St. John's Law Review

Volume 53, Fall 1978, Number 1 Article 10

CPL § 190.52: Statute Amended to Give Grand Jury Witnesses Limited Right to Counsel

Leah Kaplan

plaintiff's deposition,"[137] the Court appears to have retreated from the position that default procedures are not intended to be punitive and that proof of damages should be separate from proof of liability.[138] It is submitted that the defaulting defendant should be able to examine the plaintiff on the question of the extent of damages.[139] A contrary view would undermine the *Reynolds Securities* holding by preventing the defendant from fully utilizing his right to appear and oppose plaintiff's proof of damages.[140] It is therefore suggested that, when the issue is squarely presented, the Court should reject the *Reynolds Securities* dictum in favor of a more equitable rule giving the defendant full discovery rights for purposes of any post-judgment damages inquest.

Michael Jacobellis

CRIMINAL PROCEDURE LAW

CPL § 190.52: Statute amended to give grand jury witnesses limited right to counsel

Historically, counsel for a grand jury witness was excluded from the grand jury room[141] in order to preserve the secrecy of grand jury

[137] 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746. The Court cited no authority in support of its position that the defendant was precluded from deposing the plaintiff. It is possible, however, that the Court was referring to CPLR 3102(d) (1970), which prohibits examinations during and after the trial, except by order of the trial court or to aid in the execution of judgment. CPLR 3102, commentary at 267 (1970). Nevertheless, the cases decided before *Reynolds Securities* indicated that such a rule might not be applicable when a defendant is seeking information to assist him in a post-judgment damages inquest. *See* note 140 *infra*. *See generally* 3A WK&M ¶ 3102.19.

[138] *See* notes 134-135 and accompanying text *supra*.

[139] *See* CPLR 3102(d) (1970); note 137 *supra*.

[140] Although the New York courts have not specifically ruled that the defaulting defendant may examine the plaintiff, it has been held that where plaintiff's motion for summary judgment has been granted, defendant may examine the plaintiff prior to the assessment of damages. *See, e.g.*, Appeal Printing Co. v. Levine, 69 Misc. 2d 76, 329 N.Y.S.2d 110 (N.Y.C. Civ. Ct. N.Y. County 1971); Shemitz v. Junior Center, Inc., 74 N.Y.S.2d 34 (N.Y.C. City Ct. N.Y. County 1947); CPLR 3102, commentary at 65 (Supp. 1978-1979). In Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 4 N.Y.S.2d 397 (Sup. Ct. Madison County 1938), the court suggested that the defendant would have the right to examine the plaintiff prior to an inquest resulting from a default. The *Glove City* court observed: "[T]he procedure in proving damages upon an assessment . . . on a default . . . seems to be substantially the same as upon a trial . . . . [A bill of particulars] is as necessary and useful upon an assessment of damages as upon a trial." *Id.* at 604-05, 4 N.Y.S.2d at 400.

[141] Absent a specific statutory provision, a grand jury witness does not have a right to the presence of an attorney. *See, e.g.*, United States v. Scully, 225 F.2d 113, 118 (2d Cir. 1955); *In re* Black, 47 F.2d 542, 543 (2d Cir. 1931); People v. Waters, 27 N.Y.2d 553, 555, 261 N.E.2d

proceedings[142] and advance the grand jury's investigative function.[143] Denial of the right to the presence of counsel was justified on the ground that a witness was called before the grand jury to provide information and not to be prosecuted.[144] If a witness desired legal advice, he could obtain permission from the district attorney to consult with his retained lawyer outside the grand jury chambers.[145]

265, 266, 313 N.Y.S.2d 124, 125 (1970) (per curiam). Under New York's Criminal Procedure Law, an interpreter, a guard for a witness in custody and a clerk "authorized to assist the grand jury in the [administration] of [the] proceedings" may be present during a witness' testimony. CPL § 190.25(3) (1971). All those present but the witness are sworn to secrecy. *Id.* § 190.25(4) (Supp. 1978-1979). If an unauthorized person is present during testimony, any subsequent indictment for the crime under investigation may be dismissed. *E.g.*, People v. Minet, 296 N.Y. 315, 73 N.E.2d 529 (1947).

[142] People v. Ianniello, 21 N.Y.2d 418, 423, 235 N.E.2d 439, 444, 288 N.Y.S.2d 462, 467, *cert. denied*, 393 U.S. 827 (1968); People v. Conte, 17 Misc. 2d 664, 665, 186 N.Y.S.2d 393, 395 (Oneida County Ct. 1959); *see* CPL § 190.25(4) (Supp. 1978-1979). The secrecy of grand jury proceedings is maintained to protect appearing witnesses, prevent escape by an accused before his indictment and preclude tampering with the witness. People v. McAdoo, 45 Misc. 2d 664, 668, 257 N.Y.S.2d 763, 770 (N.Y.C. Crim. Ct. New York County 1965), *aff'd per curiam mem.*, 51 Misc. 2d 263, 272 N.Y.S.2d 412 (Sup. Ct. App. T. 1st Dep't 1966), *cert. denied*, 386 U.S. 1031 (1967); *accord*, People v. Werfel, 82 Misc. 2d 1029, 372 N.Y.S.2d 510 (Sup. Ct. Queens County 1975). The Court of Appeals recently has reiterated the traditional belief that secrecy is vital to the grand jury system. *See* People v. DiFalco, 44 N.Y.2d 482, 487, 377 N.E.2d 732, 736, 406 N.Y.S.2d 279, 282-83 (1978).

[143] *See, e.g.*, People v. Waters, 27 N.Y.2d 553, 555, 261 N.E.2d 265, 266, 313 N.Y.S.2d 124, 125 (1970) (per curiam); People v. Ianniello, 21 N.Y.2d 418, 424, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 467, *cert. denied*, 393 U.S. 827 (1968). At its inception, the grand jury had a duty to investigate, accuse and determine the guilt of the party charged. W. FORSYTH, HISTORY OF TRIAL BY JURY 162-64 (1971). Over the centuries, however, the grand jury's role has been refined and its adjudicatory responsibilities have been eliminated. *Id.* at 165. Today, the grand jury's function in the United States is generally limited to investigating criminal activity and handing down indictments. CPL § 190.05 (1971); *see* People v. Avant, 33 N.Y.2d 265, 271, 307 N.E.2d 230, 234, 352 N.Y.S.2d 161, 166 (1973). Nevertheless, the restriction of its functions has not resulted in a diminution of the grand jury's authority within its remaining areas of responsibility. *See* United States v. Calandra, 414 U.S. 338, 343 (1974); Nigrone v. Murtagh, 46 App. Div. 2d 343, 350, 362 N.Y.S.2d 513, 519 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975).

The modern grand jury acts as an arm of the superior court that impaneled it. CPL § 190.05 (1971). A grand jury may investigate crimes using its own knowledge or that received from a reliable source. In furtherance of its investigative purpose, the grand jury may call and swear its own witnesses, limited only by the pertinent provisions of the CPL. *See* Manning v. Valente, 272 App. Div. 358, 72 N.Y.S.2d 88 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); People v. Wyatt, 186 N.Y. 383, 391-92, 79 N.E. 330, 333 (1906); CPL § 190.50 (1971). The grand jury may initiate an investigation based on its own knowledge or upon information received from a reliable source. *See* People v. McCloskey, 18 App. Div. 2d 205, 208, 238 N.Y.S.2d 676, 681 (1st Dep't 1963). *See generally* Note, *The Grand Jury: Powers, Procedures and Problems*, 9 COLUM. J.L. & SOC. PROB. 681, 683 (1973); Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586 (1953).

[144] *See* People v. Ianniello, 21 N.Y.2d 418, 424, 235 N.E.2d 439, 445, 288 N.Y.S.2d 462, 467, *cert. denied*, 393 U.S. 827 (1968); *accord, In re* Groban, 352 U.S. 330, 332 (1957).

[145] People v. Ianniello, 21 N.Y.2d 418, 423, 235 N.E.2d 439, 444, 288 N.Y.S.2d 462, 467,

In recent years, however, prosecutorial abuses and the inequities involved in excluding counsel have led to criticism of the grand jury system and demands for reform.[146]

In apparent response to this criticism,[147] the New York Legislature has amended article 190 of the CPL to permit a grand jury witness who has waived immunity[148] to be accompanied by counsel

---

cert. denied, 393 U.S. 827 (1968); People v. Pomerantz, 63 App. Div. 2d 457, 465, 407 N.Y.S.2d 723, 729 (2d Dep't), *leave to appeal granted*, 45 N.Y.2d 829 (1978); People v. Doe, 61 App. Div. 2d 426, 431, 403 N.Y.S.2d 375, 382 (4th Dep't 1978); People v. DeFeo, 284 App. Div. 622, 627, 131 N.Y.S.2d 806, 812 (1st Dep't 1954), *rev'd on other grounds*, 308 N.Y. 595, 127 N.E.2d 592 (1955); *see* note 163 *infra*.

[146] *See, e.g.*, M. FRANKEL & G. NAFTALIS, THE GRAND JURY 64-66 (1977); Meshbesher, *Right to Counsel Before Grand Jury*, 1 SUFFOLK L. REV. 23 (1967); Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 Mo. L. REV. 193 (1971); Note, *The Grand Jury: Powers, Procedures and Problems*, 9 COLUM. J.L. & SOC. PROB. 681 (1972). Prosecutorial abuse sometimes results in the reversal of convictions or the vacatur of indictments. *E.g.*, People v. Pomerantz, 63 App. Div. 2d 457, 407 N.Y.S.2d 723 (2d Dep't), *leave to appeal granted*, 45 N.Y.2d 829 (1978); People v. Tyler, 62 App. Div. 2d 136, 405 N.Y.S.2d 270 (2d Dep't 1978). Some commentators contend that the exclusion of the witness' counsel from the grand jury room and the concomitant necessity for repeated trips outside the chamber for advice, has a prejudicial effect on the witness by "raising speculation in [the minds of the jurors] as to the purpose of the consultation." Gerstein & Robinson, *Remedy for the Grand Jury: Retain but Reform*, 4 A.B.A.J. 337, 339 (1978). *See* Naftalis, *Need for Representation at Grand Jury Inquiries*, Nat'l L.J., Oct. 2, 1978, at 19, col. 2. Governor Carey apparently was influenced by such arguments in his decision to approve CPL § 190.52 (Supp. 1978-1979). Adams & Farrell, *Grand Jury Rigors Will be Relaxed*, N.Y. Times, June 25, 1978, § 4, at 15, cols. 1-2.

[147] *See* note 168 *supra*. The amendments to the CPL were enacted to provide a measure of fairness to witnesses testifying before grand juries. Governor's Memorandum on Approval of ch. 447, N.Y. Laws (June 19, 1978), *reprinted in* [1978] N.Y. Laws A-285 (McKinney).

[148] All witnesses appearing before a New York grand jury receive transactional immunity as defined in CPL § 50.10 (1971). Section 50.10 provides that one

> who has been a witness in a legal proceeding, . . . cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence . . . . A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

Under CPL § 190.40(2) (Supp. 1978-1979), all grand jury witnesses are entitled to transactional immunity unless a waiver has been executed. A witness before a federal grand jury, in contrast, receives the more limited "use" immunity whereby

> no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1976).

Thus, while transactional immunity totally shields a grand jury witness from prosecution for criminal activity disclosed by his testimony, "use" immunity does not eliminate the possibility of indictment for the criminal act revealed to the federal grand jury if the prosecution can obtain independent evidence of the witness' involvement in the crime. Under both

into the grand jury room.[149] Effective September 1, 1978,[150] section 190.52 creates a substantive right to counsel and enables an indigent witness who has signed a waiver of immunity to have counsel appointed by the superior court which impaneled the grand jury.[151]

"transactional" and "use" immunity principles, however, if a witness' answers are not responsive to the particular questions asked, he may be prosecuted for any crimes revealed in testimony. *E.g.*, Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); People v. McFarlan, 89 Misc. 2d 905, 396 N.Y.S.2d 559 (Sup. Ct. N.Y. County 1975); *accord*, Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1891).

In a sense, a grant of immunity can be perceived as a benefit which the state gives the witness in exchange for his fifth amendment right to avoid self-incrimination. M. FRANKEL & G. NAFTALIS, *supra* note 146, at 76-77; *see* People v. Laino, 10 N.Y.2d 161, 171-73, 176 N.E.2d 571, 577-78, 218 N.Y.S.2d 647, 655-57 (1961); Special Prosecutor v. G.W., 407 N.Y.S.2d 112, 115 (Sup. Ct. Onondaga County 1978); *accord*, Kastigar v. United States, 406 U.S. 441 (1972). It is interesting to note that the *Kastigar* Court rejected the defendant's argument that only transactional immunity provides adequate safeguards to justify compulsory relinquishment of a witness' fifth amendment right. *Id.* at 453.

In New York, waiver of the immunity granted to a grand jury witness is governed by CPL § 190.45 (1971). *See generally* 1 M. WAXNER, NEW YORK CRIMINAL PRACTICE ¶ 8.16[1] (1977). A waiver of immunity must be sworn to before the grand jury and is ineffective until that time. CPL § 190.45(2) (1971); *see* People v. Gerald, 91 Misc. 2d 509, 398 N.Y.S.2d 244 (Nassau County Court 1977). The waiver must be intentionally and voluntarily executed in writing. CPL § 190.45(1), (3) (1971).

[149] Ch. 447, §§ 1-2, [1978] N.Y. Laws 760 (McKinney). CPL § 190.25(3) (1971 & Supp. 1978-1979), which lists the persons who may be admitted to the grand jury room, *see* note 141 *supra*, has been amended to include: "(f) An attorney representing a witness pursuant to section 190.52 of this chapter while that witness is present."

[150] Ch. 447, § 3, [1978] N.Y. Laws 760 (McKinney).

[151] Section 190.52 now provides:

> 1. Any person who appears as a witness and has signed a waiver of immunity in a grand jury proceeding, has a right to an attorney as provided in this section. Such a witness may appear with a retained attorney, or if he is financially unable to obtain counsel, an attorney who shall be assigned by the superior court which impaneled the grand jury.
>
> 2. The attorney for such witness may be present with the witness in the grand jury room. The attorney may advise the witness, but may not otherwise take any part in the proceeding.
>
> 3. The superior court which impaneled the grand jury shall have the same power to remove an attorney from the grand jury room as such court has with respect to an attorney in a courtroom.

CPL § 190.52 (Supp. 1978-1979). The statute's provision for a right to appointed counsel for those witnesses who cannot afford one should obviate any constitutional objections based on equal protection arguments. *See generally* M. FRANKEL & G. NAFTALIS, *supra* note 146, at 124; L. CLARK, THE GRAND JURY 135 (1975).

A number of jurisdictions outside New York have enacted statutes granting a right to counsel in the grand jury chamber. Only Kansas and Illinois, however, expressly have provided for the assignment of counsel for indigent witnesses. ILL. ANN. STAT. ch. 38, § 112-4(b) (Smith-Hurd Supp. 1978); KAN. STAT. § 22-3009(1) (1974). In addition, the state statutes differ with respect to the class of witnesses entitled to bring an attorney into the grand jury room. *See* ARIZ. REV. STAT. ANN. CRIM. R. 12.6 (West 1973) (grand jury targets); ILL. ANN. STAT. ch. 38, § 112-4(b) (Smith-Hurd Supp. 1978) (indicted witnesses); KAN. STAT. § 22-3009 (1974) (all witnesses); MASS GEN. LAWS ANN. ch. 277, § 14A (West Supp. 1978-1979) (all

While permitted to "advise" the witness, counsel may not take part in the proceeding in any other respect.[152] Furthermore, the court retains the same power to remove the attorney from the grand jury room as it has to eject an obstructive lawyer from a courtroom.[153] This limited statutory right to counsel reflects a legislative belief that, although a witness who has waived immunity should have the benefit of the presence and advice of counsel, this procedural right should not be so extensive as to impair the grand jury's effectiveness.[154]

Critics of the new provisions contend that the presence of an attorney in the grand jury room will unduly interfere with the grand jury process[155] and impede the investigation of corruption and organ-

---

witnesses); MICH. COMP. LAWS § 767.3 (1975) (all witnesses); MINN. RULES CRIM. P. 18.04 (Supp. 1968-1977) (witnesses who have waived immunity); OKLA. STAT. ANN. ch. 22, § 340 (West Supp. 1978-1979) (all witnesses); S.D. COMPILED LAWS ANN. § 23-30-7 (Supp. 1978) (effective through June 1, 1979) (all witnesses); UTAH CODE ANN. § 77-19-3 (Supp. 1977) (all witnesses); VA. CODE § 19.2-209 (1975) (witnesses who have retained counsel); WASH. CODE ANN. § 10.27.120 (Supp. 1978) (witness may have counsel in grand jury room until immunity granted).

[152] CPL § 190.52(2) (Supp. 1978-1979); *see* notes 164-165 and accompanying text *infra*.

[153] CPL § 190.52(3) (Supp. 1978-1979).

[154] Governor's Memorandum on Approval of ch. 447, N.Y. Laws 760.

[155] Some opponents to the amendment have argued that it will cause delays in grand jury proceedings. *See* Letter from the District Attorneys' Association to Governor Hugh Carey (June 9, 1978) (urging veto); *Carey Is Sent a Bill to Allow Lawyers Before Grand Jury*, N.Y. Times, June 18, 1978, at 40, col. 3. In addition, the creation of a substantive right to counsel in CPL § 190.52(1) (Supp. 1978-1979) has been criticized because it may add to the cost of grand jury proceedings. *Carey Is Sent a Bill to Allow Lawyers Before a Grand Jury*, N.Y. Times, June 18, 1978, at 40, col. 4. For example, Suffolk County District Attorney Patrick Henry has argued that "[t]o allow defense counsel in the Grand Jury will prolong the proceedings at a cumulatively tremendous expense to the taxpayers." Letter from Patrick Henry to Governor Hugh Carey (June 7, 1978) (urging veto); *accord*, Letter from Robert M. Morganthau to Governor Hugh Carey (June 19, 1978). Proponents of CPL § 190.52 (Supp. 1978-1979), however, contend that the cost to the public will be minimal since, in practice, few witnesses waive immunity. *See* Legislative Memo, League of Women Voters (May 15, 1978); News from Senator Ralph J. Marino; letter from Richard N. Gottfried, member of the Assembly, to Judah Gribetz, Counsel to the Governor (June 7, 1978). It is interesting to note that, in a memorandum urging approval of the amendment, Mr. Gottfried estimated that the requirement of appointed counsel for indigent witnesses could cost localities approximately $1.2 million. Bill Memorandum (A. 7723).

One commentator has expressed the view that the statutory language of CPL § 190.25(4) (Supp. 1978-1979) may allow a witness to authorize his attorney to reveal information elicited by the grand jury 'in the lawful discharge of [the attorney's] duties.' *Id.*, commentary at 60. It should be remembered, however, that as an officer of the court, an attorney's duty is to further the interests of justice, as well as to protect his client. Kraushaar v. La Vin, 181 Misc. 508, 42 N.Y.S.2d 857 (Sup. Ct. Queens County 1943). It follows, therefore, that the attorney has an obligation not to manipulate the statute in a manner that would defeat the purpose of the grand jury.

ized crime.[156] The amendments, however, also may be regarded as an illustration of the view that a right to counsel should exist in situations where an attorney's presence would mitigate or avoid the possibility of substantial prejudice to an individual's rights.[157] The traditional notion that the right to counsel did not extend to grand jury witnesses[158] was a product of the premise that grand jury investigations are not adversary proceedings.[159] By enacting CPL § 190.52, the legislature appears to have rejected this premise, to a limited extent, and instead has recognized that significant prejudice could result from grand jury testimony following a waiver of immunity.[160]

---

[156] Even prior to the enactment of CPL § 190.52 (Supp. 1978-1979), New York courts recognized that a person's legal rights may be critically affected by a grand jury proceeding. Thus, in People v. Ianniello, 21 N.Y.2d 418, 424, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 468, *cert. denied,* 393 U.S. 827 (1968), a witness was found to have the right to consult with counsel outside the grand jury chambers. *Accord,* People v. Ward, 37 App. Div. 2d 174, 177, 323 N.Y.S.2d 316, 319 (1st Dep't 1971) (per curiam); *see* note 145 and accompanying text *supra.*

In Kirby v. Illinois, 406 U.S. 682, 688 n.6 (1972), the Supreme Court indicated that the sixth amendment right to counsel attaches at the "critical period" of a criminal proceeding. One commentator has noted that "counsel is extended to a [particular] stage because what happens to a defendant at that stage critically affects his rights." Steele, *supra* note 146, at 197. A substantive right to counsel has been recognized in a variety of situations. *See* United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-ups); Escobedo v. United States, 378 U.S. 478 (1964) (police interrogation); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearings); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignments). The extension of the right to counsel in these situations has led some commentators to conclude that a similar right should be extended to appearances before a grand jury. *E.g.,* Steele, *supra* note 146, at 193; *The Supreme Court, 1963 Term,* 78 HARV. L. REV. 143, 222-23 (1964).

[157] *See* People v. Ianniello, 21 N.Y.2d 418, 424, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 467, *cert. denied,* 393 U.S. 827 (1968); M. FRANKEL & G. NAFTALIS, *supra* note 146, at 28; Meshbesher, *supra* note 146, at 23-24.

[158] *See* United States v. Calandra, 414 U.S. 338, 343-44 (1974); United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied,* 350 U.S. 897 (1955); M. FRANKEL & G. NAFTALIS, *supra* note 146, at 67; Note, *Juries and Jurors: The Right to Counsel in the Oklahoma Grand Jury,* 29 OKLA. L. REV. 967, 969 (1976).

[159] It may be argued that, in reality, grand jury proceedings have some adversarial characteristics. For example, overzealousness on the part of some prosecutors can result in the grand jury functioning as an arm of the prosecutor rather than as an arm of the court. *See* People v. Aviles, 89 Misc. 2d 1, 391 N.Y.S.2d 303 (Sup. Ct. N.Y. County 1977); note 146 and accompanying text *supra.*

[160] An individual who is the target of a grand jury investigation has a right to testify before that body. CPL § 190.50(5)(a) (1971). He must, however, sign a general waiver of immunity and thus make himself vulnerable to prosecution for criminal acts revealed by his testimony. CPL § 190.50(5)(b) (1971). Since these individuals are entitled to have counsel present under CPL § 190.52(1) (Supp. 1978-1979), a situation could arise in which a witness is represented by an attorney who also represents the target-witness. Burke, *Lawyers Inside Grand Jury Rooms,* N.Y.L.J., June 23, 1978, at 2, col. 1. Some prosecutors have expressed concern that, in such multiple representation situations, the attorney might act as a "pipeline" between the grand jury and the target, informing him of the other client's testimony. Letter from Edward Cosgrove, District Attorney of Erie County, to Governor Hugh

In permitting counsel inside the grand jury room to advise the witness, the amendment eliminates the former time-consuming procedure whereby the witness had to request permission and then leave the grand jury room for legal advice.[161] Nevertheless, new problems may arise with respect to the proper role of the attorney who accompanies his client into the grand jury room. While CPL § 190.52 provides that the "attorney may advise the witness, but may not otherwise take any part in the proceeding,"[162] it does not indicate whether this advisory activity may be initiated by counsel. Since the grand jury witness could consult counsel to determine the relevancy of questions and the existence of any testimonial privileges prior to the enactment of CPL § 190.52,[163] the right to counsel afforded witnesses under the new provision would appear to encompass at least this type of attorney-client interaction. When an attorney attempts to go beyond this limited role, however, conflict with the district attorney can be expected to result.[164] In such an instance, the superior court which impaneled the grand jury will have to act as arbiter.[165]

Carey (June 9, 1978); *see* Letter from Joseph Jaffe, District Attorney of Sullivan County, to Governor Hugh Carey (June 9, 1978). In such situations the target-witness would have an "unquestionable advantage" if he testifies after the appearance of his attorney's other client. Burke, *Lawyers Inside Grand Jury Rooms*, N.Y.L.J., June 23, 1978, at 1, col. 2. It is submitted, however, that this possibility will not present a substantial problem in practice. In those rare instances in which an attorney represents both a witness and a target of the investigation, the statutory penalties for breaching grand jury secrecy, would appear sufficient to prevent the attorney from acting as a "pipeline" for either client. *See* CPL § 190.25(4) (Supp. 1978-1979).

[161] *See* Burke, *supra* note 156, at 2, cols. 1-2; note 145 and accompanying text *supra*.

[162] CPL § 190.52 (Supp. 1978-1979).

[163] People v. Ianniello, 21 N.Y.2d 418, 424-25, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 468-69, *cert. denied*, 393 U.S. 827 (1968). Access to counsel for legal advice can be important even to a witness who enjoys immunity, since such a witness may be prosecuted if he gives voluntary or gratuitous testimony that is not responsive to the prosecutor's questions. CPL § 190.40(2) (Supp. 1978-1979).

[164] *See* Burke, *supra* note 156, at 2, col. 1. The district attorney acts as a legal advisor to the grand jury as well as a prosecutor. The judge of the impaneling court does not preside over the grand jury proceedings, although he does share the role of legal adviser. CPL § 190.25 (3), (6) (1971 & Supp. 1978-1979).

[165] *See* CPL § 190.52(3) (Supp. 1978-1979); Letter from Charles J. Wilcox, District Attorney of Rensselaer County, to Judah Gribetz, Counsel to the Governor (June 12, 1978). A number of jurisdictions outside New York have adopted statutes which clearly limit the grand jury witness' attorney to an advisory role. *See* ILL. REV. STAT. § 112-4(b) (Supp. 1978); KAN. STAT. ANN. § 2-3009 (1974); MASS. GEN. LAWS ANN. ch. 227, § 14A (West Supp. 1978-1979); MINN. RULES CRIM. P. 18.04 (1964); VA. CODE § 19.2-209 (1975). While courts within these jurisdictions have not yet addressed the question of the scope of the attorney's role, their future decisions on this issue may prove helpful to New York courts. In addition, as one commentator has suggested, the courts can turn for guidance to the situations where an attorney represents a witness appearing before a congressional or administrative committee,

While some delay and disruption may occur as a result of the implementation of CPL § 190.52,[166] the experience of another state with a similar statute suggests that the existence of a right to counsel will not effect a dramatic alteration in the grand jury process in New York.[167] In the final analysis, the amendments represent a responsive effort on the part of the legislature to revitalize the grand jury system.[168] In light of the potential for procedural problems, however, it is suggested that the courts should monitor the effects of the amendment to ensure that it operates in the manner intended by the legislature.

Leah Kaplan

Court of Appeals sanctions warrentless arrest based on probable cause

It is well established that a warrantless "street arrest" does not violate the fourth amendment proscription against unreasonable searches and seizures[169] if the arresting officer has reasonable cause

---

or where an attorney accompanies his client to a police lineup. Naftalis, *Need for Representation at Grand Jury Inquiries,* Nat'l L.J., Oct. 2, 1978, at 19, col. 3, 47, col. 4.

[166] In testifying before a congressional committee, Charles Ruff, the last Watergate special prosecutor stated:

> [T]he 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 . . . that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel.

Quoted in Gerstein & Robinson, *Remedy for the Grand Jury: Retain but Reform,* 64 A.B.A.J. 337, 339 (1978).

[167] Although the analogous Massachusetts statute, MASS. ANN. LAWS ch. 277, § 14A (1977), has no provision for the expulsion of "unruly counsel" it appears that the grand jury process in Massachusetts remains essentially unaffected. *See* Burke, *supra* note 156, at 2, col. 1.

[168] It is interesting to note that when Governor Carey vetoed an identical grand jury reform bill in 1975 he stated that the witness' right to confer with counsel outside the grand jury room rendered the proposed procedural change unnecessary. Governor's Disapproval Memorandum No. 118 (1975), *reprinted in* [1975] N.Y. Legislative Index 478. Upon approving the 1978 bill, however, Governor Carey observed that it was needed to ensure fairness and "encourage confidence in the grand jury system." Governor's Memorandum on Approval of ch. 447, N.Y. Laws (June 19, 1978), *reprinted in* [1978] N.Y. Laws A-285, 286.

[169] U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person to be seized.

In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held the prohibitions of the fourth amendment applicable to the states through the due process clause of the fourteenth amendment.