

## **CPL ARTICLE 190: GRAND JURY.**

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A Grand Jury is impaneled by a Superior Court. It has at least 16 people, but not more than 23. Its job is to examine evidence of offenses; as well as misconduct by public officer (even if not criminal).

Appellate Division of Judicial Department decides how many grand juries for each of its Superior Courts; however a Supreme Court justice may order a grand jury impaneled in extraordinary circumstances.

Grand Juries stay impaneled at least until the next term when a new one is chosen, except that if its business is not concluded then if both the jury and the District Attorney advise the Court, the Court may at anytime in the remaining 5 days extend the term to a specified future date.

If the only grand jury of a county is recessed, either the D.A. of a defendant may petition the Court to reconvene it.

Grand Jurors are chosen pursuant to Judiciary Law, but they cannot be challenged. However the Court may discharge the entire panel before swearing - and summon another - if it was not in accordance with Judiciary Law. The Court can also refuse to swear an individual who is not qualified, or can discharge such person already sworn.

The Court must appoint a foreman, as well as another foreman to act in the first's absence. The jury itself chooses a secretary to keep records.

The grand jury must be sworn, and the Court must ensure that they receive a printed version of the provisions of this article. The Court may also give other instructions.

If a court has more than one grand jury at a time, jurors can be transferred back and forth.

At least 16 members of the jury must be present for it to be able to function, and at least 12 must agree to any action it takes.

Any grand juror - not just the foreman - may swear witnesses.

During deliberations and voting, only grand jurors can be present; however a Sign interpreter may assist a hearing-impaired juror, but must swear to keep proceedings secret (not necessary if already took oath of office).

Otherwise, only the following may be present at grand jury proceedings: district

attorney; clerk (or other public servant); stenographer; witness; interpreter (prosecutor must provide for witness, interpreter must sworn to keep proceedings secret, unless has taken an oath of office); public servant having custody of a witness (must also take oath of secrets, unless already sworn into office); attorney representing witness; videotape operator.

If a child 12 or under is a witness to certain charges such as rape or murder - and the D.A. consents - may have a social worker, counselor, psychiatrist, etc... present. Such person must not tell the witness what to answer though.

Grand Juries are secret, no juror or other person can disclose without court order; except that jury can have police or D.A. assist with examining evidence. Also, it's okay if a D.A. *already* reported child abuse to the State Central Register before Grand Jury; but otherwise must apply ex-parte to Superior Court for order of permission to disclose.

Witness can disclose own testimony!

The grand jury is the judge; the Court and D.A. advise can instruct it about law on the record, no other assistance can be sought.

Generally, the same rules of evidence for criminal trials apply. Scientific reports of expert technician public servants may be received when certified. If report was sent electronically, jury must have transmittal memo of both sender and receiver attesting to a true and complete copy (including # of pages); also certified physical copy must be provided within 20 days to jury, and to defendant within 20 days of arraignment.

If a witness needs to be certified as competent, the D.A. may do so here (whereas elsewhere it could be the Court's function). Also where it's otherwise the judge's job to instruct the jury as to legal effect of evidence, so too here the D.A.

"Child witness" is a 12 year-old or younger victim of rape/incest.

"Special witness" is either unable to come to court because physically ill or incapacitated; or else witness to rape/incest and over 12, but likely to suffer emotional stress if testifying in person.

D.A. may videotape child witness in lieu of appearance. D.A. can only tape special witness if so-ordered after ex-parte written application stating grounds to the Court; application cannot be disclosed without court order. Court SHALL order if satisfied that witness is special.

[NOTE: interestingly there seems to be no statutory provision for having a child under 12 testify by video if only a *witness* to rape/incest, but not the victim.]

Video can be done anywhere, anytime. D.A. must record date/time/place at head of tape. Accurate sweep second-hand clock must be placed next to witness; or else

time/date superimposed. Social worker, psychiatrist, counsel may be present; also medical practitioners as necessary, all such must be sworn to secrecy (unless under oath of office).

D.A. states name of witness; also case caption and docket if assigned. D.O.B. of child witness must be recorded; else date of special witness order.

Witness must be sworn on record; or else a statement made that testimony will not be under oath. If using multiple tapes, each must state that it's ending and another beginning. New tape shall start with # of previous; last tape concludes with D.A. certifying total number.

Stenographer shall record tape while playing; tape can't be edited save by court order. Custody of tape maintained same as grand jury minutes.

All witnesses must testify, even if will self-incriminate! However witness is immune unless waives, or if volunteers information not asked. Witness producing records pursuant to subpoena duces tecum is not immune from those documents.

Only D.A. or Grand Jury can call witnesses, and in certain cases a person who may be criminally charged can demand to testify; otherwise no one else has such authority.

If Grand Jury will call witness(es), can demand that D.A. serve subpoena. D.A. must first comply, but can then later apply to Court, which may vacate or modify such directive.

If Grand Jury calls a particular witness even if the D.A. does not want to (and Court allows): D.A. may demand such witness waive immunity, and he/she cannot be sworn unless complies. Waiver of immunity is not effective until sworn to before grand jury. Witness must be informed of right to counsel before waiver, and allowed time to obtain/confer.

If waiver of immunity was for limited questions, anything asked beyond that is privileged.

D.A. does not have to inform any person of Grand Jury proceedings, except a defendant already arraigned on felony complaint; in which case defendant must be accorded right to testify. However a person who has knowledge that he/she is the subject of charge submitted or to be submitted to Grand Jury can request in writing to county D.A. *before* indictment/Prosecutor's Information filing of wish to testify on own behalf, and must give address for notice. D.A. shall tell jury foreman of such requests, and also provide notice to requestor of time/place to be heard. Such person must waive immunity at D.A.'s demand before testifying.

If the above rules are violated and an Indictment/Prosecutor's Information is then

filed, it must be dismissed as long as defendant so motions within 5 days or arraignment. Late = waived; cannot challenge thereafter.

Person who can request to testify as above may also request another person be called to testify; this is discretionary by the Grand Jury.

Papers related to subpoenae (including motions to quash) shall be secret; however can be disclosed if both subject of subpoena and prosecutor agree.

Publication of decisions is fine as long as identities are altered.

Any person appearing as witness under waiver of immunity has the right to have a lawyer; if indigent, then 722 [18b] counsel. Attorney can be present, but can't take part; Court can have atty remove.

D.A. MUST submit to Grand Jury any defendant being held by local criminal court on felony complaint, unless indictment was waived.

D.A. MUST submit misdemeanor if defendant is charged with it in local criminal but Superior ordered it to be submitted.

D.A. MAY submit even non-criminal public office misconduct.

Grand Jury can: indict; dismiss; direct Prosecutor's Information; direct D.A. to request removal to Family Court; submit a report of public office misconduct.

D.A. can indict when competent and admissible legally sufficient (including corroboration if required) evidence provides reason to believe that a person did the crime. Grand Jury can indict for other charges than what was submitted; even felonies for misdemeanor-only cases. If vote is to indict, either foreman or acting must file it with the impaneling court.

Grand Jury can also direct Prosecutor's Information for non-felony charges in local criminal court [except if Superior ordered misdemeanor indictment]. Such direction must be SIGNED by foreman/acting, must state criminal conduct, may join other charges/defendants, and must be filed in the same manner as indictment. Court must approve and so-order D.A. unless it appears insufficient on its face, then D.A. must file in local criminal court with trial jurisdiction.

Grand Jury MUST dismiss if evidence not legally sufficient, or it no "reasonable cause to believe" person committed crime; foreman/acting files dismissal with impaneling court.

If dismissed individual was held by local court, Superior must now release from custody or exonerate bail. D.A. may not re-submit unless Court authorizes; if dismissed a 2<sup>nd</sup> time, can never be brought back.

Unless Court orders re-submission or postponement: D.A. must mail notice of dismissal to person at last known address within 90 days.

If defendant held by local criminal for Grand Jury is in custody for more than 45 days (juvenile = 30), and Grand Jury has not yet disposed: Superior Court MUST order release unless person caused delay, or D.A. shows good cause.

Regarding misconduct in public office: Grand Jury can recommend disciplinary action (including removal); can find no misconduct; or propose executive/legislative/administrative action.

If recommending discipline, accused must have been allowed opportunity to testify; proof must be preponderance of credible and legal evidence. If no misconduct found, or administrative action proposed: cannot criticize anybody.

Court must accept report if satisfied that above rules were complied with. If not, can either direct more testimony, or else seal the report.

Accused person may file answer with court within 20 days of service, such becomes appendix to the report.

Accepted disciplinary report and order is sealed for 31 days after copy sent to person named, to allow appeal; if appeal: until it's dismissed or affirmed, or the sealing order is reversed. Sealed reports are not public record, and can't be subpoenaed.

After sealing period expires, D.A. shall file report with appropriate agency.

Court must keep report sealed if it will prejudice an pending criminal matter; until matter concludes, report only opened by court order.

Appeal of report: accused person can appeal accepted report, D.A. can appeal sealed one (Grand Jury may appoint an atty if report concerns D.A.'s office).

D.A. can appeal to Appellate Division of Judicial Department within 10 days of report being mailed to named persons; notice must be filed in duplicate with clerk of sealing court, appeal notice must also be served on persons named in report.

Appellate Division shall adopt rules granting preference to these appeals. Record on appeal remains sealed until and unless underlying report is unsealed as specified above.

This is the ONLY method of appeal, Appellate Division order is final!