NOTE: Comments are invited on the proposed Best Practices (in bold face), which represent the recommendations of the Committee on Grand Jury Proceedings. The commentary to the Best Practices may be changed by the Committee during the public comment period.

Proposed Best Practices for Use by Prosecutors Making Presentments to the Grand Jury

Best Practice No. 1

1. Target warnings

A. If, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness either is a "target" or is likely to become one, the witness should be advised, before testifying, that

(1) the grand jury is conducting an investigation into certain facts and circumstances, including your own conduct, for possible violations of law;
(2) you have the right to speak with a lawyer before you testify and to have a lawyer present with you in the grand jury room;
(3) if you cannot afford a lawyer, one may be appointed by the presiding judge to represent you at no charge to you;
(4) you may refuse to answer any question if a truthful answer would tend to incriminate you; and
(5) anything that you do say may be used against you in a later legal proceeding.

This practice is somewhat broader than the requirements of Massachusetts law. Under Commonwealth v. Woods, 466 Mass. 707, 719-720 (2014), the warnings to "targets" or "likely" targets must only include an advisement concerning the privilege against self-incrimination and that any statements given may be used against the witness. The *United States Attorneys' Manual*, (USAM) § 9–11.151 goes somewhat further, providing the additional advisement that a "target" should be warned that the witness's own conduct is being investigated. A "target" of a grand jury investigation is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Id.; see Woods, 466 Mass. at 719 n.12 (2014) (adopting this definition of "target" from the USAM). A "putative" defendant could also, for example, include a person who has already been charged in District Court with crimes arising out of the

same matter being investigated by the grand jury for possible indictment. However, such a witness is not considered a "target" if there is reason for the prosecutor to believe that, by reason of a grant of immunity, a non-prosecution agreement, or other circumstances, the witness is no longer a putative defendant.

In addition to "targets," warnings must be given to a person whom the prosecutor has reason to believe is "likely" to become a "target." Id. at 719-720 (instructing that, because grand jury testimony is "compelled," warnings should be provided both to "targets" and to any witness whom the prosecutor has reason to believe "is likely to become one").

The giving and receipt of these warnings to targets should be memorialized by the prosecutor in the presence of the witness, such as in a writing signed by the witness, by means of an audio recording or in some other appropriate manner.

The role of counsel to a witness testifying before the grand jury is limited by G. L. c. 277, § 14A. See Commonwealth v. Griffin, 404 Mass. 372, 373 (1989) ("The attorney who accompanies a client into the grand jury room has, by statute, a very limited role."). This statute affords a grand jury witness the "right to consult with counsel and to have counsel present at every step of any criminal proceeding at which such person is present, including the presentation of evidence, questioning, or examination before the grand jury . . . ." G. L. c. 277, § 14A. While counsel may "advise her client on privileges and can consult with her client upon reasonable request for the opportunity to do so, . . . [counsel] is not entitled to discovery and may not make 'objections or arguments or otherwise address the grand jury or the district attorney.'" In re Grand Jury Investigation, 92 Mass. App. Ct.531,536 n.2 (2017), quoting G. L. c. 277, § 14A.

The statutory right in Massachusetts of a grand jury witness to have counsel physically "present" during "questioning" is also different from federal procedure, in which counsel may not enter the grand jury room during testimony. See Fed. R. Crim. P. 6 (d) (1) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device."); see also Connecticut v. Gabbert, 526 U.S. 286, 292 (1999) ("[N]o decision of this Court has held that a grand jury witness has a right to have her attorney present outside the jury room."); In re Motions of Dow Jones & Co., 142 F.3d 496, 498 (D.C. Cir. 1998) ("The witness must enter the grand jury room alone, without his or her lawyer.")

This proposed best practice is otherwise consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.6(g) (4th ed. 2015) ("Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a voluntary waiver of that right."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standards 3-3.3 & 3-3.4 (3d ed. 2009) (recommending that prosecutors inform targets summoned to testify before grand jury of their "target" status before any grand jury appearance, and recommending that prosecutors

provide these targets warnings concerning self-incrimination, the use of any testimony given, and the opportunity to consult with counsel).

B. If the prosecutor determines that the evidence linking a grand jury witness to the commission of a crime suggests that the witness may become a target, the prosecutor should also consider giving the witness target warnings.

This proposed best practice affords the prosecutor discretion to consider providing a grand jury witness with "target" warnings even if the witness is not "likely" to become a target of the grand jury's investigation or a putative defendant.

C. If a witness who has been given target warnings wishes to consult with counsel, the witness should be given a reasonable opportunity to do so.

This principle expresses the prevailing practice that when a witness informs the prosecutor that he or she wishes to consult with counsel, a reasonable request for such consultation is normally granted by the prosecutor.

This principle does not detract from the vitality of Rule 5(c) of the Massachusetts Rules of Criminal Procedure or from G. L. c. 277, § 14A, which protect against a witness obstructing the grand jury's investigation through unreasonable delays. Instead, this principle is consistent with the idea that no witness may refuse to appear because of the unavailability of that witness's counsel of choice on the date set for his or her grand jury testimony. See G. L. 277 c. § 14A ("No witness may refuse to appear for reason of unavailability of counsel for that witness"); Mass. R. Crim. P. 5 (c), as appearing in 442 Mass. 1505 (2004) (same).

This proposed best practice does not affect the settled law that a target, like any other witness before the grand jury, has a duty to answer questions unless said answers would violate the privilege against self-incrimination or unless the witness has received a grant of immunity from prosecution; otherwise the witness is subject to being adjudicated in contempt. See, e.g., Gamble v. Commonwealth, 355 Mass. 394, 397-398 (1969); Heard v. Pierce, 62 Mass. 338, 339-341 (1851). Nor does it affect the settled law that a target of a grand jury investigation may be subject to prosecution for perjury if the answers given by the target are knowingly false and material to the grand jury's investigation. See Commonwealth v. Brown, 55 Mass. App. Ct. 440, 445-446 (2002) ("[A] failure to give required warnings might be a basis for suppression of a witness's testimony in other contexts, but normally it is not a basis for suppression in a subsequent prosecution alleging that the testimony was perjured."); see also Commonwealth v. Borans, 379 Mass. 117, 138 (1979) (stating that witness's status as a target has "no bearing on the validity of a conviction for testifying falsely").

D. If a witness who is unable to afford counsel is given target warnings and (1) informs the prosecutor that he or she intends to assert the privilege against self-incrimination, (2) invokes the privilege during testimony, or (3) requests to consult with counsel concerning the decision whether to testify, the matter should be brought to the attention of the supervisory judge before the prosecutor conducts any further examination of the witness before the grand jury.

This recommended best practice is consistent with prevailing Massachusetts practice, where the supervising judge exercises the power to appoint counsel for grand jury witnesses/targets who may be indigent and say either that they want counsel or that they intend to invoke the privilege against self-incrimination. The Supreme Judicial Court has not addressed the issue of whether G.L. c. 277 § 14A confers a "statutory right" to appointed counsel, beyond observing that it "does not expressly or impliedly require the appointment of counsel for indigents. Neither does it forbid such an appointment." Opinion of the Justices, 373 Mass. 915, 921 (1977). One noted Massachusetts authority has stated that, in practice, "a witness who is indigent has the right to have counsel appointed to assist him or her as the witness testifies before the grand jury." E.B. Cypher, *Criminal Practice and Procedure* § 17:42 (4th ed. 2014), citing Connecticut v. Gilliard, 36 Mass. App. Ct. 183, 186-187 (1994) (noting that prosecutor advised the defendant-grand jury witness "of her right to have counsel appointed at no expense to her"). The function of counsel for a grand jury witness is to provide advice. See G. L. c. 277, §14A; S.S. Beale et al., *Grand Jury Law and Practice* § 6:26 (West 2d ed. Supp. 2013); see also United States v. Williston, 862 F.3d 1023, 1030-1032 (10th Cir. 2017) ("[G]rand-jury witnesses are not in custody while testifying[.] . . . Questioning in a grand-jury room does not implicate the types of coercion that *Miranda* sought to remedy.")

This recommended best practice does not create any new Fifth amendment or art. 12 rights, because the role of counsel is limited and not constitutionally mandated. See United States v. Washington, 431 U.S. 181, n.5 (1977) ("All *Miranda's* safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody."); United States v. Mandujano, 425 U.S. 564, 579-580 (1976) (reasoning that *Miranda*-type access to counsel is constitutionally mandated only to counteract the compulsion that is inherent in custodial interrogation and that such compulsion is not present when a witness is called to testify before the grand jury).

The purpose of recommending this as a best practice is to protect against an inadvertent waiver of the privilege against self-incrimination by a witness who is not represented by counsel solely by reason of the witness's indigence. These cases present complex legal issues. Witnesses who are given target warnings and who choose to proceed to testify without consulting with a lawyer are at risk of inadvertently waiving the privilege against self-incrimination and incriminating themselves. See In re Grand Jury Subpoena, 442 Mass. 1029, 1029 (2004) (stating that the privilege against self-incrimination can be invoked on a question-by-question basis and that the

normal avenue for appellate relief from a judicial order to testify is for the witness to disobey the order, be adjudged in contempt, and appeal). The recommended best practice also tends to facilitate inquiry by the Court into whether any claim of privilege is or is not valid, an inquiry in which it is understood that counsel for the witness may play a role. See, e.g., Commonwealth v. Martin, 423 Mass. 496, 504-505 (1996) (describing procedure under which judge may assess the validity of a grand jury witness's invocation of the privilege and, if appropriate, "discuss with the witness and the witness's counsel limits on the privilege against self-incrimination that may apply to the witness in the circumstances of the particular case"). The question of a witness's indigency can always be brought before the supervisory judge.

In addition to being consistent with prevailing practice, allowing a Justice of the Superior Court to appoint counsel for the limited purpose of protecting a witness against an inadvertent waiver of the privilege against self-incrimination is consistent with the Superior Court's supervisory authority over the grand jury. See In re Pappas, 358 Mass. 603,613 (1971) ("In exercising supervision over the grand jury, the presiding judge has discretion (1) to act in aid of effective judicial administration and (2) to prevent excessive or unnecessary interference with the legitimate interests of witnesses . . . ."). Additionally, having counsel appointed for this limited purpose would tend to protect the integrity of the judicial system when a witness who may have had a privilege testifies before the grand jury; any waiver by the witness would likely be regarded as valid and the witness's grand jury testimony would be available for later use at trial, consistent with the rules of evidence pertaining to a witness's prior statements. See Mass. G. Evid. § 801(d)(1)(A) (2017).

Best Practice No. 2

2. The Record of the Proceedings

The entire grand jury proceeding — with the exception of the grand jury's own deliberations — is to be recorded in a manner that permits reproduction and transcription. This shall include any legal instructions and communications provided to the grand jury by a judge or a prosecutor during the proceeding, as well as a record of all those present during the proceeding, excluding the names of the grand jurors.[1]

This best practice is based upon Commonwealth v. Grassie, 476 Mass. 202, 220 (2017) ("[W]e decide today that the entire grand jury proceeding—with the exception of the grand jury's own deliberations—is to be recorded in a manner that permits reproduction and transcription."). It is consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(d) (4th ed. 2015) ("The entirety of the

[1] The committee is not addressing discovery matters that occur after the completion of the grand jury proceedings.

proceedings occurring before a grand jury, including the prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved. The prosecutor should avoid off-the-record communications with the grand jury and with individual grand jurors."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-8.5 (3d ed. 2009) ("In jurisdictions where grand jury proceedings are recorded, a prosecutor's advice, recommendations, and other communications with the grand jurors should be of record except as otherwise provided by law.").

Grand jury proceedings should never go "off the record." E.B. Cypher, *Criminal Practice and Procedure* § 26.13 (4th ed. 2014); see Commonwealth v. Carpenter, 22 Mass. App. Ct. 911, 912-913 (1986) (condemning as "a mistake scrupulously to be avoided in the future," certain off-the-record comments by the prosecutor that related to the manner of the presentation of evidence); see also Commonwealth v. Qualter, 19 Mass. App. Ct. 970, 971 (1985) (noting defendant had accused prosecutor of impairing the integrity of the grand jury proceedings during a recess by improperly urging grand jurors to curtail further questioning). All questions posed by a prosecutor or a member of the grand jury, as well as any comment or instruction relating to a question or answer, along with the testimony, should be recorded.

The *recording* of instructions is to be distinguished from the *production* of instructions to persons other than the prosecutor. See Rule 63 of the Rules of the Superior Court ("Stenographic notes of all testimony given before any grand jury shall be taken by a court reporter, who shall be appointed by a justice of the superior court and who shall be sworn. Unless otherwise ordered by the court, the court reporter shall furnish transcripts of said notes only as required by the district attorney or attorney general.").

Best Practice No. 3

3. Prosecutor's Instructions on the Law

It is the duty of the prosecutor in appropriate circumstances to advise the grand jury of the relevant law. The prosecutor should respond to jurors' legal questions and may refer to the evidence, but should not express any opinion or views on issues of fact, participate in the deliberations or comment on or speculate concerning any matters outside the evidence.

This proposed best practice is based upon Commonwealth v. Coleman, 434 Mass. 165, 172 (2001) (stating that a prosecutor's duty "is to present the evidence, and explain the meaning of the law."). See E.B. Cypher, *Criminal Practice and Procedure* § 17.33 (4th ed. 2014) ("It is the duty of the District Attorney, in appropriate circumstances, to advise the Grand Jury of the relevant law."). Currently the prosecutor is not required to inform a grand jury of the elements of the offense (or of any lesser offenses) for which it seeks an indictment, Commonwealth v.

Noble, 429 Mass. 44,48 (1999), except in limited circumstances involving certain charges against juveniles, see Commonwealth v. Walczak, 463 Mass. 808, 809-810, 832-833 (2012), or where there is a specific request from the grand jury, see Noble, 429 Mass. at 48. However, the prosecutor retains discretion to do so in all cases where the prosecutor deems it appropriate or proper. Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989), quoting Attorney Gen. v. Pelletier, 240 Mass. 264, 307 (1922) ("A prosecutor may advise a grand jury on the law 'in appropriate instances.'"); see also Commonwealth v. Smith, 414 Mass. 437, 439-441 (1993) (approving "the prosecutor's presence at grand jury deliberations pursuant to the grand jury's request, to assist the grand jury with respect to questions they may have concerning the law").

Whether the prosecutor making the presentation also serves as the grand jury's legal advisor or whether that is a responsibility assigned to another prosecutor is a matter for the District Attorney's discretion. Cf. American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(b) (4th ed. 2015) ("Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.").

This proposed best practice is consistent with Massachusetts law concerning the prosecutor's duty to protect the independence of the grand jury. See Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 209 (1971), quoting Commonwealth v. Favulli, 352 Mass. 95, 106 (1967) ("In presenting cases to the grand jury the prosecutor and his assistants must scrupulously refrain from words or conduct that will invade the province of the grand jury or tend to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them."); Pelletier, 240 Mass. at 307-310 (explaining that a prosecutor present during grand jury deliberations "cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action.").

It is also consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(a) (4th ed. 2015) ("In presenting a matter to a criminal grand jury, and in light of its *ex parte* character, the prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-8.3 (3d ed. 2009) ("A prosecutor should take no action and should make no statements that have the potential to improperly undermine the grand jury's independence.")

It appears that the practice of giving trial jurors a written copy of the final instructions has become a matter of routine in many civil and criminal cases. Although there is no established

best practice in the context of legal instructions to the grand jury, providing written instructions to a grand jury may be useful in the context of some presentations.

Best Practice No. 4

4. The Presentation of Evidence

In presenting evidence to a grand jury, a prosecutor should:

A. Be mindful that there is a preference for direct testimony and take reasonable steps to ensure that when hearsay evidence is presented that may not be admissible at trial, it is reliable and not misleading;

B. Ensure that the grand jury is informed, either by the judge during empanelment or otherwise, that they have the right to request the production of additional witnesses or evidence if they find it material and pertinent to their consideration.

C. Be mindful that testimony that consists of answers to leading questions may treated as the "mere confirmation or denial" of an assertion posed by the questioner and thus limit any potential for the substantive use of such grand jury testimony at trial.

D. Take reasonable steps to prevent the grand jury from hearing evidence that is false, inaccurate, misleading or distorted or considering any evidence otherwise improper for the grand jury to consider.

E. Present exculpatory evidence in the possession of the prosecution (1) that would greatly undermine the credibility of an important witness, (2) that would be likely to affect the grand jury's decision or (3) where withholding it would distort the meaning of the evidence presented or seriously taint the presentation.

Section A strikes a balance between the rule expressed in Mass. R. Crim. P. 4 (c) ("An indictment shall not be dismissed on the grounds that … hearsay evidence was presented before the grand jury.") and Commonwealth v. Stevenson, 474 Mass. 372, 377-380 & n.5 (2016) ("Our affirmation of the policy that allows for indictments before the grand jury to rely solely on hearsay evidence dates back more than a century") and the nuanced prescription expressed in Commonwealth v. St. Pierre, 377 Mass. 650, 656 (1979) ("[S]ound policy dictates a preference for the use of direct testimony before grand juries."). Accord, Commonwealth v. Walczak, 463 Mass. at 845 (2012) (Spina, J., concurring in part and dissenting in part); Commonwealth v. LaVelle, 414 Mass. 146, 149 (1993); Commonwealth v. O'Dell, 392 Mass. 445, 451 n.1 (1984); Commonwealth v. Lincoln, 368 Mass. 281, 285 n.2 (1975); Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 96, n.9 (2001). It is consistent with nationally recognized standards. See National District Attorney's Association, *National Prosecution Standards*, 3d ed. (2009),

Standard 4-8.4 ("The prosecutor may present reliable hearsay evidence to the grand jury in accordance with applicable law or court rule. However, when hearsay evidence is presented, the grand jury should be informed that it is hearsay evidence."); USAM § 9-11.232 ("Each United States Attorney should be assured that hearsay evidence presented to the grand jury will be presented on its merits so that jurors are not misled into believing that the witness is giving his or her personal account.").

Section B is based upon Commonwealth v. McNary, 246 Mass. 46, 51 (1923) (although as a general principle "the grand jury, in the regular discharge of their duty, cannot admit, or hear any testimony, but such as is properly produced to them in support of the prosecution," if it appears that there are witnesses other than those produced by the prosecutor and the grand jury are "convinced that their testimony may be material and pertinent, and of such a nature as would elucidate or explain the evidence for the government, and lead them to a more perfect knowledge of the merits of the case, it is said they may require the testimony of such witnesses.") and Stevenson, 474 Mass. at 380, n.9 ("It would be helpful if the Superior Court would craft a model instruction for use by judges who are empanelling grand jurors. Among other things, the instruction could inform them that they may request the production of additional witnesses if they find it necessary to their full consideration of a case presented to them by the prosecutor."). This is consistent with *American Bar Association Criminal Justice Standards for the Prosecution Function*, Standard 3-4.6(d) (2015) ("When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury's right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.")

Section C is derived from Commonwealth v. Daye, 393 Mass. 55, 75 (1984), overruled on other grounds, Commonwealth v. Le, 444 Mass. 431 (2005), where the court explained that a grand jury statement should be admitted in evidence only if it is clear "that the statement was that of the witness, rather than the interrogator" and that judges therefore have discretion to exclude "yes" or "no" answers to leading questions posed before the grand jury. See also Commonwealth v. DePina, 476 Mass. 614, 621-622 (2017) (grand jury testimony offered substantively where witness feigned lack of memory at trial); Commonwealth v. Maldonado, 466 Mass. 742, 754-756 (2014) (grand jury testimony offered substantively where witness gave inconsistent statement at trial).

Sections D and E are based upon principles expressed in cases such as Commonwealth v. Clemmey, 447 Mass. 121, 130 (2006) ("While prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury, they must present exculpatory evidence that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury's decision, as well as evidence the withholding of which would cause the presentation to be seriously tainted"); Commonwealth v. Arroyo, 442 Mass. 135, 143 (2004)

("[W]e require that prosecutors not 'distort the meaning' of the evidence that they present by withholding certain portions of it"); Commonwealth v. Good, 409 Mass. 612, 618-620 (1991) (It was improper for the prosecutor to present a "wanted poster" for the defendant to the grand jury; "in addition to being highly inflammatory, the poster was devoid of evidentiary value"); Commonwealth v. Reddington, 395 Mass. 315, 319 (1985) ("[T]he knowing use of false testimony by the Commonwealth or one of its agents may impair the integrity of grand jury proceedings and is a ground for dismissing the indictments"); O'Dell, 392 Mass. at 448-449 ("Our affirmance of the dismissal of the indictment results from our conclusion that the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation to the grand jury of a portion of a statement attributed to the defendant without revealing that an exculpatory portion of the purported statement had been excised"); Commonwealth v. Hunt, 84 Mass. App. Ct. 643, 652-653 (2013) ("The deception inherent in the Commonwealth's failure to make a full disclosure of Fernanda's exculpatory statement was exacerbated by the prosecutor's careful scripting of Trooper Robertson's testimony to create the impression that Fernanda's identification was consistent and reliable"); and Commonwealth v. Callagy, 33 Mass. App. Ct. 85, 88 (1992) (improper for the prosecutor to inform the grand jury that a suspect had invoked his right to remain silent when confronted by the police).

Although the defendant "bears a heavy burden" to show impairment of the grand jury proceeding, LaVelle, 414 Mass. at 150, and inaccurate testimony made in good faith does not require dismissal of an indictment, dismissal is appropriate where (1) the Commonwealth knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict. Commonwealth v. Mayfield, 398 Mass. 615, 620–622 (1986). See Commonwealth v. Silva, 455 Mass. 503, 509 (2009) (citing cases).

Best Practice No. 5

5. Instructions on Lesser Offenses and/or Defenses

A. When the Commonwealth seeks to indict a juvenile for murder, the prosecutor should consider whether there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) that should be presented to the grand jury, in which case any such evidence known to the prosecutor should be presented, and the prosecutor must instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses.

B. In any other circumstances, a prosecutor should consider instructing the grand jury on the elements of lesser offenses and/or defenses as a matter of discretion, where such instructions would be in the interest of justice or would assist the

grand jurors to understand the legal significance of mitigating circumstances and defenses.

Currently, the instruction contemplated in Section A is not required except where the prosecutor seeks to indict a juvenile for murder and where substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) has been presented to the grand jury. Walczak, 463 Mass. at 810. This proposal goes somewhat beyond a literal reading of Walczak, in that it calls for the submission of evidence of substantial mitigating circumstances or defenses to the grand jury, though this obligation may be implicit in the Court's holding. See id.

Three Justices of the Supreme Judicial Court, concurring in the Walczak judgment, concluded that such instructions should be given in cases where the prosecutor seeks to indict an adult for murder as well. Id. at 837 (Gants, Botsford, & Duffly, JJ., concurring). These Justices reasoned that where the evidence of mitigating circumstances presented to the grand jury is so substantial that concealing it would impair the integrity of the grand jury, instructions on the elements of murder in the second degree and on the legal significance of the mitigating circumstances should be given. Such instructions must be given so that the grand jury can understand the legal significance of the evidence as it might pertain to the decision to indict. Id.

Conversely, three other Justices, also concurring with the judgment in Walczak but dissenting in part, rejected any requirement that the Commonwealth present evidence to the grand jury concerning mitigating circumstances or defenses. Id. at 844 (Spina, J., Ireland, C.J., & Cordy, J., concurring in part and dissenting in part). These Justices also rejected any requirement, even where a prosecutor seeks to indict a juvenile for murder, that the grand jury be instructed as to such mitigating circumstances or defenses absent a specific request from the grand jury. Id.

Section B provides that the prosecutor may instruct the grand jury on the elements of offenses that can be viewed as "lesser" than the offense for which the prosecutor seeks indictment. Section B also gives the prosecutor discretion to instruct on the significance of legal defenses that may be raised by the evidence. These proposed best practices relate to one of the core principles of constitutional separation of powers under which the prosecutor has broad discretion in deciding whether to prosecute. See Shepard v. Attorney Gen., 409 Mass. 398, 401 (1991), quoting Ames v. Attorney Gen., 332 Mass. 246, 253 (1955) ("Judicial review of decisions which are within the executive discretion of the [prosecutor] 'would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights.'"); see also Burlington v. District Attorney for the Northern Dist., 381 Mass. 717, 721 (1980) ("The virtual exclusion of judicial intervention to check or correct the district attorney [in choosing whether to prosecute] . . . follows from Part I, art. 30, of the Massachusetts Constitution declaring a separation of powers."); See also Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923) (overruled on other grounds) ("Power to

enter a nolle prosequi is absolute in the prosecuting officer from the return of the indictment up to the beginning of trial, except possibly in instances of scandalous abuse of authority.").

This best practice proposed in Section B would encourage the exercise of prosecutorial discretion to provide instructions (such as the instructions required in Section A) in cases other than those involving juveniles, where substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) has been presented to the grand jury. It would also encourage the exercise of prosecutorial discretion in cases where there may be a viable defense, such as where the target of the grand jury investigation did not retreat from an unlawful intruder in his home before resorting to self-defense. See G. L. c. 278, § 8A ("In the prosecution of a person who is an occupant of a dwelling charged with killing or injuring one who was unlawfully in said dwelling, it shall be a defense that the occupant was in his dwelling at the time of the offense and that he acted in the reasonable belief that the person unlawfully in said dwelling was about to inflict great bodily injury or death upon said occupant or upon another person lawfully in said dwelling, and that said occupant used reasonable means to defend himself or such other person lawfully in said dwelling. There shall be no duty on said occupant to retreat from such person unlawfully in said dwelling."); contra Commonwealth v. Sosa, 79 Mass. App. Ct. 106, 115-116 (2011) ("A person may not use force in self-defense until he has availed himself of all proper means to avoid physical combat."). There might be many other circumstances in which a prosecutor, exercising discretion in the interest of justice, might instruct the grand jury on alternative charging options in light of "mitigating" evidence and this proposed best practice would encourage the exercise of such discretion. Additionally, although the prosecutor "is not required to inform the jury of the elements of the offense for which it seeks an indictment or of any lesser included offenses," Noble, 429 Mass. at 48, if the grand jury request instructions, the prosecutor should provide appropriate and accurate instructions.

The committee recommends that, when a grand jury presentation includes exculpatory evidence or evidence of mitigating circumstances or defenses, individual prosecutors should consult with a supervisor to help determine whether to instruct on any lesser offense(s). Prosecutors should assess each case individually to determine whether, under the totality of the circumstances, charging the most serious, provable offense is likely to achieve justice in the individual case.

For example, in some circumstances a prosecutor may believe that charging a lesser offense is more consonant with justice, in light of the facts of the individual case, the existence of mitigating or potentially exculpatory evidence, and any potential difficulty of proving an essential element of the offense at trial. In such a scenario, the prosecutor should consider whether to present a lesser offense, in lieu of or as an alternative to a more serious proposed charge (even if the prosecutor believes that the prospective defendant is guilty of the more serious charge).

This proposed best practice acknowledges that the prosecutor's discretion goes beyond the baseline ethical requirement for seeking an indictment in the Commonwealth of Massachusetts. See Mass. R. Prof. C. 3.8(a), as appearing in 473 Mass. 1301 (2016) ("The prosecutor in a criminal case shall . . . refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists."). The National District Attorney's Association has adopted a more stringent standard that charges should be brought only if the charges "adequately encompass the accused's criminal activity and . . . [the prosecutor] reasonably believes [the charges] can be substantiated by admissible evidence at trial." National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-2.2 (3d ed. 2009). Similarly, the *United States Attorneys' Manual* states that, to indict on any charge, the prosecutor must believe that the "*admissible evidence* will probably be sufficient to sustain a conviction." USAM § 9-27.220 (emphasis added). The manual further states that, while the most serious provable charges should generally be brought, "the decision to bring such charges always should reflect an individualized assessment and should fairly reflect the defendant's criminal conduct." USAM § 9-27.300. Cf. Commonwealth v. Newton N., a juvenile, 478 Mass. 747 (2018) (prosecutors have broad discretion whether to prosecute where there may be questions concerning criminal responsibility or mental impairment; questions of criminal responsibility and mental impairment are not relevant considerations in determining probable cause).

Best Practice No. 6

6. Issues Concerning Evidence

A. Non-Presentation and Redaction of Grand Jury Exhibits

In general, when documents or other physical evidence are received pursuant to a grand jury subpoena, the prosecutor must present them to the grand jury. In limited circumstances, however, a prosecutor may find that materials were inadvertently received that would be inappropriate to present to the grand jury. Before presenting such materials to the grand jury, the prosecutor should assess the circumstances for potential prejudice to the target of the investigation as well as a breach of any statutory privilege of the target or a third party.

The prosecutor may file a motion with the presiding justice to redact certain portions of the record. In filing this motion, the prosecutor should attach a copy of the unredacted version of the document in question, along with proposed redactions for the judge to review. In order to preserve the record, the motion should also request that the original/complete document be preserved and impounded. In addition, the prosecutor should inform the grand jury in a neutral fashion that the prosecutor inadvertently received

material that the prosecutor declines to present because of its privileged nature or inapplicability to the investigation.

This best practice is based upon principles expressed in Commonwealth v. Cote, 407 Mass. 827, 829-833 (1990) and an actual practice method for handling redactions that has been identified by the committee.

Inappropriate material might be received pursuant to a grand jury subpoena when, for example, third parties produce records that contain evidence of a victim's prior sexual conduct that is protected by the rape-shield statute. See G. L. c. 233, § 21B. In the same vein, medical records obtained by way of a grand jury subpoena might arrive with an attached psychiatric record that is statutorily privileged. See G. L. c. 233, § 20B. A prosecutor in possession of such inappropriate materials should discuss the options with a supervisor and take steps to protect the privilege against an improper breach. If the prosecutor believes that evidence transmitted in response to a grand jury subpoena is subject to a privilege that has not been waived and that may prohibit its unauthorized disclosure to the grand jury, the matter should be brought to the attention of the supervising judge before the material is presented to the grand jury.

Prosecutors do not appear to have a uniform practice concerning the receipt of privileged material in response to a grand jury subpoena. At the trial level, the Dwyer protocol applies to presumptively privileged documents so that the holder of the privilege has notice and an opportunity to be heard at a hearing held pursuant to Rule 17 of the Massachusetts Rules of Criminal Procedure. See Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). When the grand jury issues a subpoena for records, no such protocol exists. See In re Grand Jury Subpoena, 411 Mass. 489, 490 (1992) (holding that the record holder must disobey the subpoena and risk contempt in order to appeal the denial of the record holder's motion to quash the subpoena; contempt order may be stayed during appeal); In re Rhode Island Grand Jury Subpoena, 414 Mass. 104, 108 (1993) (same; purpose of requiring contempt prior to appeal is to deter delay in grand jury proceedings and hiding evidence); Society of Jesus of New Eng. v. Commonwealth, 442 Mass. 1049, 1050 (2004) (same).

When the issuance of a grand jury subpoena to a lawyer may implicate the attorney-client privilege however, Massachusetts rules of professional conduct require prior judicial approval. See Mass. R. Prof. C. 3.8(e), as appearing in 473 Mass. 1301 (2016) ("The prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless . . . the prosecutor obtains prior judicial approval . . . ."); cf. American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.6(i) (4th ed. 2015) ("The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, or other witness whose testimony reasonably might be protected by a recognized privilege, without considering the

applicable law and rules of professional responsibility in the jurisdiction."); see also Preventive Med. Assocs. v. Commonwealth, 465 Mass. 810, 828-830 (2013) (holding that prosecutor's use of a taint team to review attorney-client privileged materials that were obtained pursuant to a search warrant was a "constitutionally permissible method by which to identify privileged materials and exclude them from review by members of the investigation or prosecution team").

Although the committee cannot identify a best practice, it recommends that privileged records should only be summoned to grand jury when necessary to establish probable cause or to determine the existence of exculpatory evidence. If such privileged materials are to be summoned to the grand jury, the prosecutor should consider (1) obtaining a waiver from the subject of the privileged records or (2) providing notice to the record holder and the subject of the records and to obtain judicial approval for a grand jury subpoena for privileged records to prevent the unnecessary piercing of the statutory privilege. To the extent that the privileged materials are not necessary to the grand jury investigation, access to such materials may be addressed after indictment pursuant to Rule 17 and the Dwyer protocol. Mass. R. Crim. P. 17, 378 Mass. 885 (1979); Dwyer, 448 Mass. at 145-146.

B. Viewing Exhibits

When the grand jury receives evidence in a form that requires the use of another device to access it, such as a CD or DVD, the grand jury should be provided with the means to access the evidence so provided and the prosecutor should state on the record that the grand jury has the means to review such evidence during their deliberations.

This best practice is based upon prevailing current practice and is not intended to direct the grand jury in its consideration of the evidence before it. Rather, it is only intended to make a record that the grand jury has the ability to review all of the evidence that has been presented.

C. Voluminous Evidence

If the prosecutor has received voluminous documentary material or other physical evidence for presentation to the grand jury but is not able to review the full materials before presenting them to the grand jury, the prosecutor should inform the grand jury of what portions of the materials have, and have not, been reviewed in advance by the prosecutor, and instruct the grand jury that they have the right to conduct their own independent review of the materials.

The committee is unable to identify a current consensus in actual practice concerning what to do when voluminous materials have been received and must be presented to the grand jury, even though time constraints may have prevented the prosecutor from closely reviewing all the materials in their entirety. However the committee recommends that prosecutors, whenever practicable, review all materials prior to their presentation to the grand jury. The committee further recommends that when the prosecutor is aware that voluminous materials, including but not limited to audio and visual files, presented to the grand jury contain exculpatory information, the prosecutor should "make the grand jury aware of the exculpatory needle in the evidentiary haystack." See Commonwealth vs. Kaplan, Norfolk Super. Ct., No. 1582CR00580 (Aug. 21, 2017).

APPENDIX A

Committee Members

Honorable Robert L. Ullmann, Superior Court, Chair
Honorable Peter W. Agnes, Jr., Appeals Court
Janice Bassil, Esq., Bassil & Budreau, Boston
Assistant District Attorney Paul J. Caccaviello, Berkshire County District Attorney's Office
Honorable Judd J. Carhart, Appeals Court (retired)
Assistant Attorney General David E. Clayton, Office of the Attorney General
Assistant District Attorney Kevin J. Curtin, Middlesex County District Attorney's Office
Randy Gioia, Esq., Committee for Public Counsel Services
Honorable Bertha Josephson, Superior Court (retired)
Clinical Professor Diane S. Juliar, Suffolk Law School
Assistant District Attorney Mary Lee, Bristol County District Attorney's Office
Kevin M. Mitchell, Esq., Law Office of Kevin M. Mitchell, Chelsea
Donna Jalbert Patalano, Esq., Winchester*

*Resigned from the committee prior to the issuance of the Report.

APPENDIX B

Table of Authorities

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