



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD  
THURSDAY, SEPTEMBER 8, 2016

#### **Call to Order:**

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:36 p.m.

#### **Members Present:**

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Jordan, Kurfess, Mulvihill, Sapphire, Skindell, Sykes, and Wagoner in attendance.

#### **Approval of Minutes:**

The minutes of the July 14, 2016 meeting of the committee were approved.

#### **Discussion:**

##### *Article I, Section 10 Grand Jury Process*

Chair Abaray began the meeting by noting that Nancy Brown, director and advocacy committee chair for the Ohio League of Women Voters, who had attended many of the committee's meetings, has moved out of state. Chair Abaray acknowledged the service of Ms. Brown, saying she would be missed.

Chair Abaray announced that the committee would be continuing its discussion of the grand jury process, specifically, whether to recommend any changes to Article I, Section 10.

Committee member Richard Sapphire asked whether Professor Thaddeus Hoffmeister of the University of Dayton College of Law, who was present to assist the committee, could clarify some aspects of the grand jury procedure.

Professor Hoffmeister said the right to a grand jury hearing in the United States Constitution is one of the few rights that have not been incorporated in the states, noting a majority of states do not have a grand jury, with some states allowing the prosecutor to file an information. Professor Hoffmeister said an information is the equivalent of a criminal complaint. He said, in Ohio, the citizen has right to a grand jury hearing unless he has already been indicted.

Describing the preliminary hearing process, Professor Hoffmeister said in that setting the accused is entitled to have counsel present and has an opportunity to cross-examine prosecution witnesses and put on witnesses in his own defense. Professor Hoffmeister said the grand jury was conceived as a way to buffer the citizen from the government and to have community conscience in the criminal justice process. He said the issue is important today because so often criminal cases do not go to trial. He said using a grand jury is one of the few examples of how the community can be involved in the process. He said a big difference between a grand jury hearing and a preliminary hearing is that the preliminary hearing is presided over by a judge, and is open to the public and is adversarial, while the grand jury process involves the community and is closed.

Mr. Saphire asked whether an individual who is arrested and charged has a right to proceed by preliminary hearing and waive the grand jury. Professor Hoffmeister said a person who is already indicted has lost the right to a preliminary hearing.

Mr. Saphire asked whether someone who has not been charged but has been notified they are under investigation can insist that there be a grand jury in order to proceed. Professor Hoffmeister answered that the government is always going to have to get an indictment absent a waiver by the defendant of the grand jury. He added that, if the prosecution does not indict within ten days of charging there has to be a grand jury unless it is waived. He said a preliminary hearing is very rapid fire, adding there is benefit to the defense and the prosecution to have the preliminary hearing, especially if it is a sensitive case, because it lets people see the evidence. He said a preliminary hearing can facilitate a plea bargain.

Committee member Charles Kurfess asked what the issue is before the court at the preliminary hearing. Professor Hoffmeister said the question is whether there is probable cause for the charge to go forward.

Mr. Kurfess asked if the court makes a ruling, and what alternatives are available to the court at the preliminary hearing. Professor Hoffmeister said the court does make a ruling, and there are a number of alternatives available, including finding probable cause and, if the hearing is in municipal court, binding the person over for trial in common pleas court.

Professor Hoffmeister continued that most states use preliminary hearings, some use the grand jury, and some allow the filing of an information, but even there a judge is required to agree there is probable cause. He commented that “by waiving a grand jury you are agreeing there is a true bill.”

Mr. Saphire wondered whether an accused who waives the grand jury submits to indictment. Professor Hoffmeister said the accused who waives under the federal system improves his

position for sentencing. He said the more an accused can show he cooperated, the better his sentencing is likely to go.

Mr. Sapphire asked whether, by waiving his right to grand jury, the defendant is incriminating himself. Professor Hoffmeister said he would not go that far, saying the defendant is strategically deciding what rights he will exercise that are going to benefit him at the end of the day. He added, "If you go to trial they will impose a 'trial tax'."

Mr. Sapphire said he is less inclined to believe the grand jury has any value to a defendant. Professor Hoffmeister commented that it does have value if the grand jury truly operates as it has historically, but if a defense attorney advises the client he is likely to be indicted, the defendant is likely to waive. He said that is the scenario if there is only one attorney in the room, because the prosecutor is the only person in the room and there is less pressure to present a compelling case.

Committee member Dennis Mulvihill asked how often the prosecutor recommends a particular indictment rather than leaving the question open-ended. Professor Hoffmeister answered that one of the challenges is a lack of data on that question. He said, outside Hawaii, he does not know how many jurisdictions allow another attorney to be present. He said it may depend on the prosecutor and how strictly the prosecutor follows the rules. He added the prosecutors are much more hands-on than just allowing the grand jury to consider the question alone. He said the prosecutor gives direction, guiding the jurors because there is no one else they can turn to.

Chair Abaray then recognized Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, who was available via telephonic conference call to answer the committee's questions on the grand jury process in his state.

Mr. Sapphire asked Mr. Shimozono how he would characterize the relationship between the prosecutor and the grand jury legal advisor, wondering whether, if jurors pose a question to the prosecutor and are not satisfied with the answer, they can pose the same question to the advisor.

Mr. Shimozono said the relationship is generally professional and cordial. As a legal advisor to the grand jury, he said he recognizes that he has to wear a different hat than he does when he is defending. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. He said, in his experience, the relationship has never been antagonistic, and that prosecutors recognize he is not there to influence the jury's decision.

Mr. Sapphire asked how the grand jury advisor would handle a question that already had been asked of the prosecutor. Mr. Shimozono said he has not been in that situation, and that, for the most part, the jury does not really question the prosecutor but rather questions the witnesses. He said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. He said he has had jurors say afterward they wish the prosecutor had done a better job but they are not telling the prosecutor that.

Judge Patrick Fischer asked if there an attorney-client relationship between the legal advisor and the grand jury. Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional

sense. He noted an attorney-client relationship encompasses a broad range of considerations; for instance, there can be a conflict of interest if the grand jury legal advisor is later asked to represent one of the jurors in a legal proceeding.

Judge Fischer followed up, asking whether the legal advisor owes a duty to the grand jury or to the target of the investigation. Mr. Shimozone said the duty is owed to the jurors and not to the defendant. Judge Fischer wondered who has standing to object if the prosecutor interferes with the legal advisor's access to the grand jury. Mr. Shimozone said he would expect the jurors would notify the legal advisor that they wanted to ask a question but were not allowed. He said, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened. Judge Fischer asked to whom the legal advisor owes a constitutional duty, to which Mr. Shimozone replied it is not specifically to the defendant but rather to the grand jury.

Committee member Mark Wagoner asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment. Mr. Shimozone said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, the defense could file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Mr. Mulvihill asked if it is automatic for the defendant to get access to a transcript of the grand jury hearing. Mr. Shimozone said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Mr. Mulvihill noted that, in Ohio, the defendant is not entitled to grand jury testimony unless he can show grounds exist for dismissal of the indictment, a rule that seems impossible because it requires the defendant to show something happened when, without access to a transcript, it is impossible to know what happened. Mr. Shimozone remarked that he saw that Ohio rule and was surprised by it.

Mr. Mulvihill asked how frequently Mr. Shimozone uses the grand jury transcript to impeach a prosecution witness who may have changed his story. Mr. Shimozone said the transcript is a tremendous asset to the defense because any time a person gives a version of the facts he will not give the exact same version each time. So, he continued, that is a useful tool for the defense. He said "Not only are we looking to see if there is anything wrong with what was presented, but just knowing what was presented is a tremendous benefit to the defense." He added, if the prosecutor has the benefit of knowing what was presented to the grand jury, the defense also should know.

Mr. Mulvihill asked whether the legal advisor gets a transcript of the grand jury's deliberation. Mr. Shimozone said the legal advisor is only allowed to see the presentation of witnesses and questions by the grand jury to the witnesses and to grand jury counsel. He said the deliberations are not recorded.

Chair Abaray asked if the transcript is free. Mr. Shimozone said there is a charge but if the defendant is indigent, the public defender's office will pay for the transcript. He said the reason there is a cost is that the court reporter must be paid. He said this can be costly, so what defense counsel often does is get a copy of the recording of the hearing and then only request the key parts.

Chair Abaray asked whether the legal advisor is immune for actions taken during grand jury proceedings. Mr. Shimozone said he would believe so, but has not been told that specifically. He said legal advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said he is not aware that the issue has been raised. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Mr. Saphire asked whether the duties and responsibilities of the legal advisor are set out in statutes or court rule. Mr. Shimozone said they are set out in statute, and also court rule. He said grand jury legal advisors receive a binder with information about the process, setting forth the powers of the grand jury, Hawaii rules of penal procedure, the duties of the legal advisor, related case law, and procedural rules, as well as a copy of the constitutional provision and statutory references to the grand jury legal advisor.

Mr. Saphire asked how many separate criminal jurisdictions exist in Hawaii, noting that Ohio has 88 counties, each with a separate common pleas court. Mr. Saphire wondered how Mr. Shimozone might structure a grand jury legal advisor system in a state with that many jurisdictions. Mr. Shimozone said Hawaii has five circuits, each with its own criminal administrative judge, and that judge selects the counsel. He said he would assume if there are 88 districts and all are separate, then each would have its own judge and each would have its own legal advisor. He said the chief justice of the Hawaii Supreme Court relies on the recommendation of the criminal administrative judge when he appoints.

Chair Abaray asked whether Mr. Shimozone has information on what prompted Hawaii to put this in the constitution, and whether the system is viewed as being effective. Mr. Shimozone said he does not know about the history of the provision, although he speculated that it is because Hawaii has a very strong interest in privacy and due process, and so has a more liberal constitution. He said the state expands privacy rights where the federal law is the floor.

As far as the effectiveness of the system, Mr. Shimozone said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Chair Abaray noted an issue in Ohio concerns the secrecy of the process, with some distrusting the grand jury because they believe the prosecutor is steering the results. She asked whether having the grand jury legal advisor in Hawaii has helped create more confidence. Mr. Shimozone said he thinks it helps but he is not sure because they have not done it any other way. He said he

is not sure the general public in Hawaii even knows there is a grand jury legal advisor present, and that they have not had a lot of high profile cases.

Professor Hoffmeister asked Mr. Shimozono whether, if Mr. Shimozono were advising a jurisdiction about adopting the system, whether he would recommend they do it exactly like Hawaii or whether he would recommend some changes. Mr. Shimozono said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

John Murphy, executive director of the Ohio Prosecuting Attorneys Association, who was in the audience, asked Mr. Shimozono whether jurors ask questions of the witnesses. Mr. Shimozono said jurors will do this, although the practice is not extensive.

Mr. Murphy said the prosecutor is in the room and does a basic examination of witnesses, suggesting that, in Ohio, it is the prosecutor's function to explain the law. Mr. Shimozono explained that, in Hawaii, the prosecutor gives jurors a sheet of paper that has the charge on it, without much detail. Then, he said, the prosecutor puts on evidence. But, he added, the prosecutor does not explain the law. He said, in some cases, the law is straightforward so there is not much to explain. Usually, the role of the legal advisor is to explain a legal phrase that the jury does not understand. He said many times, if not most times, the legal advisor does not get asked any questions. He said, in four out of five sessions he may not get a single question.

There being no further questions for Mr. Shimozono, Chair Abaray thanked him for his time.

Chair Abaray then requested staff to provide the committee with the Hawaii constitutional provision regarding the grand jury legal advisor so that the committee might consider it. Mr. Saphire added the committee would benefit from taking a close look at the current content of Article I, Section 10.

**Adjournment:**

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

**Approval:**

The minutes of the September 8, 2016 meeting of the Judicial Branch and Administration of Justice Committee were approved at the November 10, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray  
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer  
Judge Patrick F. Fischer, Vice-chair