Citizens' Grand Jury Manual

Grand Jury Qualifications and Selection of Grand Jury

The requirements for grand juror selection are contained in the Jury Selection and Service Act, 28 U.S.C. §§ 1861, et seq. ("JSSA"). Grand jurors must be "selected at random from a fair cross section of the community in the District or Division wherein the court convenes."[1] The JSSA does not require that the resulting grand jury be a statistical mirror of the community but only that the grand jurors are selected from a source that is reasonably representative of the community.[2]

Each judicial district has a written plan for random juror selection that has been reviewed and approved by the chief judge and the judicial counsel for the circuit.[3] Among other things, each district's plan (1) establishes a jury commission or authorizes the clerk of the court to manage the jury selection process, (2) specifies the sources for the names of prospective jurors and identifies those groups of persons or occupational classes that are exempt from service or whose members may be automatically excused upon request[4] and (3) describes the procedures to be followed in randomly selecting jurors from among the qualified candidates. Actual juror qualifications, such as United States citizenship, age, English language proficiency, absence of physical or mental infirmity, and lack of conviction for a felony are detailed in 28 U.S.C. § 1865. The JSSA specifically prohibits any exclusion based on race, color, religion, gender, national origin, or economic status.[5]

Under the usual procedure, the clerk sends out "juror qualification forms" under § 1864. Based on the responses received, a decision is made as to whether the prospective jurors are qualified or automatically excused. The names of qualified jurors are then placed in a master jury wheel from which names are drawn randomly when a grand jury is to be empaneled. The prospective jurors are then summoned for jury duty.[6] Typically, the jurors from which the grand jury will be selected have been summoned and are present when the staff enters the court for empaneling.

When the prospective jurors have been assembled, the judge or the clerk will explain the demands of grand jury service and will inquire of the prospective grand jurors whether there is any reason why service on the grand jury would present an undue hardship, e.g., long-term illness, hearing impairment,

---

[1] 28 U.S.C. §1861

[2] See United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968), cert. denied, 394 U.S. 934 (1969);United States v. Marcello, 423 F.2d 993 (5th Cir.), cert. denied, 398 U.S. 959 (1970); United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976).

[3] 28 U.S.C. 1863.

[4] The JSSA mandates the use of voter registration lists or lists of actual voters as the primary source of juror names. To the extent necessary, these lists may be augmented by supplemental sources. See generally United States v. Young, 822 F.2d 1234 (2d Cir. 1987); United States v. Brummitt, 665 F.2d 521 (5th Cir. Unit B Dec. 1981), cert. denied, 456 U.S. 977 (1982); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979).

[5] 28 U.S.C. § 1862; see generally United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974); United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); United States v. Maskeny, 609 F.2d 183 (5th Cir.), cert. denied, 447 U.S. 921 (1980); United States v. Gometz, 730 F.2d 475 (7th Cir.),cert. denied, 469 U.S. 845 (1984).

[6] The number to be summoned varies from district to district.

acute business problems, etc. The criteria for excusing a prospective juror varies from judge to judge, but generally is extremely strict. The power of the court to excuse prospective grand jurors is set forth in 28 U.S.C. § 1866(c):

> . . . any person summoned for jury service may be (1) excused by the Court, upon a showing of undue hardship or extreme inconvenience, for such period as the Court deems necessary, at the conclusion of which such person shall be summoned again for jury service.[7]

Following this procedure, the 23-person grand jury is picked from the remaining prospective jurors.

Composition and Structure of the Grand Jury

1. General Composition

A regular grand jury consists of at least 16 but not more than 23 members. It may be empaneled initially for up to 18 months. This period may be extended by the court for an additional six months. The time period a grand jury sits is computed from the date of empanelment. Each grand jury has a foreperson, a deputy foreperson and often a secretary.

2. Duties of the Grand Jury Foreperson

Fed. R. Crim. P. 6(c) provides:

> FOREPERSON AND DEPUTY FOREPERSON. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

The court-appointed foreperson is the court's administrator of the grand jury sessions, supervising the recording activities of its secretary (if a secretary is appointed and performs such activities), assuring that there is a lawful number of jurors present at each session, and acting as liaison on behalf of the grand jurors with the supervising judge when problems or questions arise requiring consultation with the court. One of the foreperson's most important functions is administering the oath to witnesses. The foreperson is also the spokesman for the grand jury, presenting indictments to the court in open session and causing a secret record to be kept of the number of jurors concurring in the findings of every indictment.

Following the examination of a witness, grand jurors should be allowed to question the witness. The grand jury foreperson may also supervise this questioning (recognizing the questions of the grand jurors in an orderly fashion. Rapport with the jury is increased if such supervision is left to the foreperson.

---

[7] See United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

If the foreperson is absent, the deputy foreperson, who is also appointed by the court, assumes all of the duties of the foreperson. If both are absent, the court must appoint another foreperson for such time as is necessary. It is essential to have someone authorized to administer oaths to witnesses.

3. Duties of the Grand Jury Secretary

Although there is no specific legislation that creates the position, it is customary in many districts for a secretary of the grand jury to be appointed. Fed. R. Crim. P. 6(c) authorizes the foreperson to designate a juror to perform specific secretarial duties on his behalf. Normally, the jurors select a member to act as secretary to keep a record of the jurors' attendance, the matters presented, the witnesses called, and the number of votes cast on each indictment.[8] This procedure is usually followed with the concurrence of the foreperson.

Usually, the grand jury secretary receives a roster of the grand jurors from the clerk. The secretary takes attendance twice a day (at the beginning of the morning session and after lunch). A true count of the members present is generally taken by the secretary at each break and the noon recess. The secretary's attendance records are given to the clerk of the court to verify the clerk's records.

The secretary will generally keep docket sheets on which are recorded the type of investigation, the court's docket number (if any), the matters being presented, the names of all witnesses appearing before the jury, together with remarks and other data. Prior to the appearance of each witness, the secretary should be supplied with the correctly spelled name of the witness for recording on the docket sheet.[9] These duties must be explained to the secretary.

The practice in many districts requires the secretary (or the staff) to pick up the grand jury books (the docket sheets, secretary's notes, etc.) each morning at the United States Attorney's office, return them at noon, pick them up again after lunch, and return them at adjournment. The contents of the grand jury's books are highly confidential and they are usually secured in the United States Attorney's or the clerk's safe when not in use by the jury. The staff should ascertain what the practice is in each particular district.

In some jurisdictions, a secretary is selected but performs no duties; in other jurisdictions, a secretary is not appointed. In these jurisdictions, a deputy clerk (or in some cases, the foreperson or the Government attorney) checks the attendance of the jurors prior to the morning session and sometimes prior to the afternoon session. No further check is made of juror attendance. However, it is recommended that after every break, the foreperson make a statement for the record of how many jurors are present. Insofar as the attendance of witnesses is concerned, the only records will be the Certificate of Attendance and Payment and the grand jury transcripts.

---

[8] 8 Moore's Federal Practice, ¶ 6.02[2] at 6-11 (2d ed. 1970).

[9] In antitrust investigations, the docket sheet often shows an entry such as United States v. Antitrust Matter. If an indictment is returned, "Antitrust Matter" is stricken, and the names of the defendants are listed where "Antitrust Matter" previously appeared.

Recordation

Rule 6(e)(l) provides that:

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device . . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

Prior to the adoption of the rule, colloquy between Government attorneys and the grand jury was not routinely recorded. The rule now requires that all statements made by Government attorneys, as well as the witnesses and grand jurors, before the grand jury be recorded. Attorneys should never go off the record, even to discuss non-investigation related matters, such as lunch schedules. The practice has been, however, to order a complete transcript only of actual witness testimony and opening and closing statements by Division attorneys. Care should be taken, however, to record all proceedings even if transcripts are ordered only for the above-listed matters. The untranscribed notes generally remain in the custody of the court reporter, but care should be taken that all notes are preserved and available on request.

Arrangements should be made for a reporter to be present in advance of the grand jury session. Forms should be filled out in advance for payment of the reporter for attendance and transcripts. This will require the identity and address of the reporter and his federal identification number.

The reporter should be sworn before the first session begins and, in some jurisdictions, before each subsequent session begins. In subsequent sessions, any new reporter who has not been sworn before that grand jury should be sworn. Oaths for reporters are generally available from the grand jury clerk.

Limitations on Grand Jury Power to Investigate

1. What May a Federal Grand Jury Investigate

A federal grand jury may investigate any federal criminal offense committed within the district, i.e., within the jurisdiction of the court.[10] A grand jury that calls a witness without any purpose of obtaining evidence from him of any offense committed, in whole or in part, in the district in which the grand jury is sitting exceeds its powers and any indictment based on that testimony may be dismissed.[11] Nevertheless, since "the eventual scope and direction of [the grand jury's] inquiry is often only hazily perceived and tentatively defined", it must be allowed "to pursue any leads which may be uncovered."[12] For these reasons, the grand jury's jurisdiction is not limited to the probable result of its

[10] Hubner v. Tucker, 245 F.2d 35, 39 n.6 (9th Cir. 1957).
[11] Brown v. United States, 245 F.2d 549, 554 (8th Cir. 1957).
[12] United States v. Doulin, 538 F.2d 466, 470 (2d Cir.), cert. denied, 429 U.S. 895 (1976); see also United States v. Paxson, 861 F.2d 730, 733 (D.C. Cir. 1988).

inquiry.[13] A witness cannot challenge the right of a grand jury in one district to question him concerning events in another district.[14]

A grand jury may investigate a matter with no defendant or criminal charge specifically in view.[15] The powers of investigation of the grand jury and its powers to obtain information are "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." This, the Supreme Court points out, is normally "developed at the conclusion of the grand jury's labors, not at the beginning."[16] However, it is an abuse of the grand jury process to conduct a grand jury investigation with the sole intent of eliciting evidence for a civil case.[17] It is also improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial.[18]

A grand jury may investigate matters previously investigated by another grand jury.[19] This is true even if the first grand jury took adverse action. As stated in United States v. Steel, 238 F. Supp. 580, 583 (S.D.N.Y. 1965):

> In any event, and assuming the first and second grand juries were in complete disagreement, this would be no ground for dismissal since adverse action by a grand jury does not bar or limit action, including contrary action, by a subsequent grand jury. . . .

A grand jury may indict on hearsay and other evidence that would be inadmissible at trial, or, for that matter, even on the knowledge of the grand jurors themselves.[20] Care should be taken, however, to elicit as much admissible evidence as possible.

Historically, the grand jury could present or indict. Presentment is the process whereby a grand jury initiates an independent investigation and asks that a charge be drawn to cover the facts if they constitute a crime. Since the grand jury may present, it may investigate independently of direction from the United States Attorney.[21] Presentment, however, is now obsolete in federal courts.[22] Further, an indictment is invalid if not signed by the Government attorney.[23]

A grand jury may investigate violations of law, although the evidence presented to it is without authority of the Attorney General.[24]

---

[13] United States v. Paxson, 861 F.2d at 733.
[14] United States v. Girgenti, 197 F.2d 218, 219 (3d Cir. 1952).
[15] United States v. Smyth, 104 F. Supp. 283, 287 n.1 (N.D. Cal. 1952).
[16] Blair v. United States, 250 U.S. 273, 282 (1919).
[17] United States v. Procter & Gamble Co., 356 U.S. 677 (1958).
[18] United States v. Dardi, 330 F.2d 316, 336 (2d Cir.), cert. denied, 379 U.S. 845 (1964).
[19] United States v. Thompson, 251 U.S. 407 (1920); United States v. Steel, 238 F. Supp. 580, 583 (S.D.N.Y. 1965); In re Borden Co., 75 F. Supp. 857, 863-64 (N.D. Ill. 1948).
[20] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).
[21] United States v. Smyth, 104 F. Supp. at 295.
[22] In re United Elec., Radio and Mach. Workers, 111 F. Supp. 858, 863 n.13 (S.D.N.Y. 1953).
[23] Fed. R. Crim. P. 7(c).
[24] Sullivan v. United States, 348 U.S. 170, 173 (1954).

2. Limitations on the Power to Investigate by District Court

The court may issue subpoenas for testimony and documents and may exercise its contempt powers to guarantee compliance with such subpoenas. However, the court cannot unduly interfere with the essential activities of the grand jury nor encroach on the grand jury's or the prosecutor's prerogatives. In United States v. United States District Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957), the district court refused to permit the Government attorneys to examine subpoenaed documents or transcripts outside the presence of the grand jury or to summarize and digest the evidence for the grand jury, quashed a subpoena duces tecum on the grounds that the grand jury could not demonstrate "materiality", ordered the grand jury to either indict or return a no bill (the grand jury desired further investigation), held that the Government attorneys could help prepare an indictment, but only in the presence of the grand jury, and adjourned the grand jury and refused the Government's request to call it back into session. On a writ of mandamus, the Fourth Circuit held, inter alia, that the lower court should reconvene the grand jury and permit it to continue the investigation, vacate orders quashing the subpoenas and limiting the right of Government counsel to receive and use evidence before the grand jury, and permit Government counsel to summarize and digest the evidence for the benefit of the grand jury.

Although the grand jury is a "sovereign body," the courts exercise supervisory jurisdiction and may prevent gross abuses of power. Thus, should the court object to acts of the grand jury, it may discharge the grand jury under the provisions of Fed. R. Crim. P. 6(g). Few cases exist showing the circumstances which would compel a court to discharge a grand jury. As stated in In re Investigation of World Arrangements, 107 F. Supp. 628, 629 (D.D.C. 1952):

> This court specifically limits itself to dismissal of a grand jury only where there is good cause. The court feels that grand juries should be consistently advised of their power to act independently in investigations and their duty to diligently inquire into crimes triable in the District of Columbia. Nor should the court, without cause, intervene to discharge a grand jury to prevent an indictment.

3. Power of Grand Jury Limited by Prosecutor

Fed. R. Crim. P. 7(c) provides, in part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. . . . [Emphasis supplied.]

The grand jury cannot indict without the signature of the prosecutor. As stated in United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965):

> The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. . . . It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States

> in their control over criminal prosecutions. The provision of Rule 7, requiring the signing of the indictment by the attorney for the government, is a recognition of the power of government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. . . .

Although it is common practice for the United States Attorney to sign the indictment, an indictment is equally valid if signed by a Division attorney. A grand jury cannot make accusations of individuals short of indictment; it cannot issue reports to the public or other branches of government.[25] This, of course, is not applicable to special grand juries empaneled under the provision of 18 U.S.C. §§ 331, et seq.

4. What Objections Can be Raised to the Grand Jury Proceeding and by Whom

In general, objections can be raised to the activities of a grand jury insofar as the activities exceed or contravene the limitations of the grand jury's jurisdiction as set forth above. However, witnesses appearing before a grand jury generally have no right to raise such objections.[26] Witnesses have the same testimonial privileges they would have in any other criminal proceeding. However, the grand jury's power to investigate is not limited to admissible testimony. As stated in In re Radio Corp. of America, 13 F.R.D. 167, 170-71 (S.D.N.Y. 1952):

> The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . . [W]itnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. . . ." [Citing Blair v. United States, 250 U.S. 273 (1919).][27]

Objections to the scope or propriety of the grand jury proceedings are available only to persons indicted by such grand jury.

Who May Be Present -- Rule 6(d)

1. Who May Be Present

Fed. R. Crim. P. 6(d) provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

---

[25] See In re United Elec., Radio and Mach. Workers of Am., 111 F. Supp. 858, 864, 869 (S.D.N.Y. 1953).
[26] Witnesses may object to allegedly defective subpoenas on grounds of unreasonableness, burdensomeness, etc. (See Ch. III § F.) and to improper electronic surveillance (See Ch. IV § D.4.).
[27] See also United States v. Girgenti, 197 F.2d 218, 219 (3d Cir. 1952) (witness not entitled to challenge the authority of the court or the grand jury, provided the grand jury has de facto existence and organization).

This rule allows attorneys for the Government, the witness, interpreters, and stenographers or operators of recording devices to be present during the grand jury session. Only the grand jurors themselves may be present during deliberation or voting.

Not every attorney working for the federal establishment is a Government attorney within the meaning of Fed. R. Crim. P. 6(d). Generally, only Department of Justice attorneys and attorneys working for the Department under a special appointment qualify.[28]

The witness is not entitled to have counsel present in the grand jury room.[29] However, the Division's general practice is to advise the witness that he may leave the grand jury room to consult with counsel.[30]

Some districts permit the use of grand jury "agents"; however, this practice is fraught with potential problems and is discouraged in the Antitrust Division.

2. The Effect of Presence of Unauthorized Persons in Grand Jury Room

In the past, the presence of unauthorized persons in the grand jury room was often a sufficient ground for dismissal of an indictment.[31] However, the Supreme Court in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), held that errors in grand jury proceedings should not be grounds for dismissing an indictment unless such errors prejudiced the defendants. As the Court stated at p. 256:

> [D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations (citations omitted).

The Supreme Court in Bank of Nova Scotia, among other things, held that a violation of Rule 6(d) by having two agents read prior testimony in tandem was not grounds for dismissal in that case.

An indictment will not be set aside for mere technical violations of the rule. Thus, when an attorney unconnected with the proceedings accidentally entered the grand jury room and remained there for several seconds and where testimony was immediately stopped before the grand jury, the indictment was not quashed.[32] Technical intrusions of unauthorized persons should be noted on the record, together with the fact that no proceedings were conducted while those persons were present, if this is indeed the case.

---

[28] See Fed. R. Crim. P. 54(c); Ch. II § C.1.; In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) (FTC attorney not within Rule).

[29] United States v. Corallo, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973).

[30] Such consultations should not be allowed to unreasonably disrupt the proceedings. See Ch. IV § F.7.

[31] See United States v. Heinze, 177 F. 770 (2d Cir. 1910).

[32] United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969); see also United States v. Kahan & Lessin Co., 695 F.2d 1122, 1124 (9th Cir. 1982).

A violation of Rule 6(d) is remedied by a guilty verdict from a petit jury.[33]

3. Effect of having ineligible or disqualified grand juror present

Fed. R. Crim. P. 6(b)(2) provides:

> A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. . . . An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Despite the clear language of this Rule, defendants often attempt to use the presence of one or more ineligible grand jurors in the jury room as grounds for a motion to dismiss an indictment. Such motions are routinely denied by the courts.[34] The courts have examined, in camera, the records required to be kept by the grand jury under Rule 6(c) and denied a 6(b)(2) motion summarily, if the records disclosed that the number of jurors concurring (discounting the jurors challenged) totaled 12 or more.[35]

[33] United States v. Mechanik, 475 U.S. 66 (1986).

[34] See United States v. Johnston, 685 F.2d 934 (5th Cir. 1982), cert. denied, 460 U.S. 1053 (1983).

[35] See, e.g., United States v. Anzelmo, 319 F. Supp. 1106, 1113 (E.D. La. 1970); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1967 (S.D. Ohio 1971).