Defending Liberty
Pursuing Justice

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March 2, 2001

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01-CR-B

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The Advisory Committee on Criminal Rules has published for comment amendments to Rules 6 and 35 of the Federal Rules of Criminal Procedure

On behalf of the American Bar Association it is requested that the Committee consider the following Association views related to these Rules.

Rule 6

While the Advisory Committee has proposed only stylistic changes to Rule 6, the American Bar Association asks that the Committee consider the Association's long standing policy related to this Rule. This policy supports allowing any witness who appears before a grand jury and testifies to be accompanied by counsel. The ABA policy provides that the attorney may only be present when the witness is present. Furthermore, the attorney would be present only to advise the client, not to address the grand jury or otherwise take part in the proceedings before it.

Since the Advisory Committee is making some much-needed changes to the Federal Rules of Criminal Procedure, the Association suggests that the Committee add a provision allowing the presence of a witness' counsel when the witness appears before the grand jury. This change would bring the Federal Rules of Criminal Procedure in line with those States that have already allowed witnesses to appear with counsel during grand jury proceedings. Further, this would enhance the fairness of the grand jury process without injury to the prosecution's case.

A copy of the relevant Association policy is enclosed.

Rule 35

The Advisory Committee recommends certain clarifying, yet substantive amendments to Rule 35.

The Association recommends that the Committee consider making further amendments to allow defense counsel to move for reduction and corrections of sentence. Prior to passage of the Comprehensive Crime Control Act of 1984, the Rule provided that defense counsel could make such a motion for the court's consideration.

Enclosed is the relevant American Bar Association policy on this matter. Although adopted in 1987, the principles it espouses are still valid. The accompanying report, which is not a part of the official ABA policy, may be useful to the Committee in considering this matter.

The American Bar Association appreciates the opportunity to transmit its views on these matters being considered by the Advisory Committee.

Sincerely,

Robert D Evans

Robert D. Evans

/RE

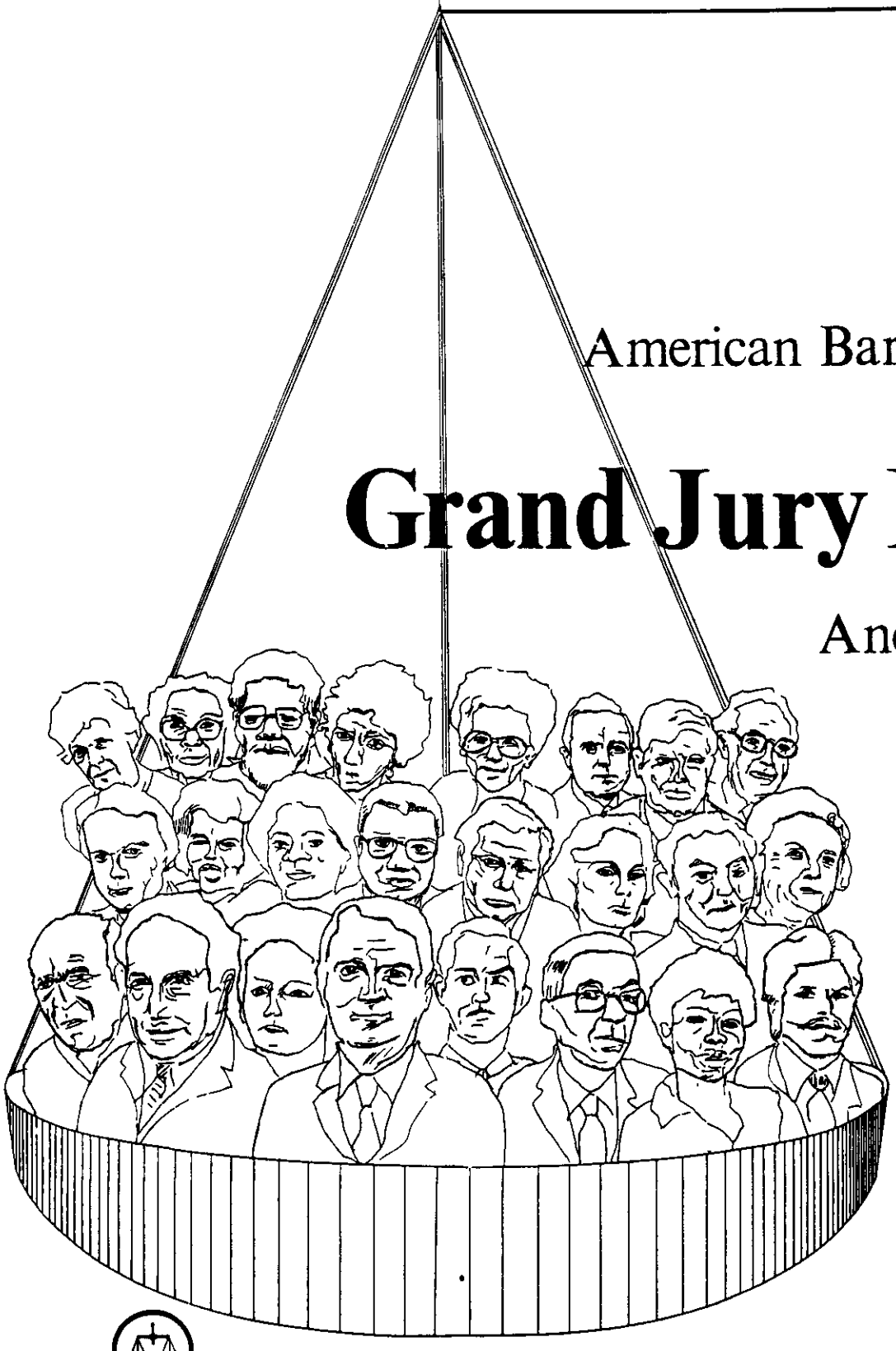
Enclosures

0892 wpd

American Bar Association

Grand Jury Policy

And Model Act (1977-1982)



Published by the Section of Criminal Justice — 1982

ABA Grand Jury Policy and Model Act (1977-82)

Only the grand jury principles and black letter model act constitute approved ABA policy
The commentary and backup materials are included for explanatory purposes.

ABA Section of Criminal Justice
1800 M Street, N.W.
Washington, D.C. 20036
202/331-2260

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Editor: Marcia Christensen
Manuscript Typist: Carol Rose

PREFACE

This publication sets forth the American Bar Association policies relating to grand juries. It includes thirty grand jury principles and the Model Grand Jury Act

These principles and policies are the cooperative work of prosecutors, defense counsel, academicians and judges. They evolved over a seven-year period under the leadership of Richard E Gerstein, former State's Attorney in Dade County, Florida, who is now a private practitioner. He and his Committee studied grand jury practice, evaluated federal and state experience and made the recommendations which are set forth in this document. These recommendations have been approved by the ABA House of Delegates and have been adopted as Association policy.

I trust that each of you who receive this publication will join us in an effort to implement these principles. We urge adoption of the model act or incorporation of these principles in rules of court We will confer with you if you contact the Section office in Washington, D.C.

I also hope that each of you will consider membership in the ABA Criminal Justice Section. If you are not already a member of the Section, I urge you to join and become active We have many projects which are worthy of your effort. A membership application is included in the back of this publication

Judge Sylvia Bacon
Chairperson

May 1982

Introduction

The Problem

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England — where the grand jury originated in the 12th Century — abolished the institution in 1933.

During its eight centuries of existence, the grand jury has had a dual function — as a shield for the innocent and a sword for the government. The colonists brought it from England as part of the common law. They believed that, as a citizens' body, the grand jury would protect them from unwarranted prosecution by the Crown. Later, the requirement of grand jury indictment was embodied in the Fifth Amendment to the Constitution, thus mandating its use today in all federal criminal cases.

The grand jury is a unique body in our legal system. It possesses awesome powers: The grand jury's work is conducted in secret. It has virtually unlimited subpoena powers. It can question witnesses without their lawyer present. Courts do not generally supervise its work closely. The grand jury can have recalcitrant witnesses jailed without trial.

Over the past 200 years, the grand jury has undergone great evolution. The majority of states now allow prosecution by indictment or by information, and in many, it has fallen largely into disuse. Yet use of the grand jury has increased on the federal level in recent years. It has become a powerful tool for investigating complex white collar crime, organized crime and public corruption.

This increased use of the federal grand jury has had several results. There have been increasing charges of grand jury abuse — charges that the grand jury is but a "tool" of the prosecution, and charges that its investigative powers are being used unfairly. But while many such charges have been voiced in the past by radical groups and the criminal defense community, business leaders are now voicing such allegations. Organizations such as General Motors and Braniff Airways — themselves the subjects of intensive federal grand jury scrutiny — have criticized the uses to which the grand jury is put. Additionally, more and more attorneys in large civil firms, whose clients for the first time are being called before grand juries in major tax and antitrust investigations, are beginning to recognize the problems of grand jury abuse. They are surprised to learn, for example, that they cannot accompany their client inside the grand jury room — and that, even if he were a target, their client has no right to present his side of the story, or to present exculpatory evidence.

The question of fairness in grand jury proceedings has thus become an issue of broad interest to the legal profession.

The grand jury has largely escaped the attention given over the past two decades to virtually every other stage of a criminal proceeding. As a result, with the increased focus recently on the need for correction of abuses, a number of organizations and individuals have come forward to propose reforms. These proposals have drawn strong attack from many prosecutors — in particular the U.S. Department of Justice — and from some members of the judiciary. Nonetheless, a series of congressional hearings over the past several Congresses has exposed numerous abuses and given exposure to a host of potential reforms.

ABA Response

Since 1975, the American Bar Association House of Delegates has adopted a number of proposals to bring the grand jury into the 20th Century, and to restore its "protective" function. The ABA has opposed abolition of the grand jury, however. Abolition on the federal level would require amending the Bill of Rights — a dangerous precedent. The ABA recognizes, too, that grand juries play an effective role in investigating complex white collar crime. The vital role played by the grand jury during the Watergate era is evidence of this. Finally, grand juries provide an important opportunity for citizens to participate in the criminal justice system.

In August 1975, a Committee on the Grand Jury created by the American Bar Association's Criminal Justice Section obtained ABA House of Delegates backing for a policy addressing a grand jury reform bill in the 94th Congress, H.R. 1277. Many key aspects of grand jury reform were covered in the 1975 policy — including counsel in the grand jury room, and transactional immunity.

Believing, however, that the Association's policy should be broadened, the Grand Jury Committee subsequently presented a comprehensive report with recommendations to the Criminal Justice Section's governing Council, where it received unanimous backing. Thus, a package of 25 grand jury principles was brought to the House of Delegates of the ABA in August 1977. During debate, the House of Delegates approved the vast majority of these principles by overwhelming voice vote. The hotly-contested question of allowing counsel in the grand jury room (principle #1) was approved by the House by a two-to-one margin — 196 to 83 — despite substantial opposition voiced by the U.S. Department of Justice. Similarly, despite articulate criticism of principle #17, supporting transactional immunity, the ABA reaffirmed its support for that position.

Another of the first 25 ABA grand jury principles (#5) provides that the target of a grand jury investigation should be given the right to testify if he signs a waver of immunity. Prosecutors should notify the target of the opportunity to testify, unless notification would result in flight, endanger others or obstruct justice, or the prosecutor cannot with reasonable diligence notify the target. Fairness is the

basis for this proposal. A target should be given the right to tell *his* side of the story before an indictment is returned. Without having the opportunity to hear from the subject of the investigation, the grand jury's function of arriving at an accurate indictment is undermined. Still another proposal in the initial package of reforms (principle #3) would obligate the prosecutor to present exculpatory evidence to the grand jury: No prosecutor should knowingly fail to disclose to the grand jury evidence which substantially tends to negate guilt. This is needed to insure public confidence in the grand jury's ultimate decision to prosecute. The prosecutor also has a basic responsibility to seek a just result. The grand jury has no way to learn of exculpatory evidence unless alerted to it by the prosecutor. This would bring greater accuracy to the screening decision. Otherwise, a person may go to trial on the basis of an ex parte proceeding from which all exculpatory evidence was excluded. Other ABA principles among the original 25 cover such areas as requiring recording of all grand jury proceedings, not allowing the prosecutor to present evidence to the grand jury which he knows to be constitutionally inadmissible at trial, and providing that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. It should be noted that the Department of Justice, which fiercely opposed some aspects of the proposed policy, did support 20 of the principles as finally drafted. This in part resulted from the Grand Jury Committee's efforts to work closely with the Department in hammering out compromises, and in many areas these efforts were successful.

Since 1977, five additional grand jury principles have been proposed by the Committee, amended and/or approved by the Criminal Justice Section's governing Council, and eventually adopted by the American Bar Association.

In August 1980 the ABA House of Delegates approved three proposals dealing with constitutional privilege against self-incrimination (principle #26); informing the grand jury as to the elements of the crimes considered by it (principle #27); and protecting witnesses from contempt charges for refusing to testify (principle #28).

Then, in February 1981 the Association approved two more reform proposals sponsored by the Criminal Justice Section (amending one slightly to strengthen its impact), and offered its support to a Section-proposed amendment to the Federal Rules of Criminal Procedure regarding disclosure of grand jury proceedings. Principle #29, generally prohibiting calling of lawyers before the grand jury to be questioned on matters learned during the legitimate investigation and preparation of a case, or being subpoenaed to produce work product material concerning the client's case, was strengthened by the ABA House of Delegates by a floor amendment to delete the language, "absent extraordinary and compelling circumstances." Principle #30, approved by the ABA as submitted by the Section, is designed to make uniform a practice now used in some jurisdictions which requires grand jurors to address evidence against each named defendant in a multi-defendant case separately, and each count in a multi-count case independently. The Section-proposed amendment to Rule 6(e) of the F.R.Cr.P. would prevent unauthorized disclosure of secret grand jury information for use in civil proceedings. As a supplement to the package of 30 specific grand jury reform principles, this ABA policy position was proposed by the Section to ensure that the grand jury is not used as an uncontrolled means of enforcing civil laws.

In late 1979, the Grand Jury Committee began another task, as well — the drafting of a model state grand jury reform act — to serve as a guide to assist states in implementing the ABA-approved proposals. The Committee believed that a model grand jury act could serve as an excellent catalyst to spur additional action by state legislatures to revise statutes to reflect grand jury reforms, facilitating legislative consideration of ABA proposals After several years of work, the Grand Jury Committee and the Criminal Justice Section obtained ABA House of Delegates approval for the Model Grand Jury Act of January 1982, included in this monograph.

It is significant to note that the Committee which drafted these policies from 1977 on, has been composed of persons with extensive prosecutorial experience. As a result, the principles are realistic and practical — not ivory tower concepts conjured up without reference to day-to-day criminal justice problems. The Committee is chaired by Richard E. Gerstein, who served more than 20 years as State's Attorney of the 11th Judicial Circuit of Florida (the greater Miami area), and who received the 1979 Rockefeller Public Service Award for "improving justice and reducing crime" on the basis of his longterm and successful efforts in grand jury reform. Also on the Committee since 1977 have been Seymour Glanzer, one of the original Watergate prosecutors, and Paul Johnson, who served as State Attorney in Tampa, Florida for many years. Charles Ruff, the last Watergate Special Prosecutor, and until recently U S. Attorney for the District of Columbia, was a member of the Committee in its early years.

It is of equal import that the 10,000 members of the ABA Criminal Justice Section — which directs and oversees the work of its Grand Jury and numerous other Committees through its governing Council, and which must approve work products for transmittal to the ABA's policy-making House of Delegates — represents every segment of the criminal justice system: prosecutors, trial and appellate judges, public and private defense attorneys, corrections officials, persons engaged in investigation and enforcement, and law teachers and students.

Impact

The Grand Jury Committee, the Criminal Justice Section and the ABA have been extremely pleased with the impact many of these proposals for grand jury reform have had. In addition to the fact that 15 states now allow lawyers in the grand jury room, many states (including New Mexico and Colorado) have enacted broad grand jury reform bills

The U.S. Department of Justice has also instituted changes in its internal procedures on handling of grand juries. Revisions which adopt many of the ABA's principles have been promulgated by the Department in the Manual for United States Attorneys An amendment to the Federal Rules of Criminal Procedure has also now been adopted to require recording of all federal grand jury proceedings — a long overdue reform.

A number of times, in recent years, too, courts have set aside indictments based on a "totality of circumstances" approach in evaluating prosecutorial improprieties, and the Sixth Circuit, among other courts, has criticized the handling of grand jury proceedings.

Grand jury reform has also won wide support among members of the organized bar. The American College of Trial Lawyers has given significant support to these efforts, as has the Association of the Bar of the City of New York. A poll conducted in 1982 by the American Bar Association *Journal* found that lawyers around the country rated the issue of counsel in the grand jury room higher in importance than any other legislative subject before the Congress except Legal Services Corporation funding. This reflects the depth of support within the legal profession for bringing change in grand jury procedures.

Continuing Implementation Efforts

Despite this broad support, however, progress toward implementing some of the key reforms on the federal level has been slow. A proposal to include counsel in the grand jury room in the federal criminal code bill in the U.S. House of Representatives in 1980 was strenuously opposed by the Department of Justice — and defeated in the Judiciary Committee. In the current push to enact crime-fighting legislation, prospects in the 97th Congress for grand jury legislation do not appear great. The mood of the Congress and the attitude of the Administration may make it difficult to achieve legislative enactment of key reforms in the near future. The issue continues to be one of major interest to the bar, however, as reflected by the fact that it continues as an ABA Presidential Legislative Priority for the Association.

The American Bar Association does not believe that the grand jury is obsolete. It is an institution deeply rooted in the common law tradition of this country It can perform an important function in investigating complex crimes. The key role which the grand jury played during Watergate is testament to its vitality. With proper revamping and careful attention the grand jury can continue to perform an important function in the American system of justice — but a corrective dose of due process is needed to bring this 12th Century institution fully into the 20th Century.

The American Bar Association's work has, we believe, helped to focus needed attention on the grand jury, and the need for reforms That work, however, would not have progressed without the leadership of Richard E. Gerstein who has served as chairperson of the Grand Jury Committee since 1975, and Robert M Ervin of Tallahassee, member of the American Bar Association Board of Governors and former Criminal Justice Section chairperson, who was instrumental in helping secure ABA House of Delegates approval of these policies.

Laurie O. Robinson
Director, ABA Criminal Justice Section

ABA Grand Jury Principles

Developed by the American Bar Association
Section of Criminal Justice

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

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

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

Commentary to Principles

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

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

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

A Seventh Circuit decision [*U.S. v. Kopel*, 552 F.2d 1265 (1977)] points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. [*See In re Tierney*, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.] The prestigious American Law Institute (ALI), in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes... it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel ... is closely related to the traditional view that the proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation. The difficulty with this view ... is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt. ... The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver. ... And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions. ... For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

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

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

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the

grand jury room, the Criminal Justice Section has strengthened principle #20, which addresses that subject.

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

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

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

SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION

J. Michael McWilliams, Chairman, Presiding
New Orleans, Louisiana, February 16–17, 1987

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FOREWORD

In accordance with the Rules of Procedure of the House of Delegates, I am pleased to provide each delegate with this Summary of Action taken by the House in New Orleans, Louisiana. The Summary is also being sent to the president, secretary and executive director of each state and local bar association and affiliated organization represented in the House, to section and division officers, and to standing and special committee chairmen.

The Summary should be helpful to delegates and others in reporting to interested persons the activities of the Association and in developing material for publication in bar journals. It contains a list of reports made to the House, a description of action taken and the text of each resolution approved. For further information recipients may wish to refer to the book of reports with recommendations upon which this Summary is based. The number indicated for each item in the Summary refers to the number assigned to the corresponding report in the bound book of reports.

If a member of the House believes that a correction in the Summary is necessary, the Rules require that the Secretary be notified within ten days after receipt of the Summary. Action on any proposed correction will be taken at the next session of the House. I hope the Summary will be of interest and value to you.

William H. Neukom
Secretary

The Section's third recommendation (Report No. 110C) was approved by voice vote. It reads:

Be It Resolved, That the American Bar Association urges the Congress of the United States to retain Rule 35(b) of the Federal Rules of Criminal Procedure to allow a criminal defendant to move and a federal judge to consider a possible reduction of a sentence.

REPORT

Background on Rule 35

Rule 35 of the Federal Rules of Criminal Procedure was first enacted in 1946. Although it was subsequently amended four times, the three main points of the Rule have remained constant. Those points are: first, to permit district courts to correct illegal sentences; second, to permit district courts to correct sentences illegally imposed within a specified time after entry of final judgment; and, third, to permit district courts, upon motion of defendant, to reduce sentences within a specified time after entry of final judgment. This latter purpose, commonly known as "the motion to reduce, "is presently codified at Rule 35(b).

The wisdom of having such a rule was recognized by the ABA in both the first and second editions of the ABA Standards for Criminal Justice. See Standard 6.1 of the first edition and Standard 18-7.1 of the second edition. The Commentary to Standard 18-7.1 in the second edition of the Standards, at 501, notes that the authority to grant sentence reductions was derived from the common law power which permitted courts to reduce sentences as long as they acted within the same term of court.

Changes made by the Comprehensive Crime Control Act of 1984

Under the Comprehensive Crime Control Act of 1984, Congress has eliminated this long-standing power and turned Rule 35(b) on its head. Instead of permitting defendants to seek reductions in sentences, the Rule, which is to become effective when the sentencing guidelines are enacted, permits only the government to seek a reduction in a defendant's sentence, and even the government is prohibited from seeking such reduction unless the defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission...."

The legislative history of the Act gives little clue to the reasoning behind this radical emasculation of Rule 35(b). It merely states that the Rule was amended "to accord with the provisions of proposed section 3742 of title 18 concerning appellate review of sentence." Sen. Rep. No. 98-225, "Comprehensive Crime Control Act of 1983," Report, 98th Cong., 1st Sess. (1983) at 158, reprinted in 4 U.S. Code & Cong. Ad. News 3182, 3341 (hereafter cited as "U.S. Code at"). After reading through the legislative history explaining the reasons for the creation of the Sentencing Commission, one can speculate that the drafters eliminated a defendant's right to request a reduction in sentence because they believed such a request should only on be made to the Commission itself, see 28 U.S.C. §994(r), or to the court of appeals. Moreover, because the drafters rejected rehabilitation as a basis for sentencing a defendant to prison, it may have appeared to the drafters that the major reason for requesting sentence reductions had been obviated. As discussed below, none of these assumptions support the elimination of the defendant's right to request a reduction in sentence.

Under subsection (r) of section 994, the drafters do permit a defendant to request a modification of the sentencing guidelines "only on the basis of changed circumstances that were unrelated to his individual case, such as changes in community view of the gravity of the offense, or the deterrent effect particular sentences for the offense might have on the commission of the offense by others." In those cases where the Commission accepted the defendant's point of view, it would be required to submit a proposed amendment to Congress. U.S. Code at 3362. Although the process envisioned by the drafters appears lengthy and quite cumbersome, they are to be lauded for the inclusion of a provision which is intended to keep them "alerted to the possible need for amendments to the guidelines." U.S. Code at 3362.

Problems posed by changes to Rule 35

The objection is not to what the drafters have included, but rather to what they have not included. Neither appellate review of sentences nor procedures for requesting modification of the sentencing guidelines serve the same purposes that have traditionally been served by permitting defendants themselves to seek reductions in sentences from district court judges.

As often stated by the courts, the purpose of Rule 35(b) is "simply to allow the district court to decide if, on further reflection, the original sentence now seems unduly harsh." United States v. Stewart, 650 F.2d 207, 208 (9th Cir. 1981), quoting, United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973). Accord United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968) (purpose of Rule is to give "every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim."); United States v. Ferri, 686 F.2d 147, 154 (3d Cir. 1982).

The fact that Congress now envisions a set of sentencing guidelines to direct the sentencing process does not alter the basic premise underlying Rule 35(b). District court judges still may make mistakes; reflection still may cause a change of heart; circumstances may still change after sentencing; new information may still be discovered after sentencing; disparities in sentencing may still exist; and both remorse and cooperation may still be withheld on advice of counsel until all appeals are exhausted. There follows an analysis of each of these points.

Analysis of Problems posed by Changes to Rule 35

1. Mistakes

The cases clearly bear out the proposition that district court judges sometimes labor under misapprehensions when imposing sentence. See, e.g., United States v. Taylor, 768 F.2d 114 (6th Cir. 1985); United States v. Parrish, Slip Op. No. 85-2589 (7th Cir. 1986); United States v. Eschweiler, 782 F.2d 1385 (7th Cir. 1986). Although it is arguable that such a misapprehension could serve as the basis for reversal on appeal under 18 U.S.C. §3742(e)(1) as a sentence imposed "in violation of law or as a result of an incorrect application of the sentencing guidelines...", this result is not at all clear. It is not clear because, first, reversal based on judicial misapprehension does not squarely fall within the language of §3742. Second, it is not clear that a defendant will be permitted to present to the appellate court new information showing why information or assumption relied upon by the court was incorrect.

Moreover, because the vast majority of sentences in federal court are imposed following guilty pleas, at present most defendants who believe their sentences were imposed based on judicial misapprehension of a material fact, move the court to reconsider their sentence before they decide to appeal. By eliminating this first step, the drafters have guaranteed a vast increase in he number of appeals from guilty pleas. They have also antly lengthened the time necessary to cor: ect such a sentence.

2. Time for Reflection

As noted by the court in United States v. Colvin, 644 F.2d 703, 707 (8th Cir. 1981), one of the "benign purposes" of Rule 35 is to give the sentencing judge "[t]he opportunity..., at some remove in time from the immediacy of the crime, to reflect upon and reconsider a sentence...." The ABA has not only recognized this purpose of Rule 35, but has noted that: "The arguments for some form of fail-safe mechanism [in the sentencing context] are compelling." The Commentary to Standard 18-7.1 goes on to say:

> Sentencing is a human process, and it will sometimes happen that a court will respond in a strongly negative fashion to some characteristic of the offender or the offense only later to realize, after reflection, that it has overreacted. The literature on

sentencing provides sufficient examples to suggest that such incidents are not rarities. [Footnote and citations omitted]. No public policy requires that error be perpetuated, and the most efficient remedy is to permit the court to rectify those judgments it realizes are excessive.

3 ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures, Standard 18-7.1 at 501-02 (2d ed. 1980).

Although the intended effect of the sentencing guidelines is to remove some of this "human process" from the sentencing process, the legislative history makes clear that sentencing is to remain individualized. Further, the sentencing court will inevitably filter the information it receives through its own experiences and perceptions, continuing the possibility of human error or "overreaction."

It should be noted that the drafters were aware that not every issue in every case would be included in a guideline. They note, for example, that policy statements may be needed to address "such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which does not occur sufficiently frequently to be incorporated in the guidelines themselves...." U.S. Code at 3349. Thus, under the guidelines as contemplated, the unique individuality of both the sentencing judge and defendant will remain "wild cards" in the sentencing process, making the arguments for a "fail-safe mechanism" as compelling today as they were in 1980.

3. Changed Circumstances

Under the present Rule 35, a sentencing court may consider significant changes in circumstances which occur shortly after sentencing. Thus, where a defendant becomes seriously ill, or a defendant's spouse becomes unable to care for him/herself or their children, or a defendant's child meets some disaster, the court is able to consider the problem. See United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980) (where court's recommendation that defendant be sentenced to minimum security prison near his family could not be followed, and where defendant's family desperately needed income defendant could provide, sentence would be reduced); United States v. Irizzary, 58 F.R.D. 65 (D. Mass. 1973)(hardship on defendant's wife and family justified sentence reduction); United States v. Orlando, 206 F. Supp. 419 (E.D.N.Y. 1962) (considering age of aunt with whom defendant's seriously ill wife was staying, reduction of sentence was justified).

Under the new Rule 35 and the anticipated sentencing guidelines a defendant will be prohibited from bringing such circumstances to the attention of a court. Yet, if any of these circumstances existed at the time of sentencing, they would clearly be permissible considerations. The time immediately following imposition of a prison sentence is often critical to a defendant and a defendant's family, since stress often creates or accelerates illnesses such as heart attacks, strokes and even cancer. Providing no recourse to defendants in such situations will on occasion permit bitter injustices to occur, leaving both the defendant and the court with, at a minimum, a sense of frustration. Moreover, to knowingly create a system that refuses to provide a remedy for such situations will eventually taint the public's view of the entire sentencing process.

4. New Information

Probation officers have become increasingly overworked. The more overworked they become, the greater the possibility that they will not uncover a piece of relevant information until after sentencing. Under the new Rule, if this piece of information is not uncovered until after the time for filing notice of appeal has expired, the defendant is again left with no recourse. This, of course, is exactly what Rule 35 was intended to prevent. See United States v. Ferri, 686 F.2d 147, 154 (3d Cir. 1982); United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. [illegible] (1968) (Rule 35 intended to permit sentencing court to consider further information about defendant or case presented after sentencing).

5. Sentencing Disparity

A recognized purpose of Rule 35 has always been to give courts time to review their sentences to ensure no significant sentencing disparity exists. See United States v. Walker, 469 F.2d 1377, 1381 (1st Cir. 1972). The fact of sentencing disparity has become so important to various segments of the legal community, that the Sentencing Commission was created in large part to eliminate disparity in sentencing. Theoretically, therefore, sentencing disparity should be much less common under the new sentencing guidelines. Nonetheless, the drafters themselves recognized that even under the guidelines, disparities may exist: "Another important function

of the policy statements might be to alert Federal district judges to existing disparities which are not adequately cured by the guidelines, while offering recommendations as to how such situations should be treated in the future." U.S. Code at 3349. Thus, the need to review sentences in light of other sentences imposed in similar cases close in time, also militates toward preserving a defendant's right to request a reduction in sentence.

6. Remorse and Cooperation

In 1973 the Advisory Committee on Criminal Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States considered amending Rule 35 to make the 120 period run from the day of imposition of sentence, regardless of whether or not an appeal was filed. Thus, under the proposed amendment the filing of an appeal would not toll the running of the 120 days and the 120 day period would generally expire before a defendant's appeal had been decided. One of the main reasons this amendment was rejected was because it effectively prohibited defendants from expressing remorse in a Rule 35 motion or from cooperating with the government before the motion was filed. As stated by Judge Marvin Frankel in his response to the Advisory Committee's request for comments on the proposed amendment:

> There is not special benefit, and some evident detriment, in the proposal to cut off motions to reduce after 120 days, eliminating the right to make such motions after an unsuccessful appeal. It happens with some frequency that a defendant planning an appeal is thereby inhibited from saying to the judge or probation officer things that might serve as mitigating factors. So, for example, a defendant planning an appeal is not in a position to admit guilt or otherwise exhibit repentance. Similarly, he may not feel (or be) free to tell what he knows about other defendants or potential defendants. Yet sentencing judges tend often to weigh adversely the indications that a defendant is "uncooperative" or lacking in remorse. When a defendant is permitted to move for a reduction after affirmance of his conviction, the prospect may afford both a legitimate

> opportunity to him and a possible contribution to the public interest. He may be invited specifically to say, after appeal, the possibly meaningful things he is constrained to withold at the earlier stage. cf. United States v.Sweig, 454 F. 2d 181 (2d Cir. 1972). The proposed amendment obviates this possibility without achieving any gain sufficient to justify this result.

These same considerations are, of course, valid today and will remain valid under the sentencing guidelines. There will simply be no opportunity for a defendant to admit guilt and express remorse before appeal, unless it is done on the day of sentencing. Similarly, although the version of Rule 35(b) which is to become effective along with the sentencing guidelines permits the government to request a reduction in sentence based on defendant's cooperation, the Rule seems to read as if the one year runs from the day of sentence and is not tolled by the filing of an appeal. Although many appeals are decided in less than a year, some are not. Thus, for those defendants whose cases take longer than a year to be decided on appeal, they will not be afforded the same opportunity to cooperate free from fifth amendment problems that apparently similarly situated defendants with shorter or less difficult cases are afforded.

Additional Problems

Another difficulty with the new Rule 35(b) is that it give the government complete control over the decision as to whether to file a motion to reduce. If the government does not believe the defendant's cooperation was substantial enough to merit a reduction, it can simply refuse to file a motion. Yet, the decision as to whether the cooperation was substantial really belongs to the sentencing judge. Using past experience as a guide, it often happens that a defendant cooperates with the government and then finds that the government either does not believe him or her or is somehow not fully satisfied with the cooperation. It would again seem that in this situation a defendant should at least have the opportunity to bring the cooperation to the attention of the sentencing judge, and let the judge make the final decision after hearing both sides. Leaving the decision as to whether or not to even bring the information to the attention of the court within the government's unfettered discretion, denies the adversarial nature on which our system of justice is built and has the appearance of unfairness.

Two final points need to be made. First, if the defendant's right to request a reduction in sentence is eliminated, it becomes the only area in the law, civil or criminal, where a party is not entitled to request reconsideration of a judicial decision. The appearance of unfairness, and indeed the actual unfairness of, making the sentencing decision sui generis in the law is obvious, especially now that the government has been granted the right to appeal sentences. Second, keeping alive a defendant's right to request sentence reductions put little added burden on the system, and may in fact decrease the number of appeals which would otherwise be filed in guilty plea cases. At present, few defendants appeal from denials of motions to reduce. There is no reason to think this would change under the new laws. In addition, although the government would now be permitted to appeal where motions to reduce are granted, it should be remembered that the majority of such motions are not granted. Furthermore, there is no reason to believe the government would automatically appeal all those that were granted.

Conclusion

In sum, it is strongly urged that Congress amend the version of Rule 35 which is to become effective along with the sentencing guidelines to include the present version of Rule 35(b) which permits defendants to request sentence reductions within 120 days of entry of a final order in their case.

Respectfully Submitted,

Norman Lefstein, Chairperson
Criminal Justice Section

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

March 22, 2001

Mr. Robert D. Evans
Director, Governmental Affairs Office
American Bar Association
740 Fifteenth Street, N.W.
Washington, D.C. 20005-1022

Dear Mr. Evans:

Thank you for your suggestions to amend Criminal Rules 6 and 35. A copy of your letter was sent to the members of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Anthony J. Scirica
Advisory Committee on Criminal Rules
Professor Daniel R. Coquillette