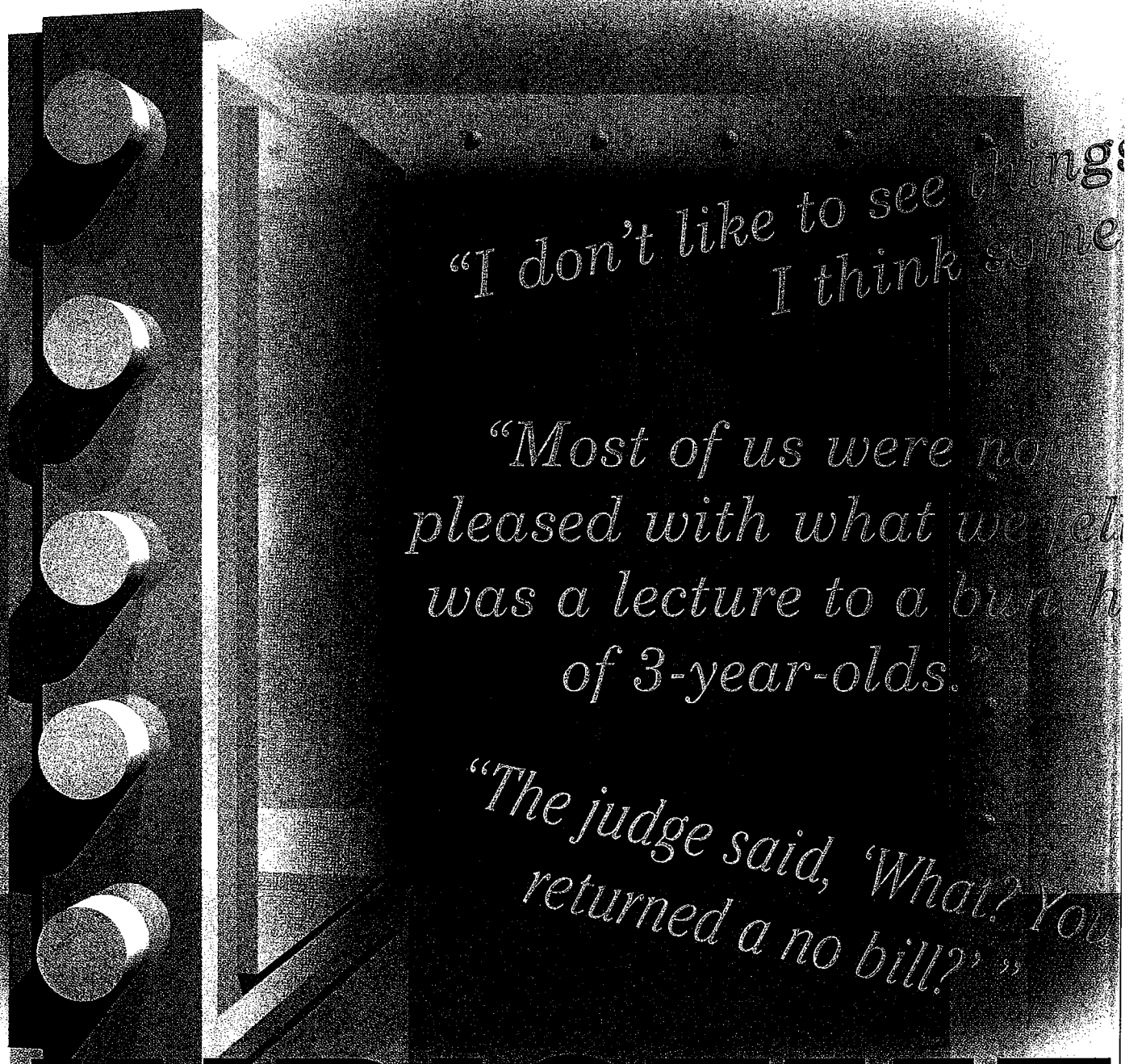

INDICTME of a SY

GRAPHIC BY JEFF DIONISE

ailroaded through, and f them were."

BY JOHN GIBEAUT

When the 34-year-old computer programmer received her federal jury summons in early 1998, she had no inkling that she would be serving on a grand jury.

"At the time, I didn't even know what a grand jury was," says the woman, who with 22 other citizens was about to enter a sort of government-run sausage factory where all federal felony cases are packed and shipped to court.

For the next 14 months, the grand jurors sat and watched as a parade of assistant U.S. attorneys trotted one case after another before them. The jurors' mission appeared simple enough: To determine whether the government had cleared the low probable-cause hurdle needed to issue an indictment.

But amid hundreds of cases whirling together in the grinder, the woman found much of her service disturbing. She saw her fellow grand jurors sit inattentively as the government presented its cases, then almost automatically vote for indictments with little or no discussion. She saw prosecutors rush through cases so fast that they didn't even take the time to instruct the jurors on the elements of the crimes. She saw prosecutors and government witnesses, most of them federal agents, hint that defendants had committed other offenses not presented for indictment.

"There were attorneys I respected," says the woman, whose name is being withheld by the *ABA Journal*. "There were attorneys I did not. I don't like to see things railroaded through, and I think some of them were."

The grand juror is not alone, says Susan W. Brenner, associate dean at the University of Dayton School of Law. For 2½ years, Brenner has maintained an informational Web site for grand jurors. She says she's received e-mails from about 50 federal grand jurors, including the one who spoke to the *Journal*.

"What she's saying is exactly what I'm hearing from other grand jurors," Brenner says.

Such stories, coupled with the recent grand jury investigations of President Clinton and his associates, have breathed new life into defense bar calls for reform, including a controversial proposal to allow lawyers to accompany their clients into the jury room. With Clinton himself facing the possibility of indictment after he leaves office this month, one congressman expects to introduce legislation this winter incorporating those reforms.

Although they consider anonymous critics on the Internet about as reliable as "the kinds of people who call up radio stations," Justice Department officials nevertheless have reacted to criticism from other quarters with an ambitious program to retrain federal prosecutors in grand jury practice.

"We expect that every assistant U.S. attorney in the country will have that kind of re-education," says James K. Robinson, assistant attorney general in charge of the criminal division.

Besides the nuts and bolts of presenting cases, the training also stresses the grand jury's traditional independence from prosecutors. But expect Justice to cackle if Congress tries to give the foxes keys to the grand jury chicken coop.

"We really think this would seriously undermine the federal grand jury," Robinson says.

Long Bloodlines

Modern federal grand juries trace their roots back nearly 900 years to England. By the time the institution reached the colonies, grand juries had evolved into bodies that not only indicted the guilty but also protected the innocent from unfounded charges.

Grand juries often shielded colonists from abuses by prosecutors for the Crown, and the framers

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NT STEM

Grand jurors and judges are shining some light on prosecutorial abuses that go on behind closed doors. Defense lawyers say the problems show it's time for reform.

required indictment in the Fifth Amendment as a buffer between the accused and the government. By the early 20th century, however, grand juries primarily had become prosecutors' weapons, using secrecy and immense subpoena powers to charge defendants and conduct wide-ranging investigations spanning months and, sometimes, years.

At the same time, the U.S. Supreme Court essentially has viewed the grand jury as an independent fourth branch of government that operates beyond its authority. In a long line of cases, the Court consistently has refused to mess with prosecutors' handling of grand juries, even when confronted with allegations of questionable conduct or use of evidence inadmissible at trial.

BRENNER

The practice of virtually automatic indictments is ongoing and occurs nationwide.

As a result, defense lawyers say, the executive branch, through the Justice Department, has managed to hijack the once-independent grand jury.

And the government doesn't take mutiny lightly, as the computer programmer and her fellow grand jurors learned in one case where they did the unbelievable.

Unable to muster the 12 votes needed for an indictment, they returned what grand jury parlance calls no true bill, or "no bill" for short. The action was not merely unexpected. It was almost unheard of in a system the government says yields indictments in 99.9 percent of the matters it submits to grand juries.

When the grand jurors convened again a month later, a woman known to the panel only as the "grand jury shepherd" had a few words to say about their sudden independent streak. The grand juror interviewed for this story now presumes the woman was a supervising prosecutor.

"We got a half-hour lecture," the grand juror says. "We got a lecture that prosecutors don't bring a case to a grand jury unless they've got all their ducks in a row, that they've done all their homework and have all their evidence. There is no reason to return a no bill."

The reprimand reminded the woman of a teacher scolding a class of errant schoolchildren: "Most of us were not pleased with what we felt was a lecture to a bunch of 3-year-olds."

These kids back-sassed, however. The jurors asked why they were needed if prosecutors had done such a bang-up job. Were they merely rubber stamps? No, replied the shepherd. Did it make any difference if the evidence wasn't credible?

"She said, 'No. Credible has a legal meaning,' " the woman recalls. "A number of jurors were offended by this."

Shortly afterward, the grand jury was dismissed, four months shy of completing its 18-month term.

Another Way to Run a Railroad

Enter the defense bar's argument for grand jury reform.

"The whole thing is a joke," says New York City lawyer Gerald B. Lefcourt. A former president of the National Association of Criminal Defense Lawyers, he chaired a commission sponsored by the group that last spring proposed a 10-point federal grand jury "bill of rights."

"They don't know what's going on," Lefcourt says of grand jurors. "That's why they become rubber stamps. Unfortunately, they're just a bunch of potted palms. Prosecutors are taking them for granted."

The defense bar proposal closely tracks reforms the ABA unsuccessfully urged in 1977. In addition, U.S. Rep. William D. Delahunt, D-Mass., hopes to introduce similar reforms when Congress convenes this month.

Besides opening the jury room door to defense lawyers, the proposals would force the government to observe other constitutional safeguards used in open court proceedings. For example, prosecutors would be required to present exculpatory evidence and exclude unconstitutionally seized evidence.

Naturally, this kind of talk doesn't fly with officials at Justice. They point out that grand jury sessions by their nature are one-sided. They don't even have to be constitutionally fair, according to the High Court.

Moreover, Justice officials say, the measures would emasculate grand juries by stripping them of needed secrecy and turning sessions into minitrials not envisioned by the Fifth Amendment.

Some states have enacted reforms similar to those sought on the federal level. And because the U.S. Supreme Court never applied the grand jury clause to the states, most have largely eliminated the ritual by allowing prosecutors to file charges on their own without seeking indictments.

The feds, however, insist that they need nearly omnipotent grand juries to help them strike blows to the soft underbellies of sophisticated drug rings, white-collar corporate crooks, spy networks and other

ABAJ/LARRY BURGESS

organized crime. State prosecutors, the feds say, just don't face that many complicated cases.

But while grand juries may depend on secrecy to operate effectively, that same secrecy also means few Americans—lawyers included—really know what happens behind the closed doors.

"We never see [a grand jury itself]," says Brenner, who teaches a course in grand jury practice. "When I teach this stuff to law students, I have to underline that there is no judge in the room. There is no this. There is no that. And these are law students. What do you think regular people know?"

Lifting the Shroud

The general public wouldn't get a front-row seat under proposed reforms. But defense lawyers say they at least deserve a chance to see what goes on once the grand jury room door closes and seals off the light from outside.

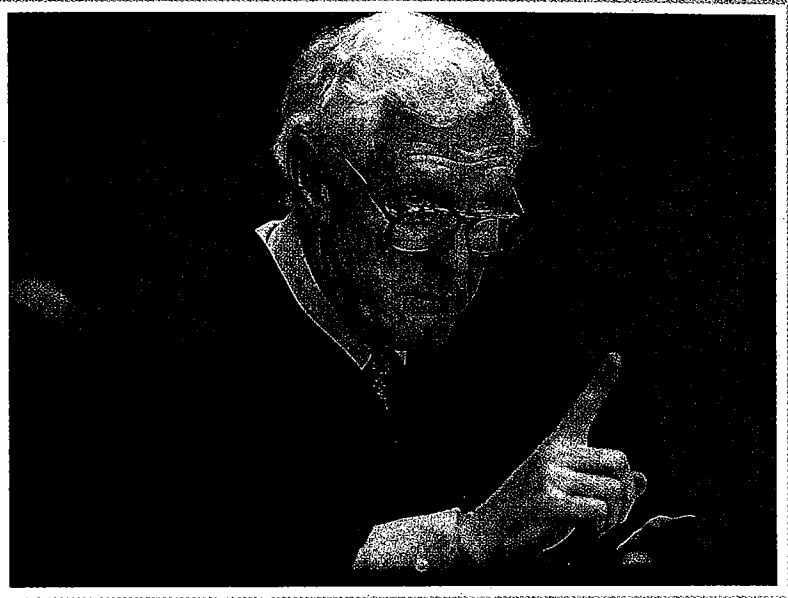
"Counsel in the jury room is the core reform," says Rep. Delahunt, who was a state district attorney in the Boston area for 20 years before he was elected to the House in 1996. As a state prosecutor, Delahunt backed legislation in 1980 to allow defense lawyers into Massachusetts grand jury sessions.

"Back then, many of my colleagues were lamenting that this was the end of civilization, that the barbarians would be at the gate and the Visigoths would run wild," Delahunt says. "None of that happened, and there hasn't been a single complaint that I'm aware of."

Under the defense bar proposal, a lawyer could accompany the client only if the client has not received immunity—a standard practice that allows the government to squeeze testimony from reluctant witnesses.

While the defense lawyer could advise the client during testimony, he or she could not address grand jurors, stop the proceedings, make objections or stop the client from answering a question. The presiding judge would have the power to remove disruptive lawyers from the room.

In current practice, a witness may leave the room to consult with a lawyer. That's the way it should remain, say Justice Department officials, who point out that the U.S. Judicial Conference in 1999 rejected another proposal to let defense



LAGUEUX Prosecutor's conduct in civil rights case against cop was suspect.

Down for the Count

U.S. District Judge Ronald R. Lagueux may have surprised even himself when he told the government he was going to dismiss a civil rights indictment against a Providence, R.I., police officer accused of beating two people in separate incidents. In more than three decades on the bench, Lagueux had dismissed only one other grand jury indictment, years ago in a rape case when he sat as a Rhode Island state judge.

But something appeared out of whack with the case against Randell P. Masterson, which wound up in front of Lagueux in the summer of 1998. After all, local Assistant U.S. Attorney Edwin J. Gale had taken the matter to a grand jury once but failed to get an indictment.

"Then a fellow came up from Washington," Lagueux recalls. "His name was Mark Blumberg, a civil rights lawyer from central Justice."

The government convened a second grand jury, this time headed by Blumberg. Where Gale failed, Blumberg succeeded, obtaining not just one but two civil rights counts in an indictment against the decorated officer.

Lagueux later learned that Gale had sought just one count, involving the arrest of a suspect while Masterson was on duty. After that didn't work, Blumberg apparently decided to sweeten the pot.

He added a second count. The problem, as Lagueux recalls, was that the new count involved off-duty conduct. Lagueux doubted the evidence would support the state-action element needed to convict on a civil rights charge.

"He was trying to show if the guy did this off duty, he probably did this on duty, too," Lagueux says. "My guess is that the off-duty charge never would have gotten to a jury."

Worse, he says, was Blumberg's conduct before the grand jury. The behavior brought Lagueux to the brink of granting Masterson's motion to dismiss the indictment—something federal judges just don't do.

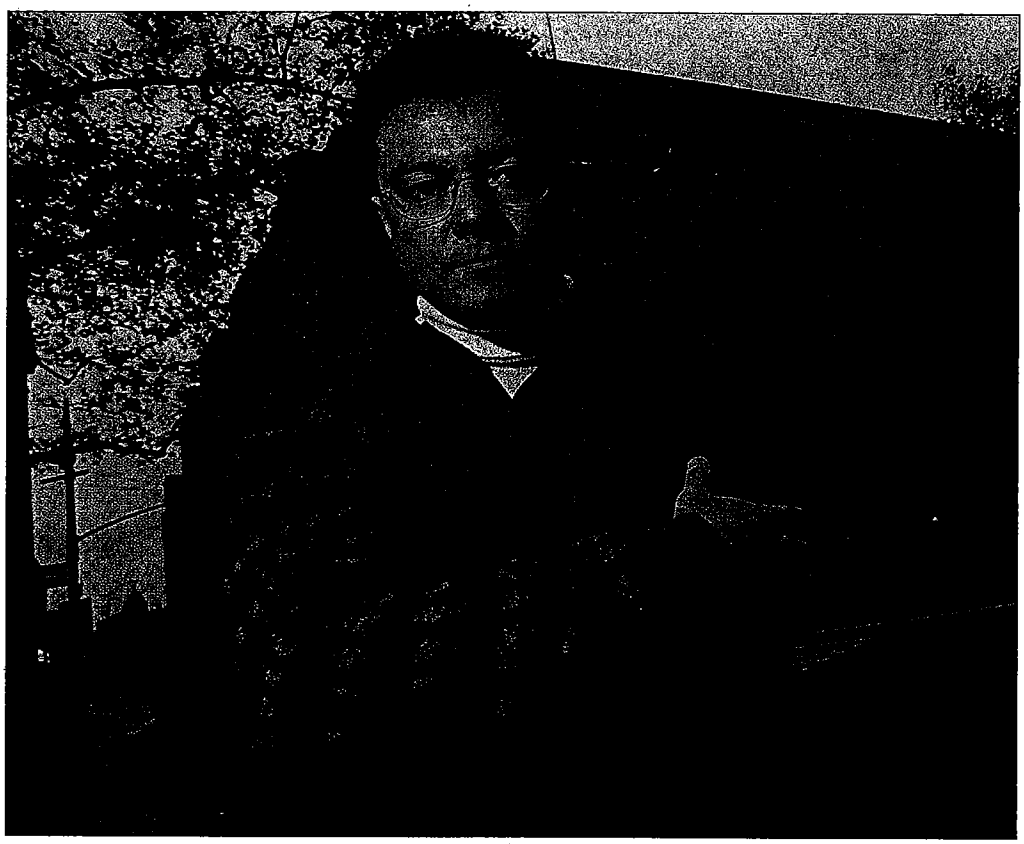
Blumberg "gave the grand jury a charge that went beyond the law," Lagueux remembers. "He told the grand jury who was lying and who wasn't lying. The really egregious thing was that he was telling the grand jury how to judge credibility."

Justice officials would not allow Blumberg to comment.

But after private meetings with Lagueux, it became clear to prosecutors that even if they eventually won the case on appeal, they faced the prospect of an embarrassing published opinion castigating them for the way they handled it. So in January 1999, they acquiesced and dismissed the indictment on their own—with prejudice. The criminal case against Masterson was dead and buried.

"It really was not in the best interest of anyone to continue fighting the defendant's motion," says U.S. Attorney Margaret E. Curran.

"Although legally it did not constitute misconduct—it did not constitute abuse of the grand jury—it nevertheless created the perception of unfairness. The best thing to do was to get out." —*John Gibeaut*



TATNALL
Allowing defense lawyers in the grand jury room is not disruptive.

lawyers come inside. Officials say that having a lawyer in the room would kill any spontaneous exchanges and otherwise make testimony appear rehearsed.

Moreover, they worry that lawyers would tip off other witnesses, especially in investigations of corporations and organized crime. And despite tight reins, Justice officials say defense lawyers can't be trusted to keep their mouths shut once they get a foot in the door.

"You would have a temptation that most defense attorneys would find difficult to resist to make an objection, then march up to the chief judge to squabble over it," says Assistant Attorney General Robinson.

But one former grand juror, Kirk Tatnall, says defense lawyers appeared only two or three times when he served for a month in 1999 on a New York state grand jury in Manhattan. New York has allowed defense lawyers in the grand jury room since 1978. The rare appearances barely caused a ripple in the proceedings, Tatnall says.

"They could only whisper to their clients," says Tatnall, 34, an advertising salesman. "They can't ask any questions. There's no way they can disrupt it."

Defense lawyers also say their mere presence would deter misconduct by prosecutors. Justice Department officials, on the other hand, say the defense has ample opportunity to ferret out wrongdoing from accounts of witnesses not bound by the secrecy that silences prosecutors and grand jurors.

They also can ask the trial court to review transcripts of grand jury proceedings after an indictment is returned. And there's usually nothing to find anyway, the feds say, because their own standards for bringing cases and for professional conduct exceed the Constitution and those of many state bars.

"We're not looking at the lowest common denominator in our grand jury practice," Robinson says.

But detecting misconduct—let alone punishing it—isn't as easy as Justice makes it sound. First, witnesses may not recognize wrongdoing when they see it, and some of the most serious allegations arise when prosecutors address grand jurors with no one else in the room. Second, courts value grand jury secrecy so highly that they almost never breach it to allow defense lawyers to fish for misconduct, even when faced with arguably legitimate suspicions.

When they do find grand jury misconduct, courts generally say a public trial rinses away the taint, although only about 5 percent of cases make it all the way to trial without the defendant pleading out.

Only in the rarest of cases will prosecutors behaving badly cause a pretrial dismissal or reversal of a conviction on appeal. Besides, Justice officials say, only a minute fraction of the department's 9,000 lawyers engage in misconduct.

'Trust Us'

When prosecutors do misbehave, Justice says it's best handled as an internal matter, because it has the easiest access to its employees and department documentation. Defense lawyers ridicule the purported internal deterrent to misconduct as flaccid, because it's based on department policy and doesn't carry the force of law. Thus, they gripe, Justice can bend the rules to suit its own purposes without answering to an outside authority.

DOJ officials insist that they mean business, anyway. While they generally decline to discuss individual cases, Attorney General Janet Reno has instituted a policy of selectively releasing findings from some high-profile internal investigations.

"We hold our prosecutors to very high standards," says H. Marshall Jarrett, counsel for the DOJ's Office of Professional Responsibility. "We care, and care deeply, about misconduct before grand juries."

Jarrett, criminal chief Robinson and other top-level officials at Justice likely will be gone after a new administration assumes office this month.

But critics don't expect that a new occupant in the Oval Office will do that much to discourage conduct problems deeply ingrained in the institutional culture of the Justice Department. Legislation is the best cure, they say.

And the time may be right, says Delahunt. He notes that Congress in recent years has force-fed other reforms to Justice. First came the 1997 Hyde Amendment, which allows victims of bad-faith prosecu-

ABAJ/ARNOLD ADLER

tions to sue for attorney fees. Then Congress passed the 1998 McDade Amendment, which forces federal prosecutors to follow state bar rules in jurisdictions where they work.

Indeed, the tough talk from Clinton administration officials largely stems from that strong medicine. At the same time, however, a General Accounting Office study completed last summer found that Justice has made significant progress since the early 1990s—when ethics probes were pretty much rudderless—in setting guidelines for internal investigations and in identifying consistent problem areas that may require policy changes.

From 1997 through June 2000, the professional responsibility office opened 321 formal investigations into complaints against prosecutors for all types of conduct, before grand juries and otherwise. Nearly half arose from court findings or criticisms.

Of 101 judicially inspired probes closed during that period, 21 resulted in findings of professional misconduct, which Justice defines as intentional violation of a lawyer's legal and ethical duties, or reckless disregard for those obligations. Punishment can include firing, but Jarrett says the scant few lawyers who get in trouble that serious usually resign first. In the remaining cases, 60 lawyers were cleared, with the rest chalked up to poor judgment, mistakes or other factors. Numbers like that leave some defense lawyers wondering just how serious Justice really is.

Consider the case of Los Angeles real estate investor Bernard Gross, convicted in February of bankruptcy fraud. Although U.S. District Judge Audrey B. Collins refused to dismiss the indictment, she ordered prosecutors to show their superiors copies of an order in which the

A Shrimp Case Grilling

Prosecutor skewered for telling panel what it would do

The stench left in the judges' nostrils came from more than the rancid shrimp the defendants were peddling.

The whole case against seafood processor Sigma International Inc. smelled, well, fishy to a three-judge panel of the Atlanta-based 11th U.S. Circuit Court of Appeals.

But although the panel nearly gutted and scaled a federal prosecutor for misconduct before the grand jury that indicted the St. Petersburg, Fla., company and several employees, it let stand convictions obtained later at trial. Still, with one of its own left flopping around on the deck, the government wasn't content to reel in its catch and just go home.

Cutting Bait

So here's how the government got a rehearing in a case it already had won:

For a year, a grand jury in Tampa, Fla., considered evidence against company vice president William Andrew Walton, plant manager Charles Sternisha and three other employees in a scheme to import rotting shrimp from India and China, mask the smell with a chlorine-based marinade, then sell it to unsuspecting customers. The grand jury, however, didn't finish its work and never got the chance to vote on an indictment. Then, after meeting for fewer than two days, a new grand jury indicted the company and all five employees in September 1995.

Only Walton and Sternisha were convicted. After oral arguments before the 11th Circuit panel, defense claims of prosecutorial misconduct evidently piqued the appellate judges' interest enough to entice them into opening a sealed, partial grand-jury transcript supplied by the government. Defense lawyers hadn't even seen the material.

The judges didn't like what they found.

Right off the bat, Assistant U.S. Attorney Michael L. Rubinstein told members of the newly seated grand jury that they would be voting on an indictment the very next day. The appeals judges were incredulous.

"A prosecutor may not set the grand jury's schedule for it, nor may a prosecutor suggest that the grand jury has a limited amount of time in which to reach a decision," wrote Judge Gerald B. Tjoflat (pronounced show-flat). "By telling a brand-new grand jury that it would vote tomorrow, Rubinstein nearly foreclosed any serious questioning or deliberation by that body." *United States v. Sigma International Inc.*, 196 F.3d 1314 (1999).

Nevertheless, the panel determined that the grand jury wasn't swayed by the veteran prosecutor's misconduct and refused to dismiss the indictment. But regardless of the defendants' guilt, the court suggested that Rubinstein should be punished for his grand jury behavior.

The judges lambasted Rubinstein for, among other things, suggesting that the defendants had committed crimes for which they never were investigated or charged: "Any lawyer with a grain of common sense and even a limited understanding of the code of ethics should know that remarks such as these are intolerable."

Despite the acid criticism, the government could have claimed victory then and there. The purveyors of the putrid shrimp were headed to prison. And the court's denunciation of Rubinstein was nothing more than dicta.

That wasn't good enough. Rubinstein and his superiors at the Justice Department set out to clear his name.

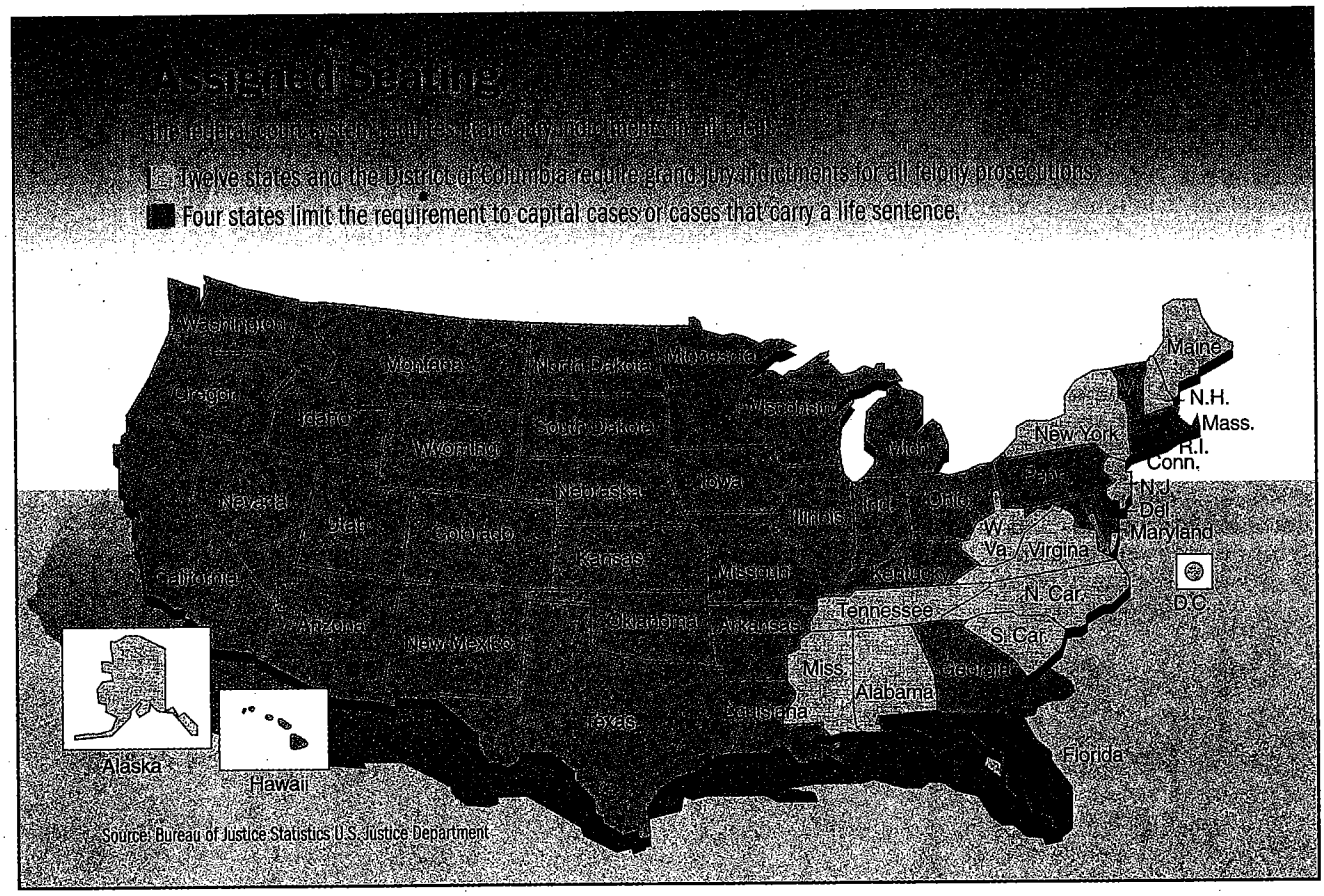
Using lawyers from the department's civil division in Washington, D.C., Rubinstein unsuccessfully tried to intervene to wipe away the smear. Although the decision already had appeared in local newspapers, Justice also unsuccessfully sought to prevent further damage to the prosecutor's reputation by asking the court to put off publishing it in the hardbound version of the Federal Reporter.

But the government's chumming paid off in August, when the court granted a rehearing on the broader issue of whether Rubinstein's conduct violated the defendants' Fifth Amendment right to indictment by an independent grand jury.

In new briefs, the government was as adamant as ever that Rubinstein had done nothing wrong. "We maintain that the prosecutor's conduct was entirely consistent with established grand jury practices and authoritative guidance for grand jury practice," wrote Rubinstein's boss, U.S. Attorney Donna A. Bucella. Her office declined to elaborate.

The government may end up wishing it had cut bait instead. The 11th Circuit also ordered the rest of the grand jury transcript unsealed. Among the new tidbits cited by defense lawyers: a suggestion by Rubinstein that eating the tainted shrimp could cause cancer.

—John Gibeaut



judge found they violated department policy by refusing Gross' request to testify before the grand jury. *United States v. Gross*, 41 F. Supp. 2d 1096 (C.D.Cal. 1999).

But Jarrett saw it differently. "We conclude that the defendant at no time affirmed that he wished to testify before the grand jury," Jarrett wrote in a letter clearing the prosecutors.

Because of the judge's findings, Assistant U.S. Attorney Kendra S. McNally says she offered Gross five more chances to testify. "He did not take advantage of any of them," she says.

The Man Behind the Curtain

Defense lawyers also beef that the government routinely and inappropriately uses grand jury secrecy to get its way when other avenues are closed. But the usually prosecution-friendly 4th U.S. Circuit Court of Appeals based in Richmond, Va., astounded everyone when it yanked the curtain off one such attempt.

Discovery already had been stayed in a civil case, where the feds and 18 states had accused Charlotte, N.C., book wholesaler Baker & Taylor Inc. of shortchanging schools and libraries on discounts promised to institutional customers. Undaunted, the government turned around and tried to get the same material with a grand jury subpoena.

In sealed proceedings, a District judge in Charlotte quashed the subpoena. The government appealed, and the case remained sealed as briefs were filed with the 4th Circuit.

Defense lawyer Thomas L. Patten of Washington, D.C., assumed that the courtroom would be closed when he arrived for oral argument. Instead, without explanation or a motion from either side, the three-judge panel flung open the doors to the public.

After summarily denying requests by the government to keep its lawyers' names under wraps, the panel affirmed the District Court and named names in a published opinion. *In re Grand Jury Subpoena*, 175 F.3d 332 (1999).

"I figured if I won this, it would be another one I'd never be able to talk about," Patten says. He adds that the government got what it deserved, because the matter would have remained secret had Justice not appealed a case that was a sure-fire loser from the start. "This is all the government's doing."

One of the prosecutors on the criminal case, Frank Whitney of Charlotte, says the trial judge had specifically cleared him of any misconduct, so the folks from professional responsibility gave him only a cursory phone call. The other prosecutor, Mark Winston of Newark, N.J., declined comment.

Whitney says the ruling killed the criminal investigation, at least in the 4th Circuit. Baker & Taylor and its parent, W.R. Grace & Co., settled the civil litigation last summer for $18.5 million.

The case probably reminds some defense lawyers of the introduction from the classic television detective series *The Naked City*. It's just one of a million stories. They reckon prosecutors' unwarranted control over grand juries probably allows many more instances of misconduct to go undetected, just beneath the surface of reported cases and news coverage. "The whole grand jury system is lawless," says defense bar spokesman Lefcourt.

But a few tales of woe don't impress the feds. And as long as Justice remains at the wheel, don't expect the department to hand itself any rope if Congress tries to string up the current scheme.

"The burden ought to be on the proponents of these changes to bring up all the wrongs, evils and abuses to justify this," Robinson says. "You'd better find some instances of innocent people who are being framed."

So using grand juries to frame only the guilty must be another matter. ■