

# CHAPTER 5

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## *Grand Jury Issues*

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*Cross-References:*

- Compositional challenge to petit jury, § 30.4
- Defects in the complaint or indictment, ch. 20
- Discovery of grand jury minutes, § 16.6E
- Grounds for denying or quashing a summons, § 13.4
- Right to indictment and waiver of the right, § 4.3
- Selective or vindictive treatment, ch. 24
- Witness's privilege against self-incrimination, ch. 33

## § 5.1 INTRODUCTION

Historically, the grand jury serves both as a “shield,” protecting defendants against improper criminal charges, and as a “sword,” using its subpoena power to investigate suspected criminal activity. In practice, the grand jury process offers few protections for targets or witnesses, and the courts are reluctant to remedy improprieties. Still, counsel’s attention to the process is essential. Before an indictment is found, opportunities may exist to influence the course of proceedings, advise clients who are potential grand jury witnesses, and gather important discovery information. If an indictment is found, counsel’s scrutiny of the grand jury minutes might disclose flaws that justify dismissal, even — in rare instances — without a showing of prejudice to the defendant. In extraordinary circumstances, the Commonwealths’ abuse of the grand jury process might preclude re-indictment.

Motions to dismiss the indictment based on irregularities in the grand jury’s composition or procedures include:<sup>1</sup> (1) challenges to the grand jury’s composition or method of selection (*see infra* § 5.8.C(3)(b)); (2) challenges to the grand jury’s manner of proceeding, such as violations of grand jury secrecy (*see infra* § 5.5), or abuse of the subpoena power (*see infra* § 5.7); (3) claims that the indictment rests on insufficient or prejudicial evidence *see infra* § 5.6); and (4) claims that the defendant’s rights, for example, his right to counsel, were violated during his appearance before the grand jury (*see infra* § 5.8A(3)).

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<sup>1</sup> This paragraph draws on A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 172(A) (5th ed. 1988).

With exceptions noted below, a motion to dismiss the indictment will not succeed unless the irregularity has seriously impaired the grand jury process or resulted in prejudice to the defendant.<sup>2</sup> Once the defendant has been tried and convicted, prejudice from irregularities in the grand jury process becomes particularly difficult to show. Therefore, such objections should be raised before trial in a motion to dismiss the indictment.

## § 5.2 REFERENCES

Mass. R. Crim. P. 5 is largely modeled on Fed. R. Crim. P. 6. Counsel should therefore look to federal law for support on unsettled issues.<sup>3</sup> *See generally* Susan W. Brenner, Lori E. Shaw & Gregory G. Lockhart, *Federal Grand Jury: A Guide to Law and Practice* (West 2006); Sara Sun Beale & William C. Bryson, *Grand Jury Law and Practice*, (2d ed. 1998); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* (4th ed. 1999 and annual updates); BNA, *Criminal Practice Manual* Pt.3, ch. 13-17 (2008 and updates); ABA Model Grand Jury Act (approved by ABA House of Delegates Jan. 1982), *reproduced in* Arenella, “Reforming the State Grand Jury System: A Model Grand Jury Act,” 13 *Rutgers L.J.* 1 (1981); Pinales, “Representing a Witness Before a Grand Jury,” 1 *Criminal Defense Techniques* §§ 6.01–6.06 (R. Cipes, ed. 1976). Massachusetts grand jury practice is described in 30A K. Smith, *Massachusetts Practice* Ch. 16 (2007 & Supp. 2010).

## § 5.3 SCOPE AND PURPOSE OF THE RIGHT TO GRAND JURY INDICTMENT; INDEPENDENCE OF GRAND JURY

*The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a [sic] probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.*<sup>4</sup>

Accordingly, article 12 of the Massachusetts Constitution Declaration of Rights implicitly establishes the right to indictment as a precondition of trial subjecting a defendant to “infamous punishment” — that is, death or imprisonment in state prison.<sup>5</sup>

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<sup>2</sup> Commonwealth v. Cote, 407 Mass. 827, 833 (1990).

<sup>3</sup> “The Federal grand jury system is . . . analogous to the grand jury system in the Commonwealth and therefore Federal disclosure precedent is relevant in the absence of state law suggesting the appropriate standards.” In re John Doe Investigation, No. 031855 (Suffolk County 1980) (Irwin, J.), in Codinha, *Grand Jury Procedures*, in MCLE-NELI, PROSECUTOR’S CRIMINAL INVESTIGATIVE TECHNIQUES 79, 97 (1980).

<sup>4</sup> Jones v. Robbins, 74 Mass. (8 Gray) 329, 344 (1857). For a history of the grand jury in Massachusetts, *see* Law Student Research Council, *Survey of the Grand Jury System*, 3 PORTIA L.J. 70 (1967).

<sup>5</sup> Jones v. Robbins, 74 Mass. (8 Gray) 329, 349 (1857). Because the district courts may not impose state prison sentences the right does not apply when a district court retains

Additionally, article 12 “was designed in part to prevent judges from overawing the grand jury or interfering in any way with the independence of its action. Its purpose was sedulously to preserve in its integrity the absolute freedom of the grand jury from every outside influence.”<sup>6</sup> Implementing article 12, statutes provide for the sitting of both regular and special grand juries, and regulate their terms and the method for their selection.<sup>7</sup> The court instructs the grand jurors as to their obligations and powers before they begin their duties and thereafter responds to any requests for further instructions.<sup>8</sup> The court also has general responsibility to supervise and guide grand jurors, and to protect against impairment of their integrity and independence.<sup>9</sup>

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jurisdiction over an offense within its concurrent jurisdiction. Mass. R. Crim. P. 3(b). Moreover, the Commissioner of Correction may not transfer a prisoner sentenced to a house of correction to a state prison, even for valid disciplinary reasons, unless the prisoner had the benefit of indictment or validly waived that right. *Brown v. Commissioner of Correction*, 394 Mass. 89 (1985).

<sup>6</sup> *Attorney General v. Pelletier*, 240 Mass. 264, 309 (1922).

<sup>7</sup> *See generally* Mass. R. Crim. P. 5, Reporter’s Notes. At least 23 jurors must be selected to sit for terms that vary depending on the county. G.L. c. 277, §§ 1, 2, 2A–2H. A number less than 23 is competent to return an indictment, so long as at least 13 are present and 12 concur in the return of a “true bill” of indictment. *Commonwealth v. Wood*, 56 Mass. (2 Cush.) 149 (1848). However, the grand jurors voting to return an indictment need not have heard all of the evidence presented. *Commonwealth v. Wilcox*, 437 Mass. 33 (2002) (no right to discover juror attendance records for purpose of learning whether at least 12 of the indicting grand jurors had heard all of the evidence).

G.L. c. 277, § 1A, permits the superior court to extend the term of a grand jury’s sitting, *see Commonwealth v. Westerman*, 414 Mass. 688, 702–04 (1993); *Ventresco v. Commonwealth*, 409 Mass. 82, 85–87 (1991); *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 48–49 (1996). Grand jurors and special grand jurors are to be drawn, summoned, and returned in the same manner as traverse jurors. G.L. c. 277, §§ 2A, 3; G.L. c. 234A §§ 2–4, 10–26. To be eligible for duty a juror must be (1) a resident of the judicial district in which he is called to serve, (2) a United States citizen, (3) over 18 years of age, (4) able to speak and understand English, and (5) not a felony defendant or a convicted felon within seven years. G.L. c. 234A, § 4. A grand juror may not subsequently serve on the petit jury in the same case. G.L. c. 277, § 14.

In 1982 the General Court reformed the state’s jury system by permitting the S.J.C. to expand the experimental Middlesex County “one day/one trial” system to all counties, *see* G.L. c. 234A, § 1 ff., 13. The reformed system is administered by the office of jury commissioner. G.L. c. 234A, § 5. G.L. c. 234, which formerly regulated jury selection and procedure, remains on the books but, to the extent its provisions are inconsistent with c. 234A, is ineffective. *See Commonwealth v. Benjamin*, 430 Mass. 673, 675–76 (2000). Jury selection is governed solely by c. 234A, but other subjects, such as voir dire interrogation, are still governed by c. 234. *See* G.L. c. 234, § 28; *Commonwealth v. Mickel*, 401 Mass. 1003, 1003–04 (1987). Grand jury selection is discussed *infra* at § 5.8.C(3)(B)(1)(a). *See also infra* ch. 30, Juror Examination and Selection.

<sup>8</sup> *Attorney General v. Pelletier*, 240 Mass. 264, 307 (1922).

<sup>9</sup> “The grand jury is ‘an appendage, a branch, an integral part of the court acting under the authority of the court,’ and . . . it is the judge’s duty to prevent interference with the grand jurors in the performance of their proper functions . . . .” *Commonwealth v. Wolcott*, Nos. 92115–92116, Memorandum of Decision and Order on Defendant’s Motion to Dismiss Grand Jury Indictments, 6 (Superior Court for Plymouth County, 1993) (quoting *Grand Jurors for Worcester County for the Year 1951 v. Commissioner of Crops & Taxation*, 329 Mass. 89, 91 (1952), and citing *Commonwealth v. McNary*, 246 Mass. 46, 50–51 (1923); *Finance Comm’r v. McGrath*, 343 Mass. 754, 761–68 (1962)). *Compare* *United States v. Williams*, 504 U.S. 36

In practice the greatest threat to grand jury independence comes not from courts but from prosecutors, who normally exercise great control over the proceedings.<sup>10</sup> To promote the grand jury's independence, Massachusetts law restricts the prosecutor's role. The prosecutor may instruct the grand jury on the law<sup>11</sup> and has the "right to be present at the taking of testimony for purpose of giving information or advice touching any matter cognizable by [the grand jury], and may interrogate witnesses,"<sup>12</sup> but may not be present during deliberation and voting except at the jury's request.<sup>13</sup> Even then, he may respond only to requests for advice on matters of law.<sup>14</sup> The prosecutor may not attempt to influence the jurors in the performance of their duties.<sup>15</sup> Therefore he should not testify,<sup>16</sup> express his own opinion, make arguments, or state facts that are irrelevant

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(1992) (federal grand juries enjoy historic independence of courts and prosecutors; federal courts lack inherent "supervisory power" to require prosecutors to reveal the existence of substantial exculpatory evidence to the grand jury).

<sup>10</sup> See, e.g., *Shepard v. Attorney General*, 409 Mass. 398 (1991) (decision whether to bring inquest report to attention of grand jury is within broad discretion of Attorney General).

<sup>11</sup> *Attorney General v. Pelletier*, 240 Mass. 264, 307 (1922). It is customary in each county for one assistant district attorney, acting as "counsel to the grand jury," to perform this function at the start of each new jury's term. The prosecutor's lengthy, unrecorded lecture on the elements of common crimes and defenses may constitute the only such guidance the jurors receive. See *infra* § 5.4; *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999) (murder-1 indictments valid although prosecutor did not instruct grand jurors on elements of murder in the first and second degree; "[t]he Commonwealth is not required to inform a grand jury of the elements of the offense for which it seeks indictment or of any lesser included offenses."); *Commonwealth v. Riley*, 73 Mass. App. Ct. 721, 727 (2009) (same). In counties without "vertical prosecution" systems, the same "counsel" might conduct all or most grand jury presentations.

<sup>12</sup> *Attorney General v. Pelletier*, 240 Mass. 264, 309 (1922).

<sup>13</sup> Mass. R. Crim. P. 5(g). See *Commonwealth v. Coleman*, 434 Mass. 165 (2001), reaffirming *Commonwealth v. Smith*, 414 Mass. 437, 438–41 (1993) (permitting prosecutor's presence during deliberation and voting, at jury's request, does not violate defendant's due process rights under federal or Massachusetts constitution).

<sup>14</sup> See *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999) (if grand jurors ask, the prosecutor *should* instruct jurors on elements of the offense) (dictum).

<sup>15</sup> See *Attorney General v. Pelletier*, 240 Mass. 264, 309–10 (1922) (improper for prosecutor to present series of cases without having grand jury vote on them as presented and thereafter for prosecutor to refresh memory of jurors by summarizing facts before the vote; this was "manifest perversion of grand jury proceedings," permitting the district attorney to "substitute his memory for recollection to the grand jurors and is to that extent to usurp their function").

<sup>16</sup> A prosecutor's use of leading questions in presenting evidence to the grand jury is occasionally challenged as unfairly influencing the testimony, but absent intentional and prejudicial prosecutorial misconduct, perhaps to avoid disclosing critical exculpatory evidence, this practice has not resulted in the reported dismissal of an indictment. See *Commonwealth v. Martinez*, 420 Mass. 622, 625–26 (1995) (so noting); *Commonwealth v. Vacher*, WL 4070540 (Superior Court for Barnstable County, 2010) (declining to dismiss indictment, noting "[l]eading questions warrant dismissal only when they constitute intentional or egregious prosecutorial misconduct which impairs the integrity of the grand jury proceeding"). *But see* *Commonwealth v. Wolcott*, Nos. 92115–92116, Memorandum of Decision and Order on Defendant's Motion to Dismiss Grand Jury Indictments, 13–14 (Superior Court for Plymouth County, 1993) (prosecutor's almost exclusive use of leading questions effectively made

to the investigation, but might influence the jurors.<sup>17</sup> Otherwise, “a dishonest, corrupt and vicious district attorney” could “use the great power of his office and his influence with the grand jury as an engine of oppression.”<sup>18</sup>

## § 5.4 ACCESS TO RECORD OF GRAND JURY PROCEEDINGS

Unlike the more restrictive federal system, in Massachusetts relevant grand jury minutes are subject to mandatory discovery by the defendant without a showing of particularized need.<sup>19</sup> This includes relevant federal grand jury minutes from a parallel or related investigation.<sup>20</sup> Grand jury testimony may provide valuable discovery. Also, any such testimony that is inconsistent with the same witness’s testimony at trial might be admissible both for impeachment purposes *and* as substantive proof.<sup>21</sup> If the minutes have not been transcribed, counsel should request the prosecutor or, if necessary, the court to order transcription.<sup>22</sup>

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prosecutor a “witness” in violation of rules of professional responsibility and fatally impairing integrity of grand jury).

<sup>17</sup> Attorney General v. Pelletier, 240 Mass. 264, 307–08 (1922). “[The prosecutor’s] duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law. The weight and credibility of the evidence is wholly for the grand jury. He should refrain from expressing an opinion on the facts even if asked.” *Pelletier, supra*, 240 Mass. at 310. Nor should the prosecutor interfere with direct grand juror questioning of witnesses. *See Matter of Nassau County Grand Jury*, 87 Misc. 2d 453, 461, 382 N.Y.S.2d 1013 (1976) (affirming grand jurors’ right to question witnesses directly).

<sup>18</sup> Attorney General v. Pelletier, 240 Mass. 264, 308 (1922).

<sup>19</sup> Mass. R. Crim. P. 14(a)(1)(A)(ii); Commonwealth v. Stewart, 365 Mass. 99, 105–06 (1974). *See infra* § 16.6E. *Compare* 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 108 (2010).

<sup>20</sup> Commonwealth v. Liebman, 379 Mass. 671, 675 (1980) (burden on prosecutor to obtain federal grand jury minutes on pain of dismissal of indictment with prejudice); Commonwealth v. Liebman, 388 Mass. 483 (1983) (same case; conviction reversed and new trial ordered). *See also* Commonwealth v. Donahue, 396 Mass. 590, 596–602 (1986) (FBI reports).

<sup>21</sup> Commonwealth v. Daye, 393 Mass. 55, 65–75 (1984) (specifying conditions under which probative use allowed); Commonwealth v. Berrio, 407 Mass. 37, 44–45 (1990) (*Daye* rule not limited to identification evidence). *See* Mass. Guide to Evidence, Sec. 801(d)(1)(A) (SJC Advisory Committee on Massachusetts Evidence Law ed. 2011) (excluding from the category of hearsay a prior statement by a witness who testifies at trial “and is subject to cross examination concerning the statement which is (i) inconsistent with the [witness’s] testimony; (ii) made under oath before a grand jury...; (iii) not coerced; and (iv) more than a mere confirmation or denial of an allegation by the interrogator”). Exculpatory grand jury testimony by a witness who claims the privilege against self-incrimination at trial might also be admissible. *See* Mass. Guide to Evidence, Sec. 804 (b)(1) (Hearsay Exceptions; Declarant Unavailable, Prior Recorded Testimony (SJC Advisory Committee on Massachusetts Evidence Law ed. 2011) (admissibility of such grand jury testimony depends on trial court finding that the prosecutor had a “similar motive to develop the testimony” in the grand jury proceedings). *See generally infra* § 32.11C(5).

<sup>22</sup> Mass. R. Crim. P. 14(a)(1)(A)(ii).

Superior Court Rule 63 requires stenographic notes to be taken of all grand jury “testimony.”<sup>23</sup> In practice, therefore, statements of the prosecutor before the start of testimony and other non-testimonial exchanges are frequently made but unrecorded<sup>24</sup> and will rarely become known to the defense. In one exceptional case, where the transcript contained the prosecutor’s direction to go “off-the-record” in addressing the grand jury, the Court condemned the practice as improper, and “a mistake scrupulously to be avoided.”<sup>25</sup> Counsel who learns of such an interruption in the record should request an evidentiary hearing to discover what transpired in the interim.

The absence of any recording requirement for the prosecutor’s instructions to the grand jury on the law may be subject to challenge. If the jurors were misinformed, for example, about applicable defenses to the crime, their finding of sufficient cause to indict would be undermined. But without a record of the instructions, discovery of the defect is impossible.<sup>26</sup> Counsel for a defendant who is bound over near the end of one grand jury term, whose case will be presented to a jury not yet seated, might attack this practice by means of a civil action in superior court seeking an order (and preliminary injunction) requiring the grand jury to record the prosecutor’s instructions on the law.

## § 5.5 GRAND JURY SECRECY; PRESENCE OF UNAUTHORIZED PERSONS

Grand jury hearings and deliberations are secret.<sup>27</sup> This policy serves two major purposes: first, to “save individuals from notoriety unless probable cause is found

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<sup>23</sup> Mass. Super. Ct. R. 63. *See also* G.L. c. 221, § 86 (judicial appointment of grand jury stenographers). G.L. c. 221, § 91B, permitting the accused to record proceedings by his own stenographer, by its terms does not apply to grand jury proceedings.

<sup>24</sup> Codinha, *Grand Jury Procedure*, in MCLE-NELI, PROSECUTOR’S CRIMINAL INVESTIGATIVE TECHNIQUES 79, 81 (1980). *Compare* Fed. R. Crim. P. Rule 6(e)(1) (requiring record of “all proceedings” except grand jury deliberations or voting).

<sup>25</sup> *Commonwealth v. Carpenter*, 22 Mass. App. Ct. 911, 912–13 (1986) (prejudicial evidence presented off the record could unfairly influence grand jury, and potentially exculpatory evidence could be kept from defendant; in addition, the defendant inevitably is at a disadvantage in such a situation because neither he nor attorney is present at grand jury proceedings, and prosecutor (and possibly stenographer) are employees of district attorney and have interests adverse to the defendant’s; nonetheless, no dismissal where no prejudice). *See also* *Commonwealth v. Ianello*, 401 Mass. 197, 198–99 (1987) (improper for prosecutor to tell jury off the record prior to testimony of target defendant that he was “hot tempered and knows karate so be careful and don’t get him too mad. He’s about five feet tall but he’s all muscle”; dismissal not required, however, because integrity of grand jury not impaired).

<sup>26</sup> *Compare* Fed. R. Crim. P. 6(e)(1), requiring record of “all proceedings” except grand jury deliberations or voting.

<sup>27</sup> Grand jurors are sworn to secrecy. G.L. c. 277, § 5; Mass. R. Crim. P. 5(d). An exception exists for disclosures in the performance of official duties or by specific court direction. Grand jurors may not discuss their deliberations or votes, but this requirement is more relaxed after an indictment has come down. *Opinion of the Justices*, 373 Mass. 915, 919 (1977). The juror’s oath of secrecy does not protect against disclosure of the prosecutor’s misconduct. “[W]hen justice may be outraged or go unsatisfied unless such conduct before the grand jury be disclosed, the ban of secrecy may be removed by the court and the truth be ascertained.” *Attorney General v. Pelletier*, 240 Mass. 264 (1922). Nor does it prevent a grand juror, after the finding of an indictment, from testifying that a prosecution witness at trial testified differently before the grand jury. *Commonwealth v. Mead*, 12 Gray 167, 170–71 (1858).

against them and an indictment is returned and disclosed”;<sup>28</sup> second, “to shield grand jury proceedings from any outside influences having the potential to ‘distort their investigatory or accusatory functions.’”<sup>29</sup> Only persons performing “an official function in relation to the grand jury”<sup>30</sup> are bound by secrecy. Therefore nothing prevents a witness before a grand jury from disclosing his testimony.<sup>31</sup>

The Supreme Judicial Court has strictly construed the secrecy requirement.<sup>32</sup> Witnesses, prosecutors,<sup>33</sup> counsel for a witness,<sup>34</sup> and a stenographer<sup>35</sup> may normally be

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<sup>28</sup> *Commonwealth v. Pezzano*, 387 Mass. 69, 73 (1982) (quoting Opinion of the Justices, 373 Mass. 915, 919 (1977)); *In the Matter of Doe Grand Jury Investigation*, 415 Mass. 727, 729 (1993) (secrecy also serves to encourage free disclosure of information to the grand jury, protection of witnesses from intimidation, and enhancement of free grand jury deliberations).

<sup>29</sup> *Commonwealth v. Pezzano*, 387 Mass. 69, 73 (1982) (quoting Opinion of the Justices, 373 Mass. 915, 918 (1977)). *See* *WBZ-TV4 v. District Atty. for Suffolk District*, 408 Mass. 595, 600 (1990) (“Grand jury secrecy is designed to protect the grand jury from extraneous influences that have the potential to distort the investigatory or accusatory functions of the grand jury”). *See also* *Attorney General v. Pelletier*, 240 Mass. 264, 308 (1922) (secrecy avoids perjury and defense flight).

<sup>30</sup> Mass. R. Crim. P. 5(d).

<sup>31</sup> *Butterworth v. Smith*, 494 U.S. 624 (1990) (Florida prohibition on grand jury witness’s disclosure of his own testimony after the investigation has ended and the indictment has been returned violates first amendment); Opinion of the Justices, 373 Mass. 915, 920 (1977) (noting that while grand jurors are subject to a statutory oath of secrecy, “[e]ven contemporaneously, before indictment, no prohibition is laid on [grand-jury witnesses] as to discussing their testimony”).

<sup>32</sup> *See In the Matter of Doe Grand Jury Investigation*, 415 Mass. 727 (1993) (denying access by news media to video- and audio-tapes of lineup ordered by grand jury, even though both grand jury investigation and subsequent criminal proceedings were concluded, many of the details of the lineup had already been publicly revealed in investigative reports, and several directly interested individuals consented). *Compare* *Globe Newspaper Co. v. Police Comm’r*, 419 Mass. 852, 865–66 (1995) (upholding required disclosure of internal police documents regarding, inter alia, grand jury matters, because after prior public disclosures “there is no real remaining secrecy to protect.”). In *Commonwealth v. Pezzano*, 387 Mass. 69 (1982), the superior court judge had authorized a state police officer to be present in the grand jury room for security purposes while two prison inmates testified. The trooper had been sworn to uphold the secrecy of the proceedings, was dressed in civilian clothes, sat in the rear of the room, made no comments, and asked no questions of the witnesses. Although the trooper was the primary investigating officer in the matter and was a potential witness, the judge ruled that his presence was inherently necessary and without adverse influence on either the witness or the grand jurors. On review, the S.J.C. ruled that the trooper’s presence infringed the defendant’s right to grand jury secrecy, and that the indictments should have been dismissed.

<sup>33</sup> *Commonwealth v. Conefrey*, 410 Mass. 1 (1991) (victim witness assistant’s presence upheld, because member of district attorney’s office); *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 207–09 (1971) (no greater number than is “necessary”); *Commonwealth v. Favulli*, 352 Mass. 95, 106 (1967) (prosecutor has wide discretion as to the presence of additional assistant district attorneys in such reasonable number as he deems appropriate to the efficient presentation of evidence); *Commonwealth v. Schnackenberg*, 356 Mass. 65 (1969) (presence of assistants to prosecutor does not contravene rule excluding other witnesses or bystanders during examination of witnesses); Mass. R. Crim. P. 5(c).

<sup>34</sup> G.L. c. 277, § 14A. *See infra* § 5.8A(3).



present in the grand jury room. Mass. R. Crim. P. 5(c) to the contrary notwithstanding,<sup>36</sup> exceptions to the rule must rest “upon inherent necessity and not upon convenience.”<sup>37</sup> For example, the presence of a police officer as a guard might be justified where “absolutely necessary,” but not a guard who is also the chief investigating officer.<sup>38</sup>

The proper remedy for the presence of an unauthorized person before the grand jury is dismissal of the indictments, regardless of a defendant’s inability to demonstrate prejudice. This follows from the difficulty of showing prejudice before trial has occurred, and from the fundamental nature of the violation.<sup>39</sup>

## § 5.6 QUALITY AND QUANTITY OF EVIDENCE REQUIRED

The courts are reluctant to dismiss an indictment based on evidentiary irregularities before the grand jury. Generally, “a court will not review the competency

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<sup>35</sup> G.L. c. 221, § 86. *See also* Lebowitch, Petitioner, 235 Mass. 357, 362 (1920) (additional persons can attend when necessary to enable grand jury to ascertain the truth; examples include interpreter and attendant for sick witness).

<sup>36</sup> Adopted after the grand jury proceedings in *Pezzano*, Rule 5(c) permits the presence of persons who are “necessary or convenient” to the presentation of evidence. This was implicitly disapproved in *Pezzano*. The Court noted that Rule 5(c) departs in this respect from its model, Fed. R. Crim. P. 6(d), and cautioned that Rule 5(c) “should not be viewed as effecting any change” in the Court’s practices prior to the Rule’s adoption. *Commonwealth v. Pezzano*, 387 Mass. 69, 72 n.5 (1982).

<sup>37</sup> *Commonwealth v. Pezzano*, 387 Mass. 69, 74 (1982) (quoting Lebowitch, Petitioner, 235 Mass. 357, 363 (1920)).

<sup>38</sup> “[T]he ‘essential characteristics of the grand jury would be broken down if a police officer or other person who had investigated the evidence, interviewed the witnesses, and formulated a plan for prosecuting the accused should be permitted to be present during the hearing of testimony. . . . The attendance of a police officer would afford opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure by testimony, and for infringing the secrecy of the proceedings.’ ” *Commonwealth v. Pezzano*, 387 Mass. 72, 74–75 (1982) (quoting Opinion of the Justices, 232 Mass. 601, 604 (1919)). *But see* *Commonwealth v. Favulli*, 352 Mass. 95 (1967), discussed in *Pezzano, supra*. 387 Mass. at 77–78 (Nolan J., dissenting). *Favulli* approved the presence of several prosecutors in the grand jury room, including one who had earlier interviewed a witness who testified in his presence. A decade later, the S.J.C. declared that prosecutors may not appear “in overbearing or intimidating numbers.” Opinion of the Justices, 373 Mass. 915, 919 (1977). *Compare* Mass. R. Crim. P. 5(c), permitting presence of those prosecutors who are “necessary or convenient to the presentation of evidence.” *See also* *Commonwealth v. Angiulo*, 415 Mass. 502, 511–13 (1993) (Rule 5(c) authorized presence and participation of Assistant U.S. Attorney whose presence was not shown to have compromised truth-seeking function of the grand jury, and who did not direct or control the grand jury presentation).

<sup>39</sup> *Commonwealth v. Pezzano*, 387 Mass. 72 (1982); *Commonwealth v. Harris*, 231 Mass. 584, 587 (1919). *Compare* *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (general requirement of prejudice except for discriminatorily selected grand jury or other violation of fundamental fairness); *United States v. Mechanik*, 475 U.S. 66 (1986) (conviction at trial rendered harmless any violation of grand jury secrecy from simultaneous testimony of two law enforcement officers).

or sufficiency of the evidence before a grand jury.”<sup>40</sup> But the Supreme Judicial Court has identified two extraordinary circumstances in which such judicial inquiry is appropriate: “(1) when it is unclear that sufficient evidence has been presented to the grand jury to support a finding of probable cause to believe that the defendant committed the offense charged in the indictment; and (2) when the defendant contends that the integrity of the grand jury proceedings somehow has been impaired.”<sup>41</sup>

Turning first to a claim attacking the integrity of the grand jury proceedings, the cases assign to the defendant a “heavy burden” of showing that particular practices in his or her case unduly “threatened the integrity of grand jury proceedings.”<sup>42</sup> To satisfy this burden, a defendant must demonstrate that evidence was given knowing that it was false or deceptive with the purpose of obtaining an indictment,<sup>43</sup> and that there was a “reasonable likelihood” that this evidence affected the grand jury’s decision to indict.<sup>44</sup> If the defendant satisfies this standard, he or she is entitled to a dismissal of the indictment, ordinarily without prejudice.<sup>45</sup> In rare instances, when counsel can satisfy the court that the abuse in

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<sup>40</sup> *Commonwealth v. Moran*, 453 Mass. 880, 883-84 (2009) (reinstating indictment for armed assault with intent to murder dismissed for insufficient evidence of intent to kill, citing the “time-honored rule that courts do not ordinarily ‘inquire into the competency or sufficiency of the evidence before the grand jury’”). . .

<sup>41</sup> *Commonwealth v. Mathews*, 450 Mass. 858, 873 (2008) (citing and quoting *Commonwealth v. Freeman*, 407 Mass. 279, 282 (1990)).

<sup>42</sup> *Commonwealth v. Shea*, 401 Mass. 731, 734 (1988). Compare *Commonwealth v. Kater*, 432 Mass. 404, 412 (2000) (holding burden not met) with *Commonwealth v. O’Dell*, 392 Mass. 445, 446 (1984) (holding burden met).

<sup>43</sup> *Commonwealth v. Mayfield*, 398 Mass. 615, 620 (1986) (noting negligence not enough; falsehood or deception must be known and such evidence intentionally offered to obtain an indictment); *Commonwealth v. Pond*, 24 Mass. App. Ct. 546, 550-51 (1987) (observing that to support a claim that the integrity of the grand jury proceedings has been impaired, the evidence (1) must have been given with knowledge that it was false or deceptive, (2) must have been given with the intention of obtaining an indictment, and (3) must probably have influenced the grand jury’s determination to hand up an indictment); *Commonwealth v. Edgerly*, 13 Mass. App. Ct. 562, 579 (1982) (requiring proof that “the prosecution solicited and used testimony that it knew to be false, of a set purpose to help to convict an accused, or, without itself soliciting such testimony, consciously used it or permitted it to be used to that end). See also *Commonwealth v. Graham*, 431 Mass. 282, 290 (2000); *Commonwealth v. Clarke*, 44 Mass. App. Ct. 502, 510 (1998).

<sup>44</sup> See, e.g., *Commonwealth v. Kelcourse* 404 Mass. 466, 468 (1989) (declining to dismiss where there was “minimal” likelihood that the complained of statement by the prosecutor affected the grand jury’s decision to indict for first degree murder); *Commonwealth v. Callagy*, 33 Mass. App. Ct. 85, 88–89 (1992) (quoting *Commonwealth v. Kelcourse*, 404 Mass. 466, 468 (1989) (defendant failed to show that witness’s reference to defendant’s silence after receiving *Miranda* warnings “probably influenced the grand jury’s determination to indict the defendant”)); *Commonwealth v. McGahee*, 393 Mass. 743, 747 (1985) (failure to present exculpatory evidence).

<sup>45</sup> See, e.g., *Commonwealth v. O’Dell*, 392 Mass. 445, 446 (1984) (upholding dismissal without prejudice of armed robbery indictment, holding the integrity of the grand jury proceedings was impaired by prosecutor’s offering defendant’s statement with exculpatory passages excised, seriously tainting the statement’s presentation to the grand jury).

question was particularly egregious, the indictment might be dismissed with prejudice.<sup>46</sup>

The second ground for dismissing an indictment is that the evidence presented to the grand jury was insufficient. To be sufficient, the evidence presented to the grand jury, viewed in the light most favorable to the prosecution,<sup>47</sup> must be such that the grand jurors could reasonably have concluded that there was probable cause to believe an offense was committed and that it was defendant who committed the offense.<sup>48</sup> In contrast to the “directed verdict” standard applied in district court bind-over and probable-cause hearings,<sup>49</sup> “probable cause to arrest” will support a grand jury indictment. A motion attacking an indictment on this ground (a *McCarthy* motion) should thus draw on case law on probable cause to search and arrest.<sup>50</sup> *McCarthy* motions are particularly likely to succeed if the prosecutor’s case before the grand jury was built on thin or circumstantial evidence.<sup>51</sup>

## § 5.6A HEARSAY

<sup>46</sup> See *id.* at 447 (1984) (implying that Commonwealth should be precluded from seeking to re-indict if its grand jury presentation was “willfully deceptive or otherwise egregious” but declining to impose that sanction for the conduct there in question).

<sup>47</sup> See *Commonwealth v. Rodriguez*, 75 Mass. App. Ct. 235, 238 (2009).

<sup>48</sup> See *Commonwealth v. McCarthy*, 385 Mass. 160, 163-64 (1982) (holding that indictment for assault with intent to rape should have been dismissed because the grand jury heard no evidence of the defendant’s participation in or presence at the crime).

<sup>49</sup> See *supra* § 2.1.

<sup>50</sup> A motion to dismiss on this ground permits counsel to test the prosecution view of the law as applied to the facts presented to the grand jury. See, e.g., *Commonwealth v. Caracciola*, 409 Mass. 648, 650 (1991) (“[T]he prosecutor must present sufficient evidence to establish the identity of the accused, and probable cause to arrest him or her. However, the requirement of sufficient evidence to establish [these two facts] is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding.”) (citing *Commonwealth v. O'Dell*, 392 Mass. 445, 451 (1984)); *Commonwealth v. De Cologero*, 19 Mass. App. Ct. 956, 958 (1985) (“although the links between [the defendant and the crime], as presented to the grand jury, would not warrant a finding of guilty, probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction”). See also, *Commonwealth v. Jones*, 77 Mass. App. Ct. 53, 59 (2010); Reporter’s Notes, Mass R Crim P 3(g)(2).

<sup>51</sup> See, e.g., *Commonwealth v. Lopez*, 80 Mass. App. Ct. 390, 396-97, *rev. denied*, 461 Mass. 1103 (2011) (upholding dismissal of a joint-venture first-degree felony-murder indictment arising from an unarmed robbery because the grand jury heard no evidence suggesting defendant’s pre-robbery knowledge that the co-defendant principal planned either to rob or punch the victim, much less in a life-threatening manner); *Commonwealth v. Reveron*, 75 Mass. App. Ct. 354, 358-60, *rev. denied*, 450 Mass. 1107 (2009) (upholding dismissal of joint-venture assault, robbery, and felony-murder indictments because insufficient evidence that defendant, who was not present, knew his co-defendant principal was armed and planned to rob the victim); *Commonwealth v. Tam*, 49 Mass. App. Ct. 31 (2000) (three hours after armed assault by four Asian males and one female, and apprehension of one of the males, three Asian males and one female came to police station in same car driven by assailants, to bail out arrestee. All the males were the same approximate height as the assailants; only one of them had visible injuries. As to the other two, evidence was equally consistent with noncriminal purpose, and insufficient to identify them as participants. Court held that evidence before grand jury was insufficient to identify defendants as being among perpetrators of crime).

Historically grand juries were not bound by the rules of evidence and could indict even on the basis of the jurors' personal knowledge. Mass. R. Crim. P. 4(c) permits the use of hearsay before the grand jury:

An indictment shall not be dismissed on the grounds that the evidence presented before the grand jury consisted in whole or in part of the record from the defendant's probable cause hearing or that other hearsay evidence was presented before the grand jury.

While frequently expressing disapproval of the practice,<sup>52</sup> the Supreme Judicial Court has followed the lead of the U.S. Supreme Court<sup>53</sup> in upholding indictments based on hearsay evidence.<sup>54</sup> Although the Supreme Judicial Court has declared that reliance on hearsay might require dismissal of the indictment in "extraordinary circumstances,"<sup>55</sup> it has never on that basis alone required dismissal. Such circumstances might be present, however, if:

1. The particular hearsay on which the indictment rests is of the sort that would not support the issuance of a warrant. For example, an indictment based on an informant's hearsay tip might be vulnerable to a *McCarthy* motion if that hearsay would not satisfy both prongs of the *Aguilar-Spinelli* test of probable cause.<sup>56</sup> This seems most likely to occur in drug cases.

2. Prosecutorial misconduct impaired the integrity of the grand jury.<sup>57</sup> For example, if the prosecutor failed to bring out the hearsay nature of the testimony in

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<sup>52</sup> See *Commonwealth v. St. Pierre*, 377 Mass. 650, 656 (1979) ("sound policy dictates a preference for the use of direct testimony before grand juries"). See also *Commonwealth v. Kater*, 432 Mass. 404, 412 (2000); *Commonwealth v. O'Dell*, 392 Mass. 445, 451 n.1 (1984); *Commonwealth v. Saya*, 14 Mass. App. Ct. 509, 514 (1982); *Commonwealth v. Lincoln*, 368 Mass. 281, 285 n.2 (1975).

<sup>53</sup> *Costello v. United States*, 350 U.S. 359 (1956) (indictment not invalid even if based solely on hearsay). See also *United States v. Dionisio*, 410 U.S. 1, 15 (1973) (grand jury may indict "on tips, rumors . . . or their own personal knowledge").

<sup>54</sup> *Commonwealth v. Bishop*, 416 Mass. 169, 173–74 (1993) (reliance on sexual abuse victim's videotaped testimony to obtain an indictment is acceptable, though disfavored); *Commonwealth v. Spence*, 38 Mass. App. Ct. 88, 91 (1995) (accord); *Commonwealth v. St. Pierre*, 377 Mass. 650, 655 (1979) (dismissal of indictment unjustified where grand jurors received hearsay exclusively, even when better testimony was available); *Commonwealth v. Freiberg*, 405 Mass. 282, 301 (1989) (following *St. Pierre*); *Commonwealth v. Robinson*, 373 Mass. 591, 592 (1977) (principle "well established . . . that the adequacy of the evidence presented to the grand jury cannot be tested by a motion to dismiss"; trial court's resort to interlocutory report of the issue disapproved). See also *Commonwealth v. Riley*, 73 Mass. App. Ct. 721, 727 (2009) (An indictment may be based wholly on hearsay, and the weight and credibility of the evidence is wholly for the grand jury).

<sup>55</sup> *Commonwealth v. St. Pierre*, 377 Mass. 650, 656 (1979) (quoting *Commonwealth v. Comins*, 371 Mass. 222, 224 (1976) (In the absence of extraordinary circumstances, fact that indictments were issued solely on the basis of hearsay evidence was not in itself a ground for their dismissal.)). But see *Commonwealth v. Leitzsey*, 421 Mass. 694, 697–98 (1996) (permissible for prosecutor to present large part of evidence by reading prior statements of witnesses who, under oath, validated and were given opportunity to change their statements).

<sup>56</sup> See *infra* § 17.5A(2). See *Commonwealth v. Champagne*, 399 Mass. 80, 82–83 & n.4 (1987) (grand jury evidence against defendant "unquestionably thin" but sufficient; dictum that grand jury testimony should establish hearsay informant's reliability).

<sup>57</sup> *Commonwealth v. St. Pierre*, 377 Mass. 650, 655–61 (1979).

order to deceive the grand jurors as to “the shoddy merchandise they were getting,”<sup>58</sup> dismissal of the indictment might be warranted.

3. Hearsay was presented to the grand jury as part of a deliberate strategy to subvert defense discovery of the prosecution’s case.<sup>59</sup>

### § 5.6B USE OF LEADING QUESTIONS

Although federal law is probably to the contrary,<sup>60</sup> in Massachusetts the use of leading questions to present crucial testimony before the grand jury might justify dismissal of the indictment.<sup>61</sup>

### § 5.6C DUTY TO PRESENT EXCULPATORY EVIDENCE

Because a target has neither a right to testify before the grand jury nor to have the grand jury hear any particular evidence,<sup>62</sup> the target is completely dependent on the prosecutor to inform the grand jury of exculpatory evidence. Although a prosecutor is not required to present “all possibly exculpatory evidence” to a grand jury, he or she must alert the grand jurors to the existence of “important exculpatory evidence.” In that category, the Supreme Judicial Court includes “exculpatory evidence that would greatly undermine the credibility of an important witness, [other] evidence likely to affect the grand jury’s decision,” as well as evidence the withholding of which would cause the

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<sup>58</sup> *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972) (approved in *Commonwealth v. St. Pierre*, 377 Mass. 650, 655 (1979)). In *Estepa*, the grand jury was led to believe that it was presented with eye-witness testimony, but in actuality the testimony was hearsay. The Second Circuit cases also mandate dismissal if the case involves “a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted.” *Estepa, supra*, 471 F.2d at 1137. Although most federal courts discourage the use of hearsay when avoidable, the Second Circuit rules allowing dismissal are exceptional. 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 111 (2010).

<sup>59</sup> *Commonwealth v. St. Pierre*, 377 Mass. 650, 660–61 (1979). Other strategic elements mentioned by the S.J.C. were avoiding a probable-cause hearing and refraining from memorializing the statements of important witnesses.

<sup>60</sup> *United States v. Brown*, 872 F.2d 385, 387–88 (11th Cir. 1989) (upholding indictment based on hearsay testimony elicited by leading questions); *Costello v. United States*, 350 U.S. 359 (1956) (upholding facially valid indictment despite “questionable” prosecutorial practices not amounting to violation of due process).

<sup>61</sup> *See Commonwealth v. Wolcott*, Nos. 92115–92116, Memorandum of Decision and Order on Defendant’s Motion to Dismiss Grand Jury Indictments (Superior Court for Plymouth County, 1993) (dismissing without prejudice indictment obtained by 95 percent leading questions, in effect making ADA a “witness”; leading questions are permissible to “stimulate an accurate memory” but if too suggestive or numerous might “implant a false one”) (citing *Nessralla v. Commonwealth*, S.J.C. No. 83-419 (1984) (Wilkins, J.), a 1984 single-justice opinion, which criticized the practice for interfering with the grand juror’s ability to assess witness credibility and the strength of the case for indictment; according to Justice Wilkins, “[t]he practice offers up an appellate issue to each defendant so indicted” (at 2)). *But see Commonwealth v. Martinez*, 420 Mass. 622, 625–26 (1995) (dismissal would require showing of prejudice and of egregious prosecutorial misconduct, such as conscious use of leading questions to avoid the disclosure of exculpatory evidence).

<sup>62</sup> *In Re Grand Jury Subpoena*, 447 Mass. 88, 93 (2006) (citing *Commonwealth v. Gibson*, 368 Mass. 518, 522–25 (1975); *Commonwealth v. Bobilin*, 25 Mass. App. Ct. 410, 413 (1983); *see infra* § 5.8A(1)(a)).

presentation to be seriously tainted.”<sup>63</sup> However, unless the defendant demonstrates that the evidence withheld would have distorted or “greatly undermine[d]” the credibility of the evidence presented to the grand jury,<sup>64</sup> such that the withheld exculpatory evidence would likely have affected the grand jury’s decision to indict,<sup>65</sup> the indictment will stand.<sup>66</sup>

Courts sometimes say that the defendant must show that the prosecutor purposely withheld exculpatory evidence in order to obtain an indictment,<sup>67</sup> but other cases indicate that even negligent<sup>68</sup> omissions might require dismissal. Even though

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<sup>63</sup> *Commonwealth v. Clemmey*, 447 Mass. 121, 130 (2006) (citing *O’Dell* as an apparent example of the last of the three types of “important exculpatory evidence”). The SJC has been reluctant to dismiss on this ground. *See Commonwealth v. Tanso*, 411 Mass. 640, 655 (1992) (where grand jurors were informed that witness was testifying in exchange for immunity, no need to inform them of his allegedly prior inconsistent statement or of contradictory statement by another witness); *Commonwealth v. Connor*, 392 Mass. 838, 855 (1984) (dismissal not warranted where, through questioning of key witness, prosecutor “minimally fulfilled his duty” to make grand jury aware of witness’s prior inconsistent testimony); *United States v. Ciambrone*, 601 F.2d 616, 623–25 (2d Cir. 1979) (in interest of justice, prosecutor should make grand jury aware of substantial evidence negating guilt). *Compare* *United States v. Williams*, 504 U.S. 36 (1992) (federal courts lack inherent “supervisory power” to require prosecutors to reveal the existence of substantial exculpatory evidence to the grand jury).

<sup>64</sup> *Commonwealth v. McGahee*, 393 Mass. 743, 746–47 (1985). *See, e.g., Commonwealth v. Roman*, 414 Mass. 642, 648–49 (1993) (failure to present defendant’s denial to officer did not greatly undermine the validity of the evidence presented); *Commonwealth v. Trowbridge*, 419 Mass. 750 (1995) (same *re*: evidence that other courts had dismissed as unfounded estranged wife’s previous sexual misconduct allegations).

<sup>65</sup> *Commonwealth v. McGahee*, 393 Mass. 743, 746–47 (1985); *Commonwealth v. Ali*, 43 Mass. App. Ct. 549, 556 (1997) (failure to disclose chief prosecution witness’s initial denial to police of any knowledge of the crime, and her apparent intoxication at one police interview, not likely to have affected grand jury decision); *Commonwealth v. Connor*, 392 Mass. 838, 854 (1984). Courts have declined to find prejudice on the ground that the trial jury, having heard the exculpatory evidence, found guilt beyond a reasonable doubt; therefore, disclosure “to a grand jury seeking only probable cause would have had a negligible effect on their decision to indict.” *Commonwealth v. LaVelle*, 414 Mass. 146, 151 n.2 (1993), *quoted in* *Commonwealth v. Garrity*, 43 Mass. App. Ct. 349, 353 (1996); *Ali, supra*, 43 Mass. App. Ct. at 557. This reasoning makes postconviction attack very difficult, and illustrates the importance of moving to dismiss the indictment before trial. *See supra* § 5.1. *Compare* ABA Model Grand Jury Act § 101 (court discretion to dismiss for suppression of evidence tending to negate a material element of the crime; higher standard for dismissal of evidence bearing upon a possible affirmative defense).

<sup>66</sup> If exculpatory evidence is withheld from the grand jury but disclosed during the trial of the indictment and the defendant is convicted, the defendant has no claim of prejudicial error. *See Commonwealth v. Dyou*s, 436 Mass. 719, 724 (2002) (reasoning that the grand jury’s determination of probable cause would not have been affected by evidence that failed to raise a reasonable doubt with the petit jury).

<sup>67</sup> *Commonwealth v. Daye*, 435 Mass. 463, 467 (2001) (defendant “must show that the deceptive evidence was given to the grand jury knowingly and for the purpose of obtaining the indictment;” no indication that prosecutor knew that witness had used cocaine on night of incident); *Commonwealth v. Bobilin*, 25 Mass. App. Ct. 410 (1988) (no indication that prosecutor consciously tried to suppress exculpatory evidence).

<sup>68</sup> *Commonwealth v. Petras*, 26 Mass. App. Ct. 483, 489–89 (1988) (negligent failure to disclose might, in some circumstances, “rise to a level that cannot be condoned”), *rev. denied*, 403 Mass. 1105 (1988), *cert. denied*, 57 U.S.L.W. 3620 (March 20, 1989) (88-1270).

motions to dismiss for failure to disclose exculpatory evidence to the grand jury are infrequently granted and even less frequently with prejudice, in appropriate circumstances they are worthy of serious consideration.

For example, in *Commonwealth v. O'Dell*<sup>69</sup> the Supreme Judicial Court affirmed dismissal of an indictment without prejudice where the grand jury was presented a statement attributed to the defendant without being told that the prosecutor had excised an exculpatory portion. The Court held that the excision distorted and seriously tainted the presentation to the grand jury, impairing the integrity of the proceedings. But in most reported instances of failure to present exculpatory evidence the courts have upheld the indictment.<sup>70</sup> Despite the courts' reluctance to grant *O'Dell* motions, some judges are very responsive if significant exculpatory evidence was not presented. Even a dismissal benefits the defendant because in subsequent presentations (which should be before a new grand jury), the prosecutor will have to include the previously omitted evidence and perhaps more. This might raise doubts in the grand jury, or at least give the defendant access to more exculpatory evidence.

An *O'Dell* motion can also benefit the defendant by creating opportunities for otherwise unavailable discovery, for example, in cases initiated by direct indictment. Once counsel makes a preliminary showing that some exculpatory evidence was not presented, counsel may request an evidentiary hearing to determine what other evidence might have been withheld. At that hearing counsel might, for example, examine the investigating officers to discover the existence and observations of witnesses otherwise unknown or unavailable to the defense.

## § 5.6D PERJURED TESTIMONY

The presentation of perjured testimony to a grand jury calls for the “prophylactic measure” of dismissing the indictment only when the testimony impairs the integrity of the grand jury process.<sup>71</sup> To win dismissal the defendant must show that the false testimony: (1) was given either with knowledge that it was false or deceptive

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<sup>69</sup> 392 Mass. 445, 447 (1984).

<sup>70</sup> See, e.g., *Commonwealth v. Dyous*, 436 Mass. 719, 722 (2002) (no duty to present witness's prior statement which differed from, but did not contradict, his grand jury testimony); *Commonwealth v. Drumgold*, 423 Mass. 230, 239 (1996) (distinguishing *O'Dell* where presentation of defendant's edited statement had no tendency to convert exculpatory statement into inculpatory one); *Commonwealth v. Donnelly*, 33 Mass. App. Ct. 189 (1992) (no duty to present conflicting evidence from different witnesses contrary to Commonwealth theory; resolution of conflicting testimony is better left to petit jury); *Commonwealth v. Pace*, 22 Mass. App. Ct. 916 (1986) (withholding victim's photographic identification of someone other than defendant unlikely to affect grand jury's decision to indict, which was based on “compelling circumstances”); *Commonwealth v. McGahee*, 393 Mass. 743, 746–47 (1985) (unlikely that disclosing eyewitness's failure to identify defendant at the probable-cause hearing would have affected the grand jury's decision to indict because other identification testimony sufficiently supported indictment); *Commonwealth v. McGuire*, 19 Mass. App. Ct. 1013 (1985) (unlikely that disclosing victim's failure to identify defendant at lineup would have affected decision to indict because testimony as to earlier identification procedure sufficiently supported indictment).

<sup>71</sup> *Commonwealth v. Mayfield*, 398 Mass. 615, 620 (1986). “[I]f the Commonwealth or one of its agents knowingly uses false testimony to procure an indictment, the indictment should be dismissed, and a prosecutor who learns of the use of the knowingly false, material evidence has a duty to come forward.” *Id.* See also *Commonwealth v. Salman*, 387 Mass. 160, 166-67 (1982).

or in reckless disregard of the truth<sup>72</sup>; (2) was material to the question of probable cause and probably influenced the grand jury’s decision to indict;<sup>73</sup> and (3) was presented for the purpose of obtaining an indictment.<sup>74</sup> Dismissal is not appropriate if both the witness and the prosecutor acted in good faith<sup>75</sup> or were negligent only as to the testimony’s falsity.<sup>76</sup> In appropriate circumstances the Commonwealth’s failure to cooperate with defense efforts to investigate apparent grand jury perjury might warrant prophylactic dismissal of the suspect indictments.<sup>77</sup>

### § 5.6E ILLEGALLY SEIZED EVIDENCE

From the logic of the various federal constitutional exclusionary rules it would seem to follow that no indictment could stand if based on evidence obtained in violation of protections under the Fourth, Fifth, Sixth, or Fourteenth Amendments.<sup>78</sup> Nor would any grand jury witness have to answer questions based on such evidence.

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<sup>72</sup> Commonwealth v. Ortiz, 53 Mass. App. Ct. 168, 174 (2001) (no dismissal where there was no evidence that the prosecutor knew or recklessly disregarded the possibility that identification testimony was false).

<sup>73</sup> Commonwealth v. Drumgold, 423 Mass. 230, 235, 238 (1996) (after hearing accurate version of eyewitness evidence, trial jury’s finding of guilt beyond reasonable doubt suggests that grand jury’s decision to indict would not have been different if evidence had not been misstated). *But see* Commonwealth v. Mayfield, 398 Mass. 615, 631, 638 (1986) (disputing requirement of actual prejudice) (Liacos, J., dissenting).

<sup>74</sup> Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986). *See* Commonwealth v. Waters, 410 Mass. 224, 232–33 (1991) (no dismissal where perjured police testimony given not to support the prosecution, but an “extortion scheme”); Commonwealth v. Bongarzone, 390 Mass. 326, 338 (1983) (no dismissal where police officer’s knowingly false grand jury testimony was material, but exculpatory).

<sup>75</sup> Commonwealth v. Martino, 412 Mass. 267, 278–79 (1992) (no showing that false statement intentionally or recklessly made); Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989) (“Inaccurate testimony given in good faith does not by itself require dismissal”); Commonwealth v. Reddington, 395 Mass. 315, 320 (1985) (police officer’s inaccurate grand jury testimony given in good faith).

<sup>76</sup> Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986). The Court has not determined whether an indictment based on false testimony should be dismissed if the Commonwealth had no knowledge of its falsity at the time the testimony was presented. *See* Commonwealth v. Salman, 387 Mass. 160, 166 n.4 (1982). But if the prosecutor learns that false testimony was knowingly used to obtain an indictment, he must so advise the court and request a dismissal. *Salman, supra*, 387 Mass. at 167. *See also* Mass. Rules of Prof. Conduct, S.J.C. Rule 3:07, Rule 3.3(a)(4) (“If a lawyer has offered, or the lawyer’s client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures”).

<sup>77</sup> Commonwealth v. Salman, 387 Mass. 160, 167–68 (1982). *See also* Commonwealth v. Lewin, Nos. 069443-48, Memorandum and Order on Commonwealth’s Petition for Rehearing March 29, 1989, 27–30 (Superior Court 1989) (pattern of “pervasive, egregious, deliberate and intentional” misconduct, including police perjury and the failure to disclose exculpatory evidence, requires dismissal of indictments).

<sup>78</sup> *See* ABA, Model Grand Jury Act § 100 (barring presentation to grand jury of evidence obtained in violation of target’s constitutional rights) (approved Jan. 1982). The Act appears in Arenella, *Reforming the State Grand Jury System; A Model Grand Jury Act*, 13 *RUTGERS L.J.* 15 (1981).



But in *United States v. Calandra*<sup>79</sup> the Supreme Court indicated otherwise. Although *Calandra*'s holding was narrow and involved only the disfavored Fourth Amendment exclusionary rule, it has also been accepted in the Commonwealth<sup>80</sup> and applied to most other illegally obtained evidence.<sup>81</sup>

However, a different rule applies to evidence obtained by illegal electronic surveillance. Statutes applicable to the federal system have been interpreted to bar a grand jury from questioning any witness based on illegal electronic surveillance of that witness.<sup>82</sup> The same is arguably true under Massachusetts law on both statutory and constitutional grounds. G.L. c. 272, § 99, regulating electronic surveillance, punishes the willful use or disclosure of any wire or oral communication by any person who knows that the communication has been intercepted without legal authority,<sup>83</sup> and permits a “defendant in a criminal trial” to suppress the fruits of any illegal surveillance.<sup>84</sup> Although the statute does not specifically say whether such fruits may either be presented in evidence to the grand jury or used as the basis of questions in the grand jury, neither practice should be permissible. If willfully and knowingly done, either practice would constitute a crime. Also, article 14 of the Massachusetts Constitution Declaration of Rights may bar such use. Not only has the Supreme Judicial Court construed article 14 as giving broader protection than the Fourth Amendment,<sup>85</sup> it has also announced that “electronic eavesdropping in and about a private home” requires the extreme deterrent of “exclusion of such evidence for all purposes.”<sup>86</sup> If, as

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<sup>79</sup> 414 U.S. 338 (1974) (witness may not refuse to answer grand jury questions that are derived from illegally seized evidence).

<sup>80</sup> *Commonwealth v. Santaniello*, 369 Mass. 606, 608 (1976) (assuming that grand jury questions were product of unconstitutional search, immunized witness obliged to answer; *Calandra* result adopted under Commonwealth's constitution).

<sup>81</sup> See, e.g., *Commonwealth v. Frieberg*, 405 Mass. 282, 301 (1989) (Fifth Amendment *Miranda* violation). Even a coerced confession has been ruled admissible before a grand jury. In re *Weir*, 495 F.2d 879 (9th Cir. 1974) (noting that this avenue of attack was foreclosed by *Calandra*) *cert. denied* 419 U.S. 1038 (1974).

<sup>82</sup> 18 U.S.C. §§ 2515, 2518, *construed in* *Gelbard v. United States* 408 U.S. 41 (1972); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987); In re *Grand Jury Proceedings (Hill)*, 786 F.2d 3, 6–7 (1st Cir. 1986).

<sup>83</sup> G.L. c. 272, § 99(C)(3).

<sup>84</sup> G.L. c. 272, § 99(P).

<sup>85</sup> See *Commonwealth v. Upton*, 394 Mass. 363, 371–75 (1985) (rejecting Supreme Court's “totality of circumstances” test of probable cause in favor of two-prong *Aguilar-Spinelli* test). Compare *Commonwealth v. Blood*, 400 Mass. 61, 68–71 (1987) (provision of G.L. c. 272, § 99, rendering admissible at trial the evidentiary fruits of warrantless police electronic surveillance of private home with the consent of one party to the conversation, violates art. 14 of state constitution) with *United States v. White*, 401 U.S. 745, 751 (1971) (warrantless electronic surveillance of conversations with the consent of only one of the parties is not unreasonable search or seizure).

<sup>86</sup> *Commonwealth v. Fini*, 403 Mass. 567, 573 (1988) (“half measures of deterrence” gained by exclusion of electronic surveillance evidence from government's case-in-chief not adequate; exclusion of such evidence “for all purposes”—including impeachment of defendant's testimony at trial—“will act as a still further deterrent”). But see *Commonwealth v. Crowley*, 43 Mass. App. Ct. 919 (1997) (citing *Commonwealth v. Santoro*, 406 Mass. 421, 423 (1990) (statute merely gives defendant standing to seek discretionary suppression; state action required)). Compare *United States v. Havens*, 446 U.S. 620, 626–27 (1980) (evidence obtained as result of Fourth Amendment violation admissible to impeach the defendant's testimony).

the Supreme Judicial Court held, such evidence may not even be used to impeach the defendant's trial testimony on collateral issues,<sup>87</sup> it should not be usable at the more crucial stage of the grand jury.

## § 5.6F DEFENDANT'S CRIMINAL RECORD

The prosecutor's intentional presentation of defendant's criminal record or other bad acts<sup>88</sup> to the grand jury is "undesirable" and might, under proper circumstances, require dismissal of the indictment.<sup>89</sup>

## § 5.7 SUBPOENA POWER

### § 5.7A SCOPE OF POWER IN GENERAL

Grand jury subpoenas ("summonses"<sup>90</sup>) may require the recipient to appear and testify (subpoena ad testificandum), to deliver tangible evidence such as documents (subpoena duces tecum), to appear in a lineup, or to give exemplars of his blood, handwriting, voice, and so on. Subject to recognized constitutional law, common law, or statutory privileges, the grand jury has broad power to compel testimony relevant to its proper accusatory or investigative purpose. "The public has a right to every man's evidence."<sup>91</sup> However, the court has supervisory power to prevent "oppressive,

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<sup>87</sup> Commonwealth v. Fini, 403 Mass. 567, 573 (1988).

<sup>88</sup> See Commonwealth v. Clemmey, 447 Mass. 121, 133 (2006) (presentation of evidence that defendant engaged in other, uncharged environmental violations assumably improper in seeking indictment for violations of Wetlands Protection Act, but the presence of "adequate direct evidence" that defendant committed the acts for which he was indicted "rendered insignificant the arguably improper information" about his other misconduct.)

<sup>89</sup> See Commonwealth v. Vinnie, 428 Mass. 161, 174–75 (1998) (prosecutor condemned for intentionally presenting evidence of defendant's prior criminal conduct that might have led grand jury to indict on the basis of propensity, but cumulative evidence of guilt was powerful, and defendant failed to show that this evidence "probably made a difference" in decision to indict); Commonwealth v. Thompson, 427 Mass. 729, 738 (1998) (evidence of defendant's past criminal conduct was relevant to indictment as habitual criminal); Commonwealth v. Freeman, 407 Mass. 279 (1990) (indictments upheld despite police witness's reference to defendant's arrest on unrelated charge, where officer's statement was in response to grand juror's question, was not false or deceptive, was not shown to be made with intention to obtain indictment, and where other witness testimony supported the indictment); Commonwealth v. Ali, 43 Mass. App. Ct. 549, 558 (1997) (same); Commonwealth v. Saya, 14 Mass. App. Ct. 509, 515–17 (1982) (although presenting evidence of defendant's criminal record is undesirable and might risk serious prejudice, no threat to grand jury's integrity where record was relevant to credibility of recanting witness, and where, at second hearing several weeks later, other incriminating evidence fully supported indictment). See also Commonwealth v. Allison, 434 Mass. 670, 697 (2001) (appearance of defendant in handcuffs and shackles before grand jury was "highly improper").

<sup>90</sup> Under Mass. R. Crim. P. 2(b)(17) and 17(a), in "criminal proceedings" the term *summons* has replaced *subpoena*. Presumably this usage also applies to grand jury process, but here we follow the courts in continuing to speak of grand jury "subpoenas."

<sup>91</sup> United States v. Mandujano, 425 U.S. 564, 572 (1976); In re Pappas, 358 Mass. 604, 607 (1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 632 (1972) (rejecting newsreporter's privilege).

unnecessary, irrelevant and other improper inquiry and investigation.”<sup>92</sup> The witness bears the burden to establish that the grand jury inquiry is improper or oppressive.<sup>93</sup>

Although technically a witness has a duty to testify until he appears and invokes a valid privilege,<sup>94</sup> it is improper for the prosecutor to subpoena a witness who he knows will claim a privilege, merely for the purpose of prejudicing the grand jurors against him.<sup>95</sup> An exception to this impropriety exists in the case where the prosecutor intends to seek authority to immunize the witness’s testimony, which necessitates a prior claim of the Fifth Amendment privilege before the grand jury.<sup>96</sup>

**§ 5.7B GROUNDS FOR RESISTING GRAND JURY PROCESS:  
IN GENERAL**<sup>97</sup>

The court has broad discretion to quash or modify a grand jury subpoena.<sup>98</sup> Courts are reluctant to interfere in the grand jury process<sup>99</sup> and generally will choose the least intrusive remedy to correct abuses, but courts will quash a subpoena in

<sup>92</sup> In re Pappas, 358 Mass. 604, 612 (1971). *See also* Mass. R. Crim. P. 17(a)(2) (judicial power to quash if compliance would be “unreasonable or oppressive”).

<sup>93</sup> In re Pappas, 358 Mass. 604, 614 (1971). In federal proceedings, some courts have held that in order to enforce a subpoena the government should be required to demonstrate (perhaps with disclosure to the witness) that each item sought “is relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose.” In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 93 (3d Cir. 1973); In re Soto-Davila, 96 F.R.D. 409 (D.P.R. 1982). In In re Pantojas, 628 F.2d 701, 704–05 (1st Cir. 1980), the First Circuit rejected the *Schofield* rule, but stated that “[d]istrict courts should . . . feel free to require such showing by the government as a means of assuring themselves that grand juries are not overreaching, or simply as a means of removing the issue of sufficiency of nexus from dispute.”

<sup>94</sup> United States v. Mandujano, 425 U.S. 564, 574–75 (1976).

<sup>95</sup> Dismissal of the indictment is proper if the prosecutor has “so unfairly exploited the matter as to constitute prosecutorial misconduct,” or if the defendant was prejudiced. Commonwealth v. Lang, 24 Mass. App. Ct. 253, 257–58 (1987) (citing Commonwealth v. Kane, 388 Mass. 128, 138 (1983) (no prosecutorial misconduct where, inter alia, prosecutor did not know in advance that witness would claim privilege)). “[W]here there is doubt what the witness will do, it is sound practice to put the substantive questions to him under oath in the absence of the [trial] jury” to determine whether he should be called. Commonwealth v. Martin, 372 Mass. 412, 421 n.17 (1977). *Cf.* Commonwealth v. Burke, 20 Mass. App. Ct. 489, 510 (1985) (despite prior notice to prosecutor of target’s wife’s intention to claim testimonial privileges, no evidence that her appearance was deliberately designed to influence the grand jury against target); Commonwealth v. Fazio, 375 Mass. 451 (1978) (where alleged victim claimed privilege in front of trial jury, no improper prosecutorial purpose or prejudice to defendant). *See also* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION 3–3.6(e)(1992 updated Aug. 2010) (target who announces intention to exercise privilege against self-incrimination should not be called as witness unless prosecutor intends to seek grant of immunity).

<sup>96</sup> *See infra* § 33.7.

<sup>97</sup> This section relies significantly on A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 163 (5th ed. 1988), and Rodis, *A Lawyer’s Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123, 130–39 (1978).

<sup>98</sup> In re Pappas, 358 Mass. 604, 613 (1971).

<sup>99</sup> United States v. Dionisio, 410 U.S. 1, 16–18 (1973).

extreme circumstances.<sup>100</sup> Counsel should move to quash a subpoena ad testificandum<sup>101</sup> if it is used abusively for such purposes as repeatedly harassing a defendant or witness<sup>102</sup> or gathering evidence for use at trial of a pending civil case<sup>103</sup> or criminal charge.<sup>104</sup> A subpoena requiring the production of documents or tangible items or submission to investigatory procedures may be quashed or modified on the additional grounds that: (1) the subpoena seeks production of plainly irrelevant material or is unreasonably overbroad, indefinite, or oppressive<sup>105</sup> (such subpoenas may violate

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<sup>100</sup> *Compare* In re Grand Jury Subpoenas, April 1978 at Baltimore, 581 F.2d 1103, 1108–10 (4th Cir. 1978) (although quashing subpoena might be appropriate if it were the only means of protecting petitioner, less drastic remedy of limiting disclosure was adequate) *with* In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 767 F.2d 26, 29–30 (2d Cir. 1985) (quashing grand jury subpoena for same materials subpoenaed earlier for pending trial).

<sup>101</sup> Neither federal nor Massachusetts rules of court expressly authorize quashing of a subpoena ad testificandum. *Compare* Mass. R. Crim. P. 17(a)(2). Federal courts are split on whether the authority to quash such subpoenas exists. *See* 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 274 (2010) (stating “[a]lthough courts have granted motions to quash, the better practice in ordinary cases is to require the witness to appear and claim any privilege or immunity he may have”).

<sup>102</sup> *United States v. Dionisio*, 410 U.S. 1, 12 (1973) (dictum); *United States v. American Honda Motor Co.*, 273 F. Supp. 810 (N.D. Ill. 1967) (successive grand jury inquiries and indictments for alleged separate conspiracies arising out of same transactions constitute harassment in violation of due process). *But cf.* In re Borden Co., 75 F. Supp. 857 (ND. Ill. 1948) (upholding latest subpoena duces tecum in 10-year course of repeated, massively intrusive, and fruitless investigations).

<sup>103</sup> *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

<sup>104</sup> Massachusetts law reflects the federal rule prohibiting use of the grand jury for “the sole or dominant purpose” of preparing an already pending indictment for trial. *See* *Petition of the District Attorney for the Plymouth District*, 391 Mass. 723, 727 (1984) (improper to summons witness before grand jury solely for purpose of determining whether he would claim his Fifth Amendment privilege at pending criminal trial); *Commonwealth v. Liebman*, 379 Mass. 671, 677 (1980) (improper to use grand jury to prepare pending indictment for trial, but no prejudice to defendant shown); *United States v. Doe*, 455 F.2d 1270, 1273 (1st Cir. 1972) (where such abusive purpose not shown, federal grand jury in Massachusetts permitted to gather evidence relevant to pending California indictments, but protective disclosure measures ordered). *See also* *United States v. Flemmi*, 245 F.3d 24 (2001) (discussing criteria for judging propriety of prosecutor’s renewed use of grand jury after *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *In re Grand Jury Proceedings (Fernandez-Diamante)*, 814 F.2d 61, 71 (1st Cir. 1987); *United States v. Beasley*, 550 F.2d 261, 266 (5th Cir. 1977) (prosecutor may not use grand jury “for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery, although this may be an incidental benefit”); *United States v. Kovaleski*, 406 F. Supp. 267 (E.D. Mich. 1976). Suspect factors include identity of subject matter, of subpoenaed witnesses and documents, and of prosecutors.

The government’s commencement of a civil action to obtain evidence for a criminal prosecution might also require dismissal of the indictment. *Commonwealth v. Hogan*, 389 Mass. 450, 452 (1983) (citing *United States v. Kordel*, 397 U.S. 1, 11–12 (1970)).

<sup>105</sup> Subpoenas duces tecum are valid at common law if they describe the material required with reasonable particularity, if the material is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits. *Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 360–61 & n.8 (1977). *See also* Mass. R. Crim. P. 17(a)(2): “The court on motion may quash or modify [a summons to produce . . . books, papers, documents, or other objects] if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule

federal and state prohibitions on unreasonable searches and seizures);<sup>106</sup> (2) the subpoena seeks material protected by some common law, statutory, or constitutional<sup>107</sup> privilege including, for example, the attorney-client and attorney work-product privileges or the privilege against self-incrimination;<sup>108</sup> or (3) the subpoena unjustifiably intrudes on First Amendment freedoms.<sup>109</sup>

### § 5.7C SUBPOENAS ORDERING LINEUPS, FINGERPRINTS, HANDWRITING, ETC.

In *United States v. Dionisio*<sup>110</sup> and *United States v. Mara*<sup>111</sup> the U.S. Supreme Court upheld the use of grand jury subpoenas to compel individuals to give voice and handwriting exemplars for identification purposes, free of any Fourth or Fifth Amendment constraints. A subpoena to appear, the Court has held, does not constitute a Fourth Amendment “seizure” and therefore need not be supported by any preliminary showing of “reasonableness.”<sup>112</sup> Nor does a defendant’s compelled compliance with such subpoenas infringe on Fifth Amendment protections because voice, handwriting, and other identifying physical characteristics are not “testimonial.”<sup>113</sup> However, a subpoena for this and other “real” evidence may still be subject to resistance on the following grounds: (1) if the witness has been neither arrested nor charged, the need for a government showing of legitimacy of purpose of the grand jury investigation and reasonable basis for imposing on the client (*see supra* § 5.7B);<sup>114</sup> (2) the subpoenaed

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14”; *United States v. R. Enterprises*, 498 U.S. 292 (1991), interpreting “unreasonable” in parallel federal Rule 17(c). “Summons” is defined in Mass. R. Crim. P. 2(b)(17). The S.J.C. has held that Rule 17(a)(2) empowers the court “in appropriate circumstances” to modify the subpoena to require that the costs of compliance be borne by the Commonwealth. In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 501 (1992).

<sup>106</sup> In re Grand Jury Subpoena (Allied Auto Sales), 606 F. Supp. 7, 11–12 (D.R.I. 1983) (three criteria of “reasonableness” are relevance of material to investigation, specification of materials with “reasonable particularity,” and reasonable time period covered by record subpoenas); *Finance Comm’r v. McGrath*, 343 Mass. 754, 761–68 (1962) (subpoena that is overbroad and unreasonable under Fourth and Fourteenth Amendments should be quashed or modified) (dictum); *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

<sup>107</sup> “Subpoenas which invade any constitutional rights of the investigated party are unreasonable.” Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 361 n.8 (1977); *Commonwealth v. Cote*, 407 Mass. 827, 833–36 (1990) (motion to suppress subpoenaed telephone records properly denied because no reasonable expectation of privacy under either the Fourth Amendment or art. 14).

<sup>108</sup> *See infra* §§ 5.7D, 33.1.

<sup>109</sup> *See infra* § 5.8A(4).

<sup>110</sup> 410 U.S. 1, 9–15 (1973). *See Commonwealth v. Crowe*, 21 Mass. App. Ct. 456, 472–73 (1986) (grand jury may legitimately require suspect to appear in lineup).

<sup>111</sup> 410 U.S. 19 (1973).

<sup>112</sup> *United States v. Dionisio*, 410 U.S. 1, 21–22 (1973).

<sup>113</sup> *See infra* § 33.1.

<sup>114</sup> *See Commonwealth v. Downey*, 407 Mass. 472, 475–477 (1990) (although defendant was not arrested or charged for incident under investigation, subpoenas for his blood, saliva, and hair were upheld where evidence before grand jury would have supported his arrest and indictment); *Commonwealth v. Doe*, 408 Mass. 764 (1990) (because lineup is especially intrusive and risks mistaken identification, grand jury order must be supported by showing of

physical evidence cannot be produced without implicitly communicating self-incriminating assertions (*see infra* §§ 13.4B, 33.1); (3) retrieval of the subpoenaed material, such as bodily fluids or foreign objects, amounts to an unreasonable search or seizure.<sup>115</sup>

Also, forcing the prosecutor to seek judicial enforcement of the grand jury request gives defense counsel a valuable opportunity to modify its terms. Frequently the prosecutor drafts the grand jury's order in detailed form calculated to benefit the state. For example, a lineup order might specify the number and size of the lines, who will select the other participants, whether and when the line may be photographed or videotaped, whether defense counsel or the police may be present when the witness communicates the lineup results, and so forth. Even though the court will likely enforce the grand jury's lineup order, many judges will agree to counsel's specific requests to make it fairer to the defendant by, for example, ordering a preliminary "blank" line, increasing the size of the line, permitting the procedure to be videotaped, or excluding the police from the subsequent witness interview.<sup>116</sup> Similarly, counsel may resist and then seek to modify grand jury orders to produce other kinds of evidence, such as voice or handwriting exemplars.

If the client is not charged with any crime as a result of the grand jury proceeding, counsel may move for return of the exemplars.<sup>117</sup>

#### **§ 5.7D SUBPOENAS DIRECTED TO DEFENSE ATTORNEYS OR THEIR AGENTS**<sup>118</sup>

Grand jury subpoenas to defense attorneys or other members of the defense team have become common in recent years.<sup>119</sup> Such subpoenas seek documents or testimony on matters purportedly outside the attorney-client and work-product privileges, such as the client's identity or fee arrangements.<sup>120</sup> Obviously, service and

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reasonable suspicion, but not probable cause; relying on common law and its supervisory power, the Court did not decide whether lineup order constitutes "seizure" under art. 14).

<sup>115</sup> *Commonwealth v. Trigonos*, 397 Mass. 633, 640 (1986) (Fourth Amendment right to showing of probable cause in adversary hearing to enforce postindictment order to obtain defendant's blood sample); *Winston v. Lee*, 470 U.S. 753, 758–66 (1985) (despite existence of probable cause, compelled surgery to remove bullet from suspect's body is unreasonably intrusive under fourth amendment); *Rochin v. California*, 342 U.S. 165, 174 (1952) (stomach pumping to recover evidence swallowed by defendant offends due process). *But see* *In the Matter of a Grand Jury Investigation*, 427 Mass. 221, 225–26 (1998) (upholding grand jury subpoena for blood samples despite absence of probable cause to believe that persons whose blood was sought committed crime under investigation; sufficient that there was reasonable basis to believe that samples would significantly aid grand jury investigation of circumstances in which there was good reason to believe a crime had been committed).

<sup>116</sup> *See, e.g., Commonwealth v. Doe*, 408 Mass. 764, 766 at n.1 (1990) (single justice deleted order permitting the use of force to compel defendant to participate in lineup).

<sup>117</sup> *In re Grand Jury Proceedings (Schofield)*, 486 F.2d. 85, 93–94 (3d Cir. 1973).

<sup>118</sup> The following discussion draws heavily on Hoffman, Kelston & Shaughnessy, *Attorney Subpoenas and Massachusetts Rule PF 15*, 74 MASS. L. REV. 95 (1989) [hereinafter Hoffman]. *See also infra* § 13.2A (prosecution subpoena of defense counsel).

<sup>119</sup> Most such subpoenas have been issued in the federal system, but the practice also exists in state grand juries. *See Hoffman, supra* note 118 at 104.

<sup>120</sup> *See, e.g., In re Grand Jury Matters*, 593 F. Supp. 103 (D.N.H. 1983) (unprivileged records of legal fees and expenses, and dates, times, places, and attendees of meetings between

enforcement of the subpoena can have devastating consequences for both clients and lawyers.<sup>121</sup> In response to a 1984 MBA report<sup>122</sup> the Supreme Judicial Court limited the practice by adopting the disciplinary rule, PF 15.<sup>123</sup> PF 15 declared that a prosecutor acts unprofessionally if he fails to obtain judicial approval before subpoenaing an attorney to testify before the grand jury concerning his client. Effective January 1, 1998, the Court replaced PF 15 with Mass. R. Prof. C. 3.8(f).<sup>124</sup> Rule 3.8(f) offers several new protections not available under the former rule: (1) issuance of such subpoenas is conditioned on the prosecutor's satisfaction of certain rigorous criteria; (2) the defense attorney is entitled to an adversarial proceeding before a subpoena issues; and (3) the rule explicitly applies to subpoenas for testimony relating to former as well as current clients.<sup>125</sup> Counsel receiving notice of a prosecutor's application for judicial approval of a grand jury subpoena directed to himself or his agent,<sup>126</sup> requiring

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attorneys and clients), *aff'd*, 751 F.2d 13 (1st Cir. 1984). Compare *In re Grand Jury Subpoena*, 615 F. Supp. 958 (D. Mass. 1985) (privileged attorney-client correspondence, memoranda, and drafts).

<sup>121</sup> In upholding the application of this rule to federal prosecutors, the First Circuit Court of Appeals identified the following harms caused by such subpoenas: damage to the attorney-client relationship of trust; creation of a conflict of interest between attorney and client; diversion of attorney time and resources from client service to self-protection; discouraging attorneys from providing representation in controversial criminal cases; interference with the client's rights to due process and to counsel of choice; and susceptibility to abuse by overzealous prosecutors. *Whitehouse v. United States Dist. Ct.*, 53 F.3d 1349 (1st Cir. 1995). *But see Stern v. United States Dist. Court*, 214 F.3d 4 (1<sup>st</sup> Cir. 2000) (federal district court local rule limiting federal prosecutor's ability to subpoena lawyers is invalid). For an excellent discussion of the relevant policies and suggested tactics, see Hoffman, *supra* note 118 at 95.

<sup>122</sup> Report of the MBA Criminal Justice Section, approved by Board of Delegates Nov. 28, 1984, reproduced in Hoffman, *supra*, note 118 at Appendix.

<sup>123</sup> S.J.C. Rule 3:08 PF 15 (effective Jan. 1, 1986) provided: "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness."

<sup>124</sup> Mass. R. Prof. C. 3.8(f) provides: "The prosecutor in a criminal case shall . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding."

Rule 3.8(f) is based upon both the former PF 15 and ABA Model Rules of Professional Conduct 3.8(f), including former subsection 3.8(f)(2), deleted by the ABA in 1995.

Violation of Mass. R. Prof. C. 3.8(f) by state prosecutors is subject to disciplinary sanctions, but the rule does not apply to federal prosecutors, see *Stern v. United States Dist. Court*, 214 F.3d 4 (2000) (U.S. Dist. Ct. Local R. 83.6(4)(b), applying Rule 3.8(f) to federal prosecutors, is invalid).

For rules in other jurisdictions similar to Mass. R. Prof. C. 3.8(f), see Alaska R. Prof. C. 3.8(f) and R.I. R. S. Ct. art. V RPC R. 3.8(f) and Comment.

<sup>125</sup> PF 15 was interpreted to apply to attorneys who formerly represented the person concerning whom testimony is sought. *United States v. Edgar*, 82 F.3d 499 (1st Cir.), *cert. denied sub nom. Edgar v. United States*, 519 U.S. 870 (1996).

either testimony or the production of documents or other tangible items concerning his client, should consider the following.<sup>127</sup>

### 1. Notice to Client

Counsel should promptly notify and advise the client regarding this event.<sup>128</sup>

### 2. Obligation to Resist

Given counsel's ethical obligations to protect client secrets, to avoid becoming a witness in the client's case, and to advocate zealously for the client's interest, the attorney normally must resist issuance and enforcement of the subpoena.<sup>129</sup> If, despite counsel's opposition, the court approves issuance of the subpoena, counsel should move to quash,<sup>130</sup> and if the court denies the motion, seek to appeal. Although, normally, orders refusing to quash subpoenas are not "final" and are therefore not immediately appealable,<sup>131</sup> counsel might contend that an exception to this rule, the so-called "*Perlman* doctrine," permits the client, as an aggrieved third party, to bring an interlocutory appeal.<sup>132</sup> If an appeal is unavailable, counsel might be obliged to defend

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<sup>126</sup> PF 15 encompassed agents of an attorney, including investigators, In the Matter of a Grand Jury Investigation, 407 Mass. 916, 918 (1990). The attorney-client privilege extends to investigators, paralegals and other agents of the attorney, In re Grand Jury Proceedings (Hill), 786 F.2d 3, 6 n.4 (1st Cir. 1986). *See also* Dabney v. Investment Corp. of Am., 82 F.R.D. 464, 465–66 (E.D. Pa. 1979) (attorney-client privilege does not cover communications with one not acting as agent for attorney).

<sup>127</sup> *See generally* United States v. Edgar, 82 F.3d 499 (1st Cir.), *cert. denied sub nom.* Edgar v. United States, 519 U.S. 870 (1996) (review of counsel's obligations on receipt of subpoena). For more detailed discussion and practice advice *see* Hoffman, *supra*, note 118 at 102–04.

<sup>128</sup> United States v. Edgar, 82 F.3d 499, 508 (1st Cir.), *cert. denied sub nom.* Edgar v. United States, 519 U.S. 870 (1996) (even if crime-fraud exception allegedly defeats privilege, failure to notify client of subpoena risks "at least . . . a malpractice suit and . . . professional discipline").

<sup>129</sup> United States v. Edgar, 82 F.3d 499, 508 (1st Cir.), *cert. denied sub nom.* Edgar v. United States, 519 U.S. 870 (1996) (obligation to resist disclosure of confidential information until there is contrary judicial determination). In exceptional situations counsel might decide not to oppose issuance of a narrowly drawn subpoena that does not threaten the client's interest. Even in such cases, counsel might first need to obtain the client's informed consent and waiver of the rights to confidentiality and conflict-free counsel.

<sup>130</sup> *See supra* § 5.7B.

<sup>131</sup> *See* In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 492–93 (1992) (accounting firm may not appeal denial of motion to quash grand jury subpoena for taxpayer-client's records; firm must disobey order and appeal from subsequent contempt order).

<sup>132</sup> In most federal circuits the "*Perlman* doctrine" (*see* Perlman v. United States, 247 U.S. 7, 13 (1918)) permits interlocutory appeal by an aggrieved third party, such as a subpoenaed attorney's client. Although initially rejecting this view, *see* In re Oberkoetter, 612 F.2d 16 (1st Cir. 1980), the First Circuit changed course and adopted the *Perlman* doctrine. *See* In re Grand Jury Subpoenas, 123 F.3d 695, 697–98 (1st Cir. 1997) (client may immediately appeal denial of motion to quash subpoena, directed at law firm, to produce records pertaining to client; *Perlman* doctrine necessary to avoid possibility of serious conflict of interest between lawyer and client). Prior to the First Circuit's change of course and attendant overruling of



himself in contempt proceedings in order to preserve the client's rights. In that eventuality, counsel should be able to win a stay of the contempt order if he promptly appeals.<sup>133</sup>

### 3. Grounds for Resistance

Under Rule 3.8(f), the prosecutor has the burden to justify issuance of a lawyer subpoena by showing a “genuine need to intrude into the lawyer-client relationship.”<sup>134</sup> This burden implies three basic requirements. *First*, the prosecutor should be required to affirm that she “reasonably believes” that all three conditions set forth in Rule 3.8(f)(1) are satisfied.<sup>135</sup> These are: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;<sup>136</sup> and (3) there is no

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*Oberkoetter*, the S.J.C. had followed *Oberkoetter* and rejected the *Perlman* doctrine. *See* In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 492 (1992) (corporate client of independent accounting firm may not appeal denial of client's motion to quash subpoena directed to accounting firm for client's tax records; client can and must rely on accounting firm's incentive to disobey order and appeal from subsequent contempt order). That is how the matter stands. It remains to be seen whether the S.J.C. will follow the First Circuit and allow interlocutory client appeals, or will adhere to the reasoning of the now-overruled decision in *Oberkoetter*.

<sup>133</sup> *See* In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 498–99 (1992) (trial judges should stay orders of contempt pending appeal “provided the appealing party acts promptly”).

<sup>134</sup> Mass. R. Prof. C. 3.8(f), Comment. Standards specifically applicable to attorney - witness subpoenas may be found in federal cases granting motions to quash. *See, e.g.*, In re Grand Jury Matters (Hodes & Gordon), 751 F.2d 13 (1st Cir. 1984); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 945–46 (E.D. Pa. 1976); In re Terkeltoub, 256 F. Supp. 683, 686 (S.D.N.Y. 1966) (cited and discussed in Stern & Hoffman, *Privileged Informers: The Attorney-Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1813 & 1824, nn.145 & 198. (1988)).

The federal courts are likely to interpret their Rule 3.8(f) in a way that does not require federal prosecutors to make this showing at the hearing. However, the S.J.C. interpreted PF 15 to allow a superior court judge to quash a subpoena where the procedure was not followed. In the Matter of a Grand Jury Investigation, 407 Mass. 916, 919 (1990). Therefore, the S.J.C. will likely incorporate the standards of Rule 3.8(f) into the substantive law that governs motions to quash.

<sup>135</sup> Mass. R. Prof. C. 3.8(f). *See also* EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS, Department of Justice, UNITED STATES ATTORNEY MANUAL, §9-13.410(C) (1997, and updated Jan. 2009), available on the internet at [www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/13mcrm.htm#9-13.410](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.410) (requiring authorization for an attorney subpoena from the Assistant Attorney General of the Criminal Division based on the following principles: (1) information sought not be protected by a valid claim of privilege, (2) all reasonable attempts to obtain information from alternative sources proven unsuccessful, (3) reasonable grounds to believe crime has been committed and information sought reasonably needed for successful completion of investigation or prosecution, (4) need for information outweighs potential adverse effects on attorney-client relationship, including particularly risk that the attorney may be disqualified from the representation by having to testify against client in investigation, and (5) subpoena be narrowly drawn, directed at material information regarding limited subject matter and covering a reasonable, limited period of time).

<sup>136</sup> *Compare* R.I. R. S. Ct. art. V RPC R. 3.8 Comment, requiring that the evidence sought “is not merely peripheral, cumulative or speculative.”

other feasible alternative to obtain the information.<sup>137</sup> *Second*, the prosecutor should be required to demonstrate to the court why it is reasonable to believe that each of the three conditions is satisfied.<sup>138</sup> *Third*, the prosecutor should be required to persuade the court that issuance of the subpoena is justified in terms of these conditions. In light of the harm caused by issuance of a lawyer subpoena, the prosecutor should arguably be held to at least a “clear and convincing” standard of proof. Finally, if the court is inclined to approve the subpoena, counsel should explore whether the subpoena could be narrowed to reduce the harm to the client.<sup>139</sup> Ultimately, it has been suggested,<sup>140</sup> the decision whether to grant or deny a motion to quash an attorney-subpoena calls for balancing the government’s need for the information sought against the harm threatened by enforcement of the subpoena.<sup>141</sup>

#### 4. Remedies for Violation

If a grand jury has already received evidence subpoenaed in violation of Mass. R. Prof. C. 3.8(f), the judge has “a full panoply of remedies,” including “presentation of the evidence to a different grand jury without use of the subpoenaed evidence . . . , suppression of the evidence without a different grand jury or, in an especially egregious case, the dismissal of indictments.”<sup>142</sup>

#### § 5.7E PENALTIES FOR REFUSAL TO OBEY SUBPOENA

The grand jury has no power to enforce its own subpoenas. If a witness is recalcitrant the grand jury, acting through the prosecutor, must seek enforcement in the courts. Ordinarily when a witness — without acceptable reasons — refuses to comply

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<sup>137</sup> Compare R.I. R. S. Ct. art. V RPC R. 3.8 Comment, requiring a showing that “the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.”

<sup>138</sup> Although the Rule provides for an adversary hearing, the prosecutor can be expected in some cases to make *ex parte* submissions to the court. Where appropriate, counsel should be prepared to contest the justification for such submissions. See Hoffman, *supra* note 118 at 105; In re Grand Jury Subpoena (Legal Servs. Ctr.), 615 F. Supp. 958, 966–67 (D. Mass. 1985) (policy of grand jury secrecy applies to affidavit recounting grand jury testimony or product of grand jury’s “independent initiative,” but not to fruit of government’s own investigatory activity).

<sup>139</sup> Courts have frequently responded to motions to quash by insisting that the subpoena be narrowed. See Hoffman, *supra* note 118 at 105–06, 109 n.115. See also *supra* § 5.7B (court’s broad discretion to modify grand jury subpoena); R.I. R. S. Ct. art. V RPC R. 3.8 Comment (no approval unless, inter alia, the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter in a reasonably limited period of time, and gives reasonable and timely notice).

<sup>140</sup> Hoffman, *supra* note 118 at 109.

<sup>141</sup> Article 12 of the Mass. Const. Declaration of Rights might be cited in opposition to subpoenas infringing on the rights to counsel and to due process.

<sup>142</sup> In the Matter of a Grand Jury Investigation, 407 Mass. 916, 919 (1990). See also United States v. Edgar, 82 F.3d 499, 509 (1st Cir.), *cert. denied sub nom.* Edgar v. United States, 519 U.S. 870 (1996) (no prejudice from failure to comply with PF 15; no dismissal of indictment where defendant did not show that but for his attorney’s testimony he would not have been indicted); Whitehouse v. United States Dist. Ct., 53 F.3d 1349, 1360 (1st Cir. 1995) (power to dismiss reserved for “extremely limited” circumstances).

with a grand jury subpoena or to answer questions before the grand jury, the Commonwealth will petition the superior court to order the witness to comply. If that fails, the Commonwealth will seek to have the witness held in civil contempt and jailed until he complies.<sup>143</sup> The civil contempt procedure gives the witness notice and an opportunity to show cause why contempt should not be imposed. But criminal contempt proceedings,<sup>144</sup> including summary contempt if the contemptuous behavior “immediately imperils the administration of justice,”<sup>145</sup> are also used. Whichever type of contempt proceeding is used, counsel should request a stay of execution of imprisonment pending appeal<sup>146</sup> and seek the client’s release on bail during that period.

## § 5.8 CHECKLIST OF GRAND JURY WORK FOR DEFENSE COUNSEL

### § 5.8A PREINDICTMENT REPRESENTATION

#### 1. Relations with the Prosecutor and Client

##### *a. If the Client Has Not Been Subpoenaed*

If counsel is aware that his client is the target of a grand jury investigation, and if testimony by the client or other potential witness would likely influence the grand jury not to indict, counsel might ask the prosecutor to have such witness called. Because this tactic reveals the client’s defense before the prosecution has begun it will be used only rarely—for example, when the case against the client depends on an incredible victim and the client’s credibility is excellent.

Note that the target has no right to testify before the grand jury or to have it hear any particular evidence.<sup>147</sup> And neither counsel nor the client may address any communication to the grand jurors; such action has been held contemptuous.<sup>148</sup> But defense counsel may request the prosecutor to present certain exculpatory evidence to

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<sup>143</sup> *See, e.g., Stornanti v. Commonwealth*, 389 Mass. 518, 519–20 (1983) (affirming superior court finding of civil contempt for refusing to comply with subpoena). The jail term cannot exceed the grand jury’s term of sitting. *See Commonwealth v. Raczkowski*, 19 Mass. App. Ct. 991, 992–93 (1985) (citing *Shillitani v. United States*, 384 U.S. 364, 370–72 (1966)).

<sup>144</sup> *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 88 (3d Cir. 1973). *See Mass. R. Crim. P. 44; Murphy v. Commonwealth*, 354 Mass. 81, 82 (1968) (reversing, on other grounds, criminal contempt conviction and jail sentence for failure to answer two questions before grand jury which, meanwhile, had concluded investigation and indicted third party).

<sup>145</sup> *Commonwealth v. Corsetti*, 387 Mass. 1, 8 (1982) (although summary punishment under Mass. R. Crim. P. 43 is generally regarded with disfavor, it was appropriately applied to newspaper reporter who refused to answer questions at hearing on murder defendant’s motion to suppress; because resort to other remedies might have delayed the trial “interminably,” time was of the essence). *See also Commonwealth v. Borans*, 388 Mass. 453, 455 n.5 (1983) (avoiding question whether summary contempt procedure was improper).

<sup>146</sup> From the cases it appears that stays are normally granted. *See, e.g., Stornanti v. Commonwealth*, 389 Mass. 518, 519 n.1 (1983); *Commonwealth v. Corsetti*, 387 Mass. 1, 3 (1982).

<sup>147</sup> *In Re Grand Jury Subpoena*, 447 Mass. 88, 93 (2006); *Commonwealth v. Gibson*, 368 Mass. 518, 522–25 (1975) (citing *Costello v. United States*, 350 U.S. 359, 361–64 (1956)).

<sup>148</sup> *Commonwealth v. McNary*, 246 Mass. 46 (1923).

the grand jury; the prosecutor's failure at least to communicate counsel's request to the grand jury might support a later motion to dismiss.<sup>149</sup>

*b. If the Client Has Been Subpoenaed*<sup>150</sup>

If a client receives a grand jury subpoena,

1. Counsel should contact the prosecutor to learn whether the client has been subpoenaed as a witness or a target and what questions will be asked;<sup>151</sup>

2. If the client is simply a witness and non-incriminating information, documents, or exemplars are sought, counsel might be able to arrange informal compliance without any need for the client to appear before the grand jury. If the client has received a subpoena duces tecum, counsel should attempt to learn whether his oral testimony is also sought and consider whether a motion to quash or modify the subpoena is appropriate;<sup>152</sup>

3. If counsel's efforts to quash a subpoena in the superior court have failed, in some instances relief might be had from the Supreme Judicial Court under G.L. c. 211, § 3.<sup>153</sup> Otherwise, because interlocutory appeal from denial of a motion to quash is not generally allowed,<sup>154</sup> the client is left with the choice either to test the subpoena's validity in contempt proceedings by refusing to comply,<sup>155</sup> or comply and preserve the issue for appellate review after conviction.

<sup>149</sup> See *supra* § 5.6C.

<sup>150</sup> The following passages rely heavily on Makowski, *Effectively Representing a Client Before a Grand Jury*, 20 PRAC. LAW. 59 (Nov. 1974). See also NAT'L LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES §§ 1.38-40 (4th ed. 1999); Pinales, "Representing a Witness Before a Grand Jury," 1 CRIMINAL DEFENSE TECHNIQUES §§ 6.04-6.05 (R. Cipes, ed. 1976).

<sup>151</sup> Regarding the witness's right to "target" warnings, see *infra* § 5.8C(3) & note 196, and § 33.6B & note 75. There is also a risk that the prosecutor's alleged purpose will prove false, to the client's detriment. See NAT'L LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES §§ 1.38-40 (4th ed. 1999).

<sup>152</sup> See *supra* § 5.7A-D.

<sup>153</sup> See *infra* § 45.9A. See, e.g., Commonwealth v. Doe, 408 Mass. 764, 766 n.1 (1990) (single justice modified grand jury's lineup order); In the Matter of a Grand Jury Investigation, 407 Mass. 916 (1990) (upholding single justice's denial of relief on technical grounds, but finding for petitioner on merits). *But see* Ventresco v. Commonwealth, 409 Mass. 82, 83-85 (1991) (relief under G.L. c. 211, § 3 unavailable unless petitioner can show substantive right that could not be remedied through the normal appellate process). Alternatively, in an exceptional case, one might be able to persuade the superior court judge to report the issue under Mass. R. Crim. P. 34. See In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 497 & n.10 (1992).

<sup>154</sup> In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 492-99 & n.10 (1992) (refusing to address merits of motions to quash subpoena duces tecum addressed to accountant, or to make exception for third-party corporation whose records were involved; an exception might exist, however, if subpoenaed party had been "disinterested and independent of the intervenor" and therefore lacked incentive to challenge order by risking contempt). See also In the Matter of a Rhode Island Grand Jury Subpoena, 414 Mass. 104, 109-11 (1993) (third party claiming privilege in subpoenaed documents has no standing to intervene to move to quash, nor to appeal order denying motion). See generally *infra* § 45.6.

<sup>155</sup> See *infra* ch. 46. The S.J.C. has pointed out that contempt orders usually are stayed pending appeal if the claim "may have merit," and that successful appeal will result in expungement of the citation. In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 498-99

4. Counsel should ask the prosecutor whether the client was subjected to electronic surveillance and if so, request the application and the order for the electronic surveillance and transcript or tapes of monitored conversations; if the subpoena appears to be the fruit of unlawful surveillance, counsel may move to quash the subpoena and/or advise the client not to answer questions derived from the surveillance;<sup>156</sup>

5. If incriminating client communications are sought, counsel should advise the client on the privilege against self-incrimination and consider the possibility that, if the client claims the privilege, the prosecutor will seek immunity for him;<sup>157</sup>

6. Counsel should explore ways to prevent client liability for perjury and counsel him regarding same. The risk of later perjury prosecution can be minimized if counsel requests the prosecutor to grant access to any prior statements or grand jury testimony of the client or reports of prior interviews with him in the government's possession.<sup>158</sup> These should be reviewed with the client before his appearance. Counsel should also request, as a precondition for allowing the client to testify, a chance to review the testimony after it has been transcribed and to provide additional testimony clarifying any misleading or ambiguous answers.<sup>159</sup> If the prosecutor refuses either request, ask the court to order his cooperation on the ground that both measures would promote accurate and truthful testimony before the grand jury and ensure the correction of honest mistakes in the client's testimony.

## 2. Debriefing Grand Jury Witnesses

Grand jurors, prosecutors, and others who perform official functions in relation to the grand jury are bound by secrecy.<sup>160</sup> But a witness is not prohibited from discussing his testimony, either before or after an indictment is handed down.<sup>161</sup> Therefore, defense counsel may interview grand jury witnesses about their testimony free of government interference<sup>162</sup> and should make every effort to do so. Through

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(1992). Regarding nonfrivolous challenges by third-party privilege holders, such as a taxpayer's accountant, the Court urged trial judges "to stay orders of contempt pending appeal provided the appealing party acts promptly." *Grand Jury Subpoena*, *supra*, 411 Mass. at 499.

<sup>156</sup> See *supra* § 5.6E.

<sup>157</sup> See *infra* § 33.7.

<sup>158</sup> Under federal law the witness has no general right to a copy of his or her prior grand jury testimony. See *In re Bianchi*, 542 F.2d 98, 100 (1st Cir. 1976) (immunized witness protected against use of his testimony in prosecution for past perjury and has no right to protection for future perjury). A witness must make a "strong showing of particularized need" to obtain a copy of his or her prior grand jury testimony (or even to take notes while reviewing the transcript), see *In re Grand Jury*, 566 F.3d 12, 18, 21 (1st Cir. 2009), but a witness must only demonstrate "particularized need" to gain access to the transcript. *Id.* at 18 (holding this lesser standard satisfied by prosecutor's threats of perjury prosecution, combined with complexity of testimony involving "ancient activity").

<sup>159</sup> Makowski, *supra* note 150, at 62. See *In re Russo*, 53 F.R.D. 564, 571 (C.D. Cal. 1971) (approving disclosure to witness). Cf. *Matter of May 1980 Grand Jury*, 491 F. Supp. 44 (M.D. Pa. 1980) (denying request for disclosure; witness must show "compelling necessity . . . with particularity").

<sup>160</sup> See *supra* § 5.5.

<sup>161</sup> Opinion of the Justices, 373 Mass. 915, 920 (1977).

<sup>162</sup> See *In re Grand Jury Proceedings (Appeal of Fernandez & Ramos)*, 814 F.2d 61, 68–70 (1st Cir. 1987) (government letter advising subpoena recipients not to disclose receipt of

such interviews counsel can learn what the witnesses said and what subjects the government were interested in and discover possible grounds for challenges to the grand jury's composition.<sup>163</sup> If the defendant is indicted, counsel may then seek discovery of the grand jury minutes.<sup>164</sup>

### 3. Right to Counsel in the Grand Jury Room

Prior to 1977 a grand jury witness could consult with counsel only by leaving the examination room for the corridor. In that year, G.L. c. 277, § 14A, was enacted, giving grand jury witnesses the "right to consult with counsel and to have counsel present" whenever such witnesses are present. However counsel "may make no objections or arguments or otherwise address the grand jury or the district attorney."<sup>165</sup>

Moreover, it has been said that a witness has no right to notice of the right to counsel before the grand jury, at least if the prosecution has no reason to believe he will perjure himself,<sup>166</sup> and does not affirmatively mislead the witness as to the desirability of counsel.<sup>167</sup> And "no witness may refuse to appear for reason of unavailability of counsel for that witness."<sup>168</sup> A witness may thus bring an attorney with him if he has one but may not expect a continuance of the proceeding contingent on his getting one. Counsel for a witness asked to appear before a grand jury should initiate contact with the district attorney's office as soon as possible to maximize the possibility that any necessary continuance may be obtained by agreement.

The right to counsel under both the federal<sup>169</sup> and Massachusetts<sup>170</sup> constitutions attaches only after adversary judicial proceedings have been initiated.

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the subpoena violated Fed. R. Crim. P. 6(e)(2)). *See also* Advisory Committee Note, Fed. R. Crim. P 6 (e) (1944):

2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.

<sup>163</sup> *See infra* § 5.8C(3)(b).

<sup>164</sup> Mass. R. Crim. P. 14(a).

<sup>165</sup> The statute was upheld in *Opinion of the Justices*, 373 Mass. 915 (1977). *See also* Mass. R. Crim. P. 5(c). G.L. c. 277, § 14A, guarantees the right to the effective assistance of counsel. *Commonwealth v. Griffin*, 404 Mass. 372, 374–75 (1989) (dictum) (defendant failed to demonstrate either actual conflict of interest or prejudice from joint representation before the grand jury).

<sup>166</sup> *Commonwealth v. Hawkins*, 26 Mass. App. Ct. 911, 912 (1988) (dictum).

<sup>167</sup> In *Commonwealth v. Weed*, 17 Mass. App. Ct. 463, 469 (1984), the witness was misleadingly advised by prosecutor that counsel was unnecessary as long as truth was told. The court found that the grand jury testimony was not "freely and voluntarily given" for purposes of waiving the privilege against self-incrimination and held that the witness has "a right not to be misinformed or led astray by the Commonwealth."

<sup>168</sup> G.L. c. 277, § 14A.

<sup>169</sup> *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (grand jury proceedings not a "critical stage" for Sixth Amendment purposes). The right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), which derives from the Fifth Amendment rather than the Sixth, is also probably unavailable. *Miranda, supra*, 384 U.S. at 578–82 (plurality opinion). *See infra* §§ 8.1, 19.4D.

Therefore, witnesses have no constitutional right to counsel at the grand jury stage. However, the right to retained counsel under G.L. c. 277, § 14A, might give indigent witnesses an “equal protection” right to counsel.<sup>171</sup> Arguably, an indigent witness-target questioned before the grand jury needs counsel as much as a suspect in police custody, especially given the complexities of assertion or waiver of the Fifth Amendment privilege and potential liability for criminal contempt.<sup>172</sup> Counsel should be prepared to raise this issue by seeking dismissal of indictments brought against defendants whose uncounseled grand jury testimony resulted in indictment, unless valid waivers of counsel were obtained.

#### **4. Grounds for Refusing to Answer Particular Questions**

Among the grounds a witness may invoke for refusing to answer particular questions are:

- (1) The privilege against self-incrimination (*see infra* §§ 33.1–33.5);
- (2) Other testimonial privileges under the federal or state constitution, statutes, or common law;<sup>173</sup>
- (3) First Amendment freedoms of speech, press, religion, and free association.<sup>174</sup>

#### **5. Advising Defense Witnesses Subpoenaed by Grand Jury**

Some prosecutors will call defense witnesses before the grand jury for discovery and tie down their testimony so it can later be impeached. Counsel should

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<sup>170</sup> Commonwealth v. Griffin, 404 Mass. 372, 374 (1989) (grand jury hearing not an adversary judicial proceeding).

<sup>171</sup> Cf. Commonwealth v. Gilliard, 36 Mass. App. Ct. 183, 186 (1994) (“presumably” an indigent witness has right to appointed counsel). The question was raised and postponed in Opinion of the Justices, 373 Mass. 915, 921–22 (1977). Compare United States v. Mandujano, 425 U.S. 564; 602–09 (1976) (concurring opinion of Justice Brennan) (arguing need for counsel).

<sup>172</sup> Blumenson & Nilsen, Pretrial Procedure Under the Massachusetts Rules of Criminal Procedure, 67 MASS. L. REV. 61, 63–64 (1982). *See infra* §§ 33.1–33.5.

<sup>173</sup> *See* Three Juveniles v. Commonwealth, 390 Mass. 357, 359–61 (1983) (reviewing testimonial privileges). Testimonial privileges are “exceptions to the general duty imposed on all people to testify,” and are strictly construed. The same testimonial privileges generally apply in the grand jury as at trial. *But see* Commonwealth v. Paszko, 391 Mass. 164, 189 n.29 (1984) (spousal privilege might not apply at grand jury); Mass. Guide to Evidence 504(a)(1) (A spouse may not be compelled to testify in the trial of an indictment, complaint or other criminal proceeding brought against the other spouse.).

<sup>174</sup> *See generally* NAT’L LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES, ch. 7 (4th ed. 1999); In the Matter of a John Doe Grand Jury Investigation, 410 Mass. 596 (1991) (superior court order quashing grand jury subpoenas issued to reporters, upheld under common law principles stated in Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources and Other Unpublished Information, 395 Mass. 164 (1985)); Commonwealth v. Corsetti, 387 Mass. 1, 4–6 (1982) (in circumstances of case, rejecting reporter’s privilege under First Amendment, state constitution, and common law); Branzburg v. Hayes, 408 U.S. 665, 708 (1972) (“[G]rand juries must operate within the limits of the First Amendment as well as the Fifth”) (dictum). Cf. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 543–46 (1963) (state must show overriding and compelling state interest to justify investigative intrusion on First and Fourteenth Amendment freedom of association).

interview these witnesses and prepare their testimony as for a trial. If the witness has a valid self-incrimination privilege, he should be advised to obtain independent counsel. If he has any testimonial privilege other than self-incrimination, the advice probably should be the same. Counsel should here take special care, for if, with the motive to protect his own client, counsel undertakes to advise the witness to claim a privilege, his advice might constitute the crime of obstructing justice.<sup>175</sup> Such conduct might also trigger a Commonwealth motion to disqualify defense counsel on grounds of conflict of interest.<sup>176</sup>

## 6. Representing Multiple Defendants

Although joint representation of multiple witnesses at the grand jury stage may offer significant advantages to the defense, it may also raise serious ethical problems and provoke a Commonwealth motion to disqualify defense counsel.<sup>177</sup> Counsel should therefore exercise great caution before agreeing to act in this capacity.

### § 5.8B IF NO BILL IS RETURNED

Mass. R. Crim. P. 5(f) requires the grand jury to notify the court daily of all cases as to which it has determined not to indict.<sup>178</sup> When no bill is returned by the grand jury, the records of its proceedings must be sealed.<sup>179</sup> If the accused has been held in custody pending the grand jury action, he must be discharged unless held on other process. Also, any person in custody pending indictment must be discharged if he is not indicted before the end of the second sitting of the court at which he is held to answer, unless the court makes certain findings on the cause of delay.<sup>180</sup> This right may be particularly significant in counties with a backlog of grand jury cases. Counsel for a

<sup>175</sup> See *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (upholding attorney's conviction for advising immunized client to refuse to testify before grand jury, where attorney's purpose was to protect third party rather than client).

<sup>176</sup> See discussion immediately below.

<sup>177</sup> See generally *infra* § 8.6; *Commonwealth v. Griffin*, 404 Mass. 372, 375–76 (1989) (court will not infer conflict from mere fact of joint representation before grand jury; defendant failed to demonstrate either actual conflict of interest or prejudice); See *Wheat v. United States*, 486 U.S. 153 (1988) (upholding trial court's "broad latitude" before trial to disqualify defense counsel of choice where a "serious potential for conflict" exists, despite defendant's waiver of conflict-free counsel); *In re Grand Jury Proceedings (Doe)*, 859 F.2d 1021 (1st Cir. 1988) (reversing disqualification of counsel at grand jury stage under *Wheat* test); S.J.C. Rule 3:07, Mass. R. Prof. C. 1.7, Conflict of Interest: General Rule, Comment 7, Conflicts in Litigation ("potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one . . . of several persons under investigation . . . for the same transaction . . . by a grand jury."). The problem is discussed in Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 AM. CRIM. L. REV. 301 (1980); Moore, *Disqualification of the Attorney Representing Multiple Witnesses Before a Grand Jury*, 27 UCLA L. REV. 1 (1979).

<sup>178</sup> See also G.L. c. 277, § 15.

<sup>179</sup> G.L. c. 276, § 100C.

<sup>180</sup> G.L. c. 276, § 100C; *Commonwealth v. Perry & Walker*, Nos. 034602–09 (Suffolk Superior Court March 1981) (Lynch. J.) (definition of a "sitting" is term "which begins on the first Monday of every month and ends on the day preceding the first Monday of the next month").



jailed client who is bound over just before the beginning of month one and who has not been indicted by the middle of month two should carefully monitor the grand jury's activity.<sup>181</sup> If the client has not been indicted by the last Thursday of month two, counsel should appear in court on the following day moving for the client's release as mandated by statute.

Nothing prevents the Commonwealth, after a grand jury declines to indict, from presenting the same evidence to a second grand jury.<sup>182</sup> However, the state constitution might bar "repeated submissions of the same evidence to multiple grand juries," which practice would undermine the protective purpose of the grand jury.<sup>183</sup>

## § 5.8C POSTINDICTMENT ISSUES

Defense objections to the indictment should be presented to the trial judge in the form of a motion to dismiss; objections raised for the first time on appeal may be deemed waived.<sup>184</sup>

### 1. If a Bill Is Returned

Unless the prosecution has reason to fear that notice of the indictment will cause the defendant to flee, return of the indictment will normally result in a summons to the arraignment.<sup>185</sup> If counsel anticipates the return of an indictment he should contact the prosecutor handling the grand jury to arrange a convenient arraignment date.

### 2. Defects in the Charge

Counsel should scrutinize the indictment with an eye to identifying challenges to its face (see *infra* § 20.4).

### 3. Other Grounds for Attacking the Indictment

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<sup>181</sup> Counsel can learn who has been indicted each day by contacting the district attorney's office or by inspecting the list of indictments recorded each day in the court clerk's docket book.

<sup>182</sup> Similarly, the Commonwealth may proceed against a juvenile by complaint in the juvenile session of the District Court after it fails to obtain a youthful offender indictment. *Commonwealth v. Dale D.* 431 Mass. 757, 760 (2000).

<sup>183</sup> *Commonwealth v. McCravy*, 430 Mass. 758, 762–63 (2000) (after first grand jury that heard evidence of OUI homicide returned single indictment for OUI, second grand jury heard same evidence and returned six indictments; article 12 did not require dismissal, but might bar repeated submission of same evidence to multiple grand juries).

<sup>184</sup> *Commonwealth v. Mayfield*, 398 Mass. 615, 623 n.5 (1986). Of course, jurisdictional attacks may later be raised. Issues related to the conduct of the grand jury will be deemed waived on appeal unless counsel has ensured that the grand jury minutes were made part of the record at trial and later forwarded by the clerk to the appellate court. *Commonwealth v. Kater*, 409 Mass. 433, 445 & n.11 (1991).

<sup>185</sup> Mass. R. Crim. P. 6 permits either a summons or warrant but arguably prefers the former unless the prosecutor represents to the court that the defendant might flee if not arrested. In such a case, the prosecutor may request that the judge direct that the indictment be kept secret until after the arrest. *See* Mass. R. Crim. P. 5(d). However, prosecutors have been known to recommend warrants for other reasons, such as a desire for publicity in high-profile cases.

*a. Prosecutorial Misconduct*<sup>186</sup>

Counsel should scrutinize the grand jury transcript for evidence of any prosecutorial misconduct that might justify dismissal of the indictment because it “impaired the integrity of the grand jury.”<sup>187</sup> Also, prosecutorial misconduct that threatens “irremediable harm to the defendant’s opportunity to obtain a fair trial” or that is “egregious, deliberate, and intentional, or that results in a violation of constitutional rights” may give rise to presumptive prejudice and warrant the “drastic remedy” of dismissal.<sup>188</sup> A wide range of prosecutorial abuses might qualify, including:

1. Deliberately seeking an indictment for an offense that the prosecutor knows is not supported by probable cause;<sup>189</sup>
2. Use of the grand jury for improper purposes — that is, to obtain pretrial discovery;<sup>190</sup>
3. Abandoning the prosecutor’s proper role before the grand jury;<sup>191</sup>

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<sup>186</sup> Error in the judge’s orientation speech to the grand jury might also justify dismissal of an indictment. *See* Commonwealth v. Hrycenko, 31 Mass. App. Ct. 425, 426–28 (1991) (judge’s “inelegant” remarks describing grand jurors’ duty should have stated the probable cause standard but, in context of the judge’s other remarks, and as shown by jurors’ subsequent conduct, the jurors understood their proper role).

<sup>187</sup> *See supra* § 5.6 (“impair integrity” factors). In evaluating claims of prosecutorial misconduct, the courts may apply the tripartite *Mayfield* test applicable to the presentation of perjured testimony. *See supra* § 5.6D; Commonwealth v. Olsen, 35 Mass. App. Ct. 929 (1993) (prosecutor’s presentation of prejudicial propensity evidence “barely [fell] within permissible limits” under *Mayfield*); Commonwealth v. Good, 409 Mass. 612, 618–20 (1991) (briefly displaying wanted poster of defendant to grand jury was improper and inflammatory, but did not impair integrity of proceedings); Commonwealth v. Ianello, 401 Mass. 197, 198–99 (1987) (court did not abuse its discretion by denying dismissal remedy for improper prosecutorial comments about defendant’s temperament to grand jury; evidence presented prior to comments amply supported indictments); Commonwealth v. Champagne, 399 Mass. 80, 84 (1987) (“The standard for determining whether grand jury bias entitles a defendant to relief is more strict than that applied to the bias of a petit jury”); Commonwealth v. Wolcott, Nos. 92115–92116, Memorandum of Decision and Order on Defendant’s Motion to Dismiss Grand Jury Indictments, 13–14 (Superior Court for Plymouth County, 1993) (dismissing indictment because prosecutor’s excessive use of leading questions raised serious doubts about integrity of grand jury proceedings). *See also* Commonwealth v. Phillips, 413 Mass. 50, 58–59 (1992) (suppression of evidence, rather than prophylactic dismissal of indictments, is proper remedy for police department’s “search on sight” policy).

<sup>188</sup> *But see* Commonwealth v. Lewin, 405 Mass. 566, 579 (1989) (dictum) (despite “contemptible and disgusting” police perjury and other misconduct, dismissal of murder charges not warranted where defendant might still receive fair trial, and dismissal not necessary to deter future misconduct).

<sup>189</sup> *See* Commonwealth v. Bray, 19 Mass. App. Ct. 751, 763–64 (1985) (evidence did not support claim of bad faith on the part of prosecutor who obtained first degree murder indictment against defendant). *Compare* Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 447 (1986) (new trial ordered where, inter alia first-degree murder indictment brought to enhance likelihood of compromise conviction for lesser crime). *See also* S.J.C. Rule 3:07, Mass. R. Prof. Conduct 3.8(a) (the prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause).

<sup>190</sup> *See supra* § 5.7B.

<sup>191</sup> *See supra* § 5.3.

4. Misdirecting the grand jury on the law, presenting perjured testimony, or withholding exculpatory evidence;<sup>192</sup>
5. Deliberately using the grand jury to subvert discovery;<sup>193</sup>
6. Flagrantly improper use of the subpoena power,<sup>194</sup> for such purposes as:
  - a. Gathering evidence from witnesses outside the presence of the grand jury<sup>195</sup> or without its authority;<sup>196</sup>
  - b. Trapping the witness into incriminating herself<sup>197</sup> or committing perjury;<sup>198</sup>
  - c. Unjustifiably forcing the witness to invoke his Fifth Amendment privilege before the grand jury;<sup>199</sup> and
  - d. Pre-indictment delay.<sup>200</sup>

*b. Challenges to the Composition of the Grand Jury*<sup>201</sup>

Grand jurors in the Commonwealth are drawn and summoned in the same manner as petit jurors.<sup>202</sup> In the past, Massachusetts juries were selected using the “key man” system, involving subjective determinations by community representatives as to

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<sup>192</sup> See *supra* § 5.6. *But see* Commonwealth v. Lewin, 405 Mass. 566 (1989); Commonwealth v. Kelcourse, 404 Mass. 466, 467–69 (1989) (possibility that grand jury may have drawn incorrect inference from prosecutor’s statement that a blood test for alcohol is not relevant to a murder indictment did not mandate dismissal where argument speculative, prosecutor’s misstatement not intentional or reckless, and evidence overwhelming against defendant).

<sup>193</sup> See *supra* § 5.6A.

<sup>194</sup> This section draws on Rodis, *A Lawyer’s Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123, 130–39 (1978). See also *supra* § 5.7B.

<sup>195</sup> Commonwealth v. Smallwood, 379 Mass. 878, 887–88 (1980) (prosecutorial misconduct to use subpoena power to interview witnesses, but no prejudice); United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976) (use of “forthwith” grand jury subpoena as ploy to facilitate office interrogation improper under Fed. R. Crim. P. 17).

<sup>196</sup> Commonwealth v. Cote, 407 Mass. 827, 831–33 (1990) (prosecutor’s unauthorized use of grand jury subpoena to acquire telephone message records that were not presented to the grand jury but were introduced at trial was an abuse, but it neither seriously impaired grand jury process nor prejudiced defendant); In re Melvin, 546 F.2d 1 (1st Cir. 1976) (subpoena to appear in lineup improper because not authorized by grand jury). See also Commonwealth v. Gurney, 13 Mass. App. Ct. 391, 405 (1982).

<sup>197</sup> But a grand jury witness has no right to warnings that she is a target of the grand jury investigation. See Commonwealth v. D’Amour, 428 Mass. 725, 741–43 (1999) (witness-suspect who had received and understood self-incrimination and right to counsel warnings was not entitled, under article 12 of the state constitution, to target warning); United States v. Washington, 431 U.S. 181 (1977) (witness has no federal constitutional right to receive target warnings), discussed *infra* at § 33.6B & note 75; Commonwealth v. Gilliard, 36 Mass. App. Ct. 183, 187–88 (1994).

<sup>198</sup> Commonwealth v. Borans, 379 Mass. 117, 138–39 (1979) (claim rejected; defendant had option to plead self-incrimination); Brown v. United States, 245 F.2d 549 (8th Cir. 1957).

<sup>199</sup> See *supra*, § 5.7A.

<sup>200</sup> See *infra* § 23.1.

<sup>201</sup> See *infra* § 30.4 (compositional challenges to petit jury).

<sup>202</sup> See *supra* § 5.3.

juror qualifications.<sup>203</sup> The susceptibility of that system to abuse facilitated successful challenges to grand jury selection.<sup>204</sup> Spurred by pressure from the Supreme Judicial Court,<sup>205</sup> the legislature shifted to a statewide system of random selection, which is less conducive to challenge.<sup>206</sup>

Challenges to the composition of a grand jury must be made by pretrial motion to dismiss.<sup>207</sup> Two types of challenges exist: challenges to the “array” (to the composition of the grand jury as a whole) and challenges to the “polls” (to the bias or qualifications of a particular juror).

### *1. Challenge to the Array*

(A) Challenges Based on Discrimination. An indictment returned by a grand jury that is chosen in a discriminatory manner violates equal protection under the Fifth and Fourteenth Amendments of the federal Constitution and under article 12 of the Massachusetts Constitution Declaration of Rights.<sup>208</sup> Although the Sixth Amendment jury right to a fair cross section of the community does not apply to state grand juries,<sup>209</sup> article 12 entitles the defendant to a grand or petit jury that “represents a cross section of individuals and ideas in the community” as well as to a process that is “free of discrimination against his grouping in the community.”<sup>210</sup> In Massachusetts, then, “there is no distinction between the equal protection analysis for grand juries and the Sixth Amendment [fair cross section] analysis for petit juries as exists in Federal law.”<sup>211</sup> While Massachusetts court decisions on jury composition often draw on federal constitutional standards, article 12 “affords the defendant at least as much

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<sup>203</sup> See G.L. c. 234, § 4; *Commonwealth v. Bastarache*, 382 Mass. 86, 92 (1980).

<sup>204</sup> See, e.g., *Commonwealth v. Aponte*, 391 Mass. 494 (1984) (prima facie showing of “key man” system resulting in unintentional but systematic discrimination against Hispanics). See also *Commonwealth v. Bastarache*, 382 Mass. 86 (1980).

<sup>205</sup> *Commonwealth v. Aponte*, 391 Mass. 494, 508 (1984); *Commonwealth v. Bastarache*, 382 Mass. 86, 102–03 (1980).

<sup>206</sup> See *Commonwealth v. Acen*, 396 Mass. 472, 477–83 (1986) (G.L. c. 234A requirements that jurors speak and understand English and be United States citizens withstand state and federal constitutional challenges); *Commonwealth v. Marchionda*, 385 Mass. 238, 239–43 (1982) (jury selection under G.L. c. 234A, which resulted in a disproportionate number of women being called, not ground for dismissal absent showing of illegality in composition of array or in juror selection process).

<sup>207</sup> See *Commonwealth v. Pope*, 392 Mass. 493, 498 (1984). See also Mass. R. Crim. P. 13(a), 13(c). Cf. *Commonwealth v. Rodriguez*, 364 Mass. 87, 91 (1973) (objection to trial jury after jurors were sworn came too late).

<sup>208</sup> A due process claim might also exist. See *Campbell v. Louisiana*, 523 U.S. 392, 400–02, 118 S. Ct. 1419, 1424–25 (1998) (white defendant has standing to claim that exclusion of Blacks from grand jury violates his right to due process of law).

<sup>209</sup> *Commonwealth v. Bastarache*, 382 Mass. 86, 89 n.1, 96–99 (1980) (contrasting Sixth Amendment and equal protection tests). See also *Castaneda v. Partida*, 430 U.S. 482, 492–93 (1977) (discussing equal protection challenge to composition of grand jury).

<sup>210</sup> *Commonwealth v. Aponte*, 391 Mass. 494, 507 (1984) (quoting in part *Commonwealth v. Soares*, 377 Mass. 461, 478, cert. denied, 444 U.S. 881 (1979)). Although *Soares* concerned a petit jury, the S.J.C. in *Aponte* drew on such cases to articulate the “essential safeguards of art. 12 with respect to jury selection in general.”

<sup>211</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 240–41 & nn.4, 5 (1997).

protection as the Sixth and the Fourteenth Amendment.”<sup>212</sup> Therefore, counsel should focus analysis on the more generous Commonwealth constitutional standards.

To sustain a challenge, a defendant must make a *prima facie* showing that there is “substantial underrepresentation”<sup>213</sup> on the basis of race or membership in an identifiable group,<sup>214</sup> over a significant period of time.<sup>215</sup> Under equal protection analysis, the defendant must also show that the selection procedure is not racially neutral or is “susceptible of abuse.”<sup>216</sup> Under fair cross section analysis, the defendant must show the underrepresentation is due to “systematic exclusion.”<sup>217</sup> For analysis under article 12, the Supreme Judicial Court effectively treats the two tests as fungible.<sup>218</sup> Because equal protection analysis requires a finding of intentional discrimination, but fair cross section analysis does not, defense counsel will find the latter test easier to satisfy.

A defendant of one race has standing to challenge, on equal protection or due process grounds, exclusion of members of a different race from the grand jury.<sup>219</sup>

What constitutes an “identifiable group” is an open question. The Supreme Judicial Court has shown “particular sensitivity in analyzing jury selection practices to discrimination against those groupings in the community that are set out in art. 1 of the Declaration of Rights”<sup>220</sup> (“sex, race, color, creed or national origin”).<sup>221</sup> But others —

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<sup>212</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 244 (1997).

<sup>213</sup> The S.J.C. has adopted the “absolute disparity” test to determine whether underrepresentation is substantial. One calculates disparity under this test by subtracting the group’s representation in the jury venire from its representation in the community. A less than 10 percentage point disparity can never be substantial. *See Commonwealth v. Fryar*, 425 Mass. 237, 242–43 & n.6 (1997) (if Blacks and Hispanics constituted 15.42 percent of population of eligible jurors in Hampden County, and 7.33 percent of venire, absolute disparity — 8.09 percentage points — would not be “substantial”).

<sup>214</sup> *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (citing *Whitus v. Georgia*, 385 U.S. 545 (1967) (18 percent discrepancy between number of Blacks on tax list and on grand jury venire sufficient to make out *prima facie* case of discrimination)); *Sims v. Georgia*, 389 U.S. 404 (1967) (19.7 percent discrepancy); *Jones v. Georgia*, 389 U.S. 24 (1967) (14.7 percent discrepancy). *But see Commonwealth v. Fryar*, 425 Mass. 237, 239 n.3, 241–42 (1997) (no *prima facie* case of systematic underrepresentation of Blacks and Hispanics in Hampden County grand jury venires where defense presented no information on racial or ethnic composition of venires; trial judge ruled that an analysis of jurors’ surnames was unreliable, and denied defense request to contact jurors to ascertain their race).

<sup>215</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 241 & n.4 (1997).

<sup>216</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 241 n.4 (1997); *Commonwealth v. Bastarache*, 382 Mass. 86, 97 (1980).

<sup>217</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 241 n.5 (1997).

<sup>218</sup> *Commonwealth v. Fryar*, 425 Mass. 237, 241 (1997).

<sup>219</sup> *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419 (1998) (white defendant has third-party standing under *Powers v. Ohio*, 499 U.S. 400 (1991), to raise equal protection challenge to discriminatory exclusion of Blacks from grand jury, and has standing to claim that exclusion of Blacks violates his right to due process; Court avoided deciding whether third-party standing exists to raise fair cross section challenge).

<sup>220</sup> *Commonwealth v. Aponte*, 391 Mass. 494, 507 (1984) (quoting *Commonwealth v. Bastarache*, 382 Mass. 86, 101 (1980)). “The groups which art. 12 protects and which cannot form the basis for juror exclusion are the same classes referred to in art. 1 of the Massachusetts Declaration of Rights.” *Aponte, supra*, 391 Mass. at 507.

such as political belief, economic status, and educational background — have also been recognized.<sup>222</sup>

(B) Procedure and Burden of Proof. A challenge to the array of jurors must be timely and in writing and supported by affidavits specifying the grounds for the challenge. The court has discretion to decide the challenge based solely on the affidavits, or it may order an evidentiary hearing.<sup>223</sup> To establish the system’s “susceptibility to abuse” for an equal protection claim, racial designations on prospective juror lists would support such a showing.<sup>224</sup> More subtle indications have also been recognized.<sup>225</sup> Once the court is satisfied with the defendant’s showing, a presumption arises of intentional discrimination. To rebut the federal equal protection argument, the prosecution need only show that the discrimination was unintentional.<sup>226</sup>

Article 12 protects against any systematic exclusion on the basis of article 1 groupings if the discrimination resulted — however unintentionally — from a nonrandom selection system.<sup>227</sup> With the statewide adoption of random selection in place of the former “key man” system, “systematic exclusion” is difficult to show.<sup>228</sup>

Counsel should be prepared to support a challenge with affidavits comparing the group’s numbers in the general population with its numbers in the juror pool.<sup>229</sup> “To insure the integrity of the juror selection process, and the accountability of the office of

<sup>221</sup> Mass. Const. Declaration of Rights art. 1, as amended by art. 106 (approved Nov. 2, 1976).

<sup>222</sup> See NAT’L LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES § 4.8 (4th ed. 1999) (collecting cases). The First Circuit once recognized particular age groups as “distinctive groups” but no longer does. See *Barber v. Ponte*, 772 F.2d 982, 1000 (1st Cir. 1985), *overruling* *La Roche v. Perrin*, 718 F.2d 500, 503–04 (1st Cir. 1983). See also *Commonwealth v. Bastarache*, 382 Mass. 86, 100–02 (1980); *Commonwealth v. Manning*, 41 Mass. App. Ct. 696, 698 (1996) (persons over 70 not distinctive group for purposes of Sixth Amendment fair cross section analysis) (citing *Barber, supra*, 772 F.2d at 997).

<sup>223</sup> G.L. c. 234A, §§ 73, 74. The language of §§ 73 and 74 seems directed exclusively toward petit juries. Because § 73’s requirement that the challenge be made before any juror is examined is inapplicable to the grand jury context, counsel should look for time requirements to Mass. R. Crim. P. 13(c) and, by analogy, to the spirit of these statutes.

<sup>224</sup> See A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 158 (5th ed. 1988); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (race indicated on questionnaire); *Whitus v. Georgia*, 385 U.S. 545 (1967) (different color tax return indicating race). In the Commonwealth confidential questionnaires are enclosed with the juror summonses. They are intended to be used at voir dire and, because of their timing, have no impact on juror selection. See G.L. c. 234A, §§ 22, 23.

<sup>225</sup> See *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (given clear showing of underrepresentation and nonrandom selection system, fact that Spanish surnames are easily identifiable is sufficient to show susceptibility of abuse).

<sup>226</sup> *Commonwealth v. Bastarache*, 382 Mass. 86, 97 (1980).

<sup>227</sup> *Commonwealth v. Aponte*, 391 Mass. 494, 509 (1984).

<sup>228</sup> See *Commonwealth v. Fryar*, 425 Mass. 237, 243–44 (1997) (where jury lists compiled by random selection from census data, no showing of “systematic exclusion” even if failure of local census administrators to aggressively pursue nonresponding residents resulted in underrepresentation of Blacks and Hispanics).

<sup>229</sup> See G.L. c. 234A, § 73; *Commonwealth v. Fryar*, 425 Mass. 237, 242–43 & n.6 (1997) (method of calculating “substantial underrepresentation”); *Commonwealth v. Aponte*, 391 Mass. 494, 502 (1984).

the jury commissioner”<sup>230</sup> the office of jury commissioner must make prospective juror lists available to the public on request. If no indication of underrepresented class status appears on the lists, counsel could contact jurors summoned over several years to request the information desired.<sup>231</sup>

(C) Right to Grand Jury Drawn from the Vicinage of Crime. Article 13 of the Massachusetts Constitution Declaration of Rights and state statutes<sup>232</sup> accord defendants the common law “vicinage” right to a grand jury composed of citizens who live where the crime was committed. But neither the state nor federal<sup>233</sup> constitution bars the legislature from authorizing a grand jury in one county to indict for crimes occurring in a town beyond the county line.<sup>234</sup> While the defendants have a statutory right to the inclusion of citizens from the vicinage in the grand jury pool, an indictment found in violation of that requirement would not be quashed absent a showing of prejudice, perhaps an insuperable bar.<sup>235</sup>

## 2. Challenge to Polls

Apart from a challenge for lack of legal qualifications,<sup>236</sup> the grounds on which an individual grand juror may be challenged are very narrow. The Supreme Judicial Court has refused to recognize any federal or state constitutional right to an unprejudiced grand jury,<sup>237</sup> and an indictment is valid even if individual grand jurors may have been influenced by pre-indictment publicity,<sup>238</sup> or by conversations with an investigating officer.<sup>239</sup> But the defendant would be entitled to a hearing on a prima

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<sup>230</sup> G.L. c. 234A, § 15. The Supreme Court has interpreted the somewhat more explicit federal statute to provide a litigant mounting a challenge to a jury array with “an *unqualified* right to inspect jury lists.” *Test v. United States*, 420 U.S. 28, 30 (1975) (emphasis in original). *See* 28 U.S.C. § 1861.

<sup>231</sup> *See* *Commonwealth v. Aponte*, 391 Mass. 494, 497 (1984) (former grand jurors mailed questionnaires and asked to indicate ethnic identification). *But see* *Commonwealth v. Fryar*, 425 Mass. 237, 241 (1997) (trial judge denied defense request to contact jurors to ascertain their race).

<sup>232</sup> G.L. c. 277, § 3; G.L. c. 234, § 10. *See also infra* § 20.4E(2) (venue).

<sup>233</sup> *See* *Commonwealth v. Duteau*, 384 Mass. 321, 330–31 (1981) (neither Mass. Const. Declaration of Rights art. 13 nor Sixth Amendment to the United States Constitution bars legislative authorization to Franklin County grand juries to indict for crimes committed in Athol, Worcester County); *Commonwealth v. Parker*, 2 Pick. 550, 552–56 (1824). *Compare* *People v. Guzman*, 755 P.2d 917, 927 (Cal. 1988) (Sixth Amendment vicinage right binds the states via the Fourteenth Amendment).

<sup>234</sup> *Commonwealth v. Duteau*, 384 Mass. 321, 327 (1981).

<sup>235</sup> *Commonwealth v. Duteau*, 384 Mass. 321, 328 n.10 (1981).

<sup>236</sup> *See supra* § 5.3.

<sup>237</sup> *Commonwealth v. McLeod*, 394 Mass. 727, 732–33 (1985), *cert. denied sub nom. Aiello v. Massachusetts*, 474 U.S. 919 (1985). *Compare* the more protective federal rule. *See* *United States v. Burke*, 700 F.2d 70, 82 (2d Cir. 1983) (on showing that defendant suffered actual prejudice from grand jury bias defendant constitutionally entitled to have conviction overturned) (dictum). *See also* *Beck v. Washington*, 369 U.S. 541, 546 (1962) (refusing to “remotely intimate any view” on whether there is a due process right to an unbiased grand jury applicable to State grand jury proceedings).

<sup>238</sup> *See* *Commonwealth v. Monahan*, 349 Mass. 139, 154–56 (1965) (no examination of jurors required on showing of prejudicial publicity). *See also* § 26.3B, suggesting the utility of moving to dismiss the indictment nonetheless.

facie showing of “bias or prejudice so egregious as to result in an indictment based on ‘hatred or malice ’ in violation of the grand jurors oath.<sup>240</sup> Thus, the participation of individual jurors should be challenged only if they clearly lack the statutory qualifications or if the bias is severe and/or general.<sup>241</sup>

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<sup>239</sup> See *Commonwealth v. Woodward*, 157 Mass. 516, 517 (1893).

<sup>240</sup> *Commonwealth v. McLeod*, 394 Mass. 727, 733–34 (1985) (citing G.L. c. 277, § 5). “It is not . . . necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required.” *Commonwealth v. Geagan*, 339 Mass. 487, 499 (1959) (quoting *Commonwealth v. Woodward*, 157 Mass. 516, 519 (1893)).

<sup>241</sup> See A. AMSTERDAM, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 158 (5th ed. 1988).