

## Module 7 Study Guide: The Grand Jury - The People's Grand Bulwark of Liberty

### *Common Law and Founders' Design*

#### Lesson Summary

This lesson examines the legal architecture of the grand jury, positioning it not as a tool of the modern state, but as a **pre-political institution** rooted in early English common law. The central premise is that the grand jury exists outside the delegated authority of the three branches of government, serving as a direct expression of the people's power. By tracing the hierarchy of authority, from Natural Law and Natural Rights to the Constitution and finally to the government, the lesson establishes that the state cannot lawfully regulate or abolish an institution that originates above it in the structural chain.

Historically, the grand jury emerged from local "hundreds" where ordinary citizens, bound by oath, conducted inquiries into community wrongdoing. This structure evolved into a dual-purpose mechanism: the **Shield**, which protects citizens from unfounded state accusations, and the **Sword**, or the power of **Presentment**, which allows the jury to initiate its own investigations without a prosecutor's permission. The lesson highlights a critical modern "structural inversion" where the grand jury has been absorbed into the prosecutorial process, functioning more as a "conduit" for state power than the independent "barrier" intended by the Founders and preserved in the Fifth Amendment and state constitutions.

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#### Key Maxims

The following maxims serve as the "bones of reason" and structural constraints within the architecture of law:

- The decision of twelve good and upright men is thought by the common law to be the dictate of truth. *Halk. Max. 73.*
- Jurors ought to be neighbors, of sufficient estate, and free from suspicion. *Jenk. Cent. 141; Bouv. 134.*
- The administration of an oath is an indispensable requisite to the formation of a legal jury. *Lumsden v. City of Milwaukee, 8 Wis. 485,486.*
- Juries are the judges of fact and law in American jurisprudence. *State of Georgia v. Brailsford, 3 Dall. 1, 4; U.S. v. Dougherty, 473 F.2d 1132-33.*
- Ibi semper debet fieri triatio, ubi Juratores meliorem possunt habere notitiam- A trial should always be had where the jury may get the best information. *7 Coke, 1*

## The Rule of Law: Power, Authority and Accountability

### Study Quiz

- 1. What does it mean to describe the grand jury as a "pre-political institution"?** A pre-political institution is one that existed before the modern state and stands outside the delegated authority of the executive, legislative, and judicial branches. Because it was not created by the government, the government does not possess the authority to regulate, reshape, or abolish it.
- 2. How does the "hierarchy of authority" place the grand jury in relation to the government?** The hierarchy begins with Natural Law and Natural Rights, which are held by the people who then establish a Constitution to limit delegated powers. Government is the final, lowest layer of this structure, meaning it cannot claim authority over the grand jury, which operates at the level of the people.
- 3. What was the significance of the "hundreds" in early English common law?** The hundreds were local districts where groups of ordinary men were required to come forward under oath to inquire into local wrongdoing. These men were not legal professionals or government officials; their authority arose from their sworn duty and their status as representatives of the community.
- 4. Why is the number twelve considered a functional structural requirement rather than just a tradition?** The requirement of twelve ensured that the power to accuse could not be exercised by a single individual or authority, requiring a convergence of independent judgment. It created a body large enough to reflect the community's collective conscience while preventing personal vendettas or the concentration of power.
- 5. How did Sir Edward Coke and Justice Antonin Scalia describe the relationship between the grand jury and the state?** Sir Edward Coke stated that the king's attorney is "but a witness" before the grand jury, emphasizing the prosecutor's subordinate role. Justice Scalia reaffirmed this by explaining that the grand jury is an institution separate from the courts, over whose functioning the courts do not preside.
- 6. What are the two primary functions of grand jury secrecy?** Secrecy protects the independence of jurors from intimidation or retaliation by powerful individuals who have an interest in the outcome of an inquiry. Additionally, it protects the reputation of the accused by ensuring that weak or malicious accusations are dismissed without being aired publicly.
- 7. Explain the difference between the "Shield" and the "Sword" functions of the grand jury.** The "Shield" function acts as a defensive barrier that prevents the state from advancing unfounded or malicious charges without community approval. The "Sword" refers to the power of presentment, allowing the grand jury to initiate its own investigations and accusations based on its own knowledge, especially regarding government misconduct.

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8. **What is the constitutional significance of the term "presentment" in the Fifth Amendment?** By including "presentment" alongside "indictment," the Fifth Amendment explicitly preserves the grand jury's independent authority to initiate inquiries. This confirms that the institution was not absorbed into the government but was carried forward with its active, independent powers intact.
9. **How does the doctrine of *nemo judex in causa sua* apply to the modern role of the prosecutor?** This doctrine dictates that no one can judge their own cause; however, modern practice often allows the prosecutor, the accusing party, to control evidence and legal instructions. This creates a structural violation where the party seeking the accusation is also managing the process that evaluates its validity.
10. **What is the "New York Contradiction" regarding the grand jury?** The New York Constitution explicitly forbids the impairment of the grand jury's power to inquire into public official misconduct, yet modern handbooks often condition this power on the prosecutor's direction. This creates a conflict between a constitutional command of independence and a practical reality of administrative management.

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### Answer Key

1. **Pre-political:** It means the institution predates the state and exists outside the three branches of government; therefore, it is not a subordinate tool of those who exercise delegated power.
2. **Hierarchy:** Authority flows from Natural Law to the People, then to the Constitution, and finally to Government; the grand jury sits above the government level as a direct expression of the people's power.
3. **Hundreds:** They were local districts in early England where ordinary community members made sworn inquiries into wrongdoing, forming the foundational model of local knowledge and independence from central authority.
4. **The Number Twelve:** It distributed decision-making power, requiring a "dictate of truth" from a collective rather than a single official, which acted as a safeguard against the concentration of power.
5. **Coke and Scalia:** Coke defined the prosecutor merely as a witness; Scalia defined the grand jury as separate from the judiciary, proving the institution is not an arm of the prosecution or the courts.
6. **Secrecy:** It serves to protect jurors from coercion/retaliation and to protect the accused from the permanent reputational damage of weak or unproven claims.
7. **Shield and Sword:** The Shield stops improper state accusations; the Sword (presentment) initiates inquiries independently when the state refuses to act.

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8. **Presentment in 5th Amendment:** It signifies the preservation of the grand jury's active power to bring accusations on its own motion, not just react to what a prosecutor provides.
9. ***Nemo judex*:** Since the prosecutor is an adversarial party, their modern control over the grand jury's evidence and instructions violates the principle that the accusing party should not manage the authorization process.
10. **NY Contradiction:** Article I, Section 6 of the NY Constitution states grand jury power shall "never be impaired," yet the system now treats it as a managed component under prosecutorial or judicial supervision.

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### Essay Format Questions

1. Analyze the architectural metaphor of the "burning building" as it relates to legal spectacle versus legal structure. How does this shift in perspective change the evaluation of the grand jury's current function?
2. Discuss the implications of *casus omissus* and Alexander Hamilton's arguments in Federalist No. 83. Why is the Constitution's silence on the mechanics of the grand jury interpreted as a restriction on government power rather than a grant of it?
3. Compare the historical role of "freeholders" and local knowledge in the grand jury system to the modern legal concept of "bias." Why was familiarity once considered a protection rather than a flaw?
4. Examine the shift from "Indictment" to "Information" as described through the lens of Blackstone's "Ghost of the Star Chamber." What are the dangers of allowing the state to bypass the independent "stamp of verisimilitude"?
5. Evaluate the concept of *void ab initio* in the context of modern grand jury outcomes. If an institution returns indictments at a 99% rate, has it transitioned from a structural barrier to a conduit, and what does this mean for the legitimacy of the process?

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### Glossary of Key Terms

- **Billa Vera:** Latin for "True Bill"; the formal endorsement of a grand jury that a criminal charge is supported by evidence.
- **Casus Omissus:** A legal principle stating that a matter omitted from a text is not to be supplied by interpretation; used to argue that government cannot add regulations to the grand jury that are not in the Constitution.
- **Conduit:** In this context, an institution that merely processes the state's requests without acting as an independent filter or barrier.

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- **Freeholders:** Historically, property owners within a community who were selected for grand jury service because they had a direct stake in the community's stability.
- **Grand Bulwark:** A defensive structure; used by Blackstone to describe the grand jury as the primary protector of the liberties of the subject.
- **Hundreds:** Early English administrative divisions where the communal inquest system originated.
- **Ignoramus:** Latin for "we do not know of it"; the term used when a grand jury rejects a prosecutor's charge.
- **Information:** A formal accusation issued by a prosecutor or government official alone, without the involvement of a grand jury.
- **Nemo judex in causa sua:** The principle that no one should be a judge in their own case, highlighting the conflict of interest in a prosecutor-managed grand jury.
- **Pre-political:** Existing before or independent of the formal political state or government structure.
- **Presentment:** An independent notice or accusation taken by a grand jury based on their own knowledge or investigation, without a bill of indictment from a prosecutor.
- **Star Chamber:** An ancient English court associated with arbitrary, secret prosecutions by the Crown without a jury; used as a warning against state-controlled accusations.
- **Veritas Potissimum:** The principle of placing truth above all other considerations, including established beliefs or expectations.
- **Void ab initio:** A legal term meaning a contract, action, or authority was invalid from the very beginning.

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### Homework

#### Task: Structural Comparison Exercise

1. Review the attached *New York Grand Juror's Handbook*.
2. Read **Article I, Section 6** of the New York Constitution.
3. Identify at least three specific instances where the *Handbook* conditions, redirects, or limits powers that the Constitution declares "shall never be suspended or impaired."
4. Write a brief report (1–2 pages) documenting these discrepancies. Frame your findings as a structural comparison: Does the *Handbook* treat the grand jury as an independent body of the people, or as a managed component of the judicial system? Provide direct citations from both texts to support your analysis.

## The Rule of Law: Power, Authority and Accountability

### Answer Key

#### Structural Comparison Report: New York Grand Juror's Handbook vs. New York Constitution Article I, Section 6

The New York Constitution, Article I, Section 6 explicitly protects grand jury authority in these terms:

*“The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.”*

(This clause appears after the indictment requirement and double-jeopardy/self-incrimination protections; the Handbook quotes only the truncated indictment clause on p. 6.)

In contrast, the *Grand Juror's Handbook* (Revised July 2025) and the statutory framework it reproduces (Criminal Procedure Law Article 190) repeatedly **condition, redirect, or subordinate** that protected power to judicial and prosecutorial control. The Handbook opens by declaring the grand jury *“an arm of the court”* (Overview, p. 7) and states that its *“legal advisors are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source”* (§ 190.25(6), Handbook p. 18). This framing positions the grand jury not as an independent *“body of the people”* exercising unsuspendable constitutional power, but as a **managed component of the judicial system** whose operations are channeled, reviewed, and potentially overridden by the very officials it is empowered to investigate.

#### Three specific instances of conditioning or limitation:

1. **Restriction on independent legal advice and interpretation** (§ 190.25(6), Handbook p. 18): *“The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury...”* The Constitution's *“shall never be ... impaired”* clause protects the grand jury's ability to inquire into public-officer misconduct. By statute (and as reinforced in the Handbook), the grand jury is barred from consulting any independent counsel or source when evaluating evidence of official misconduct. This funnels all legal judgment through the prosecutor or judge, precisely the actors whose conduct may be under scrutiny.

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2. **Prosecutorial/judicial override of the grand jury’s witness-calling power** (§ 190.50(3), Handbook p. 9): “The grand jury may ... direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction. At any time after such a direction ... the people may apply to the court ... for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena...” The constitutional power to “*inquire*” and “*find indictments*” necessarily includes the ability to compel relevant testimony. The Handbook explicitly allows the prosecutor to petition a judge to block a witness the grand jury itself has chosen to call, directly impairing the independent investigative authority the Constitution declares unsuspendable.
3. **Court-controlled reporting and sealing of findings on public-officer misconduct** (§ 190.85, Handbook pp. 34–36): After a grand jury investigation into “misconduct, nonfeasance or neglect in public office,” the report must be submitted to the court. The court “*shall examine it and the minutes*” and may (a) accept and file it as a public record, (b) seal it if it “*may prejudice fair consideration of a pending criminal matter,*” or (c) order additional testimony or outright sealing if it finds the report deficient. The named public servant receives the report in advance and may file an answering appendix before any public filing. The Constitution protects the power “*to inquire ... and to find indictments or to direct the filing of informations in connection with such inquiries.*” The Handbook converts that power into a court-vetted, potentially secret “report” process that can be delayed, redacted, or suppressed by judicial order, impairing the very mechanism the Constitution shields from suspension or impairment “by law.”

**Structural conclusion** The Handbook consistently treats the grand jury as a **managed judicial appendage** rather than the independent constitutional safeguard the framers embedded in Article I, § 6. Every major function, legal instruction (§ 190.25(6)), witness selection (§ 190.50(3)), evidence presentation (Overview, pp. 7–9), and even the publication of findings on official misconduct (§ 190.85), is routed through the district attorney or supervising judge. This statutory overlay, presented to every grand juror as authoritative guidance, effectively conditions and limits the very power the Constitution declares shall “never be suspended or impaired by law.” The result is a body that, in practice, operates under prosecutorial and judicial management rather than as the autonomous “sword and shield” of the people described in the Constitution’s plain text.





NEW YORK STATE UNIFIED COURT SYSTEM

# GRAND JUROR'S HANDBOOK



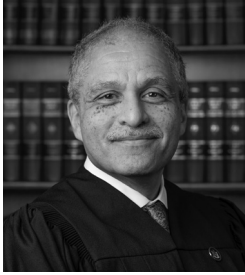
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**Revised July 2025**

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## MESSAGE FROM THE CHIEF JUDGE



Thank you for your upcoming service as grand jurors. As grand jurors, you now are a part of our court system. As a grand juror, you do not work for the prosecutor or for the defendant. Instead, like me, like the judges throughout our state, and like the many others who work in our courts, your responsibility is to fulfill the mission of the courts to provide the best justice that can be provided.

Before a criminal prosecution starts, grand juries provide a vital function by hearing the prosecution's evidence against the defendant and determining whether that evidence is sufficient to charge the defendant with a crime. Just like judges, grand jurors work for the court and must be neutral and fair: indicting persons accused of crimes where the evidence is sufficient to meet the legal definition of the crimes charged, and refusing to indict persons charged with crimes where the evidence is not sufficient to meet the legal definition of the crimes charged.

Without the careful and thoughtful participation of grand jurors, we could not preserve the rights of both defendants and victims in our system, could not protect public safety, and could not ensure that police and prosecutors follow the law. We know that grand jury service will require you to make changes to your usual daily routine, and we will attempt to accommodate you to make sure the disruption is not severe. Grand jury service, though, is one of the very most important parts of the criminal justice system: it gives citizens like you – instead of kings or dictators -- the decision of whether to prosecute someone with a serious crime.

For a brief period of your lives, you will be performing an essential and rewarding service vital to a democratic system of justice. On behalf of the more than our 16,000 people within New York's court system, I offer our deepest gratitude for your contribution to the pursuit of justice. Thank you.

A handwritten signature in black ink, which appears to read "Rowan D. Wilson". The signature is fluid and cursive, written in a professional style.

**Rowan D. Wilson**

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## UNITED STATES CONSTITUTION

### **5th Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...

## NEW YORK STATE CONSTITUTION

### **Article 1, Section 6**

No person shall be held to answer for a capital or otherwise infamous crime...unless on indictment of a grand jury...

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## OVERVIEW

### **The Purpose of this Handbook**

This handbook is for citizens summoned to serve as grand jurors in New York State. It is designed to answer commonly asked questions about grand jury service. Whether or not you actually sit on a grand jury, this handbook has information that everyone should know about grand juries and grand jury service.

This handbook is not a substitute for Article 190 of the Criminal Procedure Law, which is the legal framework for the grand jury. New York State law requires that each grand juror be given a copy of Article 190 to read and to use as a reference while serving as a grand juror. There is a copy of Article 190 starting at page 14 of this handbook.

If you do sit on a grand jury, remember that the grand jury's legal advisors are the District Attorney or assistant district attorney (also called the prosecutor) and the judge - and no one else. Any questions you have about the law should be addressed only to the prosecutor, and, if necessary, to the judge. For other questions about grand jury service, you should consult with commissioner of jurors' staff or the grand jury warden, or with the prosecutor if a grand juror needs to speak with a judge.

### **The Role of the Grand Jury in the Criminal Justice System**

The grand jury is an arm of the court. It is not an agent of the prosecutor or the police. A grand jury does not decide whether or not a person has been proven guilty. That is the trial jury's job. The grand jury decides whether or not a person should be formally charged with a crime or other offense. The grand jury makes that decision based on evidence presented to it by the prosecutor, who also instructs the grand jury on the law. The grand jury's decision must be based on the evidence and on the law.

In general, the grand jury makes one of three decisions:

- a) The grand jury may vote to formally accuse someone of a crime. This accusation is called an "indictment," also known as a "bill" which is short for "bill of indictment."
- b) The grand jury may vote to dismiss the charges, also known as a "no-bill."

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- c) The grand jury may direct the prosecutor to file an information accusing the person of an offense less serious than a felony.<sup>1</sup>

There are also rare circumstances where a grand jury recommends that a case should be sent to Family Court or where the grand jury makes a report to the court.

### Why We Have Grand Juries

The use of trial juries (also called petit juries) and grand juries goes back approximately 800 years. Beginning around 1215 A.D., both types of juries were used in England. The grand jury made the formal accusation, known as a “bill of indictment” or “presentment.”<sup>2</sup> The trial jury decided whether the accusation was proven.

The grand jury is included in the United States Constitution and the New York State Constitution. In New York State, a person cannot be brought to trial for a felony unless that person has been indicted by a grand jury.

The grand jury has an awesome responsibility. It uses its power both as a sword and as a shield: a sword to accuse or indict those whom there is reason to believe have committed crimes; a shield to protect the innocent against unfounded accusations.

### Differences Between Grand Juries and Trial Juries

Usually when we think of juries, trial juries come to mind. That’s because most people who serve as jurors serve as trial jurors. In fact, out of 574,000 people who served as jurors in New York State in 2005, only 29,000 of them were grand jurors. Another way of looking at it is that only one juror out of 20 is a grand juror.

There are many differences between trial juries and grand juries. The most important is that a grand jury decides whether or not there is enough evidence to charge an accused person with a crime and a trial jury decides whether or not the person who is charged with a crime has been proven guilty beyond a reasonable doubt. *(See chart on page 5)*

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1) Under special circumstances in cases involving 13 to 15 year olds, the prosecutor may instruct the grand jury about the option of sending or removing the case to Family Court. Also, a grand jury may be asked to investigate alleged misconduct in office by a public official, criminal or otherwise. As a result of its investigation the grand jury may issue a report to the court making recommendations for legislative, executive or administrative action in the public interest.

2) The terms “indictment” and “presentment” are used interchangeably. This handbook will refer only to “indictment.”

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## BASICS OF GRAND JURY SERVICE

### Qualifications of Jurors

Grand jurors and trial jurors must meet the same qualifications. You are eligible to serve as a juror in New York State if you are:

- 1) a United States citizen,
- 2) at least 18 years old, and
- 3) a resident of the county to which you are summoned to serve

In addition, jurors must

- 4) be able to understand and communicate in the English language, and
- 5) not have been convicted of a felony.<sup>3</sup>

In general, people who serve as grand jurors or trial jurors in New York State are not eligible to be called for jury service again for six years. Those who serve for 11 days or more (which is very common for grand jurors) cannot be called again for eight years.

### Term of Service

Your jury summons states whether you have been summoned as a grand juror or as a trial juror. Length of service for a grand juror can vary from two weeks to a month or more. Where the term of service lasts for a month or more, grand jurors usually sit for one or two days per week. The grand jury summons states the length of the term and the reporting requirements. The Commissioner of Jurors and the judge will explain how long the grand jury term of service will be and how often grand jurors will be required to be present in court. Grand jurors serving for long terms go about their normal business on days when the grand jury is not in session.

### Orientation and Selection of a Grand Jury

Upon arrival at the courthouse, summoned grand jurors typically see a grand jury orientation video and the Commissioner of Jurors or a member of the Commissioner's staff explains the logistics of service. The actual selection process is conducted by the Commissioner of Jurors or by the judge, who are the only people authorized to excuse summoned grand jurors. After assuring that all summoned grand jurors are qualified to serve, the Commissioner or judge explains the

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3) Persons previously convicted of a felony who have received a Certificate of Relief from Civil Disabilities or a Certificate of Good Conduct may be qualified to serve as jurors.

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grand jurors' duties, and 23 jurors are randomly selected from among those who are qualified.

### **How Many Grand Jurors?**

A grand jury has 23 members. In order to conduct any business - hearing evidence or deliberating - a "quorum" of at least 16 grand jurors must be present. In order to make a decision, at least 12 grand jurors who have heard the essential and critical evidence and also the legal instructions must vote. All jurors who have heard the essential and critical evidence and have been provided with the instructions may vote.

### **The Foreperson**

After the grand jurors are sworn, the judge appoints a foreperson. The foreperson administers the oath to each witness who testifies before the grand jury (although any member of the grand jury may do so) and may chair the grand jury sessions.

The grand jury's decisions must be given to the judge in writing. The foreperson signs the document and gives it to a member of the court staff or directly to the judge. If the grand jury cannot make a decision, that too is reported in writing to the judge by the foreperson.

### **The Assistant Foreperson**

The judge also appoints an assistant or acting foreperson who performs the foreperson's duties if the foreperson is absent or unavailable.

### **The Secretary**

The grand jury selects a secretary to keep the records of the grand jury's business. For example, the secretary keeps a record of jurors who are not present when evidence or legal instructions are given. When the grand jury votes, the secretary records the results of the vote.

Service as a grand juror begins with an oath of office given to the jurors by the judge. The grand jurors swear or affirm that they will perform their duties faithfully.

## GRAND JURIES AND CRIMINAL TRIAL JURIES COMPARED

QUESTIONS	GRAND JURY	FELONY TRIAL JURY
How many jurors?	23 jurors and no alternates	12 jurors plus alternates
How long does the jury serve?	Two weeks to three months or more depending on the county	Length of one trial
For how many days do the jurors report?	From every day for two weeks or more to a couple of days a week for several months	Every day until the trial is completed
How many cases does the jury hear?	Usually hears many cases	One
Who presents evidence?	The prosecution	In addition to the prosecution, the defense may present evidence.
Is a defense attorney present?	A defense attorney is present only if the accused person chooses to testify. The defense attorney is not permitted to ask questions, make objections or speak to the grand jury.	Yes. The defense attorney is present throughout the trial except in cases where the defendant is acting as his or her own lawyer. The defense attorney takes an active role in the trial.
Is a judge present?	A judge may be present to select the jurors but is not present during presentation of evidence. The judge is available to answer grand jurors' questions as needed.	Yes. The judge must be present in the courtroom throughout the trial.
How many jurors must be present to hear evidence?	At least 16	All 12 jurors (and alternates) must be present throughout the trial.
What does the jury decide?	Whether or not to formally charge the accused person with a crime	Whether or not the prosecution has proved the defendant guilty beyond a reasonable doubt
How many jurors decide?	16 jurors must be present to deliberate. 12 jurors who have heard all the essential and critical evidence and the legal instructions must agree.	To find a defendant guilty or not guilty a unanimous vote of the 12 jurors is required.
Are the proceedings open to the public?	No. A grand jury's work is done in secret. Only specific individuals with a role to play in the proceedings may be present.	Yes. A jury trial is a public proceeding. Only the jury's deliberations are conducted in secret. In rare instances a judge may close the court-room to the public.

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## THE GRAND JURY GETS TO WORK

### What Grand Juries Do

A grand jury usually hears many different, unrelated cases. Only the prosecution presents evidence to the grand jury. There is no judge present during the grand jury's proceedings. However, a judge is available to resolve legal issues and to answer questions, if needed.

The grand jury's work comes before a trial. The grand jury's main job is to decide whether or not a person should be formally charged with a crime. This formal charge is called an indictment. The grand jury decides whether there is legally sufficient evidence of a crime and whether there is reasonable cause to believe that the accused person committed that crime.

### Grand Jury Secrecy

Everything that happens in the grand jury room is secret. The purposes of grand jury secrecy are to obtain the full cooperation of the witnesses who appear before the grand jury, to permit grand jurors to make decisions free from outside interference, and to protect an innocent person who may be investigated but never indicted.

Grand jurors must preserve the secrecy of the grand jury proceedings. Grand jurors may not discuss anything that occurs in the grand jury room with anyone other than the other members of the jury, the prosecutor or the judge, if necessary. Any discussion about the case by grand jurors must occur only in the grand jury room. When proposing questions for a witness, grand jurors should take care not to reveal the identity of another witness, the substance of another witness's testimony, or other evidence they have heard or seen. Grand jurors may not tell others anything about any action the grand jury takes.

Unlike others involved with the grand jury, witnesses are not required to keep their role secret. Grand jury witnesses are allowed to discuss their own testimony in public if they wish to do so. Anyone other than a witness who violates the secrecy of a grand jury is subject to serious penalties, including imprisonment.

No one may talk to a grand juror about the grand jury's work. A grand juror should immediately inform the jury staff, grand jury warden, the prosecutor or, if necessary, the judge if anyone outside the grand jury room approaches the grand juror and tries to talk about the grand jury or its work.

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### Reasons For Grand Jury Secrecy

- Full cooperation from witnesses
- Free and confidential deliberations
- Protection of the innocent - who may be investigated, but never indicted

### Who is Present in the Grand Jury Room?

The law strictly limits who may be present in the grand jury room during grand jury proceedings. Only those who have official duties may be present. In addition to the grand jurors themselves, those who may be present include: the prosecutor, the witness, an attorney for the witness, an interpreter, the stenographer who records everything that is said during the proceedings, and a court employee authorized to assist the grand jury. Sometimes a social worker, rape crisis counselor, psychologist or other professional accompanies a child witness during the child's testimony. If there is evidence that must be presented by video, then a video operator is present. And, finally, a corrections officer or other public servant will accompany a witness who is in custody.

When the grand jury is deliberating and voting, only the grand jurors may be in the room. The only exception to this rule is where a sign-language interpreter is needed for a deaf or hearing-impaired grand juror.

### Who May be Present in the Grand Jury Room?

- Jurors
- Prosecutor
- Witness
- Attorney for the witness
- Stenographer
- Interpreter
- Court employee who assists the grand jury
- Professional accompanying a child witness
- Video operator
- Public servant holding a witness in custody

### Grand Jurors' Questions

Grand jurors may ask questions about the law. They may also ask questions of witnesses about the evidence. Generally, the prosecutor reviews grand jurors' questions for witnesses and permits only those that are relevant and legally proper.

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All substantive discussions between grand jurors and prosecutors or between grand jurors and judges are recorded stenographically. There are no “off the record” remarks about the substance of a case in the grand jury.

### **Note-Taking by Grand Jurors**

Because grand jurors may hear evidence in many cases and because there may be gaps of days or weeks between witnesses or between hearing evidence and deliberating, many grand jurors find taking notes helpful, and sometimes essential, in recalling the evidence in a particular case. In some counties, grand jurors are given note-taking materials. Grand jurors who are not given such materials may request them from Commissioner of Jurors staff or the grand jury warden.

Jurors who do not take notes should rely on their own independent recollection and should not be influenced by the notes of other grand jurors. At any time the grand jury may ask the stenographer to read testimony from the transcript.

Grand jurors’ notes must remain in the grand jury room at all times. All notes are collected and destroyed when the grand jury’s work is completed.

### **The Accused Person’s Role**

An accused person is not required to testify before the grand jury and may not even be aware that he or she is being investigated by one. Sometimes the accused person chooses to testify before the grand jury. When that happens, the person’s attorney may be present in the grand jury room only during the defendant’s testimony to advise him or her during the testimony. The attorney may not ask questions, make objections or address the grand jury.

An accused person who does not testify is not permitted to have an attorney present for any part of the grand jury proceedings. This is because unlike a trial, the grand jury proceeding is not an adversary proceeding. The purpose of a grand jury proceeding is only to decide whether or not the prosecution has enough evidence to proceed with a case against the person and not whether or not the prosecution can prove that person guilty beyond a reasonable doubt. Therefore, it is only at a trial that a defendant may have an attorney present at all times.

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An accused person who is indicted - formally charged with a crime - becomes a defendant in a criminal case. A defendant is represented by an attorney for all proceedings, except in the rare case where a defendant decides to represent herself or himself.

### **Deciding Which Witnesses Testify**

The prosecutor can call any witness believed to have relevant information. Also, the grand jury may direct the prosecutor to call witnesses or to recall witnesses who have already testified.

In addition, the accused person or that person's attorney may ask the grand jury to hear from a particular witness. If such a request is made, the grand jury decides whether it wishes to hear the witness's testimony. If the grand jury wishes to hear from the witness, the grand jury directs the prosecutor to subpoena the witness.

When the grand jury directs the prosecutor to call a witness, that request must be honored. However, the prosecutor may ask the judge to limit or prevent a witness's appearance. If the judge concludes that the witness's appearance would not be in the public interest, the witness will not be called to testify.

### **How the Grand Jury Makes Decisions**

Before the grand jury is asked to deliberate and vote, the prosecutor gives the legal definitions of the proposed charges and other legal instructions. Grand jurors may ask questions about these definitions and instructions of the prosecutor and, if necessary, the judge.

In order for a grand jury to deliberate and vote on a case, a "quorum" of at least 16 grand jurors must be present. The grand jurors discuss with each other the evidence and the legal instructions and then they vote. No one else is present in the room when the grand jury deliberates and votes except a sign language interpreter if needed for a juror. At any time the grand jury may ask the stenographer to read testimony from the transcript.

To formally charge an accused person with a crime, 12 grand jurors who heard all the essential and critical evidence and also the legal instructions must agree that there is legally sufficient evidence and reasonable cause to believe that the accused person committed a crime. A grand juror who has not heard all the essential and critical evidence on a case or who has not heard the legal instructions cannot vote in that case.

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## QUESTIONS ABOUT GRAND JURY SERVICE

### **What if I recognize a witness or the name of the accused person?**

A grand juror who recognizes a witness or the name of an accused person should immediately inform the Commissioner of Jurors staff or the grand jury warden or the District Attorney or assistant district attorney or the judge.

### **What if grand jury service would be a hardship for me?**

Grand juries, like trial juries, represent the communities from which they are drawn. Despite the inconvenience, everyone who is summoned is expected to serve. Excusals from grand jury service are granted rarely, and only after a juror provides proof to the Commissioner of Jurors or to the judge that grand jury service would pose a severe hardship.

### **Do I have to attend every session?**

Yes. Attendance must be taken seriously. A grand juror is expected to report for every day that the grand jury is sitting. However, the law recognizes that there are emergencies or other unusual circumstances when a grand juror must be absent. A grand juror who cannot be present should contact Commissioner of Jurors staff or the grand jury warden to explain.

When grand jurors are absent, serious consequences can result. No evidence can be presented and no vote can be taken unless a “quorum” of 16 grand jurors is present. A juror who has not heard all of the essential and critical evidence on a case cannot vote on that case. Jurors should bear in mind that evidence might be presented on different days.

### **Will I understand what I have to do?**

Grand jurors listen to all the evidence presented and decide which evidence or witnesses are credible. All individuals, regardless of educational level or occupation, are equally equipped to make these decisions. The grand jury’s conclusion is a group decision; it is not the decision of any single person. For centuries, our jury system has worked well with citizens using their common sense and good judgment while serving as grand jurors and as trial jurors.

### **What should I wear?**

Grand jury service is a very serious matter. The grand jury plays a crucial role in the criminal justice system. A juror’s appearance and attitude should reflect the importance of the grand jury’s work. Clothes appropriate to a dignified occasion should be worn.

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### **When will I have to serve again?**

Jurors who sit for 11 days or more and successfully complete their service will not be eligible to be called again for eight years. Generally, jurors who serve for less than 11 days are eligible to be called again in six years. A person who is qualified and called again is selected at random from the county wide pool of jurors and may be summoned either as a trial juror or a grand juror.

### **Will I get paid for my grand jury service?**

Grand jurors are paid according to the same rules as trial jurors. The jury fee is \$72 per day. The law requires employers with more than ten employees to pay an employee serving as a juror at least \$72 per day for the first three days of service. After the first three days, the state pays the jury fee to jurors whose employers are not paying them. The state pays the \$72 fee for jurors who work for employers with fewer than ten employees if the employer is not paying them. The state also pays the jury fee to jurors who are not employed, or who are serving while on vacation or on a regularly scheduled day off. For more information about juror payment, see the chart that appears on the next page or go to “Who pays your jury fee?” at the court system’s website: [www.nyjuror.gov](http://www.nyjuror.gov).

The Commissioner of Jurors is required to collect Social Security numbers from all jurors who may be paid \$600 or more for their service. Jurors paid \$600 or more will be issued an IRS 1099 form for tax purposes at the end of the calendar year.

Grand jurors serve until they are discharged by the judge. The judge may extend the grand jury term if the District Attorney or assistant district attorney and the grand jury say that it cannot complete its work before the end of its term of service. However, it is rare that a grand jury’s term is extended.

## **CONCLUSION**

The decision whether or not to charge someone with a crime is an important one. The grand jury must give individual consideration to each person under investigation and to each charge being considered. The grand jury’s decisions must be based on the evidence and on the law and not on speculation, bias, hostility or prejudice.

The judge, the witnesses, the attorneys and, most important, the accused person all rely upon each individual grand juror to perform the duties of a grand juror with honesty, integrity and fairness.





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# ARTICLE 190

## THE GRAND JURY AND ITS PROCEEDINGS

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### **§ 190.05 Grand jury; definition and general functions.**

A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting apart of such court, the functions of which are to hear and examine evidence concerning offenses and concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise, and to take action with respect to such evidence as provided in section 190.60.

### **§ 190.10 Grand jury; for what courts drawn.**

The appellate division of each judicial department shall adopt rules governing the number and the terms for which grand juries shall be drawn and impaneled by the superior courts within its department; provided, however, that a grand jury may be drawn and impaneled for any extraordinary term of the supreme court upon the order of a justice assigned to hold such term.

### **§ 190.15 Grand jury; duration of term and discharge.**

- 1) A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated. Upon such date, or within five days preceding it, the court may, upon declaration of both the grand jury and the district attorney that such grand jury has not yet completed or will be unable to complete certain business before it, extend the term of court and the existence of such grand jury to a specified future date, and may subsequently order further extensions for such purpose.
- 2) At any time when a grand jury is in recess and no other appropriate grand jury is in existence in the county, the court may, upon application of the district attorney or of a defendant held by a local criminal court for the action of a grand jury, order such grand jury reconvened for the purpose of dealing with a matter requiring grand jury action.

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**§ 190.20 Grand jury; formation, organization and other matters preliminary to assumption of duties.**

- 1) The mode of selecting grand jurors and of drawing and impaneling grand juries is governed by the judiciary law.
- 2) Neither the grand jury panel nor any individual grand juror may be challenged, but the court may: (a) At any time before a grand jury is sworn, discharge the panel and summon another panel if it finds that the original panel does not substantially conform to the requirements of the judiciary law; or (b) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service pursuant to the judiciary law, or incapable of performing his duties because of bias or prejudice, or guilty of misconduct in the performance of his duties such as to impair the proper functioning of the grand jury.
- 3) After a grand jury has been impaneled, the court must appoint one of the grand jurors as foreman and another to act as foreman during any absence or disability of the foreman. At some time before commencement of their duties, the grand jurors must appoint one of their number as secretary to keep records material to the conduct of the grand jury's business.
- 4) The grand jurors must be sworn by the court. The oath may be in any form or language which requires the grand jurors to perform their duties faithfully.
- 5) After a grand jury has been sworn, the court must deliver or cause to be delivered to each grand juror a printed copy of all the provisions of this article, and the court may, in addition, give the grand jurors any oral and written instructions relating to the proper performance of their duties as it deems necessary or appropriate.
- 6) If two or more grand juries are impaneled at the same court term, the court may thereafter, for good cause, transfer grand jurors from one panel to another, and any grand juror so transferred is deemed to have been sworn as a member of the panel to which he has been transferred.

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### § 190.25 Grand jury; proceedings and operation in general.

- 1) Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.
- 2) The foreman or any other grand juror may administer an oath to any witness appearing before the grand jury.
- 3) Except as provided in subdivision three-a of this section, during the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may, as the occasion requires, also be present: (a) The district attorney; (b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings; (c) A stenographer authorized to record the proceedings of the grand jury; (d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge; (e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge. (f) An attorney representing a witness pursuant to section 190.52 of this chapter while that witness is present. (g) An operator, as that term is defined in section 190.32 of this chapter, while the videotaped examination of either a special witness or a child witness is being played. (h) A social worker, rape crisis counselor, psychologist or other professional providing emotional support to a child witness twelve years old or younger, or a social worker or informal caregiver, as provided in subdivision two of section two hundred six of the elder law, for a vulnerable elderly person as provided in subdivi-

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sion three of section 260.31 of the penal law, who is called to give evidence in a grand jury proceeding concerning a crime defined in article one hundred twenty-one, article one hundred thirty, article two hundred sixty, section 120.10, 125.10, 125.15, 125.20, 125.25, 125.27, 255.25, 255.26 or 255.27 of the penal law provided that the district attorney consents. Such support person shall not provide the witness with an answer to any question or otherwise participate in such proceeding and shall first take an oath before the grand jury that he or she will keep secret all matters before such grand jury within his or her knowledge.

- 3a) Upon the request of a deaf or hearing-impaired grand juror, the prosecutor shall provide a sign language interpreter for such juror. Such interpreter shall be present during all proceedings of the grand jury which the deaf or hearing-impaired grand juror attends, including deliberation and voting. The interpreter shall, if he or she has not previously taken the constitutional oath of office, first take an oath before the grand jury that he or she will faithfully interpret the testimony of the witnesses and the statements of the prosecutor, judge and grand jurors; keep secret all matters before such grand jury within his or her knowledge; and not seek to influence the deliberations and voting of such grand jury.
- 4) (a) Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony. (b) When a district attorney obtains evidence during a grand jury proceeding which provides reasonable cause to suspect that a child has been abused or maltreated, as those terms are defined by section ten hundred twelve of the family court act, he must apply to the court supervising the grand jury for an order permitting disclosure of such evidence to the state central

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register of child abuse and maltreatment. A district attorney need not apply to the court for such order if he has previously made or caused a report to be made to the state central register of child abuse and maltreatment pursuant to section four hundred thirteen of the social services law and the evidence obtained during the grand jury proceeding, or substantially similar information, was included in such report. The district attorney's application to the court shall be made *ex parte* and *in camera*. The court must grant the application and permit the district attorney to disclose the evidence to the state central register of child abuse and maltreatment unless the court finds that such disclosure would jeopardize the life or safety of any person or interfere with a continuing grand jury proceeding.

- 5) The grand jury is the exclusive judge of the facts with respect to any matter before it.
- 6) The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

### **§ 190.30 Grand jury; rules of evidence.**

- 1) Except as otherwise provided in this section, the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.
- 2) A report or a copy of a report made by a public servant or by a person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, may, when certified by such person as a report made by him or as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.
- 2a) When the electronic transmission of a certified report, or certified copy thereof, of the kind described in subdivision two or three-a

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of this section or a sworn statement or copy thereof, of the kind described in subdivision three of this section results in a written document, such written document may be received in such grand jury proceeding provided that: (a) a transmittal memorandum completed by the person sending the report contains a certification that the report has not been altered and a description of the report specifying the number of pages; and (b) the person who receives the electronically transmitted document certifies that such document and transmittal memorandum were so received; and (c) a certified report or a certified copy or sworn statement or sworn copy thereof is filed with the court within twenty days following arraignment upon the indictment; and (d) where such written document is a sworn statement or sworn copy thereof of the kind described in subdivision three of this section, such sworn statement or sworn copy thereof is also provided to the defendant or his counsel within twenty days following arraignment upon the indictment.

- 3) A written or oral statement, under oath, by a person attesting to one or more of the following matters may be received in such grand jury proceeding as evidence of the facts stated therein: (a) that person's ownership or lawful custody of, or license to occupy, premises, as defined in section 140.00 of the penal law, and of the defendant's lack of license or privilege to enter or remain thereupon; (b) that person's ownership of, or possessory right in, property, the nature and monetary amount of any damage thereto and the defendant's lack of right to damage or tamper with the property; (c) that person's ownership or lawful custody of, or license to possess property, as defined in section 155.00 of the penal law, including an automobile or other vehicle, its value and the defendant's lack of superior or equal right to possession thereof; (d) that person's ownership of a vehicle and the absence of his consent to the defendant's taking, operating, exercising control over or using it; (e) that person's qualifications as a dealer or other expert in appraising or evaluating a particular type of property, his expert opinion as to the value of a certain item or items of property of that type, and the basis for his opinion; (f) that person's identity as an ostensible maker, drafter, drawer, endorser or other signator of a written instrument and its falsity within the meaning of section 170.00 of the penal law; (g) that person's ownership of, or possessory right in, a credit card account number or debit card account number, and the defendant's lack

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of superior or equal right to use or possession thereof. Provided, however, that no such statement shall be admitted when an adversarial examination of such person has been previously ordered pursuant to subdivision 8 of section 180.60, unless a transcript of such examination is admitted.

- 3a) A sex offender registration form, sex offender registration continuation/supplemental form, sex offender registry address verification form, sex offender change of address form or a copy of such form maintained by the division of criminal justice services concerning an individual who is the subject of a grand jury proceeding, may, when certified by a person designated by the commissioner of the division of criminal justice services as the person to certify such records, as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.
- 4) An examination of a child witness or a special witness by the district attorney videotaped pursuant to section 190.32 of this chapter may be received in evidence in such grand jury proceeding as the testimony of such witness.
- 5) Nothing in subdivisions two, three or four of this section shall be construed to limit the power of the grand jury to cause any person to be called as a witness pursuant to subdivision three of section 190.50.
- 6) Wherever it is provided in article sixty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may in an equivalent situation in a grand jury proceeding, be made by the district attorney.
- 7) Wherever it is provided in article sixty that a court presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.
- 8) (a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein: (i) a person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and

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(ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law. (b) Any business record offered for consideration by a grand jury pursuant to paragraph (a) of this subdivision must be accompanied by a written statement, under oath, that (i) contains a list or description of the records it accompanies, (ii) attests in substance that the person making the statement is a duly authorized custodian of the records or other employee or agent of the business who is familiar with such records, and (iii) attests in substance that such records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act, transaction, occurrence or event, or within a reasonable time thereafter. Such written statement may also include a statement identifying the name and job description of the person making the statement, specifying the matters set forth in subparagraph (ii) of this paragraph and attesting that the business has made a diligent search and does not possess a particular record or records addressing a matter set forth in paragraph (a) of this subdivision, and such statement may be received at grand jury proceedings as evidence of the fact that the business does not possess such record or records. When records of a business are accompanied by more than one sworn written statement of its employees or agents, such statements may be considered together in determining the admissibility of the records under this subdivision. For the purpose of this subdivision, the term "business records" does not include any records prepared by law enforcement agencies or prepared by any entity in anticipation of litigation. (c) Any business record offered to a grand jury pursuant to paragraph (a) of this subdivision that includes material beyond that described in such paragraph (a) shall be redacted to exclude such additional material, or received subject to a limiting instruction that the grand jury shall not consider such additional material in support of any criminal charge. (d) No such records shall be admitted when an adversarial examination of such a records custodian or other employee of such business who was familiar with such records has been previously ordered pursuant to subdivision eight of section 180.60 of this chapter, unless a transcript of such examination is admitted. (e) Nothing in this subdivision shall affect the admissibility of business records in the grand jury on any basis other than that set forth in this subdivision.

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**§ 190.32 Videotaped examination; definitions, application, order and procedure.**

- 1) Definitions. As used in this section: (a) "Child witness" means a person twelve years old or less whom the people intend to call as witness in a grand jury proceeding to give evidence concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25 of the penal law of which the person was a victim. (b) "Special witness" means a person whom the people intend to call as a witness in a grand jury proceeding and who is either: (i) Unable to attend and testify in person in the grand jury proceeding because the person is either physically ill or incapacitated; or (ii) More than twelve years old and who is likely to suffer very severe emotional or mental stress if required to testify in person concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25 of the penal law to which the person was a witness or of which the person was a victim. (c) "Operator" means a person employed by the district attorney who operates the video camera to record the examination of a child witness or a special witness.
- 2) In lieu of requiring a witness who is a child witness to appear in person and give evidence in a grand jury proceeding, the district attorney may cause the examination of such witness to be videotaped in accordance with the provisions of subdivision five of this section.
- 3) Whenever the district attorney has reason to believe that a witness is a special witness, he may make an ex parte application to the court for an order authorizing the videotaping of an examination of such special witness and the subsequent introduction in evidence in a grand jury proceeding of that videotape in lieu of the live testimony of such special witness. The application must be in writing, must state the grounds of the application and must contain sworn allegations of fact, whether of the district attorney or another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided, that in the latter event, the sources of such information and the grounds for such belief are stated.
- 4) If the court is satisfied that a witness is a special witness, it shall issue an order authorizing the videotaping of such special witness in accordance with the provisions of subdivision five of this

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section. The court order and the application and all supporting papers shall not be disclosed to any person except upon further court order.

- 5) The videotaping of an examination either of a child witness or a special witness shall proceed as follows: (a) An examination of a child witness or a special witness which is to be videotaped pursuant to this section may be conducted anywhere and at any time provided that the operator begins the videotape by recording a statement by the district attorney of the date, time and place of the examination. In addition, the district attorney shall identify himself, the operator and all other persons present. (b) An accurate clock with a sweep second hand shall be placed next to or behind the witness in such position as to enable the operator to videotape the clock and the witness together during the entire examination. In the alternative, a date and time generator shall be used to superimpose the day, hour, minute and second over the video portion of the recording during the entire examination. (c) A social worker, rape crisis counselor, psychologist or other professional providing emotional support to a child witness or to a special witness, as defined in subparagraph (ii) of paragraph (b) of subdivision one of this section, or any of those persons enumerated in paragraphs (a), (b), (c), (d), (e), (f ) and (g) of subdivision three of section 190.25 may be present during the videotaping except that a doctor, nurse or other medical assistant also may be present if required by the attendant circumstances. Each person present, except the witness, must, if he has not previously taken a constitutional oath of office or an oath that he will keep secret all matters before a grand jury, must take an oath on the record that he will keep secret the videotaped examination. (d) The district attorney shall state for the record the name of the witness, and the caption and the grand jury number, if any, of the case. If the witness to be examined is a child witness, the date of the witness' birth must be recorded. If the witness to be examined is a special witness, the date of the order authorizing the videotaped examination and the name of the justice who issued the order shall be recorded. (e) If the witness will give sworn testimony, the administration of the oath must be recorded. If the witness will give unsworn testimony, a statement that the testimony is not under oath must be recorded. (f ) If the examination requires the use of more than one tape, the operator shall record a statement of the district attorney at the end of each tape declaring that

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such tape has ended and referring to the succeeding tape. At the beginning of such succeeding tape, the operator shall record a statement of the district attorney identifying himself, the witness being examined and the number of tapes which have been used to record the examination of such witness. At the conclusion of the examination the operator shall record a statement of the district attorney certifying that the recording has been completed, the number of tapes on which the recording has been made and that such tapes constitute a complete and accurate record of the examination of the witness. (g) A videotape of an examination conducted pursuant to this section shall not be edited unless upon further order of the court.

- 6) When the videotape is introduced in evidence and played in the grand jury, the grand jury stenographer shall record the examination in the same manner as if the witness had testified in person.
- 7) Custody of the videotape shall be maintained in the same manner as custody of the grand jury minutes.

#### **§ 190.35 Grand jury; definitions of terms.**

The term definitions contained in section 50.10 are applicable to sections 190.40, 190.45 and 190.50.

#### **§ 190.40 Grand jury; witnesses, compulsion of evidence and immunity.**

- 1) Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
- 2) A witness who gives evidence in a grand jury proceeding receives immunity unless: (a) He has effectively waived such immunity pursuant to section 190.45; or (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive. (c) The evidence given by the witness consists only of books, papers, records or other physical evidence of an enterprise, as defined in subdivision one of section 175.00 of the penal law, the production of which is required by a subpoena duces tecum, and the witness does not possess a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in subparagraph (a) and (b) of this subdivision.

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**§ 190.45 Grand jury; waiver of immunity.**

- 1) A waiver of immunity is a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding.
- 2) A waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness.
- 3) A person who is called by the people as a witness in a grand jury proceeding and requested by the district attorney to subscribe and swear to a waiver of immunity before giving evidence has a right to confer with counsel before deciding whether he will comply with such request, and, if he desires to avail himself of such right, he must be accorded a reasonable time in which to obtain and confer with counsel for such purpose. The district attorney must inform the witness of all such rights before obtaining his execution of such a waiver of immunity. Any waiver obtained, subscribed or sworn to in violation of the provisions of this subdivision is invalid and ineffective.
- 4) If a grand jury witness subscribes and swears to a waiver of immunity upon a written agreement with the district attorney that the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated and testifies concerning another subject, matter or area of conduct not included in such written agreement, he receives immunity with respect to any further testimony which he may give concerning such other subject, matter or area of conduct and the waiver of immunity is to that extent ineffective.

**§ 190.50 Grand jury; who may call witnesses;  
defendant as witness.**

- 1) Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.
- 2) The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge.

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- 3) The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness who was not called by the people, it may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction. At any time after such a direction, however, or at any time after the service of a subpoena pursuant to such a direction and before the return date thereof, the people may apply to the court which impaneled the grand jury for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena, attach reasonable conditions thereto, or make other appropriate qualification thereof.
  - 4) Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called at the instance of the grand jury sign a waiver of immunity pursuant to section 190.45 before being sworn, and upon such demand no oath may be administered to such witness unless and until he complies therewith.
  - 5) Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision: (a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein; (b) Upon service upon the district attorney of a notice requesting appearance before a grand jury pursuant

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to paragraph (a), the district attorney must notify the foreman of the grand jury of such request, and must subsequently serve upon the applicant, at the address specified by him, a notice that he will be heard by the grand jury at a given time and place. Upon appearing at such time and place, and upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration. Upon giving such evidence, he is subject to examination by the people. (c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's direction to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment or prosecutor's information may not thereafter be challenged on such ground.

- 6) A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.
- 7) Where a subpoena is made pursuant to this section, all papers and proceedings relating to the subpoena and any motion to quash, fix conditions, modify or compel compliance shall be kept secret and not disclosed to the public by any public officer or public employee or any other individual described in section 215.70 of the penal law. This subdivision shall not apply where the person subpoenaed and the prosecutor waive the provisions of this subdivision. This subdivision shall not prevent the publication of decisions and orders made in connection with such proceedings or motions, provided the caption and content of the decision are written or altered by the court to reasonably preclude identification of the person subpoenaed.

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**§ 190.52 Grand jury; attorney for witness.**

- 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. Such assigned attorney shall be assigned pursuant to the same plan and in the same manner as counsel are provided to persons charged with crime pursuant to section seven hundred twenty-two of the county law.
- 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.

**§ 190.55 Grand jury; matters to be heard and examined; duties and authority of district attorney.**

- 1) A grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.
- 2) District attorneys are required or authorized to submit evidence to grand juries under the following circumstances: (a) A district attorney must submit to a grand jury evidence concerning a felony allegedly committed by a defendant who, on the basis of a felony complaint filed with a local criminal court of the county, has been held for the action of a grand jury of such county, except where indictment has been waived by the defendant pursuant to article one hundred ninety-five. (b) A district attorney must submit to a grand jury evidence concerning a misdemeanor allegedly committed by a defendant who has been charged therewith by a local criminal court accusatory instrument, in any case where a superior court of the county has, pursuant to subdivision one of section 170.25, ordered that such misdemeanor charge be prosecuted by indictment in a superior court. (c) A district attorney may submit to a grand jury any available evidence concerning an offense prosecutable in the courts of the county, or concerning misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.

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### § 190.60 Grand jury; action to be taken.

After hearing and examining evidence as prescribed in section 190.55, a grand jury may:

- 1) Indict a person for an offense, as provided in section 190.65;
- 2) Direct the district attorney to file a prosecutor's information with a local criminal court, as provided in section 190.70;
- 3) Direct the district attorney to file a request for removal to the family court, as provided in section 190.71 of this article.
- 4) Dismiss the charge before it, as provided in section 190.75;
- 5) Submit a grand jury report, as provided in section 190.85.

### § 190.65 Grand jury; when indictment is authorized.

- 1) Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.
- 2) The offense or offenses for which a grand jury may indict a person in any particular case are not limited to that or those which may have been designated, at the commencement of the grand jury proceeding, to be the subject of the inquiry; and even in a case submitted to it upon a court order, pursuant to the provisions of section 170.25, directing that a misdemeanor charge pending in a local criminal court be prosecuted by indictment, the grand jury may indict the defendant for a felony if the evidence so warrants.
- 3) Upon voting to indict a person, a grand jury must, through its foreman or acting foreman, file an indictment with the court by which it was impaneled.

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**§ 190.70 Grand jury; direction to file prosecutor's information and related matters.**

- 1) Except in a case submitted to it pursuant to the provisions of section 170.25, a grand jury may direct the district attorney to file in a local criminal court a prosecutor's information charging a person with an offense other than a felony when (a) the evidence before it is legally sufficient to establish that such person committed such offense, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense. In such case, the grand jury must, through its foreman or acting foreman, file such direction with the court by which it was impaneled.
- 2) Such direction must be signed by the foreman or acting foreman. It must contain a plain and concise statement of the conduct constituting the offense to be charged, equivalent in content and precision to the factual statement required to be contained in an indictment pursuant to subdivision seven of section 200.50. Subject to the rules prescribed in sections 200.20 and 200.40 governing joinder in a single indictment of multiple offenses and multiple defendants, such grand jury direction may, where appropriate, specify multiple offenses of less than felony grade and multiple defendants, and may direct that the prospective prosecutor's information charge a single defendant with multiple offenses, or multiple defendants jointly with either a single offense or multiple offenses.
- 3) Upon the filing of such grand jury direction, the court must, unless such direction is insufficient on its face, issue an order approving such direction and ordering the district attorney to file such a prosecutor's information in a designated local criminal court having trial jurisdiction of the offense or offenses in question.

**§ 190.71 Grand jury; direction to file request for removal to family court.**

(a) Except as provided in subdivision six of section 200.20 of this chapter, a grand jury may not indict (i) a person thirteen years of age for any conduct or crime other than conduct constituting a crime defined in subdivisions one and two of section 125.25 (murder in the second degree) or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (ii) a person fourteen or fifteen years of age for any conduct or crime other than conduct constituting a crime defined in subdivisions one and two

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of section 125.25 (murder in the second degree) and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse in the first degree); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; subdivision four of section 265.02 of the penal law, where such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law; or section 265.03 of the penal law, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law; or defined in the penal law as an attempt to commit murder in the second degree or kidnapping in the first degree, or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law. (b) A grand jury may vote to file a request to remove a charge to the family court if it finds that a person thirteen, fourteen or fifteen years of age did an act which, if done by a person over the age of sixteen, would constitute a crime provided (1) such act is one for which it may not indict; (2) it does not indict such person for a crime; and (3) the evidence before it is legally sufficient to establish that such person did such act and competent and admissible evidence before it provides reasonable cause to believe that such person did such act. (c) Upon voting to remove a charge to the family court pursuant to subdivision (b) of this section, the grand jury must, through its foreman or acting foreman, file a request to transfer such charge to the family court. Such request shall be filed with the court by which it was impaneled. It must (1) allege that a person named therein did any act which, if done by a person over the age of sixteen, would constitute a crime; (2) specify the act and the time and place of its commission; and (3) be signed by the foreman or the acting foreman. (d) Upon the filing of such grand jury request, the court must, unless such request is improper or insufficient on its face, issue an order approving such request and direct that the charge be removed to the family court in accordance with the provisions of article seven hundred twenty-five of this chapter.

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### **§ 190.75 Grand jury; dismissal of charge.**

- 1) If upon a charge that a designated person committed a crime, either (a) the evidence before the grand jury is not legally sufficient to establish that such person committed such crime or any other offense, or (b) the grand jury is not satisfied that there is reasonable cause to believe that such person committed such crime or any other offense, it must dismiss the charge. In such case, the grand jury must, through its foreman or acting foreman, file its finding of dismissal with the court by which it was impaneled.
- 2) If the defendant was previously held for the action of the grand jury by a local criminal court, the superior court to which such dismissal is presented must order the defendant released from custody if he is in the custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.
- 3) When a charge has been so dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury. If in such case the charge is again dismissed, it may not again be submitted to a grand jury.
- 4) Whenever all charges against a designated person have been so dismissed, the district attorney must within ninety days of the filing of the finding of such dismissal, notify that person of the dismissal by regular mail to his last known address unless resubmission has been permitted pursuant to subdivision three of this section or an order of postponement of such service is obtained upon a showing of good cause and exigent circumstances.

### **§ 190.80 Grand jury; release of defendant upon failure of timely grand jury action.**

Upon application of a defendant who on the basis of a felony complaint has been held by a local criminal court for the action of a grand jury, and who, at the time of such order or subsequent thereto, has been committed to the custody of the sheriff pending such grand jury action, and who has been confined in such custody for a period of more than forty-five days, or, in the case of a juvenile offender, thirty days, without the occurrence of any grand jury action or disposition pursuant to subdivision one, two or three of section 190.60, the superior court by which such grand jury was or is to be impaneled must release him on his own recognizance unless: (a) The lack of a grand jury disposition during such period of confinement

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was due to the defendant's request, action or condition, or occurred with his consent; or (b) The people have shown good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded grand jury action within the prescribed period or rendered the same against the interest of justice.

### **§ 190.85 Grand jury; grand jury reports.**

- 1) The grand jury may submit to the court by which it was impaneled, a report: (a) Concerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or (b) Stating that after investigation of a public servant it finds no misconduct, nonfeasance or neglect in public office by him provided that such public servant has requested the submission of such report; or (c) Proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.
- 2) The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one and that: (a) The report is based upon facts revealed in the course of an investigation authorized by section 190.55 and is supported by the preponderance of the credible and legally admissible evidence; and (b) When the report is submitted pursuant to paragraph (a) of subdivision one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one, it is not critical of an identified or identifiable person.
- 3) The order accepting a report pursuant to paragraph (a) of subdivision one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 190.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division,

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whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and, except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein.

- 4) Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.
- 5) Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one is not satisfied that the report complies with the provisions of subdivision two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public.

#### **§ 190.90 Grand jury; appeal from order concerning grand jury reports.**

- 1) When a court makes an order accepting a report of a grand jury pursuant to paragraph (a) of subdivision one of section 190.85, any public servant named therein may appeal the order; and when a court makes an order sealing a report of a grand jury pursuant to subdivision five of section 190.85, the district attorney or other attorney designated by the grand jury may appeal the order.
- 2) When a court makes an order sealing a report of a grand jury pursuant to subdivision five of section 190.85, the district attorney or other attorney designated by the grand jury may, within ten days after service of a copy of the order and report upon each public servant named in the report, appeal the order to the appellate

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division of the department in which the order was made, by filing in duplicate a notice of appeal from the order with the clerk of the court in which the order was made and by serving a copy of such notice of appeal upon each such public servant. Notwithstanding any contrary provision of section 190.85, a true copy of the report of the grand jury shall be served, together with such notice of appeal, upon each such public servant.

- 3) The mode of and time for perfecting an appeal pursuant to this section, and the mode of and procedure for the argument thereof, are determined by the rules of the appellate division of the department in which the appeal is brought. Such rules shall prescribe the matters referred to in subdivision one of section 460.70 and in section 460.80, except that such appeal is a preferred cause and the appellate division of each department shall promulgate rules to effectuate such preference.
- 4) The record and all other presentations on appeal shall remain sealed, except that upon reversal of the order sealing the report or dismissal of the appeal of the named public servant by the appellate division, the report of the grand jury, with the appendix, if any, shall be filed as a public record as provided in subdivision three of section 190.85.
- 5) The procedure provided for in this section shall be the exclusive manner of reviewing an order made pursuant to section 190.85 and the appellate division of the supreme court shall be the sole court having jurisdiction of such an appeal. The order of the appellate division finally determining such appeal shall not be subject to review in any other court or proceeding.
- 6) The grand jury in an appeal pursuant to this section shall be represented by the district attorney unless the report relates to him or his office, in which event the grand jury may designate another attorney.

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