



# Ohio Judicial Conference

The Voice of Ohio Judges

May 5, 2017

Janet Abaray  
Judicial Branch and Administration of Justice Committee, Chair  
Ohio Constitutional Modernization Commission  
77 South High Street, 24<sup>th</sup> Floor  
Columbus, OH 43215

**RE: Grand Juries**

Dear Chairwoman Abaray,

The Ohio Judicial Conference has reviewed the Judicial Branch and Administration of Justice Committee's proposal to amend Article I, Section 10 of the Ohio Constitution to require the appointment of an independent counsel to advise the members of the grand jury and separately to provide transcripts of grand jury testimony to defendants.

### Independent Grand Jury Advisor

We have several concerns with the proposal regarding an independent grand jury advisor. The Ohio Jury Instructions, a publication of the Ohio Judicial Conference, include an instruction to the grand jury that "At any time, any grand juror, through the foreperson, may contact the court either directly or through the prosecuting attorney for additional instructions." OJI CR 301.07(6). In other words, the Ohio Jury Instructions specifically instruct a grand jury that if it has any questions regarding the law, they can call upon the judge to answer them. Independent counsel would usurp the function of an independent judiciary and could even advise the grand jury contrary to the instructions of the judge. If the proposal imagines a larger role for the independent counsel than that currently played by the judge, then it is difficult to understand how the independent counsel would give advice of an impartial nature. This proposal has been under consideration by the committee for only a short time. It is one that significantly changes the role of the independent judiciary and one that could be fraught with unintended consequences.

Additionally, it could prove difficult for small counties to find attorneys willing to fill the position of independent counsel. Such an appointment would disqualify them from representing defendants in felony cases. The expense to counties could be significant as well. As a practical matter, the independent counsel would have to be present at all times in order to advise the grand jury. This would lead to significant additional costs when an already independent judge is available to answer questions.

This proposal is a sea change in criminal justice practice in Ohio. It is one that deserves careful consideration and one that we believe should not be recommended by this body after only a few brief meetings. We urge this committee to carefully consider several things as you decide whether or not to move forward on this proposal. First, a similar change was discussed and rejected by the Supreme Court of Ohio's Task Force to

OHIO JUDICIAL CONFERENCE

65 South Front Street, 4<sup>th</sup> Floor | Columbus, OH 43215 | 614.387.9750 | 800.282.1510 | FAX 614.387.9759 | [www.ohiojudges.org](http://www.ohiojudges.org)

Examine Improvements to the Ohio Grand Jury System. Second, ingraining this change in the Constitution will prove inflexible when problems inevitably arise. Third, Ohio would be only the second state in the country to adopt such a requirement. There is wisdom in what our founding fathers adopted over 200 years ago. The fact that there have been several high profile cases recently where the outcome was not what some thought appropriate should not be the basis for changing a process that has endured since our founding.

#### Grand Jury Transcripts

The primary purpose of disclosing grand jury transcripts to the defendant is the right of the defendant to confront his accuser and to expose a witness's inconsistent statements. Both are protected under current law if a matter goes to trial.

Criminal Rule 6(E) of the Ohio Rules of Criminal Procedure states that "A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

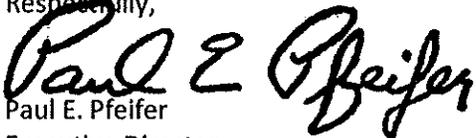
Criminal Rule 6(E) was adopted under the Supreme Court of Ohio's rulemaking authority in Article IV, Section 5 of the Constitution. This section grants the Supreme Court the authority to prescribe rules governing the practice and procedure in all courts of the state. The proposal would authorize the General Assembly to regulate the form of the record and the process for releasing any part of the record through a provision made by law. This conflicts with the Court's rulemaking authority and potentially authorizes the General Assembly to govern court procedural matters.

#### Conclusion

The Ohio Judicial Conference does not dispute that some improvements to the grand jury process may be necessary. The recommendations of the Supreme Court Task to Examine Improvements to the Ohio Grand Jury System, for example, are worthy of consideration. We do not, however, believe that the system needs to be fundamentally altered due to a few high profile cases that have come to light in the last few years. Emotional reactions to limited events rarely make for good law. Improvements to the grand jury process do not need to be constitutional in nature. They should instead include (1) education about the importance of grand jury confidentiality (i.e. witness protection, and to avoid unfounded prosecutions, damage to reputations, and premature notice to those being investigated that they may be indicted), (2) guidance about the work of grand juries, (3) implementation and integration of available technologies, (4) close monitoring by a judge to address juror concerns and accountability of outcomes, and (5) solid and proven court procedures to facilitate the work.

We thank you for your attention to these comments and urge your deliberate and careful consideration of the proposals before you.

Respectfully,

A handwritten signature in black ink that reads "Paul E. Pfeifer". The signature is written in a cursive, flowing style.

Paul E. Pfeifer  
Executive Director