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying."

COVERS ACTS AND COMMUNICATIONS

The privilege against adverse spousal testimony ". . .is invoked, not to exclude private marital communications, but rather to exclude evidence of *criminal acts and of* communications". ***Trammel v. U.S.***, 445 U.S. 40, 51 (1980). Unlike the attorney-client, physician-patient, or priest-penitent privileges, the privilege against adverse spousal testimony "is not limited to confidential communications". ***Trammel v. U.S.***, 445 U.S. at 51.

See ***State v. Robinson***, 376 S.E.2d 606 (W.Va. 1988) (noting that defendant's actions, allegedly growing marijuana in wife's presence, were subject to marital privilege).
NEED NOT BE CONFIDENTIAL

While the "confidential marital communications privilege" protects only "communications between the spouses" rather than "objective facts,"

U.S. v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977);
Percira v. U.S., 347 U.S. 1 (1954).

. . . the "privilege against adverse spousal testimony" covers both "criminal acts and of communications made in the presence of third persons". ***Trammel v. U.S.,*** 445 U.S. at 51.

NO PRIVILEGE IF MARRIAGE DEFUNCT

A defendant cannot use the privilege to keep an ex-spouse or an estranged spouse from testifying.

U.S. v. Roberson, 859 F.2d 1376 (9th Cir. 1988) (holding that privilege is inapplicable to communication that occurred two months after defendant had filed for divorce and moved out).

CRIMINAL ENTERPRISE EXCEPTION APPLIES ONLY TO "CONFIDENTIAL COMMUNICATIONS PRIVILEGE" NOT "ADVERSE TESTIMONIAL PRIVILEGE"

The so-called "criminal enterprise exception", which excludes from protection "conversations between husband and wife about crimes in which they are jointly participating when the conversations occurs", applies only to the privilege's "protection of confidential marital communications". ***U.S. v. Mendoza***, 574 F.2d 1373, 1381 (5th Cir. 1979); ***U.S. v. Entreben***, 624 F.2d 597, 598 (5th Cir.), *reh. denied*, 629 F.2d 1350 (1980).

Thus, contrary to the rule with respect to the "confidential marital communications privilege", even where "the spouses have been partners in crime" and the witness spouse "was allegedly involved in the criminal acts of her husband", the "privilege against adverse spousal testimony" is not abrogated and same constitutes "no exception to the privilege". ***Appeal of Malfitano***, 633 F.2d 276, 277-80 (3d Cir. 1980) (noting well-reasoned discussion).

TESTIMONY NEED NOT BE TECHNICALLY INCRIMINATING TO BE "ADVERSE"

In order for the witness to invoke the "adverse spousal testimony" privilege the inquiry need only indirectly inculpate the non-testifying spouse.

In re Grand Jury (Malfitano), 633 F.2d 276, 180 (3d Cir. 1980);
U.S. v. Armstrong, 476 F.2d 313, 315-16 (5th Cir. 1973);
In re Grand Jury Matter, 673 F.2d 688 (3d Cir. 1982).

CRUEL TRILEMMA

As one court noted:

"A witness before a grand jury should not be compelled to choose among perjury, contempt, or disloyalty to a spouse". ***In re Grand Jury Investigation***, 603 F.2d 786, 789 (9th Cir. 1979).

ESTABLISHING PRIVILEGE BY IN CAMERA PROFFER

The appropriate procedure for establishing a privilege may be *in camera, ex parte*, proffer to the court outside the presence of Counsel for the Government, in order that one not be required to waive his or her privilege in their effort to assert same.

U.S. v. Kampiles, 609 F.2d 1233, 1248 (7th Cir. 1979);
U.S. v. Brown, 539 F.2d 467, 470 (5th Cir. 1976);
U.S. v. Bocra, 623 F.2d 281, 285 (3d Cir. 1980);
In Re Investigation (Lynchburg), 563 F.2d 652, 654 (1977).

"In response to the Government's Motion to disqualify the two attorneys [for conflict of interest], the court examined five of the witnesses . . . *in camera and ex parte*, at Appellant's [the criminal defendant's] request. It sealed the record . . . also at appellant's request." ***Id.***

The Supreme Court has indicated that it is the "duty of the District Court to treat ...material as presumptively privileged upon receiving a claim of privilege" and then to order "an in camera examination" of that material in order to ascertain the validity of the claim and provide for a meaningful appellate review:

"Upon receiving a claim of privilege ...it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the prejudicial material was essential to the justice of the [pending criminal] case ...here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and *ordered an in-camera examination* of the subpoenaed material."

(Emphasis supplied) ***U.S. v. Nixon,*** at 713-14.

FAMILY PRIVILEGE

Case law recognizing a parent-child privilege:

In re Grand Jury Proceedings (Greenberg), 11 Fed.R.Ev.Serv. 579 (D.C. Conn. 1982) (noting mother's refusal to disclose confidential communications with daughter);
People v. Fitzgerald, 422 N.Y.2d 309, 313 (1979);
Application of A&M, 403 N.Y.2d 375 (1978).

"The parent-child privilege did not develop because as a practical matter it was little needed. The catalyst for the aggressive lawmaking of ***Agosto*** was a new law enforcement tactic implemented by federal prosecutors and investigators in Nevada . . . The problem then, was to substantiate legally the existence of a privilege for which there has never been explicit authority. Yet, the very absence of such explicit authority appears to be testimony to the pervasiveness and depth of our society's conviction that the parent-child bond should be free from state intrusion." Kandoian, *The Parent-Child Privilege and the Parent-Child Crime: Observations on State v. DeLong and In re Agosto*, 36 MAINE L. REV. 59, 83 (1984).

Cases refusing to recognize a parent-child privilege:

Recent attention has been focused on the lack of a parent-child privilege which the specter of Monica Lewinski's mother being called to testify before the grand jury about private conversations her daughter had with her concerning intimate relations with the President of the United States. The D.C. district court declined to recognize a parent child privilege and compelled the testimony. This unseemly conduct by the independent counsel has lead to grass roots efforts to establish the parent child privilege. **David Savage, Legacy of a Scandal, Presidency and the People: Impeachment case puts in doubt. L.A. Times, Feb, 13, 1999; Harvey Silvergate, Zippergate Update: Monica's Reading List. The Boston Pheonix, April 3, 1998; Investigating the President: The Newsletter with Jim Lehrer Transcript, Feb. 10, 1998.**

In Re Grand Jury, 103 F.3d 1140, 1146-47 (3d Cir. 1997) (denying parent-child privilege stating that no state within the Third Circuit has recognized such a privilege).
Port v. Heard, 764 F.2d 423 (5th Cir. 1985);
In re Kinoy, 326 F. Supp. 400 (1970);
U.S. v. Penn, 647 F.2d 876 (9th Cir. 1980) (noting 5-4 decision, the court narrowly rejected a derivative claim of parent-child privilege);

In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. 1981);
United States ex rel. Riley v. Franzen, 653 F.2d 1153 (7th Cir. 1981) (dicta);
U.S. v. Jones, 683 F.2d 817 (4th Cir. 1982) (rejecting privilege on grounds there was no showing that the testimony would be "adverse" to the parent);
In re Matthews, 714 F.2d 223 (2d Cir. 1983) (holding no "in law" privilege).

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The New Jersey District Court has recognized a psychotherapist patient privilege protecting confidential communications of psychotherapy patients in federal grand jury investigations. ***In re Grand Jury Subpoena***, 710 F. Supp. 99 (D.N.J. 1989) (following a Sixth Circuit decision, disagreeing with the Eleventh Circuit)

RIGHT TO COUNSEL

Although it is well established that a grand jury witness has no right to the "presence" of counsel before the grand jury. ***In re Groban***, 352 U.S. 330 (1952), some confusion exists as to whether a grand jury witness has a right to confer with counsel sitting outside the grand jury room after each question or series of questions.

Many courts are of the opinion that "counsel may ...sit outside of the grand jury room; and, *at any and all times* during questioning a witness may leave the room to consult with his attorney.

In re Taylor, 567 F.2d 1183, 1186 n.1 (2d Cir. 1977);
U.S. v. Mandujano, 425 U.S. 564, 581, 605-07 (1976);
U.S. v. Capaldo, 482 F.2d 821 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969);
In re Tierney, 465 F.2d 806, 810-11 (5th Cir. 1972) (indicating that while the court has "...the power to prevent a breakdown in the grand jury proceeding by frequent departures from the grand jury room for frivolous reasons and with intent to frustrate the proceedings, the witness does have a right to consult with counsel, suggesting "government counsel could facilitate the proceedings by making a set of questions available at one time to the witness so that they might be discussed as a group with counsel").

Indeed, even the Supreme Court noted, albeit in dicta, that informing a grand jury witness "he could have the assistance of counsel, but that counsel could not be inside the grand jury room ...[is] plainly a correct recital of the law". ***U.S. v. Mandujano***, 425 U.S. 564, 881 (1979).

See also ***Commonwealth v. McClosley***, 277 A.2d 764, *cert. denied*, 404 U.S. 1000.

However, at least one court has suggested that a grand jury witness' right to consult with counsel may only require that the witness be provided with an opportunity to consult with counsel *prior* to testifying; and that even that limited right to counsel is "undercut" and "minimal" where the grand jury witness has been granted immunity.

See ***In re Lowry***, 713 F.2d 616 (11th Cir. 1983).

"Even had Lowry not been able to consult *after* he heard the questions it is unlikely that any right he had to counsel would have been violated here. Lowry and Jenking were fully aware of the subject of the grand jury's probe and could easily have predicted and prepared for its inquiries in advance". ***In re Lowry,*** 713 F.2d 616 (11th Cir. 1983).

"[Moreover], [w]here, as here, a grand jury witness is made immune from prosecution based on his testimony, the rationale for right to counsel is undercut, at best it appears that right becomes minimal at best."

See also ***U.S. ex rel Buonoraba v. Commissioner***, 316 F. Supp. 556 (S.D.N.Y. 1970).

The Eleventh Circuit's opinion notwithstanding, a grand jury witness may need to consult with a lawyer concerning *various other legal rights* and privileges which are often highly technical. For example, a witness would need the advice of counsel to understand the prohibition against use or disclosures of evidence obtained as a result of electronic surveillance,

Gelbard v. U.S., 408 U.S. 41 (1972) (noting violations of First Amendment freedoms);
Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972) (noting unlawful search or seizure);
U.S. v. Calandra, 414 U.S. 338 (1974) (noting attorney-client privilege);
Schwimmer v. U.S., 232 F.2d 855 (8th Cir. 1956) (noting marital privilege);
Blau v. U.S., 340 U.S. 332 (1951);
and questions requiring a close analysis so as to avoid the very technical offense of perjury,

Bronston v. U.S., 409 U.S. 353 (1973).

The point is, the need for consultation with counsel is evident *even after a witness is given immunity.*

Nevertheless, the Courts seem to be increasingly more sensitive to the interruption created

by a grand jury witness' repeated entry and exit from the grand jury room which prosecutors often claim is very disruptive of that body's investigatory function. Both the Fifth and Eleventh Circuit Courts of Appeals have expressed their concern for the same.

In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972) (stating that the court has "the power to prevent a breakdown in the grand jury proceedings by frequent departures from the grand jury room for frivolous reasons and with intent to frustrate the proceedings").

In re Lowry, 713 F.2d 616, 617 (11th Cir. 1983) (stating, "...Lowry requested to recess to consult with his lawyer, the grand jury forewoman complained about the constant interruptions these consultations were creating...").

Defense counsel, on the other hand, should insist on the witness' right to consultation.

DEFENDANT'S GRAND JURY TESTIMONY

Any "recorded testimony of the defendant before a grand jury which relates to the offense charged" is discoverable under Rule 16(a)(1)(A).

a. Secrecy.
Under FED. R. CRIM. PRO. Rule 6(e), the policy of grand jury secrecy does not apply to any witness and therefore there is no impediment to disclosure of the defendant's own testimony. ***Dennis v. United States***, 384 U.S. 855, 86 S.Ct. 1840, 16 L.2d 953 (1966).

See also ***Butterworth v. Smith***, 110 S.Ct 1376, 108 L.Ed.2d 572, 110 S.Ct. 1376 (1990) (stating that *any proscription* of post investigation disclosure by a witness of his own testimony is violative of the First Amendment).

b. Relevancy.
Many courts do not even require a showing of need or relevance in interpreting this rule. *See, e.g.*, ***United States v. United Concrete Pipe Corp.,*** 41 F.R.D. 538 (N.D. Tex. 1966); ***In re Sealed Motion***, 880 F.2d 1367 (D.C. Cir. 1989) (holding grand jury witness has right to transcript of his or her *own* grand jury testimony without any showing of "particularized need", noting that even if such a showing were required, providing a witness a transcript of his or her *own* testimony would provide that witness with some protection against future perjury charges).

c. Recordation.
Recordation of all grand jury proceedings including statements made by prosecution is now

required by FED. R. CRIM. PRO. Rule 6(e)(1).

d. Corporate Officers:
Rule 16(a)(1)(A) also adopts a broad interpretation of the discovery of grand jury testimony of corporate officers or employees where the corporation is a defendant. However, it is interesting to note that this is one of the only provisions of the Rule which requires a motion directly to the court, a point not discussed in the Advisory Committee note, although the note does intimate that testimony of such corporate officers or other officials is now "discoverable as statements of the defendant." FED. R. CRIM. PRO. Rule 16 Advisory Committee Note 1974.

GRAND JURY TRANSCRIPTS OF OTHER WITNESSES

RULE 16(A)(3) provides as follows: "[e]xcept as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury."

a. Defendant's Testimony.
Rule 16(a)(1)(A) provides for mandatory disclosure of a defendant's own grand jury testimony which relates to the offense charged.

(1) Corporate Defendant.
Corporate defendants are entitled to inspect any testimony given by its officers, direct agents, and employees before the grand jury ***U.S. v. Tobin packing Co., Inc***., 362 F.Supp. 1127 (N.D.N.Y. 1973); ***U. S. v. Bally Mfg. Corp.***, 345 F.Supp. 410 (E.D. La. 1972). The test used to determine whether the grand jury witness was a representative of the corporation is the same test as set out in Rule 16(a)(1)(A). ***U.S. v. White Ready-Mix Concrete Co.***, 449 F.Supp. 808 (N.D. Ohio, 1978).

b. Witness Testimony.
Brady v. Maryland may require disclosure of exculpatory grand jury testimony of a government witness, but Brady imposes no time limits on such disclosure that are inconsistent with the Jencks Act. ***U. S. v. Campagnola***, 592 F.2d 852 (5th Cir. 1979); ***United States v. Eisenberg***, 469 F.2d 156 (8th Cir. 1972).

c. Rule 6(e) Discovery.
FED. R. CRIM. PRO. Rule 6(e)(2) provides generally for secrecy of grand jury proceedings. One exception for defense discovery appears in Rule 6(E)(ii)"The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-

jury matter:…at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;"

(1) Particularized Need.

A "strong showing of a particularized need" is required to justify pre-trial disclosure of grand jury testimony. ***Pittsburgh Plate Glass Co. v. United States***, 360 U.S. 395, 79 S. Ct. 1237 , *reh. denied*, 361 US 855 (1959); ***United States v. Rubin***, 559 F.2d 975, *reh. denied*, 564 F.2d 98, 572 F.2d 320 (5th Cir. 1977), *vacated*, 439 U.S. 810, 99 S.Ct. 67 (1978), *on remand*, 591 F.2d 278 (1979); ***United States v. Harbin***, 585 F.2d 904 (8th Cir. 1978) (alleging that the transcript might reveal a ground on which to dismiss the indictment and could be used in cross-examination was insufficient).

(a) Examples of Need:

(i) To establish a double jeopardy defense when a Los Angeles grand jury transcript was requested by a Texas defendant, ***U. S. v. Hughes***, 413 F.2d 1233 (5th Cir. 1969).

(ii) To enable counsel to investigate well-documented suspicions of jury-tampering. ***United States v. Moton***, 582 F.2d 654 (2d Cir. 1978), *on remand*, 463 F. Supp. 49 (S.D.N.Y. 1979).

REQUESTS FOR DOCUMENTS OBTAINED BY GRAND JURY

Requests for grand jury documents may evoke different, and less exacting, considerations than requests for transcripts of grand jury testimony.

In re Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079 (7th Cir. 1982); *Cf. In re U.S.,* 398 F.3d 615, 619 (7th Cir. 2005).

POOR MEMORY

Answers such as "I don't know" or "I don't recall" constitute answers and are, therefore, not contemptuous,

In re Michael, 326 U.S. 224 (1945);
Ex Parte Hudgins, 249 U.S. 379 (1914);
Brown v. U.S., 356 U.S. 148, 185 (1958) (providing a perjurious answer is not contempt where they can be shown to be false they may form the basis for a perjury prosecution);

Gebhard v. U.S., 422 U.S. 281 (9th Cir. 1970);
U.S. v. Nicolletti, 310 F.2d 359 (7th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963);
U.S. v. Sweig, 441 F.2d 114 (2d Cir. 1971).
In re Investigating Grand Jury of Chester County, Pennsylvania (Lees), No. 197 Misc. 1987 (Pa. S.Ct. July 27, 1988) (responding that one does not remember constitutes testimony-the remedy, if the judge supervising the grand jury is convinced that the answer is not a truthful one, is an indictment for perjury, not contempt), or obstruction of justice [18 U.S.C. §§ 1503 & 1505].

See ***U.S. v. Alo***, 439 F.2d 751 (2d Cir. 1971);
U.S. v. Cohn, 452 F.2d 881 (2d Cir. 1971).

See also ***In re Grand Jury Proceedings***, 539 F.2d 382 (5th Cir. 1976) (stating that there is no right to competency hearing where witness claims inability to recall).

ELECTRONIC SURVEILLANCE

While a witness may not refuse to answer a question solely because it is based upon fruits of an illegal search, ***U.S. v. Calandra***, 414 U.S. 338 (1974), he would have "just cause" within the meaning of the contempt statutes to refuse to answer a question based upon illegal electronic surveillance.

18 U.S.C. § 2515;
Gelbard v. U.S., 408 U.S. 41 (1972);
In re Grand Jury Proceedings (Hermann), 664 F.2d 423 (5th Cir. Unit B, 1981).

Upon the mere "allegation that the grand jury questioning is prompted by illegal wiretaps, the government is required to make an adequate denial". ***In re Brummitt***, 613 F.2d 62, 65 (5th Cir. 1980). And an evidentiary hearing should be conducted to determine the sufficiency of the government's response, where a "specific" claim is made.

Beverly v. U.S., 468 F.2d 732, 744 (5th Cir. 1972) (noting preferred practice).

WHAT MATTERS MAY GRAND JURY INVESTIGATE?

Federal grand juries have exceedingly broad investigative powers.

Blair v. U.S., 250 U.S. 273 (1919);
Branzburg v. Hayes, 408 U.S. 665 (1972);
U.S. v. Dionisio, 410 U.S. 1 (1973);

In re Grand Jury Proceedings, 558 F.2d 1177 (5th Cir. 1977).

In some states (e.g. Texas), a grand jury only has authority to investigate crimes allegedly occurring within the county in which it is impaneled or other crimes specifically authorized to be prosecuted in a foreign county by statute.

Rodgers v. County of Taylor, 368 S.W.2d 794, 796-7 (Tex. App.--Eastland, 1963); ***Rodriguez v. State,*** 918 S.W.2d 34, 36 (Tex. App.—Corpus Christi 1996).

See also ***U.S. v. Standard Oil Company***, 316 F.2d 884 (7th Cir. 1963);
U.S. v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952);
Application of Iaconi, 120 F. Supp. 589 (D. Mass. 1954).

"INEFFECTIVE" BY DEFINITION

Whatever its geographical boundaries, the grand jury poses an almost insurmountable obstacle in the path of the attorney charged with "effectively" representing a summoned citizen. Like a visitor to the land of Oz, the criminal defense lawyer has neither a key to the kingdom nor green goggles to peer within.

As the opinion in ***In re Grand Jury Proceedings (Lowry)*** suggests, many courts seem to equate "advise of counsel" with "obstruction of justice". ***In re Grand Jury Proceedings (Lowry)***, 713 F.2d 616 (11th Cir. 1983). Given the proliferation of perjury indictments against "targeted" witnesses compelled to testify before such "tribunals" the criminal defense bar should voice its refusal to tolerate such intolerance.

ADVICE OF "RIGHTS" OF GRAND JURY WITNESSES

The following material is quoted from the United States Department of Justice, United States Attorney's Manuel, §9-11.150.

"It is the policy of the Department of Justice to advice a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation.

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

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

Advice of Rights

The grand jury is conducting an investigation of possible violations of federal criminal laws involving: (State here the general subject matter of inquiry...)

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

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

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.

Grand Jury Reforms

The National Association of Criminal Defense Lawyers, along with the Commission to reform the Federal Grand Jury, proposes the following reforms that hopefully might make the Grand Jury process more just:

1. A grand jury witness who does not have immunity shall be accompanied by his lawyer.

2. A prosecutor shall not knowingly fail to disclose to the grand jury information that exculpates the defendant.

3. Prosecutor shall not present constitutionally inadmissible evidence to the grand jury.

4. A target or subject of a grand jury shall be given the opportunity to testify before a grand jury.

5. A witness should have the right to receive a transcript of his/her grand jury testimony.

6. The grand jury shall not name an person as an unindicted co conspirator in an indictment.

7. Subjects or targets called before the grand jury who do not have immunity shall be given a Miranda warning.

8. Subpoenas for grand jury witnesses shall be issues at least 72 hours before the date of appearance.

9. Grand jurors shall be given instruction for the record regarding their duties as grand jurors and the power they hold.

10. A prosecutor shall not call before the grand jury a subject or target who has invoked the constitutional privilege against self incrimination.