

Report and
Recommendations
of the
Investigating
Grand Jury
Task Force

NOVEMBER 2019

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Preliminary Statement

The materials and opinions in the Report and Recommendations are solely those of the Investigating Grand Jury Task Force.

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Proposed Grand Juror Handbook

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Introduction and Overview

In July 2017, the Supreme Court of Pennsylvania formed the Investigating Grand Jury Task Force to perform a comprehensive review of the investigating grand jury system in this Commonwealth. The Task Force was charged with preparing a publicly issued report that would advance proposals for possible improvement.

To ensure a variety of perspectives, the Supreme Court selected members from a broad spectrum of backgrounds. The appointed members include judges, a law school professor, and attorneys who have practiced extensively before grand juries.

In establishing the Task Force, the Supreme Court suggested various areas for study, including assessing the scope and nature of grand jury secrecy, as well as the roles of the supervising judge and the Commonwealth's attorney. The Supreme Court also noted that training for supervising judges, nondisclosure orders, and swearing attorneys to secrecy were likely topics. The Supreme Court did not, however, expressly limit the Task Force's inquiry, other than cabining it to examining the operation of Pennsylvania's investigating grand juries.¹

Investigating Grand Juries

The investigating grand jury has dual goals: investigating crime and protecting the citizenry from unfounded criminal charges. In its pursuit of these goals, the grand jury is an important part of our criminal justice system.

In modern times, these tribunals are authorized through Pennsylvania's Investigating Grand Jury Act. See 42 Pa.C.S. §§4541-4553. Each tribunal is finite in duration, being statutorily confined to a term of no more than 24 months.

Investigating grand juries may be limited to a single county or may have multicounty jurisdiction. County grand juries are impaneled upon the order of the president judge of that judicial district to investigate suspected criminal activity within that county. Typically, the prosecuting entity with respect to a county investigating grand jury is the local district attorney, although the Office of Attorney General is statutorily authorized to conduct investigations via such a tribunal.

In contrast, only the Office of Attorney General is permitted to seek, from the Chief Justice of the Supreme Court of Pennsylvania, the convening of a multicounty investigating grand jury. Those tribunals, which are commonly known as statewide investigating grand juries, are impaneled only on the averment of

¹ Indicting grand juries are also permitted in Pennsylvania. See Pa.R.Crim.P. 556 - 556.13 (authorizing the impanelment of an indicting grand jury when there are concerns about witness intimidation). The Supreme Court did not ask the Task Force to study indicting grand juries.

the Attorney General that they are necessary to investigate organized crime or public corruption occurring on a multicounty basis. Typically, there are three statewide investigating grand juries simultaneously in operation in the Commonwealth. Since 1979, forty-six statewide investigating grand juries have been impaneled.

Investigating grand juries operate in a manner distinct from those juries that issue verdicts in civil and criminal trials. The “petit juries” that decide civil and criminal cases consider the evidence and arguments offered in open court by two opposing sides. Petit juries determine issues such as whether an individual recovers monetary damages for an injury and whether a person charged with a crime is guilty.

An investigating grand jury, in contrast, is constituted to inquire into suspected criminal activity. Grand jury proceedings are conducted in secret and are largely controlled by the prosecutor. Indeed, while a witness summoned to appear before the grand jury may be accompanied by counsel, that attorney is not allowed to lodge objections or otherwise address the grand jury or the prosecutor.

While the investigating grand jury has no authority to determine guilt or innocence, it may recommend, via a presentment, that the authorities bring charges against a person or entity when it finds probable cause to believe criminal activity has occurred. Additionally, an investigating grand jury may issue a report related to its investigation. Such reports may discuss conditions related to organized crime or public corruption. More broadly, a report may recommend legislative, executive, or administrative action in the public interest.

Task Force Methodology and Structure of the Report

The initial phase of the Task Force’s work focused on gathering information about the operation of investigating grand juries in Pennsylvania, in order to identify perceived problems and opportunities for improvement. The Task Force heard from judges who have supervised grand juries, as well as lawyers experienced in grand jury practice. The Task Force members and the contributors who offered their views were cognizant of the secrecy strictures applicable to grand jury matters. Thus, discussions were generalized to avoid disclosing investigation-specific details.

Of the judges who contributed, three supervised then-operating statewide investigating grand juries. Another jurist had supervised a county investigating grand jury.

The practitioners included representatives from the Pennsylvania District Attorneys Association and the Pennsylvania Association of Criminal Defense Lawyers. Additionally, the Office of Attorney General provided input through a group of its attorneys who work in its grand jury unit. Several defense counsel who specialize in grand jury practice also contributed.

Upon conclusion of its information-gathering sessions, the Task Force identified six topics that warranted in-depth consideration: the Role of the Supreme Court, the Role of the Supervising Judge, the Role of the Attorney for the Commonwealth, Grand Jury Secrecy, Grand Jury Reports, and Regional

Investigating Grand Juries. Task Force members were assigned to individual working groups to examine each of these topics in detail and bring the results of that examination to the full Task Force for further discussion and analysis. As detailed in this Report, the effort resulted in 37 separate recommendations designed to improve the efficiency, effectiveness, and fairness of investigating grand juries in Pennsylvania.

This Report devotes a section to each of the six major topics. Those sections commence with a short narrative, providing general background and explaining what the Task Force learned during the course of its work. Each section then advances specific recommendations for further action.

The vast majority of the recommendations relate to actions that the Supreme Court could perform, such as amendments to procedural rules or altering court administrative practice. While arguably beyond the Court's express mandate, other recommendations propose amendments to statutory provisions and thus are within the authority of the General Assembly.

All of the recommendations are supported by a majority vote of the Task Force. Where a recommendation lacks unanimity, the number of opposing votes are specified. The dissenting members have provided statements detailing the rationales for their disagreement.²

Whenever the Task Force proposes any specific language for a rule or statutory amendment, proposed additions are shown in **bold and underlined** and proposed deletions are shown in **[bold and brackets]**.

² To protect the deliberative process and promote the free exchange of ideas, the Report does not identify dissenting members by name.

Synopsis and Summary of Recommendations

I. Role of the Supreme Court. The Supreme Court has a significant role in investigating grand jury matters. Among other things, it is the sole appellate tribunal for challenges to investigating grand jury orders. As a result, its decisional law in this area is crucial for providing guidance to supervising judges and the practicing bar. In addition, the Supreme Court, through the Chief Justice, adjudicates applications to impanel statewide investigating grand juries. The Task Force makes the following three recommendations with regard to the Supreme Court's role:

Recommendation One: A rule of procedure should be adopted regarding the process for submitting applications to convene a statewide investigating grand jury.

Recommendation Two: The Supreme Court is encouraged to continue to address outstanding grand-jury-law issues in published opinions.

Recommendation Three: The Supreme Court's Internal Operating Procedures should be amended to provide specific timetables for circulation of and voting on recommendations relating to challenges to investigating grand jury orders.

II. Role of the Supervising Judge. In examining the central role of the supervising judge of an investigating grand jury, the Task Force identified a range of obstacles to the appropriate fulfillment of that role, including inadequate training, limited written resources, and insufficient staff support. The Task Force offers the following ten recommendations related to supervising judges:

Recommendation One: A judicial training program should be established for new supervising judges.

Recommendation Two: A handbook should be developed as an ongoing resource for supervising judges.

Recommendation Three: A handbook for grand jurors should be adopted.

Recommendation Four: The Supreme Court should consider funding for law clerk support for supervising judges of statewide investigating grand juries.

Recommendation Five: The clerk of courts of the county in which a statewide investigating grand jury is based should be identified as the filing office for that tribunal.

Recommendation Six: Whenever a statewide investigating grand jury is in session, the supervising judge should be on the premises or readily available to return to the premises.

Recommendation Seven: Rule of Criminal Procedure 229 and the related Comment should be amended to authorize the supervising judge to establish procedures by which grand jury transcripts

may be maintained by the attorney for the Commonwealth.

Recommendation Eight: The Supreme Court of Pennsylvania, through the Administrative Office of Pennsylvania Courts, should explore developing a system by which grand jury transcripts could be stored electronically.

Recommendation Nine: The supervising judge of a statewide investigating grand jury should submit certain relevant statistics concerning the work of the grand jury to the Supreme Court.

Recommendation Ten: Supervising judges should be encouraged to submit their significant decisions for publication, redacted as necessary to protect grand jury secrecy.

III. Role of the Attorney for the Commonwealth. The Commonwealth's attorney has a pivotal role in establishing and running an investigating grand jury. The investigating grand jury process commences with the Commonwealth's attorney filing with the court an application to convene a grand jury. Following impanelment, the Commonwealth's attorney sets the course for the tribunal via notices of submission, which define the investigations that will be pursued through the grand jury. To provide some incremental clarification of the prosecutor's role, as well as facilitate certain judicial functions, the Task Force makes the following four recommendations:

Recommendation One: With respect to a multicounty investigating grand jury, the Commonwealth's attorney should provide certain relevant statistical information to the supervising judge.

Recommendation Two: The Rules of Criminal Procedure should be amended to recognize that the Commonwealth's attorney has the authority to provide certain guidance to the investigating grand jury when it considers whether to direct the preparation of a presentment or a grand jury report.

Recommendation Three: The Rules of Criminal Procedure should be amended to clarify that the Commonwealth has the duty to ensure that all proceedings before the grand jury, but for the grand jury's deliberations and votes, are recorded or transcribed.

Recommendation Four: Rule of Criminal Procedure 229 should be amended to reflect the role of the Commonwealth's attorney in ensuring that the records of the grand jury are maintained, including facilitating the process for transferring materials from a supervising judge whose term is ending to any successor supervising judge.

IV. Grand Jury Secrecy. The Task Force expended considerable effort on the topic of grand jury secrecy. While secrecy is foundational to grand jury operations, there is substantial uncertainty about that term. The Task Force sought to identify areas in which uncertainties over the scope and application of grand jury secrecy have caused unnecessary difficulties. In order to provide needed guidance, and to address a variety of other issues relating to secrecy, the Task Force makes the following ten recommendations:

Recommendation One: Grand jury facilities should be configured to permit witnesses to enter and leave outside public view.

Recommendation Two: Rule of Criminal Procedure 231(C) should be rewritten to conform to the underlying statute, 42 Pa.C.S. §4549(b), and restrict secrecy to “matters occurring before the grand jury.”

Recommendation Three: To ensure consistency with Recommendation Two, the Comment to Rule of Criminal Procedure 231 should be amended to delete the last paragraph and include a discussion of case law interpreting the term “matters occurring before the grand jury.”

Recommendation Four: To conform to the Investigating Grand Jury Act, Rule of Criminal Procedure 230 should be amended to specify that the release to an investigating agency of matters occurring before the grand jury is permitted only when such release is in furtherance of a criminal investigative purpose.

Recommendation Five: When disclosure orders support the Commonwealth attorney in the performance of his or her duties, they should be reasonably granted.

Recommendation Six: The Court should adopt a new Rule of Criminal Procedure 233 regarding disclosure of grand jury testimony by witnesses and their attorneys.

Recommendation Seven: Witnesses should be sworn individually and clearly advised of their rights and obligations concerning secrecy.

Recommendation Eight: The attorney appearance form should be confined to its purpose: a notice that the attorney represents a particular witness. Attorneys representing witnesses should not be sworn to secrecy until such time as they are to be exposed to “matters occurring before the grand jury.” The secrecy oath should be administered by the supervising judge.

Recommendation Nine: Trial judges, not grand jury supervising judges, should control the release of grand jury material in a charged case.

Recommendation Ten: The rule governing the release of grand jury material in a charged case should be amended to more closely comply with existing law and to promote the orderly operation of criminal trials.

V. Grand Jury Reports. The subject of grand jury reports divided the members of the Task Force more sharply than any other issue. Ultimately, a four-member majority of the Task Force opted to suggest that the Legislature abolish grand jury reports. Those members concluded that the reporting process is in tension with the grand jury’s role as the protector of individual rights, as there are considerable due process concerns with the creation and release of a report.

Three members of the Task Force, however, disagree with the recommendation to abolish reports. One of those members finds that the availability of a reporting power is a policy question for the General Assembly and is outside the mandate of the Task Force. Two other members oppose eliminating reports,

which have been instrumental in exposing malfeasance and corruption over several decades, particularly since the majority's recommendation is directed to a process that has been supplanted by recent Supreme Court decisions.

Although a majority of the group proposes abolishment of reports, the Task Force recognizes that the reporting function is presently authorized and may continue indefinitely into the future. The Task Force thus makes several alternative recommendations, see Recommendations Two through Eight, that, if adopted, would make changes to the existing reporting system.

Recommendation One: The Investigating Grand Jury Act should be amended to eliminate grand jury reports.

In the alternative:

Recommendation Two: Section 4552 of the Investigating Grand Jury Act should be amended to preclude a grand jury report from critically commenting on a named or otherwise identified individual unless the comment relates to charges filed against the individual or charges recommended against the individual in an accepted presentment.

Recommendation Three: The Investigating Grand Jury Act should be amended to clarify that the preponderance of the evidence standard is to be employed by the investigating grand jury in making its statements of fact in the grand jury report, while the supervising judge's review of the report is subject to the sufficiency of the evidence standard.

Recommendation Four: New Rule of Criminal Procedure 234(A) and (B) should be adopted to require the attorney for the Commonwealth to provide citations to the record to aid the supervising judge's review of the grand jury report.

Recommendation Five: New Rule of Criminal Procedure 234(C)(1) should be adopted to explain the nature of the supervising judge's review of a grand jury report.

Recommendation Six: New Rule of Criminal Procedure 234(C)(2) and (D) should be adopted to set out appropriate procedures to follow when the supervising judge finds certain passages of a report unsupported by sufficient evidence.

Recommendation Seven: New Rule of Criminal Procedure 234(C)(3) should be adopted to make clear that grand jury secrecy applies to the contents of a grand jury report until the supervising judge files the report as a public record.

Recommendation Eight: Section 4546 of the Investigating Grand Jury Act should be amended to permit a limited extension of an investigating grand jury's term to address issues relative to a grand jury report.

VI. Regional Investigating Grand Juries. Finally, the Task Force found that district attorneys in less-populous counties could benefit from using investigating grand juries, but are unable to convene them due to financial and logistical concerns. Accordingly, the Task Force proposes a statutory change,

whereby less-populous counties could pool resources to impanel grand juries that they would use collectively.

Recommendation One: The General Assembly should consider amending the Investigating Grand Jury Act to permit the convening of regional investigating grand juries by counties of the fourth through the eighth classes.

Recommendation Two: In the event the General Assembly amends the Investigating Grand Jury Act to permit formation of regional investigating grand juries, the Supreme Court should promulgate necessary procedural rules.

Part I: Role of the Supreme Court

The Supreme Court of Pennsylvania has a critical role with respect to investigating grand juries. See generally *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Diocese of Greensburg (Diocese of Harrisburg)*, 191 A.3d 750, 764 (Pa. 2018) (in defining the role of the Supreme Court, noting that a “strong judicial hand” is indicated) (citation omitted; emphasis in the original).

One of the many facets to this role is the singular function the Supreme Court plays in the appellate review process. Unlike most legal issues, which are initially considered on appeal by an intermediate court, appellate challenges concerning investigating grand juries are solely the province of the Supreme Court. See 42 Pa.C.S. §722(5) (providing the Supreme Court “exclusive jurisdiction” over appeals from final orders relative to investigating grand juries).

The Supreme Court’s decisional law in this area is thus crucial for providing guidance to supervising judges and the practicing bar, particularly in light of significant uncertainties caused or left unresolved by the language of the Investigating Grand Jury Act. Along these lines, some jurists and attorneys who contributed to the Task Force commented that this area of the law would benefit from the issuance of more opinions, at both the supervising judge and appellate levels.

The Supreme Court’s oversight responsibility is enhanced as to multicounty tribunals, as those grand juries may be constituted only upon the Chief Justice granting an application to impanel. See 42 Pa.C.S. §4542 (in the context of the Investigating Grand Jury Act, defining the “Supreme Court” as the Chief Justice or any other Justice designated by general rule); see also 42 Pa.C.S. §4544 (noting that applications to convene a statewide investigating grand jury are submitted to the “Supreme Court,” *i.e.*, the Chief Justice). While the process for submission and adjudication of those applications has seemingly been a smooth one, the procedural rules provide no specific guidance.

Additionally, the Supreme Court lacks basic statistical data regarding statewide investigating grand juries. This is in marked contrast to most, if not all, other aspects of the judicial system, for which there are annual, detailed workload statistics. See <http://www.pacourts.us/news-and-statistics/research-and-statistics/>. Without caseload statistics, the Supreme Court’s ability to meet the staffing and resource needs of supervising judges of statewide investigating grand juries is hampered.

In other sections of this Report, the Task Force recommends that supervising judges of statewide investigating grand juries, with the assistance of the Office of Attorney General, compile certain statistics for submission to the Supreme Court on an annual basis. See Task Force Report, Role of the Supervising Judge, Recommendation Nine, and Role of the Attorney for the Commonwealth, Recommendation One. As a corollary principle, it would be helpful to have the Office of Attorney General provide certain statistical information in its applications to impanel statewide investigating grand juries.

In an effort to address these various concerns, the Task Force makes the following recommendations:

Recommendation One: A rule of procedure should be adopted regarding the process for submitting applications to convene a statewide investigating grand jury.

The Task Force is unaware of any systemic problems with the submission and adjudication of applications to convene a statewide investigating grand jury. That said, the absence of a rule governing this fundamental aspect of grand juries is notable. The Task Force thus proposes adoption of such a provision, which largely memorializes existing practice.

Additionally, the Task Force suggests requiring the Office of Attorney General to include statistics regarding the investigations it intends to submit to that new grand jury, with the particular caution that the data should be general in nature so as to ensure that grand jury secrecy is not compromised. Those statistics will necessarily be confined to data available to the Office of Attorney General before that grand jury is convened and, thus, will not reflect all investigations that will ultimately be submitted to the tribunal over the time it is in operation.

Specifically, the application should state how many investigations relating to organized crime and/or public corruption the Office of Attorney General intends to submit to the new grand jury upon its impanelment. See 42 Pa.C.S. §4544 (providing that a multicounty investigating grand jury may be convened only upon the averment of the Office of Attorney General that such a tribunal is necessary to investigate organized crime, public corruption, or both, that is occurring in more than one county). To further illuminate the anticipated workload of the new grand jury, the Office of Attorney General should specify how many investigations it intends to submit to this new tribunal that are unrelated to organized crime and/or public corruption.³

Accordingly, the Task Force proposes adoption of new Rule of Criminal Procedure 245:⁴

Rule 245. Applications to Convene a Multicounty Investigating Grand Jury

(A) The Attorney General shall file an application to convene a multicounty investigating grand jury in the Supreme Court's Office of the Prothonotary.

(B) In that application, the Attorney General shall state that, in his or her judgment, the convening of a multicounty investigating grand jury is necessary to:

(1) investigate organized crime, public corruption, or both, that involves more than

³ Under current decisional law, the Section 4544 requirements apply with respect to impanelment only and do not limit the matters that the Office of Attorney General may investigate through a statewide investigating grand jury. See *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006).

⁴ In the event the Supreme Court accepts some of the rule changes proposed by this Report, it may be prudent to renumber existing rules. For example, the instant proposed new rule, which would govern the initiating stage of a statewide investigating grand jury, would seemingly be best placed at the beginning of the portion of the Rules of Criminal Procedure specific to statewide investigating grand juries (*i.e.*, this new rule would logically be designated Rule of Criminal Procedure 240).

For purposes of this Report, however, there is no need to suggest such renumbering. Rather, the Supreme Court's Criminal Procedural Rules Committee would be well situated to handle such an eventuality.

one county of the Commonwealth;

(2) such investigation or investigations cannot be adequately performed by a county investigating grand jury; and

(3) such investigation or investigations cannot be adequately performed by another multicounty investigating grand jury.

(C) Based on information available when the application to convene a multicounty investigating grand jury is filed, the Attorney General shall indicate how many investigations he or she intends to submit to the multicounty investigating grand jury that:

(1) relate to organized crime and/or public corruption, further specifying how many of such investigations will be transferred from another grand jury and how many will be newly initiated; and

(2) are unrelated to organized crime and/or public corruption, further specifying how many of such investigations will be transferred from another grand jury and how many will be newly initiated.

(D) The Attorney General shall indicate whether the investigating grand jury is to have statewide jurisdiction or, alternatively, specify the counties for which the investigating grand jury is to be convened. The Attorney General shall also indicate the preferred location for the investigating grand jury.

(E) The application shall be acted on by the Chief Justice of Pennsylvania within 10 days.

(F) An order granting an application to convene a multicounty investigating grand jury shall:

(1) declare that the multicounty investigating grand jury has statewide jurisdiction or, alternatively, specify the counties over which it has jurisdiction;

(2) designate a judge of the court of common pleas as the supervising judge;

(3) designate the location or locations of the multicounty investigating grand jury proceedings; and

(4) provide for any other incidental arrangements as may be necessary.

Comment: This rule, in large part, both tracks the pertinent sections of the Investigating Grand Jury Act, see 42 Pa.C.S. §§4541-4553, and memorializes existing practice with respect to applications for statewide investigating grand juries. Traditionally, such applications, and the orders disposing of them, have not been placed under seal, as the contents are general in nature and do not disclose any particulars that would implicate grand jury secrecy.

The statistical information required by this rule should be general in nature, so as to avoid disclosing any matters covered by grand jury secrecy provisions. Additionally, the statistics concern only that data available to the Attorney General at the time the application to convene is filed. As such, the statistics should not be viewed as a tally of the total number of investigations the Attorney General will ultimately conduct through the grand jury. Indeed, considering that investigating grand juries commonly operate for 24 months, any estimate given prior to impanelment as to the tribunal's full workload would be speculative.

Finally, the statistics are pertinent to the statutory criteria for impanelment. See 42 Pa.C.S. §4544(a). Those Section 4544 requirements apply with respect to impanelment and do not limit the matters that the Office of Attorney General may investigate through a statewide investigating grand jury. See *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006).

Recommendation Two: The Supreme Court is encouraged to continue to address outstanding grand jury law issues in published opinions.

Appellate review of investigating grand jury matters is streamlined, bypassing the intermediate appellate court layer. See 42 Pa.C.S. §722(5) (providing the Supreme Court “exclusive jurisdiction” over appeals from final orders relative to investigating grand juries); see *also* 42 Pa.C.S. §702(a) (noting that any challenge to an interlocutory order shall be “taken to the appellate court having jurisdiction of final orders in such matters”). This compression of the appellate process effectively expedites review of a supervising judge’s order, which is beneficial considering the limited lifespan of any investigating grand jury. See 42 Pa.C.S. §4546 (explaining that an investigating grand jury has an initial 18-month term, which may be extended by 6 months).

This review construct also heightens the importance of Supreme Court decisional law, as it is the only appellate court disposing of such issues. Some jurists and practitioners who contributed to the Task Force commented that this area of the law would benefit from the issuance of more opinions, particularly given the range of issues left unresolved by the language of the Investigating Grand Jury Act.

These contributors, though, offered this view prior to the Supreme Court’s issuance of several opinions in grand jury cases. See, e.g., *Diocese of Harrisburg*, *supra*; *In re Fortieth Statewide Investigating Grand Jury (40th SWIGJ Report Litigation I)*, 190 A.3d 560 (Pa. 2018) (recognizing the due process rights of those critically named in a grand jury report alleging numerous instances of child sexual abuse); *In re Fortieth Statewide Investigating Grand Jury (40th SWIGJ Report Litigation II)*, 197 A.3d 712 (Pa. 2018) (determining that, after grand jury term had expired, permanent redaction was the sole, adequate remedy for violations of the due process rights of those challengers who had been critically named in a grand jury report); *In re Return of Seized Property of Lackawanna County*, 212 A.3d 1 (Pa. 2019) (determining that a supervising judge of a multicounty grand jury is empowered to issue search warrants).

These cases do not mark the end of the Supreme Court's expenditure of resources on this area of the law, with additional opinions anticipated in the foreseeable future. *See 2014 Allegheny County Investigating Grand Jury, Appeal of WPXI, Inc.*, 30 WAP 2018 (considering, *inter alia*, whether a search warrant issued by an investigating grand jury is subject to the common law right of access); *In re Grand Jury Investigation No. 18*, 18 MM 2019 (order dated Apr. 29, 2019) (directing full appellate briefing and oral argument to consider, *inter alia*, petitioner's constitutional challenges to a grand jury report critical of him).

As a result, any need for more decisions from the Supreme Court is far less pressing than it was when the contributors offered their views to the Task Force. That said, the Task Force observes that additional appellate guidance in the grand jury arena would be beneficial. For instance, while the Court had the opportunity to consider nondisclosure strictures placed on attorneys, *see Diocese of Harrisburg*, there is no appellate case law on the standards for imposing a "gag order" on a witness. Along these lines, some contributors, as well as some Task Force members, observed that they knew of instances when such strictures were placed on witnesses without the statutorily required hearing being conducted. *See* 42 Pa.C.S. §4549(d) (recognizing that "[n]o witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge").

As such, the Task Force encourages the Supreme Court to issue additional opinions, as appropriate, in this area of the law.

Recommendation Three: The Supreme Court's Internal Operating Procedures should be amended to provide specific timetables for circulation of and voting on recommendations relating to challenges to investigating grand jury orders.

From the outset, grand jury matters proceed through appellate review at an accelerated rate. *Compare* Pa.R.A.P. 3331 (governing appellate challenges regarding investigating grand jury orders; further providing, via reference to Rule of Appellate Procedure 1512, a 10-day deadline for such filings), *with* Pa.R.A.P. 903 (setting forth a standard 30-day deadline for filing a notice of appeal), *and with* Pa.R.A.P. 1113 (allotting 30 days in which to pursue allocatur review).

Challenges to investigating grand jury orders are considered on the Supreme Court's Miscellaneous Docket, which generally provides for swifter disposition than other types of filings. *Compare* Supreme Court IOP §6 (directing that an allocatur report is to be circulated among the Supreme Court members within 90 days of receipt of judicial assignment, with a proposed disposition date of not greater than 60 days), *with* Supreme Court IOP §7 (providing that recommendations in Miscellaneous Docket matters are generally to be circulated within 60 days of receipt of the answer or date when the answer had been due, whichever occurs first; further directing that the proposed disposition date should be no greater than 30 days from circulation).

Yet, even that comparatively more rapid timetable could complicate grand jury proceedings, which are limited to operating for no longer than two years. *See* 42 Pa.C.S. §4546 (explaining that an investigating grand jury has an initial 18-month term, which may be extended by 6 months).

Accordingly, the Task Force proposes amending Section 7 of the Supreme Court's Internal Operating Procedures:

§7. Motions, Miscellaneous Petitions, and Applications for Relief

B. Assignment, Circulation and Disposition. All motions, petitions and applications will be assigned to the Chief Justice, except for emergency motions, motions addressed to a single Justice, and applications for stay of execution in capital cases. In matters assigned to the Chief Justice, the Chief Justice will prepare a memorandum setting forth the positions of the parties and a recommended disposition. Recommendations should be circulated within sixty (60) days from the date the answer is filed or is due to be filed, whichever occurs first, and should contain a proposed disposition date no greater than thirty (30) days from the date of circulation, except in:

(1) Children's Fast Track cases, in which recommendations shall be circulated within fifteen (15) days from the date the answer is filed or due to be filed, whichever occurs first, and the proposed disposition date shall be no greater than fifteen (15) days from the date of circulation; and

(2) Investigating grand jury cases, in which recommendations shall be circulated within fifteen (15) days from the date the answer is filed or due to be filed, whichever occurs first, and the proposed disposition date shall be no greater than fifteen (15) days from the date of circulation.

A vote of the majority is required to implement the proposed disposition. Every motion, petition or application shall be decided within sixty (60) days, or within thirty (30) days in Children's Fast Track **and investigating grand jury** cases.

F. Reconsideration Applications.

2. ***Circulation and Disposition.*** The assigned Justice shall circulate to the Court a recommended disposition within fourteen (14) days of the date of the assignment, within seven (7) days of the date of assignment in Children's Fast Track **and investigating grand jury matters [appeals]**, or as soon as practicable in emergency and stay of execution matters.

Part II: Role of the Supervising Judge

The Task Force received considerable input from both jurists and practitioners regarding the crucial role played by grand jury supervising judges. These contributors identified a range of obstacles to the appropriate fulfillment of that role, including inadequate training, limited written resources, and insufficient staff support.

Newly appointed supervising judges receive no formalized training as to grand jury proceedings. While incoming supervising judges have historically consulted with their experienced counterparts, this *ad hoc* approach is less than ideal.

Moreover, supervising judges lack sufficiently authoritative written resources. The leading treatise on Pennsylvania grand jury practice has not been updated for several decades. There is also a relative lack of publicly available judicial decisions, either from supervising judges or appellate courts, though the Supreme Court of Pennsylvania has recently issued several valuable opinions in grand jury matters.

Supervising judges sometimes lack adequate support staff. This concern can be particularly acute for senior judges, who do not have regularly employed law clerks or administrative assistants. Moreover, at least some supervising judges of statewide investigating grand juries do not have a central judicial office to accept and docket filings.

These deficiencies have led the Office of Attorney General to close some of those gaps. For instance, while the procedural rules require supervising judges to maintain physical custody of grand jury transcripts, the Office of Attorney General has actually fulfilled this role. While the Task Force is not opposed to the Office of Attorney General performing this duty, there should be clarity in the rules about that responsibility.

Moreover, the procedural rules do not identify a filing office for statewide investigating grand juries. Some experienced attorneys are aware that motions relative to such grand juries have historically been docketed by the clerk of courts of the county in which the grand jury sits. Yet, the lack of guidance in the rules has engendered confusion among some practitioners and seemingly led to nonstandard approaches. Indeed, some witnesses' counsel have given their applications directly to the Office of Attorney General, with the request that the Commonwealth's attorney facilitate the docketing of those filings. Having the Commonwealth's attorney act in that capacity could be problematic, particularly in instances in which a person wishes to submit an *ex parte* application seeking relief relative to the Office of Attorney General.

On occasion, supervising judges may have relied on employees of the Office of Attorney General for research assistance. Accounts of such reliance were secondhand and not detailed. Additionally, it is unexceptional for a judge to direct counsel to provide authority for a stated position. That said, supervising judges should have the resources necessary to avoid even the possibility of commingling prosecutorial and judicial functions. *See generally Lyness v. Com., State Bd. of Med.*, 605 A.2d 1204 (Pa. 1992) (in discussing the importance of separation between prosecutorial and adjudicatory roles, emphasizing that even the appearance of bias is to be avoided).

Also, supervising judges of statewide grand juries were not consistently present on site when the grand jury was in session, which could create the possibility, as well as the perception, that the grand jury is without sufficient judicial oversight.

The Supreme Court has an important role in supervising the operation of investigating grand juries beyond that of the supervising judges. See generally *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Diocese of Greensburg (Diocese of Harrisburg)*, 191 A.3d 750, 764-65 (Pa. 2018). To assist the Supreme Court in that function, supervising judges should be tasked with certain specific duties, such as making on-the-record findings as to particular orders, as well as compiling basic statistics of grand jury matters.

Recommendation One: A judicial training program should be established for new supervising judges.

A formalized training program will not only provide foundational information to newly appointed jurists, but will also have the benefit of standardizing the supervision of grand juries.

The training program should be immediately accessible, as the time period between a supervising judge's appointment and the judge's assumption of his or her duties is typically no more than a few weeks. Live judicial training courses would be unsuitable, as they are impracticable to plan on short notice and, given the small number of judges who would need the training, would not be cost-efficient. Instead, the optimal approach would be a pre-recorded video training program that would be accessible on demand.

This training program should be developed by the Judicial Education Department of the Administrative Office of Pennsylvania Courts. The Task Force further recommends that the program be designed to meet the standards for approval for purposes of the judicial education requirement. See *In re: Pennsylvania Continuing Judicial Education*, 719 Supreme Court Rules Docket (order dated Dec. 9, 2016). The judges who are currently presiding over the statewide investigating grand juries would be excellent resources in developing this program. Additionally, Task Force members would be available for consultation.

The Task Force recommends that the training video include information relative to the following topics:

1. History of the grand jury.
2. Statutory and case law overview.
3. Role of the Commonwealth's attorney.
4. Impanelment process:
 - i. county investigating grand juries:
 - a. application by the Commonwealth's attorney or president judge;
 - b. summoning and selection of jurors.
 - ii. statewide investigating grand juries:
 - a. application by the Office of Attorney General;
 - b. summoning and selection of jurors.

1. Role of jurors:
 - i. members and alternates;
 - ii. appointment of foreperson and selection of secretary;
 - iii. quorum requirement;
 - iv. limitations on authority (including prohibition against the grand jury initiating investigations on own accord);
 - v. vote to extend term of grand jury;
 - vi. consideration of testimony/review of evidence;
 - vii. direction to prepare presentment/consideration of presentment;
 - viii. submission of grand jury report.
2. Role of the witness.
3. Role of the supervising judge:
 - i. impanelment of the grand jury;
 - ii. matters concerning grand jurors (excusal from service; swearing; selection of foreperson);
 - iii. matters concerning witnesses (swearing; advising of rights; court appointment of counsel);
 - iv. motion practice;
 - v. control and maintenance of secrecy of grand jury transcripts;
 - vi. review and acceptance of notice of submission;
 - vii. review and acceptance of presentments;
 - viii. review and acceptance of grand jury reports.
4. Issues a supervising judge commonly considers:
 - i. Secrecy/determining what are “matters occurring before the grand jury”;
 - ii. Contempt;
 - iii. Attorney conflict of interest;
 - iv. Subpoenas;
 - v. Exercise of Fifth Amendment privilege;
 - vi. *Ex parte* communications;
 - vii. Nondisclosure orders;
 - viii. Grand jury reports (including pre-publication notice and an opportunity to respond).
5. Statistics-reporting requirement for supervising judges of statewide investigating grand juries. See Recommendation Nine of this Section.
6. Encouragement to publish decisions. See Recommendation Ten of this Section.

Recommendation Two: A handbook should be developed as an ongoing resource for supervising judges.

The Task Force recommends that a handbook be created to offer general guidance to supervising judges. Such a handbook would parallel the judicial training program suggested in Recommendation One.

Additionally, the Task Force proposes the adoption of a protocol for regular updating of this handbook to ensure that it remains useful for future jurists and practitioners.

Recommendation Three: A handbook for grand jurors should be adopted.

Many judicial districts have handbooks that are distributed to prospective jurors hearing civil and criminal cases. The Task Force suggests that a handbook specific to statewide investigating grand juries be adopted. A proposed grand juror handbook is attached as an Appendix.

Recommendation Four: The Supreme Court should consider funding for law clerk support for supervising judges of statewide investigating grand juries.

The Task Force suggests a law clerk position be created whereby one attorney would provide support with respect to all supervising judges presiding over statewide investigating grand juries. That law clerk would be responsible for conducting legal research and assisting in the drafting of opinions and orders, as well as incidental administrative support work. See 42 Pa.C.S. §1903 (in the chapter relating to the Administrative Office of Pennsylvania Courts, empowering the Supreme Court to appoint “subordinate . . . staff as may be necessary and proper for the prompt and proper disposition of the business of all courts”).

One member of the Task Force suggests that each supervising judge should have his or her own law clerk, employed either on a part-time basis or to be shared with common pleas judges in the vicinity. That member believes that a single statewide clerk would not be sufficiently accessible to one or more supervising judges, both because of geography and because statewide grand jury sessions sometimes overlap. Additionally, over time, and as different jurists rotate in and out of the role of supervising judge, a single clerk may take on a more prominent role than is appropriate to the nature of the position.

Recommendation Five: The clerk of courts of the county in which a statewide investigating grand jury is based should be identified as the filing office for that tribunal.

Historically, filings relative to statewide investigating grand juries have been docketed by the clerk of courts in the county in which the grand jury sits. The close physical proximity of the clerk's office and the sitting statewide investigating grand jury make this a logical choice. Moreover, those clerks of courts have experience managing the secure dockets of the county-level grand juries that have operated in their jurisdictions.

Yet, the procedural rules do not identify a filing office for a multicounty investigating grand jury. This has led to confusion among the practicing bar.

The Task Force suggests that the historical practice be memorialized in the rules. Such a uniform approach would supply needed clarity and consistency in grand jury procedures. As a practical matter, litigants could readily identify the proper location for filing with respect to each statewide grand jury, as the county in which such a tribunal sits is specified in the publicly disclosed order permitting the convening of that tribunal. See 42 Pa.C.S. §4544(b)(3); Pa.R.Crim.P. 243(A).⁵

In accordance with this recommendation, the Task Force proposes the addition of a new procedural rule and associated comment:

Rule 246. Filing Office for Multicounty Investigating Grand Juries

(A) The filing office for a multicounty investigating grand jury shall be the clerk of courts for the county designated as the location of the investigating grand jury.

(B) The clerk of courts shall place all such filings on a sealed docket.

Comment: The county in which a multicounty investigating grand jury sits is specified in the order permitting the convening of that tribunal. See 42 Pa.C.S. §4544(b)(3); Pa.R.Crim.P. 243(A). Unlike most other orders concerning grand juries, Supreme Court orders permitting the convening of multicounty investigating grand juries have historically not been sealed. Litigants can thus readily identify the proper clerk of courts for submitting filings relative to a particular grand jury.

Recommendation Six: Whenever a statewide investigating grand jury is in session, the supervising judge should be on the premises or readily available to return to the premises.

At least with respect to some previous statewide investigating grand juries, supervising judges were

⁵ Relatedly, the Administrative Office of Pennsylvania Courts should be consulted about the possibility of developing a secure, electronic grand jury filing system.

not consistently on location when the grand jury was in session. In some instances, supervising judges performed important judicial functions, such as advising witnesses of their rights and swearing them in, via remote video link.

While supervising judges do not sit in the grand jury sessions themselves, their consistent personal presence on site produces important benefits, both tangible and intangible. Given the serious nature of witness warnings and oath taking, judges should perform those functions in person. Additionally, considering the timeliness concerns that arise in grand jury proceedings, having the immediate availability of the supervising judge to promptly resolve legal issues avoids unnecessary delay and promotes efficient operation of the grand jury. More generally, the absence of the supervising judge could foster the false impression that the grand jury is under the exclusive control of the Office of Attorney General, without adequate judicial supervision.

Accordingly, the Task Force proposes the following rule and accompanying comment:

Rule 247. Presence of Supervising Judges of Statewide Investigating Grand Juries

Whenever the investigating grand jury is in session, the supervising judge of the statewide investigating grand jury shall either be on the premises or readily available to return to the premises.

Comment: The presence of the supervising judge while the grand jury is in session serves several important functions, including the in-person swearing of witnesses and the prompt handling of any legal issues that may arise. When the supervising judge is not physically present, the work of the grand jury may be delayed.

The supervising judge administers oaths to various individuals. See Pa.R.Crim.P. 223 (oath to stenographer); 224 (oath to court personnel); 225 (oath to grand jury and foreman); 227 (oath to witness); 231, Comment (oath to attorney for witness). These oaths should be administered by the supervising judge in person, although there may be instances when, due to timeliness concerns and to protect grand jury secrecy, an oath for an attorney for a witness may be administered via two-way, simultaneous electronic communication.

During the course of a grand jury session, various legal issues may arise. If the supervising judge is not on the premises, or readily available to return to the premises, then the issues may not be resolved in a timely manner, risking significant delay and inconvenience. While the supervising judge does not sit in the grand jury sessions themselves, and therefore need not be physically present for the entirety of a grand jury session, the judge must be readily available to return to the facility promptly should the need arise. While the meaning of readily available may vary with the circumstances, ordinarily the judge should be able to return within 30 minutes in order to ensure the efficient operation of the grand jury.

Recommendation Seven: Rule of Criminal Procedure 229 and the related Comment should be amended to authorize the supervising judge to establish procedures by which grand jury transcripts may be maintained by the attorney for the Commonwealth.

The procedural rules require the supervising judge to “control the original and all copies of the transcript,” see Pa.R.Crim.P. 229, without explicitly allowing the jurist to establish an alternative method for managing those materials. Yet in practice, the Office of Attorney General typically fulfills this function. This approach has developed out of necessity, as supervising judges have lacked the staffing, space, and security necessary to maintain physical control of transcripts. Additionally, as supervising judges are replaced, and as grand juries expire, there are no procedures in place to transfer these materials to a successor jurist.

While the Task Force has no objection to the current practice of the Office of Attorney General maintaining physical control of the transcripts, clarification is warranted as to the supervising judge’s role in this process. The Task Force accordingly recommends that Rule of Criminal Procedure 229 and its related Comment be amended as follows:

Rule 229. Control of Investigating Grand Jury Transcript/Evidence.

Except as otherwise set forth in these rules, the **[court] supervising judge** shall control **and maintain the secrecy of** the original and all copies of the transcript, **as well as any physical evidence that has been presented to the investigating grand jury. The supervising judge shall establish procedures for supervising the custody and control of said grand jury materials. [and shall maintain their secrecy. When physical evidence is presented before the investigating grand jury, the court shall establish procedures for supervising custody.]**

Comment: This rule requires that **the supervising judge establish procedures to maintain grand jury materials. The supervising judge may designate the attorney for the Commonwealth as the entity that controls, maintains, and ensures the secrecy of such materials until their release pursuant to these rules. [the court retain control over the transcript of the investigating grand jury proceedings and all copies thereof, as the record is transcribed, until such time as the transcript is released as provided in these rules. Reference to the court in this rule and in Rule 230 is intended to be to the supervising judge of the grand jury.]**

Recommendation Eight: The Supreme Court of Pennsylvania, through the Administrative Office of Pennsylvania Courts, should explore developing a system by which grand jury transcripts could be stored electronically.

The Task Force suggests that maintenance of grand jury transcripts be modernized, so that a secure electronic storage platform is developed. This would facilitate the secure maintenance and controlled distribution of such grand jury material.

Recommendation Nine: The supervising judge of a statewide investigating grand jury should submit certain relevant statistics concerning the work of the grand jury to the Supreme Court.

The Supreme Court of Pennsylvania has recently highlighted the critical judicial role in supervising the operation of investigating grand juries. See *generally Diocese of Harrisburg*, 191 A.3d at 764-65. While this role applies with respect to both county and statewide grand juries, the Supreme Court's oversight function is enhanced with respect to multicounty tribunals, as the Chief Justice approves any applications to convene those entities. See 42 Pa.C.S. §§4542, 4544.

Statistics regarding the work that statewide investigating grand juries perform would assist the Supreme Court in its oversight role. Some supervising judges of statewide investigating grand juries have evidently recognized the value of transmitting such information, as those jurists have taken it upon themselves to advance certain statistics to the Chief Justice. The Task Force recommends establishing this as a course of conduct required for all supervising judges.

Accordingly, the Task Force suggests that supervising judges of multicounty investigating grand juries be tasked with providing certain basic statistics on an annual basis, free from any particularized data that could divulge matters covered by grand jury secrecy.

Correlatively, the Task Force suggests that the Court further consider whether to publicly disclose some, or all, of these statistics. The Task Force recognizes that certain non-case-specific judicial statistics are already publicly available. See, e.g., <http://www.pacourts.us/news-and-statistics/research-and-statistics/> (publicly posting various court-related statistics). That said, the Task Force recognizes that there may be confidentiality concerns specific to the grand jury context.

The Task Force proposes the addition of new Rule of Criminal Procedure 248 and related Comment:⁶

Rule 248. Submission of Annual Statistics Regarding Multicounty Investigating Grand Juries

(A) A supervising judge of a multicounty investigating grand jury shall submit statistics to the Chief Justice of the Supreme Court of Pennsylvania on an annual basis.

(B) The statistics shall be general in nature and shall not disclose any matters covered by grand jury secrecy provisions.

(C) The statistics shall report activities of the investigating grand jury within the previous calendar year, including:

⁶ In a separate portion of this Report, the Task Force suggests the adoption of another subsection to Rule of Criminal Procedure 248 to address the role of the Office of Attorney General in this statistics-gathering process. See Role of the Commonwealth's Attorney, Recommendation One (proposing the promulgation of Rule of Criminal Procedure 248(D)).

(1) How many days the grand jurors reported for service;

(2) How many notices of submission were submitted by the attorney for the Commonwealth;

(3) How many notices of submission related to organized crime, public corruption, or both;

(4) How many notices of submission were accepted by the supervising judge;

(5) How many presentments were issued by the grand jury;

(6) How many presentments were accepted by the supervising judge;

(7) How many grand jury reports were submitted by the grand jury; and

(8) How many grand jury reports were accepted by the supervising judge.

(E) The statistics shall be submitted to the Chief Justice of the Supreme Court of Pennsylvania on or before March 1 of the following calendar year.

(F) The statistics shall be tabulated and maintained by the Administrative Office of Pennsylvania Courts.

Comment: The Supreme Court of Pennsylvania has a critical role in supervising the operation of investigating grand juries. See generally *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Diocese of Greensburg*, 191 A.3d 750, 764-65 (Pa. 2018). While this role applies with respect to both county and statewide grand juries, the oversight function is enhanced with respect to multicounty tribunals, as the Chief Justice approves any applications to convene those entities. See 42 Pa.C.S. §§4542, 4544.

To assist the Supreme Court in its role, a supervising judge of multicounty investigating grand juries is required to submit certain general statistical information. In providing this information, the supervising judge is cautioned that the data should be general in nature, so as to avoid disclosing any matters covered by grand jury secrecy provisions.

Recommendation Ten: Supervising judges should be encouraged to submit their significant decisions for publication, redacted as necessary to protect grand jury secrecy.

Several contributors commented on the lack of case law relating to grand jury practice, both at the supervising-judge and appellate levels, and further represented that the lack of guidance hampers practice.

This scarcity of published case law appears to be due to factors particular to each judicial level. Supervising judges are aware of their crucial role in maintaining grand jury secrecy. See *In re Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011) (observing that “[t]he very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings”). As a result, there has been an understandable reluctance to make publicly available any material that would risk the breach of grand jury secrecy. The Task Force has learned that this concern has translated into a nearly universal practice of supervising judges sealing any opinion they author.

As an additional, although lesser, point of concern, questions were raised as to what compilation or platform would be available for dissemination of the supervising jurists' decisions. The *Pennsylvania District and County Reports*, which is the historically recognized source for decisions issued by common pleas court judges, selects which decisions to publish. There is thus no guarantee that a supervising judge's efforts to prepare a disclosable opinion would result in publication in that collection.

The sealing of a supervising judge's opinion is not necessary in all situations. By way of example, in the context of a recent grand jury matter, a supervising judge determined that his opinion could be fully disclosed. See *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 565-67 (Pa. 2018) (discussing a June 5, 2018 opinion of the supervising judge, which was unsealed). Moreover, some opinions may contain only isolated passages of secret information, such that the redaction of confidential material could be readily accomplished. The Task Force strongly encourages supervising judges to examine their significant opinions to determine whether a publicly disclosable version could be published.

Also, while the *Pennsylvania District and County Reports* does not print all decisions by common pleas court jurists, other platforms place few limitations on publication. For example, Thomson Reuters Westlaw encourages submission of opinions for online reporting. See <https://legal.thomsonreuters.com/en/solutions/government/court-opinion-submission-guidelines> (with reference to Westlaw's "unlimited storage capacity," encouraging jurists to "exercise liberal discretion" in submitting opinions for online publication).

To ensure that these recommendations are routinely communicated to supervising judges, the Task Force suggests that they be incorporated into any judicial training program for supervising judges. See Recommendation One of this Section.

Part III: Role of the Attorney for the Commonwealth

Historically, the grand jury has been an independent body created by statute to investigate crime and initiate criminal charges. The grand jury also protects the citizenry from unfounded criminal charges. In its pursuit of these dual goals, the grand jury is an important part of our criminal justice system.

The Commonwealth's attorney has the pivotal role in establishing and running an investigating grand jury. The investigating grand jury process commences with the prosecutor filing with the court an application to convene a grand jury. A county grand jury may be constituted if there is criminal activity best investigated fully by using grand jury investigative resources. See 42 Pa.C.S. §4543. A multicounty grand jury, which can be sought only by the Attorney General, may be convened because of organized crime or public corruption that involves more than one county and cannot adequately be investigated by a county grand jury. See 42 Pa.C.S. §4544.

Following impanelment, the Commonwealth's attorney sets the course for the tribunal via notices of submission, which define the investigations that will be pursued through the grand jury. See 42 Pa.C.S. §§4548, 4550 (setting forth that the prosecutor files notices of submission with the supervising judge; further barring the grand jury from inquiring into alleged offenses on its own motion). Under current Pennsylvania practice, the prosecutor presents evidence for the grand jury's consideration, further advising the grand jury on the law as it considers issuance of presentments and grand jury reports.

In sum, the prosecutor must fairly manage the substance and course of the grand jury's investigations, subject to the vote of the grand jury and to the control of the supervising judge on matters within their respective authority. To provide some incremental clarification of that role, as well as facilitate certain judicial functions, the Task Force makes the following Recommendations.

Recommendation One: With respect to a multicounty investigating grand jury, the Commonwealth's attorney should provide certain relevant statistical information to the supervising judge.

By separate recommendation, the Task Force suggests that supervising judges of statewide investigating grand juries be directed to provide certain basic statistics on an annual basis. See Role of the Supervising Judge, Recommendation Nine (proposing the promulgation of Rule of Criminal Procedure 248(A), (B), (C), (E), (F)).

Many of those statistics will be maintained by the supervising judge on an ongoing basis, such as how many presentments the judge has accepted. Two subsets of this data, however, would be more readily gathered by the Office of Attorney General. Initially, it is well positioned to tally how many days a grand jury

convened, as the Office of Attorney General tracks this information for purposes such as compensating the jurors. See 42 Pa.C.S. §4553(b).

Additionally, a notice of submission will not necessarily indicate whether the investigation relates to organized crime, public corruption, or both. *Cf. In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 511-12 (Pa. 2006) (while observing that a statewide investigating grand jury may be impaneled only upon averments of organized crime, public corruption, or both per 42 Pa.C.S. §4544, recognizing that not every investigation conducted by that tribunal need satisfy those criteria). Thus, the Office of Attorney General would be in the best position to provide this cumulative statistic to the supervising judge.

To that end, the Task Force now suggests that proposed Rule 248 be augmented to include subsection D, as well as corollary language in the Comment, to indicate that the Office of Attorney General is to provide these statistics to the supervising judge.⁷

Rule 248. Submission of Annual Statistics Regarding Multicounty Investigating Grand Juries

* * * * *

(C) The statistics shall concern certain activities of the investigating grand jury within the previous calendar year, including:

(1) How many days the grand jurors reported for service;

* * * * *

(3) How many notices of submission related to organized crime, public corruption, or both;

* * * * *

(D) The Office of Attorney shall submit to the supervising judge, on or before February 1 of the following calendar year, statistics relative to subsections (C)(1) and (3).

* * * * *

Comment:

* * * * *

This rule requires the Office of Attorney General to provide the tally of how many days a grand jury met, as it already tracks this information for purposes such as compensating the jurors. See 42 Pa.C.S. §4553(b). Additionally, while a supervising judge receives the notices of submission, the face of that document will not necessarily indicate whether the investigation relates to organized crime, public corruption, or both. Cf. In re Twenty-Fourth Statewide Investigating Grand Jury, 907 A.2d 505, 511-12 (Pa. 2006) (while observing that a statewide investigating grand jury may be impaneled only upon averments of organized crime, public corruption, or both per 42 Pa.C.S. §4544, recognizing that not every investigation conducted by that tribunal need satisfy those criteria). Thus, the Office of Attorney General would be in the best position to provide this year-end statistic to the supervising judge.

⁷ For sake of clarity, the language below also quotes from portions of proposed Rule 248(C), whose adoption is advocated by a separate recommendation. See Role of the Supervising Judge, Recommendation Nine.

Recommendation Two: The Rules of Criminal Procedure should be amended to recognize that the Commonwealth's attorney has the authority to provide certain guidance to the investigating grand jury when it considers whether to direct the preparation of a presentment or a grand jury report.

Recommendation Three: The Rules of Criminal Procedure should be amended to clarify that the Commonwealth has the duty to ensure that all proceedings before the grand jury, but for the grand jury's deliberations and votes, are recorded or transcribed.

The Investigating Grand Jury Act speaks in terms of the grand jury instructing the Commonwealth's attorney to prepare a presentment. See 42 Pa.C.S. §4551(a). The Act also empowers the investigating grand jury to submit a grand jury report to the supervising judge. Yet, as with petit juries, the typical member of an investigating grand jury is a layperson unlearned in the law. Guidance is thus warranted.

The Commonwealth's attorney has traditionally performed such a function. This is in keeping with the spirit of the Investigating Grand Jury Act, which provides that the Commonwealth's attorney defines the scope of the investigation. See, e.g., 42 Pa.C.S. §4548 (specifying that the investigating grand jury is not empowered to "inquire into alleged offenses on its own motion"); 42 Pa.C.S. §4550 (detailing that a grand jury investigation commences with the Commonwealth's attorney presenting a notice of submission for the supervising judge's consideration).

The Task Force offers no opposition to continuing with this approach. For the sake of clarity, however, it suggests that the procedural rules be amended to recognize that the Commonwealth's attorney explains the elements of the charges that could be listed in a presentment, as well as the guiding principles applicable to a grand jury report. Additionally, the rule should acknowledge that the Commonwealth's attorney may summarize the evidence that has been presented, but with the express caution that it is the grand jury's recollection of the evidence, and not that of the prosecutor, which controls.

Furthermore, the Task Force notes that there is arguably ambiguity about which entity effectuates the statutory mandate that grand jury proceedings are to be recorded. See 42 Pa.C.S. §4549(a) (stating simply that the proceedings "shall be stenographically recorded or transcribed or both"). Placing this duty on the Commonwealth's attorney seems sensible, as the prosecutor is present in the grand jury room whenever the tribunal is in session, whereas the supervising judge is not.

To this end, the Task Force suggests the adoption of new Rule of Criminal Procedure 232.

Rule 232. Guidance of an Investigation by the Commonwealth's Attorney.

(A) An investigation is commenced upon the approval of a notice of submission presented by the Commonwealth's attorney to the supervising judge.

(B) The Commonwealth’s attorney may explain to the investigating grand jury the elements of the charges that could be set forth in a presentment.

(C) The Commonwealth’s attorney may explain to the investigating grand jury the principles applicable to a grand jury report.

(D) The Commonwealth’s attorney may summarize for the investigating grand jury the evidence that has been presented, but with the express caution that it is the investigating grand jury’s recollection of the evidence, and not that of the prosecutor, which controls.

(E) The Commonwealth’s attorney shall ensure that proceedings before the investigating grand jury, except for the investigating grand jury’s deliberations and votes, are stenographically recorded or transcribed or both.

Comment: The Investigating Grand Jury Act specifies that proceedings before the grand jury, but for the deliberations and votes of the tribunal, are to be recorded. See 42 Pa.C.S. §4549(a). While the statute is silent as to designating the entity responsible for ensuring that such recording occurs, logically the duty falls on the Commonwealth’s attorney, who will be present whenever the grand jury is in session.

The unintentional failure to make such a recording, however, should not be seen as affecting the validity of any subsequent presentment, grand jury report, or prosecution. Compare Fed.R.Crim.P. 6(e)(1) (imposing a similar requirement in federal grand jury proceedings; further instructing that “the validity of a prosecution is not affected by the unintentional failure to make a recording”).

Recommendation Four: Rule of Criminal Procedure 229 should be amended to reflect the role of the Commonwealth’s attorney in ensuring that the records of the grand jury are maintained, including facilitating the process for transferring materials from a supervising judge whose term is ending to any successor supervising judge.

The supervising judge has the responsibility of ensuring that grand jury materials are controlled and maintained. See Pa.R.Crim.P. 229.⁸

Yet, this responsibility is not solely that of the supervising judge. The Commonwealth’s attorney has a significant role in safeguarding the secrecy of grand jury materials, both before and after expiration of the grand jury’s term. This is particularly so with respect to statewide investigating grand juries. Although each individual statewide investigating grand jury is in existence for no more than 2 years, there has been, in the past quarter century, at least one such tribunal in operation at all times. The Office of Attorney General, although led and staffed by different individuals over the decades, has remained a constant and provides some continuity in a system where, as a matter of course, supervising judges come and go.

⁸ In another section of this Report, the Task Force proposes amendments to Rule of Criminal Procedure 229 to clarify the supervising judge’s role in maintaining grand jury materials. See Supervising Judges Section, Recommendation Seven.

The Task Force proposes further amending Rule 229, adding a final paragraph to the Comment that recognizes the role of the Commonwealth's attorney in this process.

Rule 229. Control of Investigating Grand Jury Transcript/Evidence.

Except as otherwise set forth in these rules, the **[court] supervising judge** shall control **and maintain the secrecy of** the original and all copies of the transcript, **as well as any physical evidence that has been presented to the investigating grand jury. The supervising judge shall establish procedures for supervising the custody and control of said grand jury materials.** **[and shall maintain their secrecy. When physical evidence is presented before the investigating grand jury, the court shall establish procedures for supervising custody.]**

Comment: This rule requires that **the supervising judge establish procedures to maintain grand jury materials. The supervising judge may designate the attorney for the Commonwealth as the entity that controls, maintains, and ensures the secrecy of such materials until their release pursuant to these rules.** **[the court retain control over the transcript of the investigating grand jury proceedings and all copies thereof, as the record is transcribed, until such time as the transcript is released as provided in these rules. Reference to the court in this rule and in Rule 230 is intended to be to the supervising judge of the grand jury.]**

Per established practice, the Commonwealth's attorney works cooperatively with the supervising judge in this process. This cooperative action is particularly useful in the multicounty investigating grand jury context. Upon the expiration of such a grand jury, a successor tribunal is typically impaneled, with the supervising judge of the successor grand jury being tasked with maintaining secrecy of grand jury materials generated by prior multicounty investigating grand juries. While the departing and incoming supervising judges bear the primary responsibility to effectuate the transfer of such materials, the Office of Attorney General can provide practical assistance in this process.

Part IV: Grand Jury Secrecy

As the Supreme Court has made plain, the secrecy of grand jury proceedings is “indispensable to the effective functioning of a grand jury.” *In re Investigating Grand Jury of Philadelphia Cty., Appeal of Philadelphia Rust Proof Co. (Rust Proof)*, 437 A.2d 1128, 1130 (Pa. 1981). Every individual who made a presentation to the Task Force generally agreed with the goals of secrecy – the protection of witnesses, grand jurors, and subjects’ reputations, and the prevention of flight or obstruction of justice. See *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011).

There was considerable disagreement, however, as to the precise scope of secrecy, particularly as to what and whom secrecy should apply in order to advance those goals, to comply with the Investigating Grand Jury Act and related rules, and to permit counsel for witnesses and subjects to represent their clients effectively. Uncertainty in itself has caused difficulty, for to err in misconstruing secrecy risks punishment by contempt. In addition, a consensus developed that in some instances, the obligations of secrecy have been interpreted in such a way as to impede prosecutors in conducting investigations, negotiating with witnesses and subjects, and deciding what charges to bring.

The Court recently provided valuable guidance on certain aspects of grand jury secrecy. See *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Dioceses of Greenburg (Diocese of Harrisburg)*, 191 A.3d 750 (Pa. 2018). In particular, the Court made clear that (1) attorneys representing grand jury witnesses are themselves subject to grand jury secrecy; (2) with appropriate authorization from their client-witnesses, and absent a contrary court order, such attorneys may disclose the testimony of their client-witnesses to the same extent as may the client-witness; and (3) grand jury witnesses (and their attorneys) are not necessarily free to disclose matters occurring before the grand jury other than the witness’s testimony. *Id.* at 758-61. In addition, the Court observed that the statutory term “matters occurring before the grand jury,” 42 Pa.C.S. § 4549(b), “should be understood to reach beyond only what actually transpires in a grand jury room.” *Diocese of Harrisburg*, 191 A.3d at 762.

Despite this recent judicial guidance, and the dictates of the Investigating Grand Jury Act and related Court rules, much uncertainty remains. Accordingly, the Task Force considered case law from other states and the federal courts. See *generally Diocese of Harrisburg*, 191 A.3d at 762 (referencing a “wide body of federal decisional law”).

The Task Force sought to identify areas in which uncertainties over the scope and application of grand jury secrecy have caused unnecessary difficulties. Although our goals were greater clarity and specificity, rules must be general, and intelligent development of rules often must await the education that their application in litigation provides. Increase in the number of published opinions and improvements in training supervising judges, prosecutors, and the bar should sharpen these rules and ameliorate some of these problems.⁹

⁹ Task Force members discussed at length the scope of the statutory term “matters occurring before the grand jury,” 42 Pa.C.S. § 4549(b). Through that process, they found the term not to be amenable to a simple, universally controlling definition. Attempts to craft such a bright-line rule resulted in maxims that were both under- and over-inclusive, depending on the hypothetical contexts to which they were applied.

Recommendation One: Grand jury facilities should be configured to permit witnesses to enter and leave outside public view.

There have been instances where witnesses appearing before investigating grand juries have been identified, as their arrivals and departures were in view of the general public. To protect secrecy, the Task Force recommends that, when grand jury facilities are being constructed or remodeled, that they be designed to permit witnesses to enter and leave outside the view of the public.

Recommendation Two: Rule of Criminal Procedure 231(C) should be rewritten to conform to the underlying statute, 42 Pa.C.S. §4549(b), and restrict secrecy to “matters occurring before the grand jury.”

Recommendation Three: To ensure consistency with Recommendation Two, the Comment to Rule of Criminal Procedure 231 should be amended to delete the last paragraph and include a discussion of case law interpreting the term “matters occurring before the grand jury.”

Rule 231 presently defines grand jury secrecy as applying to “any information pertaining to the grand jury[.]” Pa.R.Crim.P. 231(C). The Supreme Court has directed that, to the extent this language could be read to reach more broadly than the Investigating Grand Jury Act, it should be amended. See *Diocese of Harrisburg*, 191 A.3d at 762 n.20.

In response to that directive, the Task Force recommends that Rule 231(C) be revised to conform to the corollary statutory provision. See 42 Pa.C.S. §4549(b) (providing that grand jury secrecy applies to “matters occurring before the grand jury”). Relatedly, it suggests amending the Comment to reference case law discussing the term “matters occurring before the grand jury”:

Rule 231. Who May be Present During Session of an Investigating Grand Jury

(C) All persons who are to be present while the grand jury is in session shall be identified in the record, shall be sworn to secrecy as provided in these rules, and shall not disclose any **[information pertaining to the grand jury] matters occurring before the grand jury** except as provided by law.

Comment:

[Paragraph (C), added in 1987, generally prohibits the disclosure of any information related to testimony before the grand jury. There are, however, some exceptions to this prohibition enumerated in Section 4549 of the Judicial Code, 42 Pa.C.S. §4549.]

“The first lesson of federal precedent is that the phrase ‘matter occurring before the grand jury’ is a term of art.” Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, 3 Crim. Proc. § 8.5(c) (4th ed. 2017), quoted in *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Diocese of Greenburg*, 191 A.3d 750 (Pa. 2018).

The grand jury secrecy mandate is inapplicable to matters that do not occur or transpire before the grand jury, even if the evidence is gathered in the course of an investigation that also uses the grand jury. For example, documents, a witness’s independent knowledge, or other evidence that exist independent of the grand jury investigation are not subject to grand jury secrecy as long as disclosing them would not reveal that they have been produced to the grand jury. See, e.g., *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63-65 (3d Cir. 1982) (Interview reports, documents obtained in the investigation without subpoena, recordings and transcripts of consensually monitored conversations, and draft indictments were not necessarily “matters occurring before the grand jury”).

At the same time, the need to preserve the secrecy of testimony and evidence presented to the grand jury may extend secrecy to other matters that may themselves reveal what occurred before the grand jury, including indirect disclosures of information. *United States v. Norian Corp.*, 709 Fed.Appx. 138, 142 (3d Cir. 2017) (“The touchstone is not what has been examined by the grand jury, but what may reveal ‘the essence of what takes place in the grand jury room’”) (quoting *In re Grand Jury Investigation (N.J. State Comm’n of Investigation)*, 630 F.2d 996, 1000 (3d Cir. 1980)); *United States v. Stanford*, 589 F.2d 285, 291 n.6 (7th Cir. 1978) (describing a particular request for documents as one that “would be in effect a disclosure of the grand jury proceedings”). In other words, the preservation of secrecy for “matters occurring before the grand jury” sometimes requires the extension of secrecy beyond what actually is said or presented in the grand jury room.

Recommendation Four: To conform to the Investigating Grand Jury Act, Rule of Criminal Procedure 230 should be amended to specify that the release to an investigating agency of matters occurring before the grand jury is permitted only when such release is in furtherance of a criminal investigative purpose.

Recommendation Five: When disclosure orders support the Commonwealth attorney in the performance of his or her duties, they should be reasonably granted.

Rule 230 presently states that certain grand jury materials “may be released to another investigative agency, under such other conditions as the court may impose.” Pa.R.Crim.P. 230(C). The Investigating Grand Jury Act, however, specifies that such disclosures are permitted only “to assist [those other entities] in investigating crimes under their investigative jurisdiction.” 42 Pa.C.S. §4549(b); see also *In re Investigating Grand Jury of Philadelphia Cty., Appeal of Philadelphia Rust Proof Company, Inc.*, 437 A.2d 1128 (Pa. 1981). The Task Force thus suggests amending Rule 230 to conform it to Section 4549(b).

Additionally, uncertainty about the contours of grand jury secrecy has caused prosecutors to refrain from having otherwise productive conversations with witnesses, subjects, targets, or their counsel. When such conversations support the Commonwealth’s attorney in the performance of his or her duties, as by facilitating witness testimony or promoting the early resolution of investigations, the Commonwealth’s attorney should be able to seek, and expect to receive, permission to disclose matters occurring before the grand jury.

We thus propose that Rule 230(C), and the associated Comment, be amended as follows:

(C) Other Disclosures:

(1) Upon [appropriate] motion, and after a hearing into relevancy, the [court] supervising judge may order disclosure of [that a transcript of testimony before an investigating grand jury, or physical evidence before the investigating grand jury,] matters occurring before the grand jury [may be released] to [another investigating agency] local, State, other state, or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction, under [such other] such conditions as the [court] supervising judge may impose.

(2) Upon motion by an attorney for the Commonwealth, a supervising judge may approve disclosure of matters occurring before the grand jury by a Commonwealth attorney to witnesses, subjects, or targets, and their counsel, provided that such disclosure is for use in the performance of the Commonwealth attorney’s duties.

Comment:

* * * * *

The language in subparagraph (C)(1), which permits release to other investigative agencies, was reworded to track the language in 42 Pa.C.S. § 4549(b). See *In re Investigating Grand Jury of Philadelphia Cty. Appeal of Philadelphia Rust Proof Company, Inc.*, 437 A.2d 1128 (Pa. 1981).

Subparagraph (C)(2) was added to make clear that attorneys for the Commonwealth may, under appropriate circumstances, seek orders authorizing disclosure to witnesses, subjects, targets, and/or their counsel.

Disclosure orders often support Commonwealth attorneys and other law enforcement agencies in their investigative and prosecutorial work and advance the cause of justice. See *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986) (“We agree . . . that a statement of opinion by a Justice Department attorney as to an individual’s potential criminal liability does not violate the dictates of Rule 6(e) even though the opinion might be based on knowledge of the

grand jury proceedings, provided, of course, the statement does not reveal the grand jury information on which it is based.”) (internal quotation marks and citation omitted).

Recommendation Six: The Court should adopt a new Rule of Criminal Procedure 233 regarding disclosure of grand jury testimony by witnesses and their attorneys.¹⁰

Prohibiting by court order a grand jury witness from disclosing his or her own testimony presents substantial First Amendment issues. See *Butterworth v. Smith*, 494 U.S. 624 (1990) (holding that Florida statute prohibiting witness from ever disclosing testimony given before grand jury violates the First Amendment insofar as it prohibits witness from disclosing his or her own testimony after the grand jury’s term has ended). A grand jury witness cannot be prohibited from discussing facts to which they were called upon to testify before the grand jury, provided that the witness has an independent source for those facts, and “absent a need to further a state interest of the highest order.” *Id.* at 632 (internal quotation marks and citation omitted); see also *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1139 (10th Cir. 2003) (“*Butterworth* makes clear that the state cannot, by calling a person as a witness, prohibit her from disclosing information she possessed beforehand, that is, the substance itself of the information the witness was asked to divulge to the grand jury.”) Therefore, the witness should have notice and an opportunity to be heard before being subject to a nondisclosure order, and an opportunity to challenge the order on appeal.

The Investigating Grand Jury Act provides that “No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge.” 42 Pa.C.S. §4549(d). Despite this requirement of a hearing, contributors informed the Task Force that, while some of their clients have been subject to orders barring them from disclosing their grand jury testimony, neither their clients nor they have ever participated in a hearing or been presented with a written order.

The Task Force recognizes that sometimes hearings should be *in camera* and *ex parte* if to do otherwise would reveal secret grand jury material or work the harm – witness tampering or intimidation – that the nondisclosure order is meant to prevent. A record must be made of the hearing, though, to review. The “cause” finding and the parameters of the nondisclosure order should be in writing, both for the purposes of review and to clarify for the witness and attorney their obligations.

A nondisclosure order directed to a witness should be immediately appealable. The Task Force recognizes that witnesses who unsuccessfully challenge a grand jury subpoena before the supervising judges do not have an automatic right to appeal; rather, such witnesses may pursue appellate review only after subjecting themselves to contempt proceedings. See *Rust Proof*, 437 A.2d at 1130 n.3.

That approach was developed in recognition that appellate litigation of a subpoena could interfere with the grand jury’s ongoing investigation. *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 510 (Pa. 2006) (“Requiring the choice between compliance with the subpoena and the possibility

¹⁰ Two members of the Task Force dissent from portions of this Recommendation. Their dissenting statement follows this Section.

of contempt preserves the interest in expeditious grand jury proceedings.”) A similar concern does not apply in the nondisclosure context, however, as a nondisclosure order affects what the witnesses can do after they have given their testimony or provided their documents. In addition, forcing the witness to act in contempt of the order to secure the right to appeal would work the very harm the nondisclosure order aims to prevent – a disclosure that threatens the safety of witnesses, the flight of a target, or the obstruction of justice. Finally, the rule should explicitly state that the pendency of an appeal is not grounds for the witness to refuse to obey a subpoena for testimony or documents.

Additionally, as the Court’s recent decision in *Diocese of Harrisburg* makes clear, both witnesses and their attorneys would benefit from further guidance concerning what they may and may not disclose in the absence of a nondisclosure order. Part of the current uncertainty surrounds the meaning of the witness’s “testimony before the investigating grand jury” as used in 42 Pa.C.S. §4549(d). To address that uncertainty, the Task Force recommends including in new Rule 233 a definition of the term.

Accordingly, the Task Force recommends the adoption of a new Rule 233 as follows:¹¹

Rule 233. Disclosure of Grand Jury Testimony by Witnesses and Their Attorneys and Requirements for Nondisclosure Orders.

(A) Disclosure of grand jury testimony by witnesses and their attorneys. No witness or attorney for a witness shall be prohibited from disclosing the witness’s testimony before the grand jury unless, after a hearing before the supervising judge, cause is shown to justify nondisclosure by that particular witness or the witness’s attorney. In no event may a witness be prevented from disclosing the witness’s testimony to his or her attorney.

(B) Conduct of nondisclosure hearing. The witness and the witness’s attorney shall have the right to participate in the hearing regarding nondisclosure unless the supervising judge finds that the need to protect the secrecy of matters occurring before the grand jury requires the exclusion of the witness and the witness’s counsel from all or portions of the hearing. The supervising judge shall support any nondisclosure order with written or on-the-record findings provided to the witness and the witness’s attorney, with such redactions as the supervising judge deems necessary to protect the secrecy of matters occurring before the grand jury. The nondisclosure order shall specify the prohibitions on disclosure applicable to the witness and the witness’s attorney. A nondisclosure order is immediately appealable, but the appeal shall not operate as an automatic stay of the order and is not grounds for a witness to refuse to testify or otherwise comply with a grand jury subpoena.

(C) Definition of “witness’s testimony.” The term “witness’s testimony” as used in these rules includes questions the witness is asked, the responses of the witness, and documents or tangible items the witness is shown in the course of his or her testimony.

¹¹ In the event the Rules of Criminal Procedure are amended to permit an immediate appeal from a nondisclosure order, a corollary provision may also need to be included in the Rules of Appellate Procedure. See, e.g., Pa.R.A.P. 311 (governing interlocutory appeals as of right).

Recommendation Seven. Witnesses should be sworn individually and clearly advised of their rights and obligations concerning secrecy.

In the course of their legal practice, some of the Task Force members have seen grand jury witnesses sworn as a group. Various contributors to the Task Force relayed similar observations. This practice, under which witnesses both learn of the involvement of others in the grand jury process and have their own involvement exposed to others, is inconsistent with the preservation of grand jury secrecy. The problem is exacerbated by the fact, discussed below, that under current practice grand jury witnesses ordinarily take no secrecy oath. As a result, witnesses may believe themselves free to tell the world not only about their own testimony, a right expressly granted by statute, see 42 Pa.C.S. § 4549(d), but also about the other witnesses with whom they were sworn in by the supervising judge.

The Court's recent decision in *Diocese of Harrisburg* illuminated a gap in the current legal framework concerning the secrecy obligation of grand jury witnesses. While neither the Investigating Grand Jury Act nor the relevant rules of criminal procedure unambiguously impose any secrecy obligation on grand jury witnesses, the Court's opinion is based in part on the premise that grand jury witnesses may not disclose any "matters occurring before the grand jury" other than their own testimony. See *Diocese of Harrisburg*, 191 A.3d at 759-60, 760 n.16. Justice Donohue's concurring and dissenting opinion, cited with approval in this respect by the majority opinion, see *id.* at 760 n.16, makes this point explicitly: "[S]ection 4549(d)'s command that 'no witness shall be prohibited from disclosing his testimony' must be understood as a narrow exception to a broader secrecy requirement. Stated differently, the logical corollary to section 4549(d) is that witnesses are prohibited from disclosing matters before the grand jury other than their own testimony." *Id.* at 768 n.3 (Donohue, J., concurring and dissenting) (emphasis in original).

Given that violations of grand jury secrecy may subject witnesses to contempt, those witnesses should be explicitly advised of their rights and obligations in that regard, at the time they are sworn in by the supervising judge. The Task Force also recommends changing the current reference in Rule of Criminal Procedure 227 to witnesses being sworn "in open court" to witnesses being sworn "by the supervising judge" to reflect current practice and preserve secrecy.

Rule 227 should be amended as follows:

(A) Each witness to be heard by the investigating grand jury shall be sworn *and advised of his or her rights by the supervising judge* before testifying. *Absent good cause, the witness shall be sworn individually and outside the presence of other witnesses.* [The witness may elect to be sworn *in camera* or in open court.]

(B) The supervising judge shall explain to each witness that witness's rights and obligations concerning grand jury secrecy, including the following:

(1) The right to counsel, including the right to confer with counsel during the witness's appearance before the grand jury;

(2) The privilege against self-incrimination;

(3) The right, absent a contrary court order, to disclose the witness's own testimony, which includes the questions the witness is asked, the responses of the witness, and documents the witness is shown in the course of his or her testimony; and

(4) The obligation, absent a contrary court order, to keep secret all matters occurring before the grand jury, including matters occurring before the supervising judge, other than the witness's own testimony.

(C) The supervising judge shall administer an oath to each witness in substantially the following form:

"Do you swear or affirm that that the testimony you will give will be the truth, the whole truth, and nothing but the truth? Do you swear or affirm that you will keep secret all matters occurring before the grand jury other than your own testimony?"

[*Comment:* Should the witness fail to exercise any election, it is intended that the court will determine whether the witness is to be sworn *in camera* or in open court. When it is necessary to give constitutional warnings to a witness, the warnings and the oath must be administered by the court. As to warnings that the court may have to give to the witness when the witness is sworn, see, e.g., *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (Pa. 1971).]

Recommendation Eight. The attorney appearance form should be confined to its purpose: a notice that the attorney represents a particular witness. Attorneys representing witnesses should not be sworn to secrecy until such time as they are to be exposed to "matters occurring before the grand jury." The secrecy oath should be administered by the supervising judge.¹²

The entry of appearance form currently in use in the statewide investigating grand juries performs two distinct functions. First, it provides notice to the grand jury, as well as to the attorney for the Commonwealth and the supervising judge, that a particular attorney represents a particular witness in connection with a particular grand jury investigation. The value of such notice is undeniable. *Cf. Diocese of Harrisburg*, 191 A.3d at 771-73 (Wecht, J., concurring and dissenting) (discussing origin and value of entry of appearance form). Second, the current form requires the attorney entering his or her appearance simultaneously to swear an oath to keep secret all matters occurring before the grand jury except when authorized by law. The Court in *Diocese of Harrisburg* concluded that the oath then in use was overbroad and directed that it be modified. *Id.* at 760-61 (majority opinion). The Court, through an opinion by Justice Baer joined by four other Justices, also effectively invited this Task Force to make further recommendations concerning the form. *Id.* at 765-66 (Baer, J., concurring, joined by Saylor, C.J. and Todd, Dougherty, Mundy, JJ.).

¹² Two members of the Task Force dissent from this Recommendation. Their dissenting statement follows this Section.

Accepting that invitation, the Task Force recommends that the two functions of the current entry of appearance form be separated. First, the appearance form should be confined to the purpose implied by its title and served by similar forms in other contexts -- notification to relevant actors that the attorney represents a particular individual or entity in connection with the matter at hand.

Second, at such time that an attorney needs to be sworn to secrecy, that function should typically be accomplished by an appropriate oral oath. The use of a written appearance form to convey an attorney's secrecy obligation has significant shortcomings. Such a serious obligation, one that carries the penalty of contempt for its violation, should ordinarily be imposed in person by the supervising judge to ensure that the attorney accepts it knowingly and voluntarily. An oral oath or explanation of the obligation also enables the attorney to ask questions or express uncertainties in a forum where the questions can be answered.

Most often, the attorney secrecy oath would not be necessary until such time as the attorney's witness testifies in the grand jury, as that is the point at which the attorney first learns of "matters occurring before the grand jury." Under those circumstances, the oath to the attorney could be administered immediately before the client-witness testifies. On occasion, such as when a motion is argued to the supervising judge before the witness has testified, or when an attorney or the Commonwealth has obtained an order authorizing disclosure to the private attorney, the attorney may need to be sworn at an earlier point in the proceedings. In either case, there is no need for an attorney for a witness to be sworn until such time as that attorney is to be privy to matters occurring before the grand jury.

The Task Force recognizes, however, that there will occasionally be instances when it would be appropriate for the supervising judge, in his or her discretion, to permit the attorney to execute the oath via a statement signed out of the presence of the judge. For instance, when the Commonwealth has obtained an order from the supervising judge authorizing disclosure of grand jury material to a private attorney, execution of an oath may be necessary prior to when an in-person swearing could take place. The proposed amendments reflect the retention of such discretion in the hands of the supervising judge.

The Task Force recommends that the following language be added to the end of the Comment following Rule of Criminal Procedure 231:

Attorneys for witnesses should be sworn to secrecy at such time as they are to exposed to "matters occurring before the grand jury" within the meaning of Paragraph (C). The oath should be substantially in the following form:

"Do you solemnly swear or affirm that you will keep secret all that transpires in the grand jury and all matters occurring before the grand jury, except when authorized by law or permitted by the court? Do you understand that, with the consent of your client or clients, you may disclose the content of your client's grand jury testimony, but only to the same extent that your client may do so under applicable law, and provided that you are not prohibited from doing so by either a specific order from the supervising judge or by the Rules of Professional Conduct?"

The supervising judge should typically administer this oath in person to ensure that the attorney accepts it knowingly and voluntarily. There will, however, be instances when in-person administration of the oath may be impracticable. Accordingly, the supervising judge may, in his or her discretion, permit the attorney to execute the oath via a statement signed out of the presence of the judge.

Recommendation Nine. Trial judges, not grand jury supervising judges, should control the release of grand jury material in a charged case.

Recommendation Ten. The rule governing the release of grand jury material in a charged case should be amended to more closely comply with existing law and to promote the orderly operation of criminal trials.¹³

An investigating grand jury is, by its nature, investigatory in nature. Following issuance of a presentment, any resultant criminal proceedings are conducted before a separate tribunal, with a trial court judge presiding.

Yet, Rule of Criminal Procedure 230 calls for the grand jury supervising judge, not the trial judge, to decide whether grand jury testimony may be disclosed in connection with the charged case. This approach was likely adopted out of sensitivity for maintaining grand jury secrecy, with the view being that supervising judges are uniquely situated to assess what may be appropriately disclosed.

The corollary, however, is that the jurist with the most developed insight on the criminal prosecution, *i.e.*, the trial judge, is not handling this important aspect of the proceedings. The Task Force finds this approach questionable, particularly since secrecy concerns are dissipated, and often eliminated, once an investigation has resulted in the filing of charges. *See Rust Proof*, 437 A.2d at 1130 (listing as one of the bases for grand jury secrecy the protection of the “innocent accused who is exonerated from disclosure of the fact that he has been under investigation”). Moreover, the Task Force believes that trial judges are fully capable of appreciating any remaining secrecy concerns and appropriately tailoring a disclosure order to protect confidential material.

Additionally, the Task Force suggests other amendments to Rule 230 to conform the provision to existing law. Most significantly, the rule presently requires a defendant to file a motion for exculpatory material, which is arguably in tension with case law. *See Commonwealth v. Strong*, 761 A.2d 1167, 1171 n.5 (Pa. 2000) (providing that the prosecution is required “to disclose exculpatory information material to the guilt or punishment of an accused even in the absence of a specific request”). The Task Force thus proposes edits that clarify that the duty is on the Commonwealth to disclose this material, with further instruction that any disputes about this disclosure are to be adjudicated by the trial judge.

Furthermore, a defendant should, as a matter of course, be given transcripts of his or her grand jury testimony. To promote efficiency in the pretrial process, that disclosure should occur shortly after formal arraignment.

Finally, the Task Force recommends a change relative to the disclosure of the grand jury testimony of those individuals who subsequently appear as a witness at the criminal trial. Presently, Rule 230 provides that such grand jury testimony is to be made available to the defendant only after the direct testimony of the witness. That inflexible timing provision has complicated criminal proceedings, including causing

¹³ One member of the Task Force dissents from portions of Recommendations Nine and Ten. That member’s dissenting statement follows this Section.

delays of trials to allow the defense to review the transcripts prior to conducting cross-examination. Accordingly, the Task Force suggests relegating these disclosures, including their timing, to the discretion of the trial judge per general rule. See Pa.R.Crim.P. 573(B)(2) (governing those Commonwealth disclosures that are discretionary with the court).

Accordingly, the Task Force recommends that Rule 230 be amended as follows:

(B) Defendant in a Criminal Case:

(1) When a defendant in a criminal case has testified before an investigating grand jury concerning the subject matter of the charges against him or her, **the Commonwealth shall furnish the defendant with a copy of the transcript of such testimony within 30 days after formal arraignment. [upon application of such defendant the court shall order that the defendant be furnished with a copy of the transcript of such testimony.]**

(2) When a witness in a criminal case has previously testified before an investigating grand jury concerning the subject matter of the charges against the defendant, **disclosure of such testimony to the defendant by the Commonwealth shall be decided by the trial judge and governed by Rule of Criminal Procedure 573(B)(2) concerning discretionary discovery. [upon application of such defendant the court shall order that the defendant be furnished with a copy of the transcript of such testimony; however, such testimony may be made available only after the direct testimony of that witness at trial.]**

(3) **After formal arraignment, the Commonwealth shall furnish the defendant with a copy of any exculpatory grand jury testimony or exculpatory documentary evidence or tangible evidence presented to the grand jury. If the parties disagree as to whether or when evidence should be disclosed under this paragraph, the defendant shall file a motion with the trial judge, who shall decide the matter. [Upon appropriate motion of a defendant in a criminal case, the court shall order that the transcript of any testimony before an investigating grand jury that is exculpatory to the defendant, or any physical evidence presented to the grand jury that is exculpatory to the defendant, be made available to such defendant.]**

Grand Jury Secrecy - Dissenting Statement

Recommendation Six: proposed new Rule of Criminal Procedure 233 regarding nondisclosure orders

Two members of the Task Force dissent from aspects of subsection (B) of the proposed rule, and object to subsection (C).

Subsection (B): The requirements for on-record proceedings and findings concerning nondisclosure orders are appropriate, but the proposal goes too far in entitling witnesses and attorneys to attend those proceedings. Such proceedings will of necessity reveal information unknown to the witness, whether about other witnesses or about the possible future course of the investigation.

Generally, these orders are sought because of concerns that a witness or his attorney will try to coordinate with or influence the testimony of other witnesses. They cannot freely be discussed in the presence of the very people who are the subject of such concerns. The default rule, therefore, should be the same as the practice for almost all other decisions made by the supervising judge. By its essential nature, the grand jury is not an adversary process, and the proposal does not provide justification for departing from that norm in this instance.

Of course, subjects of a nondisclosure order should have the opportunity to address the matter with the judge. The current supervising judge in Harrisburg typically provides in issuing such orders that the witness is free to ask the court for further consideration of the matter. That process is adequate to protect the witness's interests.

The proposal is also in error in providing for immediate appeals. Despite assurances that such appeals will cause no disruption at all, the reality is to the contrary. Grand juries are necessary because powerful institutions and individuals are resistant to other methods of investigation. Such targets often have considerable resources at their disposal – and experience shows they will use those resources to frustrate the grand jury process. If they can appeal, they will.

And those appeals, even if they do not as a matter of law create an automatic stay, will do so as a matter of fact. Under the proposal, these appeals would be as of right, and would go directly from common pleas to the highest court. Only rarely would a common pleas judge be willing to hold witnesses in contempt while such an appeal is pending before the Supreme Court, without giving the Court the opportunity to decide a matter that the rules of procedure have explicitly entrusted to it.

The result would be to prevent the nondisclosure order from taking full effect for weeks or months, and – depending on the stage at which the litigation arises – quite possibly for the life of the grand jury. That would put those with the resources to appeal in effective control of the nondisclosure question. It is no solution to say that the witness subject to the order will still have to testify: the whole problem is the effect of disclosure on other witnesses.

The general rule is that interlocutory orders of a grand jury supervising judge are not appealable. The law recognizes that grand juries cannot operate in a state of perpetual interlocutory litigation. The proposal suggests there is a need for appellate guidance in this particular circumstance, but the same could be said about most of the other orders that grand jury judges issue. As above, the proposal offers no rationale for carving out this one area for special disruptive treatment.

Counter-proposal: delete the first and last sentences of proposed subsection (B).

Subsection (C): The proposed definition of “witness’s testimony” is an expansion of the statutory language to mean something it does not say. The act simply states that “[n]o witness shall be prohibited from disclosing his testimony.” 42 Pa.C.S. §4549(d). Every day, in courtrooms across the Commonwealth, juries are instructed that testimony consists only of what the witnesses said, not what they were asked or shown.

The proposal nevertheless suggests that, in addition to what witnesses themselves choose to say on the stand in the grand jury room, witnesses should also be free to discuss publicly the questions of grand jurors and attorneys, and any documents or other grand jury exhibits they may see. Such a rule would change the statute, and court rules cannot do that.

But even if the proposal were addressed to the legislature rather than the Court’s rule making function, it would still be unjustified. Secrecy is of central importance in the grand jury process, as the proposal initially acknowledges. Section 4549(d) is a narrow exception to that essential rule of secrecy, not a means to undercut it. Certainly, Commonwealth attorneys may reveal information by questioning witnesses on the grand jury stand – just as they may reveal information by engaging in “productive conversations” with witnesses before they ever take the stand, as envisioned by Recommendation Five.

That does not mean, however, that the information so revealed should thereby enter the public domain. As the proposal elsewhere recognizes, the proper conduct of a grand jury investigation may require that Commonwealth attorneys reveal information to a variety of individuals: agents, attorneys, subjects. But such interactions cannot occur if the recipients are entitled to share whatever has been shared with them. Witnesses should be permitted to disclose just what the statute says they can disclose – their own testimony.

Counter-proposal: delete proposed subsection (C).

Recommendation Eight: proposed Rule 231 regarding attorney secrecy oaths

Two members of the Task Force dissent from Recommendation Eight. The proposal is in error in advocating for the removal of the secrecy oath from the entry of appearance form recently mandated by the Supreme Court in *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750, 766 (Pa. 2018).

Citing Justice Baer’s concurring opinion, the proposal states that the Court has invited this Task Force to change the language adopted by the Court, and that we should accept the invitation. The proposal’s

reference to Justice Baer's statement is incomplete, with the result that it is not accurate.

The majority opinion in the case, invoking the Court's supervisory authority, crafted specific language to be included in the entry of appearance form. Justice Baer responded that "I can abide by the Majority's invocation of our supervisory authority . . . so long as it is understood that the use of this methodology does not alter the inherent ability of our various committees, including the *ad hoc* grand jury study group, to modify the form as *statutory changes, caselaw, or other superseding factors would require.*" *Diocese of Harrisburg*, 191 A.3d at 766 (Baer, J., concurring) (emphasis supplied).

There have been no statutory or caselaw changes or other superseding factors that would allow modification to the language dictated by the Court. Justice Baer's "invitation" does not apply.

But even if this were a matter of first impression not controlled by the Court's recent precedent, the proposal would still be unwarranted. The proposal recommends that the secrecy oath be removed from the entry of appearance form, and that attorneys should not have to take any oath until they appear in court for testimony, at which point they must be sworn in person.

Like other recommendations, however, this proposal would serve only to weaken the essential secrecy of the grand jury process. The proposal suggests that the oath is unnecessary up front because lawyers will not be exposed to grand jury information until the point when their client actually testifies.

But that is not accurate. As recognized in Recommendation Five, appropriate management of a grand jury investigation will often require discussions between attorneys for the Commonwealth and for represented parties long before a party testifies, and in cases where a party never testifies. Those conversations cannot properly take place if attorneys are unsworn. What Recommendation Five encourages, therefore, Recommendation Eight discourages.

Accordingly, the oath should apply from the moment the attorney enters the case. If he acquires grand jury information thereafter, we can be assured it will be protected. If he does not acquire such information, he has nothing to worry about. The oath can do no harm.

At the same time it posits that secrecy oaths are not important enough to be required *ab initio*, the proposal suggests that oaths are so important they should be administered only in person, by the supervising judge. But we are talking about lawyers here, not uninformed lay people. Surely attorneys, who regularly prepare and sign documents on pain of perjury or other sanctions, are capable of understanding the full significance of the written secrecy oath without a judge having to read it to them.

An in-person swearing requirement is logistically unworkable. Supervising grand jury judges do not sit like magisterial district judges, 24 hours a day and seven days a week. The supervising judge is typically available in person only when the grand jury is in session, which may be only a week a month, or less. The judge may not even live near the jurisdiction in which the jury meets. The attorneys may be even farther away.

The proposal suggests we can deal with these problems by "occasionally" allowing lawyers to take the oath in writing. But this concession negates the premise of the proposal. If secrecy may be necessary long before a witness testifies, and if signed statements are good enough, why not just maintain administration of the oath as already mandated by the Supreme Court?

The current supervising judge in Norristown has a practice that accommodates all concerns at issue here. The lawyer first executes the oath by way of the entry of appearance form. Then, if and when the attorney appears before her, she orally reminds the attorney of his secrecy obligations. This practice ensures both that secrecy is protected from the earliest point, and that the full solemnity of the obligation is impressed upon those subject to it.

Counter-proposal: maintain the existing entry of appearance form and add this paragraph to the Comment for Rule 231:

Attorneys representing parties in grand jury matters must sign an entry of appearance form that contains the secrecy oath prescribed by the Supreme Court in *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Pa. 2018). The oath reminds attorneys that, as the Court held in that case, they are subject to the same duty of secrecy as all others – except witnesses – who are in possession of grand jury information, and that attorneys may reveal a client-witness’s testimony to others only with the explicit, knowing, voluntary and informed consent of the client.

If the attorney thereafter appears in person before the supervising judge for grand jury proceedings, the judge should reiterate the attorney’s secrecy obligations in accordance with the oath.

Recommendations Nine and Ten: proposed changes to Rule of Criminal Procedure 230 regarding pre-trial disclosures to defendant

One Task Force member dissents as to portions of Recommendations Nine and Ten. The recommendations appropriately suggest that Rule 230(B) be amended to provide a time frame for furnishing a transcript of the defendant’s grand jury testimony where he is facing trial on charges resulting from the grand jury investigation. These recommendations also appropriately suggest that the defendant need not file a motion in order to receive *Brady* material – as properly defined in Rule 573(B)(1)(a) – that exists in the grand jury record.

The remainder of the recommendations, however, particularly the proposal to remove the supervising judge’s control over the grand jury record and place it with the trial judge, would further and unjustifiably sap the secrecy on which the grand jury process depends.

The proposal argues that, while the supervising judge is uniquely situated to consider the secrecy of the grand jury record, the trial judge is uniquely situated to consider the fairness of the trial process, which should always prevail.

In reality, however, the trial judge has no advantage in weighing the necessary considerations, and is in fact at a distinct disadvantage. The assumption of the proposal is that the trial judge is intimately familiar with the evidence and issues in the case, while the supervising judge is ignorant. The opposite is true. The procedure in question is intended to take place well in advance of the actual trial, usually months before. At that point there is no reason that the trial judge would have close knowledge of the facts of the case. The judge will be presiding over many other trials that precede this one; indeed he or she may not even wind up being the assigned judge by the time the matter comes to trial.

In order to make his case for any additional grand jury discovery, therefore, the defendant would have to educate the trial judge about the evidence and potential issues presented – a task that he could just as easily perform with the supervising judge. Except that there would be no need to do so – because the supervising judge *will already* be intimately familiar with the case by virtue of his duties during the investigation: hearing motions; reviewing submissions, presentments, and reports; reading transcripts of the testimony. The trial judge, months before trial, will have nowhere near this level of knowledge.

The supervising judge, moreover, will have all of his own prior experience presiding over trials. “Supervising judge” is not some kind of inherited, immutable status; it is simply a temporary judicial assignment. Supervising judges will have had years of experience hearing criminal trials, and some continue to carry a trial load even as they carry out their grand jury duties. They combine both sets of skills. Judges who supervise statewide grand juries, moreover, are individually selected by the Chief Justice of the Supreme Court – who should be trusted to designate judges who will be up to the task.

Thus the only “advantage” held by the trial judge for present purposes is his lack of familiarity with either the grand jury investigation or the pending trial. He will have no idea what is in the record he is supposed to be protecting, and little idea how the trial will unfold months in the future. The pressures of his caseload may push him toward what could, for him, be the easier course – just give the defendant what he wants. That is hardly the proper way to protect the integrity of the process.

Other details of the proposal only confirm the disadvantages suffered by the assigned trial judge (if there even is one yet). Proposed subsection (B)(2) provides that the trial judge shall, apparently *sua sponte*, decide whether to disclose the non-*Brady* testimony of grand jury witnesses other than the defendant. Proposed subsection (B)(3) provides that the trial judge shall, upon defense motion, decide whether the grand jury record contains additional, undisclosed *Brady* material.

How in the world is the trial judge supposed to make such decisions? He would have to read the entire grand jury record. In fact first he would have to be sworn to secrecy. Then he would have to read the entire grand jury record.

In considering this and the prior recommendations, all of which appear designed to diminish grand jury secrecy, it is useful to remember the reasons why we have grand jury secrecy. As Justice Wecht points out in his *Diocese of Harrisburg* opinion, secrecy is not simply for the benefit of the investigators. Its purpose is to protect both witnesses and subjects. See *Diocese of Harrisburg*, 191 A.3d at 774 (Wecht, J., concurring and dissenting). To be sure, attorneys for some witnesses may desire less secrecy and more freedom to disclose. But a strategy that suits one client in one case may harm other clients in other cases. The rules should safeguard those interests rather than undermine them. Less secrecy is not grand jury reform.

Counter-proposal: amend Rule 230(B) as follows:

(1) [as proposed.]

(2) When a witness in a criminal case has previously testified before an investigating grand jury concerning the subject matter of the charges against the defendant, **and the grand jury testimony is not disclosed pursuant to paragraph (3), the defendant may file an appropriate motion with the grand jury supervising judge, who shall decide the matter in accordance with Rule**

573(B)(2) (concerning discretionary discovery) and due regard for the preservation of grand jury secrecy. [upon application of such defendant the court shall order that the defendant be furnished with a copy of the transcript of such testimony; however, such testimony may be made available only after the direct testimony of that witness at trial.]

(3) Within 30 days after formal arraignment or thereafter with good cause, the Commonwealth shall disclose any grand jury evidence that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth. If the parties disagree as to whether or when evidence should be disclosed under this paragraph, the defendant may file an appropriate motion with the grand jury supervising judge, who shall decide the matter. [Upon appropriate motion of a defendant in a criminal case, the court shall order that the transcript of any testimony before an investigating grand jury that is exculpatory to the defendant, or any physical evidence presented to the grand jury that is exculpatory to the defendant, be made available to such defendant.]

Part V: Grand Jury Reports

A. INTRODUCTION

Contributors who appeared before the Task Force -- prosecutors, defense counsel, and judges -- offered a wide range of strongly-held and well-articulated views on the subject of grand jury reports. Several contributors highlighted the salutary aspects of grand jury reports. Favorable comments centered on the fact that reports provide a mechanism by which a grand jury may alert the public to important discoveries made in the course of investigations. Such public disclosure, particularly relating to governmental or institutional misconduct, can be the catalyst to important and needed change.

Recognition of the value of reports was not confined to prosecutors. For instance, the president of the Pennsylvania Association of Criminal Defense Lawyers generally supported preserving reports, albeit it with significant changes in procedure to protect the rights of individuals and entities.

Along these lines, many contributors highlighted what they perceived to be substantial deficiencies in the report process. They argued that reports have been and will continue to be used by attorneys for the Commonwealth for improper reasons, including for personal political gain. By way of example, one contributor contended that a particular report issued by a county investigating grand jury was motivated by a desire for political retribution, rather than any genuine concern that governmental impropriety had occurred.

Moreover, some contributors asserted that grand jury reports violated due process guarantees, observing that persons who are critically identified in a grand jury report have no statutory right to be heard or even to have a response to the criticisms contemporaneously issue with the report. See 42 Pa.C.S. §4552. Maintaining that the report process works an unlawful deprivation of a named individual's state constitutional right to reputation, some urged the elimination of grand jury reports, while others suggested that the statute be modified in various ways to protect reputational rights.

During the course of the Task Force's work, the Supreme Court issued two significant decisions related to reports. See *In re Fortieth Statewide Investigating Grand Jury (40th SWIGJ Report Litigation I)*, 190 A.3d 560 (Pa. 2018); *In re Fortieth Statewide Investigating Grand Jury (40th SWIGJ Report Litigation II)*, 197 A.3d 712 (Pa. 2018). Those opinions both aided and complicated the Task Force's consideration of this topic.

The topic of grand jury reports divided the members of the Task Force more sharply than any other issue we addressed. Ultimately, a four-to-three majority of the Task Force decided to suggest that the General Assembly abolish reports. Members of the Task Force debated whether a policy recommendation of this scope to the legislature was consistent with the mandate from the Supreme Court, which focused on improving the role of the judiciary in the grand jury process. A majority of the Task Force concluded, however, that the flaws in the report process were sufficiently serious to warrant this recommendation. Of course, here, as with the rest of this report, the views expressed are solely those of the Task Force.

In brief, four members of the Task Force propose that grand jury reports be abolished in their entirety. Those members believe, *inter alia*, that the reporting process is in tension with the grand jury's role as the protector of individual rights, as there are considerable due process concerns with the creation and release of a report.

The other three members of the Task Force, however, disagree with the recommendation to abolish reports. One of those members is in agreement with much of the majority's commentary regarding the grand jury reporting function. For that reason, that member strongly believes that uncharged individuals should not be named in a report. That said, this member finds that the question of maintaining the reporting power is a policy issue for the General Assembly and is outside the mandate of the Task Force. That same member underscores that the reporting process must, of course, comport with constitutional requirements. To that end, that member suggests adoption of the changes proposed in Recommendations Two through Eight, *infra*.

The remaining two of those three dissenting members offer a separate dissenting statement, viewing the attempt to eliminate reports as an attack on the ability of the government to expose official corruption and institutional misconduct. Such an attack is particularly questionable, as those voting against reports largely focus on a prior regime, which was effectively supplanted by the recent Supreme Court decisions directing additional procedures to protect individual rights. These two members also highlight that, for the past several decades, no other type of government report has been as effective at exposing official and institutional misconduct. Moreover, by logical extension, the majority's rationale would militate for banning other governmental reports, such as those issued by the Inspector General. These members oppose such curtailment of the ability of the government to police itself.

Although a majority of the Task Force proposes abolishment of reports, the Task Force recognizes that the reporting function is presently authorized and may continue indefinitely into the future. The Task Force thus makes several alternative recommendations that, if adopted, would make changes to the existing reporting system. Each of those alternative recommendations is supported by four or more votes; the number of members joining each alternative recommendation is indicated.

B. PROPOSING THE ABOLITION OF GRAND JURY REPORTS

Recommendation One. The Investigating Grand Jury Act should be amended to eliminate grand jury reports.¹⁴

A majority of the Task Force finds the reporting function to be contrary to the American grand jury's traditional role as the protector of individual rights, as significant due process concerns are implicated in the normal course of creating and disseminating a report. Relatedly, grand jury reports are created via a markedly one-sided process. Thus, the value of reports is questionable, as they lack the indicia of trustworthiness commonly ascribed to other court proceedings that are adversarial in nature.

¹⁴ Four members of the Task Force join Recommendation One.

Three members dissent as to Recommendation One. Of those members, two submit a dissenting statement. See *infra* at Part V, Section D.

Over the several centuries following its 12th-century inception, the grand jury shifted from being a tool meant to augment the power of the English Crown to a proceeding by which the rights of individuals were safeguarded. See generally Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 Cath. U. L. Rev. 311, 326 (1993); see also *In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971) (observing that two 17th-century matters, in which English grand juries resisted pressure from the King to issue an indictment for treason, established the grand jury as “a bulwark against the oppression and despotism of the Crown”).

In the American colonies, settlers incorporated the grand jury into the local legal system. See Kevin Washburn, *Restoring the Grand Jury*, 76 Fordham L. Rev. 2333, 2343 (2008). In keeping with its English progenitor, the colonial grand jury screened criminal charges and protected colonists against unlawful prosecutions. See Schiappa, *supra*, at 328. As tensions increased in the years leading up to the Revolutionary War, colonial grand juries were used as a mechanism to effectively nullify certain English laws. See Washburn, *supra*, at 2344 (observing that the colonial “grand jury came to be viewed as a valuable shield against government oppression”).

In modern times, the Pennsylvania Investigating Grand Jury Act governs the operation of investigating grand juries. The Act authorizes two paths to proceed against an individual: a presentment recommending criminal charges or a report. See 42 Pa.C.S. §§4542, 4551-4552. The grand jury’s choice regarding those two paths significantly affects the due process protections afforded to the individual.¹⁵

In the event the Commonwealth’s attorney files criminal charges because of a grand jury presentment, various procedural protections are afforded to the defendant. For instance, due process compels the Commonwealth to disclose impeachment or exculpatory evidence to the criminal defendant, even when the defendant has not requested that material. See *Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005) (discussing *Brady v. Maryland*, 373 U.S. 83 (1963) and related cases). Moreover, at the preliminary hearing, the defendant may call witnesses on his or her behalf and cross-examine those witnesses offered by the Commonwealth. See Pa.R.Crim.P. 542. If the case proceeds to trial, the defendant has a host of rights, such as the authority to present evidence or introduce witnesses as part of his or her defense. Moreover, due process demands that a criminal conviction may be obtained only upon the Commonwealth proving its case beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970). Finally, the defendant also has a constitutional right to appeal from a judgment of sentence. See *Commonwealth v. Harmon*, 738 A.2d 1023, 1024 (Pa.Super. 1999).

In contrast, the Investigating Grand Jury Act provides no such protections to individuals named in grand jury reports. For instance, the statute gives that individual no right to confront adverse witnesses or to obtain access to evidence that is in his or her favor. That individual has no right to present their side of events to the grand jury, either via their own testimony or evidence they produce.

There is also no subsequent, adversarial judicial process by which an individual can contest a grand jury report. There is no right to appellate review of a grand jury report, except for the right of the Commonwealth’s attorney to challenge a supervising judge’s refusal to accept a report per 42 Pa.C.S. §4552(d).

¹⁵ See Peter F. Vaira, *Power to Issue a Report without a Criminal Charge in Violation of the Pa. Constitution*, THE LEGAL INTELLIGENCER (Mar. 12, 2018), <https://www.law.com/thelegalintelligencer/2018/03/12/power-to-issue-a-report-without-a-criminal-charge-is-a-violation-of-the-pa-constitution/>.

Moreover, a grand jury report lacks the truth-finding benefits achieved through adversarial testing done in a public forum. There is no strong judicial oversight that is the hallmark of a criminal trial. Indeed, supervising judges do not even attend grand jury testimony.

In sum, the Investigating Grand Jury Act authorizes a reporting process that is deeply flawed, such that constitutional rights are likely to be violated.¹⁶ This flaw was apparent in the recent report on clergy sex abuse, in which the grand jury named over three hundred “predator priests” and detailed the acts committed by the alleged sex offenders and church officials. *See generally 40th SWIGJ Report Litigation I*, 190 A.3d at 563-64. Being critically named in such a report had significant, negative consequences to an individual’s reputation.¹⁷ Yet, as recognized by the Supreme Court, the existing statutory framework was inadequate to protect the due process rights of those petitioners. *See 40th SWIGJ Report Litigation I*, 190 A.3d at 574.

As recognized by the Court, a prominent deficiency in the report process is that it is one-sided, with the Commonwealth’s attorney controlling the proceedings. *See id.* (observing that a supervising judge’s preponderance review may be inadequate, in that such a standard “can be too effortlessly satisfied in the grand jury setting, where the evidence is controlled by a single presenter -- the attorney for the Commonwealth -- free from any requirement to adduce legally competent evidence, or exculpatory proofs”) (footnote omitted); *see also 40th SWIGJ Report Litigation II*, 197 A.3d at 722 (same).

Such a lopsided system is, in many ways, contrary to a fundamental tenet of the American system of government, namely, the belief that the free and open competition of viewpoints best advances the search for truth and wise governance. A grand jury investigation lacks any competition and any openness. It hears what the prosecutor wants it to hear: only the facts and expert witnesses and exhibits the prosecutor chooses, and only the questions the prosecutor asks. Opposing interests do not know what the grand jury hears or in which direction the grand jury is heading with its investigation. Moreover, even if a witness’ attorney has some indication as to the scope and nature of the investigation, that lawyer is prohibited from taking a traditional advocacy role before the grand jury. *See* 42 Pa.C.S. §4549(c) (explicitly forbidding a witness’ attorney from objecting, presenting argument, or otherwise addressing the grand jury or the Commonwealth’s attorney).

Further, grand jury witnesses often have a strong disincentive to add their voices to the grand jury’s investigation.¹⁸ Those called to appear before a grand jury are at risk of seeing their words used against them and may face criminal charges as a result. For that reason, savvy attorneys often counsel their clients to refrain from criticizing the prosecutor’s legal and factual theories, especially when those witnesses have traded cooperation with the investigation for a promise, formal or informal, that they will not be prosecuted. The absence of these opposing voices increases the unreliability of the end product.

¹⁶ In this Commonwealth, the right to reputation is one of constitutional dimension. *See* PA.CONST. art. I, §1 (providing that individuals have certain rights, including possessing and protecting reputation). Further, the Pennsylvania Supreme Court has held that this right is a fundamental one, on the same plane with “those pertaining to life, liberty, and property.” *40th SWIGJ Report Litigation*, 190 A.3d at 573.

¹⁷ *See* Liz Navratil and Angela Couloumbis, *Pa. Justices to Hear Arguments*, THE PHILADELPHIA INQUIRER (Sept. 25, 2018), <https://www.inquirer.com/philly/news/pennsylvania/pennsylvania-supreme-court-catholic-priests-sexual-abuse-grand-jury-20180925.html> (quoting one defense attorney as stating that “being named a ‘predator priest’ in the report is akin to being branded a lifetime sex offender”).

¹⁸ *See* R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 Indiana L.J. 823 (2016). Professor Cassidy’s concerns were corroborated by defense lawyers who appeared before the Task Force and expressed an interest in preserving the reporting function because they sometimes will accept a report critical of their clients as an alternative to prosecution. This may be a wise defense strategy, but it further impedes any testing of a report’s accuracy.

Additionally, the inherent risk of reputational harm caused by grand jury reports is compounded by the manner in which information is disseminated in our digital age, being instantaneously transmitted, broadly accessible, and, once distributed, nearly impossible to comprehensively revise or retract. In this context, the reputations of persons named, wrongly disparaged, or unfairly accused, but not criminally charged, are destroyed in an instant following issuance of the grand jury's report.

The concerns regarding systemic violations of an individual's rights, as well as recognized deficiencies in the truth-determining capacity of the report process, would be sufficient for the Task Force majority to propose elimination of grand jury reports. Yet, this abolitionist view is further supported by the realization that grand jury reports are an unnecessary legacy of this nation's colonial and antebellum eras. Other entities in our modern society ably perform like functions.

In this nation's colonial era, grand juries used reports in their roles as "general watchdogs over state and local government." See SARAH SUN BEALE ET AL., GRAND JURY LAW & PRACTICE §2:1 (2d ed. 2018); see also Brian R. Gallini, *Bringing Down a Legend: How an "Independent" Grand Jury Ended Joe Paterno's Career*, 80 Tenn. L. Rev. 705, 740 (2013) (observing that the reporting function was important in the years leading up to the American Revolution because the grand jury "acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities") (internal quotation marks and citation omitted).

Yet, in modern times, the "trend has been to restrict or even abolish the grand jury's reporting function." BEALE, *supra*, at §2.1.¹⁹ Indeed, there are approximately twenty states that refuse to endow grand juries with any reporting powers. See BEALE, *supra*, at §2:2.²⁰

This trend away from grand jury reporting is understandable, considering that governmental systems have become more sophisticated over the last two centuries. Whereas the grand jury was necessary as an *ad hoc* watchdog in colonial times, there are now entities with experience in particular areas who conduct such oversight.

Today, the General Assembly and its many committees regularly hold public hearings. The Auditor General and Inspector General conduct vigorous investigations and issue reports regularly on fraud and abuse and other matters of public concern, with recommendations for legislative and regulatory procedural reform. And the Commonwealth's many executive departments hold public hearings and informal round tables in support of the regulatory process.²¹ These open forums are well-situated to develop necessary facts and to debate any potential legislative and regulatory reform. Granted, to some degree these forums are likely influenced by political concerns. Nonetheless, they operate more openly and with greater opportunity for debate and input of opposing viewpoints than any grand jury would.

19 At present, only approximately half of the states authorize a grand jury to issue a report. See BEALE, *supra*, §2.2. Moreover, of those states, many look with disfavor on or restrict the naming of individuals in a report. See, e.g., N.Y. Crim. Pro. §190.85 (McKinney 2019) (New York statute providing that, with respect to certain grand jury reports, no critical comment is permitted as to an identifiable person); see also *Simington v. Shimp*, 398 N.E.2d 812, 816 (Ohio Ct. App. 1978) (per Connors, J., with two judges concurring) (in observing that the Ohio Legislature had not authorized critically naming individuals in grand jury reports, further detailing the harm occasioned by such naming, as the public would believe "that the grand jury speaks with judicial authority").

20 Those states run the gamut from liberal-leaning jurisdictions, such as Massachusetts, to those that are more traditionally conservative, such as Texas. Prosecutors in those states are seemingly capable of uncovering malfeasance through other established prosecutorial tools.

21 See, e.g., Pennsylvania Department of Education, www.stateboard.education.pa.gov/TheBoard/Meetings/Roundtables/Pages/default.aspx; Pennsylvania Department of Environmental Protection, www.dep.pa.gov/PublicParticipation/EnvironmentalQuality/pages/default.aspx

For the foregoing reasons, a majority of the Task Force recommends that the Investigating Grand Jury Act be amended, to delete certain passages from Sections 4542 and 4545 and to eliminate Section 4552 as follows:

Proposed deletion of definition in 42 Pa.C.S. § 4542:

["Investigating grand jury report." A report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings.]

Proposed amendment to 42 Pa.C.S. § 4545(b):

(b) Quorum and manner of action.-- Fifteen members shall constitute a quorum and may conduct business for the investigating grand jury. A majority of the full investigating grand jury shall be required to **[adopt a report or]** issue a presentment.

Proposed deletion of 42 Pa.C.S. § 4552:

[§ 4552. Investigating grand jury reports

(a) General rule.--Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report.

(b) Examination by court.--The judge to whom such report is submitted shall examine it and the record of the investigating grand jury and, except as otherwise provided in this section, shall issue an order accepting and filing such report as a public record with the court of common pleas established for or embracing the county or counties which are the subject of such report only if the report is based upon facts received in the course of an investigation authorized by this subchapter and is supported by the preponderance of the evidence.

(c) Sealed report.--Upon the submission of a report pursuant to subsection (a), if the supervising judge finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, he shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter except upon order of court.

(d) Appeal from refusal to file.--Failure of the supervising judge to accept and file as a public record a report submitted under this section may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rules.

(e) Authorization of response by nonindicted subject.--If the supervising judge finds that the report is critical of an individual not indicted for a criminal offense the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report. The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).]

C. SUGGESTING CHANGES TO EXISTING SYSTEM, IN THE EVENT REPORTS ARE RETAINED

The Supreme Court's recent decisions regarding the report on the Catholic Church did not eliminate the grand jury's report powers, although the viability of those powers remains in doubt. In the meantime, the statutory reporting power survives, and the future of those powers and the shape they will take are in the hands of the General Assembly. Should the General Assembly leave the grand jury's report power intact, we suggest that several changes should be made to the existing system.²²

Recommendation Two: Section 4552 of the Investigating Grand Jury Act should be amended to preclude a grand jury report from critically commenting on a named or otherwise identified individual unless the comment relates to charges filed against the individual or charges recommended against the individual in an accepted presentment.²³

The authority in the current statutory framework to name individuals who have not been charged with a criminal offense, see 42 Pa.C.S. §4552, has proved problematic. Various practitioners have suggested that this aspect of the Investigating Grand Jury Act is unconstitutional. See, e.g., Peter F. Vaira, *Power to Issue a Report without a Criminal Charge in Violation of the Pa. Constitution*, THE LEGAL INTELLIGENCER (Mar. 12, 2018) (asserting that the Investigating Grand Jury Act violates the Pennsylvania Constitution, as it permits the issuance of a report that damages a person's reputation without due process of law).

Such constitutional challenges were advanced in *40th SWIGJ Report Litigation I* and *40th SWIGJ Report Litigation II*. Confirming that the state constitutional right to reputation is a fundamental one, the Supreme Court concluded that the existing statutory framework was inadequate to protect the due process rights of those petitioners and that heightened procedural protections were required. See *40th SWIGJ Report Litigation I*, 190 A.3d at 574. In its subsequent opinion, the Court noted the impossibility of a remand to that particular grand jury, the term of which had expired, instead concluding that the only available remedy was to permanently redact the petitioners' identifying information from the report. See *40th SWIGJ Report Litigation II*, 197 A.3d at 723-24.

Some Justices also discussed what procedures, with respect to a future report, might be adequate to protect a named person's due process rights. See *40th SWIGJ Report Litigation II*, 197 A.3d at 724-25 (Baer, J., concurring) (discussing, but declining to endorse, specific procedures); *id.* at 725-29 (Dougherty, J., concurring) (outlining six procedures for use in the context of future reports); *cf. id.* at 729-30 (Saylor, C.J., dissenting) (concluding that remand for hearings before the supervising judge could satisfy due process). Yet, within that discussion, there was recognition that common tools of due process would have limited applicability, if any, in the grand jury setting. See, e.g., *40th SWIGJ Report Litigation II*, 197 A.3d at 728 n.2 (Dougherty, J., concurring) (rejecting the suggestion that a named person would be permitted to cross-

²² The following seven recommendations are in the alternative and are relevant if the General Assembly does not adopt the Task Force majority's initial recommendation to abolish reports. One member of the Task Force has opted not to join any of these alternative recommendations, as that member believes that the only proper course with respect to grand jury reports is to eliminate them.

²³ Four members of the Task Force join Recommendation Two.

Three members do not join Recommendation Two. Of those members, two submit a dissenting statement. See *infra* at Part V, Section D.

examine adverse witnesses); see also *id.* at 729 (Saylor, C.J., dissenting) (stating that he “would not require discovery on the scale that [the petitioners] envision or the cross-examination of witnesses that testified before the grand jury”).

A majority of the Task Force recognizes an individual’s reputational interests might receive constitutionally adequate due process protection through the addition of procedures not currently provided by statute. Yet, adding the safeguards necessary for fundamental fairness would unduly alter how the grand jury functions, such that the closer the proceedings would hew to constitutional mandates, the more distorted the investigatory grand jury proceedings would become.

For instance, negative commentary in a report will commonly be predicated on testimony provided by other witnesses. Typically, an individual with due process rights is permitted to test the testimony provided by an adverse witness through cross-examination. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (in the context of a proceeding to terminate public assistance payments, explaining that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses”). Cross-examination, however, is not consonant with grand jury proceedings. See *Hannah v. Larche*, 363 U.S. 420, 449 (1960) (in considering constitutional challenges to a civil rights commission proceeding, generally commenting that a person subject to grand jury investigation has not been permitted to cross-examine adverse witnesses, as that would have a disruptive influence on the proceedings).

Additionally, permitting a witness to engage in discovery would, at least in some instances, negate the core purposes of grand jury secrecy. See *In re Investigating Grand Jury of Philadelphia Cty., Appeal of Philadelphia Rust Proof Company, Inc.*, 437 A.2d 1128, 1130 (Pa. 1981) (observing that “secrecy, which is indispensable to the effective functioning of a grand jury’s investigation,” is designed to achieve several goals, including preventing “subornation of perjury or tampering with the witnesses,” encouraging “free and untrammelled disclosures by persons who have information with respect to the commission of crimes,” and protecting an innocent person “who is exonerated from disclosure of the fact that he has been under investigation”).

Furthermore, there are questions regarding the latitude a witness’ attorney would have in any such due process proceeding. Pennsylvania already provides for greater participation by these lawyers than does the federal system. Compare 42 Pa.C.S. §4549(c) (permitting a witness’ attorney to be in attendance during the grand jury session), with Fed.R.Crim.P. 6(d) (not including a witness’ lawyer among those permitted to be present while the grand jury is in session). Yet, the Investigating Grand Jury Act limits a witness’ attorney to a passive role in the grand jury room, explicitly forbidding that attorney from objecting, presenting argument, or otherwise addressing the grand jury or the Commonwealth’s attorney. See 42 Pa.C.S. §4549(c). While that limitation is consonant with the investigatory role of the grand jury, it is difficult to see how it would jibe with a lawyer’s duty to represent his or her client in a due process proceeding.

In sum, engrafting those tools that are commonly required to ensure due process would necessarily and fundamentally alter grand jury proceedings. Accordingly, a majority of the Task Force suggests that, in the event the Legislature continues to permit grand juries to issue reports, the Investigating Grand Jury Act be amended to preclude a report from critically commenting on individuals unless they have been charged or charges have been recommended against them in an accepted presentment. Specifically, the Task

Force majority suggests that Section 4552(a) be amended and Section 4552(e) be deleted:²⁴

(a) General rule.--Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report. **The report shall not critically comment on a named or otherwise identified individual unless the comment relates to charges filed against the individual or charges recommended against the individual in an accepted presentment.**

[(e) Authorization of response by nonindicted subject.--If the supervising judge finds that the report is critical of an individual not indicted for a criminal offense the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report. The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).]

Recommendation Three. The Investigating Grand Jury Act should be amended to clarify that the preponderance of the evidence standard is to be employed by the investigating grand jury in making its statements of fact in the grand jury report, while the supervising judge's review of the report is subject to the sufficiency of the evidence standard.²⁵

The Investigating Grand Jury Act currently requires a supervising judge to examine whether the report is "supported by the preponderance of the evidence." 42 Pa.C.S. §4552(b).

The preponderance of the evidence standard is arguably inapt as a metric of judicial review. Rather, that standard is commonly understood to be one that guides the determinations of factfinders. See *40th SWIGJ Report Litigation I*, 197 A.3d at 574 ("application of [the preponderance] standard is best suited to adversarial proceedings where competing litigants present evidence to be weighed by a factfinder").

²⁴ Colloquially, the words "person" and "individual" are often used interchangeably. The Statutory Construction Act, however, gives these terms distinct meanings. See 1 Pa.C.S. §1991 (limiting "individual" to a "natural person"; in contrast, defining "person" as including entities such as a corporation or partnership). This proposed amendment employs the term "individual," as the Task Force understands the constitutional right to reputation as one belonging to human beings. See Pa.Const. art. I, §1 (in recognizing the "Inherent rights of mankind," providing that "[a]ll men are born equally free and independent," and have certain rights, including possessing and protecting reputation). While there may be an argument for interpreting that right as extending to entities, it is not developed here.

Relatedly, the Task Force majority suggests that, as a further refinement, the General Assembly may want to confer discretion on the supervising judge to provide pre-release notice and an opportunity to respond to entities identified in a report. While such entities may not have a state constitutional right to reputation, providing such an avenue for review and response could have several benefits, including giving the public a more thorough treatment of the topic at hand.

²⁵ Four members of the Task Force join Recommendation Three. Two members agree with the goal of the recommendation, but dissent from the proposal to implement it by statute rather than rule of criminal procedure. These members reject the unexplored assumption of the majority that the existing language of the statute is inadequate. Properly understood, the relevant statutory language – "supported by the preponderance of the evidence," 42 Pa.C.S. § 4552(b) – is already the equivalent of a sufficiency test. The Supreme Court has held as much in addressing similar statutory language in *In re Vencil*, 152 A.3d 235 (Pa. 2017). See also *In re Fortieth Statewide Investigating Grand Jury*, 77 WM 2018, Brief for Respondent at 9-11.

To ensure appropriate guidance to supervising judges about their duties under the existing statute, the Rules of Criminal Procedure should be amended to address the review process, which is not covered by current rules. The necessary language appears in Recommendation Five, *infra*, proposing new Rule 234(C)(1).

A more appropriate standard for the supervising judge's review of the report would be sufficiency of the evidence. That would require the jurist to ascertain whether statements in the report are supported by record evidence, but would not improperly cast the judge in the role of potentially making fact-based determinations such as credibility and weighing. See *In re Appeal of the Board of Auditors of McKean Twp.*, 201 A.3d 252 (Pa.Cmwlth. 2018) (observing that, in applying the sufficiency of the evidence standard of review, the court may not upset credibility determinations or reweigh evidence; the test is satisfied if there is record evidence supporting the conclusions).

Accordingly, the Task Force proposes the following amendments to Section 4552:²⁶

(a) General rule.--Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report. **The report shall not critically comment on a named or otherwise identified individual unless the comment relates to charges filed against the individual or charges recommended against the individual in an accepted presentment. The factual findings of the investigating grand jury shall be based upon a preponderance of the evidence.**

(b) Examination by court.--

(1) The judge to whom such report is submitted shall examine it and the record of the investigating grand jury and, except as otherwise provided in this section, shall issue an order accepting and filing such report as a public record with the court of common pleas established for or embracing the county or counties which are the subject of such report only if the report is based **upon [facts] sufficient evidence** received in the course of an investigation authorized by this subchapter **[and is supported by the preponderance of the evidence]**.

Recommendation Four. New Rule of Criminal Procedure 234(A) and (B) should be adopted to require the attorney for the Commonwealth to provide citations to the record to aid the supervising judge's review of the grand jury report.

Recommendation Five. New Rule of Criminal Procedure 234(C)(1) should be adopted to explain the nature of the supervising judge's review of a grand jury report.

²⁶ Also reflected here are the changes suggested in Recommendation Two, *supra*.

Recommendation Six: New Rule of Criminal Procedure 234(C)(2) and (D) should be adopted to set out appropriate procedures to follow when the supervising judge finds certain passages of a report unsupported by sufficient evidence.

Recommendation Seven: New Rule of Criminal Procedure 234(C)(3) should be adopted to make clear that grand jury secrecy applies to the contents of a grand jury report until the supervising judge files the report as a public record.²⁷

The Investigating Grand Jury Act requires the supervising judge to examine the report prior to accepting it. See 42 Pa.C.S. §4552(b). That process often involves review of an extensive record. Moreover, unlike a civil or criminal trial, in which the judge is in attendance during all but the jury's deliberations, the supervising judge does not sit in the grand jury sessions themselves. Thus, a supervising judge lacks the direct familiarity with the proceedings that would aid locating pertinent passages in the record. Providing the supervising judge with citations to the grand jury record would facilitate his or her review.

In the course of undertaking the mandated review, a supervising judge may find that record evidence is insufficient to support assertions in a report. At that juncture, the path forward is less than clear. While the judiciary does have the power to redact, it is not a universal one. Rather, it is exercised in the service of particular ends. *Cf. 40th SWIGJ Report Litigation II*, 197 A.3d at 723 (while recognizing that a court has the authority to redact or expunge a government document, noting that the power is in furtherance of protecting an individual's constitutional right to reputation).

When the flaw in the report does not rise to the level of a constitutional violation, but instead is a failure to meet a statutory requirement, the authority of the supervising judge to excise the offending material and then approve the altered report for publication is far from certain. At the same time, wholesale rejection of the document may not always be warranted, particularly in instances in which the insufficiently supported declarations are a relatively minor part of the overall document. Rather, the more prudent course would be for the judge to return the report to the grand jury for its consideration, with the possibility of amendment and resubmission.

Concomitantly, the Commonwealth's right to appeal from a supervising judge's refusal to file a report should include instances when the supervising judge returns the report to the grand jury upon a finding that passages are unsupported by the evidence.

Finally, while a submitted grand jury report is undergoing the review process contemplated by statute and rule, the document would of course be regarded as grand jury material. To ensure clarity, new Rule 234 should explicitly state that secrecy strictures apply until the supervising judge releases the report to the public.

²⁷ Six members of the Task Force join Recommendations Four, Five, Six, and Seven.

The Task Force suggests that new Rule 234, along with an explanatory Comment, be adopted:

Rule 234. Investigating Grand Jury Reports.

(A) Submission of investigating grand jury report. An investigating grand jury may, upon majority vote of the full investigating grand jury, submit to the supervising judge an investigating grand jury report.

(B) Citation to the Record. At the time the report is submitted to the supervising judge for review, the attorney for the Commonwealth shall provide the supervising judge with citations to the record in support of any factual claims or evidentiary references. These citations to the record shall not be part of the report itself.

(C) Review of Report by the Supervising Judge.

(1) The supervising judge shall examine the report to determine whether the report is based upon sufficient evidence received in the course of an investigation authorized by the Investigating Grand Jury Act. In conducting this review, the supervising judge is to determine whether discrete findings are supported by record evidence.

(2) In the event the supervising judge finds that certain discrete passages in the report are not supported by record evidence, the supervising judge shall not accept the report. Rather, the supervising judge shall return the report to the investigating grand jury for its consideration, identifying those passages the supervising judge concluded were unsupported by record evidence. In the event the investigating grand jury, by an affirmative vote of the full investigating grand jury, submits a revised version of the report, or takes additional evidence in support of the findings in the report, the supervising judge shall conduct another review pursuant to subsection (C)(1).

(3) The contents of an investigating grand jury report are subject to grand jury secrecy unless and until the supervising judge files the report as a public record.

(D) Appeal from Refusal to File. Failure of the supervising judge to accept and file as a public record a report submitted under this section, including the return of a report to the grand jury pursuant to subsection (C)(2), may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rules.

Comment: The supervising judge is tasked with examining the report prior to accepting it. The supervising judge, however, does not sit through the grand jury testimony. Subsection B of this Rule requires the attorney for the Commonwealth to provide citations to the supervising judge so that the jurist can more easily identify and review the evidentiary support for the report. This subsection also specifies that citations provided by the Commonwealth for purposes of the supervising judge's review are not incorporated into the report itself. This is to ensure that, in the event the report is approved and released to the public, the record as a whole remains subject to grand jury secrecy.

Recommendation Eight: Section 4546 of the Investigating Grand Jury Act should be amended to permit a limited extension of an investigating grand jury's term to address issues relative to a grand jury report.²⁸

An investigating grand jury is currently allotted an initial eighteen-month term, with an additional six-month extension permitted. See 42 Pa.C.S. §4546. Such a period, however, may not be sufficient to address issues identified during a supervising judge's review of a grand jury report. The Task Force therefore proposes the following amendment to Section 4546(b):

(b) Extension on initiative of grand jury.--If, at the end of its original term or any extension thereof, any investigating grand jury determines by majority vote that it has not completed its business, it may request the court to extend its term for an additional period of six months. **[,except that n] No such investigating grand jury term shall exceed 24 months from the time it was originally summoned, unless further extension is needed to complete procedures pursuant to section 4552 (grand jury reports), in which case the term shall not exceed 30 months.** The court shall issue an order granting a request for extension unless it determines that such request is clearly without basis. Failure to grant an extension of term under this subsection may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rule. If an appeal is taken, the grand jury, except as otherwise prescribed by general rule, shall continue to exercise its powers pending the disposition of the appeal.

D. DISSENTING STATEMENT AS TO RECOMMENDATIONS 1 AND 2.²⁹

Readers of this document might assume that the close vote to eradicate grand jury reports reflects a similarly strong and stormy split among members of the larger public. That would be incorrect.

The Pennsylvania Association of Criminal Defense Lawyers is a professional organization of 900 public and private defense attorneys, the largest group of its kind in this state. PACDL submitted a public statement to this Task Force addressing the subject of grand jury reports.³⁰ In its statement, PACDL acknowledged arguments that, on the one hand, grand jury reports can be abused and that, on the other, such reports "historically serve an important public purpose and are available to address public problems where the evidence does not support the issuance of a presentment." Weighing those concerns, the Association concluded: "PACDL believes *the latter arguments are more persuasive* and that on balance, *grand reports should be preserved.*"³¹

Four members of this seven-member Task Force disagree with these hundreds of defense lawyers – and with Pennsylvania's prosecutors, and with the General Assembly, which represents the people of this Commonwealth, and which embedded the reporting function in the Investigating Grand Jury Act. The

²⁸ Six members of the Task Force join Recommendation Eight.

²⁹ Two members of the Task Force join this dissenting statement in full.

³⁰ https://www.pacdl.org/files/testimony_grandjury_sheppard_12_5_2017.pdf.

³¹ *Id.* (emphasis supplied).

wide support for grand jury reports is simply recognition of the compelling necessity, in any functional society, for institutional investigation and disclosure. Without it, we will get no accounting, either for those investigated or for those who investigate.

The four anti-report members grudgingly acknowledge that grand jury reports have a long and historic role in providing public accountability. Nevertheless, they contend that such reports have now become an “unnecessary legacy,” presumably of an outdated time when citizens could participate directly in their government. The anti-report members assert that we can rely instead on “more sophisticated” agencies, staffed by professional politicians, to do all the needed exposing of societal misconduct.

But this argument begs the obvious question: then why haven’t they done that? Why did government agencies fail to uncover the decades of child sex abuse in the Philadelphia archdiocese, or in any of the other dioceses across the Commonwealth? Why did these investigative entities say nothing about abuses at the Harrisburg incinerator or the Pennsylvania State Police? Where were they while legislators of both parties were misusing public funds in Bonusgate and Computergate, and while administrators closed their eyes to the lethal women’s health clinic run by Dr. Kermit Gosnell? While some of these investigations resulted in charges, it was the reports that addressed the broader societal problems that gave rise to the criminality. It was the *reports* that drove the arguments for change.

To be sure, many existing investigative agencies have done fine work ferreting out wrongdoing. But there is more than enough misconduct to go around. Had Pennsylvania disarmed citizen grand juries years ago, as the anti-report members now advocate, many of the biggest scandals in recent state history would never have been bared; abuses would simply have continued. It is unclear why the public would, or should, have to tolerate such a situation.

Nonetheless, the anti-report members assure us that government agencies can perform oversight more publicly and dispassionately than the “one-sided,” “lopsided” citizen grand jury process “controlled” by attorneys for the Commonwealth. As an example, the members point to the Auditor General’s Office.

In recent years, that office’s most notable product was a 115-page report on the Philadelphia Parking Authority. The office’s investigation, like all such agency investigations, was conducted completely internally, with zero outside oversight or judicial involvement. At its end, the Auditor General released a highly publicized report asserting that the PPA’s former executive director “took advantage” of his position “for his personal benefit,” to manipulate his compensation and engage in sexual harassment. The report charged that the director’s misconduct was the result of repeated failures by the board of directors to carry out its oversight functions.³² In releasing the PPA Report, the Auditor General commented that the director was an “unchecked tyrant” who should have been “fired . . . on the spot,” and that the board operated as an “absentee landlord.”³³ These accusations may, or may not, have been fair and justified. But there was nothing public about the investigatory process or dispassionate about its conclusions. Everything was “controlled” by the Auditor General.

Alternatively, the anti-report members suggest that grand jury reports can be safely abolished in view of the supposedly neutral and objective public oversight performed by legislative hearings. Perhaps the most prominent legislative hearings in American history were conducted by a Wisconsin

32 Performance Audit Report, Philadelphia Parking Authority, Employment Policies and Procedures, December 2017, Commonwealth of Pennsylvania Department of the Auditor General, at 1-5.

33 See, e.g., “Audit: PPA Allowed ‘Unchecked Tyrant’ Fenerty to Sexually Harass Staff,” Daniel Craig, PhillyVoice.com, Dec. 7, 2017; “Pa. Auditor: Poor PPA Management Cost Philly Schools \$78 Million,” Claire Sasko, Philadelphia Magazine, Dec. 7, 2017.

senator in the 1950s. Those hearings – carried out, in contrast to grand jury proceedings, under the daily glare of television spotlights – have given the English language the very definition of biased, bad-faith accusation: McCarthyism. Let us assume that legislative hearings will usually be conducted under better circumstances. But the public could be forgiven for wondering whether party-based posturing is the ideal atmosphere for the careful examination of complicated institutional or organized malfeasance. Grand jury proceedings – out of the public eye, before a representative cross sample of two dozen citizens, under the supervision of a judicial officer – are plainly the better choice for investigating many types of misconduct.

The truth is that, despite their potential flaws, all these mechanisms – executive, legislative, and grand jury – have their place in a society serious about policing itself. What the anti-report members fail to acknowledge, however, is that their arguments would actually require abolition not just of grand jury reports, but of *every kind* of reporting, by any governmental entity, about individual and institutional abuses. Invoking due process and reputational interests, these members demand that any subject of a governmental report receive the full menu of constitutional rights reserved for criminal defendants – at a minimum, compulsory process, confrontation, and guaranteed appeal. But these rights are *criminal trial* rights; they do not apply to governmental investigations, whether conducted by a grand jury, a legislative committee, or even an Auditor General. If grand jury reports must go, so goes it all.

Perhaps in recognition of the illogic of the anti-report position, four members have a fallback. They propose that, if reports are to be allowed at all, they must never mention anyone's name, and must be stripped of any information from which names could be identified. But the practical effect of this approach would be to prohibit exactly the kind of investigative reporting that is most essential to the operation of a free society. Those who occupy positions of power, wealth, or influence are by definition likely to be publicly known. If they abuse their positions, they would be effectively immune under the fallback proposal, because it would be impossible to report about their misconduct, even anonymously, without them being recognized. Perversely, therefore, the result of the "identity-cleansing" proposal would be more protection from public scrutiny for the most powerful perpetrators.

As it is, there are not all that many grand jury reports to begin with; the vast majority of grand jury investigations generate no report at all. When reports are called for, there may be some instances in which they can accomplish their purpose in general terms, without criticizing identifiable individuals. But in other cases, there is simply no other way to talk about the wrongdoing.

Two recent examples of governmental reports illustrate the issue. An Interbranch Commission was created in 2009 to investigate the juvenile justice scandal in Luzerne County. Two local judges had already been federally charged. But the Commission's report did not focus on the subjects of the prosecution; indeed, the Commission stated that its specific mandate was "to look beyond them at the conduct of others," precisely in order to bring to account those who were *not* facing criminal sanction.³⁴

In accordance with its mission, the Interbranch Report criticized, *inter alia*, the actions of the chief county probation officer,³⁵ and of the chief counsel to the Judicial Conduct Board.³⁶ The report asserted that identified prosecutors (both elected and line) "clearly abdicated their roles," "demonstrated no initiative, interest or concern," and "simply sat silent."³⁷ The report additionally charged that the chief public defender did not "properly supervise" and "became complicit," while other defense lawyers "abdicated

34 Interbranch Commission on Juvenile Justice Report, May 2010, at 19.

35 *Id.* at 37-38

36 *Id.* at 27-29.

37 *Id.* at 47.

their responsibilities to zealously defend their clients.”³⁸ While these were sharp words, which undoubtedly affected the careers and standing of those targeted, the Commission could not otherwise have accomplished its purpose.

Similarly, in 2013, the then-serving Attorney General appointed a special prosecutor to investigate the conduct of the Sandusky/Penn State child abuse case, which she had questioned during her campaign. The special prosecutor was not himself conducting a criminal investigation; instead it was a fact-finding mission on a matter of public controversy. The resulting Moulton Report presented substantial criticism of the prosecutors and investigators who worked on the Sandusky case. The report identified, at various stages of the investigation, “notable failure,” “missed opportunity,” “long stretches” with little if any activity, and inadequate preparation of a crucial witness for an important proceeding.³⁹ The report described these errors, *inter alia*, as “indeed puzzling,” “difficult to fathom,” and “difficult to defend.”⁴⁰ The consequences were grave: “Timeliness is particularly important in child-sexual-abuse investigations, because research suggests that child molesters are more likely to continue their behavior.”⁴¹ Thus, the unwarranted length of the investigation may well have endangered other children.⁴² Those responsible were identified by name. The report noted explicitly its commitment to doing so.⁴³

Under the no-name proposal, neither the Interbranch Report nor the Moulton Report could ever have been written. Same for Bonusgate, same for Gosnell, and, for that matter, same for the Philadelphia Parking Authority. No such reports could be publicly released without first being sanitized of every piece of information that might reveal who did what when, and who knew what when. At that point, the public might well wonder why bother.

Of course, there are some differences between grand jury reports and other types of governmental reports that criticize individuals. But those differences are all in favor of the grand jury model – the *only* form of governmental reporting that permits direct participation by regular citizens who constitute the voice of the public. Other governmental reporters, those outside the grand jury process, answer only to themselves, and operate however they wish. There are no external rules for them, no openness, no protections, just the report: however, wherever and whenever they wish to publicize it.

The Investigating Grand Jury Act, in contrast, requires considerable process as a matter of law, to include judicial supervision, a fully transcribed record, the right to and presence of counsel, and established means of appellate review. Many additional safeguards for grand jury reports have been proposed by the Office of Attorney General, and by Justice Dougherty in his concurrence in the dioceses litigation.⁴⁴ These include: the option for report subjects to testify before the grand jury; the inclusion of specific citations to the record in the report to facilitate the supervising judge’s review; the opportunity for subjects to review portions of the report referring to them, and to present objections and argument to the judge; judicial review for sufficiency of specific findings in the report; and return of the report to the jury for reconsideration, rewriting, or rescission of any unsupported findings. Indeed, some of these ideas are endorsed by this Task Force itself, in the tempered recommendations that follow behind its more immoderate proposals.

38 *Id.* at 49

39 Report to the Attorney General on the Investigation of Gerald A. Sandusky, H. Geoffrey Moulton, Jr., Special Deputy Attorney General, May 30, 2014, at 24, 27, 100, 102, 105, 107, 110, 122-23.

40 *Id.* at 27, 111, 126, 129.

41 *Id.* at 28.

42 *Id.* at 116, 120.

43 *Id.* at 10.

44 *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 726-29 (Pa. 2018) (Dougherty, J., concurring).

None of these procedures are dramatic departures from previous practice. All fit comfortably within the existing structure of grand jury process. While such procedures could be accommodated by future statutory or rule amendments, as the recommendations propose, all can be implemented in the meantime as a matter of prosecutorial and supervising judge discretion. As the Pennsylvania Supreme Court held in the diocese litigation, “the Investigating Grand Jury Act does not restrain the attorney for the Commonwealth from implementing additional procedural protections, when a grand jury undertakes to prepare a report of the tenor and scale of Report 1.” *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 574 (Pa. 2018).

Yet none of these added procedural protections are sufficient in the eyes of the anti-report members, because the right to reputation is at the same level as the rights to life, liberty, and property. That precept, however, is only the beginning, not the end, of proper due process analysis. Each of these rights, important as they are, entails different procedural protections. Adjudications involving property are not the same as those involving liberty, and a deprivation of liberty demands different procedures than a deprivation of life. The anti-report members declare their devotion to due process while disregarding its most basic principle: that particular circumstances require flexible response. Different process is due.

The kind of procedures suggested by Justice Dougherty are typical of those used in virtually every state that, like Pennsylvania, has a vigorous tradition embracing the use of citizen grand jury reports to expose public corruption. This is in addition to other states whose courts have said they would endorse the use of such reports if accompanied by the appropriate procedural protections. There is no recent national trend away from grand jury reports; only one judicial opinion has been cited in support of such a “new trend,” and that decision, from 1978, is one of those that in fact approves of the use of grand jury reports with proper procedures.

Given such procedures, there is no justification either for the outright elimination of grand jury reports advocated in Recommendation One, or for the almost-outright elimination of grand jury reports advocated in Recommendation Two. The complaints about grand jury reports in fact apply to every kind of investigative report. Some people will dispute the conclusions of the reports; some will attack the motives of the reporters. The proper response to such debate is not to destroy the reporting process, but to apply the appropriate procedures. Let us hope that the extremist positions embodied in the first two recommendations do not undermine or obscure the good work done by this Task Force in the remainder of its recommendations.

Part VI: Regional Investigating Grand Juries

Investigating grand juries have been an important tool for the Office of Attorney General. Additionally, the Task Force understands that district attorneys in first- through third-class counties regularly employ county investigating grand juries as a constituent part of their prosecutorial work.

Yet, for the most part, district attorneys in fourth- through eighth-class counties have not utilized investigating grand juries.⁴⁵ This lack of use is not due to a lack of need. Indeed, there is an increased need for such an investigatory tool since the Commonwealth's rural counties are contending with a sharp rise in criminal activity related to the ongoing opioid crisis.

District attorneys in these less-populous counties are unable to convene investigating grand juries due to financial and logistical concerns. A rural county district attorney may only have a few cases each year that would require a grand jury investigation. The cost of impaneling a grand jury for a small number of cases is prohibitive. Additionally, many rural county courthouses do not have the space to accommodate an investigating grand jury, and the limited availability of a commissioned judge to supervise a county grand jury is also an impediment.

To some degree, these financial and logistical concerns are ameliorated by the Office of Attorney General, which has traditionally worked in conjunction with rural district attorneys via multicounty grand juries. However, the Office of Attorney General is frequently engaged in several concurrent grand jury investigations, thus leaving little time for individual county investigations. Moreover, division of prosecutorial resources is, to some extent, a policy-based decision unique to the head of that particular office. While the Task Force appreciates that attorneys for the Commonwealth generally seek to safeguard the citizenry, the statewide objectives of the Attorney General may not always correspond with the local concerns of a particular district attorney.

Therefore, the Task Force recommends that less-populous counties be permitted to collectively form a regional grand jury that could be utilized by district attorneys in that region. Pooling of resources among political entities is employed in other aspects of government. For example, within the judiciary, some counties have formed regional administrative units, which allow the judges and magisterial district judges of each of those judicial districts to exercise jurisdiction throughout the regional administrative unit. See Pa.R.J.A. 701(E)(1) (permitting the creation of regional administrative units). Additionally, a contingency plan that becomes operational in times of emergency similarly permits judges and magisterial district judges to preside in matters throughout an emergency regional administrative unit. See Pa.R.J.A. 1953 (delineating the emergency regional administrative unit system).

To determine whether there would be interest in forming regional investigating grand juries, the Task Force sought input from the Pennsylvania District Attorneys Association, as well as individual district attorneys. Although the regional investigating grand jury proposal was initially formed with the fourth-

⁴⁵ Counties in Pennsylvania are classified according to population. For instance, a fourth class county has no more than 209,999 inhabitants, whereas an eighth class county has a population less than 20,000 people.

through eighth-class counties in mind, the Task Force broadened its query to include district attorneys of third-class counties to determine whether regionalization would serve their interests.

More than half of the district attorneys of third-class counties responded. The unanimous view of those respondents was that their jurisdictions would not benefit from participation in a regional investigating grand jury system. Indeed, several of those prosecutors detailed that sharing grand jury capacity with other counties would likely impede their ability to successfully investigate and ultimately prosecute crimes in their locality.

In contrast, the district attorneys from fourth- through eighth-class counties overwhelmingly supported this addition to the grand jury system. Some reported that criminal activity in their area has warranted further inquiry by an investigating grand jury, but that they lacked the resources to convene a grand jury solely for their county's use.

Having considered the opinions of the Pennsylvania District Attorneys Association and the responding individual district attorneys, the Task Force makes the following recommendations:

Recommendation One: The General Assembly should consider amending the Investigating Grand Jury Act to permit the convening of regional investigating grand juries by counties of the fourth through the eighth classes.

The Task Force recommends that the Legislature consider the expansion of the Pennsylvania investigating grand jury system to include regional grand juries which could be convened at the request of district attorneys in the fourth- through eighth-class counties. This proposal would allow multiple counties to fund and share a regional grand jury and would enhance the investigative abilities of district attorneys within the region.

The proposed implementation of this system would divide the Commonwealth into units similar to the Emergency Regional Judicial Units established by the Administrative Office of Pennsylvania Courts. These "regional investigating grand jury units" would allow district attorneys to share grand juries to enhance their investigations. This would amount to a significant cost savings for counties, in that a shared grand jury could be convened at a central location and funded jointly.

To move such an initiative forward, the Legislature would need to amend the Investigating Grand Jury Act, adopting new statutory authority for convening regional investigating grand juries. Along those lines, the Task Force recommends adoption of new Section 4543.1. As a corollary, the Task Force suggests amendment of the definitions provision. See 42 Pa.C.S. §4542. In the event that the concept of regional grand juries is adopted, the title of Section 4544 should be amended to clearly indicate that this statute applies only to those multicounty grand juries impaneled upon the request of the Office of Attorney General and would not apply to the newly established regional grand juries. Finally, Section 4553 should be amended to provide a funding framework for regional investigating grand juries.

Proposed amendments to 42 Pa.C.S. § 4542:

“Attorney for the Commonwealth.” The district attorney, **or his or her designee,** of the county **or regional grand jury unit** in which a county **or regional** investigating grand jury is summoned, **[or his designee,]** or the Attorney General, **or his or her designee,** if the Attorney General has superseded the district attorney; the Attorney General, or his **or her** designee, with respect to multicounty investigating grand juries.

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“Investigating grand jury.” The county investigating grand jury, **the regional investigating grand jury,** or the multicounty investigating grand jury [or both].

* * * * *

“Multicounty investigating grand jury.” An [Statewide or regional] investigating grand jury convened by the Supreme Court upon the application of the Attorney General and having jurisdiction to inquire into organized crime or public corruption or both under circumstances wherein more than one county is named in the order convening said investigating grand jury.

* * * * *

“Regional investigating grand jury.” **An investigating grand jury convened by the Supreme Court upon the joint application of district attorneys in a regional investigating grand jury unit.**

* * * * *

“Regional investigating grand jury unit.” **Two or more counties of the fourth, fifth, sixth, seventh or eighth classes that have, upon application to the Supreme Court, obtained approval to form a regional investigating grand jury unit to permit impanelment of a regional investigating grand jury.**

* * * * *

“Supervising judge.” The common pleas judge designated by the president judge to supervise the activities of the county investigating grand jury, or the common pleas judge designated by the Supreme Court to supervise the activities of the multicounty investigating grand jury, **or the judge of a regional investigating grand jury unit designated by the Supreme Court to supervise the activities of the regional investigating grand jury.**

Proposed new statutory provision 42 Pa.C.S. § 4543.1:

§ 4543.1. Convening regional investigating grand jury

(a) General rule.--In addition to such other investigating grand juries as are called from time to time, regional investigating grand juries shall be summoned as provided in subsection (b).

(b) On the initiative of district attorneys of a regional investigating grand jury unit.-- Application may be made to the Supreme Court by some or all of the district attorneys of a

regional investigating grand jury unit for an order directing that a regional investigating grand jury be summoned, stating in such application that the convening of a regional investigating grand jury is necessary because of the existence of criminal activity which can best be fully investigated using the investigative resources of the grand jury. The application shall specify for which counties in the regional investigating grand jury unit that the regional investigating grand jury is to be convened. The application shall also state, with a reasonable degree of specificity, the proposed allocation of responsibility and expense to be shared by the counties in which the regional investigating grand jury is to be convened.

(c) Action by the Chief Justice.-- Within 10 days of receipt of such an application, the Chief Justice shall issue an order granting the same. Failure by the Chief Justice to grant such application shall be appealable to the entire Supreme Court.

(d) Contents of order.--An order issued under subsection (c) shall:

(1) convene a regional investigating grand jury having jurisdiction over all counties specified in the application submitted pursuant to subsection (b);

(2) designate a commissioned or senior judge of the regional investigating grand jury unit to be the supervising judge over such regional investigating grand jury;

(3) provide that such supervising judge shall, with respect to investigations, presentments, reports, and all other proper activities of said regional investigating grand jury, have jurisdiction over all counties in the jurisdiction of said regional investigating grand jury;

(4) designate the ratios by which the counties which are in the jurisdiction of the regional investigating grand jury shall supply jurors;

(5) designate a location or locations for the regional investigating grand jury proceeding; and

(6) provide for such other incidental arrangements as may be necessary including the allocation of expenses to be shared by the counties which are in the jurisdiction of the regional investigating grand jury.

All matters to be included in such order shall be determined by the Justice issuing the order in any manner which he or she deems appropriate, except that the Supreme Court may adopt general rules, consistent with the provisions of this section, establishing standard procedures for the convening of regional investigating grand juries.

(e) Manner of impaneling.--The regional investigating grand jury shall be impaneled in the manner provided or prescribed by law.

Proposed amendment to the title of 42 Pa.C.S. §4544:

§ 4544. Convening multicounty investigating grand jury
on application of the Attorney General

Proposed amendments to 42 Pa.C.S. § 4553:

§ 4553. Expenses of investigating grand juries and trials resulting therefrom

(c) Regional.--The expenses of any regional investigating grand jury shall be borne by the counties in the jurisdiction of the regional investigating grand jury.

(1) Regional investigating grand jurors shall be compensated at the rate of \$40 for each day that they report for service.

(2) The costs and expenses resulting from any trial of a person against whom a presentment has been issued by a regional investigating grand jury shall be borne solely by the county in which the defendant is charged.

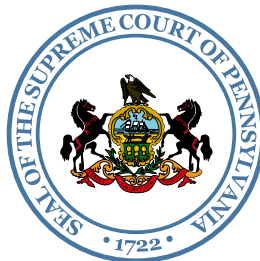
Recommendation Two: In the event the General Assembly amends the Investigating Grand Jury Act to permit formation of regional investigating grand juries, the Supreme Court should promulgate necessary procedural rules.

If the Legislature amends the Investigating Grand Jury Act to permit the formation of regional investigating grand juries, the Supreme Court will need to promptly respond with corollary procedural rules. Those provisions would likely be needed in the following areas:

1. The establishment of a regional investigating grand jury unit map taking into consideration similarly situated judicial districts and geography;
2. The location of each regional investigating grand jury;
3. The manner of appointment of a supervising judge for each regional investigating grand jury;
4. The manner, allocation and selection of jurors from each judicial unit;
5. The allocation of time and number of cases permitted for each district attorney; and
6. The financial resources necessary from each county to impanel each regional investigating grand jury and apportionment of financial responsibility to each county.

APPENDIX

Handbook for Grand Jurors Multi-County Investigating Grand Juries



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PROPOSED

Importance of Service

You have been selected to serve on a multi-county investigating grand jury, also referred to as a statewide investigating grand jury. The grand jury system is several centuries old, having been introduced in this country during colonial times.

Investigating grand juries provide a means to make discreet and comprehensive inquiries into some of the more serious potentially-criminal activities occurring in our Commonwealth, ensuring that our communities are safer by recommending, if appropriate, that criminal charges be filed against individuals suspected of violating our laws. Investigating grand juries also protect the citizenry from possible abuse of governmental power by making those recommendations only after a complete, thorough investigation. Grand juries may also file reports concerning what they have investigated, making recommendations for changes to correct matters uncovered by their investigations.

Your faithful service in this process is crucial to the administration of criminal justice.

Secrecy

In every aspect of your grand jury service, a critical component is maintaining secrecy. You are not permitted to discuss grand jury matters with anyone outside this process, even your spouse. Complete confidentiality is crucial to the functioning of the grand jury. Consequences for violating grand jury secrecy may be severe, including placing some witnesses in danger of physical harm or damaging the reputation of a person who is not involved in criminal activity. There may also be repercussions for an individual grand juror who violates the secrecy requirements, including being held in contempt.

Investigating Grand Jury Basics

You are probably familiar with the general process of a criminal trial. Criminal trials provide a process for determining whether someone charged with a crime should be found guilty or not guilty of that crime. Investigating grand juries, however, provide a process for determining whether someone should be charged with a crime, which occurs prior to any trial, or whether change in the law should be considered.

The investigating grand jury has formidable powers. For example, it can compel the appearance of witnesses to testify under oath, subject to the Fifth Amendment privilege against self-incrimination. It can require the production of documents, records, and other evidence. Further, contempt proceedings may be initiated in certain instances when the grand jury's commands and rules are disobeyed.

The investigating grand jury also has a significant restriction on its powers since there is a stringent secrecy requirement. The confidential nature of these proceedings safeguards against potential abuses. Secrecy also protects those whom the grand jury process reveals to be uninvolved in criminal conduct, preserving their good reputations by prohibiting the disclosure of the fact that they were under investigation or even that their names came up during a grand jury investigation.

Following the questioning of witnesses and examination of evidence, a grand jury will sometimes conclude that no further action needs to be taken with respect to a particular investigation. On other occasions, it will recommend that individuals be charged with certain crimes. That recommendation is known as a "presentment." The investigating grand jury may also issue a report that discusses conditions related to organized crime, public corruption, or both. More generally, a report may propose recommendations for government action to be taken.

Formation and Term of Statewide Investigating Grand Jury

The Office of Attorney General (OAG) may request the formation of a statewide grand jury to investigate suspected organized crime or government corruption. The OAG cannot unilaterally create an investigating grand jury. Rather, it must get the approval of the Chief Justice of the Supreme Court of Pennsylvania. If the Chief Justice determines that the OAG's application should be granted, the Chief Justice also selects the judge who will supervise the grand jury.

Although a statewide investigating grand jury is called only when there are indications of organized crime or government corruption, its inquiry may be broader than that, encompassing any suspected criminal activity that the OAG may investigate.

Multi-county grand juries have substantial terms of service, being constituted for eighteen months, with the possibility of an additional six-month extension. Typically, the grand jury will meet only one week out of every month.

Role of Grand Jurors

Grand jurors play a crucial part in this process. You will consider testimony from witnesses and review documents, as well as other evidence presented to you. As detailed more fully below, grand juries ultimately determine whether to recommend that charges be brought against a person and also sometimes issue reports.

At the beginning of the grand jury's term, there are 23 grand jurors. Additionally, the supervising judge designates between 7 and 15 alternates; those individuals are available to fill a vacancy when a grand juror is excused or is otherwise unable to continue their service.

Upon the initial formation of the grand jury, the supervising judge appoints a foreperson. The grand jurors themselves elect one of the grand jurors to be the secretary.

At least 15 grand jurors, a number referred to as a "quorum," must be present to conduct the business of the investigating grand jury. Furthermore, a majority of the full investigating grand jury is required to adopt a report or issue a presentment.

If the grand jury decides to recommend that charges be brought against a person, that recommendation is made in a document called a "presentment." Although OAG attorneys draft a presentment, the grand jurors are responsible for examining that draft and determining, by majority vote, whether it should be submitted to the supervising judge for his or her review. While you will likely have discussions with the OAG attorney throughout the drafting of the presentment, your deliberation and voting about whether to submit that document to the supervising judge is done privately, with only permanent grand jurors present in the room at that time.

You and your fellow jurors may also determine that a grand jury report should be created. Those reports can be utilized to alert government officials and the general public to issues of concern. Again, while the OAG attorney will draft any report, the grand jurors are tasked with deliberating and voting on the report in a private and confidential fashion. Reports that are approved by a majority of the grand jury will be submitted to the supervising judge for his or her examination.

There are a number of practical matters involved with your service as a grand juror. By statute, you are entitled to a payment of \$40 for each day of service. Additionally, your lodging, meal, and travel expenses are reimbursable, subject to certain limitations. The supervising judge does not manage the financial aspects of the grand jury. Instead, any questions regarding these issues should be directed to the OAG representative who handles financial matters.

The OAG and the supervising judge understand that there will be certain times, such as personal vacations, when you will need to be temporarily excused from service. The more advance notice you provide, the likelier it will be that these requests will be approved.

Finally, if your employer has indicated that you may be penalized for serving on the grand jury, please inform the supervising judge immediately. In many instances, such behavior by your employer is illegal.

Role of Supervising Judge

Unlike a criminal trial, where the judge is in the courtroom whenever the jury is present, the supervising judge is not required to be in the grand jury room at all times. That does not mean, however, that a supervising judge has no role. The judge has several critical duties, including:

- swearing in witnesses and advising them of their rights and obligations;
- reviewing presentments and grand jury reports to ensure compliance with statutory requirements;
- determining whether a witness is entitled to court-appointed counsel;
- issuing orders and opinions with respect to motions and applications that are filed with respect to this investigating grand jury;
- resolving questions regarding grand jury secrecy, such as whether there is cause to prohibit a witness from disclosing his or her testimony outside the grand jury room and determining whether a person should be held in contempt for violating the secrecy rule;
- resolving issues that arise concerning testimony, including assertions of a privilege not to answer a question; and
- approving or disapproving proposed investigations.

To the extent you have concerns about the impact your grand jury service may have on your job, the supervising judge is available to speak with you and address these issues.

Finally, the supervising judge will maintain a certain level of formality in interactions with the grand jurors, regardless of how many times you may have encountered him or her. This is not due to incivility on the part of the supervising judge, but, rather, is compelled by rules of judicial ethics, which set limits on a judge's interactions with grand jurors.

Role of Attorney for the Commonwealth

The OAG is responsible for identifying matters that require the resources of the investigating grand jury. It details those matters in a "notice of submission," which is given to the supervising judge for his or her consideration. If that notice is accepted, the OAG attorneys will call witnesses who will be questioned before the grand jury. The OAG attorneys will also obtain evidence for your consideration.

The OAG attorneys draft presentments and grand jury reports for the grand jury's consideration.

While it is natural that you and the OAG attorneys will develop a certain level of familiarity with one another over the many months that the grand jury operates, understand that the prosecutors, in following established rules of professional ethics, will not interact with grand jurors outside of grand jury proceedings.

Role of Witnesses and their Attorneys

Over the course of the grand jury's work, the OAG attorneys will call witnesses and issue subpoenas to individuals or entities for the production of records. Do not assume that those individuals have done something wrong simply because they have been selected to appear before the grand jury or their records have been subpoenaed. Also, sometimes the OAG's questions of a witness will be about troubling behavior. The fact that someone is subject to certain questions does not show that he or she has acted illegally.

Many witnesses will be accompanied by their lawyers. Everyone has seen television shows or movies in which the attorneys are active in the courtroom, raising objections for the judge to rule on or persuasively speaking to the jury. The investigating grand jury is different. According to statute, a lawyer for a witness may not object or present arguments before the grand jury. The one person the witness's attorney may speak to is his or her client, the witness. On some occasions, you will see the witness's lawyer whispering to his or her client. That is not meant to improperly hide information from you; rather, the witness's counsel is complying with the law that mandates that the lawyer may communicate only with the client.