The Presence of Counsel in the Grand Jury Room

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THE PRESENCE OF COUNSEL IN THE GRAND JURY ROOM

INTRODUCTION

Historically, the grand jury has had a dual function: to shield the individual from unfounded accusations,1 and to serve as an investigative tool of the government.2 It is well embedded in the American criminal justice system and indeed is one of the oldest institutions of Anglo-American civilization, with a history of more than eight hundred years.3 Although its origins are somewhat obscure,4 the development of the grand jury is usually traced from the assize of Clarendon, proclaimed by Henry II in 1166.5 By the end of the seventeenth century, it was firmly established in England and was brought to this country by the colonists.6 With the birth of the nation the grand jury was incorporated into the Bill of Rights.7

Despite its longevity, the grand jury has frequently come under attack.8 Detractors have described it as "a relic of medievalism, cumbersome, slow, inefficient, and costly."9 The grand jury has also been characterized as a

1. The grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962); accord, Committee on Codes of the New York State Assembly, Abuse of Power 23-24 (1976) [hereinafter cited as Abuse of Power]. Such protection is needed because even if an accused is ultimately acquitted at trial, the issuance of an indictment can permanently taint a person's reputation. See, e.g., Federal Grand Jury: Hearings on H.R. J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 334, 338 (1976) [hereinafter cited as 1976 House Hearings] (statement of Rep. Biaggi).


4. Morse, supra note 3, at 102-07.


6. M. Frankel & G. Naftalis, supra note 5, at 10; 1976 House Hearings, supra note 1, at 87 (memorandum prepared by the Dep't of Justice).

7. The fifth amendment provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V.

8. Among its more illustrious critics have been Jeremy Bentham, Robert Peel, Roscoe Pound, Justice Felix Frankfurter, Raymond Moley, and former President and Chief Justice William Howard Taft. M. Frankel & G. Naftalis, supra note 5, at 17.


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A number of states have eliminated the requirement that criminal prosecutions be initiated by a grand jury. England abolished its grand jury requirement in 1933. Nevertheless, in both the federal jurisdiction and in many states, the grand jury remains.

Contemporary critics, focusing on such prosecutorial abuses in the grand jury as intimidation and harassment of witnesses, unauthorized disclosures of grand jury proceedings, and the collection of evidence for use against defendants after they have been indicted, have called for basic reforms. In particular, they point to the traditional rule, adopted by the Federal Rules of Criminal Procedure and a majority of the states, that counsel is not allowed inside the grand jury room for a witness who testifies before the grand jury.

Although counsel is permitted outside the grand jury room under that procedure, the witness must leave the room during questioning to consult
with him.\footnote{18} Responding to such criticism, twelve states, including New York, have adopted procedures permitting some, if not all, witnesses to be accompanied by counsel inside the grand jury room.\footnote{19}

In evaluating the effect of this change, it is important to realize that although prosecutorial abuse may be widespread, the degree and type of abuses may differ from jurisdiction to jurisdiction.\footnote{20} For instance, the New York grand jury offers potential defendants and witnesses more protection from prosecutorial abuse than the federal grand jury in four separate ways. First, in New York, the rules of evidence for a grand jury are, with a few exceptions, the same as trial rules of evidence.\footnote{21} The Federal Rules of Evidence, however, are not applicable to the federal grand jury.\footnote{22} Thus, federal grand jurors can consider hearsay and other testimony not admissible.


\footnote{20} For purposes of clarifying the analysis, this Note will focus on the federal and New York grand juries. They will be used as prototypes of the different types of grand juries in the United States. For a complete guide to the various state grand jury provisions, see Library of Congress Study: State Grand Jury Practices (1976), \textit{reprinted in 1976 House Hearings, supra} note 1, at 716-29.


at trial. Second, in New York, all persons arraigned on a felony charge are notified of prospective or pending grand jury proceedings and all targets of investigations have a right to appear and testify in their own behalf. Under federal law, a target of an investigation has no right to notice of a prospective or pending grand jury proceeding and has no right to appear in his own behalf. Third, New York law, unlike the Federal Rules and a majority of the states, permits an arrested defendant to recommend to the grand jury that witnesses favorable to his position be called to testify, a request that is rarely denied. Fourth, and perhaps most significantly, there is a major difference between the federal and New York rules as to grants of immunity to grand jury witnesses. In the federal grand jury, there is no automatic immunity for a witness who testifies before a grand jury. Furthermore, even if the government prosecutor decides to offer immunity to a particular witness, only limited use immunity is available. In New York, any witness testifying before a grand jury is protected automatically with transactional

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29. Immunity is received only if the witness, asserting his self-incrimination privilege, refuses to testify and the United States Attorney obtains a court order directing the witness to testify. 18 U.S.C. §§ 6002-6003 (1976). This is the procedure in the vast majority of states that grant immunity to grand jury witnesses. E.g., Cal. Penal Code § 1324 (West Supp. 1979); Del. Code Ann. tit. 11, § 3506 (1975); Wash. Rev. Code Ann. § 10.27.130 (Supp. 1978).
30. Under a grant of use immunity any information directly or indirectly derived from the witness’ testimony may not be used against the witness in any criminal case except for a prosecution for perjury. 18 U.S.C. § 6002 (1976). The government may still prosecute the witness, however, based upon evidence gathered independently of the witness’ testimony. In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court ruled that such limited immunity is coextensive with the scope of the privilege against self-incrimination and is sufficient to compel testimony over a claim of the privilege.
31. N.Y. Crim. Prac. Law §§ 50.10, 190.40 (McKinney 1971 & Supp. 1978-1979). Under a grant of automatic transactional immunity any witness, even without asking for it, is protected from any prosecution for the transaction to which he testified. Transactional immunity offers the witness greater protection than use immunity and is, therefore, more desirable to the witness. The prosecutor, on the other hand, prefers use immunity. First, under a grant of use immunity more information is likely to be obtained from a witness than under a grant of transactional immunity. A witness with transactional immunity will often relate just enough information so that immunity will attach. He may then become evasive and not divulge any more information of substance. In contrast, a witness with use immunity has a strong incentive to disclose as much information as possible because the government will be precluded from using that information in a prosecution against him. Second, under a grant of use immunity the witness may still be prosecuted as to the transaction which was the subject of his testimony if a prosecution can be based on independent evidence. Consequently, although a prosecutor may be reluctant to have a witness testify under a transactional immunity grant for fear of the possibility of subsequently discovering independent
immunity unless he affirmatively waives this protection. Consequently, unless immunity is granted, a federal grand jury witness has to be on guard against making damaging self-incriminating statements; in New York, the witness is free from this concern. The New York statute permitting counsel inside the room, however, applies only to witnesses who waive their immunity. Nevertheless, both in New York and in those states that have adopted similar legislation, the practice of allowing counsel inside the room is a departure from traditional grand jury procedure. This Note will examine the need for this new rule of law. Part I will demonstrate, by analyzing both the role of the grand jury and the right to counsel arising under the fifth and sixth amendments, that a witness does not have a constitutional right to be accompanied by counsel inside the grand jury room. Part II will show that, notwithstanding the absence of a constitutional right, a balancing of conflicting policy considerations dictates that counsel be permitted inside the grand jury when the witness is not protected by immunity. Finally, Part III will examine anticipated problems under the New York statute in light of prior case law, the experience of other states, and the legislative history of the new statute.

I. CONSTITUTIONAL DIMENSIONS

A constitutional right to counsel at various pretrial proceedings has been recognized by the Supreme Court on two separate grounds. First, a sixth amendment right to counsel exists when the absence of counsel might derogate from the accused's ability to have a fair trial. Thus, for example, in United States v. Wade, the Court recognized a right to counsel at a post-indictment lineup identification. Second, a right to counsel exists when the accused needs the guidance of counsel to protect his fifth amendment self-incrimination privilege. The right emanates from the landmark decision

evidence and not being able to use it, no such fear is present with a grant of use immunity. Memorandum (No. 595, Supp. 1) from Assistant Attorney General Wilson to United States Attorneys (Sept. 2, 1971), reprinted in 1976 House Hearings, supra note 1, at 154-55.

32. Immunity may be waived pursuant to N.Y. Crim. Proc. Law § 190.45 (McKinney 1971 & Supp. 1978-1979), which provides that the waiver must be a written document subscribed by and sworn to by the witness. In order to ensure that the witness knowingly waives his right the statute requires that the witness be allowed to consult with counsel before executing the waiver and that the district attorney advise him of this right. Id.

33. Id. § 190.52 (McKinney Supp. 1978-1979).

34. The sixth amendment in pertinent part provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This guarantee, as incorporated by the due process clause of the fourteenth amendment, also applies to state prosecutions. Gideon v. Wainwright, 372 U.S. 335, 342 (1962); Powell v. Alabama, 287 U.S. 45, 66-68 (1932).


37. Id. at 226-27.

38. The right to counsel at certain pretrial stages to protect against self-incrimination "is indispensable to the protection of the Fifth Amendment privilege." Miranda v. Arizona, 384 U.S. 436, 469 (1966).
of *Miranda v. Arizona* in which the Court held that a defendant is entitled to the assistance of counsel at a custodial police station interrogation.\(^4\)

In the context of the grand jury, neither ground mandates the presence of counsel inside the grand jury room. Indeed, the sixth amendment requirement of protection of a fair trial does not require that a witness before a grand jury be aided by counsel even outside the grand jury room.\(^4\) The protection of the self-incrimination privilege requires the presence of counsel only when the witness testifying is not protected by a grant of immunity. Nevertheless, counsel need only be outside the grand jury room to satisfy the constitutional requirement.\(^4\)

### A. Sixth Amendment Right to Counsel

The Supreme Court has never specifically ruled whether a witness before a grand jury has a constitutional right to have counsel either inside or outside the grand jury room.\(^4\) The Court in *In re Groban*,\(^4\) however, did state in dictum that a witness “before a grand jury cannot insist, as a matter of constitutional right on being represented by his counsel.”\(^4\) The Court had an opportunity to reconsider the *Groban* dictum in *United States v. Mandujano*.\(^4\) In *Mandujano*, the Court addressed the applicability of *Miranda* warnings to grand jury witnesses.\(^4\) Chief Justice Burger, writing for the plurality, in dicta, denied any constitutional right to counsel at the grand jury stage.\(^4\) He cited *Kirby v. Illinois*,\(^4\) in which the Court held that there is no

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\(^40\) Id. at 466.
\(^41\) See pt. II(A) infra.
\(^42\) See pt. II(B) infra.
\(^44\) 352 U.S. 330 (1957).
\(^45\) Id. at 333. Justice Reed's opinion does not discuss the issue. Instead, he relies on prior lower court decisions. Id. at 333 n.5 (citing United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955); *In re Black*, 47 F.2d 542 (2d Cir. 1931); United States v. Blanton, 77 F. Supp. 812 (E.D. Mo. 1948)).
\(^47\) 425 U.S. at 578-80.
\(^48\) Id. at 580-81.
\(^49\) 406 U.S. 682 (1972).
sixth amendment right to counsel to protect a fair trial at a police station lineup identification made prior to the commencement of criminal proceedings, and argued that, similarly, the grand jury is too early in the criminal justice process for a constitutional right to counsel to attach.

A review of Kirby, however, reveals that the Chief Justice's analysis may have been incorrect. Kirby involved a lineup which was conducted a few hours after the accused was arrested. In denying the accused a right to counsel at the lineup, the Court reasoned that at the time of the lineup no formal criminal proceeding had been initiated against him; consequently, he had no right to counsel. The Court distinguished other cases recognizing a right to counsel at certain pretrial proceedings by stating that "all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, [or] indictment . . . ."

Applying this standard, a right to counsel in the grand jury cannot be denied as being too early in the judicial process. In many cases, a defendant appears before a grand jury after he has attended a preliminary arraignment or a preliminary hearing. In these situations, the grand jury proceeding takes place after the initiation of formal criminal proceedings. The Court has explicitly stated that a preliminary hearing initiates the judicial process. Although it has not ruled definitively on the issue, the Court has also very strongly suggested that a preliminary arraignment initiates the judicial process. Furthermore, the criteria outlined in Kirby indicate that a preliminary arraignment initiates the judicial process. In Kirby, the Court stated that criminal proceedings are initiated when the government commits itself to prosecute. At this point, the adverse positions of the government and defendant are solidified, and the defendant is immersed in the intricacies of

50. Id. at 684.
51. "No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." 425 U.S. at 581.
52. 406 U.S. at 684-85.
53. Id. at 690.
54. Id. at 689 (emphasis added). In Moore v. Illinois, 434 U.S. 220, 228 (1977), the Court explicitly stated that Kirby does not exclude a sixth amendment right to counsel in all pre-indictment stages.
55. This is the case when a person has been arrested on a felony charge. After the arrest he must be taken, without unnecessary delay, to a magistrate for a preliminary arraignment where a complaint is filed showing probable cause for the arrest. At that time he is advised of his rights and bail is set. Fed. R. Crim. P. 5; N.Y. Crim. Proc. Law § 180.10 (McKinney 1971). Under federal law, after this preliminary arraignment, the accused is entitled to a preliminary hearing within a specified time unless he is indicted by a grand jury before that time. Fed. R. Crim. P. 5(c). In New York, the accused is entitled to a preliminary hearing to determine if the evidence warrants his being held over for the grand jury. N.Y. Crim. Proc. Law §§ 180.10(2), .70(1) (McKinney 1971).
57. Brewer v. Illinois, 430 U.S. 387, 398-99 (1977). In Brewer, a warrant had been issued for defendant's arrest and he had been arraigned and committed to jail. The Court held that judicial proceedings had been initiated and a right to counsel attached. Id. at 689.
The preliminary arraignment meets this description. First, a charging instrument is filed indicating the government's intent to prosecute. Second, questions of law arise at this stage because bail is set and the accused is advised of his rights. Consequently, if a grand jury is preceded by a preliminary arraignment or preliminary hearing, the grand jury proceeding occurs after the initiation of formal criminal proceedings.

Even when it is not preceded by a preliminary arraignment or preliminary hearing, the grand jury itself is the step at which the formal judicial process is initiated. At the grand jury, the public prosecutor presents evidence against the target of the investigation. Thus, the "prosecutorial forces of organized society" are directed at the putative defendant. This, according to Kirby, is one of the marks of the initiation of criminal proceedings. The grand jury is also similar to the preliminary hearing—a step already recognized as initiating criminal proceedings—because the trier of fact focuses on the target of the investigation to determine if there is probable cause to believe that the accused has committed the alleged crime. Thus, even when the grand jury is not preceded by a prior hearing, the grand jury is not too early for a sixth amendment right to counsel to attach.

Nevertheless, even if Kirby's commencement of criminal proceedings test is satisfied in the case of a grand jury, the sixth amendment does not require that all witnesses who testify at a grand jury be assisted by counsel either inside or outside the room. First, the right to counsel, if it were to exist, would be limited to putative defendants. It is the accused who requires "the guiding hand of counsel." Only those witnesses who are targets of the investigation would have a colorable claim to be represented by counsel at the proceedings.

Second, and more fundamentally, the sixth amendment right to counsel at pretrial proceedings is directed towards preserving a fair trial rather than a fair pretrial proceeding. The Court has recognized that events at critical stages in the criminal process may reduce the possibility of a fair trial, and thus affect the ultimate fate of the accused. This does not mean, however,
that the right to counsel attaches to all pretrial proceedings. The assistance of
counsel is limited to those situations where absence of counsel may substan-
tially and irreparably damage the putative defendant's right to have a fair
trial and where adequate alternative means of protecting that right do not
exist. In United States v. Wade, the Court emphasized that absence of
counsel at a post-indictment lineup may result in an altogether unreliable
identification "which might seriously, even crucially, derogate from a fair
trial." In the police station, absent the assistance of counsel, any type of
irregularity may pass unnoticed or even be concealed. The Court in Wade
specifically mentioned that had there been sufficient alternative safeguards,
the presence of counsel would not have been required.

Conditions inside a police station, however, differ radically from those
inside a grand jury. In the grand jury, impartial jurors who observe and
weigh the events are available afterwards to report any irregularities to the
court. Indeed, the mere presence of a group of unbiased outsiders acts as a
bulwark against prosecutorial abuse and helps preserve the fairness of the
proceeding and in turn the fairness of the trial. In many jurisdictions the
entire grand jury proceeding is transcribed and subject to judicial review. In
New York, for example, a sworn stenographer is present inside the grand jury
and supplies the court with a verbatim transcript of the testimony and
statements made by the grand jurors and by the prosecutor. On the federal
level, many courts, realizing the importance of a record, require a transcript
of the proceedings despite the absence of any statutory requirement.

71. 388 U.S. 218 (1967).
72. Id. at 228.
73. Id. at 230-32.
74. Id. at 239, cited in Kirby v. Illinois, 406 U.S. at 697 (Brennan, J., dissenting).
76. United States v. Mandujano, 425 U.S. 564, 579-80 (1976); In re Groban, 352 U.S. 330,
347 (1957) (Black, J., dissenting). For a discussion of the coercive atmosphere in the grand jury
77. Pursuant to N.Y. Jud. Law § 325 (McKinney Supp. 1978-1979), a stenographer is
required to transcribe all testimony introduced before a grand jury. Furthermore, any legal
instructions or advice from the court or prosecutor must be recorded in the grand jury minutes.
N.Y. Crim. Proc. Law § 190.25(6) (McKinney 1971). Failure to record legal instructions given to
the grand jury by the prosecutor results in dismissal of the indictment if the defendant is
aff'd, 38 N.Y.2d 806, 382 N.E.2d 582, 382 N.Y.S.2d 39 (1975); see New York Hearings, supra
note 28, at 60 (statement of Special Prosecutor Keenan). Deliberations of the grand jury are not
recorded.

78. In the Southern District of New York, for example, grand jury stenographers record
every word spoken while a witness is present in the grand jury room. United States v. Messitte,
324 F. Supp. 334, 335 (S.D.N.Y. 1971). Such a procedure is not required by the Federal Rules of
Criminal Procedure. Rule 6(d) of the Rules provides that "a stenographer . . . may be present
while the grand jury is in session." (emphasis added) Courts have frequently noted that although
it is highly desirable to transcribe grand jury minutes, there is no such federal requirement.
United States v. Rubin, 559 F.2d 975, 988 (5th Cir. 1977); United States v. John, 508 F.2d 1134,
1142 (8th Cir.), cert. denied, 421 U.S. 962 (1975); United States v. Peden, 472 F.2d 583, 584 (2d
note 19, at 988-89, would have changed the rule by requiring the recording of grand jury
proceedings. Id. § 3333.
both New York and federal law, prosecutorial unfairness and irregularities can be the subject of pretrial motions to dismiss an indictment. Furthermore, even if an indictment is induced by prosecutorial abuse and is not dismissed on motion, the accused may still have a fair trial. In preparation for trial he can obtain a transcript of his own grand jury testimony. At the trial, if the government introduces a witness who testified at the grand jury, the defendant can obtain a transcript of that witness' grand jury testimony in order to cross-examine the witness effectively. Consequently, the role which counsel could serve in preserving a fair trial by merely being present at the grand jury proceedings is adequately fulfilled by other means.

Counsel's assumption of an active role in the grand jury, on the other hand, would radically alter the character of the proceedings. Historically, both in England and in the United States, the grand jury has been an investigatory rather than adversarial institution. Hence the accused is not allowed to cross-examine witnesses, raise objections, or question witnesses favorable to his own position. Because the grand jury is not adversarial, the accused

81. Dennis v. United States, 384 U.S. 855, 870-72 (1966); see 18 U.S.C. § 3500 (1976). In the Second Circuit, the defendant is entitled to see the grand jury testimony of each witness on the subject which he testified to at trial even without a showing of need. United States v. Youngblood, 379 F.2d 365, 370 (2d Cir. 1967). The Seventh Circuit also follows this approach. United States v. Amabile, 395 F.2d 47, 53 (7th Cir.), cert. denied, 401 U.S. 924 (1971). Other courts require a showing of need. United States v. Wallace, 528 F.2d 863, 865 (4th Cir. 1976); United States v. Hensley, 374 F.2d 341, 352-53 (6th Cir.), cert. denied, 388 U.S. 923 (1967). In New York, defendant's right to inspect, and to use on cross-examination, the grand jury testimony of a prosecution's witness derives from People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866 (1961). In Rosario, the court held that defendant is entitled to use, for impeachment purposes, prior statements made by the witness relating to the subject matter of the testimony. Grand jury minutes have been held to be such prior statements. People v. Jaglom, 17 N.Y.2d 162, 164, 216 N.E.2d 576, 269 N.Y.S.2d 406, 407 (1966).
83. Even in New York which permits the defendant to suggest to the grand jury that a witness favorable to his position be called to testify, N.Y. Crim. Proc. Law § 160.50(6) (McKinney 1971), the defendant does nothing more than make the suggestion. He does not go inside the grand jury with the witness and indeed he may not be sure that the witness actually gave testimony favorable to his own position. See People v. Washington, 84 Misc. 2d 935, 377 N.Y.S.2d 974 (Sup. Ct. 1976).
B. Fifth Amendment Right to Counsel

The Supreme Court has held that a right to counsel in certain pretrial proceedings may attach when the accused needs protection from making self-incriminating statements. Despite the possibility that the self-incrimination privilege may be implicated in the grand jury, Chief Justice Burger argued in Mandujano that, based upon Kirby, no right to counsel attaches at the grand jury stage. A review of Kirby, however, contradicts this contention. As Justice Brennan’s concurring opinion in Mandujano points out, the Court reached its decision in Kirby after explicitly recognizing that in the case of a lineup, the accused’s self-incrimination privilege is not implicated. The Kirby Court had noted, however, that when the accused needs assistance in protecting his self-incrimination privilege, he has a right to counsel at any critical stage of the case, no matter how early that may be. Therefore, an arrested person has a right to counsel at custodial police station interrogations. Similarly, Justice Brennan concluded, because grand jury proceedings may implicate the self-incrimination privilege, a right to counsel cannot be denied as being too early in the criminal judicial process.

The mere fact, however, that Kirby would not preclude the fifth amendment right to counsel in the grand jury to protect against self-incrimination, does not necessarily mean that a right to counsel exists. In New York, where all grand jury witnesses are automatically granted immunity unless they affirmatively waive it, the grant sufficiently satisfies the constitutional guaranty of protection against self-incrimination. Because the grant of immunity is self-executing, the witness does not need counsel to assert his right. Therefore, in New York, where there is no danger of self-incrimination unless the witness waives his immunity, the fifth amendment would not require the presence of counsel either inside or outside the grand jury room.

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84. If a pretrial proceeding is adversarial, the accused has much to lose by not being represented by counsel. Coleman v. Alabama, 399 U.S. 1 (1969) (preliminary hearing). For instance, at a preliminary hearing, he needs counsel to “freeze” the testimony of prosecution witnesses, obtain discovery of the prosecution’s case, and argue the lack of probable cause. See Dash, supra note 46, at 815. But given the nonadversarial posture of the grand jury proceeding in which counsel, even if he was present, could not perform these functions, a putative defendant’s ability to procure a fair trial does not suffer because he is denied a right to counsel.

85. See notes 38-40 supra and accompanying text.

86. 425 U.S. at 581.

87. Id. at 602 (Brennan, J., concurring).

88. 406 U.S. at 687.

89. Id. at 688 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

90. Miranda v. Arizona, 384 U.S. 436, 469 (1966). In a police station interrogation the self-incrimination privilege cannot be secured by either the admonishment of the prosecutor or by the preliminary advice from counsel. Id. at 469-70.

91. 425 U.S. at 604-05 (Brennan, J., concurring).

92. See notes 31-32 supra and accompanying text.

93. Kastigar v. United States, 406 U.S. 441, 448 (1972); Brown v. Walker, 161 U.S. 591, 595 (1896). In Kastigar, the Court ruled that even use immunity is coextensive with the self-incrimination privilege.

94. If the witness waives immunity, then his constitutional rights should be the same as a witness in a federal grand jury prior to a grant of immunity. See notes 95-109 infra and accompanying text.
In the federal jurisdiction and in those states where immunity is not automatically granted and the prosecutor decides not to procure a grant, the self-incrimination privilege may be implicated. At first blush, therefore, the witness should have a constitutional right to be assisted by counsel. Although a grand jury room has a less coercive atmosphere than a police station, the witness needs the aid of counsel to guide him as to the parameters of the self-incrimination privilege. As Chief Justice Burger has recognized, a "layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege." Because under federal law the self-incrimination privilege is not self-executing, and can be lost by not asserting it in a timely fashion, the witness should be entitled to the aid of counsel.

Nevertheless, as Justice Brennan recognizes in Mandujano, merely because the self-incrimination privilege may be implicated does not necessarily lead to the conclusion that there is a constitutional right to counsel inside the grand jury room. In the vast majority of instances, the witness would be at no disadvantage with respect to his fifth amendment right by consulting with his attorney outside rather than inside the grand jury room. If during his testimony the witness realizes the possibility that a fifth amendment privilege may be applicable, he does not suffer by having counsel outside the room. He can leave the room and discover if the privilege should be asserted. If the witness has difficulty relating his unprofessional recollection of the question to his attorney or if he finds it difficult to remember his attorney's instructions, the situation could be remedied by allowing the witness to take notes of the question and his attorney's instructions.

It is only in the limited situation where the witness does not recognize the possibility that the self-incrimination privilege can be asserted that he is at a

95. See note 29 supra and accompanying text.
96. See notes 75-76 supra and accompanying text.
99. Id. at 605 (Brennan, J., concurring).
100. Although it is possible that a witness may be reluctant to leave the room because of other considerations, see note 12 infra and accompanying text, he may leave if he wants. Thus, the constitutional requirement has been met. Typically, permission to leave the room is freely granted and some witnesses take frequent advantage of it. E.g., United States v. George, 444 F.2d 310, 315 (6th Cir. 1971) (witness "had right to consult with his attorney after every question"); United States v. Weinberg, 439 F.2d 743, 745 (9th Cir. 1971) (some witnesses conferred with counsel "after almost every question"); see United States v. Mandujano, 425 U.S. at 606 n.23 (Brennan, J., concurring). In the few cases where the court has sanctioned limiting the times a witness may leave the room to consult with his counsel, it was clear to the court that the witness was not leaving the room to receive legal advice as to the self-incrimination privilege. In In re Tierney, 465 F.2d 806 (5th Cir. 1972), the court ruled that it is proper to limit the number of times a witness leaves the room when the witness makes frequent departures for frivolous reasons with intent to frustrate the proceedings. In a leading New York case prior to the statutory change, People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, cert. denied, 393 U.S. 827 (1968), the court held that it was proper to limit a witness' departures from the room when it was clear that he wanted help in answering embarrassing questions. See notes 147-49 infra and accompanying text.
disadvantage in not having counsel inside the room. This situation, could arise if the witness, totally unfamiliar with the self-incrimination privilege or under the pressure of the questioning, becomes agitated and forgets that he can, and should, leave the room to get legal advice from his attorney. Thus, he may testify when he could have remained silent.

Notwithstanding the possibility that such a situation may arise, two considerations warrant the conclusion that a constitutional right to counsel at the grand jury stage would be fulfilled by allowing counsel to be available outside the grand jury room. First, prior to the grand jury appearance, counsel can teach his client the basics of the self-incrimination privilege. It is not necessary that the witness understand the exact parameters of the privilege; it is sufficient if he merely recognizes that the privilege might be available. 102

Second, the extent of the procedures adopted to protect the self-incrimination privilege must be balanced against the traditional role of the grand jury as a secret, investigative body. 103 The right to counsel in pretrial proceedings is not explicit in the Constitution, but derives from the fifth amendment. Even in Miranda v. Arizona, 104 the high water mark of fifth amendment protection, 105 the Court recognized that the right to counsel was not absolute by stating that alternative safeguards may be developed to protect the fifth amendment privilege. 106

The tradition of secrecy in the grand jury on the other hand, a policy “older than our Nation itself,” 107 has legitimately become to be recognized as “indispensable.” 108 Upsetting the secrecy of the proceedings is tantamount to tampering with the very essence of the grand jury. The secrecy of the grand jury must remain inviolate in order to facilitate full investigations, to prevent

102. Counsel does not have to teach his client all the details of the privilege because the client can consult further with his attorney outside the grand jury room when the client suspects that he should assert his privilege. Thus although Meshbesher, supra note 46, at 202-03, is correct in asserting that Escobedo v. Illinois, 378 U.S. 478 (1964), makes it clear that a person’s consultation with counsel at some stage prior to his questioning is insufficient to protect the self-incrimination privilege, his conclusion that the witness must consult with counsel inside the grand jury room during the questioning is incorrect. Counsel’s instruction before the proceeding plus his availability outside the room during the proceeding substantially protects the self-incrimination privilege. An additional requirement, that the prosecutor advise the witness as to his rights, would also contribute to the witness’ understanding of the privilege. See United States v. Mandujano, 425 U.S. at 605 (Brennan, J., concurring).

103. In United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969), cited in United States v. Mandujano, 425 U.S. at 605 (Brennan, J., concurring), the court said that “the rule under which [a witness is] free to leave the grand jury room at any time to consult with counsel is a reasonable and workable accommodation of the traditional investigatory role of the grand jury, preserved in the Fifth Amendment, and the self-incrimination and right to counsel provisions of the Fifth and Sixth Amendments.”


106. 384 U.S. at 436.


the flight of the accused, to prevent tampering with witnesses, and to protect
the reputations of persons who are investigated but not indicted.109 Allowing
counsel inside the room creates a possible leak in the grand jury's secrecy. In
light of this possible damage to the grand jury, the derivative right to counsel
to protect against self-incrimination is satisfied by the traditional procedure of
permitting counsel to be available to the witness outside the room.

In summary, arguments for the existence of a constitutional right to consult
with counsel inside the grand jury room are not persuasive. The defendant's
right to a fair trial is adequately ensured by other procedures such as the
transcription of grand jury minutes and judicial review of the grand jury
proceedings. Protection of the self-incrimination privilege is accomplished
either, as in New York, by providing automatic immunity to witnesses, or, as
in federal jurisdiction, by allowing the witness to consult with counsel outside
the grand jury room.

II. POLICY CONSIDERATIONS

Although there is no constitutional right to counsel inside the grand jury
room, considerations of policy dictate that in limited situations counsel should
accompany a witness into the room. As was noted earlier,110 the grand jury
fulfills two quite different roles. It shields the individual from unfounded
government accusations and is a governmental tool in conducting effective
investigation. In the context of a right to counsel inside the grand jury, these
differences become pronounced.

In the grand jury, the public prosecutor has enormous powers. As legal
advisor to the jurors he may place evidence before them,111 summarize it,112
charge the jury as to applicable law113 and ask for an indictment.114 In his
quest for an indictment, however, a prosecutor may take advantage of his
position by harassing and intimidating witnesses.115 Such prosecutorial over-
reaching may result in the issuance of an unfounded indictment, which, even if
eventually dismissed, might cause irreparable harm to the person
accused.116 Because the grand jury functions as a guardian of the rights of the individual,
such a result is at variance with the purpose of the institution itself. Although
these abuses do not deprive the defendant of a fair trial and thus do not call

109. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J.,
dissenting); United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954); 8 J. Wigmore, supra note 17,
§ 2360.
110. See notes 1-2 supra and accompanying text.
113. Id. at 781; 372 N.Y.S.2d at 544; N.Y. Crim. Proc. Law §§ 190.25(6), .30 (McKinney
(8th Cir. 1972) (defendant was subjected to a prejudicial inquisition into his life and conduct with
reference to matters not relevant to the grand jury inquiry); United States v. DiGrazia, 213 F.
Supp. 232 (N.D. Ill. 1963) (defendant was asked clearly prejudicial questions calculated to
impugn her in the eyes of the grand jury); see 1976 House Hearings, supra note 1, at 378-514
(statement and materials submitted by Coalition to End Grand Jury Abuse).
for a constitutional right to counsel, they nevertheless represent a defect in the current procedure that should be corrected. The presence of counsel inside the grand jury would stand as a bulwark against abuses of the grand jury system.\textsuperscript{117}

The constitutional protection against self-incrimination is fulfilled by allowing the witness to leave the room and consult with counsel outside. Optimally, however, to assist the witness in making legal decisions that do not endanger the loss of constitutional rights, counsel should be permitted inside the grand jury room. In New York, where the rules of evidence apply to grand juries,\textsuperscript{118} the witness, without counsel by his side, might reply to irrelevant questions, or questions that require him to divulge privileged communications.\textsuperscript{119} The witness with immunity before either the New York or federal grand jury may not realize that it does not protect him from a perjury prosecution.\textsuperscript{120} In the federal jurisdiction, the witness may need counsel's assistance to understand the nuances of the use immunity.\textsuperscript{121} Furthermore, requiring the witness to leave the room to confer with his attorney may harm the witness' credibility in the eyes of the grand jurors.\textsuperscript{122}

Although opponents of the presence of counsel in the grand jury room minimize the problems inherent in keeping counsel outside the grand jury room,\textsuperscript{123} they do not deny that the witness would be better protected if counsel were permitted inside.\textsuperscript{124} Nevertheless, they argue that the benefits of permitting counsel inside the room are clearly outweighed by the damaging effects that counsel's presence in the room would have on the grand jury's capacity to conduct effective investigations.\textsuperscript{125} Because it is an investigative

\textsuperscript{117} This argument has been made frequently. E.g., 1977 House Hearings, supra note 19, at 177 (statement of the ABA); 1976 House Hearings, supra note 1, at 627 (report of the Association of the Bar of the City of New York); New York Hearings, supra note 28, at 183 (statement of William Gallagher of the New York City Legal Aid Society).


\textsuperscript{119} See Model Code of Pre-Arraignment Proc. § 340.3, Commentary at 603 (1975).

\textsuperscript{120} The federal immunity statute specifically states that the grant of immunity does not protect against a perjury prosecution. 18 U.S.C. § 6002 (1976). In New York, all grand jury witnesses can be prosecuted for perjury. People v. Tomasello, 21 N.Y.2d 143, 234 N.E.2d 190, 287 N.Y.S.2d 1 (1967).

\textsuperscript{121} See note 30 supra and accompanying text.

\textsuperscript{122} The prejudicial effect of leaving the room is widely recognized. E.g., ABA Report to House of Delegates on Grand Jury Reform, reprinted in 1977 House Hearings, supra note 19, at 176. Watergate Special Prosecutor Charles Ruff has stated that prosecutors count on this prejudicial effect to dissuade witnesses from asserting their right to counsel. Id. at 3. But see id. at 236 (statement by Judge Lacey, representing the Judicial Conference of the United States).


\textsuperscript{125} Silbert, supra note 124, at 295-96; Heymann Statement, supra note 124, at 25. Implicit in this view is that the primary role of the grand jury is to investigate. The Department of Justice
tool of the government, a grand jury is substantially hampered by having counsel inside the room advising the witness. With counsel at the witness' side, a real possibility is created that the witness will reply to questioning by parroting responses formulated by counsel.\textsuperscript{126}

Furthermore, the presence of counsel could in certain situations have an inhibiting effect on the witness who does respond in his own words. Not infrequently, particularly in investigations of organized crime, business fraud, union corruption, antitrust violations, and other white collar offenses, one attorney represents more than just one witness. Although a witness may desire to cooperate with the government, he may be reluctant to answer fully if he knows that a mobster, an employer, fellow union members, or others whom his attorney represents will discover that he has testified against them.\textsuperscript{127}

If counsel, unwittingly or otherwise, leaks the witness' testimony to a putative defendant, two additional obstacles to effective grand jury investigation are created. First, if a putative defendant finds out about damaging testimony, he may be able to orchestrate a defense.\textsuperscript{128} Second, the prospective defendant may take reprisals against the witness who has testified against him.\textsuperscript{129} Although this may be more likely to occur in cases of multiple representation, an attorney leaking the substance of the testimony of his one client could produce similar results.

These problems exist to some degree even when counsel does not enter the grand jury room.\textsuperscript{130} They are aggravated, however, if the attorney is actually

\footnotesize{underscores this role by pointing out that the grand jury alone has plenary investigative powers beyond those possessed by police, prosecutors, magistrates, administrative bodies, and legislative committees. \textit{1976 House Hearings, supra} note 1, at 88-89.}

\footnotesize{126. Heymann Statement, supra note 124, at 22. For similar reasons a defendant in a criminal trial normally is not allowed to consult with counsel once he takes the stand. \textit{Id.}}

\footnotesize{127. The problem of multiple representation is uniformly recognized. \textit{E.g., 1977 House Hearings, supra} note 19, at 287 (statement of Edwin Miller, representing National District Attorneys Ass'n), 724 (statement of Benjamin Civiletti, Assistant Attorney General, Criminal Division, Dep't of Justice); ABA Report to the House of Delegates on Grand Jury Reform (Aug. 9, 1977), reprinted in \textit{1977 House Hearings, supra} note 19, at 177. There is debate, however, as to whether the problem of multiple representation justifies the refusal to allow any witness to bring counsel into the grand jury room. The overwhelming majority of prosecutors think that it does. \textit{E.g., 1977 House Hearings, supra} note 19, at 287 (statement of Edwin Miller, representing National District Attorneys Ass'n), 724 n.22 (statement of Benjamin Civiletti, Assistant Attorney General, Criminal Division, Dep't of Justice). Advocates of allowing counsel into the room argue that there are alternative methods of coping with the problem, that the problem will not be appreciably aggravated by allowing counsel in, and that the problem affects only a relatively small number of grand jury proceedings. \textit{Id.} at 272 (statement of Charles Ruff, Watergate Special Prosecutor); \textit{New York Hearings, supra} note 28, at 180 (statement of William Gallagher, representing New York City Legal Aid Society).}

\footnotesize{128. \textit{1977 House Hearings, supra} note 19, at 287 (statement of Edwin Miller, representing National District Attorneys Ass'n).}

\footnotesize{129. \textit{New York Hearings, supra} note 28, at 65 (statement of Robert Morgenthau, District Attorney of Manhattan).}

\footnotesize{130. Even if counsel does not enter the room but merely waits for the witness outside, he may be able to detect if the witness cooperated with the government by noting how long the witness was inside testifying or by talking with him after the grand jury appearance. \textit{1977 House Hearings, supra} note 19, at 287 (statement of Charles Ruff, Watergate Special Prosecutor).}
inside the room. By keeping counsel outside the situation is significantly improved. The witness does not have the pressure of knowing that the person sitting by his side might betray his confidence and reveal his testimony to outsiders. By eliminating this imminent source of apprehension, the witness may provide a more complete testimony. Moreover, counsel outside the room does not have access to the exact content of the witness' testimony. Although he may have a general idea of the witness' cooperation with the government, he does not know the precise nature of the witness' disclosures.

In addition to increasing the possibility of grand jury leaks, the presence of counsel inside the grand jury may disrupt the proceedings. Allowing counsel into the room, opponents argue, creates the possibility that lawyers will "lawyer." Even if a statute provides that the attorney cannot participate other than by advising his client, many fear that the attorney will not remain silent but will voice objections to certain questions. Alternatively, even if the attorney does not technically violate his obligation not to participate, he might "whisper" advice to his client in a tone audible to the grand jurors. In addition, opponents argue that without a judge present to exercise immediate control, counsel's objections can not be ruled upon with any speed. The result would be unnecessary delay of the proceedings.

Advocates of allowing counsel into the grand jury respond that these fears are unfounded. They argue that statutes which clearly state that the role of the attorney in the grand jury is strictly limited to advising the witness, and that disruptive counsel can be removed, would eliminate the possibility of prolonged, disrupted grand juries. Moreover, permitting counsel inside the grand jury room, they argue, would actually result in more efficient use of grand jury time because there would be no need for the witness to interrupt his testimony by leaving the room to seek his counsel's advice. Although no

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131. Id. at 725 (statement of Benjamin Civiletti, Assistant Attorney General, Criminal Division, Dep't of Justice).
133. Id.
134. Id.
136. Report of the Grand Jury Comm. of the ABA (1977), reprinted in 1977 House Hearings, supra note 19, at 159. Advocates of permitting counsel into the grand jury room argue that attorneys appear with witnesses before congressional committees and administrative agencies without disrupting those proceedings. 1977 House Hearings, supra note 19, at 656 (statement of Leon Friedman, representing the American Civil Liberties Union). The comparison, however, is not a fair one. At such hearings a chairman, who conducts the meeting and keeps order, is present. In the grand jury room, there is no chairman or judge to keep order. In the grand jury, every time an objection is raised the proceeding has to be interrupted pending a ruling from the presiding judge who is not present. Id. at 286 (statement of Edwin Miller representing National District Attorneys Ass'n), 745 (statement of Benjamin Civiletti, Assistant Attorney General, Criminal Division, Dep't of Justice).
exhaustive survey has been conducted, preliminary studies of those jurisdictions that have allowed counsel into the grand jury indicate that the fears of the opponents are exaggerated. The new procedure has resulted in little actual disruption of the grand jury.\textsuperscript{138}

In view of the considerable debate on the issue, it seems that counsel should be present in the grand jury only in certain situations. In a jurisdiction like New York that automatically grants immunity to witnesses, the right to counsel inside the grand jury room should be extended only to those witnesses who waive their immunity.\textsuperscript{139} In those jurisdictions that do not automatically grant immunity,\textsuperscript{140} the right should be extended to witnesses who have not been granted immunity. If after the commencement of the grand jury proceeding, the prosecutor decides to grant immunity to the witness, counsel should then be required to leave the room.

This compromise proposal is desirable for several reasons. First, it creates a laboratory condition in which legislators can observe whether counsel obstructs the grand jury proceeding. If there is no interference, the right can be extended to all witnesses. If counsel does unduly interfere, the experiment can be halted. Second, in those jurisdictions that do not automatically grant immunity, the prosecutor's desire to interrogate the witness free from interference of counsel would work as an incentive to the prosecutor to grant immunity to witnesses whom he did not plan to prosecute. The grant of immunity to such witnesses is desirable because it creates an atmosphere in which the witness, free from the threat of prosecution, will give candid and honest testimony.

Finally, and most significantly, it gives added protection only to those witnesses who need it most. The balancing of the investigative role of the

\textsuperscript{138} 1977 \textit{House Hearings}, supra note 19, at 142 (statement of Richard Gerstein, representing the ABA), 1574 (study conducted by Martin Belsky, counsel to the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary). The attorney general of Arizona, however, reports that although counsel's presence has not disrupted that state's grand juries, it has severely hampered their operations by aggravating the problems of multiple representation. In his estimation, if all witnesses were permitted to be accompanied by counsel inside the grand jury, the situation would become "intolerable." \textit{Id.} at 794. Furthermore, in Illinois' Cook County, where Ill. Rev. Stat. ch. 38, § 112-4(b) (Supp. 1978) allows counsel for a target of the investigation into the grand jury room, prosecutors have complained that certain attorneys attempt to participate in the proceedings despite such prohibition in the statute. They also report that attorneys attempt to advise witnesses in a "stage whisper" audible to the grand jurors. \textit{1977 House Hearings}, supra note 19, at 725.

Prosecutors in the New York City area have reported that the new procedure is running smoothly. None of the five prosecutors contacted by this author reported any significant problems. Interview with Sheldon Galfunt, Chief of Grand Jury Bureau of Queens County District Attorney's Office in New York City (Jan. 2, 1979); Telephone Interview with Robert Kaye, Chief of Grand Jury Bureau of Kings County District Attorney's Office (Mar. 10, 1979); Telephone Interview with John McKenna, Chief of Grand Jury Bureau of Nassau County District Attorney's Office (Mar. 19, 1979); Telephone Interview with Barbara Ryan, Chief of Grand Jury Bureau of Bronx County District Attorney's Office (Mar. 19, 1979); Telephone Interview with Thomas R. Sullivan, District Attorney of Staten Island (Mar. 19, 1979).

\textsuperscript{139} This, in fact, is the procedure in New York. N.Y. Crim. Proc. Law § 190.52 (McKinney Supp. 1978-1979); see note 32 supra and accompanying text.

\textsuperscript{140} See note 29 supra and accompanying text.
grand jury versus its protective role requires that added protection to witnesses be granted only upon a strong showing of need. Although constitutional considerations do not require that counsel be present in the room, in order to protect against prosecutorial abuse, facilitate legal advice, and eliminate the prejudicial effect of requiring the witness to leave the room to confer with his attorney, counsel should be inside the room with the witness if he is not protected by immunity. The witness without immunity needs constant legal aid to grapple with the legal problems which may confront him. Furthermore, the person who is the target of the investigation will be unable to procure a grant of immunity if he testifies before a grand jury. In the federal grand jury, the prosecutor will not grant immunity to a person whom he intends to prosecute. In New York, where immunity is granted automatically, the prosecutor will not subpoena any person whom he plans to prosecute. Thus, if the person under suspicion wants to have the opportunity to address the grand jurors, he will have to waive his immunity.141 The person who may ultimately be prosecuted needs the greatest protection from abuse. Ironically, he is afforded the least protection. It is he who needs the “guiding hand of counsel”142 at his side. It is he who should have counsel with him in the grand jury room.

III. THE NEW YORK STATUTE: ANTICIPATED PROBLEMS

Under the New York statute a witness who has waived his immunity may have counsel with him inside the grand jury while he testifies.143 “The attorney may advise the witness, but may not otherwise take any part in the proceeding.”144 If he abuses the privilege, the attorney may be removed by the supervising court.145

Although the statute does make it clear that an attorney may not interpose objections on behalf of the witness,146 it does not set out with precision the attorney’s new role in the grand jury. In its brevity it also fails to deal with corollary issues that may arise as a result of counsel’s newly expanded role. An examination of case law, the legislative history of the statute, and similar

143. The New York statute provides: “1. Any person who appears as a witness and has signed a waiver of immunity in a grand jury proceeding, has a right to an attorney as provided in this section. Such a witness may appear with a retained attorney, or if he is financially unable to obtain counsel, an attorney who shall be assigned by the superior court which impaneled the grand jury. Such assigned attorney shall be assigned pursuant to the same plan and in the same manner as counsel are provided to persons charged with crime pursuant to section seven hundred twenty-two of the county law. 2. The attorney for such witness may be present with the witness in the grand jury room. The attorney may advise the witness, but may not otherwise take any part in the proceeding. 3. The superior court which impaneled the grand jury shall have the same power to remove an attorney from the grand jury room as such court has with respect to an attorney in a courtroom. N.Y. Crim. Proc. Law § 190.52 (McKinney Supp. 1978-1979).
144. Id. § 190.52(2).
145. Id. § 190.52(3).
146. Compare N.Y. Crim. Proc. Law § 190.52 (McKinney Supp. 1978-1979) with Kan. Stat. § 22-3009(2) (1974) (“Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness.”).
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statutes in other states, however, provides some guidance as to the appropriate construction of the New York statute.

A. Scope of Attorney-Client Discussions

The leading case on right to counsel in the New York grand jury prior to the statutory change permitting counsel inside the room was People v. Ianniello.147 In Ianniello, the court of appeals stated that absent a need to discuss legal matters with an attorney, such as the applicability of a testimonial privilege or the scope of transactional immunity, a grand jury witness has no right to be "represented" by counsel.148 Thus, when a witness clearly understood all of the legal issues which confronted him but wanted strategic advice in answering "embarrassing questions," he could not leave the grand jury room to consult with counsel.149 Under this reasoning, when counsel is inside the grand jury room pursuant to the new statute, attorney-client discussions should be limited to legal advice.

Although the new statute does not distinguish between legal and nonlegal advice, its legislative history supports the contention that discussions pertaining to nonlegal matters should not be permitted. In addition to facilitating legal assistance, the purpose of the statute is to help curb prosecutorial abuse.150 Neither purpose is furthered by allowing counsel to advise the witness in nonlegal matters. If anything, such discussions may frustrate the grand jury from conducting an orderly, effective investigation. They create the possibility that the witness will rely on the attorney for answers and merely repeat the attorney's suggested responses.151 Furthermore, extended discussions may be distracting to the grand jurors. Thus, in those instances where it is clear that the witness is seeking nonlegal advice from his attorney, the discussions should be prohibited.

B. Unavailability of Counsel

The Massachusetts statute permitting counsel in the grand jury provides that witnesses may not refuse to testify if their lawyers are unavailable.152 That provision was added at the insistence of prosecutors to prevent delays.153 Other jurisdictions take a less drastic approach. The Minnesota statute, for example, provides that an attorney may be present in the room provided that "his presence can be secured without unreasonable delay in the

148. Id. at 424, 235 N.E.2d at 443, 288 N.Y.S.2d at 467.
149. Id. at 426, 235 N.E.2d at 444, 288 N.Y.S.2d at 469.
150. A precursor of the present bill was included in the New York State Assembly Code Committee report, Abuse of Power, supra note 1, dealing with prosecutorial abuse and proposed remedies. At hearings held by that committee in 1977 it was repeatedly argued that the presence of counsel would help control prosecutorial abuse. E.g., New York Hearings, supra note 28, at 183 (statement of William Gallagher, representing New York City Legal Aid Society); see Bellacosa, Practice Commentary, N.Y. Crim. Proc. Law § 190.52 at 84 (McKinney Supp. 1978-1979).
151. See note 126 supra and accompanying text.
grand jury proceedings." The comparable Kansas statute gives a witness three days to obtain counsel.\textsuperscript{155} The New York statute is silent as to the unavailability of counsel. Similarly, the legislative history does not address this situation. Absent a provision dealing with the issue, the Minnesota approach seems most meritorious. Although unavailability of counsel should not result in automatic loss of the right to counsel, delay to the proceeding should not be tolerated absent a good reason.

C. Note Taking in the Grand Jury Room

Since the inception of the new statute, some lawyers have taken advantage of their opportunity to be inside the grand jury room by taking notes of their witnesses' testimony.\textsuperscript{156} Some prosecutors, alarmed by the possibility of a breach in the secrecy of the grand jury, have objected to this procedure.\textsuperscript{157} Indeed, at least one district attorney's office instituted the practice of confiscating these notes when the witness and his attorney left the room.\textsuperscript{158} This procedure was challenged in \textit{In re Grand Jury ex rel. Riley}.\textsuperscript{159} In \textit{Riley}, the New York Supreme Court ruled that note taking is permissible and that, therefore, the notes could not be confiscated.\textsuperscript{160} The court found that such activity is permitted as part of an attorney's right "to advise" the witness.\textsuperscript{161} The decision is most disappointing because the history of the statute reveals that note taking does not help fulfill any of the purposes which the enactors of the statute had in mind, and, if anything, frustrates those purposes.

The new statute itself makes no mention of note taking. It merely states that the attorney "may advise the witness, but may not otherwise take any part in the proceeding."\textsuperscript{162} A simple reading of the statute would indicate that the attorney's role is to advise the witness and nothing else. Likewise, the legislative history does not deal with note taking per se. It does reveal, however, that the drafters of the statute designed it to serve two purposes. First, they wished to assist the witness before a grand jury to deal with legal problems that may confront him.\textsuperscript{163} Second, and foremost, they wanted to stem the prosecutorial abuse that had blossomed during Maurice Nadjari's...
tenure as Special Prosecutor. As one judge stated, "situations ... arose in which a prosecutor might, inadvertently or otherwise, overstep the legitimate bounds of his office to the detriment of a witness."

Neither purpose is furthered by permitting counsel to take notes inside the grand jury. In New York, the testimony of each witness, plus any legal instructions or advice from the court or prosecutor, is recorded by a court stenographer. As a result, there is no need for an attorney to take notes to substantiate any allegations of prosecutorial abuse. Nor will note taking help the attorney in providing legal assistance to the witness. The \textit{Janniello} court listed three types of legal decisions where there is a legitimate need to receive aid from counsel: (1) whether to assert or waive a privilege; (2) whether to refuse to answer questions having no bearing on the subject of the investigation; and (3) whether to divulge privileged conversations. The ability to take notes does not noticeably enhance the attorney's capacity to advise on any of these matters.

Furthermore, even if note taking would help the attorney advise the witness in these or other legal matters, it would only justify his taking notes during the witness' testimony. It would not permit the attorney to keep the notes after the witness had completed his testimony. If the attorney desires to keep his notes after the witness finishes testifying he may have one of two motives. Either he wants the notes to help him prepare for trial in case an indictment is issued against his client or he plans to divulge in detail the content of the witness' testimony to some outside party. The possibility that the attorney may divulge the testimony to some outside party and thereby stain the reputation of one of the parties under investigation, aid a putative defendant to orchestrate a defense, or otherwise disrupt the investigation of the grand jury, is more than sufficient reason to prohibit note taking. If the attorney desires the notes to prepare for trial he can get a complete transcript of the testimony from the court when an indictment is issued. Given the possible mischievous use of such notes, the attorney should not be permitted to keep any notes when he leaves the grand jury room.

D. Multiple Representation

As a commercial center, New York is particularly prone to both organized crime and white collar crime. The presence of an attorney inside the grand

\begin{quote}
164. A precursor of the present bill appears in a study of prosecutorial abuse and proposed remedies prepared by the Codes Committee of the New York State Assembly, Abuse of Power, \textit{supra} note 1, at 82. In that study an entire chapter is devoted to Maurice Nadjari's abuse of his powers as New York State Special Prosecutor. \textit{Id.} at 47-71.


166. \textit{See} note 77 \textit{supra} and accompanying text.

167. 21 \textit{N.Y.2d} at 424-25, 235 \textit{N.E.2d} at 443, 288 \textit{N.Y.S.2d} at 468-69

168. \textit{See} note 120 \textit{supra} and accompanying text.

169. People v. Fitzgerald, 89 \textit{Misc.} 2d \textit{243}, 391 \textit{N.Y.S.2d 322} (Sup. Ct. 1977) (defendant is entitled to minutes of his grand jury testimony even if the testimony has no relation to the pending indictment); \textit{N.Y. Crim. Proc. Law} § 240.20(1) (McKinney 1971); \textit{see} note 80 \textit{supra} and accompanying text.
\end{quote}
jury investigating these crimes raises a particularly acute problem. As noted above, in these situations the possibility exists that the attorney may leak the witness' testimony. In recognition of this possibility, Colorado, which permits counsel inside the grand jury room, prohibits an attorney who enters the grand jury to represent more than one witness in that proceeding. Although there have been constitutional challenges to this type of restriction, the highest courts of two states have found that prohibitions against multiple representation of grand jury witnesses is a constitutionally permissible limitation on the right to counsel. These courts have ruled that the right of a witness to be represented before a grand jury by counsel of his own choosing is not an absolute right. Consequently, it may be impaired upon a showing of an overriding state interest such as effective grand jury investigation.

The New York statute does not address the problem of multiple representation. It is suggested, however, that the supervising judge of a grand jury should not permit multiple representation if the prosecutor presents sufficient evidence of a conflict of interest. Although the judge deciding whether to bar multiple representation in a particular case should consider the financial consequences of separate representation, his primary concern should be to preserve the grand jury's ability to investigate thoroughly without fear of leaks to outside parties. Furthermore, to prevent attorneys from leaking grand jury testimony, whether in multiple representation situations or otherwise, all attorneys entering the grand jury should be required to take an oath not to divulge any of the witness' testimony to outside parties.

E. Objectionable Questioning

The new statute provides no procedure for an attorney to air a legitimate objection to the question asked of his client. In Bronx County, Judge Kapelman has issued a memorandum to grand juries stating that an attorney may not speak to individual grand jurors, the prosecutor, or the panel as a whole. At least in the Bronx, therefore, an attorney cannot communicate any objection to the prosecutor. Queens County takes a different approach. In Queens, if an attorney finds the prosecutor's question objectionable he is permitted to approach the prosecutor and discuss the matter quietly with him.

170. Col. Rev. Stat. § 16-5-204(4)(d) (Supp. 1977) provides: "No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury."


173. Although the legislative history reveals that there was deep concern for the problem, e.g., New York Hearings, supra note 28 at 227-28 (statement of Paul Curran, former United States Attorney), 63-64 (statement of Robert Morgenthau, District Attorney of Manhattan), the present statute does not deal with the problem.

174. Memorandum from Judge Kapelman to Grand Juries of Bronx County (n.d.).
and try to resolve the issue.\textsuperscript{175} The Queens approach seems to be the better one. Under the informal Queens procedure, the prosecutor and the attorney for the witness can resolve many evidentiary issues without interrupting the proceeding and without confusing the grand jurors. If the problem is not resolved, the witness can obtain a ruling on the issue from the supervising judge. If the judge finds the question unobjectionable and the witness persists in refusing to answer, he can then be held in contempt of court.\textsuperscript{176}

\textbf{F. Leaving the Grand Jury Room}

The new statute does not indicate whether a witness may still leave the grand jury room to discuss matters with his attorney in privacy. The issue can arise when a witness, fearing that counsel's presence will create an impression on the grand jurors that he has something to hide, decides to enter the grand jury room alone. It can also arise when an attorney is defending two clients in separate proceedings and is unavailable to enter the grand jury with one of his clients.

In \textit{People v. J.L.},\textsuperscript{177} the Supreme Court of Colorado held that the right to consult with counsel inside the grand jury room precluded the right to consult with counsel outside the room.\textsuperscript{178} The court reached its conclusion after consideration of two factors. First, under the Colorado statute, the attorney who enters the room is required to take an oath of secrecy and is prohibited from representing more than one witness without grand jury permission. The court argued that "the purposes to be served by the statute would be routinely evaded if attorneys were permitted to choose to remain outside the grand jury room."\textsuperscript{179} Second, the purpose of the Colorado statute was not only to protect the right of witnesses, but also to conserve the time of the grand jury.\textsuperscript{180} If witnesses would be allowed to leave the room the latter purpose would be frustrated.

In New York, no such issues are currently present. The statute neither prohibits multiple representation nor requires attorneys entering the grand jury to take an oath of secrecy. Therefore, under the present statute, in New York, the statutory purposes would not be frustrated if the attorney remains outside the room to consult with a witness.\textsuperscript{181} Nor is time a factor under the New York statute. The legislative history of the statute indicates that its enactors, unlike the court in \textit{J.L.}, believed that the presence of an attorney in the grand jury room might elongate the proceeding.\textsuperscript{182} This was justified,

\textsuperscript{175} Interview with Sheldon Galfunt, Chief of Grand Jury Bureau of Queens County District Attorney's Office, in New York City (Jan. 2, 1979).

\textsuperscript{176} N.Y. Jud. Law § 750 (McKinney 1975); N.Y. Penal Law § 215.51 (McKinney 1975).

\textsuperscript{177} \textit{Id.} at \textit{Colo.}, 580 P.2d 23 (1978).

\textsuperscript{178} \textit{Id.} at \textit{Colo.}, 580 P.2d at 25-26.

\textsuperscript{179} \textit{Id.} at \textit{Colo.}, 580 P.2d at 26.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} If, however, limitations were placed on multiple representation and an oath of secrecy was required of attorneys entering the room, as suggested above, see note 174 \textit{supra} and accompanying text, then the Colorado court's analysis would be applicable in New York.

however, as an expense of protecting the rights of witnesses.\textsuperscript{183} Therefore, it is consistent with the spirit of the New York law to allow a witness to consult with his attorney outside the room even if it will delay the proceeding.

The language of the statute also warrants the same conclusion. The statute provides that a witness who has waived his immunity "has a right to an attorney . . . [who] may be present with the witness in the grand jury room."\textsuperscript{184} The use of the permissive term "may" in the latter part of the statute indicates that use of counsel inside the room is at the witness' option.\textsuperscript{185}

**CONCLUSION**

The decision to permit counsel inside the grand jury room requires a delicate balancing of conflicting interests. Attorneys allowed inside the grand jury room must be careful to act as advisers not advocates. Nevertheless, the presence of counsel inside the grand jury room will be beneficial to both the grand jury and the witnesses testifying before it. The grand jury will benefit because the presence of vigilant counsel would help to check prosecutorial abuse. The witness will benefit because he will have the capable assistance of counsel and he will not have to interrupt his testimony and leave the room for advice. The linchpin of the success of the legislation, however, lies in the performance of counsel. The assumption of an adversarial role by counsel will result in tremendous detriment to the investigative role of the grand jury.

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\textsuperscript{183} Id.
\textsuperscript{185} See People v. J.L., — Colo. at — 580 P.2d at 30 (Carrigan, J., dissenting).