

**SM-10 GRAND JURY PROCEEDINGS**

The grand jury in Wisconsin is an institution created and controlled by §§ 968.40 through 968.53. The judge plays a limited role: the judge orders the creation of the grand jury; sees to it that a full grand jury is selected and sworn; instructs the grand jurors before they begin their work; presides over proceedings in which statutory immunity for witnesses is sought; accepts lists of all witnesses called by, progress reports from and indictments returned by the grand jury during its session; takes appropriate action when indictments are returned; and discharges the grand jury.

The procedural and legal aspects of a grand jury proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

**I. Swearing in the Grand Jurors**

The judge shall administer the following oath<sup>1</sup> to grand jurors before they begin the performance of their duties:

"You, as grand jurors for the county of \_\_\_\_\_, do solemnly swear or affirm that you will diligently inquire as to all matters and things which come before this grand jury; that you will keep all matters which come before this grand jury secret; that you will indict no person for envy, hatred or malice; that you will not leave any person unindicted for love, fear, favor, affection or hope

of reward; and that you will indict truly, according to the best of your understanding."

## **II. Swearing in the Court Reporters**

The judge must administer to each reporter and assistant the following oath:

"Do you solemnly swear that you will faithfully record and transcribe all the proceedings before the grand jury and keep secret the matter relative to such proceedings?"<sup>2</sup>

## **III. Charge to the Grand Jury**

It is the duty of the court to instruct the grand jury.<sup>3</sup> The following is recommended.

"The function of the grand jury is not to determine guilt or innocence but rather to investigate possible violations of the criminal law and decide whether the person or persons about whom evidence is presented should be brought to trial. The only job of the grand jury is to return indictments and, if such is appropriate, to report its progress to the court.<sup>4</sup> These progress reports, if any, must be prepared and limited so as not to violate the secrecy rule, and unless so limited, they may not be received by the court.

"Your first duty is to select a presiding juror and a clerk. It shall be the duty of the clerk to preserve the minutes of the proceedings and all exhibits.<sup>5</sup>

"All 17 jurors must attend each session unless excused by the presiding juror for good and sufficient reason.<sup>6</sup>

"No business may be transacted by the grand jury unless at least 14 members are in attendance.<sup>7</sup>

"It is the duty of the district attorney of the county to attend your grand jury sessions whenever the jury so desires for the purpose of examining witnesses in your presence, giving you advice upon any legal matter, issuing subpoenas and other process to bring witnesses before you and helping to draw bills of indictment.<sup>8</sup>

"It is the duty of the presiding juror to return to the judge a list, signed by the presiding juror, of all witnesses who are sworn before the grand jury.<sup>9</sup>

"All witnesses brought before the grand jury shall be put under oath. The presiding juror, the district attorney, or other prosecuting officer shall have the authority to administer such oath.<sup>10</sup>

"Any witness subpoenaed to appear before you has the right to confer with and obtain the legal advice of an attorney.<sup>11</sup> Although the attorney is not entitled to be present during the questioning before the grand jury, the witness should be allowed to confer with the attorney outside the jury room whenever the witness so desires.<sup>12</sup> Any witness also has the privilege against self-incrimination granted by the Fifth Amendment to the United States Constitution. Pursuant to

that privilege, the witness may refuse to answer questions before the grand jury. It is the job of the district attorney and the court to decide whether the witness has properly invoked that privilege.

"Any witness should be advised by the prosecuting officer(s) that the witness has a privilege against self-incrimination and has the right to confer with counsel. Such advice should appear on the grand jury record.<sup>13</sup>

"All grand jury deliberations are to be secret, and no one is permitted to be present at your sessions except the jury, the official sworn reporter(s) and typist(s), the prosecuting officer(s), the witness under examination, and a duly sworn interpreter, if one is required.

"The primary duty of the grand jury is to weigh the evidence against the accused. If the evidence 'excites in your minds after careful consideration an honest reasonable belief that the accused committed the offense charged,'<sup>14</sup> you the grand jury may return an indictment of the accused for the offense charged. Only such evidence as is presented during the grand jury sessions shall be considered. You should not subject yourselves to the opinions or accounts of other persons, of the media, or of any other source regarding such evidence. No indictment shall be returned unless at least 12 grand jurors concur therein.<sup>15</sup>

"No grand juror shall be allowed to state or testify in court in what manner he or she or any other member of the jury voted on any question before you, or what opinion was expressed by any juror in relation to any question.<sup>16</sup>

"No grand juror or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until the person has been arrested.<sup>17</sup>

"The grand jurors normally serve for a period of 31 consecutive days, unless more days are necessary to complete service. The court may discharge the grand jury at any time.<sup>18</sup>

"When the grand jury is discharged, all transcripts of testimony, minutes of proceedings, exhibits and other records of the grand jury shall be collected by the clerk of the grand jury and delivered, as the jury directs, either to the attorney general or to the district attorney, or, upon approval of the court, to the clerk of the court who shall impound them subject to further order or orders of the court."<sup>19</sup>

#### **IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity**

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. See Special Material 55 for an outline of a suggested procedure.

#### **COMMENT**

SM-10 was originally published in 1974, withdrawn in 1993, and republished in 1995. This revision updated statutory references and was approved by the Committee in December 2003.

This Special Material was withdrawn in 1993 because procedures for grand juries are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored because it provides scripted material that is not included in the Benchbook.

1. The oath is based on § 968.41, which specifies the content of the oath which must be administered.

2. Section 968.43(2) requires that "[b]efore assuming the duties prescribed in this section, each reporter shall make and file an oath faithfully to record and transcribe all the proceedings before the grand jury and to keep secret the matters relative to the proceedings." The oath recommended follows this statutory language. Violation of the oath is punishable as a Class H felony. § 968.43(3).

3. State v. Lawler, 221 Wis. 423, 427, 267 N.W. 65 (1936), states that "... it is the duty of the court to instruct the [grand] jury. . . ."

4. In re Grand Jury Report, 204 Wis. 409, 235 N.W. 789 (1931).

5. Section 968.42. These minutes and exhibits are not a matter of public record. Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905).

6. Section 968.48. There are to be at least 17 qualified jurors on the grand jury. Section 968.40(4).

7. Section 968.48.

8. Sections 968.47 and 978.05(4).

9. Section 968.44 refers to "witnesses who are sworn before the grand jury." It is sufficient that witnesses give an affirmation rather than an oath. § 906.03.

10. Section 968.44.

11. Section 968.45(1) provides in part as follows:

Any witness appearing before a grand jury may have counsel present, but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while before a grand jury.

It is generally conceded that a witness has no constitutional right to the assistance of counsel at the grand jury proceeding. A plurality opinion in United States v. Mandujano, 425 U.S. 564 (1976), held that the right to counsel under the 6th Amendment does not apply at the grand jury because no criminal proceedings have been instituted. Federal courts of appeals have held that the right to counsel does not attach at grand jury proceedings. See, for example, United States v. Ramsey, 785 F.2d 184, 193 (7th Cir. 1986).

12. Section 968.45.

13. At this point, the former version of SM-10 provided special advice for "target witnesses." Special warnings are not required for "targets"; the general advice regarding the privilege against self-incrimination is sufficient. United States v. Washington, 431 U.S. 181 (1977). [Also see State v. Ryan, 79 Wis.2d 83, 255 N.W.2d 910 (1977): a John Doe witness is not entitled to a "target witness" warning.]

14. State v. Lawler, note 3, supra, at 435.

15. Section 968.48.

16. Section 968.52.

17. Section 968.51.

18. Section 968.40(6).

19. Section 968.505.