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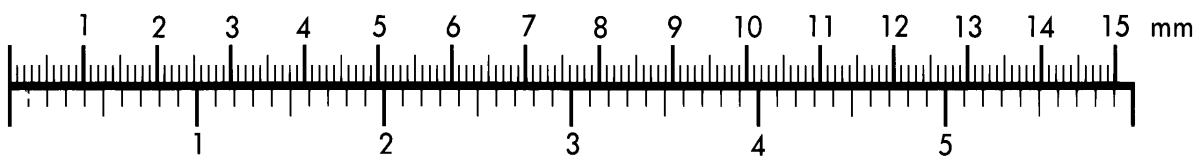




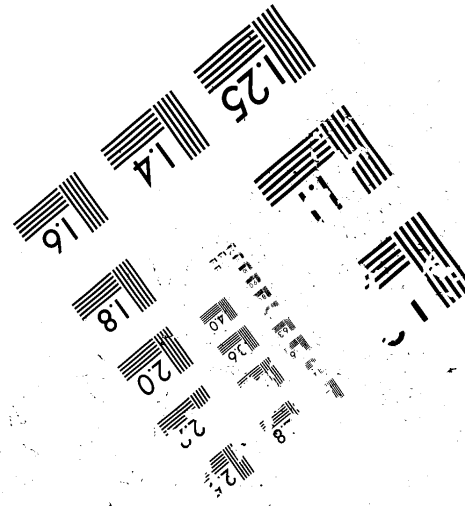
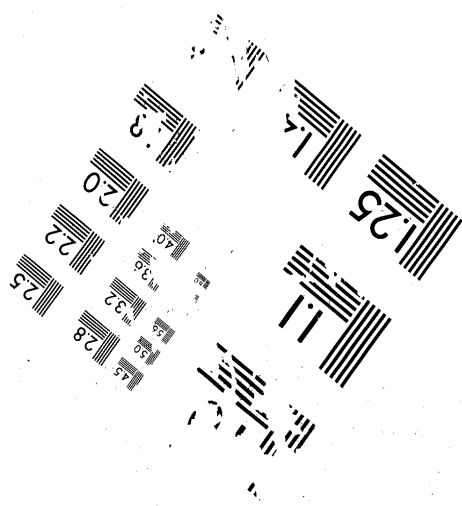
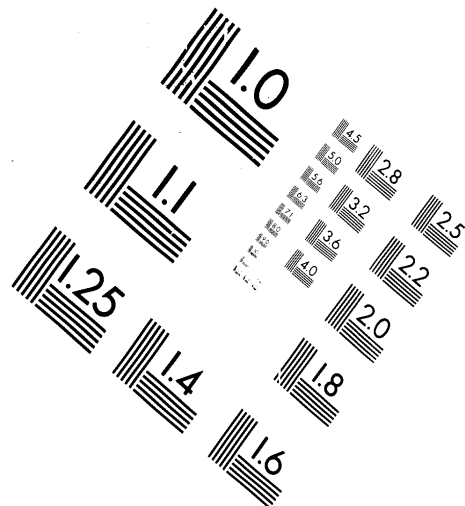
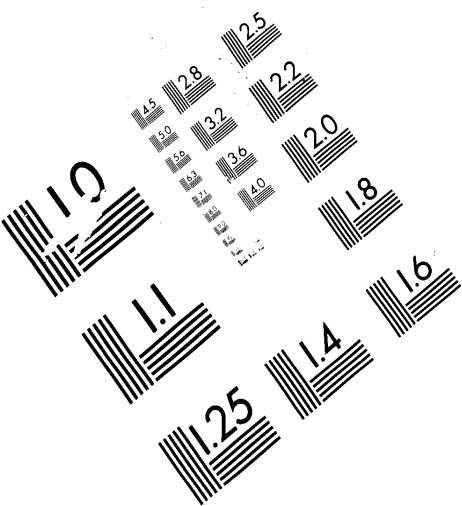
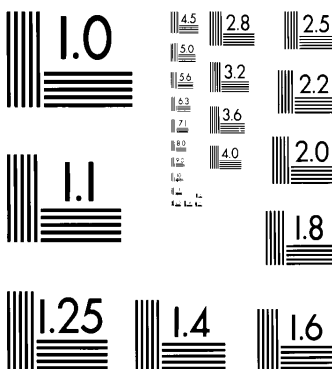
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# **THE GRAND JURY PROJECT**

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Report to Chief Judge Judith S. Kaye and  
Chief Administrative Judge Jonathan Lippman

## **VOLUME I**

Findings and Recommendations

March 31, 1999



## VOLUME I - FINDINGS AND RECOMMENDATIONS

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## **Preface**

When Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman asked me a year ago to chair the Grand Jury Project, I welcomed the opportunity. I knew that the earlier work of the Jury Project, which issued its report in 1994, had led to wide-ranging statewide reforms, revitalizing what had been a largely neglected component of our justice system. Judge Kaye expressed her hope that the success of the Jury Project could be repeated with the grand jury system.

The Jury Project had addressed only the petit, or trial, jury. Our task was to examine the "other" jury -- the grand jury. Judge Kaye asked us to focus, as the first Jury Project had done, on the experience of the juror. Our mandate included evaluating how to spread the opportunity and burden of jury service more equitably throughout the community, examining the mechanics of summoning grand jurors to the courthouse, ensuring that grand jurors understand their responsibilities, guaranteeing that grand jurors are properly treated and that their time is used efficiently and assessing the facilities in which they serve.

While not wishing to restrict our review of the process, Judge Kaye made it clear that our mission was not to evaluate alternatives to the grand jury. Quite the contrary, we were to recommend ways to strengthen the existing grand jury system.

When I agreed to chair the Committee, I wondered why the grand jury had not been examined during the Jury Project effort in 1994. The reason became clear at our first Committee meeting last February when G. Thomas Munsterman, Director of the Center for Jury Studies of the National Center for State Courts, informed the Committee that we were "pioneers." The American Bar Association Standards, used as a template for the 1994 Jury Project, addressed trial juries, not



grand juries. Many studies of the petit jury system had been conducted, but little research, if any, had ever been conducted on the issues that Judge Kaye had asked us to examine.

Undeterred by the lack of existing research, the Grand Jury Project has conducted its own research and produced what is the most comprehensive review ever of a statewide grand jury system. This report and the companion data volume contain the results of the Committee's work. There are many areas for improvement: terms of service may be too long; explanatory materials for jurors are sparse; and facilities can be improved. The report offers suggestions for review and comment on these and many other topics.

The most gratifying finding of our study is the vitality of the grand jury system. Despite the shortcomings of facilities, and often without much central administrative support, court administrators and prosecutors run an admirable grand jury system. During the course of the project, Committee members interviewed and surveyed judges, commissioners of jurors, prosecutors, court clerks and jury wardens. New Yorkers can be proud of these public servants who administer the grand jury system with such sensitivity to the needs of the citizens who serve. Their good work is appreciated by the grand jurors themselves. In an exit questionnaire prepared by the Committee that grand jurors were asked to complete at the conclusion of their service, the great majority expressed the view that they had made a contribution and had a more favorable impression of grand jury service than before they served.

I would like to thank Chief Judge Kaye and Chief Administrative Judge Lippman for creating the Grand Jury Project and affording us the opportunity and means to conduct this study. Committee work of this kind is sometimes pursued with only a vague hope that positive changes will result. Given Judge Kaye's record with jury reform, however, we knew that our findings would



receive the highest consideration and that those of our recommendations that were accepted would have the support and authority of the Chief Judge. We needed to do a careful job. With the help of a talented committee of judges, prosecutors, attorneys, jury commissioners, educators and court administrators, I believe we have succeeded.

I would also like to acknowledge the efforts of the members of the Committee, who have all worked diligently to deliver a careful and balanced report. My appreciation to our Vice-Chair, the Honorable Robert G. M. Keating, for lending his talents and experience to all aspects of the effort.

At the outset of the project, we divided into three subcommittees, each with its own chairperson. Joel Cohen, Lewis Liman, Gary Naftalis and Judge Martin Marcus have done a superb job of chairing these subcommittees and keeping them focused. Stephen Kong, Stephen Saxl, James Shifren and Jeffrey Sklaroff served as able counsel to the subcommittees by producing and reviewing numerous drafts of the report; their contribution was invaluable.

We all appreciated the cooperation we received from Office of Court Administration Director of Court Research Chester Mount and OCA Special Counsel Lawrence Marks, as well as Anthony Manisero, Martha Perez and Ari Weissfelner of the OCA Jury Office, who provided support for all phases of the Committee's work; and David Bookstaver of the court system's Communications Office for organizing the public hearing.

Our thanks to the commissioners of jurors, court administrators and prosecutors throughout the State who took the time to answer our surveys, communicate with us in person or by letter, and provide the Committee with their expertise and insight.





Finally, the Committee expresses its gratitude to the grand jurors who answered our juror exit questionnaires, wrote us letters and appeared at the public hearing. Your voice has made a difference. This report is dedicated to you and to all citizens who serve as grand jurors in the State of New York.

Stephen E. Kaufman



## THE GRAND JURY PROJECT

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## **I. INTRODUCTION**

The Grand Jury Project was created one year ago by Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman to explore ways to improve the administration of the grand jury system in New York. Unlike past efforts to drastically alter or even abolish the grand jury, the Grand Jury Project's mission was to strengthen and improve the existing grand jury system. Although Chief Judge Kaye did not limit the Committee to a specific list of topics, she did ask that the project pay special attention to the needs and concerns of the citizens who are asked to serve as grand jurors.

The Grand Jury Project Committee consisted of 32 members representing a wide range of backgrounds and perspectives. The membership included judges, prosecutors, defense counsel, jury commissioners, court administrators and academics, all of whom brought different perspectives and experiences to bear. Staffing the Committee were outside counsel and representatives of the New York State Office of Court Administration.

The Committee used the "ABA Standards Relating to Juror Use and Management" as a guide and focus for its work. Although these standards were developed for the petit jury system, many of the issues apply either directly or indirectly to the grand jury system as well. In this report, the relevant ABA standard precedes each of the recommendations set forth.

At the outset of the project, the Committee divided into three subcommittees, each with a chairperson and counsel. Each subcommittee was assigned one of three broad subject areas -- Summoning and Selection; Juror Utilization and Term of Service; and the Grand Jury Experience.

The findings and recommendations presented in the body of this report reflect this three-part organization.

The full Committee and the individual subcommittees held numerous meetings over the past year. The Committee also developed and conducted extensive statewide surveys of prosecutors and commissioners of jurors offices, gathered juror utilization data in selected counties and collected "exit" questionnaires from grand jurors in 11 counties around the State. In addition, the full Committee conducted a public hearing in October, 1998 in New York City at which persons who had served on grand juries were invited to speak about their experience. The project received, as well, scores of comments from grand jurors and others interested in the grand jury system in the form of letters, e-mail and phone calls.

Many components of the administration of the grand jury system, we learned, are functioning quite well. The Committee resisted the temptation to fix what is not broken and attempted to focus on those aspects that could be improved -- particularly matters that affect the experience of the citizens who are asked to serve as grand jurors. The recommendations and discussion portions of this report were shaped by the Committee's efforts to balance the view of all concerned, and they reflect the consensus of the Committee's members.

With regard to the experience of the grand jurors, the Committee was pleased to discover that the large majority of the grand jurors who completed the exit questionnaire reported that they had a more favorable impression of grand jury service than before they had served and that overall they believed they had made a contribution as grand jurors. In some counties, however, significant numbers of grand jurors did not view their service as favorably. Moreover, the Committee recognized that, because of the typically lengthy term of service as well as other factors, a great

many of those for whom grand jury service would be particularly burdensome are either excused or transferred to petit service. Those who do serve as grand jurors, therefore, could be expected to view their service in a more positive light. Thus, we tried to consider ways in which grand jury service can be made less onerous, and more desirable, for the many who are called to serve but cannot do so.

The Grand Jury Project report consists of two volumes. The Committee's findings and recommendations are contained in this volume -- Volume I. Volume II contains the detailed tabulations of the research data collected during the project.

## II. HISTORICAL BACKGROUND

Judge Learned Hand observed that the grand jury is "the voice of the community accusing its members, and the only protection from such accusation is the conscience of that tribunal."<sup>1</sup> The grand jury's role as a protective community voice, however, only came about after centuries of change and evolution. Indeed, it originated in twelfth century England in the opposite guise: as a pure instrument of the Crown.<sup>2</sup>

Over time the grand jury's function changed from serving as a "sword" for the King to, instead, becoming a "shield" protecting the individual from government oppression. So important was the concept of a structure to allow lay citizens to check government excesses that the grand jury was included as a guaranteed right in the Magna Carta.<sup>3</sup>

By the late seventeenth century, practice had shown that the grand jury was a needed buffer between the State and the individual. "[T]he most valuable function of the grand jury [in the ancient English system] was not only to examine into the commission of crimes, but to stand

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<sup>1</sup> *In re Kittle*, 180 F. 946, 947 (C.C. S.D.N.Y. 1910).

<sup>2</sup> King Henry II is credited with first forming the grand jury through his promulgation of the Assize of Clarendon. 1 William Holdsworth, *A History of English Law* 321-23 (7<sup>th</sup> ed. 1956). "The Assize of Clarendon was designed not to protect against improper prosecutions by the Crown, but rather to lend assistance to government officials . . . . Any hesitancy the jurors might have in bringing accusations against their neighbors would be overcome by the substantial fines the jurors faced for failing to bring forward any known offense." Yale Kamisar, et al., *Modern Criminal Procedure: Cases, Comments and Questions* 689-90 (8<sup>th</sup> ed. 1994). See also Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 *Am. Crim. L. Rev.* 701, 703 (1972) ("The ancestors of our modern grand jury are generally conceded to be the body which was formally made part of the English judicial machinery during the reign of Henry II, as a direct result of that monarch's attempt to assert his dominance over the ecclesiastical and feudal realms").

<sup>3</sup> See Ron S. Chum, *The Right to Grand Jury Indictment*, 26 *Am. Crim. L. Rev.* 1457, 1459-60 (1989).



between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."<sup>4</sup>

In light of its success, the British soon brought the institution over to the American colonies,<sup>5</sup> including New York. Before grand juries were used, the colonists had "assistants" who were authorized to enact laws, initiate proceedings against suspects, and sit in judgment of the accused.<sup>6</sup> Proving to be uncontrollable and abusive, assistants themselves were charged with offenses by grand juries.<sup>7</sup> As further evidence that colonial grand juries were taking their role as a screen between the executive and the individual seriously, grand juries in several famous instances refused to return charges sought by British authorities.<sup>8</sup> Therefore, unlike its English counterpart, the American grand jury began not as an extension of the monarchy, but as a defense against it.

After the Revolution, a centralized, representative government was formed, but without a federal grand jury.<sup>9</sup> That omission was remedied by adoption of the Bill of Rights, which ensured that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a

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<sup>4</sup> *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

<sup>5</sup> Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 Admin. L. Rev. 465, 468 (1992).

<sup>6</sup> See Richard D. Younger, *The People's Panel: The Grand Jury in the United States 1634-1941* (1993).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 17 (1972); Albert W. Alshuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871-73 (1994).

<sup>9</sup> See Younger, *supra*, at 44-46.

presentment or indictment of a Grand Jury . . . ."<sup>10</sup> Thus, by its very language, the Grand Jury Clause views the institution as a safeguard against "hasty, malicious, and oppressive public prosecutions."<sup>11</sup> However, unlike virtually all other provisions of the Bill of Rights, the guarantee of the right to be indicted for serious crimes only by a grand jury has not been incorporated into the states and is only binding on the federal government.<sup>12</sup> States were, of course, free to adopt their own guarantee, and a number of them have done so.<sup>13</sup> New York is one of those states.<sup>14</sup>

The "essential character" of New York's grand jury is English in derivation.<sup>15</sup> The current specification of the number of persons to compose a grand jury comes from the English custom of requiring the sheriff of each county to collect 24 individuals for each court session. Of these, 23 were sworn in order that a group of 12 would constitute a majority.<sup>16</sup> Consequently, the Criminal

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<sup>10</sup> U.S. Const. Amend. V.

<sup>11</sup> *Ex Parte Bain*, 121 U.S. 1, 12 (1887).

<sup>12</sup> *See Hurtado v. California*, 110 U.S. 516, 522 (1884) (rejecting argument that state grand jury indictment is required under the Due Process Clause).

<sup>13</sup> *See* Wayne R. LaFare & Jerold H. Israel, *Criminal procedure* [2d ed. 1992] § 15.1[b], n 8. (19 states still guarantee grand jury intervention as a prerequisite for all felony prosecutions). *See also Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 24 n. 6 (1986) (Stevens, J., dissenting) (most common alternative is preliminary hearing conducted in public).

<sup>14</sup> N.Y. Const. art. 1, § 6 ("No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, [certain military offenses], and in cases of petit larceny . . .), unless on indictment of a grand jury . . .").

<sup>15</sup> Lawrence N. Gray, *The Grand Jury in New York (Rights, Privileges, Duties, Responsibilities)* 143-44 (New York State Bar Assoc. 1994)).

<sup>16</sup> Peter Preiser, *Practice Commentaries*, McKinney's Consol. Laws of NY, Book 11A, *Criminal Procedure Law* § 190.05, at 190 (1993) (citing William Holdsworth, *A History of English Law* 321-22 (1922); William Blackstone, *Commentaries on the Law of England* \* 299).

Procedure Law requires that no more than 23 people be convened for a grand jury, with a concurrence of 12 needed for any affirmative action.<sup>17</sup> The minimum number is 16, which is also the number required to be present for deliberation and a vote.<sup>18</sup> This number may have come from the Assize of Clarendon, although as the common law progressed the quorum became fixed at 12.<sup>19</sup> In any event, the minimum number of 16 has been statutorily mandated in New York since 1829.<sup>20</sup>

The Criminal Procedure Law (Article 190) outlines the structure, composition and functions of the grand jury, as well as the roles of the prosecutor and the court in the system. Pursuant to that law, the court and the district attorney are "the legal advisors of the grand jury," and grand jurors cannot "seek or receive legal advice from any other source."<sup>21</sup> As part of its duty as legal advisor, the district attorney is vested by law with responsibility to submit evidence to the grand jury.<sup>22</sup>

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<sup>17</sup> CPL §§ 190.05, 190.25(1).

<sup>18</sup> CPL § 190.25(1).

<sup>19</sup> Preiser, *supra*, at 190-91 (citing Blackstone, *supra*; *People v. Petrea*, 92 N.Y. 128, 143 (1883)).

<sup>20</sup> See Preiser, *supra*, at 191 (citing R.S. pt. IV, tit. IV, art. I, § 26 (1829)).

<sup>21</sup> CPL § 190.25(6).

<sup>22</sup> CPL § 190.55.

### III. SUMMONING AND SELECTION

#### A. OPPORTUNITY FOR JURY SERVICE

##### ABA STANDARD 1:

The opportunity for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, or any other factor that discriminates against a cognizable group in the jurisdiction.

##### *New York Recommendations*

1. *The use of an annual grand jury list should be eliminated. Grand jurors should be selected directly from the source list or list of qualified jurors in the same manner as the petit jurors are drawn, updated with the same frequency.*
2. *The term of grand jury service should be reduced where practicable to permit persons from all incomes and occupations to serve.*

#### Discussion

##### Creating the Pool

Consistent with the notion of the grand jury as a voice of the community is having an expansive pool of persons available to serve as grand jurors. At common law, only men could serve on grand juries.<sup>23</sup> In time, state and federal systems eliminated the distinction, along with racial and ethnic restrictions.<sup>24</sup>

New York's grand jury selection procedure sets the standard in many respects. In general, the court system compiles a "source list" for each county, consisting of registered voters, those who

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<sup>23</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

<sup>24</sup> See, e.g., 28 U.S.C. § 1861 (1988) ("All citizens shall have the opportunity to be considered for service on grand and petit juries . . ."); Jud. Law § 500 (same).

have a current driver's license, individuals who have filed state income tax statements, people receiving unemployment or welfare benefits and volunteers.<sup>25</sup> Then, at regular intervals, the commissioners randomly draw and send qualification questionnaires to a number of individuals (a few hundred to many thousands, depending on the size of the county) drawn from the combined source list.<sup>26</sup> These questionnaires ensure that each person listed is legally qualified to serve by eliminating those who, for example, are not residents or citizens.<sup>27</sup> Those who return the questionnaire and are eligible for service are subsequently placed in a "qualified jury pool."<sup>28</sup> When a grand jury is needed, the commissioner of jurors, using the automated jury system, randomly selects a number of names from the qualified jury pool to create a "grand jury pool." The citizens in the grand jury pool are then summoned to court, where they are considered for selection as grand jurors.<sup>29</sup>

The manner in which grand jurors are selected is important for a number of reasons, the most obvious being that selection of grand jurors implicates constitutional principles. Although a criminal defendant does not have a right to a jury pool that includes members of any particular group, he or she does have a constitutional right to a panel selected from a pool of citizens drawn

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<sup>25</sup> See Jud. Law §§ 502, 506, 507; 22 NYCRR § 128.3.

<sup>26</sup> Jud. Law § 509, 513; 22 NYCRR § 128.5.

<sup>27</sup> See Jud. Law § 510 (to qualify as a juror, a person must be a United States citizen and a resident of the county, at least 18 years old, not have been convicted of a felony, and able to understand and communicate in English); 22 NYCRR § 128.4 (defining "residence").

<sup>28</sup> 22 NYCRR § 128.5.

<sup>29</sup> See 22 NYCRR § 128.6.

from a fair cross-section of the community.<sup>30</sup> This right is also codified in New York statutory law and applies to litigants in both civil and criminal cases.<sup>31</sup> Thus, when jury commissioners create a grand jury list, they cannot "systematically" exclude the members of any "distinctive" group. Put another way, to establish a prima facie violation of the cross-section requirement, a defendant must show:

- (1) that the group alleged to be excluded is a "distinctive" group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the numbers of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.<sup>32</sup>

Thus, it is evident that the court system has an obligation to devise a system that incorporates and accommodates the entire population.

A pool selection process that promotes diversity is also significant because of its beneficial effect on the justice system. A diverse grand jury will render decisions "more reflective of community sentiment -- and thus more compatible with the community's sense of justice -- than a

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<sup>30</sup> See *Holland v. Illinois*, 493 U.S. 474, 480 (1990). See also 28 U.S.C. § 1861 (parties have a right to a jury drawn from fair cross-section "of the community in the district or division wherein the court convenes").

<sup>31</sup> See Judiciary Law § 500 ("It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes . . .").

<sup>32</sup> *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (citing *Taylor v. Louisiana*, 419 U.S. 522, 538 (1945)). See also *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y. 1972) (articulating most common test for determining whether group is "distinctive").

verdict rendered by a homogenous group."<sup>33</sup> A grand jury composed of people from distinct groups will "enliven the debate, bring different life experiences to the table, and squelch the airing of stereotypes that otherwise could harm the [suspect]."<sup>34</sup> Moreover, providing an expansive grand juror base improves the public's perception of our system of justice by giving "a wide range of people a stake in the system."<sup>35</sup>

New York's process for establishing the grand jury pool is broadly representative. It obtains names from a number of different sources that bring into the pool people of all ages, incomes and backgrounds. Taken together, they maximize the diversity of the pool to the extent that is practically possible.<sup>36</sup> Because New York appears to create the proper balance between the burden of compiling lists and inclusiveness, we do not see a pressing need for the State to further expand its sources for potential jurors.

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<sup>33</sup> Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L.J. 945, 1007 (1998).

<sup>34</sup> *Id.* See also Jim Wooten, "An Important Safeguard: Let's Not Limit a Grand Jury's Right to Be Nosy," *Atlanta J. and Const.*, March 2, 1994, at A10 ("Grand juries are like church congregations: You never quite know how to size them up because you can never know what mix of talents, interests, and abilities have come together").

<sup>35</sup> Leipold, *Constitutionalizing Jury Selection*, *supra*, at 1007.

<sup>36</sup> See *United States v. Yonkers Contr. Co.*, 682 F. Supp. 757, 766 (S.D.N.Y. 1988) (underrepresentation from using voter lists also exists for driver's license lists, tax rolls or phone directories, since all of these sources are likely to overrepresent the middle-aged and the middle-class). Cf. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704, 707-11 & n. 26 (1995) (Hennepin County, Minnesota officials concerned about underrepresentation on juries, despite the county's use of driver's license, state identification card and voter registration lists).

### Updating the Pool

Another aspect of the State's pool selection procedure, however, undercuts the goal of expanding the opportunity for grand juror service. In many of New York's 62 counties, grand jurors are selected from a grand juror pool created and fixed once a year, from which grand jurors are drawn at periodic intervals (depending on the county) for the succeeding year, all without adding new potential jurors to the grand juror pool. In other words, the grand jury pool remains stagnant for one full year. By contrast, prospective new petit jurors are continuously added to the petit jury pool as their qualification questionnaires are received and processed. Thus, the grand juror pools do not receive the benefit of an ongoing monthly addition of jurors. This selection procedure has the potential to affect the representativeness of individual grand juries, particularly toward the end of the year as the number of jurors in the pool diminishes. At that point, depending on the jurors who have already served, the representativeness of the pool may not be as broad as it was at the start of the year.

As an initial matter, the legal authority for the practice of having an annual grand jury pool process stems from a recently repealed section of the Judiciary Law and long-repealed Appellate Division rules.<sup>37</sup> Because of the now-repealed law and old rules, annual grand jury pools were established in each county. The landscape, however, has now changed. Judiciary Law § 508 requires that the jury commissioner "shall draw at random for each term and each separate part of a term . . . such number of petit jurors and such number of grand jurors as he believes necessary." Judiciary Law § 501, amended in 1998, provides that "the provisions of this article shall apply to

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<sup>37</sup> See Jud. Law § 514 (repealed); 22 NYCRR Part 620 (repealed).



grand and petit jurors in all courts of the Unified Court System in which a jury may be drawn . . ."

In addition, section 128.6(a) of the Uniform Jury Rules states that "[t]rial jurors and grand jurors shall be selected for summoning at random from prospective jurors previously qualified for service."

Taken together, these provisions strongly suggest a legislative intent that both types of pools be treated the same; if there is a continuously updated petit jury pool, there should be a continuously updated grand jury pool. In fact, the statutes can now be read to permit a single pool for both prospective petit and grand jurors. Thus, we recommend that each county select grand jurors in the same manner as petit jurors are selected -- directly from the qualified pool. With no distinctions made between the petit and grand jury, and the constant influx of new individuals into the mix, such a procedure will help to comply with legislative intent, as well as broaden the grand juror base to be more representative of the community.

#### Term of Service

Effective in 1978, the New York Constitution transferred supervision of administration and operation of the courts from the four Appellate Divisions that had administered the courts within their respective departments to the executive head of the Unified Court System, the Chief Administrator of the Courts, who acts on behalf of the Chief Judge of the State.<sup>38</sup> Accordingly, the number of grand juries to be drawn and impaneled, as well as the schedule of terms of the trial courts, is now determined in accordance with Rules of the Chief Administrator of the Courts.<sup>39</sup>

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<sup>38</sup> N.Y. Const. art. VI, § 28.

<sup>39</sup> 22 NYCRR §§ 128.17, 200.13.

Pursuant to these Rules and the Judiciary Law, a grand juror will serve for the full length of the term specified.<sup>40</sup>

Establishing a desirable length for a term of grand jury service is difficult. Several factors come into play. These factors are discussed in greater length in Section IV. In brief, the needs of the criminal justice system must be balanced against the potential hardship of extended service to individual jurors. If the term is too long, many otherwise qualified for grand jury service will be unable to serve. Moreover, an individual chosen to serve as a grand juror may experience financial and personal difficulties that could, in unpredictable and undesirable ways, affect the manner in which the juror evaluates the evidence and decides the fates of those before the grand jury. If the term is too short, the juror may not obtain the depth of knowledge and understanding of the system needed to become an effective juror. These considerations must be counterbalanced against the compelling need for sufficient grand juries to be readily available to hear cases. A smooth-running grand jury system will ensure that justice will be swiftly served and courts and law enforcement will be able to comply with statutory requirements.<sup>41</sup>

We recommend that, where possible, the current terms of jury service be shortened so that more people from different occupations and backgrounds will be able to serve. Grand jury service, where one is pulled away from work commitments for long periods of time, is sometimes impossible for those in certain professions. Individuals who are self-employed and must work uninterrupted to survive financially, and those who are faced with demanding hours with little flexibility, such as

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<sup>40</sup> See Jud. Law § 525; 22 NYCRR §§ 128.8, 128.17.

<sup>41</sup> See, e.g., CPL § 180.80 (defendant released on recognizance if grand jury has not voted to indict within 144-hour period following commencement of custody).

doctors, are just a few examples. The negative effects of extended grand jury service on one's job are reflected in the grand jurors' exit questionnaires, which reported that the most significant personal hardship of their experience was the inconvenience of rearranging their work schedule. It is obvious that a shorter term of service not only would make it easier for these individuals to serve, but would help increase the pool of those able to serve.

A more extensive discussion of term of service and the Committee's specific recommendations regarding this issue are discussed in Section IV.

## B. RANDOM SELECTION PROCEDURES

### ABA STANDARD 3:

- (a) Random selection procedures should be used throughout the juror selection process. Any method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection.
- (b) Random selection procedures should be employed in
  - (i) Selecting persons to be summoned for jury service;
  - (ii) Assigning prospective jurors to panels.
- (c) Departures from the principle of random selection are appropriate
  - (i) To exclude persons ineligible for service in accordance with standard 4;
  - (ii) To excuse or defer prospective jurors in accordance with standard 6.

### *New York Recommendations*

1. *The practice of asking for volunteers during grand jury selection should be eliminated.*

### Discussion

The goal of achieving a representative and impartial grand jury can be undermined if random selection is not used at the critical time of grand juror selection. Randomness in this context means, at each stage of the process, "the same chance as every other name of being chosen."<sup>42</sup> Numerous procedures are available to accomplish this result, but the pitfall to be avoided is a system that is random in name, but in practice is "open to manipulation or unintentional but systematic bias."<sup>43</sup>

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<sup>42</sup> Maureen Solomon, *Management of the Jury System* 16 (1975).

<sup>43</sup> *Id.*

Presently, the Judiciary Law requires that the process of selecting grand jurors be a random one.<sup>44</sup> All counties comply with the mandate for random selection during the summoning stage through the use of an automated random selection procedure. The surveys, however, have revealed a problematic practice in a few counties -- apparently no more than three -- once potential grand jurors report for service. In those counties, selection of the 23-member grand jury begins by first asking for volunteers from those who have reported. Grand jury panels then will be initially populated from these volunteers.

We recommend that this practice be ended and replaced with a more random selection process. That is not to suggest that courts should not be receptive to the concerns of prospective grand jurors who claim that grand jury service would be particularly difficult or undesirable for them. Rather, it is the practice of explicitly asking for volunteers, and its dubious legality in light of the random selection requirements of the Judiciary Law, that troubles us. A random selection process can be assured in several ways while still affording prospective jurors the opportunity to request excusal. For instance, prospective jurors initially could be screened for hardship, with a random selection from those remaining. Alternatively, 23 of the prospective jurors could be randomly selected, and those who are unable to serve could be replaced by a random selection from the group not yet selected.

Accordingly, we recommend that the Office of Court Administration and the commissioners of jurors work together to develop a more random selection process in those few counties that now explicitly solicit volunteers.

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<sup>44</sup> Jud. Law §§ 500, 506 - 508.

## C. NOTIFICATION AND SUMMONING PROCEDURES

### ABA STANDARD 11:

- (a) The notice summoning a person to jury service and the questionnaire eliciting information regarding that person should be:
  - (ii) Phrased as to be readily understood by an individual unfamiliar with the legal and jury system; and
  - (iii) Delivered by first class mail.
- (b) A summons should clearly explain how and when the recipient must respond and the consequences of a failure to respond.
- (d) Policies and procedures should be established for enforcing a summons to report for jury service and for monitoring failures to respond to a summons.

### *New York Recommendations*

1. *The grand jury summons should be sent approximately six weeks before the beginning of the term and should be expanded to include information about the length, days, hours and expected duration of the grand jury term and the procedure for requesting an excuse or postponement.*

### Discussion

More than half of the counties in the State provide no information in the summons regarding information that is of significant interest to prospective grand jurors. Among the details not included is information concerning the overall length of service, the anticipated number of days of actual service, the working hours and days of service and the procedure for requesting an excuse or postponement.

We recommend that all counties adopt a summons form that includes expanded information that will be helpful to prospective grand jurors. The theory behind excluding this information from

the summons appears to be that compliance with the summons will be increased and the representativeness of the ensuing grand jury enhanced if the jury commissioner has the opportunity to explain the obligations of grand jury service in person (after the summons is answered) rather than through written notice (when the prospective juror still has an opportunity not to respond). However, if prospective jurors are not informed in advance of the obligations of grand jury service, they will not be able to make the advance arrangements necessary for them to serve. Persons who are employed may not have sufficient time to inform their employers, and persons who have family obligations may not have sufficient time to make the necessary arrangements in their family life.

We believe that the standardized summons information should include details about the hours and expected length of grand jury service, as well as the relevant procedure to follow in requesting an excuse or postponement.<sup>45</sup> Of course, the content of this information will vary from county to county, depending on the particular county's policy (e.g., five half-days a week for one month, once a week for three months). Although there is some risk that prospective jurors will be "scared off," the Committee believes that citizens should receive this information with the summons so they can realistically evaluate their ability to serve. Our surveys reveal that many counties already include this information: 31 counties include the length of the jury term on their summons, 24 counties provide the anticipated number of days a grand juror is expected to serve and 13 counties state the working hours and specific days of the grand jury service.

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<sup>45</sup> Frequency of service is another relevant item of information that could be included in the summons. Currently, a person who serves as a grand or petit juror in any New York or federal court cannot serve again as a State juror for four years, (or eight years if the juror has served for more than ten days), unless that person subsequently requests that the period be shortened. *See* Jud. Law § 524(a), (d); 22 NYCRR § 128.9.

In addition, the Committee recommends that the summons be sent approximately six weeks in advance so that prospective jurors have time to make the necessary arrangements to be away from job and family. Currently, eight counties send grand jury summonses four weeks in advance, 26 counties send summonses three weeks in advance and 24 counties send summonses only two weeks before the term is to begin.



## D. EXEMPTION, EXCUSE AND DEFERRAL

### ABA STANDARD 6:

- (b) Eligible persons who are summoned may be excused from jury service only if:
  - (i) Their ability to receive and evaluate information is so impaired that they are unable to perform their duties as jurors and they are excused for this reason by a judge; or
  - (ii) They request to be excused because their service would be a continuing hardship to them or to members of the public, or they have been called for jury service during the two years preceding their summons, and they are excused by a judge or a duly authorized court official.
- (d) Requests for excuses and deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.

### *New York Recommendations*

1. *The practice in some counties of requiring jurors to report for a pre-screening session should be eliminated.*
2. *Excuses from grand jury service should be handled by the court or the commissioner of jurors office.*

### Discussion

In some counties, before potential grand jurors are summoned for selection and orientation, they are required to report to the courthouse to receive from the office of the commissioner of jurors information concerning the commitment of time required for grand jury service. At the pre-screening session, those who demonstrate extreme inconvenience or undue hardship in meeting such commitment are excused or transferred to petit juror service.

The goal of streamlining the administrative process to minimize the inconvenience of grand jury service is not furthered by requiring prospective jurors to report for this pre-screening process. The Committee recognizes that there are some benefits in pre-screening jurors. Nevertheless, we recommend elimination of this practice, to avoid the hardship imposed by requiring an extra day's attendance at the courthouse. Any effort at pre-screening should be conducted, whenever possible, by telephone or mail.

The Committee also recommends that the court or the office of the commissioner of jurors have complete responsibility over the grand jury excusal process.<sup>46</sup> Currently, the court or commissioner's office handles all requests for complete excusal from service, whether before or after the grand jury is selected. In some counties, however, it is the prosecutor's office that often excuses individual jurors for a particular day or days. This practice is the result, in part, of convenience. The prosecutor's office, as opposed to the court, deals with grand jurors on a day-to-day basis. The prosecutor's office knows when grand jurors are available and knows when a quorum exists and has the interest in ensuring that a quorum be maintained. In addition, the prosecutor's office may be more familiar with individual grand jurors than is the court or commissioner of jurors staff.

Although the prosecutor may be in a good position to bring individual jurors' problems to the court's attention, we believe that it should be the judge, court staff or jury commissioner's office that makes the ultimate decision as to whether a grand juror should or should not be excused for a particular day during the term. This is in the interest of all participants in the grand jury system,

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<sup>46</sup> This recommendation is consistent with the Committee's general recommendation that overall responsibility for administering the grand jury system reside with the courts. *See* Section IV.

including the grand jurors themselves. To have prosecutors make the decision as to who is excused risks creating the appearance that the prosecutor is able to help select his or her jury, potentially undermining confidence in the grand jury's impartiality. For the prosecutor, there is also a risk in denying a grand juror's request for excusal, for the same grand juror whose request is denied may also sit on a case presented by the prosecutor.

## E. REMOVAL FROM THE JURY PANEL FOR CAUSE

### ABA STANDARD 8:

If the judge determines during the voir dire process that any individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual should be removed from the panel.

#### *New York Recommendations*

1. *The court, not the prosecutor, should determine whether or not to excuse a grand juror from service based on the juror's inability to be fair.*
2. *The court, not the prosecutor, ordinarily should determine whether or not to excuse a grand juror from an individual case based on the juror's inability to be fair.*
3. *The Unified Court System should evaluate whether guidelines should be developed governing how and when a grand juror's ability to be fair should be determined.*

### Discussion

CPL § 190.20(2)(b) provides that "[n]either the grand jury panel nor any individual grand juror may be challenged, but the court may ... refuse to swear him, or discharge him after he has been sworn, upon finding that he is ... incapable of performing his duties because of bias or prejudice...." The surveys conducted by the Committee revealed varying practices throughout the State relating to the process of screening jurors for bias or prejudice.

Of the 61 counties that responded to this question in our court surveys, the majority reported that they do not screen as to prospective jurors' ability to be fair; of the 21 that do, eight counties reported that only the judge conducts the screening, in ten only the prosecutor conducts the screening, and in three both prosecutor and judge conduct the screening. By contrast, the prosecutor surveys reported that 21 counties conduct screening as to prospective jurors' ability to be fair -- in eleven counties the prosecutor conducts the screening, and in ten the judge conducts the screening.

The surveys also revealed that, when a fairness screening is conducted, it generally focuses on whether the grand jurors have a relationship with the defendant (or defendant's family), victim or potential witnesses and whether the jurors have any knowledge of the crime or any experience that may prevent them from being fair and impartial in the particular case. The surveys indicated that follow-up questions may be asked by either the court or the prosecutor, as needed. In some counties, the fairness screening is conducted before each case presentation. In other counties, a general statement is made to the grand jury at the beginning of service that those jurors who feel that they cannot be fair in a particular case should approach the prosecutor or court. If the court or prosecutor finds that a juror cannot be fair, the juror will be excused from deliberating in that specific case.

The surveys point to a lack of uniformity in practice, but also, more importantly, to how few counties apparently screen grand jurors for their ability to be fair. Witnesses at the public hearing and grand jurors who wrote to the Committee were critical of the lack of questioning or inquiry into grand jurors' abilities to be fair. The Committee recommends that the court system determine whether to develop uniform guidelines governing how and when a fairness screening should be conducted. This recommendation does not suggest that there be a grand jury voir dire.<sup>47</sup> There does, however, appear to be a tension in section 190.20 of the Criminal Procedure Law, which both

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<sup>47</sup> CPL § 190.20(2) provides in relevant part:

Neither the grand jury panel or any individual grand juror may be challenged, but the court may....

(b) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service pursuant to the judiciary law, or incapable of performing his duties because of bias or prejudice....

prohibits challenges and permits discharging a grand juror because of "bias or prejudice." The question we raise is whether there can be a legally acceptable procedure for eliciting information from grand jurors or potential grand jurors as to their inability to serve because of bias or prejudice.

We also recommend that, whenever possible, the court, and not the prosecutor's office, should decide whether to excuse a grand juror on fairness grounds from service on a *particular* case. It is apparent, however, that a blanket prohibition on a prosecutor's ability to remove a grand juror for bias would be impractical. A prosecutor should be authorized to excuse a grand juror from deliberating on an individual case if the juror expresses a clear basis to infer bias -- for example, the juror knows the witness, or is a member of the defendant's immediate family. It may be logistically difficult and wasteful in such instances to delay the proceedings so that the grand jury judge may hear the juror state that he or she cannot be fair and make the same determination that the prosecutor would have made. In this regard, consideration should be given to including in the court's legal instructions that if during a presentation a grand juror realizes that he or she should not sit on that case, the grand juror should notify the prosecutor and request excusal from that case.

F. JUROR ORIENTATION AND INSTRUCTION

**ABA STANDARD 16:**

- (a) Courts should provide some form of orientation or instructions to persons called for jury service:
  - (i) Upon initial contact prior to service;
  - (ii) Upon first appearance at the courthouse;
  - (iv) Directly following impanelment;
  - (vi) Prior to deliberations.
- (b) Orientation programs should be:
  - (i) Designed to increase potential jurors' understanding of the judicial system and prepare them to serve competently as jurors;
  - (ii) Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials.
- (c) The trial judge should:
  - (i) Give preliminary instructions directly following impanelment of the jury that explains the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles;
  - (ii) Prior to the commencement of deliberations, instruct the jury on the law, on the appropriate procedures to be followed during deliberations, and on the appropriate method for reporting the results of its deliberations. Such instructions should be recorded or reduced to writing and made available to the jurors during deliberations;
  - (iii) Prepare and deliver instructions which are readily understood by individuals unfamiliar with the legal system.
- (d) Before dismissing a jury at the conclusion of a case, the trial judge should

- (ii) Explain their rights regarding inquiries from counsel or the press; and

The judge should express appreciation to the jurors for their service, but the judge should not express approval or disapproval of the result of the deliberation.

- (e) All communications between the judge and members of the jury panel from the time of reporting to the courtroom for voir dire until dismissal should be in writing or on the record in open court. Counsel for each party should be informed of such communication and given the opportunity to be heard.

### *New York Recommendations*

1. *The New York Committee on Criminal Jury Instructions should develop comprehensive pattern instructions for grand jurors relating to the proper performance of their duties and responsibilities as grand jurors. After each grand jury is impaneled, it should receive an orientation and legal instructions from the impaneling judge. If more than one grand jury is impaneled at once, the instructions may be given by another judge. All instructions should be recorded in the minutes.*
2. *The instructions from the judge:*
  - (a) *Should include an explanation of the purpose and functioning of the grand jury and an explanation of the burden of proof for indictment, including a clear and balanced definition of the term "reasonable cause to believe."*
  - (b) *Should make clear that, in determining whether the burden of proof for indictment has been met, it is the grand jurors' responsibility to assess the credibility of witnesses, and to give individual consideration to each defendant and to each charge they are considering as to each defendant.*
  - (c) *Should include an instruction that jurors may: ask legal questions of the prosecutor; upon review of the prosecutor for relevance and propriety, have factual questions asked of any witness; and, if necessary, ask legal questions of the impaneling judge.*
  - (d) *Should include an instruction that note-taking is neither prohibited nor encouraged, and, if the grand jurors have any questions about note taking, they will receive further instructions about taking notes from the prosecutors who will present cases to them.*
3. *The Unified Court System should prepare a Grand Juror's Handbook that explains the responsibilities of grand jurors. The handbook should be written in layperson terms and*



*cover the administration of the grand jury system, the purpose and functioning of the grand jury and the legal definitions noted in recommendation #2. CPL § 190.20(5) should be amended to make clear that such legal definitions may be submitted to the grand jury in written form.*

4. *The Unified Court System should prepare a standard grand juror orientation film.*
5. *The Office of Court Administration should conduct a pilot project to evaluate the feasibility of providing the initial orientation material by conducting a two-step grand jury summoning process.*
6. *The New York State District Attorneys Association should appoint a committee to review the legal instructions given to grand jurors during the prosecutor's orientation to determine if the presentation can be made clearer for the jurors. This review should consider what information should be given to jurors, when it should be given and by whom.*
7. *Grand juror forepersons and secretaries should be given additional instructions from the court as to their role and responsibilities.*

## **Discussion**

Nearly all grand jurors who responded to the exit questionnaire indicated that they were provided with a grand juror handbook, and approximately three-quarters of the grand jurors indicated that it contained an adequate explanation of the grand jury process.<sup>48</sup> While some jurors praised the handbook and explanations they received, among the more troubling criticisms that the Committee heard from others who responded to the exit questionnaires, wrote letters or testified at the public hearing was that they did not fully understand their purpose and function. This sentiment was perhaps best expressed by the grand juror who testified that “my real problem with grand jury

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<sup>48</sup> The percentages of jurors who responded in the questionnaire that the grand jury handbook adequately explained the grand jury process were: Bronx County, 62%; Kings County, 74%; New York County, 77%; Queens County, 73%; Albany County, 87%; Chemung County, 86%; Monroe County, 72%; Nassau County, 81%; Niagara County, 87%; Saratoga County, 100%; and Oneida County, 64%.

service...is that I never really, really felt I knew what I was doing there and I don't think that the other people on the jury did either and I'm not sure that we had any sense of what was being achieved by our being there." Transcript of Public Hearing (hereinafter "Tr."), pp. 9-10. Another juror from an upstate county suggested on the exit questionnaire that "it would be very helpful if someone explained the grand jury process clearly before we started the cases. Some jurors did not understand the process until at least the second month." And another juror, in a letter to the Committee, wrote that "more thorough and interactive instructions about the different charges and degrees (e.g. 1<sup>st</sup> degree, 2<sup>nd</sup> degree, etc.) would have facilitated our decision making process."

While it is not always easy to reconcile the conflicting impressions the surveys, letters and hearing sometimes provided, the Committee was concerned that even a minority of grand jurors may have been confused about their role and responsibilities. The grand jury is an entity comprised of between 16 and 23 individuals. If any one of these individuals does not understand the grand jury's role, the grand jury as a whole may be compromised and will not function as well as it could.

The petit jury orientation includes a greeting by the judge, an orientation film and a statewide juror handbook. The Committee believes that the grand jurors deserve no less of an orientation than the petit jurors. Most potential petit jurors never end up serving on a case, and those who do receive detailed information from the trial judge. By contrast, all grand jurors who remain for service actually serve on the grand jury, and even though they receive detailed information from the prosecutor for each specific case, it is important that they receive a basic grounding at the beginning of their service.

### The Court's Instructions

The best opportunity we have to educate grand jurors is during the orientation and instructions they receive at the commencement of their service. CPL § 190.20(5) presently permits, but does not require, the court to give such instructions. Although our surveys of prosecutors and commissioners of jurors reveal that grand juries in every jurisdiction receive some kind of orientation, that orientation is not uniform; in some counties it comes from the court, in others from the prosecutor, and in others from both. Indeed, sometimes grand jurors look to court officers and clerks for explanations that the law requires come only from the court or prosecutor, their “legal advisors.” Surprisingly, one grand juror claimed that “there was never any general orientation or instruction, any. Not that it was inadequate, there was none.” Tr. 33.<sup>49</sup>

The Committee believes that a full explanation of the grand jury's function and duties enhances and elevates the grand jurors' experience. It also improves the functioning of the grand jury and the administration of justice. Consistent with the grand jury's role as an arm of the court, that explanation best comes from the impaneling judge. The impaneling judge has the authority to impress the grand jurors with the seriousness and importance of their function. Indeed, one grand juror testified that if the judge were required to give these instructions in the grand jury room, “the tenor of the whole thing [would change]. I think it would be excellent because grand jurors, the grand jurors on my panel, had no idea of the relationship to the Court. For instance, I don't think anyone understood that the Judge was available [to them].” Tr. 142.

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She continued: “My first grand jury service which was the one that ran for a year we were told it was going to be extended for a long period of time but there was no, again no orientation or instruction as to what a grand jury was or how they functioned or what they did. . . We simply went and began to hear testimony and sort of figured it out along the way.” *Id.*

Although some of the instructions will be reiterated by the prosecutor in individual cases, some explanations, such as the need for the prosecutor to review questions for relevance and propriety and the standard of proof, best come from the court so that the jury will understand that the prosecutor is doing only what the law requires. To this end, the Committee recommends that the judge, not a clerk or prosecutor, provide introductory instructions to the grand jury. Accordingly, the Committee recommends that the New York Committee on Criminal Jury Instructions (CJI) develop comprehensive pattern instructions that judges may provide to grand jurors addressing the proper performance of the grand jury's duties and responsibilities. The CJI Committee could be assisted in developing the instructions by judicial members of the Grand Jury Project and should be encouraged to receive suggestions for content from prosecutors and the defense bar.

In each case, the critical decision the grand jury must make is whether there is "reasonable cause to believe" that an offense was committed and that a particular person committed it. CPL § 190.65(1)(b). For this reason, the pattern instructions should include a balanced definition of the term "reasonable cause to believe," which informs the grand jurors that they are both entitled and required to pass upon the credibility of the witnesses who appear before them, in determining whether, based on the evidence, it is more probable than not that the accused committed the offense with which they are considering charging him or her. It is, of course, necessary for the sake of society and of prospective defendants that grand jurors understand precisely what their job is. From the grand jurors' point of view -- which is the Committee's primary focus -- making clear that they are to assess credibility and making clear what burden of proof they must apply enables them to best fulfill their function as an independent decision making body.

Surprisingly, some of those who testified at the public hearing claimed that they served on panels in which individual grand jurors claimed that it was not their function to assess credibility.<sup>50</sup> We also heard complaints from more than one witness that in multiple defendant cases, the grand jury was not specifically instructed to consider the evidence against each defendant individually. Many of those on the Committee have had experiences which demonstrate that such problems are rare, and that grand juries usually do not hesitate to make credibility judgments and individualized assessments of the charges they consider. Nevertheless, the Committee concluded that, however limited the experience may be, it remains important that the judge give explanations concerning these matters to the grand jury in the initial instructions.<sup>51</sup>

Again with a view to emphasizing to grand jurors the important and independent role they play in the charging process, the Committee recommends that the pattern instructions inform the grand jury that it may ask legal questions of the prosecutor, and have factual questions asked of any witness, so long as the questions are legal and proper, and that it is the duty of the prosecutor to determine whether the questions are legal and proper. We also recommend that the instructions inform the grand jury that it may ask legal questions of the impaneling judge. By this we mean to

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<sup>50</sup> One grand juror testified that there was fundamental confusion in her grand jury as to whether the grand jurors could make independent credibility determinations concerning the witnesses who appeared before the panel. "[T]here was one big issue about whether a juror could decide not to believe a witness and one juror who was very outspoken said, well, of course you have to believe him, I mean he swore to tell the truth and he testified and he put his hand up and that's the evidence. So that's what it is. So, of course, you have to believe him because that's what he said." Tr. 64-65.

<sup>51</sup> As to the issue of separate consideration of multiple defendants, a grand juror testified that in her opinion, "I think that most of the instructions given by the DAs were fair. The only ones that I did think were unfair were there were multiple defendants and the charges were given in such a way as to make grand jurors think they had to vote the same way for all three defendants. . . I think each individual defendant should have a fair shot and have his or her role in the incident considered independent of the other two or three defendants." Tr. 81.

empower the grand jury with a mechanism for making inquiry of the court in those rare situations in which, for whatever reason, the grand jury is not satisfied with the advice it receives from the prosecutor. By making this recommendation, we do not suggest that prosecutors cannot be trusted to fulfill their role as legal advisor, nor do we mean to afford new remedies to defendants for prosecutorial abuse. Instead, we mean only to demonstrate to grand jurors the respect both the prosecutor and the court have for their independence. The Committee also recommends that instructions make clear that note-taking, while neither encouraged or discouraged, is permissible.<sup>52</sup>

### Grand Jury Handbook

In addition to the court's initial instructions, the Committee recommends that the Unified Court System prepare a Grand Jury Handbook that explains, in plain language, the duties and functions of the grand jury. CPL § 190.20(5) requires that each grand juror receive a copy of all provisions of Article 190. Merely repeating the words of the statute, without providing an understandable explanation of their meaning, is not sufficient. As one grand juror who testified at the Committee's hearing explained, "Without some elucidation whether by a Judge or a prosecutor, I don't think Article 190 is very useful to a grand juror on its own." Tr. 125-26.

A Grand Jury Handbook should explain and supplement the complex language in these provisions and provide grand jurors with a better understanding of their duties and responsibilities. This handbook should be developed in consultation with prosecutors, defense lawyers and members of the Judiciary. The topics covered in the judge's orientation should be considered for inclusion in this manual.

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<sup>52</sup> Juror questions and note-taking are the subject of separate and more detailed recommendations in Section V of the report.

The Committee recognizes that CPL § 190.20(5) states that, in addition to delivering a copy of Article 190 to the grand jury, the court may provide the grand jurors with any “oral” instructions relating to the proper performance of their duties. Thus, prior to developing a handbook that explains in writing the provisions of Article 190 and otherwise outlines the grand jurors’ duties and responsibilities, the safer course of action may be to seek amendment of section 190.20(5) to make clear that such a *written* explanation is authorized.

### Orientation Film

One of the highlights of the efforts to reform the petit jury system was the creation of a new juror orientation film. This 20-minute film provides an historical overview of the jury system, describes the jury trial process and discusses the responsibilities of the trial juror. It is engaging and professionally done, with an introduction by Chief Judge Kaye and narration by television journalists Ed Bradley and Diane Sawyer. The film is part of the juror orientation program in every county of the State, providing a threshold level of uniformity for the information given to potential jurors. Besides providing information, the petit juror film underscores the importance and seriousness of the duty that jurors are being asked to perform.

The Committee recommends that the court system prepare an orientation film for grand jurors. Like the film for petit jurors, the film should become part of the court’s grand jury orientation program in every county. The film should describe the functions and responsibilities of the grand jury, the significance and importance of grand jury service and the role of the key players in the grand jury process, and provide jurors with a general idea about the range of testimony and

cases they may be hearing over the course of their term of service. The court system should seek input from prosecutors and defense attorneys in developing the content of the film.

#### Pre-Orientation Pilot

The foregoing recommendations to standardize the court's orientation and provide a grand jury handbook and orientation film will assist in providing a streamlined and more complete grand jury orientation process throughout the State. A streamlined orientation session will be particularly important in counties participating in the proposed short service pilot programs (see Section IV) because shorter service will require courts and prosecutors to conduct more orientation sessions. To expedite and streamline the grand jury orientation process, the Committee considered the value of providing orientation material prior to the jurors' first day of reporting. While providing information through the mail has certain shortcomings -- there is no guarantee that jurors will actually read the material sent to them and it creates an extra mailing step -- the Committee believes that providing potential grand jurors with detailed information before their first appearance to prepare them for their role as grand jurors is a worthwhile endeavor.

The Committee recommends that selected counties experiment with a two-step grand juror mailing process. The first mailing will be a grand jury summons which provides information about the term date, term of service and excuse/postponement process. Excuses and postponements will be handled, as usual, by the commissioner of jurors either by mail or phone. Subsequently, all potential grand jurors not excused or granted a postponement will receive detailed information about grand jury service (i.e., a copy of CPL 190 and a Grand Jury Handbook) so they can familiarize themselves with the process before reporting for duty. The effectiveness of providing pre-reporting orientation material should be assessed through exit questionnaires or other means.



### Prosecutor's Legal Instructions

At the public hearing and in exit questionnaires received by the Committee, some grand jurors expressed their belief that the prosecution's orientation was too long and filled with incomprehensible legalese. Other grand jurors praised the clarity of the instructions given by the prosecutor and said that they found the entire process to be "very educational." Clearly, grand jurors hold differing views about the adequacy of the prosecutor's orientation and instructions.

The prosecutor's survey likewise revealed a significant difference in the length and substance of their orientation sessions. District Attorneys in 12 counties reported that their orientation lasted 30 minutes or less; 22 reported orientations lasting between 31 and 60 minutes; 17 reported orientations lasting between one and two hours; and three reported orientation sessions lasting more than two hours.

The range in the length of the orientation sessions suggests a disparity in the form and substance of the information given to the jurors. For instance, the Committee learned that in some counties the prosecutor's orientation consists of a clearly stated overview of grand jury history, functions and purpose; after the orientation, the jurors are given time to read CPL Article 190 on their own. In other counties, the law is read verbatim to the jurors, either live or by videotape.

The Committee does not endorse any single method for presenting the prosecutor's orientation nor do we suggest that there should be a standardized prosecutor's orientation. While a single form of orientation may not be appropriate for the entire State, each county may learn and borrow from each other. Given the variety in the form, length and substance of the current orientation programs, the Committee recommends that there be a formal review of the current

prosecutor orientation programs and suggests that prosecutors' offices share with each other information about the programs and practices they use. This review could be conducted under the auspices of the New York State District Attorneys Association. Consistent with the Committee's recommendation that the CJI Committee be receptive to suggestions from the defense bar when devising pattern orientation instructions for grand juries, we recommend that prosecutors be similarly receptive to defense bar comment when reviewing their orientations.

#### Foreperson and Secretary Instructions

In general, the jury foreperson supervises the order and flow of business in the grand jury. The secretary is responsible for record-keeping of grand jury business. A complaint voiced at the public hearing was that jury forepersons and secretaries did not fully understand their duties, and in some cases tried to overstep their limited roles. During the judge's initial instructions, the entire grand jury should be instructed on the role of these designees so that all jurors will understand these roles and thus the roles will not be exceeded.

In addition, under CPL § 190.20(3), the judge must select the foreperson, and the jurors themselves must choose the secretary. According to our surveys, in some counties the selection of the foreperson is left to the prosecutor. This practice should be ended because it is inconsistent with the law and the independence of the grand jury.

## IV. JUROR UTILIZATION AND TERM OF SERVICE

### A. TERM OF SERVICE

#### ABA STANDARD 5: TERM OF AND AVAILABILITY FOR JURY SERVICE

The time that persons are called upon to perform jury service and to be available therefor, should be the shortest period consistent with the needs of justice.

#### *New York Recommendations*

1. *A series of pilot projects should be initiated in counties throughout the State to test the feasibility of reducing the term of grand jury service, including:*

- a. Restricting the "availability" period;*
- b. Restricting the frequency and days of the week that jurors must report;*
- c. Reducing the hours of service; and*
- d. Reducing the number of days that jurors are required to report.*

*The pilot projects should be conducted in counties of varying size and should be carried out jointly by the courts and the district attorneys' offices.*

2. *In conjunction with the pilot projects, the Office of Court Administration should conduct a study of the reasons for delay in grand jury proceedings and the ways in which grand jury proceedings may be made more efficient.*
3. *Based upon the results of the pilot projects, efforts should be made to devise grand jury terms that better fit the duration of the cases to be presented.*
4. *Based upon the results of the pilot projects, new Rules of the Chief Administrator of the Courts should be adopted defining and governing the length of grand jury terms of service, consistent with local needs and requirements.*
5. *The courts, district attorneys' offices, defense bar and local correctional authorities responsible for the production of detained defendants to the grand jury should develop plans to improve such production as well as the timely appearance of other witnesses who wish to testify before the grand jury. District attorneys' offices should work with defense counsel and witnesses to schedule appearances before the grand jury in a cooperative fashion in order to minimize unnecessary delays. The use of video conferencing technology and other means should be explored for facilitating communication between detained defendants and their attorneys during the time between arraignment and the*

*scheduled grand jury presentation date, to assist defense counsel in consulting with their clients and providing notice to prosecutors of defendants' intentions as to whether they may testify before the grand jury.*

## **Discussion**

A grand juror's term of service is a mixture of four components: (1) the period of time the juror is required to be "available" (usually measured in weeks); (2) the day or days of the week that the juror is required to report (e.g., "every Monday and Wednesday"); (3) the hours of the day that the juror must attend (usually full days or half-days); and (4) the actual number of days that the juror reports to the courthouse. These components fit together in different ways throughout the counties of the State. For example, many grand jurors in New York City sit full days, five days a week for a four-week period, while grand jurors in many counties elsewhere in the State must be available over an eight or 12-week period but might need report only for several hours on certain days of the week. The number of days grand jurors actually serve during the grand jury term ranges from a low of two days to a high of 25 days.

From the individual grand juror's point of view, each of the components that make up the term of service (availability, frequency/days, hours and days served) may have varying importance. To some, the typical upstate term may be more attractive than the typical New York City term because the actual service involves fewer days. To others, the prospect of being on call for selected days over a span of up to three or more months may present a greater burden.

The term of grand jury service varies dramatically throughout the 62 counties of New York State. There is great diversity among the counties in the length (availability) of the regular grand jury term of service. Fifteen counties (including the five counties in New York City) require a four-

week term; 17 counties require an eight-week term; 24 counties require a 12-week term; and 6 counties have terms that last from 16 weeks to six months.

The availability period generally has an inverse relationship to the frequency of reporting. The counties that require jurors to remain available for the longest period of time (in most instances, the more rural counties) require the least frequent reporting for service, while the counties with shorter availability periods require jurors to report more frequently. In six counties, grand jurors are required to report for service on a daily basis throughout their term. In other counties, jurors are required to report twice a week, once a week or only once every two weeks. These differences are, in part, the result of the varying needs of the criminal justice systems in different counties and, in part, the product of historical accident. The following table shows the grand jury terms throughout New York State.

**GRAND JURY TERM OF SERVICE\***

DIST.	COUNTY	LENGTH OF TERM	DAYS REPORTING	PORTION OF DAY	# OF GRAND JURY TERMS EACH YEAR (1998)	GRAND JURIES SERVING EACH GJ TERM (1998)	GRAND JURIES SERVING EACH YEAR (1998)	AVERAGE DAYS SERVED (1997)**
1	NEW YORK	1 MO	MON-FRI	½ DAYS (10A-1P&2P-5P)	12	13	173	18
2	KINGS	1MO	MON-FRI	FULL DAYS	13	7	93	21
2	RICHMOND	1 MO	MON-THU	FULL DAYS	13	1	13	9
3	ALBANY	3 MOS	TUE & FRI	FULL DAYS	7	1	7	13
3	COLUMBIA	3 MOS	TUE OR THU	HALF DAYS	5	1	5	8
3	GREENE	3 MOS	WED	DEPENDS ON # OF CASES	4	1	4	7
3	RENSSELAER	2 MOS	WED & THU	FULL DAYS	7	1	7	12
3	SCHOHARIE	4 MOS	FRI	FULL DAYS	3	1	3	7
3	SULLIVAN	6/2 MOS&1/1 MO	WED	10 AM - 3 PM	7	1	7	7
3	ULSTER	3/1 MO & 5/2MOS	TUE & THU	FULL DAYS	8	1	8	13
4	CLINTON	3 MOS	1 <sup>ST</sup> 2 DAYS OF TERM	FULL DAYS	4	1	4	6
4	ESSEX	3 MOS	TUE & FRI (VARIES)	9:30 AM - 5 PM	4	1	4	7
4	FRANKLIN	3 MOS	WED & THU	9 AM - 5 PM	4	1	4	4
4	FULTON	3 MOS	NO SET DAYS	FULL DAYS	4	1	4	6
4	HAMILTON	6 MOS	DA DECIDES	DEPENDS ON # OF CASES	2	1	2	2
4	MONTGOMERY	3 MOS	THU	FULL DAYS	4	1	4	9
4	ST. LAWRENCE	3/3MOS&2/2MOS	TUE & THU	FULL DAYS	5	1	5	10
4	SARATOGA	3 MOS	WED & THU	HALF DAYS	5	1	5	12
4	SCHENECTADY	2 MOS	TUE & THU	10AM-4PM&1:30PM-5PM	6	2	12	22
4	WARREN	3 MOS	WED	FULL DAYS	4	1	4	4
4	WASHINGTON	3 MOS	FRI	FULL DAYS	4	1	4	5
5	HERKIMER	2 MOS	MON & WED	FULL DAYS	6	1	6	5
5	JEFFERSON	2 MOS	MON, TUE, WED	9:30 AM - 5 PM	6	1	6	9
5	LEWIS	3 MOS	MON	FULL DAYS	5	1	5	2
5	ONEIDA	2 MOS	TUE, WED, THU	FULL DAYS	12	2	24	12
5	ONONDAGA	2 MOS	MON - FRI	FULL DAYS	13	1	13	25
5	OSWEGO	2 MOS	DA'S DISCRETION	DA'S DISCRETION	5	1	5	9
6	BROOME	1 MO	1 <sup>st</sup> WK/M-F;WK2-4/TU&WE	10AM - 4PM	13	1	13	7
6	CHEMUNG	6/2MOS & 1/1MO	THU (IMPANELED MON)	FULL DAYS	7	1	7	4
6	CHENANGO	1 MO	TUE (SEQUENTIAL)	FULL DAYS	4	1	4	5
6	CORTLAND	3 MOS	THU (SOMETIMES FRI)	FULL DAYS	4	1	4	4
6	DELAWARE	3 MOS	TUE OR THU	FULL DAYS	4	1	4	5
6	MADISON	2 MOS	MON, TUE, WED	9AM - 4PM	6	1	6	3
6	OTSEGO	1MO(AS NEEDED)	MON - FRI	DEPENDS ON # OF CASES	4	1	4	6
6	SCHUYLER	3 MOS	THU(1 <sup>ST</sup> THU OF TERM)	FULL DAYS	4	1	4	3
6	TIOGA	2 MOS	TUE THRU THU	FULL DAYS	6	1	6	4

DIST.	COUNTY	LENGTH OF TERM	DAYS REPORTING	PORTION OF DAY	# OF GRAND JURY TERMS EACH YEAR (1998)	GRAND JURIES SERVING EACH GJ TERM (1998)	GRAND JURIES SERVING EACH YEAR (1998)	AVERAGE DAYS SERVED (1997)**
6	TOMPKINS	3 MOS	TUES	HALF DAYS(USUALLY)	5	1	5	8
7	CAYUGA	4 MOS	EVERY OTHER WED	FULL DAYS	3	1	3	10
7	LIVINGSTON	3 MOS	WED	9AM - 2PM	4	1	4	11
7	MONROE	1 MO	MON - FRI	SET BY DA'S OFFICE	13	2	26	18
7	ONTARIO	3 MOS	TUE & THU	9AM - 1 PM	4	1	4	14
7	SENECA	4 MOS	THU (2ND & 4 <sup>TH</sup> EA MO)	FULL DAYS	3	1	3	7
7	STEUBEN	3 MOS	TUES (ALTERNATE)	FULL DAYS	4	1	4	6
7	WAYNE	3 MOS	MON & TUE	9AM-1PM & 9AM-4PM	4	1	4	11
7	YATES	4 MOS	MON (WED, THU, FRI)	HALF DAYS	3	1	3	4
8	ALLEGANY	2 MOS	TUE	1 FULL DAY&HALF DAY	6	1	6	3
8	CATTARAUGUS	3 MOS	EVERY OTHER THU	FULL DAYS	4	1	4	7
8	CHAUTAUQUA	2 MOS	MON(1 <sup>ST</sup> DAY)THEN WED	9:30AM - 3PM	6	1	6	6
8	ERIE	1 MO	3-4, VARIES BY D.A.	FT/PT, VARIES BY DA	13	2	26	12
8	GENESEE	3 MOS	TUE (2ND & 4TH)	FULL DAYS	4	1	4	6
8	NIAGARA	1 MO	TUE, WED, THU	FULL DAYS & HALF DAYS	12	1	12	11
8	ORLEANS	3 MOS	FR (EVERY OTHER WK)	FULL DAYS& HALF DAYS	4	1	4	6
8	WYOMING	4 MOS	MON OR FRI	FULL DAYS & HALF DAYS	3	1	3	6
9	DUTCHESS	6/ 2MOS & 1/1 MO	TUE & THU	HALF DAYS	7	1	7	15
9	ORANGE	2 MOS	TUE, THU (WED)	FULL DAYS & HALF DAYS	6	1	6	18
9	PUTNAM	5/ 2MOS&1/ 3MOS	FRI	HALF DAYS	6	1	6	6
9	ROCKLAND	1 MO	MON & THU	FULL DAYS	13	1	13	8
9	WESTCHESTER	1 MO	TUE, THU & WED, FRI	FULL DAYS	13	4	52	7
10	NASSAU	1 MO	MON, TUE, WED, FRI	FULL DAYS	13	2	26	14
10	SUFFOLK	1 MO	MON - FRI	FULL DAYS	13	2	26	18
11	QUEENS	1 MO	MON - FRI	FULL DAYS	13	4	52	19
12	BRONX	1 MO	4 DAYS A WEEK	10AM - 6PM	13	6	78	15

\* Regular grand juries only; special grand juries are excluded from this table.

\*\*Average number of grand jury days where jurors have served more than one day.

## The Burdens of Grand Jury Service

The burdens of grand jury service are substantial. Requiring an individual to serve four or five days per week for four weeks can impact upon his or her business, employment, family, personal plans and other responsibilities. Likewise, requiring individuals to remain available for service for one specified day per week for several weeks or months also may cause considerable hardship and inconvenience, regardless of the total number of days actually served. Not surprisingly, about half of the sampled grand jury exit questionnaires revealed a preference for a shorter term of service. Interestingly, the other half of the sampled jurors responded that they preferred the current term or a longer term. This preference may be explained by a selection system which is mindful of the potential hardship of the lengthy term and permits excuses or transfers to the petit system for those jurors who demonstrate that service will cause an "extreme inconvenience or undue hardship."<sup>53</sup> Commissioners of Jurors state that many individuals are excused from grand jury service because of the length of the term, and, in a few counties, grand jurors are drawn in part from volunteers. Thus, to a significant extent, those who actually serve on grand juries are individuals who have passed the screening process and are able to devote the time to serve.

The length of service adversely affects numerous parts of the criminal justice system. As is discussed in Section III, lengthy terms of service have the potential to increase the number of

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<sup>53</sup> Jud. Law § 517(c) provides: "In determining whether an application for excusal should be granted, the commissioner or the court shall consider whether .....attendance for jury service.... cause undue hardship or extreme inconvenience to the applicant, a person under his or her care or supervision, or the public."

The Unified Court System has developed guidelines for excusing persons due to undue hardship or extreme inconvenience, including care givers (of children, sick, aged, etc.), those who can demonstrate that jury service will cause a significant financial hardship or jeopardize the needs of the public and those without any means of transportation to the courthouse.



excuses from grand jury service and decrease both the size of the grand jury pool and its representation of all members of society. If onerous terms of service make it impossible for segments of the population to serve on grand juries, the grand jury pool will be smaller, the burdens imposed on those who can serve will be greater, and the grand jury itself will be less representative of the State's citizenry.

The court system has the legal obligation to provide jurors drawn, at random, from a "cross-section of the community."<sup>54</sup> The statute also provides that "all eligible citizens shall have the opportunity to serve on grand and petit juries." A major part of the 1994 Jury Project effort was centered around this responsibility. In an effort to provide the widest possible "cross-section" and enhance the opportunity for service, the court system adopted five jury source lists, eliminated the permanent qualified list, instituted a rigorous effort to follow-up on recalcitrant jurors, reduced the terms of petit service statewide (to one-trial/one-day in most counties), and successfully petitioned the Legislature to eliminate statutory disqualifications and exemptions, increase the jury fee to \$40 per day and authorize one automatic postponement to all jurors.<sup>55</sup> All of these measures have had the effect of increasing the opportunity for service while also decreasing the frequency of service for many individuals who for years had been caught in the court system's net of repeat service. Unless the term of service is shortened, the opportunity for grand jury service will be limited to those relatively few who are able to commit to the extended time period now required.

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<sup>54</sup> Jud. Law § 500.

<sup>55</sup> New York State Unified Court System, *Jury Reform in New York State: A Second Progress Report on a Continuing Initiative*, March 1998.

Our survey of prosecutors' offices gives some reason to believe that it may be possible to shorten grand jury terms of service, at least for some types of cases. The surveys show that the vast majority of case presentations require one or two days, and only a very small percentage require more than three days. Thus, there is an opportunity to shorten the terms of many grand juries if it is possible to identify cases where the presentations can be completed in a short time span. The following table summarizes the length of the case presentations reported by the prosecutors who responded to the Committee's survey.

# PROSECUTOR SURVEY: JULY 1998

50a. What proportion of cases require 1,2,3, etc. calendar days from start to finish?

(All numbers in the table are percentages)

COUNTY	1 DAY	2 DAYS	3 DAYS	4 DAYS	5 DAYS	6-10 DAYS	11-15 DAYS	16-20 DAYS	21-25 DAYS	26-30 DAYS	31+ DAYS
NEW YORK	73	3	4	5		9	5	1			
BRONX	10				10	60	20				
KINGS	30	35	15	4	4	4	4	4			
QUEENS	50	20	10	5	5	5		5			
ALLEGANY	90							10			
CAYUGA	90	10									
CHAUTAUQUA	98					1.5			0.5		
CHEMUNG	99						1				
CORTLAND	90	10									
DELAWARE	95	5									
DUTCHESS	75					15					10
ESSEX	95	5									
FRANKLIN	80	10					10				
FULTON	80					20					
GENESEE	96						3			1	
GREENE	99					1					
HAMILTON	100										
HERKIMER	90						10				
JEFFERSON	95					4				1	
LEWIS	99.9	0.1									
LIVINGSTON	95					5					
NASSAU	75	20	4						1		
NIAGARA	60	15	5		5		5	4	4	1	1
ONONDAGA	50					30					20
ONTARIO	80		10			10					
ORANGE	75		15			5	5				
OSWEGO	98	2									
PUTNAM	95					5					
RENSSELAER	97					3					
ROCKLAND	70		20	10							
SARATOGA	20					25		20	20		15
SCHENECTADY	75		5			10	5			5	
SENECA	95					5					
ST. LAWRENCE	90	8	2								
STEUBEN	99	1									
SUFFOLK	60	20	5	5	0	5	4	0	0	0	1
SULLIVAN	60					30	10				
TIOGA	100										
ULSTER	50	40	5			5					
WARREN	99	1									
WASHINGTON	89	10				1	1	1	1	1	
WAYNE	80	15	5								
WESTCHESTER	40					60					
WYOMING	99	0.8	0.2								
YATES	99	1									

## Needs of the Criminal Justice System

Any effort to reduce the grand jury term of service must take into account the legitimate needs of the criminal justice system, including the need to have a grand jury available. These needs may be greater than many realize.

The law requires a case to be presented to the grand jury within a short period of time after a defendant is arrested. If the defendant is detained, the prosecutor must either obtain an indictment or commence a preliminary hearing within 120 hours of arrest, or, in the event that a Saturday, Sunday or legal holiday intervenes, within 144 hours of arrest.<sup>56</sup> If neither happens, the defendant ordinarily must be released from custody.<sup>57</sup> These requirements create a need for a sitting grand jury

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<sup>56</sup>

CPL § 180.80 provides:

Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than one hundred twenty hours, or, in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance unless:

1. The failure to dispose of the felony complaint or to commence a hearing thereon during such period of confinement was due to the defendant's request, action or condition, or occurred with his consent; or
2. Prior to the application:
  - (a) The district attorney files with the court a written certification that an indictment has been voted; or
  - (b) An indictment or a direction to file a prosecutor's information charging an offense based upon conduct alleged in the felony complaint was filed by a grand jury; or
3. The court is satisfied that the people have shown good cause why such order or release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded disposition of any felony complaint within the prescribed period or rendered such action against the interest of justice.

<sup>57</sup>

If the defendant is not detained but is released on bail, the prosecutor is nevertheless subject to the provisions of CPL § 30.30, the speedy trial law, which provides for dismissal if "the people are not ready for trial within: (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony." "Commencement of a criminal action" runs from the filing of the

to be available on a continuous and regular basis. If a grand jury is not available to hear and complete a case within the prescribed period, the defendant will, in all likelihood, be released from custody.<sup>58</sup>

There are several obstacles to significantly shortening the grand jury term. First, it takes time to summon grand jurors, impanel them and instruct them on the law, and more time for grand jurors to accustom themselves to their duties. A grand jury panel could not be selected and sworn on one day, hear cases and be instructed on the law in the next four days and then be discharged, without sacrifices in efficiency. The grand jurors would only have just learned to fulfill their functions and to work together as a group at the time they were discharged.

Second, a significant number of presentations before the grand jury last more than one day. If the grand jury term were to be shortened in a busy county to less than two weeks, it might be difficult for the grand jury to complete its duties. While many cases that were begun during the first week could be completed, many of the cases begun thereafter could not be completed. In that circumstance, the case would have to be presented again to a new grand jury, with the witnesses called a second time to testify. The result would be greater total burdens on the grand jury system as well as all participants, including the prosecutor, defense counsel and witnesses.

Third, it is not always possible for a prosecutor to predict how long a presentation will take. A witness, defendant, attorney or lab report may be unavailable for a few days or more. In the end,

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first "accusatory instrument against a defendant in a criminal court," CPL § 1.20(17), which can be an indictment, an information or a complaint, CPL § 1.20(1).

<sup>58</sup> The law does provide that a defendant can remain detained on the basis of a preliminary hearing rather than an indictment. Prosecutors often refrain from using preliminary hearings, however, for a variety of reasons, including concern for witnesses who may be vulnerable to embarrassment or intimidation, the danger of prejudicial pretrial publicity and the general desire to postpone witness exposure to cross-examination.

if the prediction goes awry, a short-term grand jury may end up being extended beyond its existing term. Unforeseen extensions create hardships for the jurors, logistical problems for court administrators and prosecutors and, in the extreme situation, may lead to a dismissal of the case. Alternatively, the prosecutor may be forced to re-present the case to another grand jury, which creates difficulties of its own and wastes time and resources. It is far better, in our view, for the grand jury to be impaneled for a reasonable period of time at the outset, than to be told that it will be sitting for a short period only to have its term extended.

Finally, difficulties in scheduling witnesses, including detained defendants who have given notice pursuant to CPL § 190.50 of their intention to testify, present a further obstacle to shortening the term of the grand jury.<sup>59</sup> The length of a grand jury presentation is not entirely within the control of the prosecutor. It depends also on witnesses being timely for their scheduled appearances. No prosecutor can complete a case on an efficient basis if a witness fails to appear. Those problems are exacerbated by complications arising from section 190.50, particularly as it applies to detained defendants. Under that section, a defendant has a right to be a witness in a grand jury proceeding if a criminal charge is being or is about to be or has been submitted to the grand jury against him or her.

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<sup>59</sup>

CPL § 190.50(5) provides in pertinent part:

Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under the circumstances presented in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent....

All the defendant need do to secure that right is serve on the district attorney, prior to the filing of an indictment, notice of an intention to testify.

From our survey of prosecutors' offices and communications we received from both prosecutors and defense attorneys, we learned that in a large number of cases, detained defendants serve such notice at the time of arraignment, simply to preserve their right to testify. In those circumstances, particularly in urban areas with a great number of cases, defense counsel frequently do not have the time (and could not be expected to have the time) to research the case, consult with the defendant, and reach a final determination as to whether testimony is in the client's best interests at the time the notice is initially filed. The notice is thus often filed as a precautionary matter to preserve the defendant's right to testify, in case the defendant later decides to exercise that right. In the case of defendants who are detained, the defense lawyer frequently is not able to consult easily with the defendant about a final decision to testify until the lawyer is informed that an indictment is about to be returned.

The result is that in numerous cases, particularly in the larger urban areas, many defendants give notice invoking their right to appear before the grand jury but never invoke that right once given the opportunity. For example, in New York County, prosecutors estimated that more than 80% of incarcerated defendants provided such notice, even though fewer than 10% actually testified. The estimates were similar in a number of other counties, particularly in New York City and the surrounding areas.

The problems created by insufficient means for defense counsel to communicate with detained defendants and the prosecutor create an additional obstacle to shortening the grand jury term and an

additional challenge to all the participants in the criminal justice system. In those cases in which a defendant has given notice invoking the right to testify, the district attorney is required to continue the presentation until the defendant is produced by the correctional authorities. If cases are held open to permit defendants to testify, then cases cannot be completed as quickly and the grand jury may have to endure delays and, in some instances, sit for a longer term. Some prosecutors also reported delays stemming from the failure of non-incarcerated defendants to appear before the grand jury on a timely basis.

In addition to these difficulties, there are other challenges associated with reducing the term of service. Shorter terms require more jurors, more frequent orientation sessions, and possibly more facilities, thus straining the already inadequate facilities and staff resources devoted to grand jurors. These challenges can only be solved with careful planning, creativity and, most probably, additional resources and facilities. We are confident that these challenges can be met. We note, however, that although a greater number of individuals would be required to serve on grand juries and summonses may need to be issued more frequently, the yield rate might increase because more of the New York residents summoned would be able to serve if the term were shortened.

In light of the above findings, we propose the following recommendations. Each is based on the principle of striving to reduce the burdens of grand jury service while recognizing the needs of the criminal justice system and the rights of its participants, including defendants and putative defendants.



### Pilot Projects

Any effort to reform the grand jury term of service should be done with great care so as not to impede the ability of the criminal justice system to process cases. Recognition must also be given to local needs and conditions. There are many legitimate reasons why a certain term of service may work well in one jurisdiction and not in another. We recommend that a series of pilot projects be implemented in counties across the State to test the feasibility of reducing the term of grand jury service and thereby reduce the burdens such service imposes on the citizenry. These pilot projects should be implemented in counties of differing sizes and involve experiments such as a mixture of long-term and short-term grand juries and staggered terms.

We believe, as an aspiration, that grand jury terms should be tailored to the expected length of the case presentations. Our prosecutor's survey revealed that most case presentations last less than three days. Only a relatively few cases require more time. Despite the preponderance of short presentations, the usual grand jury term throughout the State is both fixed and lengthy. In most instances, the same grand jury that hears one-day "buy-and-bust" cases may also hear a lengthy fraud case. The current "one size fits all" grand jury terms are undoubtedly easier for the courts and prosecutors to administer, but they fail to take advantage of the fact that most case presentations are brief. By tailoring the jury term to the expected length of case presentation, the system may be able to achieve shorter terms for the majority of the grand jurors without creating an unworkable administrative burden on the courts and prosecutors' offices.

We recognize that, given the needs of the criminal justice system, shortening the grand jury term may be difficult. Nevertheless, the goals of spreading the burden of grand jury service more

equitably and promoting greater satisfaction with this civic responsibility warrant creative efforts to achieve them. In light of the potential obstacles, we recommend that the courts and prosecutors proceed carefully toward the goal of tailoring the term of service to reflect case presentation time and shortening the term whenever possible. We hope that by encouraging different counties -- large and small, urban, suburban and rural -- to experiment with different solutions to the problems associated with grand jury service, an optimal system will emerge. We encourage the courts and prosecutors participating in the pilots to consider a variety of possible solutions to shortening the term of grand jury service and tailoring the term to the expected length of case presentation. Two techniques with potential for minimizing the administrative burden of a shorter term of service are mixed terms and staggered terms.

- **Mix Short-Term and Long-Term Grand Juries.** In an effort to tailor the term of service to the expected length of the case presentation, it may be useful to empanel grand juries for different terms within the same county. The shorter-term grand juries would be impaneled to hear mainly routine street crime and narcotics cases, which do not last more than one to two days. The longer-term grand juries would be empaneled to hear cases with expected longer duration and for limited purposes, such as investigations, complex cases or the exceptional case in which a presentation will require a substantial number of days or will involve a significant delay. Under a scheme of mixed terms, most grand juries would be serving shorter terms with only a limited number of grand juries required to serve longer terms. Each county should seek the best mix to meet the interests of all participants, including the grand jurors. The concern about the need to educate grand juries would be addressed by the fact that most of the cases that the grand jury

would hear would be similar. If this use of a mix of short-term and long-term grand juries proves to be effective on a trial basis, that system could be adopted on a more widespread basis.

- **Staggering Terms.** Under the present system, virtually all grand jury terms begin and end on the same day. This causes undue pressures for prosecutors, creates a hectic environment at the end of the term and poses a potential risk of rushed presentations and grand jury votes. We believe that staggering terms would avoid some of these problems. Prosecutors would have the opportunity to gauge the number of days that a particular case may take to present and thus present the case to a grand jury that will not be terminating on or before the date that the presentation is likely to be completed. We recognize that staggered terms may create new issues, such as determining how to stretch limited facilities to accommodate more grand jurors at certain times. The pilot project would provide an opportunity for the courts and prosecutors to experiment with creative solutions for solving these and other difficulties as they arise.

Courts and district attorneys' offices should maintain records and gather data in connection with the pilot projects. The data should include information concerning the length of case presentations, the actual number of days each jury served, juror utilization rates, the number of grand juries held over, the predictability of the length of case presentations and the effect that the scheduling of witnesses and defendants has on the grand jury term.

### Study the Causes of Delay in Grand Jury Proceedings

In conjunction with the pilot projects, the Office of Court Administration should monitor and study the causes of delay that prevent the reduction of the grand jurors' term of service and the more efficient utilization of grand jurors' time. Anecdotal reports submitted to the Committee indicate that a number of possible reasons account for delay in hearing cases: police officers and lay witnesses may be late for grand jury appearances; difficulties may arise in producing detained defendants; non-detained defendants may fail to appear for scheduled appearances; and there may be problems in scheduling witnesses. All of these problems, to the extent they actually exist, present an obstacle to the efficient use of the grand jury that could well be overcome.

While the causes of delay are unclear, the fact of it is not. Despite the preference among many grand jurors for a shorter term of service, there has been no meaningful analysis of the reasons for delay and no collection of data on that subject. In no county does the district attorney or court staff collect comprehensive information on the number of hours the grand jury sits, the number of cases it hears, the amount of time it spends hearing cases, and the length of a case from start to finish. Therefore, we recommend that, in conjunction with the pilot projects, OCA study these issues and recommend rules or legislative changes it deems necessary to address the causes of delay.

### New Rules Governing Grand Jury Terms

The laws regulating the duration of the grand jury term grant the court the authority to determine the term of grand jury service but are silent as to what the actual term of service should be.<sup>60</sup> The current Rules of the Chief Administrator are similarly vague.<sup>61</sup> We suggest that, after

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<sup>60</sup> Jud. Law § 525(b) provides:

Service of grand jurors in courts of the unified court system shall be for the duration of the term for which they

analysis of the results of the pilot projects discussed above, the Rules of the Chief Administrator be amended to implement the recommendations set forth herein to the extent that they are consistent with those results. An effort should be made, to the extent practicable, to tailor grand jury terms of service to the expected time needed to hear the cases to be presented.

In considering new rules, which need not be uniform even within any particular Judicial Department, consideration should be given to local needs in different counties. To that end, the Chief Administrative Judge should consult with local courts and district attorneys' offices.

### Production of Witnesses

As we have explained, the delay inherent in producing a detained defendant to testify presents a significant obstacle to shortening the grand jury term. If a detained defendant gives notice of

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have been drawn, unless sooner discharged; except that if the term of a grand jury has been extended by written order of the court having supervision of such grand jury, service shall continue until such grand jury has been discharged.

CPL § 190.15(1) provides:

A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated. Upon such date, or within five days preceding it, the court may, upon declaration of both the grand jury and the district attorney that such grand jury has not yet completed or will be unable to complete certain business before it, extend the term of court and the existence of such grand jury to a specified future date, and may subsequently order further extensions for such purpose.

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22 NYCRR Part 128.8(c) provides:

A grand juror shall serve for the duration of the term for which the grand juror has been selected and for any period during which the grand jury panel on which the grand juror has been serving is extended, unless sooner discharged.

22 NYCRR Part 128.17 provides:

The Chief Administrator of the Courts, in consultation and agreement with the Presiding Justice of the appropriate Appellate Division, shall designate: (a) the number of grand juries to be drawn and empaneled for each term of the Supreme Court or County Court established within the judicial department and (b) such additional grand juries as may be required.

intention to testify, the case may not be concluded in a single day. We do not recommend modifying the provisions of sections 180.80 or 190.50 of the Criminal Procedure Law relating to the time within which an incarcerated defendant must be indicted and the notification of prospective defendants' intentions to testify. Nevertheless, we believe that there may be ways of improving the efficiency of the grand jury without sacrificing the rights protected by these laws.

Many unnecessary delays are caused by problems in communication between detained defendants and their attorneys and, in turn, between the attorneys and prosecutors. If a detained defendant gives notice of intention to testify but, as is usually the case, does not actually do so, presentation of the case will necessarily be delayed. We propose, therefore, that defense attorneys and prosecutors work together to improve communication about whether defendants will actually testify before the grand jury. Defense counsel should attempt, to the extent practicable, to determine whether their clients may in fact testify before providing notice of their intent to testify. We also propose that courts and correctional authorities explore ways of promoting greater communication between imprisoned defendants and their counsel, such as video conferencing, in order to permit defendants to make informed choices about whether they intend to testify sooner rather than later. In addition, the court system and correctional authorities should take into account the requirements of the grand jury system in attempting to improve the system of transporting detained defendants to testify before the grand jury and in allocating facilities.

## B. JUROR UTILIZATION

### ABA STANDARD 13: JUROR USE:

- (a) Courts should employ the services of prospective jurors so as to achieve optimum use with a minimum of inconvenience to jurors.
- (b) Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of individuals summoned for jury duty and the number assigned to jury panels.
- (c) Courts should coordinate jury management and calendar management to make effective use of jurors.

### *New York Recommendations*

- 1. *Jurors should be required to report only when necessary to hear a case. A telephone call-in system should be implemented so that grand jurors can know precisely when they are required to appear.*
- 2. *Grand jurors should be released early in the day if their time is no longer needed.*
- 3. *Court administrators and prosecutors should keep jurors informed on a regular basis throughout the day about any reasons for being kept waiting. If revealing the exact reasons for waiting will prejudice the jurors, then jurors should at least be assured that others are aware that they are waiting and are doing everything they can to move things along.*
- 4. *Prosecutors' offices should educate assistant district attorneys and law enforcement personnel on the need to be sensitive to grand jurors' time and to schedule grand jury appearances efficiently and effectively.*
- 5. *The practice of conducting tours of local jail facilities for grand jurors should be eliminated.*
- 6. *The practice of requiring jurors to report simply for the purpose of "handing up" the indictment should be eliminated.*
- 7. *A system of monitoring the utilization of grand jury time should be created.*

## Discussion

The Committee's exit questionnaire asked grand jurors how much time they spent hearing cases and how much time they spent waiting in the grand jury room for a case to be presented. In many of the counties, grand jurors reported spending between 25% and 50% of their time waiting to hear cases. Anecdotal comments from individual grand jurors support these findings. In short, grand jurors spend too much time waiting to hear cases and too little actually hearing cases. Not surprisingly, they feel that too much of their time is being wasted.

We recognize that efficient juror utilization can be difficult to achieve. Numerous factors and circumstances, including the unpredictable flow of cases, witnesses who are late or fail to appear, and the need for breaks -- to use the restroom, to make telephone calls or to get a cup of coffee -- can frustrate attainment of this goal. Nevertheless, the waste of grand juror time should be avoided whenever possible. This will ensure the efficient use of resources, improve morale among grand jurors and accord those providing a public service with the respect to which they are entitled. The recommendations in this section are intended to encourage both the courts and prosecutors to continue to enhance their efforts to utilize grand jurors effectively.

### Telephone Notification

A central component of any system that effectively utilizes grand jury time is that grand jurors will be required to be present only when they will be utilized. Thus, a telephone call-in system should be implemented by the courts, with the assistance of the prosecutors, so that grand jurors can know whether and when it will be necessary for them to appear on any particular day. A similar system has been implemented for petit jurors with great success. This is one simple way to reduce clearly avoidable waiting time.



### Early Release

Grand jurors should be permitted to leave when their time is no longer required or can no longer be used productively. In some instances, grand jurors are called in the morning before they are needed and are left waiting at the end of the day when they could be released early. To address the problem of the waste of grand jury time, district attorneys' offices should make every effort to schedule presentations for the time that the grand jury is sitting, and release the grand jurors from service for the day if their services are no longer needed for that day. We recognize that some of the scheduling difficulties result from uncertainty and delays in waiting for defendants or other witnesses to testify before the grand jury. While there may be legitimate circumstances in which a grand jury may have to wait for a case until the end of the day, these circumstances should be the rare exception and the district attorneys' offices should make every effort to minimize such occasions.

### Keep Grand Jurors Informed

Court administrators and prosecutors should keep grand jurors informed on a regular basis throughout the day about scheduling and the reasons for delay. Unfortunately, grand jurors in many counties reported that all too frequently this was not done.<sup>62</sup> If a witness is late or has canceled his or her appointment, the grand jurors should be told that and not kept in the dark. In some cases, however, this will not be possible. For example, if the reason for the delay is that a detained defendant has changed his or her mind about testifying, reporting that reason could prejudice the grand jury. If revealing the exact reasons for delays will prejudice the grand jurors, they should at least be

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<sup>62</sup> In New York County, 35% of grand jurors responding to the exit questionnaire reported that they were not kept informed of the reasons for waiting; in Bronx County, the figure was 39%; in Kings County 48%; Queens County 44%; Albany County 13%; Chemung County 4%; Monroe County 16%; Nassau County 53%; Niagara County 13%; and Oneida County 21%.

assured that there will be a wait, that others are aware that they are being kept waiting and that officials are doing everything they can to keep things moving along. Jurors who are kept totally in the dark are more likely to become frustrated, feel that they are being taken for granted and believe that their time is being wasted.

#### Efficient Scheduling and Awareness of Jurors' Schedules

The court system can make improvements in grand jury facilities and in the procedures for summoning grand juries. Ultimately, however, the responsibility to utilize grand jury time efficiently lies with the prosecutor. It is the prosecutor who uses the grand jury and the prosecutor whose needs shape the grand jury's time and schedule. Making effective use of grand jury time is in the interests of everyone, including the grand jurors, the court system and the prosecutor. It is imperative that prosecutors maintain efficient scheduling practices and ensure that the grand jurors' time is well spent.

Most prosecutors already are sensitive to the needs of the grand jury. However, we recommend that prosecutors' offices routinely educate their assistant district attorneys on the need to be sensitive to the grand jury's time. This training should be incorporated into the regular orientation of the assistant district attorneys and there should be periodic reminders for more experienced assistant district attorneys. Moreover, similar reminders should be provided to members of law enforcement to ensure that they appear on time for their grand jury appearances. In addition, supervisors should ensure that individual prosecutors are not causing grand jurors to suffer undue delays.

We learned that some of the delays are caused by defense counsel's failure to advise the prosecutors in a timely fashion if defendants actually will testify. Other delays are caused by late production of detained defendants. District attorneys' offices, defense counsel and correctional authorities should make every effort to work together to ensure prompt notice as to defendants' intent

to testify and to minimize the delay caused by the production of detained defendants. In certain counties, these delays have been far in excess of what is acceptable. While we recognize the logistical and facilities problems responsible for some of these delays, we believe that a coordinated approach can alleviate much of the problem.

#### Eliminate Jail Tours

In eight counties, grand jurors are offered or provided with tours of local jail facilities. This practice is an inefficient use of grand juror time, and it provides grand jurors with an incomplete picture of the criminal justice system. Petit jurors are regularly instructed that punishment should not be their concern. This principle should also apply to grand jurors. We therefore recommend that this practice be discontinued.

#### Eliminate Requirement that Jurors Report Solely to "Hand Up" Indictment

In certain counties, from time to time, grand jurors are required to appear solely for the purpose of "handing up" an indictment. This practice is not legally required and involves a needless waste of grand juror time. We recommend that it be eliminated.

#### Monitor Juror Utilization

No proposal can sufficiently address the issue of the effective utilization of the grand jury's time unless the subject is properly understood and relevant data are collected and analyzed. Yet, when we undertook our analysis, no district attorney's office or court in the State kept comprehensive records on the use of the grand jury's time. There were no records of how long the grand jury sat, how many cases it heard, how long the presentations lasted, how long it took to present a case, and how much time the grand jury spent waiting to hear cases.

Without such data, district attorneys' offices cannot begin to make the structural reforms necessary to improve the utilization of grand jury time, and any recommendations we make will necessarily be incomplete. Accordingly, courts should maintain records of juror utilization for further analysis. To obtain data for our recommendations, we developed a juror utilization form and a juror exit questionnaire that were used in selected counties throughout the State. The daily utilization form was designed to track how the grand jurors' time was spent. The exit questionnaire provided valuable information about each juror's experience, and gave jurors an additional sense of participation in the system and a chance to "air their gripes." We recommend that similar utilization forms and exit questionnaires be used in courts throughout the State.

## V. THE GRAND JURY EXPERIENCE

### A. ADMINISTERING THE GRAND JURY

#### **ABA STANDARD 10: ADMINISTRATION OF THE JURY SYSTEM.**

The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.

- (a) All procedures concerning jury selection and service should be governed by court rules and regulations promulgated by the state's highest court or judicial counsel.
- (b) Responsibility for administering the jury system should be vested in a single administrator acting under the supervision of a presiding judge of the court.

#### *New York Recommendations*

1. *The responsibility for administering the grand jury system should reside with the court system. This responsibility includes all facets of a grand juror's service, including taking daily attendance, hearing all excuses, calling in jurors, inspecting grand jury facilities, monitoring juror utilization and assuring that daily amenities are provided.*

#### **Discussion**

In providing for the administration of the grand jury system, the law assigns particular responsibilities to various officers and agencies. For example, grand jurors are summoned by the commissioner of jurors, who is an officer of the court in the county in which he or she acts. Jud. Law §§ 502, 515. In counties within cities having a population of one million or more, the county clerk serves as the commissioner of jurors. Jud. Law § 502(a), (c). Once grand jurors are summoned, the grand juries in which they serve are "impaneled by a superior court and constitut[e] a part of such court...." CPL § 190.05. Once impaneled, grand juries need legal assistance to carry out their work,

and for that purpose, CPL § 190.25 provides that both the court and the district attorney are their “legal advisors.”

In part because of the division of these tasks under the law, and in part because of the accidents of history in each of New York’s 62 counties, the day-to-day administration of the grand jury system is currently shared by the impaneling court, the commissioner of jurors and the prosecutors. Many issues of administration -- sometimes as mundane as who, if anyone, will provide coffee, who will see to it that a lightbulb is replaced or who will call to determine the whereabouts of a missing grand juror -- are not legal issues, but practical ones, which any one of the officers having a statutory relationship to the grand jury might undertake. Because there are no clear answers in the law, because in some jurisdictions one agency has room in its budget and another does not, or simply because the administrative offices of one agency are located closer to the grand jury chamber, each county has determined somewhat differently who will undertake responsibility for various tasks, such as responding to complaints about the physical space in which the grand jurors operate, supplying whatever conveniences and services that can be made available to them and calling jurors who are absent to determine the reason for their absence and their continued availability.

While there is often a history and logic to the way in which these responsibilities have been divided, sometimes there is not. When no officer or agency is clearly assigned ultimate responsibility for the administration of the grand jury, when no one unambiguously is the one who must attend to the details of assuring that grand jurors are provided at all times with adequate treatment, facilities and amenities, the result can be, and sometimes is, an inadvertent neglect by all. Another unfortunate result can be confusion on the part of grand jurors as to the nature of their relationship with the prosecutors who present cases to them and the court personnel who are responsible for their day-to-

day care. Indeed, grand jurors are not the only ones who feel confused. For example, prosecutors in one jurisdiction supply coffee to grand jurors because no one else does, but feel uncomfortable about doing so.

Because grand juries are “a part of [the] court,” and because they must pass upon the cases the district attorney presents to them, it would be inappropriate to assign ultimate responsibility for the administration of the grand jury to the district attorney. While the courts in each county have a chief clerk who sees to the court’s many administrative needs, the Committee believes that the commissioner of jurors is the official within the court system who should administer the grand jury system.<sup>63</sup> The commissioner of jurors is charged with summoning grand jurors and is typically the first official with whom the grand jurors make contact. And often, but not always, after grand jurors are summoned, they report to a physical space within the control of the Commissioner of Jurors.

The Committee recognizes that in some counties the sharing of responsibility for grand jury administration has been an inevitable result of the court system’s limited resources. In such counties, there may be a need to increase those resources so that the court system can perform the

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<sup>63</sup> Jud. Law § 211(1)(a) and (e) appear to provide the Chief Judge with ample authority to designate the commissioner of jurors as the officer responsible for the administration of the grand jury. Jud. Law § 211(1) provides, in pertinent part:

The chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application of the unified court system throughout the state, including but not limited to standards and administrative policies relating to:

(a) The dispatch of judicial business, the designation of administrative judges, hours of court, assignment of terms and judges, transfer of judges and causes among the court of the unified court system, the assignment and reassignment of administrative functions performed by judicial and nonjudicial personnel, the need for additional judicial or nonjudicial personnel, and the publication of judicial opinions.

(e) Administrative methods and systems of the unified court system.

responsibilities the law places upon it. Even when the resources of the court system are adequate, however, it may occasionally be sensible to delegate a particular function to the prosecutor or to another official. For example, a prosecutor making a presentation to a grand jury over an extended period of time may become concerned about maintaining the quorum of grand jurors who have "heard all essential and critical evidence" relating to that presentation. *People v. Saperstein*, 2 N.Y.2d 210, 219 (1957), quoting *People v. Brinkman*, 309 N.Y. 974, 975 (1956). In such circumstances, if it becomes necessary to call the grand jurors after business hours to notify them that their attendance is necessary, it may be more practical and more effective for the prosecutor or the prosecutor's staff to make those calls. This recommendation is not meant to preclude delegation in such circumstances; rather, it seeks to assign the ultimate responsibility for the execution of all aspects of the administration of the grand jury system to one entity -- the court system -- so that issues of administration are effectively addressed and, if they are not, grand jurors know where to seek redress.



## B. GRAND JURY FACILITIES

### ABA STANDARD 14: JURY FACILITIES

Courts should provide an adequate and suitable environment for jurors.

- (a) The entrance and registration area should be clearly identified and appropriately designed to accommodate the daily flow of prospective jurors to the courthouse.
- (b) Jurors should be accommodated in pleasant waiting facilities furnished with suitable amenities.
- (c) Jury deliberation rooms should include space, furnishings and facilities conducive to reaching a fair verdict. The safety and security of the deliberation rooms should be ensured.
- (d) To the extent feasible, juror facilities should be arranged to minimize contact between jurors, parties, counsel and the public.

#### *New York Recommendations*

1. *The Office of Court Administration should perform an immediate and complete review of all grand jury facilities statewide. Based on this review, a comprehensive plan should be immediately developed and implemented to improve the quality of grand jury facilities. The plan should address, at a minimum: seating, lighting, furniture, painting, heating, air conditioning, ventilation, restrooms and security.*
2. *One of the products of the facilities review should be a facilities review checklist. Twice each year this checklist should be used to review grand jury facilities statewide.*
3. *The court staff should conduct a daily inspection to assure that grand jury facilities are clean and adequate and take immediate action to have any problems corrected.*
4. *The safety and security of the deliberation rooms should be ensured.*
5. *Grand jury facilities should be arranged to minimize contact between jurors, witnesses, defendants, counsel and the public.*
6. *Grand jurors should be provided with adequate amenities including: access to beverages and snacks through an on-site vendor or vending machines, easy access to public telephones, non-legal reading material and free parking, where possible.*

7. *If possible, a lounge area should be provided for grand jurors, where they can eat lunch and comfortably relax when the grand jury is not in session.*
8. *Where possible, the Office of Court Administration should arrange a separate entrance into the courthouse for jurors and grand jurors. Where this is not possible, the Office of Court Administration should consider issuing grand jurors a security pass in high volume counties.*

## **Discussion**

In many jurisdictions, the facilities in which grand jurors serve are clean and comfortable. Significantly, throughout the State, and within the counties of New York City in particular, the majority of grand jurors responding to exit questionnaires rated such factors as acoustics, lighting, comfort of seating, cleanliness of the courthouse, and cleanliness of restrooms as either excellent or good.<sup>64</sup> Despite this, significant numbers of the grand jurors reported these physical conditions to be fair or poor, as did a number of witnesses at the public hearing. The following were among the comments made:

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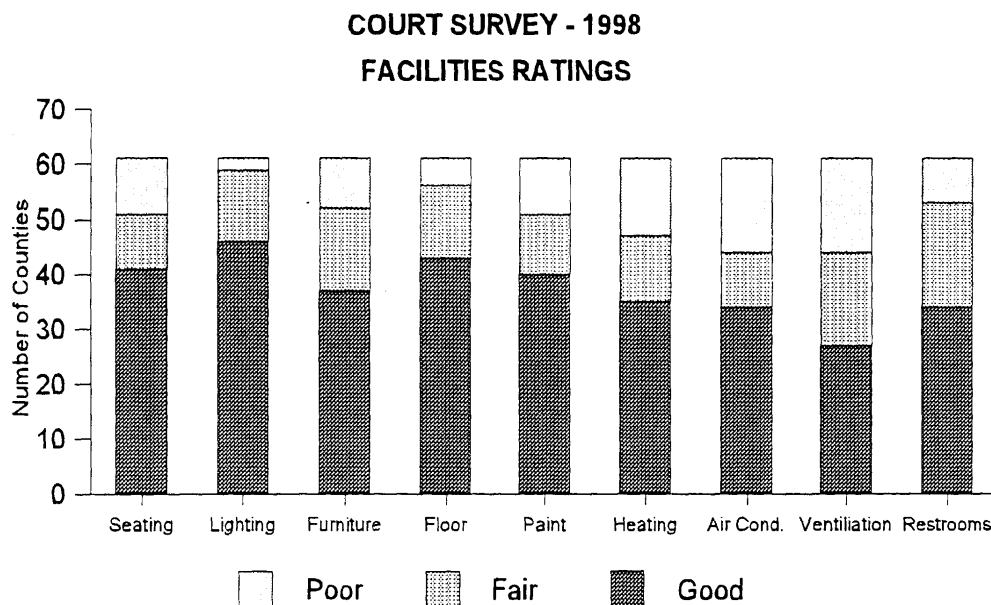
<sup>64</sup> In New York County, of those grand jurors who responded to the survey, 56% rated acoustics in the grand jury room as excellent or good; 88% rated the lighting in the grand jury room as excellent or good; 72% rated comfort of the seating in the grand jury room as excellent or good; 68% rated the cleanliness of the courthouse as excellent or good; and 71% rated the cleanliness of the restroom as excellent or good. In Bronx County, these percentages were as follows: 69% rated the acoustics as excellent or good; 81% rated the lighting as excellent or good; 71% rated the comfort of seating as excellent or good; 66% rated the cleanliness of the courthouse as excellent or good; and 70% rated the cleanliness of the restrooms as excellent or good. Similar percentages were reported for Kings County, except for seating comfort, which only 25% rated as excellent or good, and restroom cleanliness, which only 41% rated as excellent or good. In Queens County, the percentages were lower: 54% rated the acoustics as excellent or good; 75% rated the lighting as excellent or good; 52% rated the comfort of seating in the grand jury room as excellent or good; 34% rated the cleanliness of the courthouse as excellent or good; and 47% rated the cleanliness of the restrooms as excellent or good. In upstate counties, the figures resembled more closely those for New York and Bronx Counties. In Albany County, 48% rated the acoustics as excellent or good; 90% rated the lighting as excellent or good; 87% rated the seating in the grand jury room as excellent or good; 81% rated the cleanliness of the courthouse as excellent or good; and 74% rated the cleanliness of the restrooms as excellent or good. In Chemung County, the percentages were as follows: 61% rated the acoustics as excellent or good; 95% rated the lighting as excellent or good; 47% rated the seating in the grand jury room as excellent or good; 89% rated the cleanliness of the courthouse as excellent or good; and 86% rated the cleanliness of the restrooms as excellent or good.

- “Grand jury service is not done in a place that’s comfortable. It was drab, it was dismal.” Tr. 48.
- “The room was filthy. There was on the side near the windows an actual well which goes beyond the radiators or air conditioning plant. . . there was a well with I don’t know how many years worth of garbage that people had tossed in there and in the four weeks despite a lot of jurors asking that it be cleaned, it was not cleaned. The chairs were sticky enough so that some of us brought Fantastic and paper towels because it was clear those weren’t going to be cleaned. Bathrooms . . . were not in a good state and on the second or third day after some frustration I went upstairs to the Borough President’s Office and saw the person in charge of constituent relations and she managed to get someone in to clean the bathrooms.” Tr. 122-23.

In some jurisdictions, particularly those in New York City, members of the Committee who toured grand jury facilities found conditions that confirmed complaints we heard at the hearing.

The court survey also indicated a mixed rating of grand jury facilities throughout the State.

The chart below shows that between one-third and one-half of the counties have only fair or poor ratings with regard to facilities.



The effect of unpleasant physical surroundings can be exacerbated by the length of time grand jurors spend hearing cases and the repetitive nature of many of the cases grand jurors are called upon to consider. Inevitably, the perception that the physical conditions are uncomfortable and unpleasant can have an adverse effect on the quality of the grand jury experience. One former grand juror who found the grand jury meeting rooms she used to be “shabby, uncomfortable and makeshift,” described grand jury duty as “a degrading and disillusioning experience and one which I dread more each time I am faced with it.” Tr. at 23. Other grand jurors, while critical of the physical conditions, testified that such conditions did not interfere with the grand jurors’ ability to carry out their duties. “The fact that the room we worked in was filthy and airless and wasn’t cleaned until the second to the last day turned out really to be a minor frustration.” Tr. 11-12. “[N]one of the comfort issues bothered me in the least. I didn’t care that there were wooden benches or the long wait; I cared more about the process because I thought there were real problems going on in some of the main areas.” Tr. 54.

The Committee recommends that the physical condition of grand jury rooms be addressed through the recommendations set out above. These recommendations will lead both to an actual improvement in the physical space in which grand juries meet and an equally important perception on the part of the grand jurors that an administrator is responsible and concerned about their physical comfort.

Another criticism expressed by some grand jurors concerned the lack of special procedures for admitting grand jurors into courthouses. In many high-volume counties, grand jurors are required to mingle with defendants, witnesses and counsel while waiting for security clearance to enter the courthouse. The Office of Court Administration should, wherever possible, provide a separate

entrance for jurors and grand jurors. Where this is not feasible, the Office of Court Administration should consider issuing security passes to grand jurors or making some accommodation, including possibly security clearance, to speed their entry into the courthouse.

## C. GRAND JUROR COMPENSATION

### ABA STANDARD 15: JUROR COMPENSATION

- (a) Persons called for jury service should receive:
  - (i) A nominal amount in recognition of out-of-pocket expenses for the first day they report to the courthouse;
  - (ii) A reasonable fee for each succeeding day they report.
- (b) Such amounts and fees should be paid promptly.
- (c) State law should prohibit employers from discharging, laying-off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.

#### *New York Recommendations*

1. *Pay jurors a fee of \$60 per day for each day of service between 11 and 20 days. Pay jurors a fee of \$80 per day for each day of service over 20 days.*
2. *Pay the grand jury fee on a weekly basis. Do not wait until the grand jurors' term of service is complete before submitting the jurors' payroll.*

### Discussion

While petit jury duty is occasionally lengthy, more often than not it ranges from a minimum of a day or two to a couple of weeks. Grand jury service, as a rule, is more consistently protracted. For example, during 1997, grand jurors in three counties served on average more than 20 days; and in 18 counties, grand jurors on average served from 11 to 20 days.<sup>65</sup> Although, as is discussed in Section IV, the Committee recommends that efforts be made to reduce the term of grand jury service, when that is not possible, jurors who serve longer terms should receive additional compensation for

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<sup>65</sup> See the Grand Jury Term of Service Table in Section IV.

their extra days of service. This recommendation is designed to recognize -- for some grand jurors in a practical way and for others merely in a symbolic way -- the greater hardship caused by longer service requirements.

Largely as a result of the work of the Jury Project, Judiciary Law §521 was amended to provide staggered increases in daily compensation for trial and grand jurors, ultimately to the current amount of \$40 per day. Presently, 25,000 grand jurors serve each year. Of those, 12,000 serve between 11 and 20 days; 1,500 jurors serve over 20 days. Now that the daily fee has reached \$40, paying \$60 per day for each day over 10 days of service and \$80 per day for each day over 20 days would increase the annual total cost for grand juror fees by 25%, from \$4 million to \$5 million. While this is not an insignificant amount, it is a comparatively small investment in the morale of our grand juries. Adopting shorter terms of grand jury service, would, of course, result in a much smaller increase.

Until the daily wages of petit and grand jurors were raised, grand jurors were reimbursed for their travel expenses based on uniform mileage fees calculated by the Chief Administrator. When the wages of grand jurors were increased, however, the reimbursement of travel expenses ended. Some grand jurors who are aware that such reimbursement was once available now complain that it is not. Indeed, when asked to identify the most frequent complaint voiced by grand jurors, a grand jury warden in New York County immediately mentioned grand jurors' complaints about not receiving reimbursement for subway fare. Although they now receive a substantially increased per diem allowance, the feeling of unjust treatment may result from the fact that grand jurors may not

receive payment for their service until weeks after they have reached into their own pockets to pay for their travel expenses.

Precisely because grand jurors are usually called upon to commit to a longer term of service, the practice of submitting the grand jury's payroll only after the term of service ends should be changed. Specifically, the Committee endorses the ABA's recommendation that jury fees be paid promptly, and recommends that a grand juror's usually longer term of service be further acknowledged by encouraging payment to grand jurors on a weekly basis. The recommendation for earlier and more frequent compensation is meant to permit grand jurors who serve several weeks to receive at least one check before they complete their service. If auditing or accounting problems make this goal unrealistic, consideration should be given to a procedure by which grand jurors receive at least some nominal advance, if only to off-set their travel expenses.



D. DISQUALIFICATION PERIOD AFTER GRAND JURY SERVICE

*New York Recommendations*

1. *Grand jurors who serve more than 10 days should be relieved of further mandatory jury or grand jury service for an additional four years. However, those grand jurors who wish to decline this further exclusion should be permitted to do so.*
2. *A uniform policy should be adopted for all counties for potential grand jurors who report and are available for service but are not needed by the court. These jurors should be given the choice of: 1) accepting the jury fee (for one day) and the four-year disqualification period; or 2) accepting a postponement to a future date for either grand or petit service.*

Discussion

Section 524 of the Judiciary Law creates a four-year disqualification period for all persons who serve on a grand or petit jury.<sup>66</sup> The law was amended in 1998 to increase the four-year disqualification period by an additional four years for jurors who have served more than 10 days. The amendment also authorizes the commissioner of jurors to extend the disqualification period beyond those four years for *all* jurors in his or her county, regardless of their length of service, if the conditions of the county permit such an extension. The Committee supports these amendments.

The memorandum in support of these amendments reveals that approximately 4% of New York's jurors (grand and petit combined) serve for 11 days or more. The memorandum notes that the then-existing law did not "recognize the greater contribution given by those who have interrupted their lives for a substantial period of time to give an extended period of jury service," and that the amendments were designed to "provide that small group of deserving citizens with an extra four years

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This section permits a two-year disqualification period in counties where the court system determines that a four-year disqualification period would be impractical. Currently, a two-year disqualification period applies only in Bronx County.

of disqualification from jury service.” The reasoning behind the amendments to section 524 apply with particular force to grand jurors, since, given the four-week service that grand jurors in some counties are required to serve, a significant percentage of the jurors who serve more than 10 days are likely to be grand jurors.

It is unfortunate, however, that while the statute permits an individual to waive two years of the initial four-year disqualification period, it does not permit waiver of any of the second four-year period.<sup>67</sup> Among the pleasant surprises the Committee experienced was the frequency with which grand jurors reported that their service as grand jurors was a highly favorable one. A grand juror who testified at the Committee’s hearing stated that “I had a month when I was able to [serve] but the experience was extraordinary and I came out of it far richer than I went in and I am very grateful for it.” Tr. 102. This statement was corroborated by our grand jury survey, which indicated that in all those counties responding, a majority of grand jurors consistently agreed with the statement that “I felt I made a contribution as a grand juror and the time was well spent.”<sup>68</sup>

The system needs more grand jurors who are willing to serve, and should not automatically disqualify willing jurors for the additional four-year period. While it is undesirable to permit the system to be dominated by “professional” grand jurors, the statute should not require those who serve

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<sup>67</sup> Subdivision (a) of Judiciary Law § 524, effective August 1, 1998, provides that “[a] person who has served on a grand or petit jury. . . shall not be competent to serve again as a trial or grand juror. . . for four years subsequent to the last day of such service. . . .” Subdivision (d), effective the same day, provides that “[n]otwithstanding the provisions of this section, the period during which a person shall not be competent to serve as a trial or grand juror pursuant to this section shall be one-half the period specified in subdivision (a) . . . where such person so requests . . . . Such a request may be submitted at any time during the period of incompetency.”

<sup>68</sup> In New York County, a total of 64% of grand jurors either strongly agreed or agreed with this statement; in Bronx County the figure was 86%; in Kings County 90%; in Queens County, 78%; Albany County, 71%; Chemung County, 79%; Monroe County, 88%; Nassau County, 95%; Niagara County, 97%; Oneida County, 94%; and Saratoga County, 94%.

on a grand jury for more than 10 days, or even more than 20, to wait up to 8 years before being qualified to serve again. Accordingly, the Committee recommends that section 524 be further amended to permit grand jurors serving more than 10 days to waive completely the second four-year period of disqualification.

The same reasoning applies to recommendation number two. The practice concerning the disqualification of those who have been called for grand jury service but are not needed to serve on a grand jury panel varies among the counties. In some counties, such persons are paid for a day's service, and excused for four years. In other counties, such persons are not paid, but called again for service soon thereafter. In other counties, jurors are given the choice between payment and service credit, on the one hand, or no payment and early re-call on the other. Consistent with our view that those who wish to serve be permitted to do, the Committee recommends that a uniform policy be enacted that would permit those grand jurors who have made themselves available for service, but are not needed, to have the choice now only afforded in some jurisdictions: electing to be disqualified for the four year-period or accepting a postponement to a future date for either grand jury or petit jury service.

E. NOTE-TAKING BY JURORS

*New York Recommendations*

1. *In general, note-taking should be permitted. For good cause shown, the prosecutor should apply to the impaneling judge for authority to prohibit note-taking in particular cases.*
2. *Upon request of a grand juror to take notes, the prosecutor should instruct the grand jurors in the proper use of any notes taken, and the instructions should include the following:*
  - (a) *Grand jurors should not allow their note-taking to become a distraction from the proceedings.*
  - (b) *Notes are only an aid to a grand juror's memory and are not superior to his or her independent recollection.*
  - (c) *Those grand jurors who take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another grand juror has taken notes.*
  - (d) *Notes are only for the grand juror's personal use in refreshing recollection of the evidence.*
  - (e) *If there is a discrepancy between a grand juror's recollection of the evidence and the grand juror's notes, the grand jury should request a read back of the record, and the stenographer's notes or transcript prevails over a grand juror's notes.*
  - (f) *Notes are not a substitute for the official record or for the governing principles of law as enunciated by the impaneling judge or the prosecutor.*
3. *Grand jurors may refer to those notes during the proceedings and deliberations.*
4. *Any notes taken are confidential and should not be available for examination or view by any party or other person. Notes should be secured at the end of each session and collected and destroyed at the conclusion of the proceeding for which the notes were taken.*

## Discussion

As the Court of Appeals has recently observed, the common law prohibited jurors from taking notes during a trial because of “the high illiteracy rate during the earliest days of our republic. Judges did not allow note-taking because of the perceived danger that jurors capable of taking notes would dominate deliberations.” *People v. Hues*, 94 N.Y.2d 413 (1998). However, note-taking was permitted by New York’s Code of Criminal Procedure, and “[t]oday the practice is common ... and has been approved by all four Departments of the Appellate Division.” *Id.* The Court of Appeals has now endorsed note-taking by trial jurors “as a legitimate aid in absorbing and synthesizing information, as well as refreshing memory.” *Id.* Although sensitive to the danger that those who take notes may inappropriately dominate those who do not, and that note-taking may distract from, as well as aid in, absorbing information, the Court expressed its belief that “[w]ith appropriate direction from the [trial judge] potential abuses arising from note-taking can be abated.” *Id.*

Grand jurors, unlike petit jurors, may want to take notes in cases which are simple as well as those which are complex. The Court of Appeals has noted that, “[a]s cases have become increasingly complex, courts should have the option to allow jurors to take notes to aid their memories and to enable them to consider the evidence in a more informed fashion...” *Id.* Grand jurors may feel the same need in complex grand jury proceedings that may extend over weeks and even months of testimony. Moreover, unlike a trial setting, in the grand jury setting even a simple case may be interrupted by witnesses in other cases, any of which may be quite similar to each other. In that circumstance, note-taking may also permit grand jurors to keep track of which evidence relates to which case from day to day.

We recommend permitting note-taking as a general rule because it may aid some grand jurors who want to take notes, and because prohibiting the practice may give jurors the impression that they are not really expected to remember or evaluate the evidence. We recognize that this recommendation, if implemented, will not alter the practice in many counties, nor is it likely to result in many more jurors taking notes than do now. Most of the grand jurors who responded to the exit questionnaires stated that they were permitted to take notes, but in most counties very few actually did. For example, in New York County, 59% of the grand jurors indicated that they were allowed to take notes, but only 4% indicated that they actually did and 89% stated that they did not. In Albany County, 83% of the grand jurors were permitted to take notes and only 31% actually did.<sup>69</sup> In Kings and Queens Counties, however, close to 90% of the grand jurors indicated that they were not permitted to take notes.

While we recommend that note-taking be permitted, we, too, recognize the danger that notes will be misused,<sup>70</sup> and make several recommendations to guard against that danger. First, in his or her initial instructions, the impaneling judge should tell the grand jury that note-taking is neither

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<sup>69</sup> In Chemung County the figures were 86% and 14%; in Nassau County, 87% and 41%; in Oneida County, 55% and 3%; and in Saratoga County 12% and 6%. In Bronx County, 89% of the grand jurors indicated that they were permitted to take notes and 85% responded that they actually did so. The figures were similar in Monroe County where 98% of the grand jurors were permitted to take notes and 98% did so.

<sup>70</sup> The Court of Appeals has described as "[p]erhaps the most often-cited danger of note-taking . . . that the juror with the best notes will unduly influence and possibly mislead other jurors. . . ." *People v. Hues*, *supra* (citation omitted). Other dangers are that "jurors may become distracted from the proceedings when taking notes," that they "may place more significance on their notes, which may be inaccurate, incomplete or misleading, than on their own independent recollections," and that "notes may accentuate irrelevancies and ignore more substantial evidence and issues." *Id.*

encouraged nor discouraged.<sup>71</sup> By this, no special recognition will be given to those who take notes or to the notes that they take. Second, grand jurors who ask about note-taking must be specifically cautioned concerning its abuses.<sup>72</sup> Third, to protect grand jury secrecy, notes must be safeguarded during the life of the grand jury proceeding, and destroyed after it. Grand jurors must not be permitted to leave the grand jury room or area with their notes or keep the notes after the grand jury has expired. Fourth, although we recommend that note-taking be permitted in most cases, we also recognize that the secrecy that attaches to grand jury proceedings, see CPL § 190.25(4)(a), distinguishes them from public trials. The secrecy is particularly important, for example, when a threat has been made against a witness, when an undercover officer who appears before a grand jury is still operating in the field or when the grand jury is hearing testimony about electronic surveillance which is ongoing. In such cases the existence of notes may create a danger which outweighs whatever value the notes will have for the grand jury's deliberations. Thus, the prosecutor should be permitted, upon a showing of good cause, to apply to the impaneling judge for authority to prohibit note-taking in particular cases. In this way, the decision to prohibit note-taking is left to the sound discretion of the judge.

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<sup>71</sup> The instructions we recommend should be included in pattern jury instructions on grand juror note-taking that should be developed by the New York Committee on Criminal Jury Instructions.

<sup>72</sup> The instructions we recommend here are adapted directly from those the Court of Appeals has said must be given at trial. See *People v. Hues*, *supra*.

F. WRITTEN MATERIALS

*New York Recommendations*

1. *CPL §190.25(6) should be amended to make explicit that, upon request of a grand juror for further instruction with respect to a statute, the court or the prosecutor may give to the grand jury copies of the text of any statute which, in its discretion, the court or prosecutor deems proper. The amendment should include a requirement that a copy of any such text be made an exhibit in the proceeding in which it is furnished to the grand jury. However, the determination of a court or prosecutor of whether to submit the text of a particular statute should not be a ground for dismissing an accusatory instrument filed after an otherwise proper proceeding.*

Discussion

Grand jurors who testified at the hearing stated that it would have helped their deliberations had they been given written definitions of the crimes they were being asked to consider. In the words of one grand juror, “[t]he instructions were sketchy, confusing[,] everything seemed very hasty and I know that we all felt sort of pushed along, let’s just keep this going and get it done as fast as we can.” Tr. 10. Another grand juror testified that “it would have been better for the system if jurors had [legal instructions] on paper to be able to refer to.” Tr. 72.<sup>73</sup>

The Committee believes that supplying grand jurors with copies of the statutes under consideration -- which could include not only statutes defining the crimes charged, but also statutes defining relevant defenses concerning which the grand jury will be charged -- can assist the grand jurors in their deliberations while creating little or no procedural or logistical burden to the prosecutor. Providing copies of statutes could be particularly helpful to grand juries, which are faced with the

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<sup>73</sup> Unfortunately, the topic of written instructions was not covered in the exit questionnaires.



difficult task of distinguishing among multiple case presentations involving varied factual circumstances and alleged crimes.

Our proposed amendment to CPL §190.25 would not require that a copy of a statute be supplied to the grand jury in every case, or in any particular case. Rather, following the procedure now applicable to the deliberations of a trial jury,<sup>74</sup> our proposal merely would permit the court or prosecutor to furnish the text of a statute when a grand juror requests further instruction concerning a statute and the court or the prosecutor, in the sound exercise of discretion, believes that the request is necessary or appropriate. The written version of the statute so provided would be marked as an exhibit in the proceeding. It is also recommended that the legislation make clear that the determination whether to submit the text of a particular statute would not be a ground for dismissing an accusatory instrument filed after an otherwise proper proceeding.

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CPL § 310.30 provides in relevant part: "With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper."

## G. JURORS ASKING QUESTIONS

### *New York Recommendations*

1. *If, during a witness's appearance before the grand jury, a grand juror wishes to ask a question of the witness, the prosecutor generally should put the question to the witness. However, the prosecutor should refuse to ask the question if it is improper, irrelevant, or repetitive, and should rephrase the question to place it in proper form. The prosecutor should provide the grand juror with an adequate explanation for not asking or modifying a question. The witness should be excused from the grand jury room while the prosecutor determines whether grand jurors have questions of a witness, and whether and in what form the questions should be asked.*

### Discussion

The vast majority of grand jurors who responded to the exit questionnaires indicated that they were given the opportunity to ask questions of witnesses, the defendant and the prosecutor. The percentage of grand jurors who actually did ask questions was somewhat lower. However, the questionnaires did not seek, and the grand jurors who responded did not provide, any feedback concerning the manner in which their questions were either rejected as inappropriate or rephrased to ensure that they were in proper form.

The issue of grand jurors asking questions was the subject of much testimony at the Committee's hearing. It is obviously necessary that prosecutors prevent grand jurors from putting questions to witnesses which are improper in form or substance, *see, e.g., People v. Smith*, 182 A.D.2d 725 (2d Dept. 1992), and thus, by necessity, prosecutors must sometimes refuse to put particular questions to a witness and must rephrase others. Several grand jurors who appeared at the public hearing expressed frustration either because a question, as reworded by the prosecutor, "didn't always come exactly as people intended." Tr. 11, or because the reasons why a particular question was not

a proper one “weren’t made clear. . . .” Tr. 62.<sup>75</sup> Although the survey data did not indicate whether these were isolated cases or representative of a broader problem, we believe that they warrant a response. While grand jurors may not always accept or understand legitimate explanations for decisions prosecutors make concerning their questions, they are nonetheless entitled to an explanation for each such decision.

Consistent with our goal that grand jurors feel they are being treated with respect and accorded their independent role in the process, we recommend that prosecutors do what we assume they already routinely do: endeavor to provide such explanations. By doing so, grand jurors will know that their questions are being taken seriously and that their concerns are being addressed. Many prosecutors already excuse the witness from the grand jury room while the prosecutor determines whether grand jurors have questions of a witness, and whether and in what form the questions should be asked.<sup>76</sup> The Committee recognizes this as an appropriate option because it avoids the inconvenience, embarrassment and distraction whispering can sometimes cause, and because it permits the discussion between the grand juror and the prosecutor to be heard by the other grand jurors, thus enhancing the seriousness of the process by which the prosecutor reviews the grand juror’s question.

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<sup>75</sup> One witness at the hearing complained that “[n]inety percent of the questions I wanted to ask were deemed inappropriate and why? Because my questions went to questions, for example, of the credibility of the police officer, the veracity of the lab tests and other things going to the whole presentation. And I was told over and over again that that didn’t matter, that was not my job.” Tr. 43-44. Obviously grand jurors must be permitted to inquire into issues of credibility when they arise. In some situations, however, drawing the line between reasonable grand jury inquiry and outright speculation is difficult but necessary.

<sup>76</sup> See *People v. Cantos*, 174 Misc.2d 598, 602 (Sup.Ct. Queens County 1997)(“Recognizing that there are numerous reasons why such exchanges between the prosecution and Grand Jury should not be overheard by a testifying witness, this court also recommends that at the conclusion of a witness’ testimony the witness be asked to step outside the Grand Jury room temporarily while the appropriate record is being made”).

Lower courts have differed on the question whether, as a matter of law, the colloquy between a prosecutor and grand juror concerning a question the grand juror wants put to a witness must be recorded.<sup>77</sup> Even if it is required, "[i]t does not follow that any unrecorded conversation between a prosecutor and a grand juror ... automatically impairs the integrity of the Grand Jury process and creates the possibility of prejudice to the defendant." *People v. Erceg*, 82 A.D.2d 947 (3d Dept. 1981). Looking at the question from the point of view of the grand jurors, rather than the defendant, the Committee considered, but did not agree to recommend, a requirement that a prosecutor place such colloquy on the record of the grand jury proceeding.

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<sup>77</sup> Compare *People v. Brown*, 87 Misc.2d 403, 406 (Sup.Ct., New York County 1976) ("... this court finds that the District Attorney's policy of not recording the screening of grand juror's questions is proper."), with *Matter of Nassau County Grand Jury*, 87 Misc.2d 453, 461-62 (Nassau County Ct. 1976) ("It should not be necessary to remind the District Attorney that all instructions given to the grand jury with respect to their right to ask any questions or any other legal matters affecting the grand jury proceeding must be made in the presence of and recorded by a grand jury reporter."). More recently, one court, without determining whether recording such colloquy is required, expressed the view that it is "the better practice" to do so, and "strongly recommend[ed] that in order to avoid questions of impairment and impropriety, the District Attorney's Office of Queens County adopt a policy of recording proposed questions posed by members of the Grand Jury as well as the prosecutor's legal discussion and ruling concerning such questions." *People v. Cantos*, 174 Misc.2d 598, 602 (Sup.Ct. Queens County 1997).

## VI. SUMMARY OF RECOMMENDATIONS

### I . SUMMONING AND SELECTION

1. *The use of an annual grand jury list should be eliminated. Grand jurors should be selected directly from the source list or list of qualified jurors in the same manner as the petit jurors are drawn, updated with the same frequency.*
2. *The term of grand jury service should be reduced where practicable to permit persons from all incomes and occupations to serve.*

### B. RANDOM SELECTION PROCEDURES

1. *The practice of asking for volunteers during grand jury selection should be eliminated.*

### C. NOTIFICATION AND SUMMONING PROCEDURES

1. *The grand jury summons should be sent approximately six weeks before the beginning of the term and should be expanded to include information about the length, days, hours and expected duration of the grand jury term and the procedure for requesting an excuse or postponement.*

### D. EXEMPTION, EXCUSE AND DEFERRAL

1. *The practice in some counties of requiring jurors to report for a pre-screening session should be eliminated.*
3. *Excuses from grand jury service should be handled by the court or the commissioner of jurors office.*

E. REMOVAL FROM THE JURY PANEL FOR CAUSE

1. *The court, not the prosecutor, should determine whether or not to excuse a grand juror from service based on the juror's inability to be fair.*
2. *The court, not the prosecutor, ordinarily should determine whether or not to excuse a grand juror from an individual case based on the juror's inability to be fair.*
3. *The Unified Court System should evaluate whether guidelines should be developed governing how and when a grand juror's ability to be fair should be determined.*

F. JUROR ORIENTATION AND INSTRUCTION

1. *The New York Committee on Criminal Jury Instructions should develop comprehensive pattern instructions for grand jurors relating to the proper performance of their duties and responsibilities as grand jurors. After each grand jury is impaneled, it should receive an orientation and legal instructions from the impaneling judge. If more than one grand jury is impaneled at once, the instructions may be given by another judge. All instructions should be recorded in the minutes.*
2. *The instructions from the judge:*
  - (a) *Should include an explanation of the purpose and functioning of the grand jury and an explanation of the burden of proof for indictment, including a clear and balanced definition of the term "reasonable cause to believe."*
  - (b) *Should make clear that, in determining whether the burden of proof for indictment has been met, it is the grand jurors' responsibility to assess the credibility of witnesses, and to give individual consideration to each defendant and to each charge they are considering as to each defendant.*
  - (c) *Should include an instruction that jurors may: ask legal questions of the prosecutor; upon review of the prosecutor for relevance and propriety, have factual questions asked of any witness; and, if necessary, ask legal questions of the impaneling judge.*
  - (d) *Should include an instruction that note-taking is neither prohibited nor encouraged, and, if the grand jurors have any questions about note taking, they will receive further instructions about taking notes from the prosecutors who will present cases to them.*

3. *The Unified Court System should prepare a Grand Juror's Handbook that explains the responsibilities of grand jurors. The handbook should be written in layperson terms and cover the administration of the grand jury system, the purpose and functioning of the grand jury and the legal definitions noted in recommendation #2. CPL § 190.20(5) should be amended to make clear that such legal definitions may be submitted to the grand jury in written form.*
4. *The Unified Court System should prepare a standard grand juror orientation film.*
5. *The Office of Court Administration should conduct a pilot project to evaluate the feasibility of providing the initial orientation material by conducting a two-step grand jury summoning process.*
6. *The New York State District Attorneys Association should appoint a committee to review the legal instructions given to grand jurors during the prosecutor's orientation to determine if the presentation can be made clearer for the jurors. This review should consider what information should be given to jurors, when it should be given and by whom.*
7. *Grand juror forepersons and secretaries should be given additional instructions from the court as to their role and responsibilities.*

## II. JUROR UTILIZATION AND TERM OF SERVICE

### A. TERM OF SERVICE

1. *A series of pilot projects should be initiated in counties throughout the State to test the feasibility of reducing the term of grand jury service, including:*
  - a. *Restricting the "availability" period;*
  - b. *Restricting the frequency and days of the week that jurors must report;*
  - c. *Reducing the hours of service; and*
  - d. *Reducing the number of days that jurors are required to report.*

*The pilot projects should be conducted in counties of varying size and should be carried out jointly by the courts and the district attorneys' offices.*

2. *In conjunction with the pilot projects, the Office of Court Administration should conduct a study of the reasons for delay in grand jury proceedings and the ways in which grand jury proceedings may be made more efficient.*
3. *Based upon the results of the pilot projects, efforts should be made to devise grand jury terms that better fit the duration of the cases to be presented.*
4. *Based upon the results of the pilot projects, new Rules of the Chief Administrator of the Courts should be adopted defining and governing the length of grand jury terms of service, consistent with local needs and requirements.*
5. *The courts, district attorneys' offices, defense bar and local correctional authorities responsible for the production of detained defendants to the grand jury should develop plans to improve such production as well as the timely appearance of other witnesses who wish to testify before the grand jury. District attorneys' offices should work with defense counsel and witnesses to schedule appearances before the grand jury in a cooperative fashion in order to minimize unnecessary delays. The use of video conferencing technology and other means should be explored for facilitating communication between detained defendants and their attorneys during the time between arraignment and the scheduled grand jury presentation date, to assist defense counsel in consulting with their clients and providing notice to prosecutors of defendants' intentions as to whether they may testify before the grand jury.*

B. JUROR UTILIZATION

1. *Jurors should be required to report only when necessary to hear a case. A telephone call-in system should be implemented so that grand jurors can know precisely when they are required to appear.*
2. *Grand jurors should be released early in the day if their time is no longer needed.*
3. *Court administrators and prosecutors should keep jurors informed on a regular basis throughout the day about any reasons for being kept waiting. If revealing the exact reasons for waiting will prejudice the jurors, then jurors should at least be assured that others are aware that they are waiting and are doing everything they can to move things along.*
4. *Prosecutors' offices should educate assistant district attorneys and law enforcement personnel on the need to be sensitive to grand jurors' time and to schedule grand jury appearances efficiently and effectively.*
5. *The practice of conducting tours of local jail facilities for grand jurors should be eliminated.*



6. *The practice of requiring jurors to report simply for the purpose of "handing up" the indictment should be eliminated.*
7. *A system of monitoring the utilization of grand jury time should be created*

### III. THE GRAND JURY EXPERIENCE

#### A. ADMINISTERING THE GRAND JURY

1. *The responsibility for administering the grand jury system should reside with the court system. This responsibility includes all facets of a grand juror's service, including taking daily attendance, hearing all excuses, calling in jurors, inspecting grand jury facilities, monitoring juror utilization and assuring that daily amenities are provided.*

#### B. GRAND JURY FACILITIES

1. *The Office of Court Administration should perform an immediate and complete review of all grand jury facilities statewide. Based on this review, a comprehensive plan should be immediately developed and implemented to improve the quality of grand jury facilities. The plan should address, at a minimum: seating, lighting, furniture, painting, heating, air conditioning, ventilation, restrooms and security.*
2. *One of the products of the facilities review should be a facilities review checklist. Twice each year this checklist should be used to review grand jury facilities statewide.*
3. *The court staff should conduct a daily inspection to assure that grand jury facilities are clean and adequate and take immediate action to have any problems corrected.*
4. *The safety and security of the deliberation rooms should be ensured.*
5. *Grand jury facilities should be arranged to minimize contact between jurors, witnesses, defendants, counsel and the public.*
6. *Grand jurors should be provided with adequate amenities including: access to beverages and snacks through an on-site vendor or vending machines, easy access to public telephones, non-legal reading material and free parking, where possible.*

7. *If possible, a lounge area should be provided for grand jurors, where they can eat lunch and comfortably relax when the grand jury is not in session.*
8. *Where possible, the Office of Court Administration should arrange a separate entrance into the courthouse for jurors and grand jurors. Where this is not possible, the Office of Court Administration should consider issuing grand jurors a security pass in high volume counties.*

C. GRAND JUROR COMPENSATION

1. *Pay jurors a fee of \$60 per day for each day of service between 11 and 20 days. Pay jurors a fee of \$80 per day for each day of service over 20 days.*
2. *Pay the grand jury fee on a weekly basis. Do not wait until the grand jurors' term of service is complete before submitting the jurors' payroll.*

D. DISQUALIFICATION PERIOD AFTER GRAND JURY SERVICE

1. *Grand jurors who serve more than 10 days should be relieved of further mandatory jury or grand jury service for an additional four years. However, those grand jurors who wish to decline this further exclusion should be permitted to do so.*
2. *A uniform policy should be adopted for all counties for potential grand jurors who report and are available for service but are not needed by the court. These jurors should be given the choice of: 1) accepting the jury fee (for one day) and the four-year disqualification period; or 2) accepting a postponement to a future date for either grand or petit service.*

E. NOTE-TAKING BY JURORS

1. *In general, note-taking should be permitted. For good cause shown, the prosecutor should apply to the impaneling judge for authority to prohibit note-taking in particular cases.*
2. *Upon request of a grand juror to take notes, the prosecutor should instruct the grand jurors in the proper use of any notes taken, and the instructions should include the following:*
  - (a) *Grand jurors should not allow their note-taking to become a distraction from the proceedings.*

- (b) *Notes are only an aid to a grand juror's memory and are not superior to his or her independent recollection.*
  - (c) *Those grand jurors who take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another grand juror has taken notes.*
  - (d) *Notes are only for the grand juror's personal use in refreshing recollection of the evidence.*
  - (e) *If there is a discrepancy between a grand juror's recollection of the evidence and the grand juror's notes, the grand jury should request a read back of the record, and the stenographer's notes or transcript prevails over a grand juror's notes.*
  - (f) *Notes are not a substitute for the official record or for the governing principles of law as enunciated by the impaneling judge or the prosecutor.*
- 3. *Grand jurors may refer to those notes during the proceedings and deliberations.*
  - 4. *Any notes taken are confidential and should not be available for examination or view by any party or other person. Notes should be secured at the end of each session and collected and destroyed at the conclusion of the proceeding for which the notes were taken.*

F. WRITTEN MATERIALS

- 1. *CPL §190.25(6) should be amended to make explicit that, upon request of a grand juror for further instruction with respect to a statute, the court or the prosecutor may give to the grand jury copies of the text of any statute which, in its discretion, the court or prosecutor deems proper. The amendment should include a requirement that a copy of any such text be made an exhibit in the proceeding in which it is furnished to the grand jury. However, the determination of a court or prosecutor of whether to submit the text of a particular statute should not be a ground for dismissing an accusatory instrument filed after an otherwise proper proceeding.*

G. JURORS ASKING QUESTIONS

1. *If, during a witness's appearance before the grand jury, a grand juror wishes to ask a question of the witness, the prosecutor generally should put the question to the witness. However, the prosecutor should refuse to ask the question if it is improper, irrelevant, or repetitive, and should rephrase the question to place it in proper form. The prosecutor should provide the grand juror with an adequate explanation for not asking or modifying a question. The witness should be excused from the grand jury room while the prosecutor determines whether grand jurors have questions of a witness, and whether and in what form the questions should be asked.*