

INDEPENDENT COUNSEL: IMPLEMENTATION IN HAWAIIAN COUNTIES

<u>County</u>	<u>Advisor present during entire proceeding?</u>	<u>Prosecutor present during questions?</u>	<u>Compensation?</u>	<u>Legal background of current advisor(s)?</u>	<u>How often do prosecutor and GJ advisor disagree?</u>	<u>How often is grand jury?</u>
Honolulu County	Rarely.	No.	\$900-\$1,000/day.	Former prosecutor with limited experience.	Rarely.	Three days per week from 8:30AM to 12:00PM.
Kaua'i County	Usually, but not always.	Rarely.	\$737.14/day.	Civil.	Rarely, but there are many issues with advisor's lack of criminal experience.	Once a month.
Maui County/ Molokai County	Yes.	Yes.	\$737.14/day.	Both GJ Advisors are former prosecutors and current defense attorneys.	Very rarely.	Once or twice a month depending on caseload.
Hawaii County	Yes.	Yes.	\$737.14/day	One former prosecutor. One civil attorney.	Very rarely but occurred much more frequently with prior GJ advisor.	Three times a month.

Memo

To: Sherri Bevan Walsh
From: Nora Bryan
cc: Margaret Scott, Brad Gessner, John Galonski
Date: April 17, 2017
Re: Ohio Constitutional Modernization Commission's Proposals

I. Introduction

On March 9, 2017, the judicial branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission voted to recommend changes to Article I, Section 10 of the Ohio Constitution regarding grand jury proceedings. Specifically, the Committee recommended the appointment of independent counsel to advise members of the grand jury regarding the matters before it, and a right of the accused to a transcript of the grand jury testimony of any witness who is later called to testify at trial. I will discuss the law and policy underlying Ohio's current grand jury system and the flaws inherent in the Commission's proposals.

II. Proposal 1: Right of the Accused to the Grand Jury Record

The grand jury process has a long history of commitment to secrecy in its proceedings. This commitment to secrecy has been recognized as a prerequisite to the ultimate goal of grand jury independence.

A. Public Policy

Several public policy reasons serve this strict secrecy requirement. First, publicizing the proceedings might make prospective witnesses hesitant to come forward since their identities and testimony would be known by potential defendants. Second, witnesses might be less likely to testify fully and openly if they feared public disclosure would subject them to criticism or retaliation. Third, after release of testimony, those who appeared to be likely subjects of indictment might flee. Finally, secrecy ensures that those who are accused but later exonerated do not suffer public ridicule or stigma unjustly.

These policy concerns cannot be overstated. To do away with this long-standing secrecy commitment simply because there have been a handful of questionable high-profile cases would cripple the grand jury system. Prosecutors often face an extremely delicate and challenging task in persuading witnesses to appear and testify. Many of those witnesses are often afraid for their lives and will only appear after the prosecutor assures them that the proceeding is secret and that the accused will not be present. If the transcripts of the grand jury proceedings were readily available, many witnesses may refuse to testify for fear of retaliation. Potential defendants may also collude to get their stories straight and thereby present a consistent false version of events. Practically speaking, if the transcripts of grand jury proceedings were automatically available to the accused, the result would be fewer indictments and more criminals escaping punishment for their actions.

Furthermore, providing the grand jury transcripts to the accused prior to trial would hinder long-term investigations, such as organized crime, fraud, public

corruption, or use of deadly force cases. The targets of such investigations should not discover who has testified against them. Witnesses in these cases are at an especially high risk of being subjected to outside influence intended to affect their testimony, including intimidation, bribery, and threats. This makes the proposal to provide transcripts of the grand jury proceedings in these cases to the defendant especially ironic, given that much of the outcry against the current grand jury system has been in response to these high-profile types of cases. These cases require more protection, not less. Witnesses should be able to testify before the grand jury truthfully about what they saw without fear of becoming a target of retaliation, threats, or community vitriol.

B. Screening Function of the Grand Jury

The Ohio judicial system has adhered to this tradition of grand jury secrecy so as to protect the grand jury's functions as an investigator and a screening mechanism. The Committee's recommendation that the long-held secrecy of the proceedings be opened up, and the record made available to the accused, appears to stem from a concern that the grand jury has lost its independence. Presenters before the Committee implied that prosecutors are tainting the grand jury process by over-charging some cases while under-charging others. These accusations are false and counterintuitive. Prosecutors do not gain anything from charging weak cases that they cannot win at trial or under-charging strong cases that they can win at trial.

As the Supreme Court has consistently recognized, the grand jury is accusatory, not adjudicatory. Its job is not to decide guilt or innocence. Disputes about the

evidence should be resolved at trial. The grand jury's role is simply to make certain there is probable cause to indict.

Critics argue that the grand jury is simply a rubber stamp for the prosecution. They cite to the fact that the grand jury votes to indict far more often than it decides to "no bill" a case. While this is generally true in Summit County, and the other counties in Ohio, this criticism ignores the screening function performed by the very existence of the grand jury process itself. The process requires the prosecutor to analyze a case and reflect on the evidence—which often brings out the weaknesses in the case and convinces the prosecutor not to proceed with charges. These instances are not reflected in the statistics cited by critics as proof of a rubber stamp. Indeed, the cases prosecutors most often end up presenting are those in which the prosecutor has determined that the evidence is likely to sustain a conviction beyond a reasonable doubt. It is exactly this screening role that prosecutors rely on the grand jury to perform. The fact that these cases often result in some kind of conviction demonstrates the grand jury is doing its job by ensuring the cases that make it through to indictment actually have merit.

This screening process is part and parcel of the commitment to secrecy in grand jury proceedings. To make the record available to the accused would seriously hinder the process and undermine the ultimate goal of grand jury independence.

C. Criminal Rule 6 and the Particularized Need Test

The Committee's proposal also fails to take into account that there is a current mechanism for defendants to obtain grand jury transcripts pursuant to Ohio

Criminal Rule 6(E). The test to determine whether grand jury testimony may be released under Rule 6(E) is known as the "particularized need" test. "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, 420 N.E.2d 982, paragraph two of the syllabus. A "particularized need" is shown where, from a consideration of all the surrounding circumstances, it is probable that failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness's trial testimony. *State v. Burroughs*, 165 Ohio App. 3d 172, 177, 2005-Ohio-6411, 845 N.E.2d 540 (3d Dist. Logan County 2005).

Critics often cite to the fact that the particularized need test bears a high threshold, and oftentimes courts are very strict in releasing the transcripts. This illustrates how seriously the courts take the commitment to secrecy in grand jury proceedings. If Ohio is to expand the availability of the transcripts, it should certainly not be done by constitutional amendment. Less harmful proposals should be considered, such as allowing the judge to review the transcripts *in camera* for inconsistencies after a witness testifies. If there are inconsistencies to such a degree that the judge determines would prevent the defendant from receiving a fair trial, then defense counsel could be provided a copy of the transcript. Allowing the

record to be unsealed for every witness would undermine all the public policy purposes behind the long-held tradition of grand jury secrecy.

III. Proposal 2: Independent Counsel

The Ohio Constitutional Modernization Commission's proposal to allow for independent counsel to advise the grand jury during the proceedings is modeled after a Hawaii statute that provides as follows:

The grand jury counsel shall serve, upon request of the grand jury, as independent legal counsel to the grand jury, to be at the call of the grand jury during its proceedings in obtaining appropriate advice on matters of law after the grand jury has been sworn and charged by the court * * * and during the court's absence. The grand jury counsel may be present during grand jury proceedings, and if not present in the building shall be in the immediate vicinity to the building in which the grand jury meets, so that counsel will be readily available to the grand jury, but shall not participate in the questioning of the witnesses or the prosecution. The grand jury counsel's function shall be only to receive inquiries on matters of law sought by the grand jury, conduct legal research, and provide appropriate answers of law.

Haw.Rev.Stat.Ann. 612-57.

For the following reasons, this proposal is plagued with practical and logistical issues. A solution that may work in Hawaii, a state with 1.4 million people among five counties (Franklin County and Cuyahoga County in Ohio each have over 1.2 million people alone), would not translate to Ohio, a state with 11.6 million people spread over 88 counties.

A. Existing Law Sufficiently Handles This Issue

First, there is existing law that allows for the court of common pleas to advise the grand jury when there are questions. The Summit County grand jury is provided with the following instruction:

At any time, any grand juror, through the foreperson, may contact the court either directly or through the prosecuting attorney for additional instructions. When considering the offenses for indictment, the grand jury may ask the prosecuting attorney for all possible charges that may be considered based upon the facts as the grand jury finds them.

2 OJI-CR 301.07, 2 CR Ohio Jury Instructions 301.07.

To propose an independent counsel suggests that the judge is not independent. The prosecutor advises the grand jury initially on the law. No one has a greater incentive to properly advise on the elements of the law than the prosecutor. He or she ultimately must prosecute the indictment. It would not serve the prosecutor to pursue a legally faulty indictment. In the Hawaii model, the grand jury counsel's function is to receive inquiries on matters of law, conduct legal research, and provide appropriate answers of law. These functions are already carried out by the common pleas judge. Providing independent counsel serves no benefit because the judge is more capable of performing these same functions.

B. Practical Problems

1. Lack of Statutory Clarity

First, the Hawaiian statutes the Committee plans to model this proposal after are incredibly vague and do not give sufficient guidance on the role of the independent counsel. The Hawaii State Constitution, Article I, Section 11, states:

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

This vague language is hardly clarified by statute. Haw.Rev.Stat. Ann. 612-57 attempts to explain the duties of the grand jury counsel:

The grand jury counsel shall serve, upon request of the grand jury, as independent legal counsel to the grand jury, to be at the call of the grand jury during its proceedings in obtaining appropriate advice on matters of law after the grand jury has been sworn and charged by the court under section 612-16(d) and during the court's absence. The grand jury counsel may be present during grand jury proceedings, and if not present in the building shall be in the immediate vicinity to the building in which the grand jury meets, so that counsel will be readily available to the grand jury, but shall not participate in the questioning of the witnesses or the prosecution. The grand jury counsel's function shall be only to receive inquiries on matters of law sought by the grand jury, conduct legal research, and provide appropriate answers of law.

This statute states that the grand jury counsel *may* be present during the proceedings. Professor Thaddeus Hoffmeister and Mr. Shimozono each made a presentation to the Committee in support of independent counsel in the grand jury. Their presentations revealed the problems with this lack of guidance in the statute and why the implementation of independent counsel in Ohio would be a waste of resources. Professor Hoffmeister's research indicated that independent counsel was not regularly present inside the grand jury room. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171, 1215 n.310 (2008). Mr. Shimozono also indicated in his presentation before the Committee that independent counsel is not regularly present during grand jury proceedings.

This is troubling for several reasons. First, if independent counsel is not present during the proceedings, how would he or she have a complete picture of the crimes charged and the surrounding facts to give sound advice to the grand jurors?

Without knowing the full story of the particulars of the case, the independent counsel would likely give haphazard advice that is misleading and unhelpful. Also, if the independent counsel is not present during the proceedings, he or she would likely have to wait outside of the grand jury room for hours for a question that may never come. It is unreasonable to implement this proposal when in Hawaii there are five different counties, each of which seems to utilize the independent counsel in a different manner.

Furthermore, the statute provides and Professor Hoffmeister stated in his presentation to the Committee that when the independent counsel and the prosecutor disagree on the legal interpretation given to the grand jurors, they may go to the judge to resolve the conflict. This leaves only two possibilities. If the prosecutor agrees with the independent counsel's interpretation, there is no benefit of having the independent counsel there as opposed to the prosecutor. Conversely, if the prosecutor and the independent counsel disagree the judge has to resolve the conflict pursuant to Haw.Rev.Stat. Ann. 612-60. This is the exact mechanism already used in Ohio pursuant to the Ohio jury instruction discussed above.

Hawaiian statutory authority also does not address whether the prosecutor may be present in the grand jury room when the independent counsel advises the grand jurors. In Honolulu County, the prosecutors are not allowed in the grand jury room while the grand jurors are being advised. However, a survey response from Professor Hoffmeister's own research indicates that in other counties the prosecutor is always present. If the prosecutor is not present in the jury room

when the question is asked, the State would have no opportunity to object or correct any incorrect advice that independent counsel may give. In fact, Hawaiian appeals courts have had to grapple with the issue of whether a conviction must be overturned when the responses of independent counsel are inaccurate. In *State of Hawaii v. Griffin*, 126 Hawai'i 40, 53, 266 P.3d 448, 461 (App. 2011), the independent counsel made statements regarding the facts of the case from sources outside of the record and provided answers to jurors questions that were inaccurate. A prosecutor in Honolulu County expressed that although this system has been in place since 1979, serious reservations remain because the grand jurors have received erroneous advice that has led to dismissals.

After reviewing the Committee's report and Mr. Shimozone's testimony, this office communicated with Charlene Iboshi, a retired Maui County prosecutor and a current grand jury independent advisor in Hawaii. Ms. Iboshi stated that the grand jury advisor is always present during the grand jury proceedings. Again, this highlights the lack of statutory guidance. Further investigation by our office in speaking to Prosecutor Kim of Maui County reveals an added problem when the independent counsel comes from a civil background rather than a criminal background. When the independent advisor has limited knowledge of criminal law, they often ask the prosecutor to supply them the law to advise the grand jurors. The lack of any clear statutory requirements for service has led to the independent counsel being more of a bureaucratic position than one of a legitimate independent counselor.

2. Funding

In its proposal, the Committee does not address how the independent counsel would be compensated. It is likely that the legislature would make it the responsibility of the courts of common pleas to determine compensation, which would request the funds from the county commissioners. This could be an unbearable expense for several counties, especially smaller counties whose budgets are already stretched thin. To properly fund this proposal, the budgets of other agencies in the county would likely be cut. In Hawaii, grand jury advisors are paid the same per diem rate as a retired visiting judge. In Summit County, this would result in approximately \$500 per day of added expense. Some counties in Ohio hold grand jury once a month or once a week, while other larger counties hold grand jury every day or multiple grand juries at once. Having independent counsel on standby for \$500 per day would be a massive waste of time and resources, especially when there is a lack of clarity surrounding his or her function.

Another main difference between the laws of Hawaii and the laws of Ohio is a defendant's speedy trial rights. In a situation where a prosecutor and grand jury advisor disagree on the law, they would need judicial interference. If the court is unavailable to immediately solve the issue, this could have an adverse effect on the case being presented. This creates delay far beyond our current grand jury system and affects speedy trial issues. In Ohio, a defendant must be brought to trial within 90 days if they are in jail or 270 days if they are on bond. However, in Hawaii, a defendant must be brought to trial within 180 days, whether they are in jail or on

bond. Any delays in Ohio, even a one-day delay, in presenting the case to the grand jury, would result in added jail costs to the sheriff's department and the county involved.

Additionally, these prolonged grand jury reviews will lead to a number of undesirable results. For example, in order to prevent a speedy trial issue, a defendant may have to be released on bond in order to allow the grand jury to review the case and the prosecutor to bring the case to trial within 270 days rather than 90 days. If defendants are released on bond to accommodate this prolonged review, we directly put victims at risk of retaliation or intimidation. Conversely, if a defendant is in jail, and prosecutors are required to bring him or her to trial within 90 days, the prolonged grand jury review means that prosecutors have less time on the back-end to prepare for trial. In either situation, victims' rights are compromised.

3. Who Serves as Independent Counsel?

Under the Hawaii model, the statute provides that independent counsel is appointed by the Chief Justice of the Supreme Court. However, speaking with prosecutors in the Hawaiian jurisdictions reveals that the independent counsel is actually appointed by the common pleas judges in the various jurisdictions. Independent counsel is also barred from being a "public employee." Likewise, the Committee's proposed amendment also states that independent counsel "shall not be a public employee." Unfortunately, there is little doubt that this proposal takes aim at the integrity of prosecutors. But this proposal overlooks the fact that by

barring public employees from serving as independent counsel, it also in effect bars almost all defense attorneys. State public defenders, county public defenders, and court-appointed defense attorneys as we have in Summit County are all paid with public funds. In Fayette County, for example, there are four public defenders, each of whom is contractually paid to come from out-of-county. Thus, the only "qualified" attorneys would then be those unfamiliar with criminal law. Very few if any truly qualified defense attorneys would be incentivized to abandon their day jobs to take a position as independent counsel for the grand jury. Using the state public defender's schedule, independent counsel would have to be paid a maximum of \$50.00 per hour for out-of-court services and \$60.00 per hour for in court-services in order to have competitive compensation. This is just to be *available* to the grand jurors. As discussed, these fees would be incredibly difficult for counties to fit into the budget, and it is particularly wasteful in light of the fact that the independent counsel would likely be seldom used.

Problems still arise even if a qualified defense attorney serves as independent counsel. In Hawaii, prosecutors have expressed concerns regarding the integrity of the process when defense attorneys serve as independent counsel. Situations have arisen where a defense attorney will advise the grand jurors as independent counsel, then, post-indictment, the defense attorney's friend or colleague will happen to be the defense attorney on the case, and they will discuss the case with each other. This practice, intentional or not, undermines the secrecy of the grand jury and causes a multitude of ethical concerns. Additionally, if the concern is truly

impartiality then it begs the question of why the presenters before the Committee do not address that defense attorneys are partial and often carry a specific agenda.

Finally, yet another crucial difference between the laws of Hawaii and Ohio that should be considered by the Committee is that in Hawaii there is a merit selection of judges, while in Ohio, judges are elected. In Hawaii, an independently appointed judge will determine who serves as independent counsel, but in Ohio it could be a partisan political decision. Thus, in order to properly implement this proposal, the legislature would also need to remove politics from the judiciary so judges could no longer be elected. Otherwise, a situation will undoubtedly arise where elected judges will appoint independent counsel based upon political ideology or patronage.

IV. Conclusion

These proposals are in direct response to less than a handful of highly publicized cases which do not reflect the day-to-day realities of the grand jury process in Ohio. It appears to be more of a reaction to media stories rather than fact. In reality, a prosecutor's only job is to pursue justice. Prosecutors do not gain anything by misleading the grand jurors. They are the ones who will have to carry it through indictment in order to get a conviction. To pursue these drastic proposals is a direct affront on the integrity of prosecutors and is plagued with practical problems that would seriously jeopardize the grand jury system in Ohio.

Concerns with Grand Jury Advisor Similar to Hawaii's Model

- **Cost: Added budget costs to the courts, counties and state**
- **Appointment: Political patronage violates independent intent**
- **Only one tested model in a state that is vastly dissimilar to Ohio**
- **Burden on jails**
- **Potential speedy trial effects**
- **Advisor's lack of criminal knowledge negates independence**
- **Added bureaucracy**
- **Inequalities in the system between smaller counties and larger counties**
- **Lack of qualified candidates**