# STUDY OF THE LAWS, RULES AND PRACTICES RELATING TO THE GRAND JURY IN NEVADA

*Bulletin No. 85-17*

LEGISLATIVE COMMISSION
OF THE
LEGISLATIVE COUNSEL BUREAU
STATE OF NEVADA

*August 1984*

# S T U D Y  O F  T H E  L A W S ,  R U L E S  A N D  P R A C T I C E S  R E L A T I N G  T O  T H E  G R A N D  J U R Y  I N  N E V A D A

Bulletin No. 85-17

LEGISLATIVE COMMISSION
OF THE

LEGISLATIVE COUNSEL BUREAU
STATE OF NEVADA

August 1984

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SENATE CONCURRENT RESOLUTION—Directing the legislative commission to study grand juries in Nevada.

WHEREAS, The grand jury is an integral part of the system of criminal justice in Nevada; and

WHEREAS, Recognizing the need for minimum guidelines in the administration of criminal justice, the American Bar Association has developed a set of comprehensive standards covering the system of criminal justice which includes a draft published in 1979 relating to grand juries; and

WHEREAS, These standards may be of great benefit to criminal justice in Nevada; and

WHEREAS, Appropriate action should be taken to study and review the standards along with other recommendations and carry them out where necessary and practical; now, therefore, be it

*Resolved by the Senate of the State of Nevada, the Assembly concurring,* That the legislative commission is hereby directed to conduct a study of the laws, rules and practices relating to the grand jury in Nevada; and be it further

*Resolved,* That this study include an evaluation of the standards of the American Bar Association regarding grand juries; and be it further

*Resolved,* That the legislative commission report the results of the study and any recommended legislation to the 63rd session of the legislature.

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# REPORT OF THE LEGISLATIVE COMMISSION

TO THE MEMBERS OF THE 63RD SESSION OF THE NEVADA LEGISLATURE:

This report is submitted in compliance with Senate Concurrent Resolution No. 10 of the 62nd session of the Nevada legislature, which directs the legislative commission to study the laws, rules and practices relating to the grand jury in Nevada and the American Bar Association's principles relating to grand juries. The legislative commission appointed a subcommittee to conduct the study and recommend appropriate action. The members of the subcommittee were:

Senator Sue Wagner, Chairman
Assemblyman Janson F. Stewart, Vice Chairman
Senator William J. Raggio
Senator Thomas R. C. Wilson
Assemblyman Lonie Chaney
Assemblyman Jane Ham
Assemblyman James A. Stone

This report contains the findings and recommendations of the subcommittee. Considerable information was gathered during this study. The minutes and exhibits of the subcommittee's meetings are on file with the legislative counsel bureau and are available to any member.

This report is transmitted to the members of the 63rd session of the Nevada legislature for their consideration and appropriate action.

Respectfully submitted,

Legislative Commission
Legislative Counsel Bureau
State of Nevada

Carson City, Nevada
August 1984

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## LEGISLATIVE COMMISSION

Senator James I. Gibson, Chairman

| | |
|---|---|
| Senator Thomas J. Hickey | Assemblyman Louis W. Bergevin |
| Senator Robert E. Robinson | Assemblyman Joseph E. Dini |
| Senator Randolph J. Townsend | Assemblyman John E. Jeffrey |
| Senator Sue Wagner | Assemblyman Michael O. Malone |
| | Assemblyman David D. Nicholas |
| | Assemblyman John M. Vergiels |

## SUMMARY OF RECOMMENDATIONS

1. Allow a witness who is the subject of an investigation to be accompanied by counsel in his appearance before the grand jury. (BDR 14-147)

2. Allow the subject of an investigation to testify before the grand jury if he signs a waiver of immunity. (BDR 14-147)

3. Require district attorneys to make all reasonable attempts to notify a person of his right to testify unless notification may result in flight or endanger other persons or obstruct justice. (BDR 14-147)

4. Limit the period of confinement for a witness who refuses to testify before a grand jury and is found in contempt. (BDR 14-149)

5. Prohibit a district attorney from calling a person to testify before a grand jury regarding matters which have been determined to be within his constitutional privilege against self-incrimination. (BDR 14-147)

6. Require the district attorney to inform orally any witness subpenaed to testify before a grand jury of the general nature of the grand jury's inquiry. (BDR 14-148)

7. Allow a witness to review his previous testimony before a grand jury. (BDR 14-149)

8. Allow the subject of the investigation, if the grand jury does not indict him, to decide whether to make public the fact that no indictment was issued. (BDR 14-149)

9. Require a district attorney to disclose to the grand jury any evidence of which he is aware that will tend to substantially negate guilt. (BDR 14-147)

10. Prohibit a district attorney from making any statement to a grand jury which would be impermissible at trial before a petit jury. (BDR 14-149)

11. Require the district attorney to inform the grand jury as to the specific elements of the crimes to be considered by it before he seeks an indictment. (BDR 14-149)

12. Prohibit the questioning of any attorney, his agent or employee, by the grand jury concerning matters he has learned in the legitimate investigation, preparation or representation of his client's cause and prohibit the subpenaing of his private notes, memoranda and other materials which were a product of his work. (BDR 14-149)

13. Prohibit the public disclosure of the granting of immunity in a grand jury's proceeding before the issuance of an indictment or presentment in the case. (BDR 14-149)

14. Increase the penalty for breaching the secrecy of a grand jury proceeding and expand the group of persons to whom the penalty applies. (BDR 14-207)

15. Allow reports by grand juries which contain statements on matters affecting the public interest; prohibit those which ridicule or abuse any person involved. (BDR 14-208)

16. Permit any person who is directly or by innuendo, imputation or otherwise accused of a wrongdoing in a grand jury's report, which if true would constitute an indictable offense, but where a true bill has not been returned, to:

    (a) Receive a copy of the portion of the report which pertains to him; and

    (b) Request a hearing where he may move to expunge any improper statements. (BDR 14-208)

17. Require a district judge to file a grand jury's report within 60 days after it is submitted to him for review. (BDR 14-208)

18. Require the recording of all matters before a grand jury by a certified shorthand reporter except:

    (a) Any confidential communication between a witness and his legal counsel, when the legal counsel is allowed to accompany the witness before the grand jury; and

    (b) The deliberations and voting of the grand jury. (BDR 14-149)

19. Require the clerk of the court to transmit within 5 days to any affected agency or public officer a copy of the grand jury's report. (BDR 14-208)

20. Require the court which impanels a grand jury to charge the jurors and alternate jurors completely. (BDR 14-149)

21. Require the grand jury to issue a quarterly report to the district court which includes a summary of its activities and financial status. (BDR 14-209)

22. Require the district judge to give advice to the grand jury regarding legal matters. (BDR 14-209)

23. Prohibit the grand jury from spending money or incurring obligations in excess of the amount budgeted for its investigative activities unless the proposed expenditure is approved in advance by the district judge. (BDR 14-209)

24. Prohibit a district attorney from using a grand jury to obtain tangible, documentary or testimonial evidence to assist him in the preparation for trial of a defendant who has already been charged by indictment or information. (BDR 14-149)

25. Replace the term "misconduct" in NRS 172.175 with "conduct which may constitute a violation of a provision of chapter 197 of NRS." (BDR 14-208)

26. Require that grand jurors vote separately on each person considered for and each count included in a presentement or indictment. (BDR 14-149)

27. Increase the number of voters required for a petition to summon a grand jury. (BDR 14-149)

28. Increase the panel of grand jurors selected in larger counties. (BDR 14-149)

29. Require the county treasurer to distribute to the grand jury a monthly accounting of the grand jury's expenditures and the balance remaining. (BDR 14-209)

30. Allow a district court to impanel a grand jury to inquire into a specific limited matter. (BDR 14-209)

# REPORT TO THE LEGISLATIVE COMMISSION FROM THE SUBCOMMITTEE TO STUDY THE LAWS, RULES AND PRACTICES RELATING TO THE GRAND JURY IN NEVADA

## I. INTRODUCTION

In 1983 the 62nd session of the legislature adopted Senate Concurrent Resolution No. 10 which required the legislative commission to study the laws, rules and practices relating to the grand jury in Nevada. The resolution also directed the legislative commission to evaluate the standards adopted of the American Bar Association regarding grand juries. The legislative commission appointed a subcommittee to conduct the study. The members of the subcommittee were:

Senator Sue Wagner, Chairman
Assemblyman Janson F. Stewart, Vice Chairman
Senator William J. Raggio
Senator Thomas R. C. Wilson
Assemblyman Lonie Chaney
Assemblyman Jane Ham
Assemblyman James A. Stone

During its six meetings the subcommittee heard presentations from many persons, including judges, district attorneys, former grand jurors, persons who had been the subject of a grand jury's investigation, representatives of the American Bar Association and other interested citizens. The first meeting was held in Reno, the next two in Las Vegas. The fourth meeting was held in Tonopah in an effort to learn the problems which are peculiar to rural areas. The final meetings were held in Carson City where the subcommittee evaluated its findings and made appropriate recommendations.

### A. Recent Efforts for Reform

The call for the reform of the grand jury system was directed mainly at the federal level. The use of the federal grand jury has recently increased, especially for investigating complex "white collar crime," "organized crime" and public corruption. This resulted in charges of abuse. Charges were made that the grand jury was no longer serving its dual purpose as a shield for the innocent as well as a sword for the government--that it was only a "tool" of the prosecution. These charges were not new. Criminal defense attorneys, the press and other groups had been complaining about the unfairness of the system for years. Given that a

grand jury works in secret, generally without a court's supervision, that it may issue virtually unlimited subpenas, that it may question a witness without his attorney's presence, that it need not hear exculpatory evidence, and that it may jail uncooperative persons without a trial, the room for abuse is great.

However, now the charges were being made by business leaders and civil attorneys whose clients were being investigated for tax fraud and violations of antitrust laws. General Motors and Braniff Airways were scrutinized by federal grand juries. Thus, the issue of fairness and the grand jury became of broad interest to the legal profession. This resulted in extensive work by the American Bar Association (ABA), which after 7 years of work, adopted 30 principles for the reform of the grand jury system. The principles and related comments are included in Appendices A and B.

## II. FINDINGS AND RECOMMENDATIONS

The central elements of the proposed reform were the right to counsel in the grand jury room, the applicability of the rules of evidence used in trial courts and the requirement of a formal record of the grand jury's proceedings. The subcommittee found that Nevada already restricted the type of evidence which could be presented to a grand jury (NRS 172.135) and already required a transcript of such proceedings (NRS 172.215). Nevertheless, the subcommittee used the ABA principles as the basis of its study and then considered the suggested changes which were not a part of the principles.

### A. Protection of Persons Appearing Before Grand Juries

Any person called to testify before a grand jury must now leave the grand jury room in order to consult with his attorney. This requires the witness to understand and recall in precise detail each question asked and to convey that information to the attorney who is waiting outside the grand jury room. To eliminate any prejudicial effect of a witness' exits from the room to confer with his counsel, and to increase the efficiency of the proceeding, the subcommittee recommends that the legislature:

> Allow a witness who is the subject of an investigation to be accompanied by counsel in his appearance before the grand jury. (BDR 14-147)

While the first ABA principle urges that all witnesses be allowed to be accompanied by counsel, the subcommittee determined that only a witness who is the subject of an investigation truly needs to be so accompanied. The subcommittee also determined that to allow the witness' counsel to elicit testimony or to address the grand jurors would turn the hearing into an adversarial proceeding. Therefore, the subcommittee believes that the role of counsel allowed in the grand jury room should be limited solely to advising his client.

The grand jury usually does not hear testimony from the subject of an investigation before an indictment is issued. Since there may be cases where an indictment might not be issued upon hearing the subject's side of the story, thus avoiding the cost to the state and to the defendant of an unnecessary trial, the subcommittee recommends that the legislature:

> Allow the subject of an investigation to testify before the grand jury if he signs a waiver of immunity. (BDR 14-147)
>
> Require district attorneys to make all reasonable attempts to notify a person of his right to testify unless notification may result in flight or endanger other persons or obstruct justice. (BDR 14-147)

There is no limit to the time a person may be confined for civil contempt of court (NRS 22.110). The person is said "to hold the jail key in his own pocket" until he obeys the order of the court, for example, to testify or produce evidence, etc. Therefore, the subcommittee recommends that the legislature:

> Limit the period of confinement for a witness who refuses to testify before a grand jury and is found in contempt. (BDR 14-147)

A person cannot be compelled in any criminal case to be a witness against himself.[1] The court must be the final arbiter of whether a matter is within a person's constitutional privilege against self-incrimination. However, once a court has made such a determination, it is highly

prejudicial to call a witness before a grand jury and ask him questions to which he continually responds that he refuses to answer on the ground that it may incriminate him. Therefore, the subcommittee recommends that the legislature:

> Prohibit a district attorney from calling a person to testify before a grand jury regarding matters which have been determined to be within his constitutional privilege against self-incrimination. (BDR 14-147)

A subpena presently issued by a grand jury does not include a reference to the matter being considered or an explanation of the relationship between the person subpenaed and the matter being considered. Therefore, the recipient must face this imposing legal body without the slightest bit of preparation. Even if the person is subpenaed simply because he is the custodian of a necessary record, he does not know whether he is to be questioned about a crime, his tax return or his neighbor. To relieve any undue apprehension, the subcommittee recommends that the legislature:

> Require the district attorney to inform orally any witness subpenaed to testify before a grand jury of the general nature of the grand jury's inquiry. (BDR 14-148)

To ensure fairness and avoid unintended self-contradiction, the subcommittee recommends that the legislature:

> Allow a witness to review his previous testimony before a grand jury. (BDR 14-149)

B. Presentation of Evidence

NRS 172.145 provides that the grand jury is not bound to hear evidence for the defendant. While many district attorneys currently choose to present exculpatory evidence of which they are aware, it is not specifically required.[2] Therefore, the subcommittee recommends that the legislature:

> Require a district attorney to disclose to the grand jury any evidence of which he is aware that will tend to substantially negate guilt. (BDR 14-149)

NRS 172.135 already provides that a grand jury can receive only evidence which is legal and the best in degree.

However, this does not limit the statements that a district attorney may make, for example, in his opening or closing remarks to the grand jurors. Therefore, the subcommittee recommends that the legislature:

> Prohibit a district attorney from making any statement to a grand jury which would be impermissible at trial before a petit jury. (BDR 14-149)

Grand jurors are usually given a copy of the statute which is alleged to have been violated before they vote on an indictment. However, it is not always easy for a lay person to determine from the face of a statute what specific elements of the crime he must find present before voting in favor of an indictment. Therefore, the subcommittee recommends that the legislature:

> Require the district attorney to inform the grand jury as to the specific elements of the crimes to be considered by it before he seeks an indictment. (BDR 14-149)

To clarify Nevada's position regarding the privacy of the product of an attorney's work, the subcommittee recommends that the legislature:

> Prohibit the questioning of any attorney, his agent or employee, by the grand jury concerning matters he has learned in the legitimate investigation, preparation or representation of his client's cause and prohibit the subpenaing of his private notes, memoranda and other materials which were a product of his work. (BDR 14-149)

C. Disclosure of Proceedings

There are many reasons underlying the historic tradition of secrecy regarding the proceedings of a grand jury. One of the most important is the desire to protect innocent persons who have been accused and then exonerated. It is not unusual for the identity of the subject of a grand jury's investigation to be revealed in the press whether as a result of thorough investigative journalism, unintentional breaches in the secrecy or intentional "leaks." However,

since the fact that he was exonerated may not be officially disclosed (NRS 172.245) and that type of "leak" might not be considered as newsworthy, the coverage of his exoneration is often less prominent. The result is that a person who is exonerated needs a public, offical forum in which to restore his reputation if it was tarnished by his publicized involvement with a grand jury. Therefore, the subcommittee recommends that the legislature:

> Allow the subject of the investigation, if the grand jury does not indict him, to decide whether to make public the fact that no indictment was issued. (BDR 14-149)

The unregulated disclosure of information regarding a grand jury's proceedings does not serve the interests of the public or the accused. Therefore, the subcommittee recommends that the legislature:

> Prohibit the public disclosure of the granting of immunity in a grand jury's proceeding before the issuance of an indictment or presentment in the case. (BDR 14-149)

> Increase the penalty for breaching the secrecy of a grand jury proceeding and expand the group of persons to whom the penalty applies. (BDR 14-207)

D. Reports

In Nevada a grand jury performs two distinctly separate types of service. In one type of service the grand jury is an accusing body. The grand jury considers evidence presented to it and determines whether it should issue a presentment or indictment which will lead to the criminal trial of the person accused of the crime.

In the other type of service the grand jury is an investigating body. In response to instructions from the court, or in response to petitions or requests by the people, or on its own initiative, the grand jury investigates public problems, officers and institutions (such as hospitals and jails) and reports its findings. If improper conditions are found to exist, the grand jury may recommend changes. Subsection 3 of NRS 172.175 provides that the report may not include a reprimand or condemnation of any person for his

failure to meet ethical or moral standards whose violation is not a crime or public offense. The reason for this restriction is that such a report gives the person named no public, official opportunity to reply or defend himself as he could do at his trial had he been indicted. For the same reason, the report may not single out any person directly or by innuendo or otherwise accuse that person of a wrongdoing which if true would constitute an indictable offense unless the report is accompanied by a presentment or indictment of that person.

In 1979 the Nevada Supreme Court decided, in the silence of the statutes, that the district court should review the grand jury's report before it is filed and publicized. The review is to determine whether the grand jury has acted irresponsibly or unlawfully and the judge expunges any inappropriate material.[3] No limit was set on the time a district judge may take to review and file the report.

The reportorial power of a grand jury is controversial. A minority of the members of the subcommittee believe that such reports do more harm than good and therefore should be abolished. The subcommittee heard a number of stories which illustrated the damage an improper report could cause. However, a majority of the members believed that the reportorial power was a necessary means of exposing public problems and corruption. They agreed that restrictions must be imposed to avoid the damage caused by improper reports. Therefore, the subcommittee recommends that the legislature:

> Allow reports by grand juries which contain statements on matters affecting the public interest; prohibit those which ridicule or abuse any person involved. (BDR 14-208)
>
> Permit any person who is directly or by innuendo, imputation or otherwise accused of a wrongdoing in a grand jury's report, which if true would constitute an indictable offense, but where a true bill has not been returned, to:
>
> (a) Receive a copy of the portion of the report which pertains to him; and
>
> (b) Request a hearing where he may move to expunge any improper statements.
>
> (BDR 14-208)
>
> Require a district judge to file a grand jury's report within 60 days after it is submitted to him for review. (BDR 14-208)

A record of a grand jury's proceedings in a criminal case is required by NRS 172.215. To ensure a complete transcript of all proceedings of the grand jury, the subcommittee recommends that the legislature:

> Require the recording of all matters before a grand jury by a certified shorthand reporter except:
> (a) Any confidential communication between a witness and his legal counsel, when the legal counsel is allowed to accompany the witness before the grand jury; and
> (b) The deliberations and voting of the grand jury. (BDR 14-149)

A grand jury's report, after judicial review, is filed with the county clerk. There is no provision for the dissemination of the recommendations it contains. Therefore, the subcommittee recommends that the legislature:

> Require the clerk of the court to transmit within 5 days to any affected agency or public officer a copy of the grand jury's report. (BDR 14-208)

E. Judicial Oversight

The grand jury is an arm of the court. As a practical matter, however, it is the district attorney who is continually interacting with the grand jurors. This interaction raises many questions about the independence of the grand jury. The district judge must be the legal adviser and oversee the workings of the grand jury. Therefore, the subcommittee recommends that the legislature:

> Require the court which impanels a grand jury to charge the jurors and alternate jurors completely. (BDR 14-149)

> Require the grand jury to issue a quarterly report to the district court which includes a summary of its activities and financial status. (BDR 14-209)

> Require the district judge to give advice to the grand jury regarding legal matters. (BDR 14-209)

A grand jury must be financially independent. Currently a grand jury is supported through appropriations from the board of county commissioners. The subcommittee was told that the withholding of financial support has been a result of a particular board's desire to stop the grand jury's investigation. However, the subcommittee also was told that grand jurors as a group are not experienced in effective methods of investigation and therefore spend more money than is necessary. To maintain a grand jury's financial independence and provide some fiscal supervision, the subcommittee recommends that the legislature:

> Prohibit the grand jury from spending money or incurring obligations in excess of the amount budgeted for its investigative activities unless the proposed expenditure is approved in advance by the district judge. (BDR 14-209)

F. Procedural and Miscellaneous Changes

The grand jury has broad investigative powers. The potential for abuse of these powers must be limited. Therefore, the subcommittee recommends that the legislature:

> Prohibit a district attorney from using a grand jury to obtain tangible, documentary or testimonial evidence to assist him in the preparation for trial of a defendant who has already been charged by indictment, information or complaint. (BDR 14-149)

The grand jury must inquire into "the misconduct in office of public officers of every description within the county." (NRS 172.175). The term "misconduct" is narrowly described in NRS 197.110.[4] To avoid any unintended limitation, the subcommittee recommends that the legislature:

> Replace the term "misconduct" in NRS 172.175 with "conduct which may constitute a violation of a provision of chapter 197 of NRS." (BDR 14-208)

To ensure the adequacy of the grand jury's review in cases with multiple counts or subjects, the subcommittee recommends that the legislature:

Require that grand jurors vote separately on each person considered for and each count included in a presentment or indictment. (BDR 14-149)

A district judge must summon a grand jury upon the receipt of a petition which contains the signatures of 75 registered voters or a number of voters equal to a number to 5 percent of the voters voting in the last general election, whichever is greater.[5] In the smaller counties this means that as few as 75 to 80 people can force a county to spend a significant amount of money. Therefore, the subcommittee recommends that the legislature:

Increase the number of voters required for a petition to summon a grand jury. (BDR 14-149)

In the larger counties a grand jury is ultimately selected from a list of 36 persons (NRS 6.110). There are 17 regular members of the grand jury and 12 alternates. Since there has been an increase in the number of persons who ask to be excused from jury service it is difficult to obtain 29 jurors from the list of 36. Therefore, the subcommittee recommends that the legislature:

Increase the panel of grand jurors selected in larger counties. (BDR 14-149)

Grand jurors told the subcommittee that they had not known the financial status of the grand jury until all of its money had been spent. To keep the grand jurors fiscally aware, the subcommittee recommends that the legislature:

Require the county treasurer to distribute to the grand jury a monthly accounting of the grand jury's expenditures and the balance remaining. (BDR 14-209)

NRS 172.275 provides that a grand jury must not be discharged before it serves 1 year. The counties of Clark and Washoe customarily have a grand jury in session at all times. These grand juries are mainly used to screen criminal charges and issue indictments. However, when a matter requires investigation these juries are already impaneled and can turn their attention to the matter in question.

In smaller counties, however, if a matter requires an investigation by a grand jury and one is impaneled, the

grand jury investigates the matter in question and then may proceed on an unguided investigation of unrelated or irrelevant matters. District judges seem reluctant to recess the grand jurors after they have investigated the initial matter because the dismissal might appear as an attempt to hide improper actions. This results in a hesitancy to call a grand jury even when it is the best tool for a needed investigation. Therefore, the subcommittee recommends that the legislature:

> Allow a district court to impanel a grand jury to inquire into a specific limited matter. (BDR 14-209)

## III. CONCLUSION

The grand jury is an integral part of the American system of justice. It provides an efficient manner to determine the existence of probable cause in complex criminal cases. It provides a sheltered opportunity to determine the existence of probable cause in cases of a sensitive nature, such as those involving child abuse or sexual assault. It provides an effective means to investigate governmental corruption. It also provides a forum in which a district attorney may present the facts of a controversial case and receive the independent opinion of the community whether criminal charges should be brought. However, reasonable steps must always be taken to ensure against abuse of this powerful institution.

Nevada's statutes regarding grand juries were found to be significantly better than the federal system which was the target of the ABA's principles. However, the subcommittee has recommended the adoption (in some form) of 16 of the 30 ABA principles. The others were omitted because they were inapplicable, inappropriate, unacceptable or already incorporated in the Nevada Revised Statutes. The allowance of legal counsel in the grand jury room under certain circumstances, emphasizing judicial guidance and expanding the matters included in the transcript are all ways to reduce the potential for abusing the grand jury. Any illegal evidence or prosecutorial misconduct is preserved in the transcript and any improper indictments will be dismissed upon review.

With the adoption of the recommendations contained in this report, the grand jury can operate as an effective, efficient and fair part of Nevada's judicial system.

IV. FOOTNOTES

[1]U.S. CONST. amend. V.

[2]Indictments have been overturned when a court ascertained that the district attorney knowingly failed to present evidence which clearly negated guilt. Johnson v. Superior Court of California, 539 P.2d 792 (1975).

[3]In re Report Washoe County Grand Jury; Appeal of Conforte, 95 Nev. 121, (Feb. 1979).

[4]Misconduct of public officer. "Every public officer who shall:

1. Ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, for omitting or deferring the performance of any official duty; or for any official service which has not been actually rendered, except in case of charges for prospective costs or fees demandable in advance in a case allowed by law; or

2. Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or

3. Employ or use any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another,

shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subsection 2 shall be void." (NRS 197.110)

[5]NRS 6.130.

## V. SELECTED REFERENCES

ABA Grand Jury Policy and Model Act 1977-82. Washington, D.C.: American Bar Association Section of Criminal Justice, June, 1982.

Arenella, "Reforming the State Grand Jury System. A Model Grand Jury Act," 13 Rutgers Law Journal 1 (Fall, 1981).

Emerson, Grand Jury Reform: A Review of Key Issues. Washington, D.C.: Department of Justice, National Institute of Justice, January, 1983.

## VI. APPEARANCES

The following people appeared before or presented written material to the subcommittee:

Ralph Baldwin
Pahrump, Nevada

Honorable John W. Barrett
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Ed Basl, Esq.
Chief Deputy District Attorney
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Clyde Biglieri
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Malcolm S. Blakely
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Mrs. Ray Ceccarelli, President
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John Conner, Esq.
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Senator Carl Dodge
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Calvin Dunlap, Esq.
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Honorable Roger D. Foley
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Honorable Michael R. Griffin
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Ninth Judicial District
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James Miller
Virginia City, Nevada

Richard Nall
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Conrad Stewart
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Warren Storie, Chairman
Lander County Commission
Battle Mountain, Nevada

Diane Swainston
Reno, Nevada

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Ralph Watson
Austin, Nevada

Calvin L. Weston
Amargosa Valley, Nevada

Charline Whiteside
Tonopah, Nevada

Wilma Winters
Reno, Nevada

## APPENDICES

## APPENDIX A

### ABA GRAND JURY PRINCIPLES

Developed by the American Bar Association
Section of Criminal Justice

NOTE: Only the grand jury principles constitute approved ABA policy. The commentary and backup report are included for explanatory purposes.

The American Bar Association supports grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable dilligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to inpugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits in camera a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held in camera.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

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

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion in camera by the trial court which convened the grand jury, under standards expressed in principle #17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

26. No prosecutor shall call before the grand jury any witness who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination. However, the prosecutor may seek a grant of immunity or contest the right of the witness to assert the privilege against self-incrimination. In any such case, the prosecutor shall file under seal any motion to compel the testimony of a witness who has indicated his refusal to testify in reliance upon his privilege against self-incrimination and any witness may file under seal any motion relating to or seeking to exercise or protect his right to refuse to testify. All proceedings held on such motions filed under seal shall be conducted in camera, unless the witness requests a public hearing.

27. The grand jury shall be informed as to the elements of the crimes considered by it.

28. No witness shall be found in contempt for refusal to testify before a grand jury unless (1) the witness is provided an opportunity to explain to the grand jury his refusal to testify; and (2) the grand jury thereafter recommends to the court that the witness be found in contempt.

29. No attorney, his agent or employee, shall be questioned by the grand jury concerning matters he has learned in the legitimate investigation, preparation or representation of his client's cause or be subpoenaed to produce before the grand jury private notes, memoranda, and the like constituting his professional work product.

30. The grand jury should be provided separate voting forms for each defendant in a proposed indictment, and each count in an indictment should be the subject of a separate vote.

## APPENDIX B

### COMMENTARY TO PRINCIPLES

Following are comments on each of the thirty principles and supplementary proposed amendment to Rule 6(e) of the F.R. Cr.P.

1. The American Bar Association has previously gone on record (in August 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle #1 represents a reaffirmation of that position. Principle #1 spells out specifically what role counsel should play in the grand jury room. That role is carefully defined in the principle to make it clear that it is strictly limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial" -- as some have feared -- and will not impair expeditious investigations. Under the principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, a provision is included to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process -- except before the grand jury -- is a person who desires a lawyer denied that right. Requiring a witness who needs advise of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceedings and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness continually to get up, go outside, and consult with counsel.

A Seventh Circuit decision [U.S. v. Kopel, 552 F.2d 1265 (1977)] points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. [See In re Tierney, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.] The prestigious American Law Institute (ALI), in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes . . .it seems unfair and inefficient to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel. . .is closely related to the traditional view that the

proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation. . .The difficulty with this view. . .is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt. . .The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver. . .And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions. . .For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some 15 states now have statutes allowing counsel to be present in the grand jury room -- Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Colorado, Massachusetts, Michigan (one-man grand juries), Minnesota, New Mexico, New York, Oklahoma, Pennsylvania, South Dakota, Virginia, Wisconsin and Washington State. The Section contracted practicing attorneys and prosecutors in these states; none reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system.

Several arguments are raised by opponents. First it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside. [Federal Rule of Criminal Procedure 6(e)]. Second, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. In fact, the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay [Costello v. United States, 350 U.S. 359 (1956)]. When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Criminal Justice Section has strengthened principle #20, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings.

Former Watergate Special Prosecutor Charles Ruff -- in supporting this proposal in congressional testimony -- declared that ". . .the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." [Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.]

The American Bar Association has been a leader in asserting the right to assistance of counsel in the criminal justice process. As the ABA Standards for Criminal Justice on Providing Defense Services [§5-1.1] declare, "The objective in providing counsel should be to assure that quality legal representation is afforded. . ." Principle #1 would more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding. This proposal was approved by the ABA House of Delegates by an overwhelming 186-93 margin.

2. Principle #2 was added by the ABA House of Delegates at the August, 1977 Annual Meeting in Chicago as a proposed amendment to the Criminal Justice Section principles offered by the ABA Judicial Administration Division. During the 1977 debate, the U.S. Department of Justice representatives said that they did not oppose this principle.

3. Principle #3 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The ABA believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association already had gone on record in the ABA Standards for Criminal Justice on the Prosecution Function [§3-3.6(b)] supporting this, declaring that, "No prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to principle #3. As the commentary to the ABA standard states, "Such a procedure enhances public confidence in the ultimate decision on whether to prosecute. The obligation to present evidence that tends substantially to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice." The NDAA standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider -- as the trial fact finder would -- any facts tending to negate the defendant's guilt."

Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor knowingly used perjured evidence or failed to present evidence that squarely negated guilt. [U.S. v. Basurto, 497 F.2d 781 (9th Cir., 1974); Johnson V. Superior Court of California, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975).] At the suggestion of U.S. Department of Justice representatives, who questioned the mechanics of the principle as first drafted, the Criminal Justice Section rewrote it to clarify its coverage and intent, since this is a legislative principle, and not simply a general standard for prosecutorial conduct. The Justice Department did not oppose this principle in the 1977 House of Delegates debate.

4. The fourth principle would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is identical to that of §3.6(c) in the ABA Standards for Criminal Justice on the Prosecution Function, and the National District Attorneys Association Standard 14.2E. The NDAA standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The ABA agrees with this rationale. Implementation of this principle will help to insure substantial justice within the grand jury room. The U.S. Department of Justice in 1977 indicated support for this principle.

5. Principle #5 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned -- provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants -- but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required.

The Criminal Justice Section made two changes in this principle during the drafting process. First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Second, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not notify a target. The Section also made this amendment, believing it to be inherent in the original principle. Principle #5 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the ABA believes, in a fairly functioning grand jury -- and criminal justice -- system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined. The Justice Department did not oppose this principle in the 1977 House of Delegates debate.

6. The sixth principle puts the affirmative burden on the prosecutor not to present evidence which he knows to be constitutionally inadmissible at trial. This was rewritten by the Criminal Justice Section during the drafting phase to meet Department of Justice concerns about the principle as originally phrased. (It had originally stated that the grand jury "shall not consider unconstitutionally obtained evidence.") The ABA believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Association policy in the ABA Standards for

Criminal Justice on the Prosecution Function [§3-3.6(a)] declares that "a prosecutor should present to the grand jury only evidence which the prosecutor believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in U.S. v. Calandra, 414 U.S. 338 (1974), the ABA believes that this principle is needed to insure the integrity of the grand jury process; indeed, the Court in Calandra noted that "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The principle is thus not inconsistent with the thrust of Calandra.

7. Principle #7 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The ABA believes that naming of persons as unindicted co-conspirators visits opprobrium upon them -- by charging the named persons with the commission of a crime but denying them a forum in which to see acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury.

The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in U.S. v. Briggs, 514 F.2d 794 (1975). A second sentence states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Justice Department in 1977 did not oppose this principle.

8. The issuance and publication of grand jury reports which single out persons for scorn or criticism, inpugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness -- without affording them any form in which to refute the charges or to seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action -- not the castigation of individuals when the fact-finding form insured by the finding of an indictment is absent. The ABA is not proposing that such grand jury reports be proscribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on individuals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. [People v. Superior Court of Santa Barbara County, 531 P.2d 761 (Cal. 1975); Del. Rules, R.6 (1975); FLA. STAT. ANN. §905.28 (1975).]

The procedures proposed in principle #8 will assist in insuring that such abuses do not occur. [See U.S. v. Briggs, 514 F.2d 794 (5th Cir. 1975) and Report of Grand Jury Proceedings, 479 F.2d 458 (5th Cir. 1973).] The National District Attorneys Association Prosecution Standards commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that ". . .an unfavorable report

may stand as a severe form of extra-judicial punishment, from which there is no appeal. . .the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified. . .grand jurors are accountable to no one. . .grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong." This proposal was not opposed by the Justice Department during the 1977 debate.

9. The ABA opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant already charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office -- a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this principle. In a Department Office of Policy and Planning statement filed in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department stated that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred. . .It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives."

This principle is in accord with well-settled case law. [United States v. Dardi, 330 F.2d 316 (2d Cir. 1964); United States v. Doss, 545 F.2d 548 (6th Cir. 1976).] In the Doss decision, the court declared that, "We find no constitutional statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a use of the grand jury would pervert its constitutional and historial function. . ." The court called it "a possible revival of a version of the Star Chamber of 18th Century England. . ."

10. The ABA strongly opposes prosecutorial use of the grand jury to assist in administrative investigations -- e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in #9, supra. The ABA House of Delegates in February 1977 -- in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e) -- expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Criminal Justice Section report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation. . .The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." [House of Delegates Report Book, 2/77 Midyear Meeting, at 138-9.]

A U.S. Department of Justice paper submitted to the House congressional hearings echoes this concern: "One of the primary abuses of the grand jury which must be avoided. . .is the attempted use of its broad

investigative powers by governmental agencies in pursuit of investigations that are solely their own rather than the grand jury's." [U.S. Department of Justice Office of Policy and Planning, Memorandum on the Grand Jury, P. 106; printed in record of House Judiciary Subcommittee Hearings.] In the case of United States v. Doe, 72 Crim. Misc. 1(S.D. N.Y. 1972), the court, in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 and "to determine civil tax liability," declared that, "The grand jury's role is properly confined. . .when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys in 1977 expressed its support for this proposed principle.

11. Principle #11 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The ABA supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear, or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpoena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The ABA Standards for Criminal Justice on the Prosecution Function [§3-5.7(a)] recognize the prosecutor's obligation to handle witnesses "fairly, objectively, and. . . without seeking to intimidate or humiliate the witness. . ." The U.S. Department of Justice in 1977 supported this principle, as did the Advisory Committee of U.S. Attorneys.

12. Several grand jury reform bills over recent Congresses would require grand jury approval of any subpoenas issued. The ABA opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor, the ABA believes, is much better suited to make determinations regarding issuance of subpoenas than are lay grand jurors. The ABA thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys in 1977 supported this principle.

13. Principle #13 would require that a grand jury subpoena indicate the stature or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The principle does not intend that a detailed description of the statutory and subject areas be required; but that a broad statutory citation or general description of the subject be included. Justice Department representatives in 1977 expressed support for this principle, but indicated concern that, as initially written, the principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the principle's original intent, the Criminal Justice Section added the second sentence; this makes it clear that the indictment cannot be vitiated if the person is indicted under a statute or in a subject

area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys in 1977 supported this principle.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys in 1977 supported this principle.

15. Principle #15 would mandate stenographic or electronic recording of all matters before the grand jury -- except the deliberations of the grand jury itself. This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings Record, House Judiciary Subcommittee on Immigration, Citizenship and International Law, at 714).

Since this proposal was adopted by the ABA in 1977, the Federal Rules of Criminal Procedure have been amended to require recordings of all grand jury proceedings. This is a major step forward.

Major groups have supported this requirement. The American Law Institute, in its Model Code of Pre-Arraignment Procedure, urges that a record be made of all proceedings before the grand jury. The ABA Standards for Criminal Justice on the Prosecution Function [§3-3.5(c)] -- already ABA policy -- provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generally secret and ex parte, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The Prosecution Standards of the National District Attorneys Association [§14.2(F)] also urged that "all testimony before the grand jury should be recorded." Recording will aid the prosecution -- by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

16. This principle is identical to The Prosecution Standards of the National District Attorneys Association [§14.4B] and the ABA Standards for Criminal Justice on the Prosecution Function [§3-3.5(b)]. It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the commentary to the ABA standards notes, "A prosecutor should not take advantage of his role as the ex parte representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury."

Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and feel of the entire case . . ." [emphasis added] [Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153, 154 (1965).] The Justice Department in 1977 expressed its support for this principle.

17. Principle #17 broadens a prior ABA policy concerning transactional immunity to specify proper instances in which immunity should be issued: when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information.

The ABA House of Delegates (at the 1975 Annual Meeting) had already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under Kastigar v. U.S., 406 U.S. 441 (1972), only "use" immunity need be afforded. This merely prevents the prosecution from using the actual testimony (or leads derived therefrom) in any subsequent criminal prosecution.

Some 31 states currently provide transactional immunity. The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732[b]). "Use" immunity, while constitutional [see Kastigar, supra], should be rejected for several practical reasons. It is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. [The reader's attention is called to the Third Circuit case of United States v. Frumento, 552 F.2d 534 (1977), which held that immunized testimony cannot be used to impeach a witness.] Witness cooperation is essential to an effective grand jury investigation, yet the uncertainty generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning.

The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime. [See 14 Am. Crim. L. Rev. 275, 282 (1977), wherein the U.S. Department

of Justice reports that, in practice, few witnesses granted "use" immunity are subsequently prosecuted for crimes described in their immunized testimony.] "Use" immunity represents the most grudging interpretation of the constitutional right against self-incrimination, the ABA believes.

18. A number of recent grand jury reform bills have included a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the ABA does not support such a requirement. Instead, principle #18 would provide that immunity be granted on prosecution motion in camera by the trial court which convened the grand jury; the standards outlined in principle #17 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the ABA believes. This is properly an executive function with court overview.

19. Principle #19 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations -- and has the definite potential of harm to those to whom immunity is alleged to have geen granted. The U.S. Department of Justice in 1977 indicated its agreement with this principle.

20. The question of multiple representation of witnesses in grand jury proceedings has in recent years received increasing attention both from members of the private bar and from government attorneys. [See, e.g., Cole, Time for a Change: Multiple Representation Should be Stopped, 2 Nat'l. J. Crim. Def. 149 (1976); and Speech, May 3, 1977, to Chicago Bar Association on the Perils of Multiple Representation in Criminal Antitrust Proceedings, by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.] Recent court opinions have also tried to grapple with this question. [See, e.g., In Re Investigation Before April, 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976).] Principle #20 was substantially rewritten by the Criminal Justice Section during the drafting stages to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding.

Principle #20 spells out the professional responsibility of an attorney not to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the principle provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise." Under the redrafted approved principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed,

however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel of his or her own choosing" was added to avoid a situation in which the court summarily excludes certain counsel from representing any witness in the proceeding. Multiple representation is considered to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding.

The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in the above-cited article, "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charydis of ineffective assistance of counsel. . ." The Justice Department in 1977 expressed its support for this principle.

21. Principle #21 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one -- it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings had already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department in 1977 supported this principle.

22. The ABA supports legislation which would mandate the court's charging grand jurors orally on impaneling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fair function of the grand jury. Several proposed grand jury reform bills contain such provisions, as does pending legislation in several states. The Department of Justice in 1977 indicated its support for this principle.

23. In adopting principle #23, the ABA goes on record recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify. In some prosecutors' offices around the country, office policy already exists forbidding the calling of journalists before the grand jury. As

the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. . .We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." [Branzburg v. Hayes, 408 U.S. 665, at 707-708 (1972).] Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion. . ."

Principle #23 is further intended to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships. The ABA purposely did not go into further detail in this proposed principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department in 1977 expressed its support for this principle. [See also, commentary to principle #29 below.]

24. In August 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute [28 U.S.C. 1826(a)] to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Criminal Justice Section, in its study of grand jury legislation after the 1975 action, became convinced that this position should be reconsidered, and supported a six-month maximum, as contained in several pending grand jury reform bills. The Section felt that this length of confinement would be sufficient to compel a witness to testify. In June 1977, the U.S. Department of Justice -- softening its original opposition to any change in current law -- agreed to support a maximum 12-month confinement. During the ABA House of Delegates debate in August 1977, the Section agreed to support the 12-month maximum as a compromise. While recognizing that abuses have occurred [See Record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law], the Section believes the ABA-approved 12-month maximum will help to avoid long, punitive confinement. It should be stressed that the Association has previously gone on record supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.

25. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative principle outlined herein, the ABA simply notes that the court should exercise its power to impose appropriate sanctions when the proposed principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the ABA's intent to suggest statutory language.

26. Principle #26 was adopted by the ABA House of Delegates in August 1980. It provides that the prosecutor not call a witness who has stated personally or through his counsel that he will take the Fifth Amendment. Two exceptions to this are recognized, however. First, the prosecutor may of course then seek a grant of immunity under appropriate laws in his jurisdiction. Second, the prosecutor may wish to contest the witness' right to assert his privilege against self-incrimination. In that event, the prosecutor should file under seal any motion to compel the witness' testimony; the witness can file under seal any motion relating to or seeking to protect his right to refuse to give testimony. Importantly, the ABA believes proceedings stemming from these motions should be conducted in camera, and not be subject to public view. There will be instances, however, in which the witness may want a public hearing. In such cases, that request should be granted.

The principle builds in part upon the approved ABA Standards for Criminal Justice on the Prosecution Function, §3-3.6, which reads as follows:

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

In the updating of the standards approved in February 1979, this remained unchanged from the original 1971 standard. Ordinarily, the ABA believes it would impinge upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and claim there the privilege against self-incrimination when the prosecutor has been told in advance that the witness intends to do so. This can seriously prejudice the witness in the eyes of the grand jury, and use of the tactic by the prosecution is unfair.

The principle is intended to meet one of the abuses of the grand jury. Prosecutors can, for example, leak to the press in public official investiagations who is testifying and has taken the Fifth. This can ruin reputations, and -- where there is no later indictment -- the person has no way to clear his name. If the prosecutor is advised that the witness plans to take the Fifth, however, there is no need to parade the person before waiting television cameras for a three-minute appearance before the grand jury. Under the principle, the prosecutor can contest the witness' plan to take the Fifth, but it will be done in camera -- and not operate for the benefit of the news media.

In amendments to the U.S. Attorneys' Manual adopted by the U.S. Department of Justice in December 1977, the Department has directed that, "If a written communication from a target signed by him and his attorney states that they will assert the Fifth Amendment, the witness should generally be excused from testifying unless there are reasons which strongly compel his personal assertion of that right before the grand jury." [Amendment -- Section 9-11.253.] This principle is basically consistent with that Department internal policy. The Department agrees that there should not be a simple hard-and-fast rule that any witness who makes that assertion be excused from testifying. As the commentary to its policy states, ". . .such a broad rule would be

improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. . .However, if a 'target' of the investigation and his attorney state in a writing signed by both that the 'target' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry."

Colorado has employed this procedure for three years, and, according to Denver District Attorney Dale Tooley, it is working better than the old system, where the witness had to be marched in before the grand jury.

In sum, the ABA's principle #26 effectively states the underlying principle that ordinarily a person who states that he plans to invoke the constitutional privilege against self-incrimination should not be called as a witness, for it can be extremely prejudicial before the grand jurors. On the other hand, the ABA principle also recognizes that in some instances the prosecutor will feel it necessary to try to compel that person's testimony, and proposes how this should be handled.

27. Principle #27 was adopted by the ABA House of Delegates in August 1980. It provides that the grand jury be informed as to the elements of the crimes considered by it. It addresses the problem which arises as to jurors' understanding of complex cases. The ABA believes it essential that grand jurors be given an adequate understanding of such complicated areas of the law as mail fraud and conspiracy. This is obviously most important in complex white collar cases. The grand jurors cannot intelligently consider technical cases without knowing what to look for from the witnesses coming before them.

It is not the ABA's intention, however, that failure to inform the grand jury of the elements of the crime later serve as a basis for attack on the indictment.

An essential element of fairness in the grand jury room requires some instruction to grand jurors -- who are laypersons with no background in the law -- as to the elements of crimes they are looking into. The ABA recognized that the mechanics of this instruction will have to be worked out in each jurisdiction as best suits its own procedures. In some jurisdictions, this would be handled by the prosecutor; in other jurisdictions, probably by the courts; in still others, manuals might be developed.

Some case law already supports such a principle. In Gaither v. U.S., 413 F.2d 1061 (D.C. Cir. 1969), D.C. Circuit dismissed an indictment because the grand jury did not have the actual terms of the indictment before it when it considered the government's evidence. This court held that Rule 6 of the Federal Rules of Criminal Procedure requires the grand jury as a body to pass on the actual terms of the indictment because "[w]ithout an indictment before them, the jurors might not have focused upon each particular element and determined which

particular facts should be included in the ultimate accusation." [Id. at 1071.] This requirement has put little extra burden on the prosecutor in the District of Columbia and in fact sometimes helps to catch errors.

28. Principle #28 was adopted by the ABA House of Delegates in August 1980. It addresses the question of recalcitrant witnesses, a subject already covered in part by one of the previously approved principles. The new principle states that no witness shall be found in contempt for refusing to testify unless the witness is provided an opportunity to explain to the grand jurors why he refuses to testify; and the grand jury thereafter recommends to the court that the witness be found in contempt.

The ABA has previously recognized the problems which recalcitrant witnesses face, and the potential for abuses to occur. ABA principle #24, adopted in 1977, states that no witness who refuses to testify and is found in contempt should be confined for more than one year, and the ABA had before that time gone on record in opposition to reiterative contempt, with repeated confinement for refusal to testify about the same transaction.

The rationale for this additional principle is rooted in the concern that some persons who refuse to testify and are cited for contempt by the court may have a good and valid reason for not wanting to testify -- a reason which the grand jurors will accept -- but not a legally valid reason on which the court could base a decision not to find contempt.

While the Seventh Circuit has considered duress to be a defense to a contempt charge [U.S. v. Patrick, 542 F.2d 381 (7th Cir. 1976)], the Fifth Circuit recently rejected a grand jury witness' attempt to assert a duress defense to a contempt citation [In re Grand Jury Proceedings (U.S. v. Gravel) 605 F.2d 750 (5th Cir. 1979)], but refused to reach the question of whether duress can ever be invoked in such cases.

This proposal will help to strengthen the grand jury as an independent decision-making body. A key purpose of the principle is to give more independence to the grand jury and not just be a tool of the prosecutor. The grand jurors may well feel that a witness who has been called to testify against a relative has a valid reason not to do so. The grand jury should have input as to compelling testimony, particularly where family members are involved. In some instances, the grand jurors may perceive a genuine fear of assassination by a witness. In most cases the prosecutor will have sufficient influence with the grand jury to convince them of what he wants to do in such cases, but on occasion there will be witnesses who can persuade the grand jurors otherwise -- if allowed the opportunity to express their reasons for not wanting to testify with them. The prosecutor will also, of course, be able to tell the grand jurors how critical a particular witness' testimony is to the case, allowing the jury to weigh that fact in its decision. This principle could be an additional step toward insuring due process in handling witnesses before the grand jury, and toward safeguarding and strenghtening the independence of the grand jury.

29. Principle #29, generally prohibiting calling of lawyers before the grand jury to be questioned on matters learned during the legitimate investigation and preparation of a case, or being subpoenaed to produce

work product material concerning the client's case, was amended and approved by the ABA House of Delegates in February 1981 with a floor amendment to delete the language, "absent extraordinary and compelling circumstances."

The original grand jury principles adopted by the ABA in 1977 recognized this problem in general terms. This principle addresses the issue more specifically. Principle #23 approved by the House of Delegates in 1977 provided that, "All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships and comparable values." The commentary to the principle noted that its aim was "to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships."

While the Criminal Justice Section has neither the resources nor the capability to conduct a careful empirical study to measure the extent to which the calling of lawyers before grand juries is a problem nationwide, it is the Section's perception that this is a growing problem. The Section thus felt it critical that the ABA go on record in opposition to grand juries' routinely calling lawyers to testify about work product material.

An examination of the jurisprudence concerning application of the work product doctrine to proceedings before grand juries reveals some lack of clarity in current case law, and can serve as a backdrop to consideration of this principle. The U.S. Supreme Court in 1945 in Hickman v. Taylor, 329 U.S. 495, created a qualified protection from discovery for information of litigation, and for memoranda, briefs, communications and other writings prepared by counsel for his own use in handling his client's case. Equally protected were writings reflecting the attorney's mental impressions, conclusions, opinions, or legal theories -- material encompassed by the term "work product." The work product doctrine is distinct from and broader than the attorney-client privilege.

Hickman was a civil case. It was not until 1975 that the U.S. Supreme Court held the work product doctrine applicable to criminal cases. [U.S. v. Nobles, 422 U.S. 225 (1975)]. In Nobles, the Court stated:

> Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt and innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged

> area within which he can analyze and prepare his client's case...It is...necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself...Nobles, at 238 and 239.

The Court thus recognized the clear necessity of applying the doctrine to criminal cases, and found that the protection afforded also extended to information gathered by the attorney's agents at his direction. The Court found, too, that the privilege derived from the work product doctrine was a qualified one which could be waived.

The U.S. Supreme Court has not to date specifically confronted the issue of whether the work product doctrine is applicable to grand jury proceedings. Other courts, however, have confronted and resolved the problems of applying the doctrine in that context. In In the Matter of Terkeltoub, 265 F.Supp. 683 (S.D.N.Y. 1966), that court refused to compel disclosure of an attorney's conversations among himself, a client, and a potential witness. It noted that the demand that a lawyer be forced to testify about his work in defense of a client "must have at least a slightly chilling impact upon counsel for defendants in criminal cases." Although the Terkeltoub court did not make use of the term "work product," that doctrine was implied in its decision, as was the tenet that the work product doctrine effectively prevents the government from acquiring through the grand jury material which it could not secure through regular criminal discovery channels.

The Eighth Circuit was the first federal court of appeals specifically to hold that the work product doctrine applies to grand jury proceedings. in Duffy v. U.S., 473 F.2d 840 (1973), the court held that work product materials enjoy an absolute protection from disclosure in the grand jury context -- where notes and memoranda relative to witness interviews were involved. Several recent federal cases consider whether the work product doctrine affords an absolute or qualified protection to an attorney's notes and memoranda on witness interviews, and what constitutes a showing of good cause sufficient to override the privilege, if it is qualified. In In Re Grand Jury Subpoena Dated December 19, 1979 General Counsel (John Doe Corp.) v. U.S., 599 F.2d 504 (2d Cir. 1979), the Second Circuit held that an attorney's interview notes and memoranda were afforded only qualified protection. The Third Circuit reached a similar decision in In Re Grand Jury Investigation, Appeal of U.S., 599 F.2d 1224 (3d Cir. 1979). That court found that interview memoranda were protected from disclosure only in the absence of a showing of good cause by the government. The court also found that "indisputably, the work product doctrine extends to material prepared or collected before litigation actually commences."

In a case in the Southern District of New York [In Re Grand Jury Subpoena Dated November 9, 1979, 25 CrL 2529 (2/21/80)], the court ordered a law firm to turn over for possible grand jury use the tape recorded conversations between a lawyer and four persons under grand jury investigation. The court found that -- while the tapes were part of the lawyer's work product -- the qualified work product privilege had to give way to the government's substantial need for the evidence. The court noted that tape recordings are entitled to less protection than a lawyer's notes, since they are less likely to reflect his thought processes.

Another issue has also arisen: Whether the work product doctrine protects information acquired or materials prepared in anticipation of litigation other than the criminal charges which may stem from the grand jury proceeding itself. The Fourth Circuit has held, in a 1973 decision, that in the area of civil litigation, upon termination of the litigation, the work product documents prepared incident thereto retain qualified immunity from discovery, and are not freely accessible in subsequent unrelated litigation. [Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973), cert. den. 420 U.S. 997 (1975).] The Colorado Supreme Court has held that work product materials prepared in anticipation of specific civil litigation which is sought by the grand jury are not protected by the work product doctrine unless the civil case's subject matter and the grand jury proceedings are closely related. [A. et al. v. District Court of the Second Judicial District, 550 P.2d 315 (Colo. 1976) cert. den. 429 U.S. 1040.]

Whether materials prepared for use in administrative proceedings are protected from discovery by the grand jury as work product was considered by the Seventh Circuit in Velsicol Chemical Corp. v. Parsons, 561 F.2d 671 (1977), cert. den. 435 U.S. 942. The court refused to extend protections to documents prepared in the prior administrative proceedings. This approach significantly limits the utility of the work product doctrine in grand jury proceedings. Courts have also said the materials prepared in anticipation of prior criminal litigation do not enjoy protection from grand jury discovery. [In Re Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977).] One court has refused to apply the work product doctrine to grand jury proceedings. In In the Matter of Giovinazzo, 382 N.Y.S. 2d 243 (N.Y.Sup. Ct. 1976), the court found that an attorney's right to exclusive possession of his work product was not such a weighty and legitimate interest as to require placing the witness' statement beyond the grand jury's reach.

In summary, a host of difficult issues arise when courts address the question of a claim of work product privilege. The boundaries of that protection are not yet clearly defined. A court must determine if the materials the grand jury seeks fall within the definition of work product, and if the materials were prepared in anticipation of litigation (including civil trials and administrative proceedings), or whether the work product doctrine prevents disclosure to the grand jury only of materials prepared in anticipation of criminal litigation which may result from the grand jury investigation itself. Whether the work product protection extends to interview notes and memoranda must also be addressed.

The ABA believes that a work product protection for attorneys in matters arising in the investigation, preparation or representation of a client's cause is of utmost importance. With the current conflicts in the case law, it is critical that the need to protect confidential relationships is strongly asserted. The present abuse of grand jury subpoenas can and does have a chilling effect on Sixth Amendment rights.

30. Principle #30 proposed by the Criminal Justice Section was approved by the ABA House of Delegates in February 1981. It was proposed as a response to a growing problem which the Section perceived. Practice among prosecutors' offices throughout the country varies greatly. Using the federal system as a benchmark, there are U.S. Attorney's offices that submit voting forms to the grand jury which solicit only a vote of "bill" or "no bill" on an indictment -- regardless of the indictment's complexity. Thus, in a 50-count mail fraud case involving 10 individual defendants and one corporate defendant, a grand jury would in some (and it is believed many) federal jurisdictions simply be asked to vote for or against a proposed indictment.

Principle #30 is designed to make uniform the practice of those jurisdictions which in multi-count and/or multi-defendant cases submit voting forms to the grand jury requiring the grand jurors to address the evidence against each defendant in each count independently. Thus, in the case involving a 50-count mail fraud indictment with 10 individual and one corporate defendants, a grand jury would be required to review the sufficiency of each count as to each named defendant on an appropriate voting form provided by the prosecutor.

The necessary result would be to force the grand jury to assess the sufficiency of each count and the liability of each potential defendant separately.

## APPENDIX C

### Suggested Legislation

SUMMARY--Provides certain rights and privileges for persons likely to be indicted by grand jury. (BDR 14-147)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; allowing certain witnesses to be accompanied by legal counsel; providing certain persons with the right to appear; prohibiting calling certain persons to testify under certain circumstances; requiring the district attorney to present exculpatory evidence; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 172 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this act.

Sec. 2. 1. A person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return may be accompanied by legal counsel during any appearance before the grand jury.

2. The legal counsel who accompanies a person pursuant to subsection 1 may advise his client but shall not:

(a) Address directly the members of the grand jury;

(b) Speak in such a manner as to be heard by the members of the grand jury; or

(c) In any other way participate in the proceedings of the grand jury.

3. The court or the foreman of the grand jury may have the legal counsel removed if he violates any of the provisions of subsection 2 or in any other way disrupts the proceedings of the grand jury.

Sec. 3. 1. The district attorney or the foreman of the grand jury shall give notice of the provisions of section 2 of this act to each person whose indictment is sought or intended at the time:

(a) The person is served with a subpena to appear before the grand jury or notified of the investigation pursuant to section 4 of this act; or

(b) It becomes apparent to the district attorney that he intends to seek the indictment or to the grand jury that it will return an indictment, if the person was not subpenaed or notified pursuant to section 4 of this act.

2. Upon notification pursuant to paragraph (b) of subsection 1, the person must be allowed sufficient time to retain legal counsel to accompany him during any further appearances before the grand jury.

Sec. 4. 1. A person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return, but who has not been subpenaed to appear before the grand jury, may testify before the grand jury if he requests to do so and executes a valid waiver in writing of his constitutional privilege against self-incrimination.

2. Except as otherwise provided in subsection 3, the district attorney or the foreman of the grand jury shall make all reasonable attempts to notify the person of his right to testify as soon as possible after it becomes apparent to the district attorney that he intends to seek an indictment or to the grand jury that it will return an indictment. If the district attorney or foreman has made reasonable attempts to notify him and has been unable to do so, he shall present the evidence of his attempts to the district court in a closed hearing. If the court determines that all reasonable attempts have been made to notify the person, then the person need not be notified.

3. If the district attorney or foreman has reason to believe that the notification may cause the person to flee from the jurisdiction of the court, endanger the lives or property of other persons or otherwise obstruct justice, he shall present those reasons to the district court in a

closed hearing. If the court agrees with his belief, then the person need not be notified.

Sec. 5. 1. If a person who has been subpenaed to appear before a grand jury informs the district attorney that he intends to refuse to testify and to assert his constitutional privilege against self-incrimination, the district attorney shall:

(a) Move for an order of immunity pursuant to NRS 178.572;

(b) Challenge the existence of a valid privilege by filing in any court of record a motion to compel the testimony of the person; or

(c) Withdraw the subpena.

2. All proceedings which are held on a motion filed pursuant to subsection 1 must be closed unless the person subpenaed requests a public hearing.

3. If the existence of the privilege is challenged, the court shall hear the evidence of both parties and determine whether or not a valid privilege exists and to which matters, if any, it extends.

4. The district attorney shall not call a person to testify before a grand jury regarding matters which have been so determined to be within his constitutional privilege against self-incrimination.

Sec. 6. NRS 172.095 is hereby amended to read as follows:

172.095 1. The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court [must] shall give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury. The court need not, however, charge them respecting the violation of any particular statute.

2. In its charge to the grand jury, the court shall inform them that the failure of a person to exercise his right to testify as provided in section 4 of this act must not be considered in their decision of whether or not to return an indictment.

Sec. 7. NRS 172.145 is hereby amended to read as follows:

172.145 [The] 1. Except as otherwise provided in section 4 of this act and subsection 2, the grand jury is not bound to hear evidence for the defendant. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they [must order such]

shall order that evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

2. The district attorney shall present to the grand jury any exculpatory evidence of which he is aware that would:

(a) Tend to negate any of the elements of the crime allegedly committed by the person under consideration for indictment;

(b) Aid in establishing an affirmative defense available to the person under consideration for indictment; or

(c) Otherwise create a reasonable doubt about the guilt of the person under consideration for indictment.

Sec. 8. NRS 172.235 is hereby amended to read as follows:

172.235 [The district attorney, the witness under examination, interpreters when needed, a stenographer for the purpose of taking the evidence, any person engaged by the grand jury pursuant to NRS 172.205, and any person requested by the grand jury to be present may be present while the grand jury is in session, but no]

1. Except as otherwise provided in subsection 2, the following persons may be present while the grand jury is in session:

(a) The district attorney;

(b) A witness who is testifying;

(c) An attorney who is accompanying a witness pursuant to section 2 of this act;

(d) Any interpreter who is needed;

(e) The certified shorthand reporter who is taking stenographic notes of the proceeding;

(f) Any person who is engaged by the grand jury pursuant to NRS 172.205; and

(g) Any other person requested by the grand jury to be present.

2. No person other than the jurors may be present while the grand jury is deliberating or voting.

SUMMARY--Requires grand jury witnesses to be notified of general subject of inquiry. (BDR 14-148)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; requiring witnesses subpenaed to appear before a grand jury to be notified of the general subject of the inquiry; prohibiting the dismissal of an indictment under certain circumstances; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 172 of NRS is hereby amended by adding thereto a new section to read as follows:

A presentment or indictment may not be dismissed on the ground that the specific subject of the indictment or presentment was not disclosed to the defendant in a subpena issued pursuant to NRS 172.195 or paragraph (a) of subsection 1 of NRS 174.315.

Sec. 2. NRS 172.195 is hereby amended to read as follows:

172.195 1. The grand jury may issue subpenas, subscribed by the foreman or by the deputy or temporary foreman when acting for him, for witnesses within the state and for the production of books, papers or documents.

2. The grand jury shall orally inform any witness so subpenaed of the general nature of the grand jury's inquiry before the witness testifies.

Sec. 3. NRS 174.315 is hereby amended to read as follows:

174.315 1. The district attorney may issue subpenas subscribed by him for:

(a) Witnesses within the state, in support of the prosecution or whom the grand jury may direct to appear before it, upon any investigation pending before the grand jury.

(b) Witnesses within the state, in support of an indictment, information or criminal complaint, to appear before the court at which it is to be tried.

(c) Witnesses already subpenaed who are required to reappear in any justice's court at any time the court is to reconvene in the same case within 60 days, and [such] the time may be extended beyond 60 days upon good cause being shown for its extension.

2. Witnesses, whether within or without the state, may accept delivery of a subpena in lieu of service, by a written promise to appear signed by the witness.

3. The district attorney shall orally inform any witness subpenaed as provided in paragraph (a) of subsection 1 of

the general nature of the grand jury's inquiry before the witness testifies.

SUMMARY--Makes various procedural changes regarding grand juries. (BDR 14-149)

FISCAL NOTE: Effect on Local Government: Yes.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; prohibiting certain actions by the district attorney and grand jurors; allowing a person who is investigated but not indicted to publicize that an indictment was not issued; allowing a witness to review his previous testimony under certain circumstances; increasing the number of signatures required to petition for the summoning of a grand jury; making various other procedural changes; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 172 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this act.

Sec. 2. A district attorney shall not:

1. Make any statement or present any argument to a grand jury which would be impermissible if it were made to a petit jury.

2. Use a grand jury to discover tangible, documentary or testimonial evidence to assist in the prosecution of a defendant who has already been charged with the public offense by indictment, information or complaint.

Sec. 3. During a grand jury proceeding, the district attorney and the grand jurors shall not:

1. Question an attorney or his employee regarding matters which he has learned during a legitimate investigation for his client.

2. Issue a subpena for the production of the private notes or other matters representing work done by the attorney or his employee regarding the legal services which the attorney provided for a client.

Sec. 4. A person who was the subject of a grand jury investigation but against whom an indictment was not returned may, after the investigation is concluded, make public the fact that no indictment was issued as a result of the grand jury investigation.

Sec. 5. A person who:

1. Is called to testify before a grand jury; and

2. Has testified regarding the same matter at another time before the same or another grand jury,

may, upon his request and under such conditions as the court deems reasonable, review the transcript or recording of his prior testimony before he testifies again.

Sec. 6. NRS 172.095 is hereby amended to read as follows:

172.095 1. The grand jury being impaneled and sworn,

must be charged by the court. In doing so, the court [must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury. The court need not, however, charge them respecting the violation of any particular statute.] shall:

(a) Give the grand jurors such information as is required by law and any other information it deems proper regarding their duties and any charges for public offenses returned to the court or likely to come before the grand jury.

(b) Give each regular and alternate grand juror a copy of the charges.

2. Before seeking an indictment, the district attorney shall inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment.

Sec. 7. NRS 172.195 is hereby amended to read as follows:

172.195 [The] Except as otherwise provided in section 3 of this act, the grand jury may issue subpenas, subscribed by the foreman or by the deputy or temporary foreman when acting for him, for witnesses within the state and for the production of books, papers or documents.

Sec. 8. NRS 172.215 is hereby amended to read as follows:

172.215 1. Whenever criminal causes are being investigated by the grand jury, it shall appoint a certified shorthand reporter. If he is not an official district court reporter, he shall, before entering upon his duties, take and subscribe the constitutional oath of office. He [shall] is entitled to receive the same compensation for his services as an official district court reporter.

2. Except as otherwise provided in subsection 3, the certified shorthand reporter shall include in the notes he takes of a grand jury proceeding all matters which come before the grand jury including:

(a) The charge by the impaneling judge;

(b) Any subsequent instructions or statements made by the judge;

(c) Each statement made by the district attorney;

(d) Each question asked of and response given by the witnesses who appear before the grand jury; and

(e) Any statements made by the grand jurors during the proceeding.

3. The certified shorthand reporter shall not include in his notes:

(a) Any confidential communication between a witness and

his legal counsel, when the legal counsel is allowed to accompany the witness before the grand jury; and

(b) The deliberations and voting of the grand jury.

Sec. 9. NRS 172.255 is hereby amended to read as follows:

172.255 1. A presentment or indictment may be found only upon the concurrence of 12 or more jurors.

2. The jurors shall vote separately on each person and each count included in a presentment or indictment.

3. The presentment or indictment [shall] must be returned by the grand jury to a judge in open court or, in the absence of the judge, to the clerk of the court in open court, who shall determine that 12 or more jurors concurred in finding a presentment or indictment. If the defendant has been held to answer and 12 jurors do not concur in finding a presentment or indictment, the foreman shall so report to the court in writing forthwith.

[2.] 4. The failure to indict [shall not, however,] does not prevent the same charge from being again submitted to a grand jury [or as often as the court shall so direct. But, without such direction, it shall not be again submitted.] if resubmission is approved by the court.

Sec. 10. NRS 174.335 is hereby amended to read as follows:

174.335 1. [A] Except as otherwise provided in section

3 of this act, a subpena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.

2. The court on motion made promptly may quash or modify the subpena if compliance would be unreasonable or oppressive.

3. The court may direct that books, papers, documents or objects designated in the subpena be produced before the court at a time [prior to] before the trial or [prior to] before the time when they are to be offered in evidence and may , upon their production , permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Sec. 11. NRS 178.572 is hereby amended to read as follows:

178.572 1. In any investigation before a grand jury, or any preliminary examination or trial in any court of record, the court on motion of the state may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.

2. Any motion, hearing or order regarding the immunity of a grand jury witness must not be made public before an indictment or presentment is issued in the case.

Sec. 12. NRS 6.110 is hereby amended to read as follows:

6.110 1. In any county having a population of 30,000 or more, the selection of persons as proposed grand jurors must be made in the manner prescribed in this section upon notice from any district judge as often as the public interest may require and at least once in each 4 years. The clerk of the court under the supervision of the district judge presiding over the impaneling of the grand jury shall select at random the names of at least 500 qualified persons to be called as prospective grand jurors. The clerk shall then prepare and mail to each person whose name was selected a questionnaire prepared by the district judge stating the amount of pay, the estimated time required to serve and the duties to be performed. Each recipient of the questionnaire must be requested to complete and return the questionnaire, indicating thereon his willingness and availability to serve on the grand jury. The clerk shall continue the selection of names and mailing of questionnaires until a panel of 100 persons who are willing to serve is established.

2. A list of the names of persons who indicated their willingness to serve as grand jurors must be made by the clerk of the court and a copy furnished to each district

judge. The district judges shall meet within 15 days thereafter and shall, in order of seniority, each select one name from the list until [36] 50 persons have been selected. A list of the names of the persons selected as proposed grand jurors must be made by the clerk, certified by the district judges making the selection and filed in the clerk's office. The clerk shall immediately issue a venire, directed to the sheriff of the county, commanding him to summon the proposed grand jurors to attend in court at such time as the district judge directs.

3. The sheriff shall summon the proposed grand jurors, and the district judge presiding over the impaneling of the grand jury shall select at random from their number 17 persons to constitute the grand jury and 12 persons to act as alternate grand jurors. If for any reason eight or more proposed grand jurors fail to appear, additional proposed grand jurors sufficient to complete the panel of grand jurors and alternates must be selected from the list of prospective grand jurors by the district judge presiding over the impaneling, and the persons so selected must be summoned to appear in court at such time as he directs.

4. Every person named in the venire as a grand juror must be served by the sheriff mailing a summons to the person

commanding him to attend as a juror at a time and place designated therein. The summons must be registered or certified and deposited in the post office addressed to the person at his usual mailing address. The receipt of the person so addressed for the registered or certified summons must be regarded as personal service of the summons upon him and no mileage may be allowed for service. The postage and fee for registered or certified mail must be paid by the sheriff and allowed him as other claims against the county.

5. If for any reason a person selected as a grand juror is unable to serve on the grand jury until the completion of its business, the district judge shall select one of the alternate grand jurors to serve in his place. An alternate must be served by the sheriff in the manner provided in subsection 4.

Sec. 13. NRS 6.130 is hereby amended to read as follows:

6.130 1. [In any county it shall be mandatory to] The district judge shall summon a grand jury whenever a verified petition is presented to the clerk of the district court containing the signatures of [75 registered voters or the signatures of] registered voters equal in number to [5] 25 percent of the number of voters voting within the county at the last preceding general election [, whichever number of

signatures is the greater, specifically setting] which specifically sets forth the fact or facts constituting the necessity of convening a grand jury.

2. In any county, if the statute of limitations has not run against the person offending, the district judge may summon a grand jury after an affidavit or verified petition by any taxpayer accompanied by and with corroborating affidavits of at least 2 additional persons has been filed with the clerk of the district court, setting forth reasonable evidence upon which a belief is based that there has been a misappropriation of public [funds] money or property by a public officer, past or present, or any fraud committed against the county or state by any officer, past or present, or any violation of trust by any officer, past or present. The district judge shall act upon the affidavit or petition within 5 days. If he fails or refuses to recall or summon a grand jury, the affiant or petitioner may proceed as provided in NRS 6.140.

3. If there is a grand jury in recess, the court shall recall that grand jury. Otherwise, a new grand jury [shall] must be summoned.

Sec. 14. NRS 22.110 is hereby amended to read as follows:

22.110 [When] 1. Except as otherwise provided in subsection 2, when the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he [shall have performed it, and in that case the act shall] performs it. The required act must be specified in the warrant of commitment.

2. A person so imprisoned as a result of his failure or refusal to testify before a grand jury may be imprisoned in the county jail for a period not to exceed 6 months or until that grand jury is discharged, whichever is less.

SUMMARY--Urges Congress to enact American Bar Association's principles to reform federal grand juries. (BDR 150)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

JOINT RESOLUTION--Urging the members of Congress to adopt the principles developed by the American Bar Association for the reform of federal grand juries.

WHEREAS, The grand jury is the only integral part of the federal system of criminal justice which has not been reviewed under the current judicial notions of fairness and due process; and

WHEREAS, Federal grand juries conduct their work in secret and without close judicial scrutiny; and

WHEREAS, There is an apparent absence of procedural safeguards which protect accused persons and persons under investigation from the unbridled power of overzealous prosecutors; and

WHEREAS, Many cases have demonstrated that the current statutes and rules are not adequate to ensure that federal grand juries still serve the dual purposes--a shield for the innocent, a sword for the government--that our founding fathers contemplated; and

WHEREAS, Enactment of the principles developed by the American Bar Association would help prevent future abuse of federal grand juries and restore the respect this nation had for this institution which is deeply rooted in the American system of justice;

now, therefore, be it

RESOLVED BY THE AND OF THE STATE OF NEVADA, JOINTLY, That the Nevada legislature urges the Congress to enact legislation which incorporates the American Bar Association's principles for the reform of federal grand juries; and be it further

RESOLVED, That a copy of this resolution be prepared and transmitted by the legislative counsel to the Vice President of the United States as President of the Senate, the Speaker of the House of Representatives and each member of the Nevada congressional delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

SUMMARY--Enlarges scope of confidentiality of proceedings of grand jury and increases penalty for disclosure. (BDR 14-207)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; enlarging the scope of confidentiality of their proceedings; providing a penalty; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 172.245 is hereby amended to read as follows:

172.245 1. [Disclosure] The disclosure of evidence presented to or [events] an event occurring or [statements] a statement made in the presence of the grand jury other than its deliberations and the vote of [any] a juror may be made to the district attorney for use in the performance of his duties. [Otherwise a juror, attorney, interpreter, stenographer or other person may disclose evidence presented to or events occurring or statements made in the presence of the grand jury only:]

2. Except as otherwise provided in subsection 3, a grand juror, district attorney or a member of his staff, peace officer, clerk, stenographer, interpreter or a person invited to attend the proceedings of a grand jury pursuant to NRS 172.205 shall not

disclose evidence presented or an event occurring or a statement made in the presence of the grand jury.

3. A person may disclose his knowledge concerning the proceedings of a grand jury:

(a) When so directed by the court preliminary to or in connection with a judicial proceeding;

(b) When permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the presentment or indictment because of matters occurring before the grand jury; or

(c) As provided in NRS 172.225.

[2.] 4. No obligation of secrecy may be imposed upon any person except in accordance with this section. The court may direct that a presentment or indictment [shall] be kept secret until the defendant is in custody or has been given bail, and [in that event] the clerk shall seal the presentment or indictment . [and no person shall] It is unlawful for any person to disclose the finding of the secret presentment or indictment except when necessary for the issuance and execution of a warrant or summons.

5. A person who discloses evidence presented to or an event occurring or a statement made in the presence of the grand jury in violation of this section is guilty of a gross misdemeanor and contempt of court.

6. The attorney general shall investigate and prosecute a violation of this section.

Sec. 2. NRS 199.390 is hereby repealed.

SUMMARY--Specifies procedure for releasing grand jury report and rights of person identified in report. (BDR 14-208)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; specifying the procedure for the issuance of a report; establishing the rights of a person identified in a report; clarifying its authority to investigate the misconduct of public officials; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 172 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. 1. A grand jury may issue a report concerning a matter into which it may lawfully inquire.

2. The report must be issued for the sole purpose of reporting on the matter. The report must not:

(a) Contain material the sole effect of which is to ridicule or abuse a person or otherwise subject him to public opporbrium; or

(b) Accuse a person directly or by innuendo, imputation or otherwise of an act that, if true, constitutes an indictable offense unless the report is accompanied by a presentment or an indictment of the person for the offense mentioned in the report.

3. The judge impaneling a grand jury shall include the provisions of this section in his charge to the grand jury.

Sec. 3. 1. The grand jury shall submit a draft of the report that it wishes to make to the district judge who impaneled it.

2. The judge shall review its contents and expunge from the draft any material which violates paragraph (a) of subsection 2 of section 2 of this act.

3. The judge shall send to any person identified in the draft in violation of paragraph (b) of subsection 2 of section 2 of this act the pertinent part of the draft and notify him that he has been identified in the draft of the report of the grand jury in connection with possible criminal conduct. The person may, within 5 days after receiving the notice and the portion of the draft, submit a written request to the judge for a hearing in chambers to consider a motion to expunge that portion of the draft from the final report.

4. The judge shall rule on any such motion to expunge material within 20 days after the completion of the hearing on the motion.

5. If the judge determines that the draft:

(a) Violates in its entirety a provision of section 2 of this act; or

(b) After the removal of a portion pursuant to section 2 of this act, is so incomplete that it is meaningless,

he shall not file the report with the clerk of the district court but shall file instead a written statement describing, generally, his action and the basis for it.

6. The judge shall file either the draft, the draft as corrected or the statement with the clerk of the district court within 60 days after receiving the draft from the grand jury. Upon filing, the draft becomes the final report of the grand jury.

7. Within 5 days after the report is filed, the clerk shall mail a copy of the pertinent portion of the report to each person or governmental entity mentioned in the report.

Sec. 4. NRS 172.175 is hereby amended to read as follows:

172.175 1. The grand jury [must] shall inquire into:

(a) The case of every person imprisoned in the jail of the county, on a criminal charge, against whom an indictment has not been found or an information or complaint filed.

(b) The condition and management of [the public prisons] any public prison located within the county.

(c) The misconduct in office of public officers of every description within the county [.] which may constitute a violation of a provision of chapter 197 of NRS.

2. The grand jury may inquire into and report on any and all matters affecting the morals, health and general welfare of the

inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein.

[3. No report issued pursuant to this section shall single out any person or persons which directly or by innuendo, imputation or otherwise accuses such person or persons of a wrongdoing which if true would constitute an indictable offense unless the report is accompanied by a presentment or indictment of such person or persons. At the time any grand jury is impaneled, the provisions of this subsection shall be included in the charge to such grand jury.]

SUMMARY--Provides for judicial supervision of grand juries and permits impanelment for limited purpose. (BDR 14-209)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

AN ACT relating to grand juries; permitting their impanelment for a limited purpose; providing for recesses; providing for judicial supervision of grand juries; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 172 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. 1. The district judge impaneling a grand jury shall supervise its proceedings and shall provide any legal advice that it needs.

2. The grand jury shall submit a written report of its activities and expenditures no less often than every 3 months or a fraction thereof to the judge who impaneled it.

3. The grand jury shall not spend money or incur a debt exceeding the amount of money budgeted for its use unless it first obtains the approval of the judge who impaneled it after the board of county commissioners has been advised of the proposed expenditure.

4. The county treasurer shall provide to the grand jury a monthly statement of its expenditures for the preceding month and the balance remaining of the money appropriated for its use.

Sec. 3. A district judge may impanel a grand jury to inquire into a specific limited matter among those set forth in NRS 172.175. In that case, the judge shall charge the grand jury as to its limited duties and give it such information as the judge deems necessary. A grand jury that is impaneled for a specific limited purpose shall not inquire into matters not related to that purpose. A grand jury impaneled for a specific limited purpose may be discharged after the expiration of 1 year.

Sec. 4. NRS 172.175 is hereby amended to read as follows:

172.175 1. [The grand jury must] Each grand jury that is not impaneled for a specific limited purpose shall inquire into:

(a) The case of every person imprisoned in the jail of the county, on a criminal charge, against whom an indictment has not been found or an information or complaint filed.

(b) The condition and management of [the public prisons] any public prison located within the county.

(c) The misconduct in office of public officers of every description within the county.

2. [The] A grand jury that is not impaneled for another specific limited purpose may inquire into and report on any and all

matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein.

3. [No] A report issued pursuant to this section [shall] must not single out any person or persons [which] directly or by innuendo, imputation or otherwise [accuses such] or accuse the person or persons of a wrongdoing which if true would constitute an indictable offense unless the report is accompanied by a presentment or indictment of [such] the person or persons. At the time any grand jury is impaneled, the provisions of this subsection [shall] must be included in the charge to [such] the grand jury.

Sec. 5. NRS 172.275 is hereby amended to read as follows:

172.275 1. A grand jury shall serve until discharged by the court and may be so discharged at any time after the expiration of 1 year. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel an alternate grand juror in place of the juror excused.

2. Where the court is composed of more than one judge, any judge may discharge or excuse a juror; but if any other judge notifies the judge so acting, in writing within 24 hours after the action is taken, that he objects, [such action shall stand] the action stands rescinded and is not [become] effective unless

[and until] the concurrence of a majority of the judges composing the court is obtained.

Sec. 6. NRS 6.145 is hereby amended to read as follows:

6.145 Upon the completion of its business for the time being, the court may , at the request of or with the concurrence of the grand jury, recess the grand jury subject to recall at such time [or times] as new business may require its attention.