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CRIMINAL LAW

PREINDICTMENT PROSECUTORIAL CONDUCT IN THE FEDERAL SYSTEM

JAMES F. HOLDERMAN*

The 1970's witnessed an expansion of the federal prosecutor's role in the enforcement of the federal criminal law. Armed by Congress at the decade's inception with potent new investigatory tools,¹ federal prosecutors fashioned theories that expanded the application of various criminal statutes to cover activities not previously subjected to federal scrutiny.² Spurred by the public outrage resulting from Watergate and localized political scandals, federal prosecutors across the country intensified their efforts in the prosecution of white collar crime and public corruption. As part of this intensified prosecutorial effort, personnel in the United States Attorneys' offices in several large cities placed an increased emphasis on the investigation of such crimes and often became personally involved in investigations involving the traditional federal criminal investigatory agencies.³ For example, the United States Attorney's office in Chicago organized a specialized unit staffed by experienced prosecutors whose assigned tasks were to coordinate

and supervise the investigations of alleged financial crimes and public corruption.⁴

The expansion of prosecutorial activity in the 1970's, however, was not without criticism from the bar⁵ and the bench.⁶ Therefore, as the 1980's commence, some circumspection is in order. Even a chief advocate of increased prosecutor coordination and involvement in the investigation of crime, the United States Attorney for the District of Columbia, Earl J. Silbert, has warned: "[T]he prosecutor's assuming more extensive responsibilities and exerting increased influence and power in order to control crime increases his potential and capacity for abuse."⁷

The potential and capacity for prosecutorial abuse is heightened at the preindictment stage of the federal criminal process, which historically has been carried on largely in secret. A defendant's rights may be irreparably prejudiced at this phase of the criminal process without the defendant, his lawyer, or the court ever finding out. It is, therefore, necessary for federal prosecutors at the preindictment stage to be particularly scrupulous in their conduct. The purpose of this article is to explore the parameters of prosecutorial conduct at the investigative stage of the federal criminal justice system and to consider what is proper prosecutorial conduct prior to bringing a formal charge against a defendant.

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¹The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 923 (1970), provided federal prosecutors with a new immunity statute, 18 U.S.C. §§ 6001-6003 (1976), with which grand jury testimony could be compelled; a recalcitrant witness statute, 28 U.S.C. § 1826 (1976), under which witnesses could be incarcerated for civil contempt if they refused to testify; and a statutory scheme for the creation of special grand juries in larger districts, 18 U.S.C. §§ 3331-3334 (1976), under which the life of such grand juries could be extended up to three years.

²See W. SEYMOUR, UNITED STATES ATTORNEY 174-75 (1975); Henderson, *The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption*, 8 CUM. L. REV. 385 (1977); Thornburgh, *Preface to The United States Courts of Appeal: 1974-1975 Term Criminal Law and Procedure*, 64 GEO. L.J. 173, 174 (1975).

³The offices headquartered in Baltimore, Chicago, New York, Newark, and Philadelphia were in the forefront of such efforts.

⁴In the early years of the decade, the unit was known as the Special Investigations Division. It is presently called the Special Prosecutions Division. Such specialized units have been encouraged by the Department of Justice. See Jones, *Organizing a Large U.S. Attorney's Office*, 5 LITIGATION 34, 37 (1979).

⁵See, e.g., Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977); Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?* 28 AM. U.L. REV. 63 (1978).

⁶See, e.g., *United States v. Craig*, 573 F.2d 455, 497 (7th Cir. 1977) (Swygert, J., dissenting).

⁷Silbert, *The Role of the Prosecutor in the Process of Criminal Justice*, 63 A.B.A. J. 1717, 1720 (1977).

I. IMPACT OF PUBLISHED STANDARDS FOR PROSECUTORIAL CONDUCT

Federal prosecutors can look to several published sources for suggested standards of conduct in preindictment activities. Whether any of these published standards of conduct have any legally binding effect on federal prosecutors' actions is questionable. These published standards do, however, provide guidance to both prosecutors and the courts in examining the propriety of prosecutorial conduct. Among the published standards which prosecutors ought to consider are the advisory prosecutorial standards of conduct issued by various professional organizations.⁸ The federal courts often refer to such standards in addressing issues of prosecutorial conduct.⁹ No published federal decision has ever granted relief based solely upon a prosecutor's failure to adhere to these advisory standards.

Another source of guidance for federal prosecutors is the United States Attorneys' Manual circulated by the Department of Justice. This Manual is provided "for the internal guidance of the U.S. Attorneys' Offices and those other organizational units of the Department concerned with litigation."¹⁰ The binding effect of the Manual was considered by the United States District Court for the Southern District of New York in *United States v. Shulman*.¹¹ The *Shulman* court declined to grant a motion to dismiss that was premised on the failure of federal prosecutors to comply with a section of the U.S. Attorneys' Manual. The court offered two bases for its ruling. First, the court held that the

provisions of the U.S. Attorneys' Manual do not have the same recognized status as the provisions of the Code of Federal Regulations and, therefore, do not have the force and effect of law. Second, the Manual contains an express disclaimer stating that its provisions were never intended to create substantive or procedural rights for the benefit of any party.¹²

The *Shulman* court relied on this disclaimer to distinguish its decision from *United States v. Caceres*,¹³ in which the Ninth Circuit reversed a conviction because the Internal Revenue Service agents investigating the defendant had failed to comply with certain provisions of the IRS Manual. The *Shulman* court noted that the IRS Manual contained no

¹² The pertinent portion of the U.S. Attorneys' Manual states:

1-1.100 PURPOSE OF THE MANUAL

This United States Attorneys' Manual is a text prepared to aid the United States Attorneys and their Assistants in the performance of their important public responsibilities. It is designed to be the single repository of all materials and general policies and procedures relevant to the work of the United States Attorneys' Offices and to their relations with the Department of Justice with the legal divisions, investigative agencies, other bureaus and divisions, and the Office of Management and Finance (see Administrative Directives System for purely administrative guidance). The contents of this Manual are, accordingly, a necessary and invaluable guide to the United States Attorneys, their Assistants, and attorneys of the legal divisions in carrying out their duties and exercising their discretion, under the direction of the Attorney General, in representing the United States.

This Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

U.S. Attorneys' Manual, *supra* note 10, § 1-1.100.

¹³ 545 F.2d 1182 (9th Cir. 1976), *rev'd*, 440 U.S. 741 (1979). In *Caceres*, the Ninth Circuit reversed a criminal conviction for the mere noncompliance with an agency's administrative regulation absent a constitutional or statutory violation by the agency members. 545 F.2d at 1187. The Ninth Circuit relied upon its opinion in *United States v. Sourapas*, 515 F.2d 295 (9th Cir. 1975), and that of the First Circuit in *United States v. Leahey*, 434 F.2d 7, 10 (1st Cir. 1970), as support for its ruling. Several other courts both before and after *Caceres* have held to the contrary. *See, e.g.*, *United States v. Mapp*, 561 F.2d 685 (7th Cir. 1977), *aff'g* 420 F. Supp. 461, 464 (E.D. Wis. 1976); *United States v. Leonard*, 524 F.2d 1076, 1088-89 (2d Cir. 1975); *United States v. Lockyer*, 448 F.2d 417, 420-21 (10th Cir. 1971); *United States v. Hutul*, 416 F.2d 607, 626 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

⁸ The most widely circulated of these standards in the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 71-99 (1974) [hereinafter ABA PROSECUTION STANDARDS]. Other similar materials include the NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, REPORT ON COURTS (1973) and the NAT'L DISTRICT ATTORNEYS ASS'N'S NAT'L PROSECUTION STANDARDS (1977).

⁹ *See, e.g.*, *United States v. Birdman*, 602 F.2d 547, 555 (3rd Cir. 1979); *United States v. Ciambrone*, 601 F.2d 616, 626 (2nd Cir. 1979); *United States v. Gold*, 470 F. Supp. 1336, 1344 (N.D. Ill. 1979).

¹⁰ 28 C.F.R. § 0.16(b) (1978). Dep't of Justice, United States Attorneys' Manual (Aug. 31, 1976) (unpublished manual available from the Dep't of Justice) [hereinafter cited as U.S. Attorneys' Manual]. The nine-part Manual, prepared by the Executive Office of United States Attorneys, is available for purchase from the Executive Office of United States Attorneys, United States Department of Justice, Washington, D.C. 20530, under the disclosure requirements of the Freedom of Information Act at a per page fee. *Id.* § 1-1.400. *See* 5 U.S.C. § 552 (1976).

¹¹ 466 F. Supp. 293 (S.D.N.Y. 1979).

disclaimer like that in the U.S. Attorneys' Manual.¹⁴

At the time of the *Shulman* decision, the Supreme Court had granted certiorari and heard argument in *Caceres* but had not yet rendered its opinion.¹⁵ In *Caceres* the defendant had attempted to bribe an IRS agent who, without the knowledge of the defendant, had been outfitted with electronic surveillance equipment. The Ninth Circuit held that because the agents who conducted the electronic surveillance had failed to adhere to the Internal Revenue Service Manual guidelines for electronic surveillance operations, the recordings should have been suppressed.¹⁶

The United States Supreme Court, in an opinion authored by Justice Stevens, reversed the Ninth Circuit and upheld the defendant's conviction.¹⁷ The Supreme Court expressed concern that an application of the exclusionary rule to every breach of agency internal procedural regulations arising in the context of a criminal prosecution "could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures"¹⁸ and stated that absent a statutory or constitutional violation by the agents, their breach of the internal agency guidelines did not require suppression of the recordings. The Court stated that even though the Administrative Procedure Act¹⁹ authorized judicial invalidation of agency action that violated the agency's own regulations, the case before it was not a suit to invalidate agency action, rather it was an appeal from a criminal conviction, and, therefore, the Administrative Procedure Act did not provide grounds for enforcement of the regulations violated by the agents.²⁰

The dissent in *Caceres* found this position untenable because in several cases the Supreme Court had required federal agencies to conform to their own regulations even though those regulations exceeded what was necessary to comply with applicable statutes or the Constitution.²¹

The import of the *Caceres* case is that persons adversely affected by a violation of federal agency internal guidelines will not be afforded relief if those guidelines surpass the requirements of the

Constitution or federal statutes. Surprisingly, the Supreme Court did not cite previous authority upholding prosecutorial action taken in contravention of internal Department of Justice guidelines.²² Presumably, the *Caceres* decision applies to internal prosecutorial guidelines as well as internal investigative guidelines. The question the *Caceres* decision does leave open, however, is the effect of agency guidelines which are not merely internal, but which are promulgated in the Code of Federal Regulations.²³

The Code of Federal Regulations does contain published standards of conduct for Department of Justice attorneys.²⁴ Although no published federal court decision has granted any criminal defendant relief based solely on a prosecutor's breach of the standards of conduct contained in the Code of Federal Regulations, the court in *Shulman* in dicta hinted²⁵ that standards promulgated as part of the Code of Federal Regulations may provide substantive rights to a defendant.

Those standards in the Code are more general in nature than the guidelines of the United States Attorneys' Manual and included among the other provisions in the Code is the statement: "Furthermore, attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association."²⁶ It could be argued that federal prosecutors, in addition to their ethical responsibilities as licensed members of the bar and officers of the court, may have a duty imposed by the Code of Federal Regulations to comply fully with the letter and the spirit of the American Bar Association canons in fulfilling the responsibilities of their prosecutorial office. The recent district court decision, *United States v. Gold*²⁷ from the

²² See *Sullivan v. United States*, 348 U.S. 170, 173-74 (1954) (tax indictment upheld notwithstanding the prosecutor's failure to comply with Department of Justice directive to obtain approval from Attorney General's office before presenting tax case to the grand jury). See also *United States v. Hayes*, 589 F.2d 811, 818 (5th Cir. 1979).

²³ See *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957).

²⁴ 28 C.F.R. §§ 45.735-1 to 45.735-26 (1978).

²⁵ *United States v. Shulman*, 466 F. Supp. 293, 298 (S.D.N.Y. 1979). See also *United States v. King*, 590 F.2d 253, 256-57 (8th Cir. 1978), cert. denied, 440 U.S. 973 (1979); *In re Tierney*, 465 F.2d 806, 813 (5th Cir. 1972).

²⁶ 28 C.F.R. § 45-735.1(b) (1978).

²⁷ 470 F. Supp. 1336 (N.D. Ill. 1979). The court stated: An attorney for the government who acts both as a lawyer and as a witness engages in conduct that is contrary to Ethical Consideration 5-9 and Disciplinary Rule 5-101(B) of the ABA *Code of Professional*

¹⁴ 466 F. Supp. at 300.

¹⁵ See *United States v. Caceres*, 440 U.S. 741 (1979).

¹⁶ 545 F.2d at 1187.

¹⁷ 440 U.S. 741, 744 (1979).

¹⁸ *Id.* at 755-56.

¹⁹ 5 U.S.C. §§ 551-559 (1976).

²⁰ 440 U.S. at 753-54.

²¹ *Id.* at 757 (Marshall & Brennan, JJ., dissenting).

Northern District of Illinois, appears to have recognized an obligation of federal prosecutors to comply with the Code of Professional Responsibility. The *Gold* court cited the Code of Federal Regulations provision relating to the Code of Professional Responsibility as support for dismissal of the indictment based on prosecutorial impropriety during the investigation.

On the other hand, the United States Court of Appeals for the Fifth Circuit in *United States v. Thomas*²⁸ rejected an argument of a criminal tax defendant based upon the government's failure to comply with a specific provision contained in the Code of Federal Regulations. The specific Code provision breached in *Thomas* dealt with the Internal Revenue Service's procedure of granting a conference to putative criminal tax defendants prior to the recommendation of criminal prosecution.²⁹ The *Thomas* court stated: "Although the rule is published in the Federal Register and codified in the Code of Federal Regulations, it is not an officially promulgated regulation but only a statement or procedure."³⁰ As the apparent discrepancy between the *Gold* and *Thomas* opinions demonstrates, the issue of whether the Code of Federal Regulations grants substantive rights to a defendant adversely affected by a prosecutor's specific breach thereof is far from resolved.

Although the federal courts for the most part heretofore have declined to grant putative defendants meaningful relief for violations of these published standards in the absence of a prosecutorial violation of a statute or deprivation of constitutional rights, these standards, nonetheless, provide federal prosecutors with benchmarks for their conduct with which they should comply in good faith in conducting their official functions. Therefore, throughout this article as various preindictment prosecutorial activities are discussed, reference will

be made to these various published standards for comparison with the requirements imposed by federal court decisions.

II. THE DECISION TO INVESTIGATE AND EMPLOY THE GRAND JURY

The attorneys who staff the ninety-four United States Attorneys' offices across the country are the prosecutors in the federal system that are most often involved in the decision to investigate allegations of federal crime.³¹ Charged by statute with the responsibility within their respective judicial districts to "prosecute for all offenses against the United States,"³² they traditionally have been allowed by federal courts to utilize broad discretion in the exercise of their duties.³³ This judicial reluctance to interfere with prosecutorial matters stems from the constitutional doctrine of separation of power.³⁴ Despite their reluctance, however, the federal courts have utilized their supervisory power to curtail prosecutorial misconduct.³⁵ Absent misconduct, though, the federal courts have refrained from delving into matters relating solely to the exercise of prosecutorial discretion.³⁶

³¹ Although the Criminal Division of the Department of Justice in Washington, D.C., in theory is the headquarters for the federal prosecutorial effort, its decision-making functions primarily consist of reviewing the requests and decisions of the United States Attorneys' offices.

³² 28 U.S.C. § 547(1) (1976). Despite the all exclusive mandate, manpower resources require that the personnel of the United States Attorney's offices be selective in prosecuting criminal violations.

³³ See, e.g., *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (reversing district court order compelling prosecutor to bring charges contrary to plea agreement); *Nader v. Saxbe*, 497 F.2d 676, 679 (D.C. Cir. 1974) (dismissing mandamus action to compel Attorney General to prosecute violations of Federal Corrupt Practices Act); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 376 (2d Cir. 1973) (dismissing class action to compel investigation of state officials' management of correctional facility; held to be solely within prosecutorial discretion).

³⁴ See *United States v. Hall*, 559 F.2d 1160, 1164 n.2 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965).

³⁵ See, e.g., *United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979) (indictment dismissed because of prosecutorial impropriety with grand jury); *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979) (case remanded for determination of effect of prosecutorial impropriety with grand jury); *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc) (conviction vacated because of articulated improper prosecutorial motive).

³⁶ See *United States v. Hamel*, 551 F.2d 107, 113 (6th Cir. 1977) (prosecutor's decision to prosecute under

Responsibility (1975), prohibitions to which government attorneys have been made subject by 28 C.F.R. § 45.735-1(b) and by this court's supervisory authority.

Id. at 1351. See also ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9, DR 5-101(B) (1975).

²⁸ 593 F.2d 615 (5th Cir. 1979).

²⁹ 26 C.F.R. § 601.107(b)(2) (1979) provides that: "A taxpayer who may be the subject of a criminal recommendation will be afforded a district Criminal Investigation conference when he requests one. . . ."

³⁰ 593 F.2d at 622. A similar statement could be made of the standards of conduct provision regarding the canons of professional ethics of the American Bar Association in 28 C.F.R. § 45.735-1(b) (1978) upon which the court in *United States v. Gold* relied.

Although the United States Department of Justice has published policy guidelines for prosecutors to use in deciding to initiate formal charges against a defendant,³⁷ there are few published criteria for a federal prosecutor to use in deciding to initiate a criminal investigation. The American Bar Association Prosecution Standards state that prosecutors have an "affirmative responsibility to investigate illegal activities."³⁸ The standards also describe how a prosecutor should conduct himself with the grand jury.³⁹ The standards, however, do not offer any suggestions as to what factors a prosecutor should consider in deciding what allegations of crime should be investigated or when the grand jury should be employed in that pursuit.

III. THE USE OF GRAND JURY INVESTIGATORY POWER

In the federal system each grand jury is empaneled by the federal district court of the judicial district in which that grand jury sits.⁴⁰ The investigations conducted by those grand juries, whether regular grand juries or special grand juries,⁴¹ are primarily controlled by the prosecutors who work with them.⁴² Although the grand jury power to investigate is broad⁴³ and the federal prosecutors

enjoy wide discretion in performing their tasks, the prosecutors' employment of the grand jury subjects their conduct to the authority and supervision of the courts.⁴⁴ Therefore, prosecutorial conduct in using the power of the federal grand jury is not unfettered.

For example, federal prosecutors' use of the grand jury's power can only be for the discovery of criminal activities. Grand jury abuse is committed if a government attorney focuses the investigation toward uncovering evidence to be used in a civil action.⁴⁵ Although a grand jury proceeding must

special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

Id. at 343-44. See also *Costello v. United States*, 350 U.S. 359 (1956). The Supreme Court in *Blair v. United States*, 250 U.S. 273 (1919), in speaking of the grand jury declared:

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. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

Id. at 282.

In *United States v. Brown*, 574 F.2d 1274, 1275-76 (5th Cir. 1978), the Fifth Circuit stated:

By its very nature, the grand jury process is not an adversary proceeding. Its function is merely to determine if there is probable cause which warrants the defendant's being bound over for trial. A defendant has no right to require that the Government present all available evidence at this proceeding. The grand jury proceeding is a one-sided affair. The defendant is protected from such one-sidedness when, at the trial on the merits, he is "accorded the full protections of the Fifth and Fourteenth Amendments" and is "permitted to expose all of the facts bearing upon his guilt or innocence."

Id. at 1275-76 (quoting in part *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir. 1977)).

⁴⁴ See *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978); *In re Melvin*, 546 F.2d 1 (1st Cir. 1976); *United States v. Stevens*, 510 F.2d 1101, 1106 (5th Cir. 1975); *United States v. Basurto*, 497 F.2d 781, 786, 793 (9th Cir. 1974). See also *United States v. Howard*, 560 F.2d 1101, 1106 (5th Cir. 1975).

⁴⁵ See *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 104-05 (D.C. Cir. 1977); *In re Wood*, 430 F. Supp. 41 (S.D.N.Y. 1977); *United States v. Procter & Gamble Co.*,

harsher of two statutes discretionary and not reversible); *Martin v. Parratt*, 549 F.2d 50, 52 (8th Cir. 1977) (prosecutor's decision to charge defendant under habitual criminal statute discretionary and not reviewable); cf. *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir. 1974) (reversing district court order dismissing four-count indictment after prosecutor refused to proceed on only one count).

³⁷ U.S. Department of Justice Materials Relating to Prosecutorial Discretion (Jan. 18, 1977), reprinted in [1978] 24 CRIM. L. REP. (BNA) 3001.

³⁸ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.1(a).

³⁹ *Id.* § 3.5.

⁴⁰ 18 U.S.C. § 3321 (1976); FED. R. CRIM. P. 6(a).

⁴¹ A regular federal grand jury can be empaneled for a maximum period of only 18 months. FED. R. CRIM. P. 6(g). The term of special federal grand juries, which may be empaneled only in judicial districts of populations of more than four million inhabitants, may be extended beyond 18 months up to a maximum of 36 months. 18 U.S.C. §§ 3331-3334 (1976).

⁴² Prosecutors typically decide what witnesses should appear before the grand jury, draft the subpoenas, and conduct the primary questioning of the witnesses. Cf. *United States v. Thompson*, 251 U.S. 407, 413-14 (1920) ("[T]he duty of the district attorney to direct the attention of a grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.").

⁴³ The Supreme Court has reaffirmed this notion over the years. In *United States v. Calandra*, 414 U.S. 338 (1974), Justice Powell stated:

The scope of the grand jury's powers reflects its

be terminated when it becomes clear that a criminal prosecution will not be forthcoming,⁴⁶ the abuse of grand jury power for civil discovery often cannot be raised until the commencement of a civil action based on that impermissibly obtained evidence.⁴⁷

Another abuse of the grand jury's investigative power occurs when a prosecutor uses a grand jury to gather evidence to prove the charges of an indictment that has already been returned.⁴⁸ But evidence uncovered during the course of a continuing grand jury investigation may be used at the trial of a previously pending charge.⁴⁹ In order to reconcile these seemingly conflicting principles and determine whether the prosecutor's use of evidence obtained postindictment by a grand jury was improper, the federal courts generally look to the prosecutor's intent in conducting the investigation from which the evidence was derived. The test employed in such a situation is the "sole or dominating purpose" test, articulated in *United States v. Dardi*.⁵⁰

In *Dardi*, an indicted defendant's former secretary was called to testify before the grand jury. The

defendant contended that the appearance was a misuse of the grand jury, but the government responded that this testimony related to the investigation of a possible conspiracy to obstruct justice. The court held that since the government's action was not for the "sole or dominating purpose of preparing an already pending indictment for trial," the postindictment use of the grand jury was permissible.⁵¹

The federal courts in applying the "sole or dominating purpose" test have upheld several postindictment uses of the grand jury. For example, it has been held permissible for a prosecutor to use a grand jury to investigate yet uncharged criminal offenses arising from the area of activity under investigation⁵² and to discover the existence of unknown coconspirators to a previously charged crime.⁵³ Postindictment grand jury investigation to discover potential alibi witnesses was criticized by the court, but held not to require reversal unless the defendant could prove prejudice.⁵⁴ But the postindictment use of the grand jury to question a defendant about an offense for which he had been secretly indicted was held to constitute prosecutorial abuse requiring reversal.⁵⁵

A question not yet addressed by the federal courts arises when the "sole or dominating" purpose of the grand jury investigation is shifted by the prosecutor. After potentially useful trial evidence is discovered as an incident of a legitimate continuing investigation, a prosecutor may shift the purpose of the investigation in order to fully develop that evidence through the use of the grand jury for maximum benefit at the trial of the pending charge. To protect against this abuse, federal courts confronting the issue of postindictment use of the grand jury should not look just at the prosecutor's purpose at the investigation's incep-

187 F. Supp. 55 (D.N.J. 1960) (opinion on remand from 356 U.S. 677 (1958)). Under the Supreme Court's ruling in *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), IRS civil investigatory summonses became unenforceable once criminal prosecution was recommended. "Parallel" and simultaneous civil investigatory proceedings by the SEC after criminal referral were approved in *SEC v. Dresser Indus., Inc.*, [1979] 26 CRIM. L. REP. (BNA) 2274.

⁴⁶ See *United States v. Pennsalt Chem. Corp.*, 260 F. Supp. 171 (E.D. Pa. 1966).

⁴⁷ *In re Special March 1974 Grand Jury*, 541 F.2d 166, 170-72 (7th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *In re April 1956 Term Grand Jury* (Shotwell), 239 F.2d 263, 271 (7th Cir. 1956).

⁴⁸ See *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977); *United States v. Beasley*, 550 F.2d 261, 266 (5th Cir. 1977); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *United States v. Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972); *In re Archuleta*, 432 F. Supp. 583, 596 (S.D.N.Y. 1977); *In re Wood*, 430 F. Supp. 41, 47 (S.D.N.Y. 1977); *In re Pillitteri*, 420 F. Supp. 913, 914 (W.D. Pa. 1976).

⁴⁹ See *United States v. Braasch*, 505 F.2d 139, 147 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. George*, 444 F.2d 310 (6th Cir. 1971); *In re Grand Jury Investigation* (General Motors Corp.), 32 F.R.D. 175, 183 (S.D.N.Y.), *appeal dismissed*, 318 F.2d 533 (2d Cir.), *cert. denied*, 375 U.S. 802 (1963); *In re Texas Co.*, 27 F. Supp. 847, 851 (E.D. Ill. 1939).

⁵⁰ 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

⁵¹ 330 F.2d at 336 (quoting trial court opinion).

⁵² See, e.g., *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *In re Russo*, 448 F.2d 369 (9th Cir. 1971). See also *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978).

⁵³ See, e.g., *United States v. Gibbons*, 607 F.2d 1320, 1328 (10th Cir. 1979); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972).

⁵⁴ See *United States v. Sellaro*, 514 F.2d 114, 121-22 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013 (1975). See also *In re Santiago*, 533 F.2d 727, 730 (1st Cir. 1976).

⁵⁵ See, e.g., *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977) (en banc). The courts have allowed prosecutors to call indicted defendants to the grand jury to question them about other criminal activities. See, e.g., *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972); *In re Russo*, 448 F.2d 369 (9th Cir. 1971).

tion but should examine the prosecutor's purpose in utilizing the grand jury at the time the actual evidence is uncovered.

IV. THE USE OF GRAND JURY SUBPOENA POWER

A federal grand jury has nationwide subpoena power but that power is not independent of the United States District Court of the jurisdiction in which it sits. As provided in rule 17 of the Federal Rules of Criminal Procedure, the clerk of the court issues grand jury subpoenas in blank for completion and service.⁵⁶

A. THE "OFFICE" SUBPOENA

Government attorneys engaged in grand jury investigations properly may have subpoenas issued without the grand jury's authorization or awareness⁵⁷ to compel attendance of witnesses before the grand jury, but they may not use the grand jury subpoena power to gather information without the intended participation of the grand jury.⁵⁸ The practice of issuing a grand jury subpoena as a ploy to secure the attendance of a witness at the prosecutor's office is considered unprofessional conduct by the American Bar Association Prosecution Stan-

dards⁵⁹ and has been severely criticized and condemned by the courts.⁶⁰ Absent a pervasive prosecutorial practice of using subpoenas for the purpose of obtaining office interviews, the federal courts, however, appear reluctant to administer sanctions.⁶¹

B. PREAPPEARANCE INTERVIEW OR REVIEW

Often witnesses who are subpoenaed for a grand jury appearance desire a preappearance conference with the prosecutor to determine their status in the investigation. Similarly, a prosecutor may wish to informally interview a witness who has been subpoenaed to determine whether the witness has any information of value to the grand jury. The practice of conducting a preappearance interview with a subpoenaed grand jury witness has received judicial approval on the ground that it assists in eliminating unnecessary inconvenience to both the witness and the grand jury that would be caused by examining a witness at a grand jury session who had no information of benefit to the grand jury's investigation.⁶²

⁵⁹ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.1(d) states: "It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless he is authorized by law to do so."

⁶⁰ See, e.g., *Durbin v. United States*, 221 F.2d 520 (D.C. Cir. 1954):

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure." They do not recognize the United States Attorney's office as a proper substitute for the grand jury room and they do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office.

It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purposes of conducting his own inquisition.

Id. at 522 (footnotes omitted) (quoting *United States v. O'Connor*, 118 F. Supp. 248, 250-51 (D. Mass. 1953)).

⁶¹ *Cf. United States v. D'Andrea*, 585 F.2d 1351, 1357 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979) (majority of court found no reversible error in prosecutor using trial subpoena to obtain office interview of one witness who had been advised by his counsel that he was not required to appear at the interview).

⁶² See, e.g., *United States v. Mandel*, 415 F. Supp. 1033, 1040 (D. Md. 1976) (procedure proper "in absence of compelling evidence of abuse of process"). See also *United States v. International Paper Co.*, 457 F. Supp. 571, 575-76 (S.D. Tex. 1977) (the prosecutor's use of agents to

⁵⁶ FED. R. CRIM. P. 17(a) in pertinent part provides that: "The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." Although rule 17 does not specify its application to grand jury subpoenas, that application has been recognized by the courts. See *In re Loproato*, 511 F.2d 1150, 1152-53 (1st Cir. 1975); *Bacon v. United States*, 449 F.2d 933, 936 (9th Cir. 1971). See also *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978).

⁵⁷ See *United States v. Simmons*, 591 F.2d 206, 210 (3d Cir. 1979).

⁵⁸ *United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) ("Neither the FBI nor the Strike Force nor the United States Attorney has been granted subpoena power for office interrogation outside the presence of the grand jury."); *United States v. Keen*, 509 F.2d 1273, 1274-75 (6th Cir. 1975); *United States v. Hedge*, 462 F.2d 220, 222-23 (5th Cir. 1972); *In re Wood*, 430 F. Supp. 41, 47 (S.D.N.Y. 1977); *United States v. Thomas*, 320 F. Supp. 527, 529-30 (D.D.C. 1970) (United States Attorney's office for the District of Columbia enjoined from issuing "phony summons" to obtain office interviews); *cf. United States v. Miller*, 500 F.2d 751 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 435 (1976) (the circuit court held unlawful subpoenas duces tecum requiring bank presidents to appear; the subpoenas had been issued to a U.S. attorney and issued when the grand jury was not in session). See also *United States v. D'Andrea*, 585 F.2d 1351, 1365 (7th Cir. 1978) (Swygert, J., dissenting), *cert. denied*, 440 U.S. 983 (1979); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963).

When a prosecutor decides on the basis of a preappearance interview to excuse a subpoenaed witness from testifying before the grand jury,⁶³ the situation closely resembles the "office subpoena" practice condemned by the courts. Whether abuse has been committed should depend on the intent of the prosecutor in causing the service of the subpoena. If the prosecutor actually intended to use the witness before the grand jury, but decided the witness had no information and therefore excused the witness, no abuse has been committed. If the prosecutor's purpose in having the grand jury subpoena served was to secure an interview with the witness, the prosecutor has abused his office. To avoid potential abuse, prosecutors should advise a grand jury of their decision not to call a subpoenaed witness so an accurate record can be made of the grand jury's authorization of this decision. Otherwise, prosecutors may be considered to have withheld evidence from the grand jury.⁶⁴

A similar situation arises when a witness has been subpoenaed to appear before the grand jury to present nontestimonial evidence such as fingerprints or handwriting exemplars. Typically, this type of evidence is not obtained in the grand jury's presence because handwriting exemplars and fingerprints are usually not meaningful to the grand jury without review and analysis. To conserve the grand jury's time, prosecutors often have the material analyzed after it has been acquired (through the use of grand jury subpoenas), but before the material or the witness providing it has actually been presented to the grand jury. Where prosecutors conducting a grand jury investigation have not obtained the approval or direction of the grand jury to proceed with the requisition of the material through the use of the subpoena power, their ac-

tions have been held to be an abuse of the grand jury subpoena power.⁶⁵

The prosecutor in *In re Melvin*⁶⁶ initially subpoenaed Melvin to appear before a grand jury, which then directed Melvin to submit to fingerprinting and photographing. Melvin first refused to submit to the tests and did so only upon court order compelling him to comply with the grand jury's direction. The prosecutor then sought to compel Melvin's appearance at a lineup and was able to obtain a court order compelling Melvin's appearance without any grand jury authorization or direction. On a writ of mandamus, the United States Court of Appeals for the First Circuit vacated that order and held that in the absence of a specific direction from the grand jury, the entry of the order was improper. The court stated:

The order involves a major intrusion upon personal liberty which, if justified, is justified only upon the basis of the grand jury's unique investigative powers. . . .

In any event, the broadest delegation of a power of this magnitude to the United States Attorney cannot be accepted if the grand jury's own role is to remain at all meaningful.⁶⁷

In *United States v. O'Kane*⁶⁸ the United States District Court for the Southern District of Florida reached the same result. In *O'Kane* the prosecutor met O'Kane and other subpoenaed grand jury witnesses when, in response to subpoenas, they appeared in the reception room of the United States Attorney's office. The prosecutor then requested that they provide handwriting exemplars in furtherance of the grand jury's investigation. The witnesses were told that they could provide the exemplars voluntarily or be brought before the court and ordered to do so on pain of contempt. O'Kane and the others provided the exemplars voluntarily and were later brought before the grand jury. At no time did the grand jury direct O'Kane or the others to provide the exemplars. After O'Kane was indicted, the district court granted his motion to suppress the exemplars on

summarize in the grand jury the statements of subpoenaed witnesses at interviews outside the grand jury's presence was upheld); *Robert Hawthorne, Inc. v. Director of IRS*, 406 F. Supp. 1098 (E.D. Pa. 1976).

⁶³ Although it has been accepted practice for prosecutors to excuse the appearance of subpoenaed grand jury witnesses, some courts have questioned whether a prosecutor has the power apart from the grand jury to do so. *See, e.g., In re Nwamu*, 421 F. Supp. 1361, 1365 (S.D.N.Y. 1976). *See also United States v. Birrell*, 242 F. Supp. 191, 204 (S.D.N.Y. 1965).

⁶⁴ *Cf. In re Special April 1977 Grand Jury*, 587 F.2d 889, 893 (7th Cir. 1978) (court upheld district court's denial of hearing on whether government unlawfully withheld evidence from the grand jury by dismissing prospective witnesses from their scheduled appearances because petitioner presented "no concrete evidence" suggesting that the government breached its duty).

⁶⁵ *See, e.g., In re Melvin*, 546 F.2d 1 (1st Cir. 1976); *United States v. O'Kane*, 439 F. Supp. 211 (S.D. Fla. 1977).

⁶⁶ 546 F.2d 1 (1st Cir. 1976).

⁶⁷ *Id.* at 5. Once the grand jury directed that Melvin appear in the lineup, the First Circuit affirmed a district court's order compelling that appearance. *In re Melvin*, 550 F.2d 674 (1st Cir. 1977). Other courts have validated such grand jury direction. *See United States v. Balliro*, 558 F.2d 1177, 1179 (5th Cir. 1977).

⁶⁸ 439 F. Supp. 211 (S.D. Fla. 1977).

the basis that they were obtained without grand jury directive.⁶⁹

Both the *Melvin* court and the *O'Kane* court held that when evidence was obtained outside the grand jury's presence through the use of a grand jury subpoena without a directive from the grand jury, it was "no mere technical error . . . but an error affecting the proper roles of the prosecutor and the grand jury, since to endorse such a procedure would be to allow the United States Attorney to assume the powers of a grand jury."⁷⁰ Thus, prosecutors wishing to insure the propriety of their actions must consult with and obtain authorization from a grand jury whenever the subpoena power is to be employed for the acquisition of evidence outside the grand jury room.

C. REQUIRING PRODUCTION OF DOCUMENTS AND OTHER MATERIALS

The federal prosecutors' ability to use the broad power of the grand jury to compel the production of documents by subpoena is, like other matters of prosecutorial conduct, not without limitation. Rule 17(c) of the Federal Rules of Criminal Procedure provides a framework within which federal prosecutors must work in drafting subpoenas duces tecum for issuance on behalf of a grand jury.⁷¹ Motions to quash a grand jury subpoena duces tecum have been granted where the amount of material being sought is excessive or beyond the possible focus of the investigation⁷² or is privileged.⁷³

⁶⁹ *Id.* at 214-15.

⁷⁰ *United States v. O'Kane*, 439 F. Supp. at 215 (quoting *In re Melvin*, 546 F.2d at 4).

⁷¹ Rule 17(c) states:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

FED. R. CRIM. P. 17(c).

⁷² *In re Horowitz*, 482 F.2d 72, 79 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *In re 1979 Grand Jury Subpoena*, 478 F. Supp. 59, 62-63 (M.D. La. 1979); *In re Morgan*, 377 F. Supp. 281, 284-85 (S.D.N.Y. 1974); *In re Grand Jury Investigation*, 33 F. Supp. 367 (M.D.N.C. 1940).

⁷³ Constitutional privileges such as the fifth amendment may be asserted to defeat the requirement of doc-

The courts usually consider three elements in determining whether a subpoena duces tecum has been properly drawn. First, the materials sought must be relevant to the investigation being pursued;⁷⁴ second, the subpoena must sufficiently describe the material sought with reasonable particularity;⁷⁵ and third, the volume of material sought

ument production before the grand jury under certain circumstances. *See Bellis v. United States*, 417 U.S. 85, 88-101 (1974) (privilege available to individuals and sole proprietorships, but not to partnerships or corporations); *United States v. Fleischman*, 339 U.S. 349 (1950); *United States v. White*, 322 U.S. 694 (1944). *See also Curcio v. United States*, 354 U.S. 118 (1957) (corporate custodian may assert privilege if asked to explain or interpret produced records); *Shapiro v. United States*, 335 U.S. 1 (1948) (fifth amendment privilege may not be claimed to preclude production of "required records"). The attorney-client privilege and attorney work-product doctrine likewise apply to grand jury proceedings and may be asserted to preclude production of materials. *See, e.g., In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979).

⁷⁴ The question of relevance in a grand jury context is substantially less demanding than the traditional trial standard. Something is relevant if it is reasonably related to the overall subject matter of the investigation. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946); *In re Grand Jury Investigation*, 459 F. Supp. 1335 (E.D. Pa. 1978); *In re Special November 1975 Grand Jury*, 433 F. Supp. 1094 (N.D. Ill. 1977); *In re Morgan*, 377 F. Supp. 281, 285 (S.D.N.Y. 1974). If the documents required to be produced under subpoena have no apparent relevance, the subpoena will be quashed. *See, e.g., In re Horowitz*, 482 F.2d 72, 79-80 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Schwimmer v. United States*, 232 F.2d 855, 861-62 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). *See also In re Grand Jury Subpoenas*, 391 F. Supp. 991 (D.R.I. 1975), and the cases cited therein.

⁷⁵ The "reasonable particularity" standard typically applied by the courts is that the items requested be described in a fashion "that a person attempting to exercise a subpoena may in good faith know what he is being asked to produce." *In re Corrado Bros.*, 367 F. Supp. 1126, 1132 (D. Del. 1973); *see Brown v. United States*, 276 U.S. 134, 143 (1928) (subpoena must specify a reasonable time period and specify with reasonable particularity the subject to which the documents called for relate); *In re Berry*, 521 F.2d 179 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975) (broad categories acceptable if each is particularly described); *In re Harry Alexander, Inc.*, 8 F.R.D. 559, 560 (S.D.N.Y. 1949) (documents sufficiently described so they can "readily be located by an intelligent clerk"); *In re Eastman Kodak Co.*, 7 F.R.D. 760, 763 (W.D.N.Y. 1947) (documents to be produced need only be described with detail sufficient to enable recipient of subpoena to produce them); *United States v. Medical Soc'y*, 26 F. Supp. 55, 57 (D.D.C. 1938) (the subpoena should specify with reasonable particularity the subject to which the desired materials relate). The federal courts appear to apply the standard of "reasonable particularity" more stringently the longer the time

must be reasonable within the context of the investigation.⁷⁶ A prosecutor conducting his activities

period covered by the subpoena. See *In re Grand Jury Subpoena Duces Tecum*, 342 F. Supp. 709, 713 (D. Md. 1972); *In re Grand Jury Subpoena Duces Tecum* (Provision Salesmen and Distributors Union, Local 627), 203 F. Supp. 575, 578-82 (S.D.N.Y. 1961).

⁷⁶ The "reasonableness" requirement encompasses two criteria. The time period covered by the subpoena must not be excessive within the context of the investigation and the volume of material sought must not be oppressive to the subpoenaed party. See generally *Hale v. Henkel*, 201 U.S. 43 (1906). See also *Vaira, Use of the Grand Jury to Obtain Business Records*, 59 CHI. B. REC. 32 (1977). As to the time period, the general federal five-year statute of limitations is not a controlling factor. See *Coson v. United States*, 533 F.2d 1119 (9th Cir. 1976); *In re United Shoe Mach. Corp.*, 73 F. Supp. 207 (D. Mass. 1947). The factors relating to time period reasonableness included: "[1] the type and extent of the investigation; [2] the materiality of the subject matter to the type of investigation; [3] the particularity with which the documents are described; [4] the good faith of the party demanding the broad coverage; [and 5] a showing of need for such extended coverage." *In re Linen Supply Cos.*, 15 F.R.D. 115, 119 (S.D.N.Y. 1953). The federal courts have appeared to set a 10-year limit. See *In re Investigation of World Arrangements*, 13 F.R.D. 280, 282-83 (D.D.C. 1952); *In re Eastman Kodak Co.*, 7 F.R.D. 760 (W.D.N.Y. 1947) (subpoena limited to 10 years without further showing). See also *In re Grand Jury Investigation*, 33 F. Supp. 367, 371 (M.D.N.C. 1940) (subpoena requesting 10-year period upheld for some defendants). They have, however, not always adhered to it. See, e.g., *In re Radio Corp. of America*, 13 F.R.D. 167, 171 (S.D.N.Y. 1952) (18 years); *In re Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948) (20 years). But see *In re Grand Jury Investigation* (General Motors Corp.), 174 F. Supp. 393 (S.D.N.Y. 1959) (11- to 30-year subpoena relating to every phase of a corporation's business quashed); *In re Grand Jury Investigation*, 33 F. Supp. 367, 372 (M.D.N.C. 1940) (10-year subpoena modified for some defendants); *United States v. Medical Soc'y*, 26 F. Supp. 55 (D.D.C. 1938) (22-year subpoena quashed in part).

As to the oppressiveness of the subpoena to the party upon which it is served, the mere volume of the material sought is not conclusive of the issue of oppressiveness. See *In re Certain Chinese Family Benevolent and Dist. Ass'ns*, 19 F.R.D. 97, 100-01 (N.D. Cal. 1956). The volume of material is, however, a factor to be considered by prosecutors in drafting subpoenas. In *In re Grand Jury Investigation* (General Motors Corp.), 174 F. Supp. 393 (S.D.N.Y. 1956), the court quashed a subpoena that would have required "production of practically every paper outside of routine correspondence relating to every phase of the corporation's affairs, in an unlimited exploratory investigation . . . 'whose purposes and limits can be determined only as it proceeds.'" *Id.* at 395 (footnote omitted). See also *In re Nadelson*, 353 F. Supp. 971 (S.D.N.Y. 1973); *In re Harry Alexander, Inc.*, 8 F.R.D. 559 (S.D.N.Y. 1949). Another factor considered is the cost of copying the subpoenaed documents which rests on the party subpoenaed, unless that cost is oppressive.

properly should give each of these factors individual consideration in preparing a grand jury subpoena duces tecum.

If a motion to quash a subpoena duces tecum is filed alleging that the material sought is not relevant to the matter under investigation, most federal courts require that the government make a showing of relevance.⁷⁷ Prima facie relevance of the material sought to the matter under investigation is usually established by the government through an argument based on the face of the subpoena, or it can submit a prosecutor's affidavit stating the connection between the scope of the investigation and subpoenaed materials.⁷⁸

See *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976) (court may require government to pay, but only upon individualized showing that cost of compliance exceeded reasonable cost of doing business); *In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46, 48-49 (D. Md. 1977). In *In re Grand Jury Subpoena Duces Tecum* (Southern Motor Carriers Rate Conference, Inc.), 405 F. Supp. 1192, 1198-1200 (N.D. Ga. 1975), affidavits by the subpoenaed party showed that production would consume from 125,700 to 243,249 manhours and would cost between \$908,811 and \$1,759,015.62 as compared with a yearly net income of \$9,634. The court ordered the government either to advance the costs of inspecting, assembling, and photocopying the documents or to do the job itself. A section of the Right to Financial Privacy Act of 1978, which became effective Oct. 1, 1979, directs the government to reimburse financial institutions for reasonable expenses incurred in the production of subpoenaed financial records. 12 U.S.C.A. § 3405 (West Supp. 1979).

⁷⁷ See *In re Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 549 (3d Cir.), cert. denied, 425 U.S. 992 (1976); *In re Grand Jury Proceedings*, 507 F.2d 963, 965-67 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); *In re Grand Jury Investigation*, 425 F. Supp. 717 (S.D. Fla. 1977); *In re Grand Jury Subpoena Duces Tecum* (Southern Motor Carriers Rate Conference, Inc.), 405 F. Supp. 1192 (N.D. Ga. 1975); cf. *In re the Special April 1977 Grand Jury*, 581 F.2d 592, 593-94 (7th Cir.), cert. denied, 434 U.S. 1046 (1978) (subpoenas served by a federal grand jury staff of state attorney general were enforceable where the grand jury had not embarked on a fishing expedition into the affairs of the state). *Contra*, *In re Grand Jury Proceedings*, 555 F.2d 686 (9th Cir. 1977); *In re Berry*, 521 F.2d 179, 184 (10th Cir.), cert. denied, 423 U.S. 928 (1975).

⁷⁸ See, e.g., *Universal Mfg. Co. v. United States*, 508 F.2d 684, 686 n.2 (8th Cir. 1975) (applied presumption of regularity of grand jury proceedings, refusing to follow Third Circuit rule which requires the government to make minimum showing of relevance by affidavit in all challenged cases); *In re Grand Jury Proceedings*, 507 F.2d 963, 965-66 (3d Cir.), cert. denied, 421 U.S. 1015 (1975) (requiring the government to make a minimum showing of relevance to justify a challenged subpoena); *Schwimmer v. United States*, 232 F.2d 855, 862-63 (8th Cir.), cert. denied, 352 U.S. 833 (1956); *In re Grand Jury Inves-*

D. ALLOWING TIME FOR COMPLIANCE WITH SUBPOENA

Although federal prosecutors traditionally grant a subpoenaed party a reasonable amount of time within which to comply with a grand jury subpoena, the law does not establish a minimum period of time that prosecutors must allow. The few existing reported decisions regarding the time that should be allowed a subpoenaed witness for compliance have recognized the power of the federal court to require immediate compliance with process in appropriate circumstances. For example, in *United States v. Polizzi*⁷⁹ the court held that a three-day notice period for a testimonial subpoena was not automatically unreasonable. In *United States v. Re*,⁸⁰ the court stated that "the direction of a subpoena *duces tecum* to produce documents forthwith is not *per se* invalid."

Forthwith subpoenas are rarely used by federal prosecutors. The United States Attorneys' Manual states that:

All grand jury witnesses should be accorded reasonable advance notice of their appearance before the grand jury. "Forthwith" or "*eo instantur*" subpoenas should be used only when swift action is important and then only with the prior approval of the United States Attorney. Considerations, among others, which bear upon the desirability of using such subpoenas include the following: 1) the risk of flight; 2) the risk of destruction or fabrication of evidence; 3) the need for the orderly presentation of evidence; and 4) the degree of inconvenience to the witness.⁸¹

Unlike a search warrant, which is issued only upon a finding of probable cause by a judicial officer,⁸² a forthwith subpoena requiring immediate production of the subpoenaed material can be issued without any judicial involvement. A defendant harmed by improper service of such a subpoena may be held to lack standing to contest an abuse of such process.⁸³

tigation, 425 F. Supp. 717, 719 (S.D. Fla. 1977) (government's statement in open court corroborated by foremen's testimony regarding the violations being investigated was sufficient; court found that affidavit by prosecutor was not necessary); *In re Corrado Bros.*, 367 F. Supp. 1126, 1131 (D. Del. 1973).

⁷⁹ 323 F. Supp. 222, 225 (C.D. Cal.), *rev'd on other grounds*, 450 F.2d 880 (9th Cir. 1971).

⁸⁰ 313 F. Supp. 442 (S.D.N.Y. 1970). See also *In re Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956).

⁸¹ U.S. Attorneys' Manual, *supra* note 10, § 9-11.230 (Aug. 17, 1978).

⁸² See FED. R. CRIM. P. 41.

⁸³ *In United States v. Hilton*, 534 F.2d 556, 564-65 (3d

Two decisions from the Southern District of New York both dealing with forthwith subpoenas but each reaching different results provide guidance as to the issues that arise from the service of a subpoena requiring immediate compliance. In *United States v. Re*⁸⁴ federal agents, at the direction of an assistant United States attorney, served respondent at his home at 8 a.m. with a subpoena *duces tecum*. The subpoena required him to produce records before a grand jury that same morning. The respondent told the agents that he could not appear before the grand jury that morning because he had to go to work. An assistant United States attorney arrived at the respondent's home and suggested that the respondent's appearance could be excused if he would agree to turn the subpoenaed records over to one of the agents that evening and not to tamper with them in the meantime. The respondent agreed and complied that evening.

The investigation eventually led to the indictment of someone other than the respondent. The defendant in *Re* moved to suppress the documents based on a fourth amendment challenge to the forthwith subpoena. The court denied the motion, but was able to avoid the question of whether forthwith subpoenas violate the fourth amendment. The court simply held that a "seizure" did not take place in that case because the enforcement of the subpoena forthwith was excused and the respondent "voluntarily complied" by turning over the documents to the agent.⁸⁵

*In re Nwamu*⁸⁶ came before the Southern District of New York on a motion to quash a forthwith subpoena and force a return of the documents. In *Nwamu* an FBI agent served a forthwith subpoena on a corporate officer calling for the production before a grand jury of certain corporate records on

Cir.), *cert. denied*, 429 U.S. 828 (1976), the court refused to suppress a "forthwith" subpoena issued by a federal prosecutor to a bank calling for production of the subpoenaed material "to any agent of the Federal Bureau of Investigation, who was designated therein as the 'agent of the grand jury.'" The grand jury was not sitting and was therefore unavailable to accept the "forthwith" production. The court held the defendant lacked standing to raise a fourth amendment claim in the bank records, *cf. United States v. Miller*, 425 U.S. 435 (1976) (defendant possessed no fourth amendment interest in bank records that could be indicated by a challenge to the subpoena *duces tecum*), but criticized the prosecutor's conduct. See also *United States v. Digilio*, 538 F.2d 972, 984-85 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

⁸⁴ 313 F. Supp. 442 (S.D.N.Y. 1970).

⁸⁵ *Id.* at 448-49.

⁸⁶ 421 F. Supp. 1361 (S.D.N.Y. 1976).

that same day. The officer attempted unsuccessfully to reach the corporation's attorney. He then located the files sought by the subpoena and was told by the agent that "the records should be produced immediately."⁸⁷ The corporate officer asked the agent what the consequences would be of refusing to comply and was told that he "would be in contempt of court."⁸⁸ The agent then stated that he "would take the documents in lieu of his [the officer's] appearance before a federal grand jury."⁸⁹ The officer agreed, and the agent took the subpoenaed files. Instead of going to the grand jury, the agent took the files to the FBI office.

The next day agents returned to the corporate offices with three more forthwith subpoenas. This time an attempt to telephone the corporation's attorney was successful. The attorney told the agent over the phone that "[n]othing is to leave that office."⁹⁰ The agent, who already had possession of the subpoenaed items, disregarded the attorney's request and left the premises with the subpoenaed items.

The court in *Nwamu* quashed the subpoena and ordered the return of the materials to the corporation. The court stated:

We find, therefore, upon consideration of the totality of circumstances here, that compliance with the subpoenas would be unreasonable and oppressive; that neither movants nor their employees voluntarily consented to surrender of the subpoenaed items; and that the agents' taking of the subpoenaed items constitute[s] an unreasonable and unlawful search and seizure.⁹¹

Neither the *Re* court nor the *Nwamu* court addressed the issue of the prosecutor's failure to obtain grand jury authorization or direction for the forthwith production of records outside the grand jury room.⁹² But federal prosecutors, to avoid impropriety in the use of forthwith subpoenas, should first consult with the grand jury and obtain approval of forthwith process. Similarly, prosecutors should also obtain prior grand jury approval if the agent serving the subpoena intends to take immediate custody of the subpoenaed materials as an accommodation to the witness upon whom the forthwith subpoena is served.

⁸⁷ *Id.* at 1363.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1367.

⁹² See *In re Melvin*, 546 F.2d 1 (1st Cir. 1976); *United States v. O'Kane*, 439 F. Supp. 211 (S.D. Fla. 1977).

V. INSIDE THE GRAND JURY ROOM

A. THE PROSECUTOR'S ROLE AND FUNCTION

Once a federal prosecutor enters a grand jury session he has two functions—one, as advocate for the government and the other, as advisor to the grand jury.⁹³ As to the prosecutor's relationship with the grand jury, the American Bar Association PROSECUTION STANDARDS state:

3.5 Relations with grand jury.

(a) Where the prosecutor is authorized to act as legal advisor to the grand jury he may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due deference to its status as an independent legal body.

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury should be on the record.⁹⁴

⁹³ See *United States v. Ciambone*, 601 F.2d 616, 628 (2d Cir. 1979) (Friendly, J., dissenting) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) ("The *ex parte* character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.'") The portion from the *Berger* opinion to which Judge Friendly in *Ciambone* refers is a standard by which every prosecutor should conduct all his official actions:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. at 88. See also *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979).

⁹⁴ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.5. The comments to § 3.5, which further articulate standards by which a prosecutor should conduct himself before the grand jury, state:

A prosecutor should not, however, take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury.

Id. § 3.5 comments (emphasis added).

The United States Attorneys' Manual states:

In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape or innocence suffer. He must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.⁹⁵

For the most part, fulfillment of a prosecutor's dual obligation when he is appearing before the grand jury depends on the personal integrity of the prosecutor. If a conflict arises between a prosecutor's role as an advocate and his role as the grand jury's advisor, fairness dictates that the role of advisor must take precedence.⁹⁶

B. WHO MAY ATTEND SESSIONS

In the federal system, attorneys representing grand jury witnesses and putative defendants, and all but certain authorized persons, are excluded from attendance at grand jury sessions.⁹⁷ Rule 6(d) of the Federal Rules of Criminal Procedure identifies the people authorized to be present when the grand jury is in session.⁹⁸ The presence of an un-

authorized person at a grand jury session may, but does not automatically, vitiate an indictment.⁹⁹

Although the language of the rule is clear, its application has created some recent controversy in the federal courts. The debate revolves around two issues: first, whether the prior involvement of an appointed special attorney with an agency investigation of the same matter that the grand jury is investigating disqualifies that attorney and makes him an unauthorized person before the grand jury in violation of rule 6(d); second, whether a federal prosecutor's attendance at grand jury sessions subsequent to his appearance as a witness in the same investigation makes him an unauthorized person in those subsequent sessions in violation of rule 6(e).

The federal courts are split on both issues. As to the first, however, the Seventh Circuit,¹⁰⁰ the Third

States attorney or an authorized assistant of a United States attorney. FED. R. CRIM. P. 54(c). The courts have held that government attorneys for certain divisions of the Department of Justice and other departments and agencies are not government attorneys within the meaning of rule 6(d) and must get specific authority to attend a grand jury session. This is usually accomplished pursuant to 28 U.S.C. § 515 (1976). See *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962) (antitrust division attorneys must get specific authorization); *In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976) (SEC lawyers not "attorneys for the government" within rule 6(d)); *United States v. General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962) (TVA lawyers not "attorneys for the government").

Department of Justice Strike Force attorneys may be authorized to appear in a federal grand jury, even if appointment is broad in scope. See *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Morrison*, 531 F.2d 1089 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975).

⁹⁹ See *United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904 (1977); *United States v. Isaacs*, 347 F. Supp. 743, 749 (N.D. Ill. 1972); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971). Mere technical violations of rule 6(d), however, may not necessitate dismissal. See *United States v. Rath*, 406 F.2d 757 (6th Cir.), *cert. denied*, 394 U.S. 920 (1969) (accidental entrance). A witness remaining in the grand jury room to hear other testimony is grounds for dismissal. See *United States v. Edgerton*, 80 F. 374 (D. Mont. 1897). There are no allowed special exceptions to the rule 6(d) exclusion. A parent may not accompany a child who is to testify, and a marshal may not be present in the grand jury room to control a potentially unruly witness. See *United States v. Borys*, 169 F. Supp. 366 (D. Alas. 1959); *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953).

¹⁰⁰ See *In re Perlin*, 589 F.2d 260 (7th Cir. 1978) (Commodities Future Trading Commission attorney).

⁹⁵ United States Attorneys' Manual, *supra* note 10, § 9-11.015 (Aug. 17, 1978).

⁹⁶ See *United States v. Remington*, 208 F.2d 567, 573-74 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

⁹⁷ See *United States v. Fitch*, 472 F.2d 548 (9th Cir. 1973); *In re Grumbles*, 453 F.2d 119 (3d Cir. 1971); FED. R. CRIM. P. 6(d). See also *In re Groban*, 352 U.S. 330 (1957). Prosecutors must, however, allow a witness a reasonable opportunity to consult with counsel outside the grand jury room. See *In re Tierney*, 465 F.2d 806 (5th Cir. 1972); *United States v. Weinberg*, 439 F.2d 743 (9th Cir. 1971); *United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967).

⁹⁸ FED. R. CRIM. P. 6(d) states: "Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is deliberating or voting." Not all lawyers employed by the United States government come within the scope of the phrase "attorneys for the government." Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorney for the government" to mean the Attorney General or an authorized assistant of the Attorney General, a United

Circuit,¹⁰¹ and a district court in the Ninth Circuit¹⁰² have held that an agency attorney should not be disqualified if he obtains an appointment as a special attorney of the Department of Justice and participates in grand jury proceedings.¹⁰³ The only published opinion to the contrary is a panel decision from the Sixth Circuit that was reversed en banc on procedural grounds.¹⁰⁴

The controversy surrounding agency attorneys who become special assistant United States attorneys stems from the notion that the dual employment by the Department of Justice and the government agency referring the matter to the Department of Justice for criminal prosecution creates a conflict of interest. This conflict of interest, or the appearance thereof, is contrary to the ABA PROSECUTION STANDARDS¹⁰⁵ and the Code of Professional Responsibility disciplinary rules.¹⁰⁶ The three courts rejecting that argument each held that:

¹⁰¹ See *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979) (SEC attorney).

¹⁰² *United States v. Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978) (SEC attorney).

¹⁰³ Such agency attorneys are appointed by the Attorney General as special assistant United States attorneys pursuant to 28 U.S.C. §§ 515(a), 534 (1976). The permissibility of appointing special assistant attorneys was examined and upheld in *In re Subpoena of Persico*, 522 F.2d 41, 56-60 (2d Cir. 1975). See also *United States v. Wrigley*, 520 F.2d 362, 365-67 (8th Cir. 1975).

¹⁰⁴ See *In re April 1977 Grand Jury Subpoenas (General Motors Corp.)*, 573 F.2d 936 (6th Cir.), *appeal dismissed en banc*, 584 F.2d 1366 (1978), *cert. denied*, 440 U.S. 934 (1979) (IRS attorney).

¹⁰⁵ Section 1.2 of the ABA PROSECUTION STANDARDS provides that "[a] prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct." ABA PROSECUTION STANDARDS, *supra* note 8, § 1.2.

The commentary to that section states further:

A conflict of interest may arise when, for example, (i) a law partner or other lawyer professionally associated with the prosecutor or a relative appears as, or of, counsel for a defendant; (ii) a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party, or as counsel.

Id. § 1.2 commentary.

¹⁰⁶ Disciplinary Rule 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial business, property, or personal interests." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A). See also Disciplinary Rule 9-101:

(A) A lawyer shall not accept private employment

[A]lthough the prosecutor should not be a professional associate of defense counsel, there is no conflict or appearance of conflict in his being professionally associated with other lawyers interested in the prosecution. The prosecutor of course is himself interested in the prosecution, but that is not the sort of interest that creates a conflict.¹⁰⁷

As to the second issue, the prosecutor-witness conflict, the Third Circuit in *United States v. Birdman* criticized the practice, but has stated that a prosecutor testifying as a grand jury witness does not per se require dismissal of an indictment. The *Birdman* court held that although abuse might be possible in certain cases, prosecutorial testimony alone is not sufficient for reversal.¹⁰⁸ However, the *Birdman* ruling on this point is contrary to district court decisions in the Fifth¹⁰⁹ and Seventh¹¹⁰ Circuits.

The basis for this controversy stems from the ethical consideration of the ABA Code of Professional Responsibility which states: "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."¹¹¹ Those who argue for per se dismissal assert that the same ethical considerations that dictate that prosecutors should not be witnesses at the trial of cases in which they act as an advocate should disqualify them from being witnesses in grand jury proceedings in which they act as attorneys for the government. The argument is bolstered by the ABA PROSECUTION STANDARDS, which state that a prosecutor should not attempt

in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Id. DR 9-101 (footnotes omitted).

¹⁰⁷ *United States v. Birdman*, 602 F.2d 547, 562 (3d Cir. 1979); *In re Perlman*, 589 F.2d 260, 265 (7th Cir. 1978); *United States v. Dondich*, 460 F. Supp. 849, 856 (N.D. Cal. 1978).

¹⁰⁸ *United States v. Birdman*, 602 F.2d 547, 561-63 (3d Cir. 1979).

¹⁰⁹ *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978).

¹¹⁰ *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979); *cf.* *United States v. Daneals*, 370 F. Supp. 1289 (W.D.N.Y. 1974) (off the record explanatory remarks made to grand jury by regional selective service counsel insufficient for dismissal absent a showing of prejudice).

¹¹¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9

to influence the grand jury in any way that would not be permissible before a petit jury.¹¹² The argument concludes that since the prosecutor's status as a witness should have disqualified him from serving as prosecutor before the grand jury on that matter, his attendance at subsequent grand jury sessions is unauthorized because witnesses cannot attend grand jury sessions at which they themselves are not testifying.

The argument for per se dismissal in the prosecutor-witness situation has several flaws. First, one cannot automatically apply trial standards to grand jury proceedings. Prosecutors historically, and with judicial approval, have been allowed to present material to grand jurors in ways that would be impermissible at trial. The rules of evidence, other than those regarding privilege,¹¹³ do not apply to grand jury proceedings. Hearsay evidence, for example, is permissible in grand jury proceedings.¹¹⁴ A grand jury may investigate on the basis of "tips, rumors, hearsay, speculation or any source

of information"¹¹⁵ including the grand jurors' personal knowledge—evidence that would be inadmissible at trial. Second, it is incongruous to dismiss an indictment because a prosecutor testified before the grand jury.¹¹⁶ Congress, in defining the powers and duties of special grand juries, contemplated that attorneys for the government would inform grand juries of any information they had received from third parties.¹¹⁷ The per se dismissal rule would lead to an awkward situation. A prosecutor could fulfill the statutory duty by informally informing the grand jury of information he has received from a third party, but if he informed the grand jury under oath from the witness stand, he could no longer participate in the proceedings. This situation would appear to contravene the congressional intent of the statute requiring prosecutors to communicate third-party information to the grand jury. Moreover, a prosecutor is no more biased in his statements¹¹⁸ and his office is no more prestigious¹¹⁹ when he takes the witness stand in the grand jury room and testifies to information he has received than when he discusses the case with the grand jury in a session and makes a recommendation to them.¹²⁰

Another argument against per se dismissal is

¹¹⁵ *In re* Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977).

¹¹⁶ *See* *Costello v. United States*, 350 U.S. 359, 362 (1956).

¹¹⁷ It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

18 U.S.C. § 3332(a) (1976).

¹¹⁸ *See* *United States v. Birdman*, 602 F.2d 547, 553-54 (3d Cir. 1979).

¹¹⁹ *See* *United States v. Cerone*, 452 F.2d 274, 288 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972) (rejecting the "awesome office" theory advanced to preclude the testimony of a government official).

¹²⁰ *See* 18 U.S.C. § 3332(a) (1976). Courts have approved fair summarization before the grand jury by prosecutors. *See* *United States v. Litton Sys.*, 573 F.2d 195, 201 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978); *United States v. United States Dist. Court*, 238 F.2d 713, 721 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957); *United States v. Mitchell*, 397 F. Supp. 166, 172 (D.D.C. 1974).

¹¹² The ABA PROSECUTION STANDARD, *supra* note 8, § 3.5(b) states: "The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." The commentary to § 3.5 further provides that: "In general, he [the prosecutor] should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury." *Id.* § 3.5 commentary. This standard and commentary, if read literally, would require adherence to the rules of evidence in a grand jury proceeding which is simply not reasonable considering the grand jury's role in the federal criminal system. It seems equally unreasonable to adopt a per se rule of dismissal as did the courts in *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), and *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978).

¹¹³ *See* FED. R. EVID. 1101(d)(2). *See also* *Bracy v. United States*, 435 U.S. 1301 (1978) (Rehnquist, J., Circuit Justice) (the grand jury may receive evidence that would be inadmissible at trial); *United States v. Blue*, 384 U.S. 251, 255 n.2 (1966). The grand jury is not unique. Numerous proceedings affecting defendants' rights in the federal justice system do not require trial standards of procedure for the consideration of information, e.g., preliminary examinations, probation revocation, sentencing, and others. *See* FED. R. EVID. 1101(d)(3).

¹¹⁴ *See* *Costello v. United States*, 350 U.S. 359 (1956). The grand jurors must not be misled, however, into thinking they are receiving eyewitness testimony. *See* *United States v. Cruz*, 478 F.2d 408, 410 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969); *cf.* *Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963) (reading of transcript of testimony rather than presenting live witnesses permissible because grand jury not misled).

that the courts have held that, in the absence of undue influence, a breach of rule 6(d) does not rise to a constitutional infirmity vitiating the proceeding and any indictment resulting therefrom. In *Walker v. Estelle*¹²¹ the court held that a court reporter's presence during grand jury deliberations was not an infirmity of constitutional proportion sufficient to void a proceeding absent a showing of undue influence. Arguably, the rule should be no different for prosecutors who, if without asserting undue influence, remain in the grand jury room after they have testified as witnesses.¹²²

This discussion indicates that the Third Circuit in *United States v. Birdman* clearly articulated the better rule when it held that before an indictment will be dismissed in a situation where a prosecutor testified and then remained on the investigation and participated in grand jury proceedings, the defendant must show actual prejudice as a result of the prosecutorial misconduct.¹²³ Regardless of the showing required for dismissal, the courts agree that prosecutors should adhere to standards of professional ethics and either scrupulously avoid testifying before the grand jury or recuse themselves from the investigations in which their testimony is necessary.¹²⁴

¹²¹ 525 F.2d 648, 649 (5th Cir. 1976); cf. *United States v. Thompson*, 144 F.2d 604, 606 (2d Cir. 1944) (holding that the presence of grand jurors, later disqualified during the taking of testimony was not grounds for dismissal, decided under former statute 18 U.S.C. § 554(a) (repealed)).

¹²² *But see United States v. Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971) ("[t]he potential for undue influence if that be the test is made greater by the fact that the unauthorized person... was a government agent who possessed personal knowledge of the evidence being presented").

¹²³ *See United States v. Birdman*, 602 F.2d 547, 560-61 (3d Cir. 1979). On the testifying prosecutor issue the *Birdman* court did not mention *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), and distinguished *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978), on the basis that there the testifying prosecutor was needed to prove an essential element of the crime, while in *Birdman* he was a summary witness, and in *Treadway*, the prosecutor-witness' testimony was inaccurate in several respects, while in *Birdman* there was no allegation of falsification or distortion. 602 F.2d at 560-61. Although upholding the indictment, the court in *Birdman* articulated two sets of circumstances in which preindictment prosecutorial misconduct would result in an indictment being dismissed: one, actual prejudice to the defendant caused by the misconduct and, two, when the improper prosecutorial practice "has become so entrenched and flagrant... as to require a prophylactic rule of dismissal." *Id.* at 559-60.

¹²⁴ *United States v. Birdman*, 602 F.2d at 559-61.

C. THE PRESENTATION OF EVIDENCE AND PROSECUTORS' COMMENTS AND QUESTIONS

Despite the broad spectrum of permissible information a grand jury may utilize, there are limitations on the extent to which prosecutors may question witnesses or comment on matters under investigation. The United States Attorneys' Manual states these limits in general terms.¹²⁵ Although the federal courts historically have been reluctant to use their supervisory powers to sanction or even to investigate alleged prosecutorial misconduct,¹²⁶ this reluctance appears to be waning as the courts increasingly recognize the reliance of federal grand jurors on the prosecutors who appear before them¹²⁷ and the "necessity to society of an independent and informed grand jury."¹²⁸

Where prosecutors willfully have misled the grand jury¹²⁹ or knowingly have presented false information,¹³⁰ the courts usually order dismissal.

¹²⁵ *See* note 95 and accompanying text *supra*. *See also* ABA PROSECUTION STANDARD, *supra* note 8, § 3.5(b) (the full text of the quotation may be found at note 112 *supra*). Disciplinary Rule 7-106(c)(2) provides: "A lawyer shall not... [a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(c)(2).

¹²⁶ *See, e.g., In re Special April 1977 Grand Jury*, 587 F.2d 889, 892 (7th Cir. 1978) (concrete basis supporting inference of misconduct required before hearing regarding allegations of misconduct will be held); *In re Special February 1975 Grand Jury*, 565 F.2d 407, 411 (7th Cir. 1977) (strong showing must be made before court will interfere with orderly process of grand jury); *Ostrer v. Aronwald*, 434 F. Supp. 379, 394-95 (S.D.N.Y.), *aff'd*, 567 F.2d 551 (2d Cir. 1977).

¹²⁷ *See United States v. Samango*, 607 F.2d 877, 880-81 (9th Cir. 1979); *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). *See also United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 436 U.S. 31 (1978); *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973); *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972).

¹²⁸ *Wood v. Georgia*, 370 U.S. 375, 390 (1962). *See United States v. Leverage Funding Sys.*, 478 F. Supp. 799, 801 (C.D. Cal. 1979); *United States v. Asdurbal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979); *United States v. DeMarco*, 401 F. Supp. 505, 513 (C.D. Cal. 1975).

¹²⁹ *See, e.g., United States v. Samango*, 450 F. Supp. 1097 (D. Hawaii 1978), *aff'd*, 607 F.2d 877 (9th Cir. 1979) (indictment dismissed because of prosecutor's willful suppression of favorable testimony). *See also United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975) (indictment dismissed because of prosecutor's failure to disclose his improper motives for seeking second indictment).

¹³⁰ *See, e.g., United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974) (indictment dismissed because of prosecutor's willful presentation of perjured testimony). *But see Lo-*

The federal courts, however, have imposed varying sanctions in cases in which the prosecutors were negligent in presenting inaccurate information or were unaware of the falsity of the information. Most courts, however, adhere to the standard that absent evidence that the government attorneys or agents knowingly or deliberately misled the grand jury, dismissal of the indictment is not warranted.¹³¹ Because the federal courts, in addressing the issue of grand jury abuse, have typically weighed evidence demonstrating guilt against the nature of the prosecutorial misconduct, the decisions establish no consistent standard for dismissal.¹³²

raine v. United States, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968) (indictment not dismissed despite prosecutor's willful suppression of evidence undermining credibility of three key witnesses).

¹³¹ See *United States v. Ciambone*, 601 F.2d 616, 622-25 (2d Cir. 1979) (dismissal required only when grand jury knowingly or deliberately misled); *United States v. Richman*, 600 F.2d 286, 292 (1st Cir. 1979) (although government "may have been negligent" in allowing false testimony to be presented to grand jury, indictment not dismissed where prosecutor not aware of falsity at the time of testimony); *United States v. Scheuffer*, 599 F.2d 893, 895-97 (9th Cir. 1979) (absent evidence of perjury or that prosecutor believed grand jury testimony to be false, dismissal not required; even assuming impropriety of testimony, grand jury evidence was "overwhelming" and sufficient to sustain indictment); *United States v. Cathey*, 591 F.2d 268, 272 (5th Cir. 1979) (false testimony in grand jury insufficient to require dismissal of indictment absent a showing that perjury had been committed); *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (indictment should be dismissed "only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter has been presented to grand jury"). See generally *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978); *United States v. Guillelte*, 547 F.2d 743, 752-53 (2d Cir. 1976); *Coppedge v. United States*, 311 F.2d 128, 131-32 (D.C. Cir. 1962) (if some competent evidence presented to grand jury, indictment sustained even though other evidence presented to grand jury was incompetent or even false). But see *United States v. Asdurbal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979) (indictment dismissed even though prosecutor unaware of false testimony); *United States v. Sousley*, 453 F. Supp. 754, 758 n.1 (W.D. Mo. 1978) (indictment dismissed even though prosecutor merely negligent in not checking the accuracy of his comments).

¹³² Compare *United States v. Riccobene*, 451 F.2d 586, 587 (3d Cir. 1971) (indictment upheld even though prosecutor informed grand jury that a crucial witness would not testify because he feared the defendants who were "connected with organized crime and could harm him"); *Laughlin v. United States*, 385 F.2d 287 (1967) (indictment upheld even though prosecutor referred to grand jury witness as a prostitute); and *United States v. Bruzgo*, 373 F.2d 383, 384-87 (3d Cir. 1967) (indictment upheld

However, two recent court of appeals decisions¹³³ may evidence a trend in the federal courts favoring dismissal as a deterrent for prosecutorial misconduct. In *United States v. Serubo*¹³⁴ the Third Circuit reversed the defendants' convictions and remanded the case for a determination by the district court of the appropriateness of dismissing the indictment, firmly warning prosecutors that the sanction of dismissal should and would be used against them.

We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public. At a minimum, the government will be required to present its evidence to a grand jury unaffected by bias or prejudice. But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the

where the prosecutor called a witness a thief and a racketeer, which inspired the grand jurors to hiss and openly threaten him with loss of citizenship and imprisonment), with *United States v. DiGrazia*, 213 F. Supp. 232, 234-35 (N.D. Ill. 1963) (indictment dismissed because prosecutor used inflammatory language to impugn and discredit the witness and inflame the grand jurors against the accused). See also *United States v. Wells*, 163 F. 313 (9th Cir. 1908) (indictment dismissed where prosecutor told witness, "Now you know you are lying"; "I will put the screws to you," and remained in grand jury room during deliberation and voting); *United States v. Whitted*, 325 F. Supp. 520 (D. Neb. 1971), *rev'd per curiam*, 454 F.2d 642 (8th Cir. 1972).

¹³³ *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), *aff'd* 450 F. Supp. 1097 (D. Hawaii 1979); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979). The Third Circuit in *Serubo* seemed compelled to reconcile its opinion in *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979), handed down just two months before the *Serubo* decision. The *Birdman* court declined to adopt a prophylactic rule of dismissal for the prosecutorial improprieties presented there. The *Birdman* court did imply that a prophylactic rule of dismissal may be warranted absent a demonstration of actual prejudice if the conduct "was anything but an isolated incident unmotivated by sinister ends" or the conduct was "so entrenched and flagrant" to require such a sanction. 602 F.2d at 559-61 & n.61. The *Serubo* opinion reflects an exasperation with prosecutorial misconduct not present in prior opinions, and the *Serubo* court seemed to go further than *Birdman* by recognizing that the Second Circuit had in the past used dismissal as a "remedy to correct flagrant or persistent abuse." 604 F.2d at 817.

¹³⁴ 604 F.2d at 818-19. The *Serubo* court remanded the case because the misconduct reviewed by the court occurred before the grand jury that conducted the major portion of the investigation. The indictment had been returned by a second grand jury, however, and the circuit court ordered discovery to determine how tainted the second grand jury was by the conduct before the first.

grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

We suspect the dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process.¹³⁵

The prosecutor in *Serubo* did the following: (1) he attempted to link the defendants with organized crime without laying any evidentiary foundation; (2) he referred to prior loansharking charges against persons with whom he was trying to associate the defendants and summarized evidence relating to those charges without telling the grand jury that the defendants had been acquitted; (3) he impugned the testimony of witnesses who failed to link defendants with organized crime; (4) he commented unfavorably on the veracity of witnesses; and (5) he bullied witnesses who were uncooperative with him.¹³⁶

The district court found the prosecutor's conduct "generally improper, reprehensible and unacceptable,"¹³⁷ but denied the motion to dismiss. The defendants pleaded guilty, conditionally reserving their right to appeal the district court's denial of the pretrial motion.¹³⁸

The Third Circuit noted that *Serubo* was unlike its two prior decisions¹³⁹ in which the defendants' claims of prejudice resulting from grand jury abuse had been rejected because the prior indictments had been supported by "an abundance of competent evidence."¹⁴⁰ The *Serubo* court was outraged by the prosecutorial conduct presented by the facts

before it, but recognized that, since the offensive activity had taken place primarily before a grand jury which did not return the indictment and since it had not been shown that the misconduct infected the grand jury which did return the indictment, it was possible for the indictment to survive. Therefore, the court remanded the matter to the district court for a determination on that point.¹⁴¹

The *Serubo* decision, as expansive as it is, has been criticized for failing to create a mechanism whereby grand jury abuse can be discovered and for failing to dismiss with prejudice in a case in which the grand jury had been infected with the impropriety.¹⁴² The second criticism fails to recognize that dismissal of an indictment with prejudice is an extreme sanction which the federal courts are reluctant to impose.¹⁴³ Although rare, it is possible, however, that outrageous government misconduct could taint the evidence or prejudice the defendant so as to preclude the superseding charge.¹⁴⁴ However, questioning witnesses in a harassing manner or prejudicing a grand jury with comments unsupported by the record is curable by recalling the witnesses before a second grand jury and obtaining the same testimony minus the prosecutorial impropriety.

The first criticism of *Serubo* is a valid criticism of the criminal discovery system in general, but is particularly appropriate in the area of prosecutorial misconduct. In *Serubo* the government provided the defendants the transcripts revealing the prosecutorial misconduct under the doctrine of *Brady v. Maryland*.¹⁴⁵ Indeed, the only way defendants are legally allowed to examine grand jury transcripts is if those transcripts contain information favorable to the defendant and are turned over under the *Brady* doctrine or under 18 U.S.C. § 3500.¹⁴⁶ If the grand jury transcripts in *Serubo* had not contained

¹³⁵ *Id.* at 817.

¹³⁶ *Id.* at 815.

¹³⁷ *United States v. Serubo*, 460 F. Supp. 689, 700-01 (1978).

¹³⁸ For cases approving this procedure, see *United States v. Moskow*, 588 F.2d 882, 886 (3d Cir. 1978); *United States v. Zudick*, 523 F.2d 848, 851-52 (3d Cir. 1975).

¹³⁹ *United States v. Riccobene*, 451 F.2d 586 (3d Cir. 1971); *United States v. Bruzgo*, 373 F.2d 383 (3d Cir. 1967).

¹⁴⁰ *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979).

¹⁴¹ This remand in *Serubo* reflects the general attitude of the federal courts to allow reindictment upon dismissal if the superseding indictment is the product of grand jury proceedings that are free of impropriety. See *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979).

¹⁴² See Makdon & Brier, *Prosecutorial Misconduct: Bark Bigger than Bite*, *LEGAL TIMES OF WASHINGTON* 12-13 (Oct. 29, 1979).

¹⁴³ See *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979). See also *United States v. Baskes*, 433 F. Supp. 799, 804-07 (N.D. Ill. 1977).

¹⁴⁴ See, e.g., *United States v. Russell*, 411 U.S. 423, 431-32 (1973). See also *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir.), cert. denied, 426 U.S. 920 (1976).

¹⁴⁵ 373 U.S. 83 (1963).

¹⁴⁶ 18 U.S.C. § 3500 (1976). The statute requires the government to disclose to the defense any grand jury

testimony of witnesses favorable to the defendants, they would not have been discoverable. Although all comments by the prosecutor to the grand jurors during grand jury sessions now must be recorded,¹⁴⁷ the defendant or his lawyer may never discover recorded inflammatory or prejudicial comments because the transcript may never be revealed during pretrial discovery.

In *United States v. Samango*,¹⁴⁸ the Ninth Circuit affirmed the district court's dismissal of a superseding indictment.¹⁴⁹ In so doing, the court distinguished its earlier opinion in *United States v. Chanen*¹⁵⁰ in which it had reversed a district court's dismissal of an indictment for prosecutorial misconduct. The court in *Samango* described the facts before it as "superficially similar"¹⁵¹ to those in *Chanen*.

Both *Samango* and *Chanen* involved three separate grand juries and two indictments. The second indictment in both cases was based solely on hearsay evidence. In both cases the testimony of the witnesses before the previous grand juries was presented by government personnel to the indicting grand jury. In *Chanen* the government failed to present the transcript of a previous grand jury witness whose testimony was "deemed unhelpful" by the government.¹⁵²

The distinctions between *Samango* and *Chanen* upon which their opposite conclusions turned were: first, that in *Chanen* the agent read the previous grand jury transcripts to the indicting jury and in *Samango* the prosecutor left the transcripts with the grand jurors so the jurors could read the transcripts

themselves;¹⁵³ second, in *Chanen* the transcripts had revealed that some of the witnesses had previously filed false affidavits and the prosecutor had advised the grand jurors that some of the witnesses whose transcripts were read by the agent had given inconsistent statements. The *Chanen* court found this to be sufficient to apprise the grand jury of the credibility problem,¹⁵⁴ whereas the *Samango* court held that a witness, Granat, whose credibility was subject to question, had to be presented live "thereby enabling the grand jury to observe [his] demeanor and determine on its own whether Granat was a credible witness."¹⁵⁵

In sum, close analysis reveals that the *Samango* and *Chanen* facts are not as distinguishable as the Ninth Circuit presented them to be. Perhaps the reason that the court attempted to distinguish the two cases is that although the court felt compelled to exercise its supervisory powers to deter prosecutorial misconduct, it did not wish to inspire the unlimited range of allegations of misconduct of which it spoke in *Chanen*.¹⁵⁶

D. RECORDING OF PROCEEDINGS

The ABA PROSECUTION STANDARDS have always advised that "[t]he prosecutor's communications and presentations to the grand jury should be on the record."¹⁵⁷ Historically, the federal courts maintained that recording of federal grand jury proceedings was not mandatory.¹⁵⁸ Because of this,

¹⁵³ 607 F.2d at 881.

¹⁵⁴ 549 F.2d at 1311. There is no indication in the *Chanen* opinion whether the prosecutor actually explained the nature or extent of the witnesses' inconsistencies. In *Samango* the prosecutor's and agents' comments about the cooperation and credibility of the witnesses were considered to be a part of the "cumulative effect" requiring dismissal. 607 F.2d at 884. In any event, the *Chanen* court did not articulate any prosecutorial obligation to present these witnesses live so the grand jurors could assess their credibility.

¹⁵⁵ 607 F.2d at 882.

¹⁵⁶ 549 F.2d at 1309 ("The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited.")

¹⁵⁷ See ABA PROSECUTION STANDARDS, *supra* note 8, § 3.5 (c) (Tentative Draft 1971).

¹⁵⁸ See *United States v. Siegel*, 587 F.2d 721, 728 (5th Cir. 1979); *United States v. Head*, 586 F.2d 508, 511 (5th Cir. 1978); *United States v. Aloisio*, 440 F.2d 705, 708 (7th Cir.), *cert. denied*, 404 U.S. 824 (1971). Although only one published federal decision has held that the failure to record matters occurring before the grand jury was an independent ground invalidating an indictment, *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977), the courts have recognized that recording all of proceedings, including prosecutors' comments, is the better practice. See, e.g., *United States v. Peden*, 472 F.2d

transcript or statement of any government witness after the witness has testified on direct examination at trial. In reality, the disclosure of such statements is typically made before the witness' direct examination to avoid delay in the trial. See generally *United States v. Campagnuolo*, 592 F.2d 852, 858 n.3 (5th Cir. 1979); *United States v. Murphy*, 569 F.2d 771, 774 n.10 (3d Cir.), *cert. denied*, 435 U.S. 955 (1978).

¹⁴⁷ FED. R. CRIM. P. 6(c)(1).

¹⁴⁸ 607 F.2d 877 (9th Cir. 1979).

¹⁴⁹ *United States v. Samango*, 450 F. Supp. 1097 (D. Hawaii 1978).

¹⁵⁰ 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

¹⁵¹ 607 F.2d at 881.

¹⁵² 549 F.2d at 1308 n.1. Although not specifically discussed, the failure to present this "unhelpful" testimony was apparently excused by the *Chanen* court as a legitimate prosecutorial act "to screen out unreliable witnesses." *Id.* at 1311. The *Samango* court criticized the prosecutor for submitting the previous grand jury testimony of the defendant Samango as "'calculated prejudice.'" 607 F.2d at 883 (quoting the lower court opinion, 450 F. Supp. at 1106).

it was common practice for the court reporter not to record the prosecutor's comments or the comments of the grand jurors at a federal grand jury session when no witness was present.¹⁵⁹ This practice is no longer permissible because effective August 1, 1979, rule 6(e) of the Federal Rules of Criminal Procedure was amended to require the recording of all grand jury proceedings except deliberating or voting.¹⁶⁰ The proviso in rule 6(e)(1) that "[a]n unintentional failure" to record shall not "affect the validity of the prosecution" carries with it the inference that an *intentional* failure to record

will affect the prosecution. This issue has not been addressed thus far in any published decision. Since the only sanction rule 6(e) mentions is contempt of court,¹⁶¹ a court could interpret that remedy as the sole remedy, thus preventing dismissal of an indictment even if an intentional failure to record occurred. The more probable interpretation is that the use of the words "may be punished as a contempt of court" in rule 6(e)(2) does not preclude dismissal of an indictment should the circumstances of the rule 6 violation warrant such action.

Whatever sanction the court decides to impose, it can do so only if the intentional failure to record is brought to its attention. Historically, however, the discovery of grand jury material has been allowed only upon showing of "particularized need."¹⁶² Under that standard a defendant is placed in the untenable situation of having to show prosecutorial impropriety before he is entitled to review the material with which he may be able to show prosecutorial impropriety. A mere allegation of impropriety is insufficient to lift the curtain of grand jury secrecy under the present posture of the law.¹⁶³

Courts, on occasion, have questioned the strict need for secrecy.¹⁶⁴ The traditional reasons for maintaining secrecy, such as protection of witnesses and innocent parties, do not apply when it is the prosecutor's comments that are sought after return of the indictment. If deterrence of prosecutorial abuse and protection of a defendant's right to an independent unbiased grand jury are the reasons for the amendment set forth in rule 6(e)(1), those goals can only be effectively reached when the

583, 584 (2d Cir. 1973). Some district courts by rule provide for the attendance of court reporters at all grand jury sessions and for the recording of all testimony of witnesses appearing. *See, e.g.,* LOCAL CRIM. RULES OF THE NORTHERN DIST. OF ILL. 1.04(c).

¹⁵⁹ Historically, the practice of nonrecording was done to allow discussion among the jurors between witnesses' appearances. Presumably, such informal discussions among jurors are not "proceedings" of the grand jury. Now with the amendment to rule 6(e), FED. R. CRIM. P. 6(e), requiring the recording of "all proceedings except deliberating and voting," the question arises as to whether such discussions are proceedings that must be recorded. Such discussions could fall into the "deliberating" exception to the recording requirement. Prosecutors and the grand jury court reporter are pursuant to rule 6(d), FED. R. CRIM. P. 6(d), not authorized to be present at such deliberations. The outcome of the question will probably be that the court reporter will record all proceedings at which a prosecutor is present in the room. An argument could be made at least as to federal grand juries in the Northern District of Illinois that the proviso in local criminal rule 1.04(F) imposes a recording requirement of discussions between prosecutors and the grand jurors even prior to the effective date of the rule 6(e) amendment. The rule states in part:

Nothing in this order shall prohibit members of a Grand Jury from discussing, prior to deliberating on a matter, the evidence, testimony, and applicable law with the United States Attorney, Assistant United States Attorneys, or other Government counsel authorized to be before the Grand Jury, *provided that such discussions are held during recorded sessions of the Grand Jury.*

LOCAL CRIM. RULES OF THE NORTHERN DIST. OF ILL. 1.04(F) (emphasis added).

¹⁶⁰ The amendment to rule 6(e), effective Aug. 1, 1979, states:

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

FED. R. CRIM. P. 6(e).

¹⁶¹ Rule 6(e)(2) states in part that "[a] knowing violation of Rule 6 may be punished as a contempt of court." FED. R. CRIM. P. 6(e)(2).

¹⁶² *See* Dennis v. United States, 384 U.S. 855, 868-75 (1966); United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978).

¹⁶³ *See* *In re* Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977) ("a mere assertion [of impropriety by government attorneys] is not enough to call for an evidentiary and further inquiry"). *See also* United States v. Fife, 573 F.2d 369, 372 (6th Cir. 1976); United States v. Greenberg, 204 F. Supp. 400, 402 (S.D.N.Y. 1962).

¹⁶⁴ *See* United States v. Thoresen, 428 F.2d 654, 668 (9th Cir. 1970) (the court stated: "I have never been able to accept the proposition that while extensive discovery promotes the cause of justice in civil controversies, any right to discovery on the part of a defendant in a criminal case must be severely curtailed."); United States v. Duffy, 54 F.R.D. 549 (N.D. Ill. 1972); United States v. Tanner, 279 F. Supp. 457, 472 (N.D. Ill. 1967) ("trial court has the inherent power and unmitigated duty to lift the lid of secrecy in order to insure that justice will be done").

defendant is apprised of what the prosecutor did and said before the grand jury. Since a prosecutor's comments in grand jury proceedings are now required to be recorded, courts have no reason to withhold those comments from the defendant indicted as a result of those proceedings.

E. SUBPOENAING "TARGETS" OF THE INVESTIGATION

The federal courts,¹⁶⁵ including the Supreme Court,¹⁶⁶ have consistently recognized that the subpoena power of grand juries includes the power to compel the attendance of a putative defendant. While recognizing the power to compel the attendance of a "target,"¹⁶⁷ the United States Attorneys' Manual states:

[I]n the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" . . . is subpoenaed to testify before the grand jury about his involvement in the crime under investigation, an effort should be made to secure his voluntary appearance. If his voluntary appearance cannot be obtained, he should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target", careful attention

¹⁶⁵ See, e.g., *United States v. Bonacorsa*, 528 F.2d 1218, 1223 (2d Cir.), cert. denied, 426 U.S. 935 (1976); *United States v. Doe*, 457 F.2d 895, 898 (2d Cir.), cert. denied, 410 U.S. 941 (1973); *United States v. Sweig*, 441 F.2d 114, 120-21 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

¹⁶⁶ See, e.g., *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Wong*, 431 U.S. 174, 179 n.8 (1977); *United States v. Mandujano*, 425 U.S. 564, 584 n.9 (1976).

¹⁶⁷ In practice the words "target" and "subject" of the investigation are used interchangeably by both prosecutors and defense lawyers. The U.S. Attorneys' Manual draws a distinction, stating:

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.

U.S. Attorneys' Manual, *supra* note 10, § 9-11.250 (Aug. 17, 1978). In a further refinement of these terms, the U.S. Attorneys' Manual states:

An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

Id. § 9-11.250 (Jan. 24, 1979).

will be paid to the following considerations: 1) the importance to the successful conduct of the grand jury's investigation of his testimony or other information sought; 2) whether the substance of his testimony or other information sought could be provided by other witnesses; 3) whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.¹⁶⁸

The ABA PROSECUTION STANDARDS, section 3.6, contain two subsections relating to this issue:

(d) If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

(e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states that if called he will exercise his constitutional privilege not to testify, unless [the] prosecutor intends to seek a grant of immunity according to law.¹⁶⁹

As with other prosecutorial powers, federal courts are sensitive to the prejudicial effect of a putative defendant's appearance before the grand jury. In determining the extent to which prosecutors may exercise the power to compel a "target" to appear, the courts have looked to the prosecutor's motivation in seeking that appearance. Federal courts have held that the prosecutor commits an impropriety only if his sole purpose in subpoenaing a "target" before the grand jury is to force the target to claim his fifth amendment privilege against self-incrimination in front of the grand jury¹⁷⁰ or to induce the prospective defendant to commit perjury.¹⁷¹

The courts have not found any impropriety when prosecutors call a "target" to testify knowing that he will "take the fifth," but several courts have

¹⁶⁸ *Id.* § 9-11.251 (Aug. 17, 1978).

¹⁶⁹ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.6.

¹⁷⁰ See *United States v. Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); *United States v. Horowitz*, 452 F. Supp. 415, 418 (S.D.N.Y. 1978). See also *United States v. Winter*, 348 F.2d 204, 207 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

¹⁷¹ See, e.g., *Bursey v. United States*, 466 F.2d 1059, 1079-80 (9th Cir. 1972); *Brown v. United States*, 245 F.2d 549, 554-55 (8th Cir. 1957). See also *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956). The burden is on the defendant to establish the prosecutor's improper motive. See *United States v. Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974), cert. denied, 426 U.S. 911 (1976); *United States v. Devitt*, 499 F.2d 135, 140 (7th Cir. 1974).

suggested that it would be a better practice for a prosecutor to inform the grand jury that no adverse inference can be drawn from a witness' invocation of his fifth amendment right.¹⁷² The U.S. Attorneys' Manual goes even further than the courts by stating that:

[I]f a target of the investigation . . . and his attorney state in a writing signed by both that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment to the likely areas of inquiry.¹⁷³

F. RIGHT OF PUTATIVE DEFENDANT TO TESTIFY OR PRESENT EVIDENCE

The United States Attorneys' Manual gives a general outline as to when a putative defendant should be permitted to testify or present evidence.

[U]nder normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation . . . personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his privilege against self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.¹⁷⁴

The ABA PROSECUTION STANDARDS are silent on the topic.

The federal courts have consistently held that prosecutors are not obliged to grant the request of a potential defendant to present evidence to a grand jury.¹⁷⁵ The United States Attorneys' Man-

ual, however, not only recommends that such requests be granted, but encourages prosecutors to notify "targets" to afford them an opportunity to testify.¹⁷⁶ Since the United States Attorneys' Manual creates no substantive rights and such notification is not constitutionally or statutorily required, a prosecutor's failure to afford a potential defendant the opportunity to testify is not grounds for dismissal of an indictment.¹⁷⁷

G. WARNING "TARGETS" OF AN INVESTIGATION

If a prospective defendant appears before a grand jury, the question arises as to what he should be told by the federal prosecutor in order to ensure that his rights are not violated. The Supreme Court has specifically ruled that a prosecutor has no constitutional obligation to apprise a putative defendant of his "target" status when he is called to testify before the grand jury.¹⁷⁸ But the Supreme Court has declined to rule on the question of whether a "target" must be warned of his fifth amendment right to refuse to answer questions that call for the disclosure of self-incriminating information.¹⁷⁹ As a result this issue remains an open question.¹⁸⁰

¹⁷⁶ U.S. Attorneys' Manual, *supra* note 10, § 9-11.253 states:

Where a target is not called to testify pursuant to 9-11.251 . . . and does not request to testify on his own motion . . . , the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him an opportunity to testify (subject to the conditions set forth in 9-11.252 . . .) before the grand jury. Of course, notification would not be appropriate in routine clear cases nor where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

¹⁷⁷ *See* United States v. Shulman, 466 F. Supp. 293 (S.D.N.Y. 1979); note 12 & accompanying text *supra*.

¹⁷⁸ United States v. Washington, 431 U.S. 181, 189 (1977) ("[b]ecause target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights"). *But see* United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 434 U.S. 1031 (1978). In *Jacobs* the Second Circuit exercised its supervisory power to require that notice be given to targets of their status where it had been a long standing practice in the circuit for prosecutors to give such warnings. *See also* United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977).

¹⁷⁹ *See* United States v. Washington, 431 U.S. 181, 186, 190-91 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976).

¹⁸⁰ In *Mandujano*, the Supreme Court observed that federal prosecutors customarily warn "targets" of their

¹⁷² *See, e.g.*, United States v. Wolfson, 405 F.2d 779, 785 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); United States v. Horowitz, 452 F. Supp. 415, 418 (S.D.N.Y. 1978).

¹⁷³ U.S. Attorneys' Manual, *supra* note 10, § 9-11.254 (Aug. 17, 1978).

¹⁷⁴ *Id.* at § 9-11.252 (citations omitted).

¹⁷⁵ *See* United States v. Salsedo, 607 F.2d 318, 319 (9th Cir. 1979); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976); United States v. Gardner, 516 F.2d 334, 339 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1976); *In re Grand Jury Proceedings* (Berkley & Co.), 466 F. Supp. 863, 867 (D. Minn. 1979); United States v. Kernodle, 367 F. Supp. 844, 854 (M.D.N.C. 1973), *aff'd*, 506 F.2d 1398 (4th Cir. 1974).

The U.S. Attorneys' Manual states:

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department to advise grand jury witnesses of the following matters: 1) the general subject matter of the grand jury's inquiry (to the extent that such disclosure does not compromise the progress of the investigation or otherwise inimically affect the administration of justice); 2) that the witness may refuse to answer any question if a truthful answer to the question would tend to incriminate him; 3) that anything that the witness does say may be used against him; and 4) that the grand jury will permit the witness the reasonable opportunity to step outside the grand jury room to consult with counsel if he desires. This notification will be contained on a printed form (to be provided by the Department) which will be appended to all grand jury subpoenas. In addition, these "warnings" should be given by the prosecutor on the record before the grand jury when necessary and appropriate (e.g., when witness has not been subpoenaed), and the witness should be asked to affirm that the witness understands them.¹⁸¹

H. THE DUTY TO PRESENT FAVORABLE EVIDENCE TO THE GRAND JURY

Since a putative defendant has no right to present exculpatory evidence to the grand jury,¹⁸² the burden of presenting such evidence falls on the

fifth amendment rights before questioning begins. 425 U.S. at 582 n.7. Also, in *Washington*, the Court noted that the administering of warnings at the outset of questioning in the grand jury negates the possibility of compelled self-incrimination that might otherwise exist. 431 U.S. at 188.

¹⁸¹ U.S. Attorneys' Manual, *supra* note 10, § 9-11.250 (Aug. 17, 1978). The printed form of warnings recommended by the Department of Justice to which this section of the United States Attorneys' Manual refers was circulated to holders of that Manual in a memorandum dated March 15, 1979, from Phillip B. Heymann, Assistant Attorney General, Criminal Division. The form is as follows:

Advice of Rights

1. The Grand Jury is conducting an investigation of possible violations of Federal criminal laws involving:

(State here the general subject matter of the inquiry, e.g., the conducting of an illegal gambling business in violation of 18 U.S.C. 1955.)

2. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
3. Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.
4. 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 so desire.

Id. § 9-11.250 (March 15, 1979).

¹⁸² See note 175 *supra*.

prosecutor conducting the proceeding.¹⁸³ This prosecutorial obligation stems from the fifth amendment notion of a defendant's right to "an independent and informed grand jury."¹⁸⁴ A motion premised upon a prosecutor's failure to fulfill that obligation is not a challenge to the sufficiency of the evidence presented to the grand jury but a challenge of the conduct of the prosecutor in presenting it.¹⁸⁵

The ABA PROSECUTION STANDARDS state only that "[t]he prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt."¹⁸⁶ The United States Attorneys' Manual, which is more specific, states that:

Although neither statutory nor case law imposes upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury . . . , it is the Department's internal policy to do so under many circumstances. For example, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.¹⁸⁷

Although the United States Attorneys' Manual properly recognizes the duty to present exculpatory evidence to the grand jury, it incorrectly notes that case law does not impose that duty. Several federal court decisions have required disclosure to the grand jury,¹⁸⁸ including *United States v. Phillips Pe-*

¹⁸³ See Comment, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514 (1977).

¹⁸⁴ See *Wood v. Georgia*, 370 U.S. 375, 390 (1970).

¹⁸⁵ See *United States v. Samango*, 607 F.2d 877, 880 n.6 (9th Cir. 1979).

¹⁸⁶ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.6 (b).

¹⁸⁷ U.S. Attorneys' Manual, *supra* note 10, § 9-11.334 (Aug. 17, 1978) (citations omitted).

¹⁸⁸ See, e.g., *United States v. Ciambone*, 601 F.2d 616, 623 (2d Cir. 1979) ("where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict"); *United States v. Olin Corp.*, 465 F. Supp. 1120, 1127 (W.D.N.Y. 1979) ("[a] prosecutor has a duty to present to a grand jury evidence which clearly negates guilt"); *United States v. Mandel*, 415 F. Supp. 1033, 1040 (D. Md. 1976) ("the prosecutor should be obliged to present evidence to the grand jury that is favorable to the prospective defendant") (quoting M. Frankel & G. Naftalis, *The Grand Jury*, The New Leader, Nov. 10, 1975, at 22); cf. *United States v. Guillelte*, 547 F.2d 743, 753 (2d Cir. 1976) (no obligation to notify grand jury of subsequent acts which would cast doubt on credibility of evidence underlying indictment); *United States v. Gardner*, 516 F.2d 334, 338-39 (7th Cir. 1975), *cert.*

*troleum Co.*¹⁸⁹ and *United States v. Provenzano*,¹⁹⁰ in which indictments were dismissed for the prosecutors' failure to disclose exculpatory evidence to the grand jury.

In *Phillips Petroleum* the prosecutor continued to question a grand jury witness, before a court reporter, after the grand jury had been excused for the evening. During this evening session, the witness was able to explain in a manner that was exculpatory some incriminating testimony he had given before the grand jury. The prosecutor never revealed the exculpatory testimony to the grand jury. The court dismissed the indictment stating that "the failure to provide the evening testimony to the Grand Jurors was also a serious breach of the defendants' right to due process of law."¹⁹¹

In *Provenzano* the only witness who identified the defendant as being involved in the charged crime expressed doubts to the prosecutor about the validity of this identification. The prosecutor never revealed the witness' doubts to the grand jury. The court, citing *Phillips Petroleum*, dismissed the indictment stating: "In this concededly one-witness identification case, this disregard for further facts bearing on the viability of the prosecution's case deprived the Grand Jury of an opportunity to evaluate all the evidence in determining whether to return an indictment."¹⁹²

In both *Phillips Petroleum* and *Provenzano* the prosecutors were personally aware of the favorable evidence that was withheld from the grand jury. Thus, the courts were not attempting to impose a duty on prosecutors to search for favorable evidence.¹⁹³ If the government is not aware of excul-

patory material, it cannot be held to have improperly withheld it from the grand jury.¹⁹⁴

The courts that impose an obligation on prosecutors to present exculpatory evidence of which they are aware represent the better view. Where a prosecutor has breached this obligation, dismissal is warranted.¹⁹⁵

The determination of materiality of a breach of a prosecutor's duty to disclose favorable evidence is different in the grand jury context than it is after a criminal charge has been brought because the standard of proof required is different.¹⁹⁶ The grand jury standard is probable cause, and at trial it is proof beyond a reasonable doubt. The existence of a probability that a crime was committed by a putative defendant is much less easily removed than a reasonable doubt raised as to a defendant's guilt. Thus, the quantum of suppressed evidence required for remedial court action is greater at the grand jury level. Regardless of the magnitude of evidence required to create a grand jury violation, the prosecutorial obligation to present exculpatory evidence to the grand jury should be fulfilled.

I. REQUIREMENT THAT PROSECUTORS MAINTAIN GRAND JURY SECRECY

The Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of grand jury proceedings.¹⁹⁷ Rule 6(e) of the Federal Rules of Crim-

(6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Loraine v. United States*, 396 F.2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968).

¹⁹⁴ The prosecutor's personal lack of knowledge of exculpatory evidence may not relieve the duty if his investigative agents were aware of such evidence. *See People v. Trolia*, 69 Ill. App. 3d 439, 388 N.E.2d 35 (1979).

¹⁹⁵ Dismissal will, of course, not end the matter. The government is free to reindict in a proceeding devoid of impropriety. But if the grand jury, with knowledge of the exculpatory evidence, reindicts, the defendant has been accorded his fifth amendment right to "an independent and informed grand jury." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

¹⁹⁶ *See generally Galtieri v. Wainwright*, 582 F.2d 348, 362-64 (5th Cir. 1978) (en banc).

¹⁹⁷ *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6. (1958). The stated reasons for secrecy were summarized in *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954):

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or other friends from importuning the grand jurors; (3) to

denied, 423 U.S. 861 (1976) (government need not "produce evidence that undermined the credibility of its witnesses"). *But see United States v. Lasky*, 600 F.2d 765, 768 (9th Cir. 1979) ("[t]he prosecution was not required to present the grand jury with evidence which would tend to negate guilt"); *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) ("[w]e reject appellants' contention that the prosecution must present the grand jury with evidence it may have which would tend to negate guilt"). *See also United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978); *United States v. Smith*, 552 F.2d 257, 262 (8th Cir. 1977); *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978); *United States v. International Paper Co.*, 457 F. Supp. 571 (N.D. Tex. 1978) (prosecutors have no obligation to present everything that could be considered exculpatory).

¹⁸⁹ 435 F. Supp. 610 (N.D. Okla. 1977).

¹⁹⁰ 440 F. Supp. 561 (S.D.N.Y. 1977). *See also United States v. Samango*, 450 F. Supp. 1097 (D. Hawaii 1978), *aff'd*, 607 F.2d 877 (9th Cir. 1979).

¹⁹¹ 435 F. Supp. at 620.

¹⁹² 440 F. Supp. at 566.

¹⁹³ *See United States v. Ruyle*, 524 F.2d 1133, 1135-36

inal Procedure imposes the requirement of secrecy upon prosecutors, government personnel assisting them, the grand jurors, and court reporters in attendance at such proceedings.¹⁹⁸ However, witnesses appearing before a grand jury have no obligation to keep secret what occurred in their presence.¹⁹⁹ The cloak of secrecy does protect testimony and documents and other physical evidence produced under subpoena duces tecum. However, the secrecy of the grand jury is not breached if the disclosed documents are sought for their intrinsic content rather than to learn what occurred in the grand jury.²⁰⁰

A defendant moving to dismiss an indictment based upon a breach of grand jury secrecy must overcome the presumption of regularity that is accorded to governmental activities.²⁰¹ To over-

come that presumption, a defendant must demonstrate either that the breach caused an unauthorized disclosure that prejudiced him and adversely affected his rights²⁰² or that the breach generated publicity that prejudiced the grand jurors in their deliberations and deprived the defendant of a fair consideration.²⁰³

The opinion of the Court of Appeals for the Fifth Circuit in *United States v. Abbott Laboratories*²⁰⁴ demonstrates the difficulty of prevailing on a motion to dismiss based on prejudicial preindictment publicity. The district court determined that certain news stories, some inspired by Department of Justice personnel, were highly inflammatory and prejudicial, but held that the situation did not warrant a dismissal of the indictment.²⁰⁵ The court stated that:

No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled.²⁰⁶

Nonetheless, prosecutors, in the proper exercise of their duties, should refrain from disclosing any information about matters pending before a grand

²⁰² See *United States v. Thomas*, 593 F.2d 615, 623 (5th Cir. 1979); *In re Special March 1974 Grand Jury*, 541 F.2d 166, 170-72 (7th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *In re April 1956 Term Grand Jury* (Shotwell), 239 F.2d 263, 270-71 (7th Cir. 1956). Pursuant to rule 6(e), disclosure to government personnel for the purpose of assisting government attorneys in criminal investigations is permissible. See *United States v. Evans*, 526 F.2d 701 (5th Cir. 1976). See also *In re William H. Pfaffmer & Sons*, 53 F.R.D. 464 (E.D. Pa. 1971).

²⁰³ See *In re Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978); *Gorin v. United States*, 313 F.2d 641 (1st Cir. 1963), *aff'd en banc*, 336 F.2d 211 (1st Cir. 1964), *cert. denied*, 379 U.S. 971 (1965); *United States v. Abrahams*, 466 F. Supp. 552 (D. Mass. 1978); *United States v. Tallant*, 407 F. Supp. 878, 889 (N.D. Ga. 1975); *United States v. Anzelmo*, 319 F. Supp. 1106, 1113-14 (E.D. La. 1970); *United States v. Sweig*, 316 F. Supp. 1148, 1153 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971) (the court suggested that the burden of proving that preindictment publicity alone prejudiced the grand jury's work is "probably unmanageable"); *United States v. Kahaner*, 204 F. Supp. 921, 922 (S.D.N.Y. 1962).

²⁰⁴ 505 F.2d 565 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

²⁰⁵ 505 F.2d at 572.

²⁰⁶ *Id.* at 571.

prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 628-29.

¹⁹⁸ FED. R. CRIM. P. 6(e)(2).

¹⁹⁹ See *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 607 n.11 (D.C. Cir. 1976); *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282, 1285 n.5 (S.D. Fla. 1974); *In re Alvarez*, 351 F. Supp. 1089, 1091 (S.D. Cal. 1972); *In re Russo*, 53 F.R.D. 564, 572 (C.D. Cal.), *aff'd*, 448 F.2d 369 (1971); *In re Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238, 239 (N.D. Ohio 1970) (government attorney may not require a witness to report back to the grand jury as to conversations witness has with others.)

²⁰⁰ See *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960) (ICC granted access to grand jury documents over objection of company producing records because records sought for intrinsic value not what occurred in grand jury). *But see In re Grand Jury Investigation*, 210 F. Supp. 904 (S.D.N.Y. 1962). See also *United States v. Armco Steel Corp.*, 458 F.2d 784 (W.D. Mo. 1978); *Capital Indemnity Corp. v. First Minn. Constr. Co.*, 405 F. Supp. 929 (D. Mass. 1975).

²⁰¹ See *United States v. Bloom*, 450 F. Supp. 323 (E.D. Pa. 1977); *United States v. Mitchell*, 372 F. Supp. 1239, 1248 (S.D.N.Y. 1973); *United States v. Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *United States v. Kahaner*, 204 F. Supp. 921, 923 (S.D.N.Y. 1962). See also *United States v. Mandel*, 415 F. Supp. 1033, 1053-64 (D. Md. 1976) (burden is high to overcome presumption of regularity, to avoid automatic dismissal of indictments involving public figures, and to respect the latitude traditionally accorded grand juries).

jury beyond that necessary for the performance of their official duties.

J. SUBMISSION OF THE PROPOSED INDICTMENT TO THE GRAND JURY

Before an indictment can be filed in a United States District Court, both the grand jury and the United States attorney must agree on the charges to be brought. Therefore, after a grand jury has completed its investigation, the prosecutor prepares and submits a proposed indictment of charges which the grand jury can approve or disapprove. The United States attorney must then sign the indictment, for without his signature the indictment cannot properly be filed with a court.²⁰⁷

There is a split in the district courts over whether presenting a signed proposed indictment unfairly influences the grand jurors during deliberations and voting. The court in *United States v. Gold*²⁰⁸ held that it did. The weight of authority supports the view that submitting a signed indictment is not by itself improper.²⁰⁹

It seems highly unlikely that the United States attorney's signature would be an influential factor in the grand jury's decision to indict. It is difficult to imagine how a grand jury which has heard the evidence and the prosecutor's summary and recommendation and, thereby, knowing the prosecutor's position on the matter, would be so swayed by the fact that it has in its possession a signed, as opposed to an unsigned, copy of the indictment that it would lose sight of its role to act as an independent and informed buffer between the accuser and the accused.

The requirement that the grand jury fulfill its role as an independent and informed buffer additionally means that at least twelve grand jurors who vote to return the indictment must have been present to hear all the evidence presented by the prosecutors relating to the indictment.²¹⁰

VI. OUTSIDE THE GRAND JURY ROOM

A. INTERFERENCE WITH DEFENSE INVESTIGATION

The ABA PROSECUTION STANDARDS state: "A prosecutor should not discourage or obstruct com-

munication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has the right to give."²¹¹ The federal courts likewise have adhered to the principle that prosecutors, in conducting their preindictment activities, may not interfere with defense counsel's attempts to interview the grand jury witnesses. The prosecutor cannot tell a witness not to talk to the defense;²¹² he cannot impose a requirement that a witness report back to him if he is interviewed by the defense;²¹³ and the prosecutor cannot require that the interview be conducted in his presence.²¹⁴

B. THE TIMING OF INDICTMENTS

Federal prosecutors are not obliged to file criminal charges as soon as probable cause is established.²¹⁵ Deciding when to indict is left to the prosecutors' discretion. The courts have held, however, that if actual prejudice results from preindictment delay,²¹⁶ the defendant's fifth amendment due process right has been violated.²¹⁷ There is no per se rule that establishes, as a matter of law, what period of delay is unreasonable and thereby warrants dismissal.²¹⁸ The federal courts typically re-

²¹¹ ABA PROSECUTION STANDARDS, *supra* note 8, § 3.1(c).

²¹² See *United States v. Matlock*, 491 F.2d 504, 506 (6th Cir.), *cert. denied*, 419 U.S. 864 (1974) (such instruction is improper).

²¹³ See, e.g., *In re Proceedings Before the Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238 (N.D. Ohio 1970) (condemning the practice).

²¹⁴ *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969) (defendant's right to fair trial violated when prosecutor advised witness not to talk to defense counsel without prosecutor present). See also *United States v. Scott*, 518 F.2d 261, 268 (6th Cir. 1975); *Coppolino v. Helgren*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967). Witnesses, of course, have the right to refuse to be interviewed if that is their desire apart from prosecutor's wishes. *United States v. Rice*, 550 F.2d 1364, 1374 (5th Cir.), *cert. denied*, 434 U.S. 954 (1977); *United States v. Dryden*, 423 F.2d 1175, 1177 (5th Cir.), *cert. denied*, 398 U.S. 950 (1970); *Byrnes v. United States*, 327 F.2d 825, 832 (9th Cir.), *cert. denied*, 377 U.S. 970 (1964).

²¹⁵ See *United States v. Stanyione*, 466 F. Supp. 838 (E.D.N.Y. 1979); *United States v. Passman*, 465 F. Supp. 736 (W.D. La. 1979).

²¹⁶ *United States v. Quinn*, 540 F.2d 357 (8th Cir. 1976); *United States v. Jones*, 524 F.2d 834 (D.C. Cir. 1975). But see *United States v. Foddrell*, 523 F.2d 86 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975).

²¹⁷ Sixth amendment speedy trial rights are not triggered until arrest or indictment. See *United States v. Marion*, 404 U.S. 307 (1971).

²¹⁸ See *United States v. Sand*, 541 F.2d 1370 (9th Cir.

²⁰⁷ FED. R. CRIM. P. 7(c)(1).

²⁰⁸ 470 F. Supp. 1336, 1354 (N.D. Ill. 1979).

²⁰⁹ See *United States v. Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972); *United States v. Tedesco*, 441 F. Supp. 1336, 1342, (M.D. Pa. 1977). See also *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979).

²¹⁰ *United States v. Roberts*, No. Cr. 70-927 (C.D. Cal. Jan. 2, 1980); *United States v. Leverage Funding Sys.*, 478 F. Supp. 799 (C.D. Cal. 1979).

view the facts of each case to determine whether the time elapsed "has impaired the defendant's ability to defend himself."²¹⁹ The defendant must plead specific facts demonstrating prejudice resulting from preindictment delay.²²⁰ When the absence of a witness is the basis for the claim of prejudice caused by delay, the courts have required a showing that the witness "could have supplied material evidence for the defense."²²¹

There is a split of authority among the federal courts as to whether one must show both substantial prejudice and intentional delay on the part of the government or only one of the two.²²² Which-ever standard for dismissal is imposed, prosecutors must be sensitive to the potential loss of evidence caused by any delay and should move as promptly as possible toward a resolution of all criminal matters under investigation so that a putative defendant's rights will not be infringed by the passage of time at the preindictment stage.

C. BARGAINING FOR TESTIMONY UNDER IMMUNITY

The usual procedure in the federal system for obtaining a grant of statutory immunity for a witness begins with the attorney for the witness presenting a proffer of his client's prospective testimony.²²³ There is no statutory requirement that

1976), *cert. denied*, 429 U.S. 1103 (1977) (15-month delay did not prejudice defendant despite death of two possible witnesses and claimed loss of physical evidence); *United States v. Quinn*, 540 F.2d 357 (8th Cir. 1976) (10-month delay was unreasonable because witness had disappeared); *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976) (more than four years' delay not prejudicial); *United States v. MacClain*, 501 F.2d 1006 (10th Cir. 1974) (39-month delay between commencement of investigation and indictment did not result in sufficient prejudice, especially in the absence of any evidence that the delay was purposefully designed to gain some tactical advantage).

²¹⁹ *United States v. Ewell*, 383 U.S. 116, 120 (1966); *United States v. Hood*, 593 F.2d 293 (8th Cir. 1979); *accord*, *United States v. Golden*, 436 F.2d 941, 943 (8th Cir.), *cert. denied*, 404 U.S. 910 (1971); *United States v. Deloney*, 389 F.2d 324 (7th Cir.), *cert. denied*, 391 U.S. 904 (1968); *In re Special Grand Jury*, 465 F. Supp. 800 (D. Md. 1978).

²²⁰ *See United States v. Marion*, 404 U.S. 307 (1971).

²²¹ *United States v. Page*, 544 F.2d 982, 985 (8th Cir. 1976). *See also United States v. Naftalin*, 534 F.2d 770, 773 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976); *Hodges v. United States*, 408 F.2d 543 (8th Cir. 1969).

²²² *See United States v. Willis*, 583 F.2d 203 (5th Cir. 1978) (requiring a showing of both prejudice and intentional delay); *United States v. Brown*, 578 F.2d 1280 (9th Cir. 1978) (defendant must demonstrate actual prejudice to prevail). *See also United States v. Mays*, 549 F.2d 670 (9th Cir. 1977).

²²³ *See Bauer, Reflections on the Role of Statutory Immunity*

a proffer be made.²²⁴ The Department of Justice procedure, however, requires the local United States attorney conducting the investigation to submit a summary of the witness' proposed testimony along with other information for evaluation by Department of Justice personnel in Washington, D.C., before immunity will be granted.²²⁵

Once the proffer is obtained, the local federal prosecutor evaluates the credibility and value of the information to the government in the case or matter under investigation. The government either accepts the proffer and grants the witness immunity or rejects the proffer and proceeds with its investigation without the benefit of the witness' testimony.

The opinion of the United States Court of Appeals for the Seventh Circuit analyzed the immunity negotiation proffer procedure in *United States v. Rothman*.²²⁶ In that case the government was considering immunizing Rothman, but first wanted to know what his testimony would be. Rothman briefly revealed what he would say, but the government declined to immunize him. Rothman argued that since he cooperated with the government by complying with the government's request to know what his testimony would be, the government was bound to immunize him. The court rejected that argument stating:

Immunity was only a possibility with the final decision to be made by the government after evaluating the testimony Rothman offered. By merely mak-

in the *Criminal Justice System*, 67 J. CRIM. L. & C. 143 (1976).

²²⁴ 18 U.S.C. § 6003(b) (1976) requires that the United States attorney obtain "the approval of the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General" before petitioning the court for an immunity order. The determination for seeking immunity under the statute requires that the local United States attorney with the approval of one of the designated Department of Justice personnel determine that "(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(b) (1976).

²²⁵ The information the local United States attorney must submit to the Department of Justice in Washington, D.C., to obtain immunity authorization includes a summary of the witness' anticipated testimony, as well as information about the background of the case; the witness' part in the matter under investigation; how the witness' testimony may be necessary to the public interest; why the witness is likely to invoke the fifth amendment privilege; and what offenses may be disclosed by the witness under the grant of immunity.

²²⁶ 567 F.2d 744 (7th Cir. 1977).

ing the proffer, Rothman could not thereby bind the government. His offer was not accepted. Rothman would have us abandon the usual accepted concepts of applicable contract law and fashion some new standard for these circumstances. We decline, for to do so would unnecessarily destroy immunity as a useful prosecutorial technique.²²⁷

The *Rothman* court did not address the issue of the effect of the proffered information or the leads derived from that information once the government declines to immunize the witness. Proffers of testimony between defense counsel and prosecutors are considered to be "off the record," and if the proffer is rejected, both sides to the negotiations theoretically should be placed in the same position as before the proffer because the government by receiving the proffer gains valuable information about its possible case, and the witness, if still a potential defendant after rejection of the proffer, receives nothing for having made the proffer.²²⁸ Even though the government cannot use the proffered information against the witness in its case in chief, leads therefrom can be used unless there was a bargained for prohibition against their use.²²⁹

If prosecutors, by their conduct in negotiating with a witness for immunity, cause the witness to believe that his proffered statements will not be used against him in any way, the government may be bound.²³⁰ Therefore, prosecutors must be extremely careful not to make erroneous offers of immunity that could mislead a witness to waive his privilege against self-incrimination. Defense coun-

sel must be careful to understand clearly the parameters of the proffer agreement. In sum, it is important that the proffer arrangement be unambiguous and plainly understood by both sides.²³¹

A problem inherent in the government's requirement that a witness or his lawyer present a proffer of proposed testimony is that the witness may feel pressured to conform his testimony to the government's prosecutorial theory.²³² In *United States v. International Paper Co.*²³³ the defense in attacking the proffer system argued that the government's announced position offering immunity for testimony that would advance its investigation was "coercive and likely lead to deliberate or unconscious misstatements."²³⁴

The original proffer of one witness in the *International Paper* case, Charles Blanchard, was that certain conspiratorial conversations took place in either "late 1974 or early 1975." Before immunity was conferred on Mr. Blanchard, one of the prosecutors telephoned Mr. Blanchard's attorney and explained that immunity would be recommended for Mr. Blanchard only if he testified that the conversations occurred in 1975.²³⁵ The witness subsequently did so testify and provided a reason, apart from the prosecutor's statements, for choosing 1975 as opposed to 1974.²³⁶ The court rejected the defense argument, stating:

Although the government concedes, as indeed it must, that there is some inherent possibility of a witness's coloring his story to get immunity, it contends that the likelihood is slight, that it has not been shown to have occurred here, and that the remedy, if any remedy is needed, is in the right of defense attorneys to cross-examine immunized witnesses about their bargains at trial.²³⁷

Despite the court's rationale, prosecutors must be sensitive to the psychological pressure caused by

²²⁷ *Id.* at 747.

²²⁸ It is possible that the witness may have even antagonized the government personnel on the case by proffering what the prosecutor believes to be false information.

²²⁹ Without an agreement, the proffer, just like immunized testimony, could be used against the witness to impeach him. See *Harris v. New York*, 401 U.S. 222 (1971); *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Moreover, without an agreement to the contrary, the government could use the proffered information to find other information that could be used against the witness. The defendant in *Rothman* did not contend that the government violated its promise not to use any leads arising from Rothman's proffer against him.

²³⁰ See *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347-48 (1963); *United States v. Society of Independent Gasoline Marketers of America*, No. 77-2515 (4th Cir. Dec. 26, 1979); *United States v. Nussen*, 531 F.2d 15 (2d Cir.), cert. denied, 429 U.S. 839 (1976); *United States v. Lyon*, 397 F.2d 505 (7th Cir.), cert. denied, 393 U.S. 846 (1968). See also *United States v. Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975) (quoting *United States v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974)); *In re Kelly*, 350 F. Supp. 1198, 1199-200 (E.D. Ark. 1972).

²³¹ See *United States v. Carvin*, 553 F.2d 871 (4th Cir. 1977).

²³² See generally Wolfson, *Immunity, Right or Wrong?* 57 CHI. B. REC. 174 (1976).

²³³ 457 F. Supp. 571 (S.D. Tex. 1978).

²³⁴ *Id.* at 576.

²³⁵ *International Paper* was a Sherman Act price-fixing criminal conspiracy prosecution. The sentencing provisions of the Sherman Act were amended in December 1974 making a violation thereof after the date of the amendment a felony. 15 U.S.C. § 1 (1976). Therefore, whether acts in furtherance of the conspiracy took place in 1974 or 1975 made a crucial difference in whether the defendants were subject to misdemeanor or felony liability.

²³⁶ 457 F. Supp. at 576 n.5.

²³⁷ *Id.* at 576.

suggestions, especially when coupled with the benefit of absolution from criminal liability conferred by an immunity grant. Since such suggestion could cause a witness to fashion his testimony according to the prosecution's desires, it is, therefore, necessary for prosecutors to refrain from coaxing or coaching a particular theory of how or when particular events happened. An erroneous story may result and justice thereby be denigrated.

D. THE PROSECUTOR'S DECISION TO SEEK AN INDICTMENT

The decision to seek an indictment is one that falls clearly within the prosecutor's discretion.²³⁸ The Supreme Court in *Blackledge v. Perry*,²³⁹ however, declared that the federal courts may intervene in the prosecutorial decision to indict when it is demonstrated that the prosecution is motivated by "vindictiveness." The prosecutor in *Blackledge* brought a second indictment on a more serious charge against a defendant who was appealing his conviction of a lesser offense. The Supreme Court held that actual prosecutorial vindictiveness against the defendant did not have to exist for the prosecutor's action to be unconstitutional. The court stated that if the prosecutor, by bringing the second charge, was seeking to discourage the defendant from exercising a constitutional or statutory right, the prosecutor's actions were constitutionally impermissible.²⁴⁰

Under what appears to be the *Blackledge* definition of prosecutorial vindictiveness, the personal bad faith and evil motivation of the prosecutor is immaterial. To determine whether the prosecutor's action in commencing prosecution falls outside that permitted by the constitution, the federal courts look to the purpose of the action as related to the potential effect on the defendant's rights.

The courts have placed varying interpretations on the phrase "prosecutorial vindictiveness." The Ninth Circuit in *United States v. Groves*²⁴¹ recognized that courts need not find that the prosecutor was motivated by personal bad faith in prosecuting the defendant and held that the appearance of vindictiveness is sufficient to justify dismissal of the

charges. In *United States v. Litton Systems, Inc.*²⁴² the Fourth Circuit declined to find impermissible vindictiveness absent a showing of retaliatory motive. In *United States v. McFadyen-Snyder*²⁴³ the Sixth Circuit affirmed the district court's dismissal of an indictment because "the indictment and the reasons for bringing it have the effect of punishing the defendant for pursuing an appeal."²⁴⁴

The Supreme Court in *Bordenkircher v. Hayes*²⁴⁵ appeared to retreat from its *Blackledge* holding condemning prosecutorial vindictiveness. Closer scrutiny of the *Hayes* decision indicates that the court carved out an exception for such conduct to preserve and support the plea bargaining system as a means of disposing of cases.²⁴⁶ Defendant Hayes was indicted on the relatively minor charge of uttering a forged instrument.²⁴⁷ The prosecutor told Hayes during plea negotiations that, because of Hayes' prior criminal record, he would add on an additional indictment against Hayes under the state's habitual criminal statute with a mandatory life sentence if Hayes declined to plead guilty to the original charge. Hayes refused to plead guilty, and the prosecutor carried out his threat. The Sixth Circuit disapproved,²⁴⁸ but the Supreme Court,

²⁴² 573 F.2d 195, 198-200 (4th Cir.), cert. denied, 439 U.S. 828 (1978); accord, *United States v. Vaughan*, 565 F.2d 283, 284-85 (4th Cir. 1977). Both of these cases, however, arose in the plea bargaining context which has been given different treatment by the courts. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

²⁴³ 590 F.2d 654 (6th Cir. 1979). See *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978).

²⁴⁴ 590 F.2d at 655; accord, *Lovett v. Butterworth*, 610 F.2d 1002 (1st Cir. 1979).

²⁴⁵ 434 U.S. 357 (1978).

²⁴⁶ See, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (guilty plea and plea bargaining system are important components of the country's criminal justice system); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971) (plea bargaining should be encouraged if properly administered). The majority Justices in *Hayes* most certainly considered the importance of the plea bargain system to the crowded federal court docket, especially in light of the requirements of the Speedy Trial Act of 1974. 18 U.S.C. §§ 3161-3174 (1976).

²⁴⁷ The amount of the check he allegedly forged was \$88.30. The offense was punishable by two to ten years in prison. 434 U.S. at 358.

²⁴⁸ *Hayes v. Cowen*, 547 F.2d 42, 43 (6th Cir. 1976) (the court stated that the principles of *Blackledge v. Perry*, 417 U.S. 21 (1974), protect "defendants from vindictive exercise of the prosecutorial discretion." The Sixth Circuit probably would have approved the conduct if the penalties were not increased. See *United States v. Sturgill*, 563 F.2d 307, 309 (6th Cir. 1977) (addition of two counts after defendant exercised right to trial approved because potential penalties the same).

²³⁸ See U.S. Department of Justice Materials Relating to Prosecutorial Discretion, reprinted in [1978] 24 CRIM. L. REP. (BNA) 3001. The ABA PROSECUTION STANDARDS, supra note 8, § 3.9, also address the exercise of prosecutorial discretion in bringing a formal charge.

²³⁹ 417 U.S. 21, 27 (1974).

²⁴⁰ Id.

²⁴¹ 571 F.2d 450, 453-55 (9th Cir. 1978). *Contra*, *United States v. Andrews*, No. 78-5166 (6th Cir. Dec. 14, 1979) (appearance of vindictiveness insufficient).

with four Justices dissenting,²⁴⁹ approved the prosecutor's actions.

As a result of the *Hayes* decision, most federal courts have applied a more permissive standard approving seemingly vindictive conduct in the plea bargain setting.²⁵⁰

Of course, outside the plea bargaining arena, the more stringent *Blackledge* standard against prosecutorial vindictiveness still applies.²⁵¹ Once a defendant has demonstrated a prima facie case of vindictiveness, the government is typically accorded the opportunity to justify the prosecutor's decision to file charges.²⁵² There are several justifications that have been held sufficient to surmount vindictiveness charges by a defendant. Where prosecutorial action in bringing charges appears to coincide with a defendant's exercise of certain guaranteed rights, prosecutors can justify their acts by demonstrating that the evidence upon which later charges were based was not known at an earlier time or that charges were delayed to protect an informant's identity rather than to punish a successful appellant.²⁵³

²⁴⁹ 434 U.S. at 367-68 (Blackmun, J., with Brennan & Marshall, JJ., dissenting); *id.* at 372-73 (Powell, J., dissenting) ("[s]ince the prosecutor's admitted purpose was to penalize Hayes for exercising his right to trial, the conduct was constitutionally impermissible").

²⁵⁰ See, e.g., *United States v. Allsup*, 573 F.2d 1141, 1143-44 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978) (bringing gun charges against defendant who refused to accept plea bargain proposal in bank robbery prosecution held proper); *United States v. Litton Sys., Inc.*, 573 F.2d 195, 198-200 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978) (bringing criminal fraud charges against government contractor who refused to relinquish contract in exchange for no prosecution held proper). *But see* *United States v. Stacey*, 571 F.2d 440, 443-44 (8th Cir. 1978) (even though defendant's demand for return of lawfully seized funds was a factor in prosecutor's decision to indict, prosecution not impermissibly vindictive because demand for funds is not a statutory right with due process implications).

²⁵¹ See, e.g., *James v. Rodriguez*, 553 F.2d 59, 62 (10th Cir.), *cert. denied*, 434 U.S. 889 (1977) (filing of charge under habitual criminal statute at retrial after reversal of conviction unconstitutional interference with right of appeal); *United States v. DeMarco*, 550 F.2d 1224, 1228 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977) (filing more serious charge to penalize defendant for exercising venue rights impermissible conduct).

²⁵² See, e.g., *Hardwick v. Doolittle*, 558 F.2d 292, 300-03 (5th Cir.), *cert. denied*, 434 U.S. 1049 (1977) (remand to district court to allow prosecutor to present evidence on whether defendant's exercise of his rights motivated prosecutor to add new charges).

²⁵³ See *United States v. Nell*, 570 F.2d 1251, 1254-55 (5th Cir. 1978) (alleged crimes that form basis of second indictment, brought after reversal of earlier conviction, not known earlier; fact that crimes were known before

In deciding whether to prosecute, a federal prosecutor in the proper conduct of his office should consider Department of Justice policies²⁵⁴ even though the federal courts have consistently expressed reluctance to dismiss an indictment brought in violation of Department of Justice policy when the dismissal is resisted by the prosecutor.²⁵⁵ Such resistance on the part of federal prosecutors is improper, but a defendant is without redress. Federal prosecutors must be careful to conform with the policy guidelines because the courts may soon change their position of reluctance and mandate compliance by dismissing actions when the policies are not followed.

CONCLUSION

In the decades to come, preindictment prosecutorial conduct will continue to face increasing scrutiny by the courts in the federal system. The recording of all proceedings before a federal grand jury will aid the courts in that pursuit. Recording the proceedings, however, will not serve as a check of prosecutorial misconduct if persons adversely affected by improper preindictment conduct are unable to obtain access to the recording and thereby discover the impropriety. Most impropriety to date has been uncovered fortuitously.²⁵⁶

appeal does not make second indictment impermissible prosecutorial conduct); *United States v. Partifka*, 561 F.2d 118, 123 (8th Cir.), *cert. denied*, 434 U.S. 1037 (1977) (filing of second indictment after successful appeal by defendant of earlier charge not impermissible because motivation of government in delaying the filing of the second indictment was to protect informant's identity and charges filed promptly once identity revealed).

²⁵⁴ Probably the best known prosecutorial policy of the Department of Justice is the *Petite* Policy, which derives its name from *Petite v. United States*, 361 U.S. 529, 530-31 (1960), in which the Solicitor General confessed error because the *Petite* prosecution involved a federal indictment arising out of the same transaction for which the defendant had been prosecuted in state court. Department of Justice policy prohibits such prosecutions. Other examples of the *Petite* policy's application that have reached the Supreme Court are *Rinaldi v. United States*, 434 U.S. 22 (1977), and *Watts v. United States*, 422 U.S. 1032 (1975). See also *Redmond v. United States*, 384 U.S. 264 (1966) (prosecution of noncommercial consensual mailings of obscene material; prosecution violated Department of Justice policy and confession of error was entered).

²⁵⁵ See, e.g., *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 842 (1978) (district court is without authority to grant defendant's motion to dismiss prosecution brought in violation of Department of Justice policy).

²⁵⁶ See *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) (defense learned of impropriety because prosecu-

Because of the increasing importance of the preindictment phase in the federal criminal justice system, the federal courts must become sensitive to the necessity that fuller disclosure be granted defendants regarding the preindictment process.

The October 1979 decision in *In re Grand Jury Proceedings*²⁵⁷ indicates that at least one federal court recognizes the need for fuller disclosure of grand jury recordings. In that case a district judge for the Northern District of Georgia ordered the Department of Justice to furnish a putative defendant in a criminal antitrust investigation with

tor's prejudicial comments were made when individual witnesses were present in the grand jury room and transcripts of their testimony was disclosed to defense counsel as *Brady* material); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (transcripts of exculpatory testimony not revealed to grand jury not turned over until just before trial.

²⁵⁷ [1979] 26 CRIM. L. REP. (BNA) 2089 (N.D. Ga. Oct. 10, 1979). The government is appealing the decision. *See* [1979] 937 ANTITRUST & TRADE REG. REP. (BNA) A-25-26.

"a statement of issues and summary of such factual matters as may be pertinent to the decision by the responsible official to authorize or not to authorize a request for a criminal indictment with respect to the subject matter of the proceedings before the . . . grand jury."²⁵⁸

Although the courts must be careful to maintain the requirement of grand jury secrecy and the historic purpose of the grand jury process, the decision from the Northern District of Georgia may signal, as the decade of the 1980's commences, a new era of more open disclosure at the preindictment stage in the federal system. This increased disclosure will enable those subjected to the scrutiny of the preindictment investigatory process in the federal criminal justice system to be better informed whether that process functioned properly or was affected by improper preindictment prosecutorial conduct.

²⁵⁸ [1979] 26 CRIM. L. REP. (BNA) 2089 (N.D. Ga. Oct. 10, 1979).