

Evaluating Grand Jury Reform in Two States: The Case for Reform

GRAND JURY ROOM

QUIET PLEASE
GRAND JURY
IN SESSION



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
November 2011

Supported by a grant from the Foundation for Criminal Justice.

COPYRIGHT © 2011 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This report is subject to a Creative Commons Attribution-Noncommercial-Nonderivative Work license (see www.creativecommons.org). It may be reproduced, provided that no charge is imposed, and the National Association of Criminal Defense Lawyers is acknowledged as the original publisher and the copyright holder. For any other form of reproduction, please contact NACDL for permission.

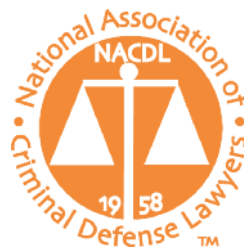
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor

Washington, DC 20036

Phone: 202-872-8600

www.nacdl.org



Evaluating Grand Jury Reform in Two States: The Case for Reform

A Report prepared for the
National Association of Criminal Defense Lawyers

By

ERIN L. CRITES

JON B. GOULD

COLLEEN E. SHEPARD



CENTER FOR JUSTICE, LAW & SOCIETY

LISA MONET WAYNE

President, NACDL
Denver, CO

GERALD B. LEFCOURT

President, FCJ
New York, NY

NORMAN L. REIMER

Executive Director, NACDL
Washington, DC

KYLE O'DOWD

Associate Executive Director
For Policy, NACDL
Washington, DC

TABLE OF CONTENTS

ABOUT THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY	3
ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ..	4
ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE	5
ACKNOWLEDGEMENTS	6
FOREWORD	7
EXECUTIVE SUMMARY	9
INTRODUCTION	13
BACKGROUND	
Grand Juries in New York State	16
Grand Juries in Colorado	18
RESEARCH	
Methodology	20
Description of Sample Surveyed	20
AN EXAMINATION OF FOUR REFORMS	
Presence of Defense Counsel	21
Provision of Transcripts	25
48 Hours' Notice to Appear	27
Exculpatory Evidence	31
CONCLUSION	34
ENDNOTES	35

ABOUT THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY

The Center for Justice, Law and Society at George Mason University (CJLS) links top social scientists with policymakers and practitioners in law, judicial administration and legal development. CJLS faculty and students are drawn from multiple disciplines, all brought together by a common interest in making academe more useful to practitioners and enriching academic research with the experience of practice. CJLS has three core objectives:

- u Advancing research and scholarly debate on questions of law and legal behavior.
- u Bridging the gap between academe and practice so that policymakers and practitioners are better informed by the insights of academic research, and academicians have a better understanding of how the concepts they study behave in practice.
- u Assisting policymakers and practitioners by applying empirical research to practical problems in the field.



ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

4

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 10,000 direct members — and more than 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice.

For more information contact:

**NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

1660 L Street NW, 12th Floor

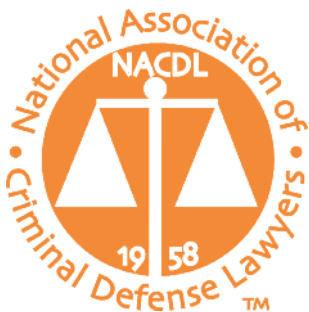
Washington, DC 20036

202-872-8600

www.nacdl.org

This publication is available online at

www.nacdl.org/2stategrandjury



ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America’s justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and assistance of effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The Foundation is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the Foundation are tax-deductible. The affairs of the Foundation are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the Foundation’s own Articles of Incorporation and its Bylaws.

For more information contact:

FOUNDATION FOR CRIMINAL JUSTICE

1660 L Street NW, 12th Floor

Washington, DC 20036

202-872-8600

www.nacdl.org/foundation



ACKNOWLEDGEMENTS

This report was prepared by Eric L. Crites, Jon B. Gould and Colleen E. Sheppard at the Center for Justice, Law & Society, George Mason University. The authors were ably assisted by Holly Stevens.

The authors wish to thank the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) and the Board of Trustees for the Foundation for Criminal Justice for their support of this project.

The authors would also like to thank the following NACDL staff for their careful editing and helpful suggestions: Quintin Chatman, Editor of *The Champion*; Ivan Dominguez, Deputy Director of Public Affairs and Communications; Tiffany Joslyn, White Collar Crime Policy Counsel; and Shana-Tara Regon, White Collar Crime Policy Director. The authors wish to acknowledge Cathy Zlomek, NACDL Art Director, for the design of the report.

The authors also thank the many attorneys in New York and Colorado who provided invaluable legal expertise, practical insights and other assistance during the course of this study, including Paul Bergman, Adele Bernhard, Alex Bunin, Maureen Cain, Hal Haddon, Gerald Lefcourt, Mark Mahoney, Melinda Sarafa, and Lisa Schreibersdorf.

Finally, the authors offer their appreciation to the attorneys in New York and Colorado, too numerous to name here, who responded to our survey and agreed to be interviewed and without whom this report would not have been possible.

The grand jury is a peculiar institution that few people really understand, even those who have served as grand jurors. After serving on a federal grand jury, one disconcerted citizen claimed to have gained only the understanding that the term “grand jury” is a misnomer: the body he served on was far from grand, and it was hardly a jury. This is not what was intended by the Constitution’s framers when providing in the Fifth Amendment that “[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment by a grand jury.” The status of the grand jury prior to the U.S. Constitution was that of a central and independent organ of the government — not merely an unimportant step along the way to a conviction.

So important was the role of the grand jury to the founding fathers that during the ratification debates on whether to include the grand jury in the Bill of Rights, Samuel Adams said the need for a grand jury was “so evidently beneficial as to need no comment.” James Wilson, delegate to the Constitutional Convention, instructed that “the grand jury is a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.”

The same respect that the founding fathers had for the grand jury has faded in the modern criminal process. Undeniably, few institutions written into the U.S. Constitution manifest such disparity between design and practice as the federal grand jury. For an accusatory process that on its face emphasizes the role of the citizen, the grand jury is a patently un-democratic body. Indeed, the 94 federal grand juries across the country function more like feudal duchies, in which federal prosecutors exercise virtually unchecked power to indict. I say this having sought countless indictments before grand juries and having overseen the Justice Department’s work to promulgate uniform rules for federal prosecutions, including grand jury proceedings. Simply put, the federal grand jury exists today, for the most part, as a rubber stamp for prosecutors.

This means that the grand jury no longer protects citizens from unfounded charges, government overreaching, and miscarriages of justice. Not too long ago, the U.S. Supreme Court noted that the grand jury has served as a “primary security to the innocent against hasty, malicious and oppressive prosecution.” This fundamental protection is needed because, for many of us, a federal grand jury indictment will deal an irreparable blow to our reputations, personal assets, careers, and even to our lives. The absence of grand jury independence has other, less obvious consequences as well. Community involvement in grand jury decisions promotes community buy-in for the criminal justice process, which supports law enforcement efforts. Additionally, independent grand jury scrutiny can save tax dollars by screening out unworthy cases and can encourage greater professionalism and sounder exercise of discretion among law enforcement and prosecutors.

Unfortunately, today’s federal grand jury has been so weakened by prosecutorial practices and judicial neglect that there is no way for the institution to manifest its full value to the criminal justice process. What is needed for the grand jury to serve its historic and constitutional role? The Supreme Court has said that a grand jury cannot “effectively operate in a vacuum,” and that an accused person has a constitutional right to a grand jury that is unbiased, “acting independently of either prosecuting attorney or judge.”

The failure to adopt rules that might give real meaning to these principles — such as rules requiring the presentation of exculpatory evidence or permitting certain witnesses to be accompanied by counsel — has prevented the grand jury from exercising informed, independent judgment and serving as a check on governmental powers.

While federal law enforcement has evolved and expanded dramatically over the decades, our legal institutions can be extraordinarily resistant to modernization, and no institution is more calcified than the federal grand jury. But this is not the case everywhere. I have always been intrigued by the experiences of states with certain reform-minded practices, and this report, the first of its kind, focuses a laser light on the experience of prosecutors, defense lawyers and judges under those regimes. The conclusions are no surprise, but they are heartening for those of us who believe our federal system can do better. States with grand jury systems should likewise learn from the Colorado and New York models examined in this report.

I strongly believe the federal grand jury has an important role to play in our participatory democracy and criminal justice system. We cannot sit idly by and accept the diminished vitality and independence of this institution as a *fait accompli*. Several states have carved a path toward creating a more robust and democratic grand jury, and state and federal policymakers would do well to follow their lead.

Larry Thompson

Former Deputy U.S. Attorney General

(2001-2003)

EXECUTIVE SUMMARY

The grand jury system has long been the subject of debate and proposals for reform. While the federal system has largely resisted any change, a number of states have not only implemented various reforms but also have extensive experience with them. Their experience is instructive in understanding how these measures would fare if adopted into the federal grand jury system.

NACDL selected two states for consideration: Colorado and New York. Both states have a constitutional right to a grand jury and have adopted several prominent reforms similar to those recommended by NACDL. In addition, the two states differ in their geography, size and legal culture, thus permitting comparisons of the experiences of grand jury reform in varying locales. Grand juries in both states see many of the same kinds of felony cases as those brought in federal court, including white collar fraud, gang cases and cases with strong political or public interest.

Researchers surveyed nearly 200 defense lawyers and interviewed upwards of 50 prosecutors, defense lawyers and retired judges. Prosecutors constituted no fewer than one-third of the interviewees in each state.

Four key reforms were addressed in the research, as both states had experience with each: (1) defense representation in the grand jury room, (2) production of witness transcripts for the defense, (3) advance notice for witnesses to appear, and (4) the presentation of exculpatory evidence to the grand jury.

The results strongly support the implementation of the four reforms at issue, finding many benefits and few drawbacks when states pursue these measures. The responses were uniform between the two states and across roles in the criminal justice system, whether prosecutors, defense lawyers or judges.

FOUR REFORMS

Counsel in the Grand Jury Room

1

- u **NEW YORK:** Attorneys may accompany a target into the grand jury room if the client has signed a waiver of immunity. While in the grand jury room, defense counsel “may advise the witness, but not otherwise take part” in the proceedings.
- u **COLORADO:** All witnesses have the right to be represented by counsel in the grand jury room, and counsel must be appointed to witnesses or targets who cannot afford to privately hire counsel. In addition to restricting defense

EXECUTIVE SUMMARY

counsel's activities in the grand jury room, Colorado prohibits an attorney or law firm from representing more than one person in a grand jury proceeding.

Findings: When witnesses and targets are allowed defense counsel in the grand jury room, the grand jury receives more accurate information and individual rights are better protected. Prosecutors interviewed were largely supportive of permitting defense lawyers to attend the grand jury proceedings with their clients and said this practice benefits the administration of justice. Prosecutors feel enabled in their questioning and can pursue their role assertively. Prosecutors in both states had only rarely encountered what they would describe as “bad behavior” by defense lawyers, and interviewees were unified in their view that including defense attorneys in the grand jury room does not slow the work of prosecutors or grand jurors. Over 80 percent of New York attorneys and 75 percent of Colorado attorneys who had accompanied a client into the grand jury room believed that their presence led to fairer questioning by the prosecutor. Moreover, defense lawyers said their presence produced “better testimony,” both by counseling their clients to testify truthfully and by ensuring that the most relevant and helpful facts are disclosed to the grand jurors in a coherent way.

10

Access to Grand Jury Transcripts

2

- u **NEW YORK:** New York law dictates that the accused, if indicted, has a right to a transcript of his grand jury testimony.
- u **COLORADO:** Not only do witnesses and their legal representatives have the right to view the transcript of the witnesses' testimony if called to testify at trial, but Colorado places an obligation on the prosecution to supply the defense with copies of the transcript and any evidence presented at the grand jury within 30 days of indictment.

Findings: Ninety-two percent of respondents in both states find that grand jury transcripts are helpful in preparing for trial or plea-bargaining, and most attorneys responding to the survey strongly agreed or agreed that the transcript improved the accuracy of their clients' future testimony. Indeed, several attorneys in New York noted the transcript's usefulness in urging clients to accept a favorable plea bargain.

Advance Notice to Testify

3

- u **NEW YORK:** Despite the adoption of other progressive grand jury practices, New York has no rule requiring that subpoenas be issued and served within any specific time frame prior to appearance.

- u **COLORADO:** Witnesses may not be required to appear sooner than 48 hours from issuance of a subpoena without good cause.

Findings: Overall, providing advance notice to witnesses and targets to appear before the grand jury improves the administration of justice by allowing individuals time to retain counsel, prepare for testimony with their lawyers, and make arrangements to appear before the grand jury. Defense attorneys in both states overwhelmingly believe their clients would have grave difficulty obtaining satisfactory representation without sufficient notice.

Interviewees stated that prior preparation is essential so that the client can testify accurately and investigate plea opportunities. Prior notice helped them to prepare their clients for the grand jury, and a majority (61 percent in Colorado and just over 50 percent in New York) said that their clients were more likely to appear if given advance notice of the subpoena. None of the defense lawyers reported instances in which their clients failed to appear after receiving notice of their grand jury appearance; none of the respondents in either state believes that the safety of witnesses is compromised when individuals are given sufficient notice.

Several lawyers expressed concern that 48 hours is insufficient time for a witness or target to obtain an attorney, if desired, and for that attorney to be briefed on the case and engage in adequate preparation with the client. The greatest concern expressed by attorneys was the delay between when a witness is notified of his grand jury appearance and the witness's appointment of counsel.

Disclosure of Exculpatory Evidence

4

- u **NEW YORK:** Prosecutors in New York grand jury proceedings must disclose to the grand jury exculpatory evidence that is so “substantial” or “important” that it might reasonably affect the jury’s decision to indict. New York law also permits targets of the grand jury to testify and request that the grand jury call other witnesses on their behalf.
- u **COLORADO:** Disclosure of exculpatory evidence to the grand jury is not required, although (as in New York) defense lawyers may request that the prosecutor present such evidence.

Findings: When the prosecution introduces exculpatory evidence, the research indicates significant positive benefits for the speed of the grand jury’s work. In fact, nearly 80 percent of respondents said the pace of the grand jury either quickens or is not affected. A large majority of responding defense attorneys in New York (77 percent) said that prosecutors rarely or never disclose exculpatory evidence in grand jury proceedings, while prosecutors asserted that they always present exculpatory material in their possession to the grand jury. New York’s

EXECUTIVE SUMMARY

12

limited rule for what must be presented (evidence that would materially influence the grand jury's investigation) may help explain these results. However, as defense attorneys reported uncovering exculpatory evidence later during trial preparation, the authors cannot rule out the effect of prosecutorial attitudes concerning evidence that does not support guilt.

Thirty-two percent of New York respondents and 42 percent of Colorado respondents report that the prosecution rarely or never accommodates defense requests to present exculpatory evidence. Defense attorneys advocate a formal mechanism to present exculpatory evidence to the grand jury, especially in cases where the prosecution will not willingly do so on its own. Currently, defense attorneys do not see any incentives for the prosecution to present this information, other than to avoid an unwanted indictment.

KEY FINDINGS FOR POLICYMAKERS

Far from raising impediments, the reforms enacted by these states improve the administration of justice in grand jury proceedings. Results of the survey and interviews suggest four key findings:

- (1)** When witnesses and targets are allowed defense counsel in the grand jury room, there exists an additional measure to help safeguard the integrity of the grand jury system, facilitate accurate testimony, and provide proper protections for all grand jury participants. The presence of defense counsel emboldens prosecutors to be assertive in their questioning because the witnesses' rights and interests are adequately protected. Neither prosecutors nor defense lawyers object to this practice, and most praise it.
- (2)** Receipt of grand jury transcripts by the defendant facilitates preparation for trial or plea, while receipt by witnesses provides the opportunity to correct mistakes and misstatements, helps refresh memories, and improves the accuracy of later statements.
- (3)** Advance notice to appear before a grand jury, which is a common practice, increases the likelihood of witness appearance and facilitates preparation; however, the Colorado rule of 48 hours' notice is deemed insufficient to obtain representation and properly prepare for the client's grand jury appearance.
- (4)** When exculpatory evidence is disclosed, it advances justice. The practice, however, must be standardized.

Uniformly, these findings show that NACDL's proposed grand jury reforms have no significant, deleterious effects when implemented in state grand juries. On the contrary, the reforms are viewed by both sides of the courtroom as increasing the accuracy, effectiveness and legitimacy of the grand jury.

Where Congress has yet to recognize the benefits of grand jury reform, a number of states have not only implemented measures similar to those in the Federal Grand Jury Bill of Rights but also have extensive experience with them.

INTRODUCTION

Grand juries are intended to “[protect] citizens from unfounded accusations of criminal wrongdoing.”¹ They are expected to do this through their investigative powers and their power to not indict, or indict for a lesser offense, if the members decide that insufficient evidence exists. However, in practice grand jurors’ independent exercise of these powers is frequently superseded by prosecutorial influence, leading some to suggest that while “the modern grand jury technically remains an independent body... as a practical matter, it relies heavily on the prosecutor to secure evidence and give the jurors legal advice.”²

In the federal system, as in many state systems, few protections exist within the grand jury itself to ensure that witnesses and targets are fairly treated; defense attorneys are not allowed in the grand jury room, the rules of evidence are lax, and transcripts are rarely made available. Several Supreme Court decisions have minimized judicial oversight of federal grand juries, and thus, the few extant rules rely upon self-policing by prosecutors. Because of this, in recent decades both observers and criminal justice groups, including the National Association of Criminal Defense Lawyers (NACDL), the American Bar Association and the Council for Court Excellence, have called for reformation or even abolition of the grand jury system.³

In order to initiate reform, legal scholars and researchers have attempted to evaluate the inner workings of the grand jury. The high value placed on secrecy has made this a difficult task. In 2001, the Council for Court Excellence organized a group of judges, prosecutors, former grand jurors, defense attorneys, and legal scholars to discuss and address problems with the federal grand jury. Twenty-three recommendations for reform came out of the meetings and inquiries conducted by its Grand Jury Study Committee. Among these were recommendations to permit counsel inside the grand jury during a client’s testimony, to require prosecutors to present exculpatory evidence to the grand jurors and to ensure that witnesses are provided a *Miranda*-type warning prior to testimony.

At about the same time, NACDL created the Commission to Reform the Federal Grand Jury, drawing on the expertise of a variety of professionals throughout the criminal justice system. Commissioners spent two years examining the need for changes in the grand jury process and produced a *Federal Grand Jury Bill of Rights* based on their findings.

FEDERAL GRAND JURY

Bill of Rights
Congress of the United States

NACDL's Federal Grand Jury Bill of Rights states:

14

- 1.** A witness before the grand jury who has not received immunity shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question, nor otherwise take an active part in proceedings before the grand jury. The court shall have the power to remove from the grand jury room, or otherwise sanction, counsel for conduct inconsistent with this principle.
- 2.** No prosecutor shall knowingly fail to disclose to the federal grand jury evidence in the prosecutor's possession which exonerates the target or subject of the offense. Such disclosure obligations shall not include an obligation to disclose matters that affect credibility such as prior inconsistent statements or *Giglio* materials.
- 3.** The prosecutor shall not present to the federal grand jury evidence which he or she knows to be constitutionally inadmissible at trial because of a court ruling on the matter.
- 4.** A target or subject of a grand jury investigation shall have the right to testify before the grand jury. Prosecutors shall notify such targets or subjects of their opportunity to testify, unless notification may result in flight, endanger other persons or obstruct justice, or unless the prosecutor is unable to notify said persons with reasonable diligence. A target or subject of the grand jury may also submit to the court, to be made available to the foreperson, an offer, in writing, to provide information or evidence to the grand jury.
- 5.** Witnesses should have the right to receive a transcript of their federal grand jury testimony.
- 6.** The federal grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent the prosecutor from supplying such names in a bill of particulars.
- 7.** All non-immunized subjects or targets called before a federal grand jury shall be given a *Miranda* warning by the prosecutor before being questioned.
- 8.** All subpoenas for witnesses called before a federal grand jury shall be issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption.
- 9.** The federal grand jurors shall be given meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider. All instructions, recommendations and commentary to grand jurors by the prosecution shall be recorded and shall be made available to the accused after an indictment, during pretrial discovery, and the court shall have discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript.
- 10.** No prosecutor shall call before the federal grand jury any subject or target who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination.

Since the publication of NACDL's *Federal Grand Jury Bill of Rights* in May 2000, Congress has done little to enact these measures, hearing instead from federal prosecutors about their fears of reform. According to these individuals, reform would slow the work of the grand jury, disclose sensitive information, intimidate witnesses, and impede the efforts of law enforcement. But where Congress has yet to recognize the benefits of grand jury reform, a number of states have not only implemented measures similar to those in the *Federal Grand Jury Bill of Rights* but also have extensive experience with them. Indeed, their experience is instructive in understanding how these measures would fare if adopted into the federal grand jury system.

With that in mind, NACDL undertook the present report to evaluate the effect of specific grand jury reforms when enacted by the states. Of those in the *Federal Grand Jury Bill of Rights*, the reform proposal receiving the most attention has been that permitting the presence of counsel for witnesses and targets testifying before the grand jury, with initial reports suggesting that the change has benefitted both sides in the grand jury process.⁴ States have experimented with several other grand jury reforms as well, including the production of witness transcripts for the defense, advance notice for witnesses to appear, and the presentation of exculpatory evidence to the grand jury.

To conduct this evaluation, NACDL engaged the Center for Justice, Law and Society at George Mason University (CJLS). CJLS is a multidisciplinary research center, bringing the insights of empirical research to the field to evaluate current practices and guide future analysis and policy. CJLS researchers have worked with governments, multinational bodies and nongovernmental organizations on projects both domestic and abroad.

Together, CJLS and NACDL selected two states for consideration — Colorado and New York. Both states have a constitutional right to a grand jury and have adopted several of the reforms similar to those recommended by NACDL. In addition, the two states differ in their geography, size and legal culture, thus permitting comparisons of the experiences of grand jury reform in varying locales. Still, both states employ the grand jury in serious cases. For example, in New York a grand jury indictment is required in all felony prosecutions unless waived by the defendant. Colorado, by contrast, generally reserves the grand jury for complicated cases such as organized crime (the Colorado Organized Crime Control Act or COCCA), which mirrors a major use of the grand jury in the federal system (the federal Racketeer Influenced and Corrupt Organizations Act or RICO). Together, these states provided researchers with an excellent opportunity to compare grand jury practices in state systems to those in the federal system, with an emphasis on the reforms proposed by NACDL for the federal grand jury.

Four key reforms were addressed in the research, as both states had experience with each.

Reforms Studied:

- (1) defense representation in the grand jury room,
- (2) production of witness transcripts for the defense,
- (3) advance notice for witnesses to appear, and
- (4) the presentation of exculpatory evidence to the grand jury.

Evaluation was conducted on two levels. First, defense lawyers were surveyed throughout each state about their experience with grand jury proceedings and the reforms undertaken. Subsequently, researchers fanned out to interview prosecutors, defense lawyers and retired judges in the two states to understand more specifically how the changes to grand jury proceedings have affected criminal practice in each jurisdiction.

The results strongly endorse the implementation of the four reforms at issue, finding many benefits and few drawbacks when states pursue these measures. The responses were uniform between the two states and across roles in the criminal justice system, whether prosecutors, defense lawyers or judges. If there were any concerns, the responses suggested that states should go further to ensure that the reforms are fully implemented across their court systems.

This report is laid out in five sections, providing background on grand jury practices in both states and then describing the research undertaken and findings made on each of the four major grand jury reforms examined. A final section summarizes the analysis, concluding that, far from raising impediments, the reforms enacted by these states improve the administration of justice in grand jury proceedings.

The results strongly endorse the implementation of the four reforms at issue, finding many benefits and few drawbacks when states pursue these measures.

BACKGROUND

Grand Juries in New York State

16

Even as other states have moved toward allowing prosecutors to file a charging document (an “information”) directly with the court, New York law dictates that “no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of a grand jury.” Except in cases in which the accused waives presentment to the grand jury as part of the plea process, all felony charges must be brought by grand jury indictment.

New York State grand juries see many of the same kinds of felony cases as those brought in federal court.

Previously, grand jury practice in New York had been criticized. In the mid-1980s, New York legislators and criminal justice officials pushed to abolish the state grand jury system in favor of preliminary hearings or another, more open system, following Chief Judge Wachtler’s now infamous quote regarding grand juries who would “indict a ham sandwich” if advised by the prosecution.⁵ A decade later, prosecutors and defense attorneys pushed to change grand jury practice as they began to promote reforms or abolition. Their efforts have been linked to the difficulty in assembling grand juries each month, an increase in unfavorable citizen attitudes toward police and their testimony, and the increasing use of “white-collar workers” on grand juries.⁶

Although grand juries continue to play a prominent role in New York criminal procedure, the calls for reform or abolition have resulted in significant changes in state practice. Judicial review of the grand jury minutes, a longtime feature of the New York system, was expanded to include discretion to reduce the charges.⁷ Thus, there is an added safeguard ensuring “that sufficient evidence [has been] presented to establish every element of the crimes charged.”⁸

As of 1978, attorneys may accompany a target into the grand jury room if the client has signed a waiver of immunity.

17

Not only do individuals charged with a felony have the right to have their case heard before a grand jury, but New York law also permits targets of the grand jury to testify and request that the grand jury call other witnesses on their behalf.⁹ Further, they are permitted to deliver an opening and closing statement, though without assistance from counsel.¹⁰ Persons who have been arraigned on charges that are the subject of a grand jury proceeding must be given notice of the grand jury proceeding and a reasonable time to exercise their right to testify. Although given the explicit right, few targets choose to testify at the grand jury.¹¹ For example, in the early 2000s, in Brooklyn, just 14 percent of felony suspects testified before grand juries investigating their cases.¹² Across New York City the rates vary, with one study showing five percent in Manhattan and 18 percent on Staten Island.¹³

Use of the Grand Jury

Over the last 40 years, the rate of grand jury indictment has slowly decreased in New York. A survey of New York grand juries found that between 1968 and 1970 the indictment rate for cases brought before the grand jury was 84 percent. Statistics from the early 1980s showed an indictment rate of about 80 percent.¹⁴ The Grand Jury Project, commissioned in December 1997 by Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman, released its report in 1999, which found New York grand juries dismiss 7% of their cases and reverse charges in 2% of their cases.¹⁵ This can be compared to Justice Department statistics released in 1991 that showed a 99.9 percent indictment rate in the federal system.¹⁶

New York State grand juries see many of the same kinds of felony cases as those brought in the federal system. As the defense lawyers surveyed for this report indicate, prosecutors in New York routinely utilize the grand jury for drug distribution, embezzlement, fraud, and conspiracy offenses. Grand juries are also employed for perjury cases, although most often when the target is a well-known person or high-ranking official. Terrorism cases remain relatively rare in New York courts, but virtually all such matters are brought before a grand jury.

Counsel in the Grand Jury

New York is one of only a few states that requires “the appointment of counsel to targets, subjects, or witnesses” in a grand jury proceeding.¹⁷ Further, as of 1978, attorneys may accompany a target into the grand jury room if the client has signed a waiver of immunity.¹⁸ That is, the client must agree that what she says during the proceedings may be used for a criminal prosecution. Except for targets, all witnesses called before the grand jury are granted transactional immunity; therefore, prosecutors rarely call a witness suspected of committing the crime under investigation.

If the client is not the target of the investigation, a lawyer is not permitted to be present in the grand jury room but may be available outside to advise a witness at the witness’s request. While in the grand jury room, however, defense counsel has a very limited role and “may advise the witness, but not otherwise take part” in the proceedings.¹⁹ Specifically, defense attorneys in a grand jury are not given the same rights as they would have before a trial jury; the defense “may not address the grand jury or object to the prosecutor’s questions,” and “must remain silent during [the client’s] testimony.”²⁰ Defense attorneys are permitted to whisper with their clients in the grand jury provided the jurors cannot hear the communication.²¹ If counsel does not accompany the client into the grand jury, the witness is permitted to excuse herself to consult with her attorney, although “most prosecutors would admit...that they count on the burden of leaving the room to dissuade the witness from asserting her right to counsel.”²²

Exculpatory Evidence

New York also has specialized standards regarding the presentation of exculpatory evidence to the grand jury. Case law requires that prosecutors of New York grand jury proceedings disclose exculpatory evidence that is so “substantial” or “important” that it might reasonably affect the jury’s decision to indict.²³ Having this information is said to assist grand jurors in having “a more balanced view of the case,” and thus to make a more informed decision.²⁴ Whether disclosure is consistently enforced, however, remains an open question and is one of the subjects of this study.

Grand Juries in Colorado

The grand jury has been part of the Colorado criminal justice system since the first state constitutions were developed in 1864 and 1876. Initially, the state's constitution required that all felony prosecutions begin by indictment. This requirement could be circumvented only in the event that the legislature passed a law allowing for alternative means for initiating criminal cases.²⁵ In 1891, the general assembly passed such a law permitting felony criminal proceedings to begin by direct filing by the prosecution.

Following the 1891 statute, little was written on grand jury practices in Colorado until the late 1960s, when claims began to surface that a district attorney in southern Colorado was using the grand jury to harass his political enemies. Prosecutions against public figures stemming from these grand jury indictments were not successful, but gained the public's attention. Following these allegations and prosecutions, and the publicity surrounding them, the Colorado Legislature sought to address concerns over abuses in the use of the grand jury. The result was a series of reforms that aimed to control the unchecked power of the prosecutor in front of the grand jury.

Many of these reforms mirrored those established by the American Bar Association in its Model Grand Jury Practices. The Colorado Legislature enacted these reforms in 1977. Two of the most significant changes were to allow defense counsel to be present with a client during the client's testimony and to permit defendants and witnesses to receive transcripts of their grand jury testimony prior to testifying at trial. Additional major reforms of the grand jury enacted in Colorado in 1977 include 48 hours' notice for witnesses who must appear, the presence of a court reporter during grand jury proceedings, and a *Miranda*-like advisement of rights or, absent that, a grant of transactional immunity for those subpoenaed to testify.²⁶ Of specific interest to this report are the rights to representation, prior notice and transcripts.

Recognizing the role that counsel plays in protecting due process, the statute not only provided the legal grounding for defense counsel to enter the grand jury room, but also added a requirement that counsel be appointed to witnesses or targets who could not afford to privately hire counsel.

Use of the Grand Jury

Because felony charges may be prosecuted by information, Colorado does not use the grand jury as frequently as does New York or the federal system. Nevertheless, cases brought by indictment in Colorado are comparable to federal felony prosecutions and include white collar fraud, gang cases and cases with strong political or public interest. Only counties with more than 100,000 citizens maintain a standing grand jury. Much of the grand jury activity is located within the larger counties and judicial jurisdictions, with most statewide grand juries conducted out of Denver.

Counsel in the Grand Jury

One of the major 1977 reforms afforded all witnesses the right to be represented by counsel in the grand jury. However, the statute is somewhat vague about the attorney's role, saying that the lawyer may advise her client during grand jury proceedings but may not question or comment to any other party in the room. In order to protect the secrecy of the grand jury, the defense attorney is required to take the same oath of secrecy that her client takes upon entering the room. Recognizing the role that counsel plays in protecting due process, the statute not only provided the legal grounding for defense counsel to enter the grand jury room, but also added a requirement that counsel be appointed to witnesses or targets who could not afford to privately hire counsel.

In addition to circumscribing the activities of defense counsel in the grand jury room, the 1977 statute prohibits an attorney or her partners or associates from representing more than one person in a grand jury proceeding. The Colorado Supreme Court upheld this limitation, explaining that “the prohibition against multiple representation was intended to preserve the secrecy and effectiveness of the grand jury process.”²⁷ Attorneys have at times represented multiple clients in the same grand jury proceedings, but this occurs only after there has been a determination that no conflict of interest exists and the grand jury (including, most particularly, the prosecutor) approves.

Grand Jury Transcripts

Reviewing transcripts of grand jury proceedings was not commonplace in the early history of the grand jury; in fact many grand jury proceedings were not even recorded. It took until 1973 for the Colorado Legislature to require that all grand jury proceedings be recorded in their entirety by an authorized court reporter.²⁸ This includes all colloquies (*i.e.*, statements between the prosecutor and grand jurors and instructions given to grand jurors) in addition to the questioning of witnesses and presentation of evidence.

Witnesses who are called to testify at the trial of an indicted individual are entitled to a transcript of their grand jury testimony prior to trial. In addition, Colorado law requires the prosecution to supply the defense with copies of the transcript and any evidence presented at the grand jury within 30 days of the judge's approval of the defense's motion. The defendant has the right to view witnesses' grand jury testimony as part of trial preparation; the transcript cannot be withheld unless the prosecution establishes a compelling reason for doing so. However, the failure of a judge to allow the defense the right to examine grand jury transcripts is not grounds for dismissal of the indictment.

Notice to Testify

Although Colorado does not require the 72 hours' notice recommended by NACDL, it does, unless good cause is shown, require at least 48 hours' notice to elapse between the issuance of a subpoena and the appearance of the witness.²⁹ This change came about in response to the misuse of grand jury subpoenas by a district attorney in southern Colorado. According to his critics, this prosecutor would regularly subpoena individuals for immediate appearance, which created professional hardships for the individuals who were required to drop everything to testify before the grand jury.³⁰ The practice also prevented witnesses from obtaining meaningful legal counsel in connection with the appearance.

In addition to the 48 hours' notice, Colorado law requires that the subpoena include a statement of the witnesses' rights, which must be “prominently display[ed] on the front of the subpoena.”³¹ The advisement is similar to those rights detailed by *Miranda v. Arizona* and maintains that: a witness may have an attorney present during the appearance; information provided during the grand jury may be used against the witness in court; the witness may invoke her Fifth Amendment right against self-incrimination; and the witness will receive court-appointed counsel if she cannot afford it.

Colorado law requires the prosecution to supply the defense with copies of the transcript and any evidence presented at the grand jury within 30 days of the judge's approval of the defense's motion.

RESEARCH

As the backgrounds of the two states selected for study suggest, the effects of grand jury reform are not well known outside of the legal community directly involved in grand jury proceedings. The CJLS designed a comprehensive, two-pronged evaluation strategy to better understand the results of these reforms in practice.

Methodology

Researchers began by developing a questionnaire about state grand jury practice, which they administered to defense lawyers in the two states via the Internet by emailed introduction from NACDL. The survey responses yielded a broad picture of grand jury practices and attitudes in each state. Thereafter, researchers followed up by interviewing prosecutors, defense attorney, and retired judges with grand jury experience. The interviews provided an opportunity to explore the survey findings in greater depth and to go beyond these results to provide more extensive comparisons of grand jury practices between the two states. Ultimately, researchers surveyed nearly 200 defense lawyers and interviewed upwards of 50 prosecutors, defense lawyers and retired judges. Prosecutors constituted no fewer than one-third of the interviewees in each state.

Description of Sample Surveyed

With the assistance of NACDL, an electronic survey was distributed to NACDL members from New York and Colorado with a brief note regarding the purpose of the survey and requesting participation. The NACDL survey resulted in a final respondent count of 192.³² As Table 1 presents, nearly three-quarters of respondents (69 percent) were from New York State.³³ Two respondents were from other states (California and New Jersey), and an additional 15 respondents did not indicate what state they were from; they were all removed from the later analysis. The findings are presented in four sections based on the four reforms that were found to be most relevant to defense attorneys in the survey and to defense and prosecuting attorneys and retired judges during the interviews.

Ultimately researchers surveyed nearly 200 defense lawyers and interviewed upwards of 50 prosecutors, defense lawyers and retired judges. Prosecutors constituted no less than one-third of the interviewees in each state.

Table 1.

State in which respondents practice


	N	Percent
New York	132	69%
Colorado	43	22%
Missing	15	8%
Other State	2	1%
Total	192	100%

AN EXAMINATION OF FOUR REFORMS

- u **Presence of Defense Counsel**
- u **Access to Grand Jury Transcripts**
- u **48 Hours' Notice Before a Grand Jury Appearance**
- u **Presentation of Exculpatory Evidence**

As discussed, four grand jury reforms were targeted in this research. For each of these reforms, common themes were brought out in the survey and further explored in the interviews. Most notably, defense counsel, prosecutors and judges are supportive of the additional due process protections provided when defense counsel is allowed in the grand jury room; when transcripts of the proceedings are furnished in a timely manner; when witnesses and targets are provided with at least 48 hours' notice prior to a grand jury appearance to prepare their testimony and obtain counsel if desired; and when exculpatory evidence known to the prosecutor or the target, witness or defense attorney is presented to the grand jury. The four reforms are discussed below in further detail.

Presence of Defense Counsel



When witnesses and targets are allowed defense counsel in the grand jury room, the grand jury receives more accurate information and individual rights are better protected. Prosecutors feel emboldened in their questioning and can pursue their role assertively.

In NACDL's *Federal Grand Jury Bill of Rights*, the Commission to Reform the Federal Grand Jury stated:

A witness before the grand jury who has not received immunity shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question, nor otherwise take an active part in proceedings before the grand jury.³⁴

Prosecutors, in particular, either support the presence of defense counsel in the grand jury room or are neutral on the practice.

22

This practice has been adopted by a few states to varying degrees, with New York and Colorado being two states with the more progressive practices. New York is one of only a few states that requires “the appointment of counsel to targets, subjects, or witnesses” in a grand jury proceeding.³⁵ However, except when representing a target who has waived immunity, the lawyer remains physically outside of the grand jury room. Colorado allows a witness legal representation in the grand jury room and requires that counsel be appointed when requested by a witness who cannot afford to retain private counsel.

Attorneys in both states commented on the benefits of this practice but suggested that the role and behavior of defense counsel and their influence on the proceedings vary greatly depending on the jurisdiction and the mindset of the defense bar. Prosecutors, in particular, either support the presence of defense counsel in the grand jury room or are neutral on the practice. Only two of the prosecutors interviewed for this report (one from each state) had any concerns about the inclusion of defense counsel in grand jury proceedings.

The attorneys surveyed from New York and Colorado reported similar experience in representing witnesses or targets before a grand jury. In New York, 47 percent of attorneys surveyed had always accompanied a witness into the grand jury. For Colorado, just over 44 percent had always done so (Table 2). It is interesting that these percentages are so close considering that New York uses the grand jury far more often than Colorado, although Colorado has more open rules permitting the presence of defense attorneys. There are a number of explanations for the similar percentages. As one New York defense attorney explained, “Local culture is to not have a defendant testify at the grand jury.” Most New York attorneys only allow their clients to go before the grand jury if their client has “a real shot at avoiding [indictment],” as it can be risky to expose the defense ahead of time. Additionally, as all prosecutors from New York indicated, only targets that have waived immunity can have their defense attorney present in the grand jury room. In this respect, Colorado and New York differ. In Colorado, even when a witness has been granted immunity, the defense attorney still may accompany the client into the grand jury room and most defense attorneys will do just

that. By contrast, New York prosecutors said defense lawyers appear less frequently.³⁶

Defense attorneys in both states commented on the lack of clarity in the role they are supposed to play while in the grand jury room. Some described their function as that of a “potted plant,” while others adopted a more active stance to the point of verbally objecting to the prosecutor’s line of questioning — a practice that is not formally sanctioned by grand jury rules in either state. Defense attorneys interviewed in New York often took pride in their efforts to object to what they considered inappropriate questions, but most described a conservative approach to their representation. Their reports were confirmed by prosecutors in both states, who had only rarely encountered what they would describe as “bad behavior” by defense lawyers and saw no reason to exclude defense attorneys who follow grand jury procedures.

Table 2.

How often have you accompanied a non-immunized witness into a grand jury proceeding?

	New York	Colorado
Always	47%	44%
Most of the time	3%	7%
Sometimes	5%	12%
Rarely	2%	7%
Never	43%	30%
Total	100%	100%
Total may not equal 100% due to rounding		

Fairer questioning has been cited as the reason to include defense counsel during grand jury testimony.³⁷ Consistently, defense lawyers said prosecutors are more likely to allow the target or witness to testify uninterrupted if defense counsel is present. Over 80 percent of New York attorneys and 75 percent of Colorado attorneys who had accompanied a client into the grand jury believed that their presence led to fairer questioning by the prosecutor (Table 3). One New York City attorney opined that when defense counsel is not present, the prosecution may become overly aggressive and have a tendency to “beat up the client” with persistent or antagonistic questioning. In Colorado, one respondent suggested that the prosecutor is less likely to “badger the witness” when he is present. Another said that unless he was present, prosecutors would try to wear down the witness to receive a desired answer.

The prosecutors interviewed generally did not feel that the presence of defense counsel affected their questioning of a witness or target, but some said they felt greater latitude to press the witness when counsel was present. For example, two of the Colorado prosecutors felt that the defense attorney served as a buffer between the witness and the prosecution and they therefore felt more comfortable “going after” a witness who was somewhat hostile or whom the prosecu-

tor felt was lying. Without the defense attorney, some prosecutors stated they were more likely to be cautious with their tactics. This attitude was surprising, as many defense attorneys believed just the opposite — that prosecutors were more likely to be aggressive when defense attorneys were absent. The apparent contradiction may simply reflect divergent tendencies or practices among prosecutors.

A few defense attorneys suggested that the grand jury process generally intimidates witnesses who, if their attorney were not present, would not know to stop the proceedings and ask to step outside to speak with their attorney. One former federal prosecutor stated that he never had a witness ask to leave the grand jury room to speak with his attorney.

Table 3.

If you have accompanied a non-immunized witness into a grand jury proceeding, do you believe your presence led to fairer questioning by the prosecutor?

	New York	Colorado
Strongly Agree	41%	35%
Agree	41%	40%
Neutral	13%	25%
Disagree	6%	0%
Strongly Disagree	0%	0%
TOTAL	N = 54	N = 20
Total may not equal 100% due to rounding		

Defense attorneys in both states found their presence in the grand jury room to be especially useful in preparing for trial or plea-bargaining. As Table 4 indicates, three-quarters of New York attorneys found this experience helpful, as did almost 70 percent of Colorado defense attorneys. Defense lawyers said being present provided them insights into the prosecution’s case, because they could hear the line of questioning and infer from that possible theories of the government’s case. Relying on the witness to relate this information during a debriefing is a gamble. Given the stress of appearing before a grand jury, attorneys believed that both witnesses and targets tend to have a poor memory for the details of their testimony. But if the lawyer is present, he can better appreciate the facts uncovered and the prosecutor’s motives for pursuing the case.

The prosecutors interviewed generally did not feel that the presence of defense counsel affected their questioning of a witness or target.

Table 4.

If you have accompanied a non-immunized witness into a grand jury proceeding, do you believe the knowledge you gained during the proceedings helped you prepare for trial or plea-bargaining?

	New York	Colorado
Strongly Agree	12%	14%
Agree	64%	55%
Neutral	16%	31%
Disagree	6%	0%
Strongly Disagree	1%	0%
Total	N = 73	N = 29
Total may not equal 100% due to rounding		

Most New York attorneys only allow their clients to go before the grand jury if their client has “a real shot at avoiding [indictment],” as it can be risky to expose the defense ahead of time.

Moreover, defense lawyers said their presence produced “better testimony,” both by counseling their clients to testify truthfully and by ensuring that the most relevant and helpful facts are disclosed to the grand jurors in a coherent way. One New York attorney described a case in which prosecutors were taken aback by the client’s version of the events, as they had been unaware of information relayed in the witness’s testimony to the grand jury. Focused testimony can direct the course of the grand jury investigation towards other plausible theories of the crime. This is one of the benefits of the grand jury system suggested by prosecutors from New York. As one prosecutor explained, the grand jury process allows for an independent body to review all the evidence, including targets’ statements, to determine whether an individual should actually be charged with a crime.

Prosecutors interviewed were largely supportive of permitting defense lawyers to attend the grand jury with their clients and said this practice benefits the administration of justice. One prosecutor stated that the presence of defense counsel “lends an air of legitimacy” to the proceedings.

As a top New York prosecutor explained, it is not only “appropriate” to have defense counsel present, but there are also “benefits to having counsel in the grand jury room.”

Others noted that defense attorneys rarely hinder the work of the grand jury and are there as silent observers. Only one of the prosecutors objected to the presence of defense counsel, believing they sought to gather information to advise other potential witnesses and their attorneys. This prosecutor, however, was an anomaly; another defense lawyer pointed out that no lawyer would voluntarily submit a client to a non-immunized grand jury appearance for the purpose of gathering information about the prosecution’s case. As a top New York prosecutor explained, it is not only “appropriate” to have defense counsel present, but there are also “benefits to having counsel in the grand jury room.” Among other things, the defense lawyer “can address issues of privilege that are hard for lay witnesses to understand.” As long as defense attorneys comply with the behavioral guidelines set for their presence, the prosecutors interviewed believe there is no harm and actually substantial benefit to including defense lawyers in the grand jury room.

If both sides see procedural benefits to defense counsel participating in grand jury proceedings, neither side tends to believe that the presence of a defense attorney affects the grand jury’s likelihood of returning an indictment. Many of the defense attorneys feel that the grand jury will follow the prosecutor’s lead regardless of whether a defense attorney is present (see Table 5). New York defense attorneys were more likely than Colorado lawyers to state that their presence affected the outcome (almost 40 percent compared to just over 20 percent in Colorado). In Colorado, prosecutors use grand juries less often and are reluctant to present a case when not confident of the outcome; in turn, defense attorneys there are far less likely to believe that their presence will have an effect on the outcome of the proceeding. Further, both defense attorneys and prosecutors in Colorado believe that some cases are brought before the grand jury specifically for the grand jury not to indict the target. This occurs in highly public and political cases where the prosecutor does not want to try an individual, but because of political pressure needs to have the grand jury decide not to indict.

Table 5.

If you have accompanied a non-immunized witness into a grand jury proceeding, do you believe your presence made the grand jury less likely to indict your client?

	New York	Colorado
Strongly Agree	10%	12%
Agree	30%	12%
Neutral	37%	41%
Disagree	18%	18%
Strongly Disagree	6%	18%
Total	N = 63	N = 17

Total may not equal 100% due to rounding

By contrast, in New York, where felonies are expected to be indicted by grand jury, defense counsel and witness testimony may have a greater influence on the outcome because the case is not as developed as it is in jurisdictions that use the grand jury only for special cases. New York prosecutors confirmed this to a degree. In some cases, prosecutors suggested that the grand jury provides a preview into how a petit jury might react to a case and thus indicate to the prosecutor that the case is not strong enough. Therefore, statements made by the target under the advisement of defense counsel may affect the outcome in cases where the evidence is weaker.

Finally, interviewees were unified in their view that including defense attorneys in the grand jury room does not slow the work of prosecutors or grand jurors. As Table 6 illustrates, almost 70 percent of New York responders said there was no effect on the pace of the grand jury, with nearly 30 percent reporting that including defense lawyers in the grand jury actually sped up the process. In Colorado, more than 40 percent of those surveyed said that witnesses took less time to testify when their lawyers were present, and another 40 percent said there was no effect on the time involved. Not a single lawyer or judge in either state said that including defense counsel significantly slows the work of the grand jury.

Interviewees were unified in their view that including defense attorneys in the grand jury room does not slow the work of prosecutors or grand jurors.

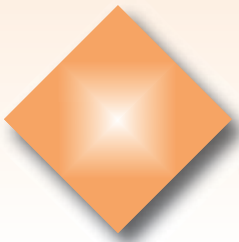
Table 6.

If you have accompanied a non-immunized witness into a grand jury proceeding, do you believe your presence affected the length of the witness's appearance?

	New York	Colorado
Significantly Faster	5%	26%
Faster	23%	16%
No Effect	69%	42%
Significantly Slower	3%	16%
Slower	0%	0%
Total	N = 74	N = 19

In sum, the practice of allowing defense attorneys into the grand jury is seen by both sides as an additional measure to ensure accuracy, efficiency, due process and proper protections for individuals involved. Defense attorneys do not appear to sway the results of grand jury proceedings, nor does their presence delay the work of the grand jury. To the contrary, defense lawyers lend legitimacy to the grand jury process when attending with their clients and are able to provide better representation to those witnesses and targets, both before the grand jury and in preparing for what may come next.

Provision of Transcripts



Receipt of witness transcripts helps to enhance case preparation, refresh memories and improve the accuracy and consistency of later statements by witnesses.

“Witnesses should have the right to receive a transcript of their federal grand jury testimony.”³⁸ Colorado gives witnesses and their legal representatives the right to view the transcript of the witnesses’ testimony if called to testify at trial. In addition, the Colorado statute places an obligation on the prosecution to supply the defense with copies of the entire transcript and any evidence presented at the grand jury within 30 days of indictment.³⁹ New York law, similarly, dictates that the accused, *if indicted*, has a right to a transcript of his grand jury testimony.⁴⁰

Despite the legal provisions, only about 35 percent of Colorado defense attorneys have “always” (23 percent) or “mostly” (12 percent) received transcripts of their clients’ testimony, and approximately one-fourth have never received transcripts. These findings may be explained by the fact that only a target or witness who is indicted or called to testify is entitled to a transcript from the grand jury. In New York, about one-half of defense lawyers have always (39 percent) or mostly (11 percent) received transcripts of their client’s testimony. Similar to Colorado, a substantial number of attorneys in New York have never received transcripts (30 percent).

Table 7.

How often has the prosecution made available a transcript of your client's testimony?

	New York	Colorado
Always	39%	23%
Most of the time	11%	12%
Sometimes	11%	23%
Rarely	10%	16%
Never	30%	26%
Total	N = 132	N = 43
Total may not equal 100% due to rounding		

The time it takes to receive grand jury transcripts was a concern, with many New York responders suggesting that they did not always receive transcripts in a timely manner.

Several attorneys in New York noted the transcript's usefulness in urging clients to accept a favorable plea bargain.

Interviews did not fully explain these low rates of receipt. Defense lawyers in both states varied in the frequency with which they request grand jury transcripts, the portions of the transcript requested, and the time it takes to receive the transcripts. New York responses may reflect the fact that the right is limited to grand jury witnesses who are indicted. Most of the defense attorneys interviewed in Colorado request transcripts if their client is indicted or called to testify at a *trial* because they have the legal right to do so. If neither of these conditions exists, many attorneys see little need for a copy of the grand jury transcript. That said, a few Colorado defense lawyers always request a transcript regardless of where their client ends up in the adjudication process, because they find having access to the transcript is important regardless. Frequently, attorneys reported that even if they were present during the grand jury questioning of a client, the transcript serves as a reminder of the questions asked by the prosecutor and grand jurors and the answers supplied by the witness. Prosecutors in both states responded that they almost always receive requests from defense counsel to review the entire transcript.

The time it takes to receive grand jury transcripts was a concern, with many New York responders suggesting that they did not always receive transcripts in a timely manner. In one instance, a New York City attorney was waiting on a district attorney who was taking too long to release the transcript, and as a result, the judge dismissed the case. Several defense attorneys echoed such frustration over delays and prosecutors who “drag their feet” in providing the transcript.

Most New York and Colorado attorneys responding to the survey strongly agreed that the transcript improved the accuracy of their client's future testimony.

Colorado defense attorneys often stated that they received transcripts in a “reasonable amount of time,” but the definition of reasonable varied by jurisdiction and practice. Attorneys who take appointed cases said they often do not receive the grand jury transcript until after the judge has already reviewed it and determined that probable cause exists for the indictment, leaving them little if any time to contest the indictment. New York prosecutors stated that they could not release the entire transcript to defense counsel, but do provide transcripts of the grand jury testimony of trial witnesses before the trial begins. One defense lawyer practicing in upstate New York noted that certain judges release the transcripts several days earlier, giving the attorneys enough time to litigate any issues before trial. Nearly all of the defense attorneys interviewed stated that they received grand jury transcripts when requested but would prefer to have them available earlier in their preparation process.

Ninety-two percent of respondents in both states find that grand jury transcripts are helpful in preparing for trial or plea-bargaining (Table 8). One attorney noted the struggle of having witnesses recount what happened during the grand jury proceedings and explained that transcripts help to augment both attorneys' and clients' memories of the process and fill in gaps when the attorney could not be present for the testimony. Indeed, several attorneys in New York noted the transcript's usefulness in urging clients to accept a favorable plea bargain. Transcripts can have a sobering effect on a client eager to go to trial when the attorney points out what was said and how the jury responded — with an indictment.

Table 8.

If the prosecution made available grand jury transcripts, did this practice help you prepare for trial or plea-bargaining?

	New York	Colorado
Strongly Agree	59%	50%
Agree	33%	42%
Neutral	8%	7%
Disagree	0%	0%
Strongly Disagree	1%	0%
Total	N = 92	N = 27
Total may not equal 100% due to rounding		

Both New York and Colorado defense attorneys find that transcripts are beneficial and should be available to witnesses and their attorneys. Using the grand jury transcript in trial preparations provides attorneys with witness testimony and an overview of the prosecution's theory of the case. Having access to the exact testimony of a client, the questions asked by the prosecutor, and the evidence presented through questioning allows the defense to begin case preparation, craft motions, and construct trial strategy.

Furthermore, transcripts are seen as important tools for ensuring that testimony at trial is accurate and consistent with testimony given at the grand jury. Most New York and Colorado attorneys responding to the survey either strongly agreed (41 percent in NY and 33 percent in CO) or agreed (50 percent in NY and 48 percent in CO) that the transcript improved the accuracy of their client's future testimony. Attorneys frequently cited the emotional and stressful nature of grand jury proceedings as an explanation for why their clients may be unable to recall in detail the testimony previously given.

Table 9.

If the prosecution made available grand jury transcripts, did this practice improve the accuracy of your client's future testimony?

	New York	Colorado
Strongly Agree	41%	33%
Agree	50%	48%
Neutral	9%	19%
Disagree	0%	0%
Strongly Disagree	0%	0%
Total	N = 88	N = 27
Total may not equal 100% due to rounding		

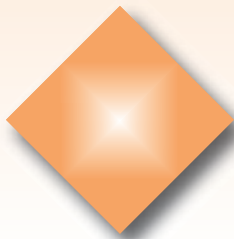
Additional Comments

One common theme brought out in the interviews (but not explicitly addressed in the survey) was how much of

the grand jury transcript was made available to the defense. Many defense attorneys in both states mentioned a desire to have access to the transcript in its entirety, including colloquy. In New York, the grand jury testimony of the prosecution's trial witnesses must be disclosed to the defense before the prosecutor's opening statement. Defense attorneys contend that having this information earlier in the process would improve their ability to prepare for trial or engage in plea-bargaining. Most attorneys stated that they generally only receive the testimony relevant to their client, unless the defense attorney suspects prosecutorial misconduct and then a full transcript can be requested.⁴¹ Many prosecutors point out that they are not allowed to release the full transcript due to the secrecy of the proceedings. Only a judge can determine if portions of the transcript beyond witness and target testimony can be provided.

Overall, attorneys find grand jury transcripts to be helpful in preparing their case for trial or for negotiating plea agreements. They all agree that the transcripts would be more useful if received in their entirety, including the colloquy. Receiving only the portion of the transcript containing the witness's or target's testimony is useful for ensuring accuracy of future testimony, but not as useful for trial and plea agreement preparations as having the entire transcript. From these responses, it appears that supplying more complete grand jury transcripts earlier in the process would better inform the defense in its preparations in the same way that the grand jury process assists the prosecution in identifying witnesses and evidence that leads to the indictment and the ensuing court case.

48 Hours' Notice to Appear



Advance notice to appear is a common practice, increases witness appearance and facilitates preparation. However, judges and defense lawyers believe more time may be required.

Giving adequate notice to witnesses and targets of a grand jury is essential so that participants can obtain counsel if desired, prepare with their attorneys, and make arrangements to appear. NACDL suggests that 72 hours be the minimum amount of notice given. NACDL's *Federal Grand Jury Bill of Rights* states:

All subpoenas for witnesses called before a federal grand jury shall be issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption.⁴²

In practice, subpoenas for grand jury appearances are often issued and served in excess of the 72 hours recommended by NACDL. However, the laws in most states still do not require such notice.⁴³

For example, in New York, despite the adoption of other progressive grand jury practices, there is no rule requiring that sub-

poenas be issued and served within any specific time frame prior to appearance. Colorado rules of criminal procedure require that 48 hours' notice be given to witnesses, but make no mention of excluding weekends or holidays in the calculation of the 48 hours.⁴⁴ The specificity of Colorado's law came as a response to the misuse of grand jury subpoenas by a district attorney in southern Colorado, who, according to his critics, would regularly subpoena individuals for immediate appearance. This abusive practice is no longer allowed and advanced notice for witnesses often exceeds the 72 hours recommended, even though not required by law.

Table 10.

How often has the prosecution given the witness at least 48 hours' notice before the date of his grand jury appearance?

	New York	Colorado
Always	27%	49%
Most of the Time	49%	33%
Sometimes	19%	12%
Rarely	2%	5%
Never	2%	2%
Total	N = 132	N = 43

Total may not equal 100% due to rounding

As Table 10 demonstrates, most respondents reported that the prosecution gave witnesses at least 48 hours' notice before the date of their appearance. In New York, 76 percent replied that all or most of their clients receive at least 48 hours' notice. In Colorado, this percentage was even higher at 82 percent. Surprisingly, seven percent of Colorado defense attorneys reported that their clients rarely or never receive 48 hours' notice. Interviews identified a potential explanation for this figure. Defense attorneys who take cases through the Alternate Defense Counsel⁴⁵ (ADC) system — especially in Denver — report that they are often assigned clients a day or less before a scheduled grand jury appearance. It is not clear, though, where the delay lies — whether clients do not ask for counsel until the last minute or the court is tardy in contacting the ADC. Prosecutors in both states assert that they try to provide as much notice as possible to potential witnesses and targets.

Most respondents reported that the prosecution gave witnesses at least 48 hours' notice before the date of their appearance.

Prosecutors in both states assert that they try to provide as much notice as possible to potential witnesses and targets.

Although just four percent of New York defense attorneys surveyed reported they rarely or never receive 48 hours' notice, they voiced similar frustrations about prior notice of a client's testimony. In some cases, the defendant is issued a grand jury date at arraignment and must let the prosecutor know then if he wishes to testify at the grand jury. A defendant who has been arraigned on felony charges that are the subject of a grand jury proceeding is entitled to notice and a reasonable time to exercise his right to appear as a witness, but appointment of counsel takes additional time; in practice, an attorney may not receive the case until an hour before the client is set to testify at the grand jury. One lawyer noted that in a few cases his notice of appointment was time-stamped in his office the same day as his client's grand jury appearance. He is optimistic, however, that the practice is changing and that defense lawyers are more frequently receiving sufficient notice. Requiring a standard notification period would not necessitate significant changes in practice in most cases but could provide greater access to representation for those individuals who have not traditionally received 48 hours' or more notice prior to a grand jury appearance.

Table 11.

If the prosecution DID NOT provide your client at least 48 hours' notice before his grand jury appearance, would he have been able to obtain satisfactory representation for the appearance?

	New York	Colorado
Always	8%	14%
Most of the Time	23%	6%
Sometimes	12%	6%
Rarely	26%	20%
Never	32%	54%
Total	N = 125	N = 35

Total may not equal 100% due to rounding

Table 11 details the importance of prior notice in a witness's preparation for the grand jury. Defense attorneys in both states overwhelmingly believe their clients would have grave difficulty obtaining satisfactory representation without sufficient notice. Colorado defense attorneys more often reported this belief (74 percent) than New York attorneys (58 percent). These differences may reflect the distinctive systems for obtaining appointed counsel in the two states. In New York, public defenders can be appointed for indi-

viduals brought before the grand jury, but in Colorado the public defender’s office can only take cases after an indictment (or information if the grand jury is not used). When private counsel is assigned (from the ADC list), there is a lag time between the subpoena to testify and an attorney’s assignment to the case.

The practice of providing at least 48 hours’ notice to witnesses has many other important effects on the proper working of the grand jury system. As indicated in Table 12, virtually every responding defense attorney in New York (99 percent) and a substantial number in Colorado (87 percent) said that prior notice helped them to prepare their clients for the grand jury, and a majority (61 percent in CO and just over 50 percent in NY) said that their clients were more likely to appear if given advance notice of the subpoena (see Table 13). Interviewees stated that prior preparation is essential so that the client can testify accurately and investigate plea opportunities.

One lawyer noted that in a few cases his notice of appointment was time-stamped in his office the same day as his client’s grand jury appearance.

When representing a target as opposed to a regular witness, respondents disagreed over how much prior notice is necessary. At one end of the spectrum, a New York public defender said that he considers a day and a half enough time to prepare a client, but he was contradicted by the majority of respondents, who sought three days or more prior notice. One lawyer explained that he needs no less than five days to prepare a client for questions and testimony. Another attorney stated his preference to meet with clients between four and six times, which would take several days.

Table 12.

If the prosecution has provided your client at least 48 hours’ notice before his grand jury appearance, did this practice help you prepare your client for the grand jury?

	New York	Colorado
Always	56%	49%
Most of the Time	43%	38%
Sometimes	1%	3%
Rarely	0%	8%
Never	0%	3%
Total	N = 127	N = 37
Total may not equal 100% due to rounding		

Attorneys in Colorado uniformly supported the state’s requirement of at least 48 hours’ notice in order to provide time to prepare their cases. Nevertheless, several lawyers expressed concern that 48 hours is insufficient time for a witness or target to obtain an attorney, if desired, and for that attorney to be briefed on the case and engage in adequate preparation with the client. Further, defense lawyers who receive referrals from the ADC expressed great concern about the short notice they receive. As one defense attorney explained, the ADC counsel may have to “drop everything to be there” or sometimes may even pick up the representation with one hour’s notice because he is already in the courthouse.

In general, retained lawyers sought additional days while appointed lawyers and public defenders were satisfied with 48-72 hours of prior preparation, the latter likely reflecting the rushed nature of their practices. However, no attorney felt that less than 48 hours is sufficient. Indeed, despite some prosecutors’ fears that “a witness might depend too much on the lawyer and ‘repeat or parrot responses discussed with the lawyer, rather than testify[ing] fully and frankly in his or her own words’” when the lawyer is present for grand jury proceedings, interviewees noted that they rarely have the time for such extensive preparation.⁴⁶

Table 13.

If the prosecution has provided your client at least 48 hours’ notice before his grand jury appearance, did this practice make your client more likely to appear before the grand jury?

	New York	Colorado
Always	10%	13%
Most of the Time	40%	48%
Sometimes	39%	29%
Rarely	8%	7%
Never	3%	3%
Total	N = 117	N = 31
Total may not equal 100% due to rounding		

A majority said that their clients were more likely to appear if given advance notice of the subpoena.

Further, none of the defense lawyers reported instances in which their clients failed to appear after receiving notice of their grand jury appearance. One lawyer noted that witnesses, especially targets, are more likely to appear if they are given notice and thus time to prepare, making it more likely that a grand jury will hear from both sides before returning an indictment. Importantly, none of the respondents in either state believes that the safety of witnesses is compromised when individuals are given sufficient notice. As one defense lawyer explained, “witness intimidation is very rare.” This view was reiterated by a New York prosecutor who is a strong supporter of prior notice, who stated that neither witness intimidation nor flight is a serious concern.

None of the respondents in either state believes that the safety of witnesses is compromised when individuals are given sufficient notice.

Prosecutors did not raise any specific objections to the notice requirement. Those interviewed reported that they try to provide as much notice as possible and attempt to work with defense attorneys and their clients if more time is needed for preparation. One Colorado prosecutor said that he attempts to notify in-state witnesses at least 10 days prior to the grand jury and tries to provide out-of-state witnesses with even more notice. Given the infrequent meetings of Colorado grand juries — they typically sit one week per month — both prosecutors and defense lawyers said that continuances can be a problem. If a witness is pushed back, it may require moving the case to the next meeting of the grand jury, which can cause additional delays.

This is much less of a concern in the New York system where, as with the federal system, the grand jury meets more frequently. In fact, in New York the concern is just the opposite — namely that the request for an indictment may be brought too quickly to the grand jury. One prosecutor noted that a shorter notice is frequently discussed with defense

Several lawyers expressed concern that 48 hours is insufficient time for a witness or target to obtain an attorney, if desired, and for that attorney to be briefed on the case and engage in adequate preparation with the client.

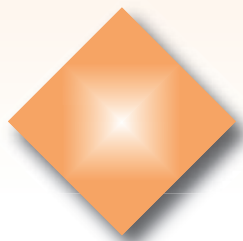
counsel first. If the target does not intend to testify, then the case can be brought to the grand jury the next day, if available. Prosecutors may do this if they are running up against the time limit to bring an indictment.⁴⁷ Prosecutors also acknowledged that they intentionally provide less than 48 hours’ notice to move a sensi-

tive or sealed case through to the grand jury to protect the victim. Their admission was confirmed by interviews with New York defense attorneys who have had clients notified at arraignment of their grand jury investigation and asked whether they intend to testify.

Overall, providing advanced notice to witnesses and targets to appear before the grand jury improves the administration of justice by allowing individuals time to retain counsel, prepare for testimony with their lawyers, and make arrangements to appear before the grand jury. The greatest concern expressed by attorneys was the delay between witness notification of the grand jury appearance and appointment of counsel. A top New York prosecutor put it best when he explained, “If the state is going to give the witness the right to be represented by counsel, it is only right that he should have the time to be prepared and to have an attorney present.” Increasing the notification period to at least 72 hours may mediate this concern by providing a greater amount of time for witnesses to contact an attorney or for counsel to be appointed and for lawyer and client to be prepared.

A top New York prosecutor put it best when he explained, “If the state is going to give the witness the right to be represented by counsel, it is only right that he should have the time to be prepared and to have an attorney present.”

Exculpatory Evidence



When exculpatory evidence is disclosed, it advances justice, but the practice must be routinized.

In the report accompanying its *Federal Grand Jury Bill of Rights*, NACDL's Commission to Reform the Federal Grand Jury declared that:

No prosecutor shall knowingly fail to disclose to the federal grand jury evidence in the prosecutor's possession that exonerates the target or subject of the offense. Such disclosure obligations shall not include an obligation to disclose matters that affect credibility such as prior inconsistent statements or *Giglio* materials.⁴⁸

Of the two states studied, only New York requires disclosure of exculpatory evidence to the grand jury. New York prosecutors must disclose exculpatory evidence that would have materially influenced the grand jury investigation.⁴⁹ By contrast, in Colorado, there is no such requirement.

Whether disclosure is consistently enforced, however, remains very much an open question. As the results in Table 14 indicate, a large majority of responding defense attorneys in New York (77 percent) said that prosecutors rarely or never disclose exculpatory evidence in grand jury proceedings. These numbers are similar to the percentage of Colorado respondents who reported the same thing (72 percent). Indeed, a higher percentage of defense attorneys in Colorado said that prosecutors had always or regularly disclosed exculpatory evidence (seven percent) than respondents in New York (four percent) even though Colorado law does not require disclosure.

Table 14.

How often has the prosecution disclosed exculpatory evidence to the grand jury?

	New York	Colorado
Always	1%	2%
Most of the time	3%	5%
Sometimes	20%	21%
Rarely	44%	33%
Never	33%	39%
Total	132	43

Total may not equal 100% due to rounding

To be sure, exculpatory evidence may not exist in a particular case, and therefore prosecutors responded that it is not surprising that it seldom would be disclosed to the grand jury. New York's limited rule for what must be presented (evidence that would materially influence the grand jury's investigation) is certainly a contributing factor, but the authors cannot rule out the effect of prosecutorial attitudes concerning evidence that does not support guilt. Interviews in New York and Colorado paint a troubling picture in which prosecutors are reluctant to disclose such evidence in discovery when it is available. None of the defense lawyers interviewed from New York City said they had received exculpatory evidence from the prosecution without prompting.

Most of the New York City attorneys claimed that prosecutors have varying conceptions of what could be considered exculpatory, and thus, do not apply a consistent or appropriate standard. The defense attorneys believe that many prosecutors think exculpatory evidence must "prove" innocence and not merely cast doubt on the case. Others believe the problem is not with the prosecutors' intentions, but rather with the definition of "exculpatory," as it tends to leave issues in the eye of the beholder. Further, many think that judges take a narrow definition of exculpatory evidence, and thus do not enforce its disclosure.

A large majority of responding defense attorneys in New York (77 percent) said that prosecutors rarely or never disclose exculpatory evidence in grand jury proceedings.

Defense attorneys in Colorado described a different scene. Although there was considerable variation in the reports of disclosure, defense lawyers did not readily report having to “fight” with prosecutors to secure the introduction of exculpatory evidence. Some of this can be ascribed to a courteous culture of practice in Colorado, but attorneys also noted that prosecutors may volunteer exculpatory evidence in cases they do not want to indict. Defense lawyers opined that, for a variety of reasons, prosecutors may feel compelled to bring a “weak” case before a grand jury — whether to allay the potential concerns of politicians, voters or key law enforcement figures — but in volunteering exculpatory evidence, prosecutors can steer the grand jury not to pursue the prosecution.

When the prosecution introduces exculpatory evidence, the research indicates significant positive benefits for the speed of the grand jury’s work. In fact, approximately 80 percent of respondents said the pace of the grand jury either quickens or is not affected, with only about one-fifth of respondents saying the practice slows the work of the grand jury (Table 15). Not surprisingly, clear majorities from both states (76 percent in New York and 59 percent in Colorado) say that grand jurors are less likely to indict a target when the prosecution introduces exculpatory evidence (Table 16). This is exactly as it should be since the prosecution’s presentation of exculpatory evidence suggests that there are good grounds to doubt the target’s possible guilt. If the outcome were reversed — if the prosecution’s introduction of exculpatory evidence made grand jurors more likely to indict a target — then the practice would be not only illogical but also deeply concerning.

When the prosecution introduces exculpatory evidence, the research indicates significant positive benefits for the speed of the grand jury’s work.

Table 15.

If the prosecution disclosed exculpatory evidence to the grand jury, did this practice affect the pace of the grand jury’s work?

	New York	Colorado
Significantly faster	4%	0%
Somewhat faster	26%	40%
Did not affect pace	52%	40%
Somewhat slower	18%	0%
Significantly slower	0%	20%
Total	N = 72	N = 17
Total may not equal 100% due to rounding		

Table 16.

If the prosecution disclosed exculpatory evidence to the grand jury, did this practice make the grand jury less likely to indict the target?

	New York	Colorado
Strongly agree	14%	12%
Agree	62%	47%
Neutral	12%	29%
Disagree	8%	6%
Strongly Disagree	3%	6%
Total	N = 64	N = 17
Total may not equal 100% due to rounding		

New York and Colorado law permits the defense lawyer to request that the prosecutor present exculpatory evidence to the grand jury. Given the importance of exculpatory evidence, it is disturbing that 32 percent of New York respondents and 42 percent of Colorado respondents report that the prosecution rarely or never accommodates defense requests to present exculpatory evidence (Table 17). But, it is just as troubling that almost the same percentage of defense lawyers in Colorado report that they have never made such a request, despite the fact that defense attorneys from both states uniformly stressed the importance of obtaining exculpatory evidence in order to craft their defense and prepare for possible plea bargaining. In the interviews, Colorado defense lawyers said that “local practice” did not encourage such requests. The result is a vicious circle in which defense lawyers do not make requests for presentation of evidence that they believe will be denied.

Table 17.

How often has the prosecution accommodated your request to present exculpatory evidence (including the presence of witnesses) to a grand jury?

	New York	Colorado
Always	4%	3%
Most of the time	23%	7%
Sometimes	41%	7%
Rarely	24%	14%
Never	8%	28%
Never Requested (N/A)	0%	41%
Total	85	29

Occasionally, defense lawyers will make formal requests to have witnesses brought in or evidence presented before the grand jury that would exculpate their clients. A former prosecutor explained that he often will make a deliberate, written request to have exculpatory evidence presented. He feels that a good prosecutor would prefer to have this evidence presented at the grand jury stage and fail to receive an indictment than to wait and risk a wrongful conviction. Others readily agreed.

Thirty-two percent of New York respondents and 42 percent of Colorado respondents report that the prosecution rarely or never accommodates defense requests to present exculpatory evidence.

Prosecutors asserted that they always present exculpatory material in their possession to the grand jury. Further, they said they are reluctant to bring a case to the grand jury when the evidence suggests an indictment is unlikely. Their account would explain why exculpatory evidence is rarely presented to grand jurors, as prosecutors state that they would demur from those matters with conflicting, weak or even exculpatory evidence. But defense attorneys found this explanation difficult to accept, as they reported uncovering exculpatory evidence later during trial preparation that they believe the prosecution should have considered before bringing the case to a grand jury. According to prosecutors, when exculpatory evidence is available to be pre-

sented at the grand jury, it is often in the form of recanted witness statements, misidentification, assertions of self-defense, or contradicting witness accounts. One prosecutor cited assaults with some gang affiliation as typical cases where exculpatory material is presented to the grand jury. In this type of case, a witness may recant prior statements, which the prosecutor then feels obliged to present to the grand jury despite believing that the change is the result of gang pressure. Again, prosecutors consistently report that when this evidence is in their possession they always present it to the grand jury.

The process available to present this evidence, however, is of great concern to the defense attorneys interviewed in both states. One defense attorney described his attempts to bring exculpatory evidence before the grand jury only to have those requests denied. He pointed the finger at an unwilling prosecutor who sought to shirk his responsibility under the guise of “the grand jury’s will.” Therefore, defense attorneys advocate a formal mechanism to present exculpatory evidence to the grand jury, especially in cases where the prosecution will not willingly do so on its own.

Currently, defense attorneys do not see any incentives for the prosecution to present this information, other than to avoid an unwanted indictment. In response, prosecutors claim that any exculpatory evidence eventually rises to the surface through witness testimony and that no special measures are necessary to require its introduction. This is especially the case, they say, because exculpatory evidence is rarely clear and can be obscured by the motives of witnesses. However, defense lawyers effectively counter that assertion by pointing out that prosecutors make little effort to present exculpatory evidence because they are not required by law (Colorado) or their refusal is rarely penalized (New York). Without a formal mechanism to step around prosecutorial intransigence, defense lawyers say, unnecessary and unfounded indictments may go forward, only to be resolved later in the criminal justice process at greater cost and inconvenience.

One defense attorney described his attempts to bring exculpatory evidence before the grand jury only to have those requests denied.

CONCLUSION

Prosecutors, defense attorneys and retired judges have provided invaluable insight on the effects of grand jury reform in New York and Colorado. Together, these professionals offered honest and candid assessments and described in detail their experiences with state grand juries. Results of the survey and interviews yield four key findings:

- (1) **When witnesses and targets are allowed defense counsel in the grand jury room,** there exists an additional measure to help safeguard the integrity of the grand jury system, facilitate accurate testimony, and provide proper protections for all grand jury participants. The presence of defense counsel emboldens prosecutors to be assertive in their questioning because the witnesses' rights and interests are adequately protected. Neither prosecutors nor defense lawyers object to this practice, and most praise it.
- (2) **Receipt of grand jury transcripts by the defendant facilitates preparation for trial or plea,** while receipt by witnesses provides an opportunity to correct mistakes and misstatements, helps refresh memories, and improves the accuracy of later statements.
- (3) **Advance notice to appear at a grand jury,** common in practice, increases witness appearance and facilitates preparation; however, the present practice of 48 hours' notice is deemed insufficient to obtain representation and properly prepare for the client's grand jury appearance.
- (4) **When exculpatory evidence is disclosed, it advances justice.** The practice, however, must be standardized.

Uniformly, these findings show that NACDL's proposed grand jury reforms have no significant, deleterious effects when implemented in state grand juries. Rather, the reforms are viewed by both sides of the adversarial system as increasing the accuracy, effectiveness and legitimacy of the grand jury. Whether protecting against unwarranted prosecutions or improving the state's investigative tool, the four grand jury reforms examined in this report are important and effective advancements and should be implemented elsewhere. In addition, the other measures outlined in NACDL's *Federal Grand Jury Bill of Rights* warrant consideration and study. Colorado and New York are effective laboratories for reform. It is time for other jurisdictions to seize the mantle of innovation and investigate the advantages that will follow from future grand jury reform.

Endnotes

1. John Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341 (2005).
2. *Id.*
3. *Id.*; Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).
4. H. Jeffrey Bayless, *Grand Jury Reform: The Colorado Experience*, 67 A.B.A. J. 568 (1981); Richard Gerstein & Laurie Robinson, *Remedy for the Grand Jury: Retain But Reform*, 64 A.B.A. J. 337 (1978).
5. Maurice Carroll, *Elimination of Grand Juries Gaining Support in Albany*, N.Y. TIMES, May 3, 1985, at B2.
6. Jan Hoffman, *No Longer Judicially Sacred, Grand Jury is Under Review*, N.Y. TIMES, March 30, 1996, at A1.
7. *Id.*
8. Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1 (2002).
9. Decker, *supra* note 1.
10. R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361 (2000).
11. Simmons, *supra* note 8.
12. William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES, June 20, 2004, at A1.
13. *Id.*
14. Simmons, *supra* note 8.
15. Bob Kaye, *How New York State Grand Juries Work*, <http://campus.udayton.edu/~grandjur/recent/hnygiw.htm> (last visited Sept. 28, 2011); *The Grand Jury Project, Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman* (1999).
16. Scott Skolnik, *Grand Jury: Power Shift?*, LEGAL TIMES, Apr. 12, 1999, available at <http://www.truthinjustice.org/grandjury.htm> (last visited Sept. 28, 2011).
17. Decker, *supra* note 1.
18. Glaberson, *supra* note 12.
19. N.Y. CPL. LAW § 190.52
20. *New York State Unified Court System*, <http://www.nycourts.gov/litigants/crimjusticesyshandbk.shtml> (last visited Sept. 28, 2011).
21. *Id.*
22. Gerald Lefcourt, *High Time for a Bill of Rights for the Grand Jury*, THE CHAMPION, Apr. 1998 at 5.
23. Victoria Lutz & Cara Bonomolo, *Battered Women, Self Defense, and the Grand Jury*, TRIAL, Aug. 1, 1996, at 46, available at http://www.pace.edu/page.cfm?doc_id=26949 (last visited Sept. 28, 2011); Cassidy, *supra* note 10.
24. Decker, *supra* note 1.
25. Colo. Const. art. 2, § 8.
26. Bayless, *supra* note 4.
27. *People ex. rel. Losavio v. J.L.*, 580 P.2d 23, 28 (Colo. 1978).
28. Colo. R. Crim. P. 6.4; Colo. Rev. Stat. § 16-5-204(f).
29. Colo. R. Crim. P. 6.1.
30. Authors' communication with attorneys (Feb. 2009).
31. Colo. Rev. Stat. § 16-5-204(4a).
32. Of the 282 respondents, 68 were removed from the analysis file because they had no grand jury experience. In addition, eight duplicate responses from participants and 14 respondents who answered less than five questions in the survey were removed from the analysis.
33. This division is expected given the size of each state's bar.
34. National Association of Criminal Defense Lawyers, *Federal Grand Jury Reform Report and Bill of Rights*, <http://www.nacdl.org/criminaldefense.aspx?id=10372> (last visited Sept. 28, 2011).
35. Decker, *supra* note 1.

36. There may have been some confusion in survey respondents' selection of "sometimes" in answering the question about accompanying non-immunized witnesses into the grand jury room. For example, five percent of New York respondents selected this response. Attorneys familiar with criminal law practices in New York suggest it would be "implausible" for attorneys to sometimes accompany non-immunized witnesses. Due to the closed-ended nature of the survey question, it is unknown why respondents chose this answer. It may be that respondents were suggesting that they rarely have clients who are witnesses but not targets, and who, without immunity, then testify before the grand jury.

37. Council for Court Excellence, *The Grand Jury of Tomorrow* (2001), available at http://www.courtexcellence.org/PublicationsNew/policy_reform_reports/grand_jury_of_tomorrow_2001.pdf (last visited Sept. 28, 2011).

38. *Federal Grand Jury Reform Report and Bill of Rights*, *supra* note 34.

40. N.Y. Crim. Pro. Law § 240.20(1)(b) (McKinney 2002).

41. Only one attorney on the western slope of Colorado, a more rural area than the practice areas of most attorneys interviewed in either state, declared that he always requests, and has never been denied, the full grand jury transcript. His example most likely represents a unique jurisdictional practice.

42. *Federal Grand Jury Reform Report and Bill of Rights*, *supra* note 34.

43. Council for Court Excellence, *supra* note 37.

44. Colo. R. Crim. P. 6.1.

45. The Office of Alternate Defense Counsel provides private attorneys for indigent defendants in criminal cases prior to indictment and in criminal and delinquency cases in which the Public Defender has determined it has a conflict of interest.

46. Kathryn White, *What Have You Done With My Lawyer? The Grand Jury Witness's Right to Consult With Counsel*, 32 LOY. L.A. L. REV. 907, 933 (1999).

47. Upon filing a felony complaint and confining a defendant to custody, prosecutors in New York have 120 hours (or 144 hours if custody overlaps with a weekend) in which to proceed to a hearing or provide a written statement that a grand jury has voted on the indictment.

48. *Federal Grand Jury Reform Report and Bill of Rights*, *supra* note 34.

49. *People v. Monroe*, 125 Misc. 2d 550, 558-59, 480 N.Y. Sup. 2d 259, 266 (1984).

This publication is available online at www.nacdl.org/2stategrandjury



**NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

1660 L Street NW, 12th Floor

Washington, DC 20036

Phone: 202-872-8600

www.nacdl.org