

MICHIGAN CRIMINAL LAW

ANNUAL JOURNAL

Vol. I, No. 1

2002

30th Anniversary Year

The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



Readers are invited to submit articles, comments, correspondence to Karen Dunne Woodside, Editor, State Bar of Michigan Criminal Law Annual Journal, Wayne County Prosecutor's Office, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226. The publication and editing thereof are at the discretion of the Editor. A cumulative index of articles will be printed in future journals, and will be available on the Criminal Law website:

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Articles in the *Journal* may be cited by reference to the volume number, abbreviated title of publication, the appropriate page number and the year of publication as, for example, 1 Mich Bar Annual Journal 5, (2002).

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Innovative Use of Investigative Subpoena Laws By Kalamazoo County and Michigan Law Enforcement Agencies to Solve Cold-Cases

By Stuart L. Fenton, Assistant Kalamazoo County Prosecuting Attorney

Prior to January 1, 1996, there was no easy way for law enforcement authorities to force or compel an uncooperative or reluctant witness to a crime to share the information that they have with the police. Such a witness could pretty much thumb his or her nose at the criminal justice system with impunity, and there was virtually nothing that could be done about it.

I say virtually, because, Michigan does have some archaic grand jury statutes still on the books-statutes which are rarely utilized because they are cumbersome, expensive and require extensive judicial involvement.

However, in 1995, the Michigan Legislature passes the Investigational Subpoena law that became effective on January 1, 1996. This law has given prosecutors and police a tremendous new ability to solve some of the most difficult crimes, by expanding their pre-charging powers, while retaining many of the protections of the old grand jury laws, insuring both judicial scrutiny, and individual rights.

To fully appreciate the beauty of the investigative subpoena law, it is first necessary to discuss how criminal charges are filed in Michigan, and to understand a little background on the grand jury system in general, and in Michigan, specifically. The overwhelming majority of cases in Michigan are charged directly by the prosecutor's office on a complaint and warrant upon submission of a charging request from police and a police report. In essence, the prosecutor reviews the police report, and if they find the existence of probable cause, they will charge the defendant with a crime. Grand juries are not commonly utilized in Michigan. More on why this is in a moment.

The problem with this simple complaint and warrant system is often times the police are stifled in their investigation because crucial witnesses refuse to talk. This can be due to loyalty to the offender, fear of retaliation, or just general dislike of the police. For whatever reason, the inability to obtain critical witness information is a major stumbling block to solving serious crime. So, many cases are just not solved, and no warrant requests are submitted. In 1997, just prior to Kalamazoo County's creation of its "Cold-Case Homicide Team" approximately thirty-nine homicide cases remained unsolved, countywide. Other Michigan counties have many times more that number.

In contrast, several other states and the federal system utilize a grand jury system, which acts as an effective method of getting around this problem of uncooperative witnesses. Grand juries have the power to subpoena witnesses before them to testify under oath prior to any charges being filed. If the witness refuses to respond to the subpoena, or answer questions at the hearing (and has no valid privilege) they are subject to the contempt powers of the court. If they lie under oath, they are subject to the penalties of perjury. At the conclusion of the investigation, the prosecutor seeks a formal indictment from the grand jury.

In addition to the obvious benefits here with uncooperative witnesses, the advantage of this system is that the lawyers know precisely what the witnesses will later say in court because they are "locked in" to a statement under oath during the grand jury. The other main attraction of this system is that rather than one official making the crucial charging decision, it is thought that a decision made by an entire panel of citizens would be more representative of the community at-large.

Unfortunately, Michigan is not a "Grand Jury state"-that is, our statutes do not provide for a standing grand jury system that is to be routinely used in the investigation and charging of crimes. Although we do have two very specific "Grand Jury" statutes, they are unique creatures of the law, and only utilized rarely, in very special circumstances. *MCL 767.3, et seq.* authorizes the use of a "one-man grand jury"-that being a judge. Witnesses can be summoned before a judge to answer questions under oath regarding a particular crime. At the end of the investigation, the judge decides whether to return an indictment. The proceedings are held in secret, and any violation of secrecy can result in criminal punishment being imposed against the violator. This type of grand jury is typically utilized to investigate public corruption cases.

MCL 767.7b et. seq. also authorizes a "Multi-County Grand Jury" to be convened solely for the purpose of investigating crimes crossing two county borders. The attorney general, or each participating county prosecutor, must file a motion seeking permission in the Michigan Court of Appeals to convene such a multi-county grand jury. Its membership must consist of not less than 13 nor more than

17 members. Secrecy provisions also govern the multi-county grand jury. These grand juries are most commonly used to investigate drug-dealing organizations, which generally operate in several counties.

These statutory provisions are the only ones authorizing a grand jury in the state of Michigan. There are no provisions for a regular, standing grand jury by which normal crimes are to be routinely investigated and reviewed for charging and indictment. The problems with these limited provisions are numerous: judicial unavailability for lengthy investigations, costs and expenses related to a full-blown grand jury, and the simple fact that most serious crimes do not cross county lines.

Back to the original problem-absent a grand jury system, how do the police get reluctant or uncooperative witnesses to divulge critical facts that could break a serious case, such as murder, criminal sexual conduct, etc. when the witnesses are predisposed to withholding that crucial information instead?

Prior to 1996, there was no legal way to do so. Hence, to address this problem, and in recognition of the fact that current grand jury statutes were inadequate, the legislature passed what perhaps can fairly be characterized as one of the most significant investigative tools ever given to law enforcement in this state: the investigative subpoena law.

In essence, the investigative subpoena law gives prosecutors the ability to subpoena witnesses during the investigative phase of a case, prior to any charges being filed, examine them under oath, subject to the powers of contempt and perjury for failure to comply or lying under oath, all without having to convene a grand jury, and all while preserving the important constitutional rights and statutory privileges of individuals.

The investigative subpoena law is found at MCL 767A1-767A9. Prosecutors are allowed to petition any District or Circuit judge in the county where the prosecutor maintains an office or where the crime was committed for authority to subpoena certain named witnesses to investigate the commission of a specific felony. Note: the crime must be a felony, and the desired witnesses must be named in the petition (prosecutors cannot just subpoena willy-nilly whoever they want). Reasonable cause must be shown that a felony has been committed, and that the named witnesses have information about the crime. If these basic requirements are met, the judge will authorize the prosecutor to subpoena the named witnesses.

Protections for the named witnesses include a 7-day notice requirement, the right to object to the subpoena (which notice must be specified on the subpoena itself), and the right to have a lawyer present throughout the proceeding. Additionally, witnesses must be informed of the right against self-incrimination. "Use Immunity" can also be obtained for witnesses with valid 5th Amendment concerns.

One issue from the defense perspective has been that no provision exists for court-appointed attorneys. However, this is consistent with the grand jury statutes currently on the books, and also with case law, which has held that witnesses appearing before a grand jury are not deemed "in custody" for *Miranda* and court-appointed attorney purposes. The environment is not considered inherently coercive or tantamount to a police interrogation. *People v Hoffman*, 205 Mich App 1 (1994); *People v Blachura*, 59 Mich App 664 (1975).

Another concern raised by prosecutors is that the statute does not have any secrecy protections like the grand jury statutes. Grand jury secrecy was deemed critical to its success. Anyone caught disclosing grand jury information could be prosecuted for violation of the secrecy provisions. With investigative subpoenas, anyone associated with the investigation (attorneys, police, and more importantly witnesses) are hypothetically free to discuss the case with anyone they want, without consequences. Secrecy was thought paramount in grand jury investigations not only to protect the integrity of the investigation, but also to protect against name and reputation of the potential target being besmirched in the event that charges did not ultimately result from the inquiry.

Instead, the elaborate secrecy provisions associated with the grand jury laws, the only things that are confidential with investigative subpoena laws are the petition itself, petitions for immunity, and transcripts of witnesses who have been interviewed under oath. Such does not make for an ideal investigative environment, but ultimately, the advantages for having such a statute at all far outweigh some of its shortcomings.

As far as procedure, normally the petition and pleadings are filed with the District or Circuit court clerk's office, and are kept in a non-public, administrative file. They are not subject to public inspection. Normally, the interviews take place in a room in the prosecutor's office, or other professional, yet, private setting. The witness is administered the oath and the prosecutor asks questions after some preliminary admonitions are given. If the witness fails to appear or refuses to answer questions without having a valid right or privilege, the prosecutor files a motion to compel, and if the witness still refuses, they can be arrested, and/or held in contempt. The penalty for contempt is up to one year in jail and a \$10,000 fine. The witness can purge himself or herself of contempt at any time simply by complying with the subpoena. Perjury is punishable by up to 15 years in prison on a non-capital crime, and up to life on a capital case.

If a subject is ultimately charged, they are ultimately entitled to the transcript of witnesses who will testify against them at trial, any co-defendant's testimony, any exculpatory testimony, and their testimony if they gave the same.

Normally, this occurs within certain deadlines in circuit court, as provided by the statute. However, *People v Pruitt*, 229 Mich App 82 (1998) held that a district court judge has the authority to order discovery of investigative subpoena prior to the preliminary examination of: (1) the defendant's own statement; (2) accomplice's statements, and; (3) any exculpatory testimony.

The Michigan Attorney General's office has put together an indispensable manual on investigative subpoenas which discusses the law in detail, has sample forms for all the various pleadings, and also makes many good suggestions on procedures. Be sure to obtain a copy and study it thoroughly before proceeding with any investigation.

Kalamazoo County has been in the forefront of investigative subpoena utilization. In 1995, a Priority Crimes Task Force was formed, which developed a screening mechanism to decide which cases were suitable for the use of investigative subpoenas. I was fortunate enough to fill the position of the newly created Investigative Subpoena attorney for six years. In 1999, a county-wide "Cold Case Homicide Team" was created. Investigative subpoenas have been instrumental in solving and successfully prosecuting eight of the previously unsolved homicide cases and bringing important closure to the families of these victims. The oldest case solved dated back to 1975 and was twenty-five years old at the time of the long-

overdue conviction after a two-week jury trial in 2000. To date, approximately 16 cases have been investigated in Kalamazoo County with the investigative subpoena tool. Virtually all of them have resulted in subsequent charges being filed, and ultimately convictions being obtained, proving the effectiveness of the procedure.

In sum, investigative subpoenas have filled the void of ineffective, cumbersome, and costly grand jury statutes in Michigan. Given the right circumstances, they are an indispensable tool for law enforcement. The law strikes the right balance by protecting the rights of the defendants and witnesses, while providing prosecutors and police the legitimate ability to deal appropriately with the people who have valuable information about serious crimes, but would rather keep the information to themselves (usually resulting in the offender avoiding any prosecution and avoiding any responsibility for the crime).

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Notes