

White-Collar Law

Relative Obscurity of State Grand Jury Process Can Lead to Abuses

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In the federal criminal-justice system, all felony indictments must be handed down by grand juries. Grand juries have historically played a less prevalent role in Pennsylvania criminal justice. However, that is changing and recent high-profile cases portend expanded use of investigative grand juries by state prosecutors. Because of their relative scarce use, the laws and procedures governing state grand juries are not particularly well known by defense lawyers and even supervising judges. At times, this lack of familiarity can lead to abuses. This article discusses some aspects of grand jury procedure in the hope that counsel and supervising judges, properly informed, will be able to protect against future abuses.

The Pennsylvania Investigating Grand Jury Act establishes single-county and multicounty investigative grand juries. Common pleas judges impanel single-county grand juries based on a prosecutor's notice of submission specifying criminal activity within the county that could best be investigated using a grand jury. The Supreme Court impanels multicounty grand juries based upon the attorney general's asserted need to investigate organized crime or public corruption involving more than one county. A court can also sua sponte impanel an investigative grand jury. A grand jury is composed initially of 23 members and serves for a term of 18 months, unless extended. The grand jury hears testimony from witnesses and reviews documents and other evidence. It can issue a presentment with regard to any person who the grand jury believes may have committed a criminal offense. Supervising judges are assigned for all grand jury proceedings.

Indemnification of Fees

Grand juries frequently subpoena witnesses to testify in relation to facts and circumstances surrounding their employment. Employers are obligated (frequently legally, always morally) to indemnify the fees incurred by these employee-witnesses. In fact, such indemnification occurs regularly in all sorts of civil, criminal and administrative proceedings. Rule 1.8(f) of the Rules of Professional Conduct, moreover, expressly permits indemnification of attorney fees, where the client gives informed consent, there is no interference with the lawyer's professional judgment, and confidences are maintained. Nevertheless, some prosecutors

and supervising judges seem unsure of a lawyer's ability to represent a client whose fees were being paid by his or her employer, especially where the investigation involves the employer. They apparently question whether a lawyer can separate his or her ethical obligations to the client/employee if his or her fees are paid by the employer, irrespective of the client's informed consent and the attorney's reasoned conclusion that indemnification would not interfere with the representation. This general suspicion of indemnification is unwarranted and contrary to firmly established law and practice. At a minimum, a court must conduct a hearing and make a factual determination that indemnification is not permitted under Rule 1.8(f) before disqualifying counsel. Disqualifying counsel for being indemnified, moreover, provides the worst of all worlds for the subpoenaed party, who is left to navigate a criminal grand jury investigation without the aid of counsel or use his or her own money to pay for a lawyer.

Representation of Multiple Clients

In the context of representing witnesses before a grand jury proceeding, it is common for a single attorney to represent groups of witnesses. Multiple representation is efficient and often enables counsel to provide more effective representation. When asked to provide representation for multiple clients, an attorney's first task is to assess whether there exists a conflict or possible conflict that precludes the multiple representation. Only if the attorney is convinced that there is no such conflict or possible conflict will the lawyer proceed with the multiple representation.

The Investigative Grand Jury Act expressly allows multiple representation, prohibiting such representation only "if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client." The Rules of Professional Conduct similarly allow multiple representation in the absence of a limitation on the lawyer's independent professional judgment. A supervising judge can order separate representation of grand jury witnesses only upon a determination that the "interest of an individual will or is likely to be adversely affected" by multiple representation. In considering disqualification, the supervising judge is admonished by the act to "give appropriate weight to the right of an individual to counsel of his own choosing." Thus, in the absence of conflict or a "likely conflict," lawyers should be allowed to represent multiple witnesses in grand jury proceedings.

Counsel who wishes to represent multiple grand jury witnesses should expect and must be prepared to fight attempts to disqualify. Indeed, counsel should expect that the prosecutor—citing grand jury secrecy—will be allowed to advocate for disqualification in camera. Courts should never rely solely on in camera presentations in making a disqualification decision. The state Superior Court, in reversing the disqualification of an attorney from representing multiple grand jury witnesses, has criticized a common pleas judge for relying on an in camera presentation by the prosecutor. The Superior Court mandated that the reasons for the disqualification be made known to counsel (even if the information would otherwise be subject to grand jury secrecy) and counsel be given the opportunity to rebut. (See *In re January 1974 Special Investigating Grand Jury*, 241 Pa. Super 246, 361 A.2d 325 (1976).) Future supervising judges should explain the rationale for disqualification and provide through an evidentiary hearing an opportunity to rebut the rationale and to establish that multiple representation is appropriate.

Prosecutors may rely on the sole Pennsylvania Supreme Court case that dealt with disqualification of an attorney representing multiple grand jury witnesses, *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975). That case, however, featured an obvious conflict of interest and should not be given an expansive reading. In that case, the attorney purported simultaneously to represent 12 Philadelphia police officers, all of whom were targets of a grand jury investigation, and all of whom were to be questioned about potential criminal conduct of the others. The lawyer told the witnesses that he would represent them, and that the Fraternal Order of Police (whom the lawyer also represented) would indemnify their fees if and only if they did not cooperate with the grand jury. By the lawyer's own admission, therefore, his ability to represent their individual interests was limited in that he would not represent them at all if they decided to cooperate. Given that the conflicts in this case were blatant and numerous, it is not surprising that the Supreme Court affirmed the lawyer's disqualification. This case does not, however, support the broad proposition that indemnified or multiple grand jury representation is always inappropriate. Instead, supervising judges must take each case on its own merits, conduct evidentiary hearings, give due regard to an individual's right to counsel of his or her choosing and only disqualify where the representation clearly offends the Rules of Professional Conduct or the Investigative Grand Jury Act.

Grand Jury Secrecy

The Investigative Grand Jury Act protects the secrecy of "matters occurring before the grand jury." Grand jury secrecy is not absolute. For example, the witness is not bound to secrecy unless the court issues a special oath that binds the witness to secrecy. Second, secrecy applies only to "matters occurring before the grand jury." Finally, otherwise secret information may be disclosed upon court order. Prosecutors interpret broadly the scope of grand jury secrecy when it is in their interest to do so. Such a broad definition of grand jury secrecy is unwarranted, however, and can impermissibly interfere with a lawyer's ability to adequately represent a client.

Upon learning that a client has received a grand jury subpoena, counsel must determine whether the client faces potential culpability. Counsel requires this information to determine how best to protect the client's interests. Counsel typically learns this information in three ways: interviewing the client, speaking with others familiar with the relevant circumstances, and speaking with prosecutors. As noted, prosecutors frequently refuse to provide any information, including information concerning their view of a client's role in the matter, citing grand jury secrecy. This is a red herring, however, as the law precludes only disclosure of "matters occurring before the grand jury," and not the prosecutor's view as to whether a client has potential exposure.

Rule 6(e) of the Federal Rules of Criminal Procedure, which governs federal grand jury matters, similarly prohibits disclosing "a matter occurring before the grand jury." Federal prosecutors regularly share with counsel their view as to where a client fits into an investigation because they know the information is central to the attorney's ability to provide adequate counsel concerning the witness's use of the Fifth Amendment. Indeed, the Department of Justice requires prosecutors to advise grand jury witnesses if the prosecutor believes that the witness is either a putative defendant or a person whose conduct is within the scope of the grand jury's investigation. This expedient sharing of information aids greatly

in the smooth operation of the grand jury process and in no way constitutes the disclosure of "a matter occurring before the grand jury."

The problem is especially acute when a witness is hailed to appear before a grand jury with short notice. Counsel does not have sufficient time to investigate whether assertion of the Fifth Amendment is appropriate or warranted. In such instances, the prosecutor—who controls the length of notice—should inform counsel whether the client has potential culpability or is merely a witness. A prosecutor who provides insufficient notice and then cites grand jury secrecy in refusing to disclose this critical information is gaming the system and effectively precluding counsel from providing adequate representation. When this happens, the supervising judge should order disclosure so that the witness is properly afforded a right to representation, as is provided by the Investigative Grand Jury Act.

Counsel representing witnesses before a grand jury should expect to face a motion to disqualify (and for the prosecutor to discuss the motion in camera with the supervising judge). Counsel should be ready to rebut these attempts to strip counsel from their clients. Supervising judges, moreover, should be wary of positions taken by prosecutors, especially on indemnification, multiple representation and the scope of grand jury secrecy.

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