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Party Challenging Validity of Grand Jury Subpoena Duces Tecum Has Burden of Proving that Subpoenaed Material Is Irrelevant to Grand Jury Investigation

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Party challenging validity of grand jury subpoena duces tecum has burden of proving that subpoenaed material is irrelevant to grand jury investigation

A party wishing to challenge the validity of a grand jury subpoena duces tecum[203] can obtain judicial relief by moving to quash or vacate the subpoena.[204] When such a motion is predicated upon the bad faith of the prosecutor, the courts normally place the burden of establishing the invalidity of the subpoena upon the party seeking relief.[205] It has been unclear, however, upon whom the bur-

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[203] A subpoena duces tecum "requires production of books, papers and other things." CPLR 2301 (1974); *see In re* Davidson's Estate, 89 N.Y.S.2d 224, 226 (Sur. Ct. N.Y. County 1949). The attorney general, or a special prosecutor appointed by him, has the authority, upon the request of the governor, to initiate a grand jury investigation and issue subpoenas duces tecum to compel production of any books or papers "which he deems relevant or material to the inquiry." N.Y. EXEC. LAW § 63(3), (8) (McKinney 1972 & Supp. 1980). Although a showing of probable cause is unnecessary, *see* Windsor Park Nursing Home v. Hynes, 56 App. Div. 2d 872, 872, 392 N.Y.S.2d 470, 471 (2d Dep't), *modified on other grounds*, 42 N.Y.2d 243, 366 N.E.2d 813, 397 N.Y.S.2d 723 (1977), the subpoenaed materials must be described with sufficient particularity, *see In re* Grand Jury Subpoena (Long Beach Grandell Nursing Home v. Hynes), 93 Misc. 2d 117, 120, 402 N.Y.S.2d 308, 310 (Nassau County Ct. 1978).

[204] *E.g.*, Spector v. Allen, 281 N.Y. 251, 258, 22 N.E.2d 360, 364 (1939); Manning v. Valente, 272 App. Div. 359, 361, 72 N.Y.S.2d 88, 92 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); *cf. In re* Additional January 1979 Grand Jury (Albany Supreme Court v. Doe), 50 N.Y.2d 14, 21, 405 N.E.2d 194, 200, 427 N.Y.S.2d 950, 955-56 (1980) (subpoena ad testificandum). The proper method of challenging the subpoena is to make a motion to quash or vacate. 2A WK&M ¶ 2304.03. The motion should be made promptly or, at the very least, prior to the return date, and should be made in the court to which the subpoena is returnable. Santangello v. People, 38 N.Y.2d 536, 539, 344 N.E.2d 404, 405, 381 N.Y.S.2d 472, 473 (1976); *see also* CPLR 2304 (1974). Any party affected by the subpoena may move to quash it. *In re* Roden, 200 Misc. 513, 515, 106 N.Y.S.2d 345, 347-48 (Sup. Ct. N.Y. County 1951).

[205] *In re* Additional January 1979 Grand Jury (Albany Supreme Court v. Doe), 50 N.Y.2d at 20, 405 N.E.2d at 199, 427 N.Y.S.2d at 955; Manning v. Valente, 272 App. Div. at 361, 72 N.Y.S.2d at 92; *see* Maison & Co. v. Hynes, 50 App. Div. 2d 13, 16, 375 N.Y.S.2d 878, 880 (1st Dep't 1975). To enable the court to render a decision on the relevancy of the requested items, sufficient information concerning the materials themselves and their relationship to the matter under investigation must be provided. Spector v. Allen, 281 N.Y. at 258, 22 N.E.2d at 364. It appears that at least two different standards as to what constitutes sufficient information have been adopted. In *Spector*, for example, the Court held that the district attorney need only reveal enough information so as to allow the court to essay an "intelligent estimate" of its relevancy. *Id.* at 258, 22 N.E.2d at 364. This standard has been followed in cases involving subpoenas which either compel the production of records or require a witness to appear and testify. *See, e.g.*, Manning v. Valente, 272 App. Div. at 362, 72 N.Y.S.2d at 92; *cf.* Gold v. Menna, 25 N.Y.2d 475, 482, 255 N.E.2d 235, 239, 307 N.Y.S.2d 33, 38 (1969) (subpoena ad testificandum). A second standard was enunciated in People v. Doe (Byk), 247 App. Div. 324, 326, 286 N.Y.S. 343, 346 (2d Dep't), *aff'd*, 272 N.Y. 473, 3 N.E.2d 875 (1936), in which the court stated that there must be a "justifiable suspicion"

den of proof falls when the recipient of the subpoena asserts that the materials sought are irrelevant to the grand jury's investigation.[206] Recently, in *Virag v. Hynes*,[207] the Court of Appeals held that a party contesting the validity of a grand jury subpoena duces tecum on relevancy grounds bears the burden of demonstrating, "by concrete evidence, that the materials sought have no relation to the matter under investigation."[208]

In *Virag*, the petitioners were served with subpoenas duces tecum requiring them to produce certain business records of their adult home for consideration by the Nassau County grand jury.[209] They moved to quash the subpoenas on the ground that the records were irrelevant to the grand jury's investigation.[210] The special assistant attorney general, in response to the petitioners' motion, did not disclose the details of the investigation being conducted.[211] Relying upon the traditional presumption of validity accorded grand jury subpoenas, she claimed that the burden rested upon the petitioners to demonstrate the materials' irrelevancy.[212] The Nassau County court granted the motion to quash the subpoenas,[213] and the Appellate Division, Second Department, unanimously affirmed,[214] premising its decision upon the failure of the deputy attorney general to disclose the relevance of the sub-

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that the subpoenaed materials are related to the matter being investigated by the grand jury. 247 App. Div. at 326, 286 N.Y.S. at 346.

[206] *Compare* Cunningham & Kaming, P.C. v. Nadjari, 53 App. Div. 2d 520, 521, 384 N.Y.S.2d 383, 384 (1st Dep't 1976) (some showing of relevance by the prosecutor is necessary) *with* People v. Doe, 35 App. Div. 2d 118, 119-20, 315 N.Y.S.2d 5, 7-8 (4th Dep't 1970) (no affirmative burden placed upon prosecutor).

[207] 54 N.Y.2d 437, 430 N.E.2d 1249, 446 N.Y.S.2d 196 (1981).

[208] *Id.* at 444, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200.

[209] *Id.* at 439, 430 N.E.2d at 1250, 446 N.Y.S.2d at 197. The records included financial statements, tax returns, personnel files, a partnership agreement, and all contracts between the home and outside suppliers. *Id.* at 439-50 n.1, 430 N.E.2d at 1250 n.1, 446 N.Y.S.2d at 197 n.1.

[210] *Id.* at 440, 430 N.E.2d at 1250, 446 N.Y.S.2d at 197. In their order to show cause, the petitioners alleged that the deputy attorney general had received a complaint concerning the death of one of the home's residents. *Id.* This single complaint, the petitioners asserted, did not justify a "sweeping investigation of the financial and operating conditions" of their home. *Id.*

[211] *Id.* Specifically, the special assistant attorney general submitted a sworn statement alluding to a broad investigation to ascertain whether "crimes had been committed in the operation of the . . . [h]ome." *Id.* She negated the petitioners' averment that the investigation was a result of an elderly woman's death. *Id.*

[212] *Id.*

[213] *See id.* at 440-41, 430 N.E.2d at 1250-51, 446 N.Y.S.2d at 197-98.

[214] 80 App. Div. 2d 912, 437 N.Y.S.2d 396 (2d Dep't 1981).

poenas.[215]

On appeal, the Court of Appeals reversed the order of the appellate division.[216] Recognizing that grand jury subpoenas enjoy a presumption of validity, Judge Jasen, writing for a unanimous Court, stated that in order to overcome this presumption,[217] the contesting party must prove that the subpoenaed materials are totally unrelated to the matter being investigated by the grand jury.[218] Additionally, the Court noted that because grand juries have limited investigatory resources, the term "relevancy," as applied in the context of grand jury investigations, is necessarily broader in scope "than when applied to evidence at trial."[219] This, the Court reasoned, necessitates giving grand juries a "fair margin of reach" in gathering material.[220] Furthermore, Judge Jasen observed that, as a practical matter, to lessen the contesting party's burden would result in excessive litigation, thereby impeding the

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[215] *Id.* Though the appellate division agreed that the special prosecutor was not obliged to disclose publicly the nature of the investigation, *id.*, it nevertheless observed that an in camera disclosure could have been made. *Id.* at 912-13, 437 N.Y.S.2d at 397.

[216] 54 N.Y.2d at 441, 430 N.E.2d at 1251, 446 N.Y.S.2d at 198.

[217] *Id.* at 444, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200. The Court noted that the presumption of validity conferred upon grand jury subpoenas is partly an outgrowth of the presumption of regularity accorded to official acts of persons serving under an oath of office. *Id.* at 443, 430 N.E.2d at 1252, 446 N.Y.S.2d at 199. Additionally, the Court observed that the presumption of validity arises from the broad investigatory powers of the grand jury. *Id.*

[218] *Id.* at 444, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200. The Court distinguished a nonjudicial "office" subpoena from a subpoena issued by a grand jury. *Id.* at 441, 430 N.E.2d at 1251, 446 N.Y.S.2d at 198. With respect to an office subpoena, the Court asserted that since there is no judicial supervision either in the issuance of the subpoena or in the questioning of the witness, the burden is on the issuer to establish the relevancy of the subpoenaed items. *Id.* at 441-42, 430 N.E.2d at 1251, 446 N.Y.S.2d at 198. To satisfy this burden, the Court stated, the issuer need only demonstrate that the requested materials have "a reasonable relation to the subject matter under investigation and to the public purpose to be achieved." *Id.* at 442, 430 N.E.2d at 1251, 446 N.Y.S.2d at 198 (quoting Carlisle v. Bennett, 268 N.Y. 212, 217, 197 N.E. 220, 222 (1935)). Concerning a grand jury subpoena duces tecum, however, the Court noted that because of its presumption of validity, "[b]are assertions of the lack of relevancy will not suffice." 54 N.Y.2d at 444, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200.

The Court also distinguished the situation in which a prosecutor attempts to hold a witness in contempt for refusing to comply with a subpoena. *Id.* at 445, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200. In this instance, the Court remarked, it is incumbent upon the prosecutor to submit sufficient information about the nature of the investigation and its relation to the subpoenaed materials to enable the court to make an "intelligent estimate" of relevancy. *Id.*

[219] 54 N.Y.2d at 444, 430 N.E.2d at 1252, 446 N.Y.S.2d at 199.

[220] *Id.* (quoting Schwimmer v. United States, 232 F.2d 855, 862 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956)).

progress of a legitimate investigation.[221] The Court thus concluded that although the burden imposed upon the challenging party is stringent, such placement of the burden is nevertheless essential to the proper functioning of the investigatory process.[222]

While the *Virag* decision imposes a harsh burden upon subpoena recipients who legitimately doubt the relevancy of requested materials,[223] the harshness of this burden is aggravated by the secrecy requirement of grand jury proceedings[224] in that it will be difficult for a subpoenaed party to establish the irrelevancy of requested evidence if the nature of the grand jury's investigation is undisclosed.[225] As an alternative, some federal courts have held

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[221] 54 N.Y.2d at 443-44, 430 N.E.2d at 1252, 446 N.Y.S.2d at 199. Several other courts have expressed the concern that the broad investigatory process of the grand jury would be unduly impeded by frivolous litigation. *See, e.g.*, McGinley v. Hynes, 51 N.Y.2d 116, 119-21, 412 N.E.2d 376, 377-78, 432 N.Y.S.2d 689, 691-92 (1980), *cert. denied*, 450 U.S. 918 (1981); Cunningham & Kaming, P.C. v. Nadjari, 53 App. Div. 2d 520, 521, 384 N.Y.S.2d 383, 384 (1st Dep't 1976); Manning v. Valente, 272 App. Div. 359, 362, 72 N.Y.S.2d 88, 93 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947). Notably, the hindrance of grand jury investigations of nursing homes is a common problem. *See* C. HYNES, PROFIT MAKING LONG-TERM CARE FACILITIES 32-33 (1978).

[222] 54 N.Y.2d at 445, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200. The Court reasoned that continual delays generated by "unmeritorious" motions to quash and subsequent appeals might lead to fading memories and loss of evidence. *Id.* at 443, 430 N.E.2d at 1252, 446 N.Y.S.2d at 199.

[223] *See id.* at 445, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200. The *Virag* Court stated that other courts have devised standards by which the presumption of validity of a subpoena duces tecum can be overcome. *Id.* One tribunal, the Court stated, required that " 'the documents . . . [must be] so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the' Grand Jury's investigation." *Id.* (citing Manning v. Valente, 272 App. Div. 358, 361, 72 N.Y.S.2d 88, 92 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947)); *see* Carvel Corp. v. Lefkowitz, 106 Misc. 2d 284, 290, 431 N.Y.S.2d 609, 614 (Sup. Ct. Westchester County 1979), *aff'd*, 77 App. Div. 2d 872, 431 N.Y.S.2d 615 (2d Dep't 1980); *see also In re* Horowitz, 482 F.2d 72, 80 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *In re* Grand Jury Subpoena, 448 F. Supp. 822, 823 (S.D.N.Y. 1978).

[224] CPL § 190.25(4) (McKinney 1971 & Supp. 1981-1982). The five reasons which have been advanced to justify secrecy of grand jury proceedings are: (1) prevention of flight of potential indictees; (2) prevention of interference with the grand jurors by prospective indictees; (3) prevention of procurement of perjury; (4) protection of innocent parties who have been called to testify but have not been indicted; and (5) assurance for prospective witnesses that their testimony will remain confidential. People v. Di Napoli, 27 N.Y.2d 229, 235, 265 N.E.2d 449, 452, 316 N.Y.S.2d 622, 625-26 (1970); L. PAPERNO & A. GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK § 133, at 225-30 (1960). For an historical perspective of the secrecy requirement of grand jury proceedings, see Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18, 18-20 (1967); *see also* 1977 UTAH L. REV. 170, 171-74.

[225] In *Virag*, the Court denied the motion to quash the subpoena duces tecum on the ground that the contesting parties were unable to establish that the requested materials were totally irrelevant to the grand jury's investigation. *See* 54 N.Y.2d at 445, 430 N.E.2d at

that the prosecutor bears the initial burden, though slight, of demonstrating the relevancy of the subpoenaed materials.[226] It is suggested that this approach, which was followed by the appellate division in *Virag*[227] is necessary to protect the privacy rights of a subpoenaed party.

It further appears that the *Virag* decision, by placing the initial burden of establishing irrelevancy on the party challenging a subpoena duces tecum, has greatly enhanced the potential for

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1253, 446 N.Y.S.2d at 200. The contestants, however, were forced to speculate as to the grand jury's purpose for requesting the items. *See id.* At least one other court has acknowledged that a conflict exists between requiring a challenging party to establish irrelevancy and the secrecy requirement of grand jury proceedings. In *In re* Grand Jury Subpoena, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978), the court held:

> Because the secrecy attendant upon grand jury proceedings precludes the target of a subpoena from knowing the status of the investigation of which the subpoena is a part, it is appropriate to require the *grand jury* to bear the burden of demonstrating the relevance of the demanded material to the investigation.

Id. (emphasis added); *see In re* Grand Jury Proceedings, 486 F.2d 85, 92 (3d Cir. 1973) (secrecy of grand jury proceedings necessarily suggests that the party seeking judicial enforcement of the subpoena be required "to make some minimum showing of the existence of a proper purpose").

[226] *See, e.g., In re* Grand Jury Impanelled January 21, 1975, 529 F.2d 543, 549 (3d Cir.), *cert. denied,* 425 U.S. 992 (1976); *In re* Grand Jury Proceedings, 507 F.2d 963, 965-67 (3d Cir.), *cert. denied,* 421 U.S. 1015 (1975). In *In re* Grand Jury Subpoena, 391 F. Supp. 991 (D.R.I. 1975), the court enunciated the following three-prong test to determine whether a prosecutor has satisfied the initial burden of establishing the relevancy of requested materials:

> (1) The existence of a grand jury investigation [must be proved by the prosecutor], and
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> (2) The nature and subject matter of said investigation [must be disclosed by the government]—this requirement is satisfied by the mere recitation of the generic nature of the subject matter under investigation . . . .
>
> (3) [The prosecutor must establish] [t]he fact that the subpoenaed documents bear a general relation to the subject matter of the grand jury investigation in question.

Id. at 997 (citations omitted). The court also stressed that the term "relevancy" should be construed broadly when applied in the context of a grand jury subpoena duces tecum. *Id.* at 998. Once the burden of establishing relevancy is satisfied, the court observed, no additional information may be obtained by the contesting party as to the nature of the grand jury's investigation. *Id.* at 995; *see also In re* Grand Jury Subpoena, 446 F. Supp. 1153, 1155 n.5 (N.D.N.Y. 1978) (the method prescribed in *Allen* is the "fairest and least intrusive approach"). Several subsequent federal court cases, however, have not been consistent. *See In re* Liberatore, 574 F.2d 78, 82 (2d Cir. 1978) (prosecutor need not establish relevancy); *In re* Grand Jury Proceedings, 555 F.2d 686, 686 (9th Cir. 1977) (prosecutor does not bear the burden of proving relevancy); *see also In re* Pantojas, 628 F.2d 701, 705 (1st Cir. 1980) (three-prong test may be adopted in the future); *In re* Berry, 521 F.2d 179, 184 (10th Cir.), *cert. denied,* 423 U.S. 928 (1975) (relevancy and materiality play no role in a grand jury investigation).

[227] 80 App. Div. 2d 912, 437 N.Y.S.2d 396 (2d Dep't 1981).

prosecutorial abuse of the power to subpoena.[228] As a result, witnesses will be forced to rely upon the prosecutor's good faith judgment as to relevancy and comply with the subpoena duces tecum,[229] or be subject to criminal contempt proceedings.[230] It is submitted that this stricture provides an additional reason for placing the burden to establish the relevancy of requested items upon the prosecutor.[231]

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Retention of counsel in connection with grand jury inquiry does not preclude subsequent investigation, in the absence of counsel, which uncovers new crimes

The fulcrum of the New York courts' enforcement of a crimi-

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[228] Traditionally, it has been considered important for the grand jury, while serving in its investigatory capacity, to be impartial, thereby protecting the rights of private citizens. United States v. Mara, 410 U.S. 19, 45 (1973) (Marshall, J., dissenting). Ideally, the grand jury should not be a tool of the government or the courts, but rather an instrument to be used for the benefit of the people. *Id.* (Marshall, J., dissenting); *see* Stirone v. United States, 361 U.S. 212, 218 (1960); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 175-77 (1963). In recent years, however, prosecutorial domination of the grand jury has increased. *See* People v. Colebut, 86 Misc. 2d 729, 734-35, 383 N.Y.S.2d 985, 990 (Sup. Ct. N.Y. County 1976); Murov, *An Examination of the Grand Jury: Inquest and Quest*, 51 N.Y.S.B.J. 115, 116-17 (1979).

[229] The *Virag* Court noted that there is a presumption of regularity accorded to official acts of individuals functioning under an oath of office. 54 N.Y.2d at 443, 430 N.E.2d at 1252, 446 N.Y.S.2d at 199-200; W. RICHARDSON, *supra* note 197, § 72, at 49. The potential exists, however, for prosecutors to act overzealously, especially during investigations of nursing homes, where widespread abuse of the Medicaid system has already been uncovered. *See* C. HYNES, *supra* note 221, at 36-50; Murov, *supra* note 228, at 134.

[230] If a witness fails to comply with a grand jury subpoena duces tecum, he is subject to a criminal contempt citation. Manning v. Valente, 272 App. Div. 358, 361, 72 N.Y.S.2d 88, 92 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); *see* 9 N.Y. JUR. *Contempt* § 47 (1960).

[231] Interestingly, the burden to establish relevancy has been placed upon the prosecutor in the context of subpoenas ad testificandum (subpoena to testify). In *In re* Additional January 1979 Grand Jury (Albany Supreme Court v. Doe), 50 N.Y.2d 14, 405 N.E.2d 194, 427 N.Y.S.2d 950 (1980), for example, the Court reiterated the proposition that a witness may not be compelled to answer irrelevant questions. *Id.* at 21, 405 N.E.2d at 199-200, 427 N.Y.S.2d at 955. Indeed, if a witness "harbors a reasonable suspicion" that a line of questioning is irrelevant, the court may be called upon to determine the validity of that suspicion. *Id.* The onus is then placed upon the prosecutor to demonstrate the relevancy of his inquiries. *Id.* It is submitted that this rule should be extended to cover witnesses who doubt the relevancy of requested materials.