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GRAND JURY SECRECY—TIME FOR A REEVALUATION*

WILLIAM B. LYTTON**

The federal grand jury is a place and a process of secrecy. This secrecy protects innocent individuals from disclosure of the fact that they may be under investigation. It protects witnesses from being pressured or threatened by potential defendants. It protects the government's interest in being able to conduct undercover investigations. As the case law has developed, however, secrecy has become an end unto itself, with the result that entirely legitimate efforts to use or discover matters that have occurred before the grand jury are blocked, at a great cost to individual litigants and the government. There needs to be a reexamination of the rule of secrecy—its statutory foundation and its decisional development—in order that the rule does not become an end unto itself, rather than merely a means to obtain a result.

THE RULE OF SECRECY

Federal Rule of Criminal Procedure 6(e)(2) states the general rule of secrecy:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure [of matters occurring before the grand jury] is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

The commonly cited reasons for this rule of secrecy were stated by the Supreme Court in *United States v. Proctor & Gamble*:

- [1] to prevent the escape of those whose indictment may be contemplated;
- [2] to insure the utmost freedom to the grand jury in its deliberations,

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and to prevent persons subject to indictment or their friends from importuning the grand jurors;

[3] to prevent subornation of perjury or tampering with the witness who may testify before the grand jury and later appear at the trial of those indicted by it;

[4] to encourage free untrammelled disclosure by persons who have information with respect to the commission of crimes;

[5] to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.¹

This formulation of the reasons for secrecy is frequently cited by lower courts² and has been reaffirmed by the Supreme Court.³

Thus, the presumption of both statutory and case law, and based upon "deeply rooted traditions", is that all grand jury proceedings are secret. No disclosure of grand jury information may be made unless such disclosure is authorized specifically by one of the five exceptions specified in Federal Rule of Criminal Procedure 6(e)(3), and the case law interpreting the rule. In those situations where a disclosure would be within Rule 6 but at odds with *Proctor & Gamble*, some courts have been willing to accept the argument that the common law rule of secrecy is broader than the statutory rule of secrecy.⁴

The rule of secrecy applies to everyone in the grand jury and all who have access to grand jury information, except the witness. Federal Rule of Criminal Procedure 6(e)(2) provides that, "No obligation of secrecy may be imposed on any person except in accordance with this rule." Because the rule of secrecy specifically applies to everyone else in the grand jury room except the witness, witnesses are free to say whatever they like about what did or did not occur before the grand jury.⁵

¹ 356 U.S. 677, 681 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954)).

² See, e.g., *In re Disclosure of Evidence*, 650 F.2d 599, 601 (4th Cir. 1981); *Securities & Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980); *United States v. Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980).

³ *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 572-73 (1983) ("But the rule [of secrecy] is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exercised such a power [to modify the rule of secrecy] without affirmatively expressing its intent to do so."); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized.").

⁴ See *In re Special Grand Jury (Anchorage Alaska)*, 674 F.2d 778, 781-82 (9th Cir. 1982); *In re Search Warrant for Second Floor Bedroom*, 489 F.Supp. 207, 211-12 (D. R.I. 1980).

⁵ The Advisory Committee on Rules noted that "[t]he rule does not impose any obligation of secrecy on witnesses. . . . The seal of secrecy on witnesses seems an un-

The need for secrecy may diminish with the passage of time or the occurrence of other circumstances. For instance, the witnesses themselves may act in such a way as to waive whatever interest they might have had in the continued secrecy of their grand jury testimony. The witnesses who seek to disclose publicly the transcripts of their own testimony,⁶ or waive the right to keep their testimony secret,⁷ may prompt a court to allow disclosure where otherwise it would not.⁸

WHO MAY BE PRESENT IN THE GRAND JURY

The secrecy of the grand jury initially is insured by the limitation on who may be present in the grand jury room. Federal Rule of Criminal Procedure 6(d) provides:

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

"Attorney for the government" is a term which is specifically defined to include only "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney."⁹ As discussed below, when used in connection with the grand jury, "attorney for the government" includes only federal prosecutors.

The witness is obviously the person under oath providing testimony to the grand jury room. No one may accompany him as he testifies. For instance, if a dangerous witness who is in custody is going to testify before the grand jury, no guards can be present in the grand jury room to provide security. Instead, the guards would have to bring the prisoner in while the grand jury was in recess, shackle, restrain or otherwise immobilize the witness, and then leave the room during the witness' examination.

The witness' attorney may not be present in the grand jury.¹⁰ The attorney, however, can be immediately outside the grand jury

necessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." FED. R. CRIM. P. 6(e)(2) advisory committee note. See also *In re Biaggi* 478 F.2d 489 (2d Cir. 1973).

⁶ *In re Biaggi*, 478 F.2d at 493.

⁷ *In re Application of Executive Securities Corp.*, 702 F.2d 406, 409 (2d Cir. 1983), cert. denied, — U.S. —, 104 S. Ct. 78 (1983).

⁸ See *Dennis v. United States*, 384 U.S. 855, 871-72 n.17 (1966).

⁹ FED. R. CRIM. P. 54(c); 28 U.S.C. § 515(a) (1976); 28 U.S.C. § 543(a) (1976).

¹⁰ *United States v. Mandujano*, 425 U.S. 564, 581 (1976). For a review of the arguments in favor of excluding a witness' attorney from the grand jury, see Silbert, *Defense*

room. The witness may consult with counsel at any time during the witness' examination before the grand jury. Indeed, a witness may consult with counsel after each question that is asked and before the witness offers an answer. When confronted with a prosecutor's complaint that such frequent consultations are delaying and obstructing the grand jury proceeding, judges rarely impose limitations on the frequency or duration of such consultations between the grand jury witness and the witness' counsel.¹¹

Where an interpreter is required, certain procedures must be followed. The interpreter must be selected from a list of certified interpreters maintained by the district court clerk.¹² The district court may also specially designate an interpreter to serve before the grand jury.¹³ Once an interpreter has been properly selected, the interpreter needs to be sworn by the foreperson to translate accurately and to keep the proceedings secret.

The stenographer who transcribes grand jury sessions is usually under contract with the U.S. Attorney's office. At the beginning of each session of the grand jury, the stenographer should be sworn by the foreperson to report the proceedings accurately and to keep the proceeding secret. The stenographer is responsible for preparing a complete record of all the proceedings before the grand jury, except the deliberations of or voting by the grand jury.¹⁴ Thus, every word said while the grand jury is in session, except during deliberations or voting, must be recorded. This includes the testimony of the witnesses, the questions asked of the witnesses by either the prosecutors or grand jurors, any statements by the prosecutor to the grand jury when no witness is present, and any colloquy among the grand jurors and the prosecutor. No transcript may be prepared from

Counsel in the Grand Jury — the Answer to the White Collar Criminal's Prayers, 15 AM. CRIM. L. REV. 293 (1978).

For a review of the arguments in favor of permitting the witness' attorney to be present in the grand jury with the witness, see Hixson, *Bringing Down the Curtain on the Absurd Drama of Entrances and Exits — Witness Representation in the Grand Jury Room*, 15 AM. CRIM. L. REV. 307 (1978).

The American Bar Association has taken the position that a witness' counsel should be allowed to be present in the grand jury room during the questioning of his own client. *American Bar Association, Report to the House of Delegates Section of Criminal Justice: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) at 160-62 (policy on grand jury reform of the ABA Section of Criminal Justice).

¹¹ *But see* United States v. Soto, 574 F.Supp. 986 (D. Conn. 1983).

¹² 28 U.S.C. § 1827 (1976). *See* United States Attorney's Manual ["USAM"] § 9-11.355 (1984).

¹³ FED. R. CRIM. P. 28.

¹⁴ FED. R. CRIM. P. 6(e)(1).

these recordings, except as otherwise required by statute¹⁵ or court order.¹⁶ The testimony of witnesses is routinely transcribed.

The record prepared by the stenographer, including any transcripts, must remain in the custody of the attorney for the government unless otherwise ordered by the court in a particular case.¹⁷ The U.S. Attorney's office normally designates the stenographer to be the agent of the government for purposes of maintaining custody of the original stenographer's record. The prosecutor will usually keep custody of all transcripts. If all or part of the proceedings before a grand jury is not recorded as a result of an unintentional failure of a recording device, the validity of the indictment is not affected.¹⁸ Finally, while the grand jury is deliberating or voting on a proposed indictment, no one other than the grand jurors may be present.

"MATTERS OCCURRING BEFORE THE GRAND JURY"

The rule of secrecy applies only to "matters occurring before the grand jury."¹⁹ Therefore, any disclosure of information that is not a matter occurring before the grand jury does not involve Rule 6, the rule of secrecy or any of the five exceptions to the rule of secrecy. Unfortunately, what is and what is not a matter occurring before the grand jury is murky at best.

The purpose of the Rule 6(e) is to prevent disclosure of the essence of what takes place in the grand jury room, what the grand jury is doing, who it is questioning, what questions it is asking, what evidence it is receiving, what targets are being investigated, and what crimes might be charged.²⁰ The disclosure of such information would jeopardize those interests that the rule of secrecy is designed to protect.²¹

¹⁵ See, e.g., 18 U.S.C. § 3500 (1976).

¹⁶ The court may order that a transcript be prepared in connection with a defendant's request upon a showing that grounds may exist to dismiss the indictment because of matters occurring before the grand jury, pursuant to FED. R. CRIM. P. 6(e)(3)(C)(ii).

¹⁷ FED. R. CRIM. P. 6(e)(1).

¹⁸ FED. R. CRIM. P. 6(e)(1). However, it might affect the ability of a witness whose grand jury testimony was not recorded to testify at trial if a court should find a violation of 18 U.S.C. § 3500 and FED. R. CRIM. P. 26.2.

¹⁹ See FED. R. CRIM. P. 6(e)(2).

²⁰ See *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 869 (D.C. Cir. 1981); *In re Grand Jury Investigation* (New Jersey State Commission of Investigation), 630 F.2d 996, 1000 (3rd Cir. 1980), cert. denied, 449 U.S. 1081 (1981); *In re Grand Jury Investigation* (Lance), 610 F.2d 202, 216-17 (5th Cir. 1980); *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1302-03 (M.D. Fla. 1977).

²¹ *United States v. Proctor & Gamble*, 356 U.S. 677, 681 n.6 (1958).

With this in mind, it is obvious that what is protected goes beyond the mere words said in the grand jury to include anything that would tend to disclose what it is that the grand jury is doing.²² Where grand jury information is disclosed in general terms, however, without the information being identified as having come from the grand jury, such disclosure may be sufficiently insulated from the grand jury so as not to be regarded as the disclosure of "matters occurring before the grand jury."²³

The transcripts of a witness' testimony before the grand jury, the transcripts of statements by a prosecutor, or the prosecutor's colloquies with the grand jury outside the presence of any witness, are most clearly "matters occurring before the grand jury," and are thus subject to the rule of secrecy.

A statement to a law enforcement agent or prosecutor by a person subpoenaed by the grand jury, however, presents a separate problem. In *In re the Special February 1975 Grand Jury (Baggot)*,²⁴ Baggot was subpoenaed by the grand jury investigating fraud involving the Commodities Futures Trading Commission (CFTC). He contacted the prosecutor and met with the prosecutor in the offices of the U.S. Attorney. Thereafter, the prosecutor prepared a memorandum of his discussion with Baggot. Later, Baggot testified before the grand jury, was indicted for fraud and pled guilty. The government thereafter sought to disclose to the Internal Revenue Service (IRS) some of the physical evidence gathered during the investigation, along with the memorandum by the prosecutor of his office interview with Baggot, so that the IRS could proceed in a civil context to assess and collect the additional tax owed by Baggot as a result of the fraud. The Seventh Circuit held that the prosecutor's memorandum of his interview in his office with Baggot was a "matter occurring before the grand jury" and subject to the rule of secrecy.²⁵ Thus, evidence clearly relevant to the IRS' tax collection function, gathered in an investigation in which the taxpayer pled guilty to fraud, was denied to the IRS.

The Third Circuit has recognized that a federal police investigation usually precedes or compliments a grand jury investigation. In such a police investigation, witnesses are routinely interviewed by

²² *United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979).

²³ *United States v. Bazzano*, 570 F.2d 1120, 1125 (3rd Cir.), *cert. denied*, 436 U.S. 917 (1977).

²⁴ 662 F.2d 1232 (7th Cir. 1981) [hereinafter cited as *In re Baggot*]. This case was decided by the Supreme Court on issues other than the proper definition of "matters occurring before the grand jury." *United States v. Baggot*, 450 U.S. 817 (1983).

²⁵ *In re Baggot*, 662 F.2d at 1238.

federal agents who make written summaries of the interviews.²⁶ The summary of an interview by a federal agent with a person who also testifies before the grand jury is not thereby automatically and necessarily transformed into a matter occurring before the grand jury.²⁷ If the summary of the interview is itself read at a later time to the grand jury, however, the Third Circuit has suggested that the summary itself, as well as the transcript of the reading of the summary are matters occurring before the grand jury.²⁸

Thus, the statement of a grand jury witness, taken outside of the grand jury, is potentially an item covered by the rule of secrecy. Its disclosure without court approval, given the current consensus by the courts, is done at the prosecutor's peril. In addition, documents created for the use of the grand jury that summarize testimony or other evidence before the grand jury reveal what occurs before the grand jury, and are thus covered by the rule of secrecy.

The more difficult problem is presented by the proposed disclosure of documents subpoenaed by the grand jury. A request for the disclosure of all documents subpoenaed by the grand jury presents the risk that such disclosure would reveal what the grand jury was doing. Thus, it would be allowable only pursuant to one of the five specified exceptions. But, where a request is made for the disclosure of discrete documents that have been subpoenaed by the grand jury, the issue once again becomes rather complex.

The prevailing view among the courts has been that when documents are sought to be disclosed for their own sake or their own intrinsic value, rather than to learn what occurred before the grand jury, the rule of secrecy is not implicated.²⁹ But in the *In re Baggot* case before the Seventh Circuit,³⁰ the court ruled without comment that third-party business records subpoenaed by the grand jury,

²⁶ Such summaries prepared by agents of the FBI are commonly referred to as "302s" because they are typed on federal form "FD302."

²⁷ *In re Grand Jury Matter* (Catania), 682 F.2d 61 (3rd Cir. 1982).

²⁸ *In re Grand Jury Matter* (Garden Court Nursing Home, Inc.), 697 F.2d 511 (3rd Cir. 1982).

²⁹ *In re Grand Jury Investigation* (New Jersey State Commission of Investigation), 630 F.2d 996, 1000 (3rd Cir. 1980); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382-83 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980); *Stanford*, 589 F.2d at 291; *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 209-10 (D. R.I. 1980); *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1303 (M.D. Fla. 1977); *Capital Indemnity Corp. v. First Minnesota Construction Co.*, 405 F.Supp. 929, 931 (D. Mass. 1975); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 729, 734 (N.D. Ill. 1962); *Davis v. Romney*, 55 F.R.D. 337, 341 (E.D. Pa. 1972); *In re Hearings Before the Committee on Banking and Currency*, 19 F.R.D. 410, 412 (N.D. Ill. 1956).

³⁰ 662 F.2d 1232 (7th Cir. 1981).

even though sought for their intrinsic value, were subject to grand jury secrecy.³¹

The conflicting theories of how to deal with the issue of whether such documents are subject to the rule of secrecy were summarized in *In re John Doe Grand Jury Proceedings*.³² The court concluded that there were four approaches. First, subpoenaed documents are never subject to Rule 6(e)'s limitations.³³ Second, the disclosure of documents subpoenaed by a grand jury is always subject to the restrictions of Rule 6(e).³⁴ Third, documents that are sought for their own "intrinsic value in the furtherance of a lawful investigation" are not subject to the secrecy provisions of Rule 6(e), the so-called "purpose test."³⁵ Fourth, a court must determine on an individual case basis whether the "release of the documents will disclose some secret aspect of matters occurring before the grand jury. If such disclosure will occur, the court must then determine if one of the exceptions to the general rule of grand jury secrecy embodied in Rule 6(e) is applicable. If such disclosure will not occur, then the documents may be released to any party having a legal right to their production."³⁶ This discussion neatly highlights the lack of uniformity on the part of courts in dealing with requests for disclosure of documents subpoenaed by the grand jury.

Presently pending before Congress is an amendment to Rule 6(e) that would make anything subpoenaed by a grand jury subject to grand jury secrecy.³⁷ Although this proposed amendment may be the cleanest and easiest resolution of the problem, it lacks the common sense approach that the district court in Rhode Island identified as the fourth approach.

FIRST EXCEPTION: DISCLOSURE TO A FEDERAL PROSECUTOR

Federal Rule of Criminal Procedure 6(e)(3)(A)(i) permits disclosure to "an attorney for the government for use in the performance of such attorney's duty."

Normally, an Assistant United States Attorney will be the person who, is most familiar with what the grand jury is doing. There

³¹ This was a 2-1 decision with a vigorous dissent that claimed that the majority opinion ignored and contradicted the prevailing rule. *Id.* at 1245. One member of the majority in that case was the Chief Judge of the U.S. Court of Customs and Patent Appeals, sitting by designation. *Id.* at 1233.

³² 537 F. Supp. 1038 (D. R.I. 1982).

³³ *Id.* at 1043.

³⁴ *Id.*

³⁵ *Id.* at 1044.

³⁶ *Id.* The court adopted the fourth approach.

³⁷ FED. R. CRIM. P. 6(e)(3)(c)(iv).

are also many situations in which lawyers from the Criminal Division of the U.S. Department of Justice will participate in federal grand jury investigations. Typically, these attorneys will be members of a "Strike Force."³⁸ Such an attorney must be specifically authorized by the Attorney General, or his designee, to conduct grand jury proceedings before the attorney can be considered an "authorized assistant of the Attorney General."³⁹ This is accomplished by an appointment letter from the Attorney General, or his designee, to the attorney. Likewise, attorneys from the Department of Justice's Antitrust Division are assigned to regional offices where they conduct criminal investigations using the federal grand jury in the particular federal district.

An Assistant U.S. Attorney is appointed by the Attorney General to serve in a specific federal district. Similarly, a Criminal Division or Antitrust Division attorney is authorized to assist the Attorney General in one or more specified federal districts.⁴⁰ If an Assistant United States Attorney, an Antitrust Division attorney or Criminal Division attorney wants to conduct a grand jury investigation in a federal district other than those in which he has been specifically authorized to act, the attorney must then receive a new and specific authorization to appear before the grand jury in such other federal district.⁴¹

The Department of Justice and the offices of the United States Attorneys have many attorneys whose duties do not relate to the enforcement of the federal criminal statutes. These attorneys, with duties that relate exclusively to the civil law as opposed to criminal law, are not included within this first exception.⁴² In deciding this issue, the Supreme Court in *United States v. Sells Engineering*, cited three problems that would arise from a contrary holding. First, disclosure to other than federal prosecutors increases the number of people with access to grand jury information.⁴³ As a result, not only is the possibility of a "leak" increased, but witnesses may be more reluctant to testify fully and candidly if they know their testimony

³⁸ See *United States v. Zuber*, 528 F.2d 981, 982 (9th Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *In re Persico*, 522 F.2d 41, 60 (2d Cir. 1975).

³⁹ *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 431 n.12 (1983).

⁴⁰ Strike Force attorneys are usually assigned to cover a geographic area that includes more than one federal district.

⁴¹ See *United States v. Prueitt*, 540 F.2d 995, 999-1003 (9th Cir.), *cert. denied*, 429 U.S. 1063 (1976); *In re Persico*, 522 F.2d 41, 46 (2d Cir. 1975); *United States v. Wrigley*, 520 F.2d 362, 367 (8th Cir.), *cert. denied*, 423 U.S. 987 (1975).

⁴² *Sells Engineering*, 463 U.S. at 427.

⁴³ *Id.* at 432.

will be routinely available for use in governmental civil litigation or administrative action. Second, a contrary holding would pose a potential for misuse because prosecutors might be tempted to use the power of the grand jury to obtain evidence useful in a civil lawsuit.⁴⁴ Such an abuse would be very difficult to detect and prove. Third, it would be unfair for government attorneys in civil litigation to have the advantage of using the grand jury as an *ex parte* form of civil discovery unavailable to other litigants.⁴⁵

An unresolved issue is whether an attorney for the Department of Justice who has properly received grand jury information in his role as a prosecutor can then use that information in the civil phase of the case.⁴⁶ The same concerns that prompted the decision in the *Sells Engineering* case, however, would suggest that such a situation, at the very least, is one that involves a serious risk for the government. The problem is a practical one because in many United States Attorney's offices, attorneys have both criminal law and civil law responsibilities.

Attorneys employed by the federal government in departments or agencies other than the Department of Justice are not included in the first exception unless and until they have been designated and sworn in as Special Assistants to the United States Attorney, or are otherwise made authorized assistants of the Attorney General.⁴⁷ Once so designated, these federal attorneys can participate fully in a grand jury investigation as an "attorney for the government," as defined in Federal Rule of Civil Procedure 54(c).⁴⁸

Where a federal grand jury investigation involves, for example, false statements to a federal agency, and the expertise of that agency's attorney is necessary to aid the investigation, agency attorneys are often made Special Assistants to the United States Attorney. Such specially designated agency attorneys, however, may not thereafter disclose grand jury information within their own agency unless such disclosure is specifically authorized under the rule. Where an agency issues regulations or initiates civil or administrative proceedings, and an agency attorney who had access to relevant grand jury information participates in that process, there is a risk that such participation violates the rule of secrecy.⁴⁹

⁴⁴ *Id.*

⁴⁵ *Id.* at 433.

⁴⁶ This issue was specifically not addressed in *Sells Engineering*, 463 U.S. 431 at n.15.

⁴⁷ *Id.* at 429 n.12.

⁴⁸ See *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978).

⁴⁹ See *United States v. Gold*, 470 F. Supp. 1336, 1350-51 (N.D. Ill. 1979). Moreover, a federal lawyer must not act as both a witness and an attorney in the grand jury proceeding. *Id.* at 1351. See also *United States v. Birdman*, 602 F.2d 547, 562 (3rd Cir.

There are frequent occasions when federal and state prosecutors are working together on a criminal investigation. The mere fact that they are working together does not bring the local prosecutor within any exception to the rule of secrecy.

Nonfederal attorneys, even if they work for state or municipal prosecutors, are not "attorneys for the government" and thus are not included in the first exception.⁵⁰ Any attorney admitted to the bar of a state, however, may be appointed by the Attorney General of the United States to conduct grand jury investigations.⁵¹

Disclosure pursuant to the first exception is automatic in the sense that the court does not have to be notified of or give its approval to the disclosure.⁵² Thus, except for whatever internal records a prosecutor may maintain, there is no official record of what grand jury material was disclosed to which federal prosecutors.

Most disclosures of grand jury information occur pursuant to this exception. A prosecutor shares the information with other prosecutors in the office, superiors in the United States Attorney's office or in the Department of Justice, and prosecutors from other offices in other districts. As long as such a disclosure is made for use by the attorney to whom the disclosure is made in the performance of that attorney's duty to enforce the federal criminal law, then the disclosure is proper.⁵³

SECOND EXCEPTION: DISCLOSURE TO FEDERAL EMPLOYEES

Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) permits disclosure to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

This language was added to Rule 6 in 1977 and recognizes the fact that in many cases, a prosecutor and a grand jury rely on a federal law enforcement agent to actually conduct the investigation.⁵⁴

The Advisory Committee notes on this section fully amplify this central fact of federal prosecution:

1979)(no inherent conflict of interest in appointing agency attorney to conduct criminal proceedings before grand jury), *cert. denied*, 445 U.S. 906 (1980); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1982).

⁵⁰ *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3rd Cir. 1962).

⁵¹ 28 U.S.C.A. § 515 (West 1968).

⁵² FED. R. CRIM. PROC. 6(e)(3)(A)(i).

⁵³ *Id.*

⁵⁴ *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F. Supp. 1098 (E.D. Pa. 1976).

Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.⁵⁵

This exception applies not only to federal agents, but also to any other federal employee who can assist the prosecutor. Lawyers for federal agencies who have particular expertise and have not been designated an "attorney for the government" can be provided grand jury information under this second exception. Once they have received grand jury information, however, they can disclose it to other people, including their immediate agency supervisor, only if those other people qualify for disclosure under one of the six specific exceptions to the rule of secrecy.⁵⁶ The rule specifically provides that a person to whom disclosure is made pursuant to this exception "shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law."⁵⁷ It is generally accepted that local law enforcement personnel are not included within the definition of "government personnel,"⁵⁸ as used in Rule 6(e)(3)(A)(ii).

Once disclosure under this exception is either contemplated or accomplished, the prosecutor "shall promptly provide the district court, before which was impanelled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made."⁵⁹ This requirement of notice to the court, however, does not entitle a witness responding to a subpoena duces tecum to disclosure of such a notice as a precondition to complying with the subpoena.⁶⁰

⁵⁵ FED. R. CRIM. P. 6(e)(3)(a)(ii) advisory committee note.

⁵⁶ See *supra* notes — and accompanying text.

⁵⁷ FED. R. CRIM. P. 6(e)(3)(B).

⁵⁸ *In re Miami Federal Grand Jury No. 79-9*, 478 F. Supp. 490, 492 (S.D. Fla. 1979); *In re Grand Jury Proceedings*, 445 F. Supp. 349, 350 (D. R.I. 1978). But see *In re 1979 Grand Jury Proceedings*, 479 F. Supp. 93, 96 (E.D. N.Y. 1979) ("government personnel" not limited to federal employees).

⁵⁹ FED. R. CRIM. P. 6(e)(3)(B).

⁶⁰ *In re Grand Jury Proceedings*, 579 F.2d 836, 839-40 (3rd Cir. 1978).

Disclosure under this second exception does not require the prior approval of the court; all that is required is that the court be notified. Thus, prosecutors routinely file with the district court "Disclosure Notices" that identify those federal personnel to whom disclosure has been or will be made in a particular grand jury investigation. Because such disclosure notices require no action by a judge, it is questionable how much judicial attention they receive. The notices may become important, however, where a leak of grand jury information occurs. In such a case, the disclosure notice serves as part of a "paper trail" that identifies those who had access to the material, and thereby helps a court track down the source of the leak.

The Advisory Committee contemplated that the names of the federal personnel to whom disclosure is made will generally be furnished to the court before the disclosure occurs.⁶¹ The rule, however, is drafted in a manner that will not inhibit the ability of federal prosecutors to share grand jury information with federal personnel with whom they are working. In addition, the rule does not specify to what lengths a prosecutor should go to identify those federal personnel who have access to the grand jury information. A strict reading of the rule suggests that the prosecutor's secretary, the operator of the duplicating equipment, and FBI clerks all should be listed on a disclosure notice. In practice, however, different districts have different procedures. In some districts, the prosecutor will list only the case agent to whom disclosure is made. Any disclosure by the case agent to other federal agents may not be disclosed to the court, although the case agent should keep his own records. Such short-cut procedures are ripe for attack as violating the rule of secrecy.

THIRD EXCEPTION: DISCLOSURE PRELIMINARY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING

Federal Rule of Criminal Procedure 6(e)(3)(C)(i) permits disclosure of matters occurring before the grand jury "when so directed by a court preliminary to or in connection with a judicial proceeding." This exception is the most difficult to apply and the one most litigated. It applies to the disclosure of grand jury matters to anyone who is not either a federal prosecutor or assisting a federal prosecutor. Before a disclosure can be made pursuant to this exception, the party seeking the disclosure must make a motion in the district court. Any hearing on such a motion is usually *ex parte*.

⁶¹ FED. R. CRIM. P. 6(e)(3)(a)(ii) advisory committee note.

No disclosure can be made until the court has granted the motion and issued an appropriate order.

Typically, the government will seek a disclosure order under this exception so that the grand jury material in question may be shared with some other tribunal.⁶² In addition, after a criminal prosecution with financial implications has been concluded, the government often seeks to disclose information acquired during the grand jury investigation to the Internal Revenue Service for any appropriate administrative or civil action.⁶³ Other parties, however, may also seek disclosure. Such disclosure motions have been made, and denied, on many bases, including the Freedom of Information Act⁶⁴ and the Clayton Act.⁶⁵

In order for this exemption to apply, there must first be a "judicial proceeding."⁶⁶ Most courts have accepted Judge Learned Hand's definition of judicial proceeding:

The term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime. An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the rule.⁶⁷

⁶² See, e.g., *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 65-66 (3rd Cir. 1982).

⁶³ E.g., *Baggot*, 459 U.S. at 817. See *infra* notes 72-76 and accompanying text.

⁶⁴ *Piccolo v. United States Dep't of Justice*, 90 F.R.D. 287 (D. D.C. 1981). The Freedom of Information Act [FOIA] contains certain exemptions, including exemption 3, 5 U.S.C. § 552(b)(3) (1976), which allows the government to withhold from disclosure information "specifically exempted from disclosure by statute." While the Federal Rules of Civil Procedure are issued by the Supreme Court under rulemaking powers delegated by Congress, and thus are not "statutes", *Founding Church of Scientology v. Bell*, 603 F.2d 945, 951-952 (D.C. Cir. 1979), *FED. R. CRIM. P. 6(e)*, at least, was affirmatively adopted by both houses of Congress, P.L. 95-78, and thus is a "statute" within the meaning of Exemption 3 of FOIA. Consequently, grand jury matters covered by *FED. R. CRIM. P. 6(e)* are not discoverable pursuant to FOIA.

⁶⁵ In *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983), the Attorney General of Illinois asserted a statutory right to grand jury materials pursuant to § 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b) (1976). That section authorizes the Attorney General of the United States to make available federal investigative files and materials to a state attorney general when the U.S. Attorney General has reason to believe that a State attorney general would be entitled to bring a federal civil antitrust action against a defendant being sued by the United States under the antitrust laws. The Supreme Court held that this statute did not give a state attorney general any special right to grand jury material. To prevail, a state attorney general has to meet the requirements of the third exemption just as any private litigant must. The district court, however, can always consider and weigh the public interest when ruling on a disclosure request based on this third exemption. *Abbott & Associates*, 460 U.S. at 467 n.15.

⁶⁶ *FED. R. CRIM. P. 6(e)(3)(c)(i)*.

⁶⁷ *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958).

Various types of proceedings have been found to be "judicial proceedings" pursuant to this exception. These include a bar committee in charge of disciplining attorneys,⁶⁸ a police board of inquiry,⁶⁹ a grievance committee of the New York City Bar Association,⁷⁰ and a state grand jury.⁷¹

In *United States v. Baggot*,⁷² the government sought the disclosure of grand jury information to the Internal Revenue Service in an audit of Baggot's tax liability; Baggot had pled guilty to engaging in sham commodities transactions to create paper losses, which he deducted on his tax returns.

The issue before the Supreme Court was whether an IRS investigation to determine a taxpayer's civil liability was "preliminary to or in connection with a judicial proceeding" within the meaning of this third exception. The Court ruled it was not.⁷³

In reaching its decision, the Court first determined whether the IRS audit was a "judicial proceeding." The government conceded it was not. Baggot, however, conceded that a tax petition for redetermination or a suit for refund would be a judicial proceeding. The Court accepted both of these concessions and noted that the "judicial proceedings" language of this exception

imposes an additional criterion governing the *kind* of need that must be shown. It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly to some identifiable litigation, pending or anticipated. Thus it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted.⁷⁴

The second issue the Court faced in *Baggot* was whether the IRS audit, admittedly not a "judicial proceeding," was nonetheless "pre-

⁶⁸ *In re* Disclosure of Testimony Before the Grand Jury, 580 F.2d 281 (8th Cir. 1981).

⁶⁹ *In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973).

⁷⁰ *Rosenberry*, 255 F.2d 118.

⁷¹ *In re* Grand Jury Matter, 682 F.2d 61 (3rd Cir. 1982); *In re* Disclosure of Evidence, 650 F.2d 599, *modified*, 662 F.2d 362 (5th Cir. 1981); *Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); *Matter of Disclosure of Testimony*, 580 F.2d 281 (8th Cir. 1978); *In re* Braniff Airways, Inc., 390 F.Supp. 344, 346 (W.D. Tex. 1975); *In re* Grand Jury Witness Subpoenas, 370 F.Supp. 1282 (S.D. Fla. 1974); *In re* Grand Jury Disclosure, 550 F. Supp. 1171 (E.D. Va. 1982). *But see* *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980).

⁷² 463 U.S. 476 (1983).

⁷³ *Id.* at 477.

⁷⁴ *Id.* at 480.

liminar[y] to or in connection with” a judicial proceeding that would result from such an audit.⁷⁵ Because it was possible that the audit would not result in litigation, the Court concluded that the audit was not preliminary to or in connection with litigation. The application for disclosure was premature and the possibility of litigation was too speculative:

Where an agency’s action does not require resort to litigation to accomplish the agency’s present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i). . . . In this case, however, it is clear that the IRS’ proposed use of the [grand jury] materials is to perform the non-litigative function of assessing taxes rather than to prepare for or conduct litigation.⁷⁶

The term “in connection with” in the third exception is easier to define. It comes into play when litigation is already commenced. The term “preliminar[y] to” is more inclusive, but, based on *Baggot*, it seems to apply only to situations where litigation is actually being prepared.

Having decided that a judicial proceeding exists, or will shortly, and thus that the grand jury material that is sought is “preliminar[y] to or in connection with a judicial proceeding,” a court must go further before deciding whether to grant a request for disclosure under this exception. The question is what standard should courts use in deciding whether to grant the disclosure that is “preliminar[y] to or in connection with a judicial proceeding.”

In the absence of any language in the Rule itself or any description by the Advisory Committee of what substantive standard courts should use, courts have created the standard of “particularized need.”⁷⁷ On the theory that there should be some good reason to breach grand jury secrecy, proponents of disclosure under this exception must show a particularized need for the grand jury information. The standard was described in detail in *Douglas Oil Co. v. Petrol Stops Northwest*:⁷⁸

Parties seeking grand jury transcripts under Rule 6(e) must show
[1] that the material they seek is needed to avoid a possible injustice in another judicial proceeding,
[2] that the need for disclosure is greater than the need for continued secrecy, and
[3] that this request is structured to cover only material so needed.⁷⁹

⁷⁵ *Id.* at 482.

⁷⁶ *Id.* at 482-83.

⁷⁷ *Abbott & Associates*, 460 U.S. 557; *Dennis*, 384 U.S. at 869-70; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398-401, *reh’g denied*, 361 U.S. 855 (1959); *Proctor & Gamble*, 356 U.S. at 681-83.

⁷⁸ 441 U.S. 211 (1979).

⁷⁹ 441 U.S. at 222, *quoted in Sells Engineering*, 463 U.S. at 443.

This particularized need test has been described by the Supreme Court as "a criterion of need."⁸⁰ It is a narrow avenue for disclosure that "was not designed as an authorization for pre-trial discovery. Its purpose, on the contrary, is to protect the secrecy of the grand jury proceedings by restricting disclosure to the exceptional case where a particularized need is shown."⁸¹ This criterion of need also was discussed in *Douglas Oil*:

It is clear from *Proctor & Gamble* and *Dennis* that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. In sum, . . . the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material.⁸²

As a practical matter, the *Douglas Oil* test is a very difficult standard to meet for someone seeking disclosure under this exception. The second and third prongs of the *Douglas Oil* test rarely pose a problem. It usually is not difficult to show that the need for disclosure is greater than the need for continued secrecy. This showing can be bolstered by carefully structuring the request to limit what is sought and by recommending to the court appropriate protective limitations.

The problem is the first step presented by the *Douglas Oil* case. It is rare for a party to be able to show that the disclosure is necessary in order to avoid a possible *injustice* in another proceeding. Convenience or cost savings alone are not enough. If the information sought is available from sources other than the grand jury material, then the party requesting disclosure must seek it from those other sources.⁸³ In *Baggot*, for example, if the proceedings had advanced to such a point that they were preliminary to a judicial proceeding, a court would have been justified in telling the IRS to conduct its own administrative or civil investigation, even if it meant

⁸⁰ *Baggot*, 463 U.S. at 480.

⁸¹ *United States v. Weinstein*, 511 F.2d 622, 627 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975).

⁸² 441 U.S. at 223, *quoted in Sells Engineering*, 463 U.S. at 443.

⁸³ "[I]n weighing the need for disclosure, the court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." 463 U.S. at 445. The Ninth Circuit has applied the *Sells Engineering* opinion retroactively. *In re Grand Jury Investigation of Peter A. Sells*, 719 F.2d 985 (9th Cir. 1983).

issuing summons for documents already subpoenaed by the grand jury and interviewing witnesses who had already testified before the grand jury. The Supreme Court has “consistently rejected the argument that such savings [of time and expense] can justify a breach of grand jury secrecy.”⁸⁴ Where the material sought is unavailable from another source, however, and that material is key to avoiding an “injustice” in another proceeding, then disclosure would be appropriate. The witness who has died, the document that has disappeared, or other similarly compelling reasons should be enough to meet the particularized need test.⁸⁵

It makes no difference if the party seeking disclosure under this exception is the government or a private party. The *Douglas Oil* test “governs disclosure to public parties as well as private ones.”⁸⁶ Yet, the government may find it easier to prevail than a private party because disclosure to the government may not raise as many concerns as disclosure to a private party.

Nothing in *Douglas Oil*, however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. Hence, although *Illinois v. Abbott & Associates* and the legislative history foreclose any special dispensation from the *Douglas Oil* standard for government agencies, the standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed. And “under the particularized need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body”⁸⁷

Thus, although a governmental body and a private party must both meet the *Douglas Oil* particularized need test, it will in some cases be easier for the government to satisfy the criteria of that test.

A great deal of the governing law on this third exception is derived from *Sells Engineering* and *Baggot*. These cases were decided on the same day, both by narrow 5-4 margins. The dissents in both

⁸⁴ *Sells Engineering*, 463 U.S. at 431.

⁸⁵ “If, in a particular case, ordinary discovery is insufficient for some reason, the government may request disclosure under a (C)(i) court order.” *Sells Engineering*, 463 U.S. at 431.

⁸⁶ *Sells Engineering*, 463 U.S. at 444.

⁸⁷ *Sells Engineering*, 463 U.S. at 445 (citations omitted).

cases demonstrate fundamental differences in the interpretations of how this exception should be applied.⁸⁸ Nonetheless, with so few grand jury cases reaching the Supreme Court, *Sells Engineering* and *Baggot* should remain the law for a considerable period of time, or until the language of Rule 6(e) is itself modified.

The witness whose grand jury testimony is sought to be disclosed, or the owner of the documents sought to be disclosed has standing to intervene in a motion to disclose under this exception.⁸⁹ Because the witness normally would not be aware of the filing of such a motion, it is up to the party filing the request or the court itself to offer the witness an opportunity to intervene. If an order adverse to the witness is issued by the court, that order may be appealed by the witness if the litigation of the disclosure motion is the only pending federal proceeding.⁹⁰ The hearing itself on a motion to disclose pursuant to this exception is normally *ex parte* in the sense that the target of the grand jury investigation has no right to be present, or even to be given notice, unless it is the target's testimony or documents that are sought to be disclosed.

The Rule itself is silent on whether such a hearing should be *ex parte*. The Advisory Committee notes that "[i]t is contemplated that the judicial hearing in connection with the application for a court order by the government under subparagraph (3)(c)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy."⁹¹ Although at least one court has determined that an *ex parte* hearing on a motion to disclose is appropriate and consistent with the intent of Congress,⁹² the legislative history is equivocal.⁹³ Not unexpectedly, courts have split on this issue, with some allowing an adversary proceeding,⁹⁴ and others allowing an *ex parte*

⁸⁸ For a critique of *Sells Engineering*, see Walker, *United States v. Sells Engineering: a Result to Promote Grand Jury Secrecy*, 21 AM. CRIM. L. REV. 99 (1983).

⁸⁹ FED. R. CRIM. P. 24(a)(2). See *Douglas Oil*, 441 U.S. 211, 218 n.8 (1979); In the Matter of Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982)[hereinafter cited as *In re Miller Brewing*].

⁹⁰ *In re Miller Brewing*, 687 F.2d 1079; *In re Grand Jury Investigation* (New Jersey State Commission of Investigation), 630 F.2d 996 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1081 (1981); *United States v. Sobotka*, 623 F.2d 764 (2d Cir. 1980).

⁹¹ FED. R. CRIM. P. 6(e) advisory committee note.

⁹² *In re Grand Jury Subpoena*, April 1978, at Baltimore, 581 F.2d 1103, 1110 n.15 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

⁹³ Compare S.REP. No. 354, 95th Cong. 1st Sess. 8, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 527, 532, with 123 CONG. REC. 25195 (1977).

⁹⁴ E.g., *In re Miller Brewing*, 687 F.2d 1079; *State of Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960); *In re John Doe Grand Jury Proceedings*, 537 F. Supp. 1038 (D.R.I. 1982); *Application of California*, 195 F. Supp. 37 (E.D. Pa. 1961).

hearing.⁹⁵

This hearing may also be related to a motion alleging some impropriety on the part of the prosecutor in his conduct of the grand jury investigation. Even in such an adversary context, the court may resolve the issue without allowing the intervenor to see the grand jury material in issue.⁹⁶

Requests for disclosure under this exception are normally made before and decided by the court that has the responsibility for supervising the grand jury whose material is being sought. Where different districts are involved, however, the procedure becomes more complex. The court that supervised the grand jury can best determine the need for continued secrecy. The court in which the litigation is pending will be the most competent to determine whether the party seeking disclosure has demonstrated a particularized need justifying the disclosure.

Federal Rule of Criminal Procedure 6(e)(3)(E) establishes the procedure to be followed in such a situation:

If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

This is quite similar to the approach suggested by the Seventh Circuit prior to the adoption of that portion of Rule 6:

The party seeking disclosure first moves for disclosure in the district where the grand jury sat. The district court which supervised the grand jury then makes a written evaluation of the need for continued secrecy and determines whether the evidence before it justifies disclosure. If the court decides that disclosure may be appropriate, it transfers the requested grand jury materials to the district court where the current case is pending. Finally, the court with the pending litigation determines particularized need and balances it against the continued need for secrecy as expressed by the first court.⁹⁷

This logical procedure allows each district to consider those issues most pertinent to its own district.

When the court where the litigation is pending is not a federal

⁹⁵ *E.g.*, *In re Grand Jury Subpoenas*, April 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743, 751 (D. Md. 1978).

⁹⁶ *In re Miller Brewing*, 687 F.2d at 1086-87.

⁹⁷ *Id.* at 1095-96.

district court, however, but the U.S. Tax Court (an Article I Court)⁹⁸ or a state court⁹⁹ for example, that court can only advise the district court that supervised the grand jury as to the need for the grand jury material. The district court can then determine whether the particularized need test has been met and issue an appropriate order.

Although the Rule does not limit the types of people to whom disclosure can be made under this exception, at least one circuit court distinguishes between disclosure to state officials and disclosure to people who hold no official position.¹⁰⁰ The Tenth Circuit seems to believe that, at least in the context of a grand jury investigation, a private investigator is not entitled to disclosure under this exception.¹⁰¹

In any investigation where disclosure is sought by the government to allow someone not employed by the federal government to review grand jury material, meeting the particularized need test, especially showing that disclosure is necessary to avoid an "injustice", is difficult at best. The government would have to demonstrate that the federal government does not have in its employ a person as qualified as the state official to whom the disclosure is sought to be made. If the judicial proceeding is a civil case, the private party seeking the disclosure probably would not have this problem. The civil party would not have available to it the second disclosure exception, and thus would not be put in the awkward position of comparing federal employees' expertise with that of state employees.

Another issue raised under this exception is whether a grand jury witness is entitled to review the transcript of his own grand jury testimony. The rule of secrecy is itself absolute, subject only to the five specific exceptions. None of the five exceptions directly applies to this situation. Thus, the witness must try to fit within this third exception. Courts are split, however, between those that have held that a witness must show particularized need for a disclosure to be authorized,¹⁰² and those that have allowed disclosure without a showing of particularized need.¹⁰³

⁹⁸ *E.g., id.*

⁹⁹ *E.g., In re Grand Jury Proceedings (Wright II)*, 654 F.2d 268 (3rd Cir.), *cert. denied*, 454 U.S. 1098 (1981).

¹⁰⁰ *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980).

¹⁰¹ *Id.*

¹⁰² *United States v. Fitch*, 472 F.2d 548 (9th Cir. 1973); *In re Bottari*, 453 F.2d 370 (1st Cir. 1972); *Bast v. United States*, 542 F.2d 893 (4th Cir. 1976).

¹⁰³ *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972); *In re Braniff Airways*, 390 F.Supp. 344 (W.D. Tex. 1975); *In re Craven*, 13 Crim. L. Rep. 2100 (N.D. Cal. 1973); *In re Minkoff*, 349 F. Supp. 154 (D. R.I. 1972); *In re Russo*, 53 F.R.D. 564 (C.D. Cal. 1971).

A prosecutor who honors a pre-indictment request by a witness to review the transcript of his own grand jury testimony, without the permission of the court, runs the risk that an allegation of grand jury abuse on his part may be made later. Such a violation of grand jury secrecy can give rise to an argument that the resulting indictment must be dismissed. Even after an indictment has been returned, it can be argued that under a strict reading of the Rule, a witness should not be allowed to review the transcript of his own grand jury testimony. In practice, however, witnesses routinely are given their own grand jury testimony to review as a part of normal pretrial preparation.¹⁰⁴ Similarly, defense counsel usually is provided some grand jury transcripts as part of normal discovery procedure.¹⁰⁵ Because the Jencks Act¹⁰⁶ mandates that, upon request, prior grand jury testimony of trial witnesses be provided to defense counsel as a cross-examination tool, prosecutors rationalize that the showing of such transcripts to the witnesses and defense counsel is implicitly authorized by the Jencks Act. It is possible that a court may someday disagree.

Defense counsel also may seek discovery of grand jury material under this exception. The particularized need that defense counsel must demonstrate may relate to the ability of the defendant to conduct his own defense investigation, identify exculpatory witnesses, or impeach government witnesses.

An example of such an effort is *United States v. Watts*:

Generally, the defense attorney argued that he needed all the grand jury testimony because any of it might possibly be utilized to impeach prosecution witnesses. But as to one witness, whom he was able to identify by name, defense counsel recited the general nature of the grand jury testimony sought and specified the prosecution witness whom he intended to impeach by such testimony. Since the attorney was seeking to discover that which was contained in secret grand jury proceedings, he could scarcely have been more specific in demonstrating the necessary "particularized need" in respect to the one witness. Thus, the District Court erred in its denial to the defense of this particular testimony.¹⁰⁷

¹⁰⁴ *United States v. Garcia* 420 F.2d 309, 311 (2d Cir. 1970); *United States v. Heinze*, 361 F. Supp. 46, 57 (D. Del. 1973); *King v. Jones*, 319 F. Supp. 653, 657 (N.D. Ohio 1970).

¹⁰⁵ FED. R. CRIM. P. 16.

¹⁰⁶ 18 U.S.C. § 3500 (1982).

¹⁰⁷ *United States v. Watts*, 502 F.2d 726, 728 (9th Cir. 1974). See also *United States v. Achtenberg*, 459 F.2d 91, 96 (8th Cir.), cert. denied, 409 U.S. 932 (1972); *United States v. Duffy*, 54 F.R.D. 549, 550-51 (N.D. Ill. 1972). But see *United States v. Bruton*, 647 F.2d 818, 824 (8th Cir.), cert. denied, 454 U.S. 868 (1981); *United States v. Benton*, 637 F.2d 1052, 1059-60 (5th Cir.), reh'g denied, 645 F.2d 72 (1981); *United States v. Natale*, 526 F.2d 1160, 1170-71 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); *United States v.*

FOURTH EXCEPTION: DISCLOSURE UPON SHOWING OF GROUNDS
TO DISMISS INDICTMENT BASED ON IMPROPER GRAND
JURY PROCEDURES

Federal Rule of Criminal Procedure 6(e)(3)(C)(ii) allows disclosure "when permitted by a 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."

Disclosure under this exception is difficult to justify, and thus rarely successful. The standard of particularized need applies to both C(i) and C(ii) disclosures. Defendants rarely have the type of specific information necessary to make the required showing and often find themselves in a "Catch 22" situation. The grounds for dismissing the indictment may be in the grand jury transcripts. Unless defendants can demonstrate the grounds for dismissing indictments, they may not be able to obtain grand jury transcripts. Yet, without the transcripts, they cannot show the improprieties.

Generalized, unsubstantial, or speculative claims of grand jury improprieties do not meet the particularized need test.¹⁰⁸ Defense counsel, however, can sometimes pique the interest of a judge by showing disturbing events reflected in the material to which the defendant does have access, including discovery material, Jencks Act statements, or statements of former grand jury witnesses during debriefing or pretrial investigation by defense counsel.¹⁰⁹ In such situations, defense counsel can ask that the court review the grand jury material *in camera* before determining whether disclosure is appropriate under this section. This at least attracts the court's attention and gets the defendant's foot in the door as a first step to more elaborate disclosure and, perhaps, motions alleging specific violations of Rule 6 and grand jury procedures. Even if such motions eventually fail, they provide the defendant with an opportunity for greater discovery, and put the government in the tactically disadvantageous position of defending its grand jury procedure.

A frequently cited basis for further investigation by the defendant into what occurred before the grand jury is the allegation that the government has been responsible for leaking grand jury information to the press, and that the defendant has therefore been de-

Anderson, 481 F.2d 685, 692-93 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974); Gollaher v. United States, 419 F.2d 520, 527 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

¹⁰⁸ United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981); United States v. Rubin, 559 F.2d 975, 988 (5th Cir. 1977), *vacated on other grounds*, 439 U.S. 810 (1978); United States v. King, 478 F.2d 494, 507 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

¹⁰⁹ See United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979).

prived of his right to an independent and impartial grand jury.¹¹⁰ This also represents a difficult basis on which to request disclosure of matters occurring before the grand jury.¹¹¹

FIFTH EXCEPTION: DISCLOSURE TO ANOTHER FEDERAL GRAND JURY

Federal Rule of Criminal Procedure 6(e)(3)(C)(iii) permits disclosure "when the disclosure is made by an attorney for the government to another federal grand jury." This recent¹¹² exception to the rule of secrecy does not involve any notice to or approval by a court. It recognizes the fact that grand jury investigations are becoming more complex and lengthy. As a result, it is not at all unusual for an investigation begun in one grand jury to be completed by a second or even a third grand jury. Sometimes, information developed in a grand jury in one district is relevant to a grand jury investigation in another district. It is, therefore, necessary to allow grand jury information to flow from one grand jury to another.

Prior to the time this fifth exception became effective, prosecutors had to seek a disclosure order under the third exception,¹¹³ alleging that the transferee grand jury was the "judicial proceeding," and that there was a particularized need for providing the material to the transferee grand jury. If a court refused to grant the motion for disclosure, the government was forced to begin its investigation anew before the new grand jury. The Advisory Committee, however, recognized that the secrecy of the grand jury is not compromised by the transfer of grand jury information from one grand jury to another because the transferee grand jury is equally bound by Rule 6's requirement of secrecy.¹¹⁴

Because this fifth exception to the rule of secrecy is relatively new, the case law interpreting it has not yet fully developed. Courts, however, will not necessarily be writing on a clean slate. There is some case law that deals with how authorized disclosures to a new grand jury should be accomplished.¹¹⁵ The issue usually presents itself in the context of how the prior grand jury testimony is to be presented to the new grand jury. Should all or some of the witnesses be recalled? Should all or some of the prior testimony be read to the new grand jury? Should all or part of the evidence

¹¹⁰ See generally *In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980) (review of cases).

¹¹¹ *Id.*

¹¹² FED. R. CRIM. P. 6(e)(3)(C)(iii) took effect on August 1, 1983.

¹¹³ FED. R. CRIM. P. 6(e)(3)(C)(i).

¹¹⁴ FED. R. CRIM. P. 6(e)(3)(c)(iii) advisory committee note.

¹¹⁵ See *infra* notes 119-23 and accompanying text.

before the original grand jury be summarized for the new grand jury by the prosecutor or a federal agent? Should the evidence before the original grand jury merely be made available to the new grand jury upon request? What if some of the members of the new grand jury do not want to review the prior evidence?

A federal agent's summary for a new grand jury of evidence presented to a previous grand jury has been held proper.¹¹⁶ Similarly, such a summary by the prosecutor also has been held to be proper.¹¹⁷ One court dismissed an indictment on grounds of grand jury abuse, however, because the prosecutor deposited with the indicting grand jury lengthy transcripts of earlier testimony without first summarizing or reading the transcripts, failed to warn the grand jury of the questionable credibility of a central witness whose testimony was contained in the transcripts, deposited transcripts of irrelevant and prejudicial testimony with the grand jury, and failed to advise the grand jury of the hearsay quality of some of the live testimony that they did hear.¹¹⁸

Some decisions that suggest summarized testimony may not properly be presented to a grand jury, however, have questionable vitality in view of more recent decisions.¹¹⁹ The better procedure is for the prosecutor to have an agent summarize the prior testimony.¹²⁰ The summary, however, if not a scrupulously fair recounting of all the relevant evidence presented to the prior grand jury, may be the basis for a motion alleging grand jury abuse and seeking dismissal of the indictment. Thus, although this fifth exception al-

¹¹⁶ *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979); *United States v. Brown*, 574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); *United States v. Litton Systems, Inc.*, 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *United States v. Cruz*, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

¹¹⁷ *United States v. Schlesinger*, 598 F.2d 722 (2d Cir.), cert. denied, 444 U.S. 880 (1979); *United States v. Blitz*, 533 F.2d 1329, 1344-45 (3rd Cir.), cert. denied, 429 U.S. 819 (1976).

¹¹⁸ *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). See also *United States v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975).

¹¹⁹ For example, the position taken in *In re Grand Jury Investigation of Banana Industry*, 214 F. Supp. 856 (D. Md. 1963) was rejected in *United States v. Litton Systems, Inc.*, 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); and the rationale underlying both *In the Matter of the May 1972 San Antonio Grand Jury*, 366 F. Supp. 522 (W.D. Tex. 1973) and *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977) was rejected in *United States v. Brown*, 574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978).

¹²⁰ A summary by the prosecutor puts him in the position of being both a witness and a lawyer in the same proceeding, in contravention of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1979). See *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979).

lows the transfer of grand jury information between grand juries, it does not solve the issue of how that transfer is most appropriately accomplished.

SIXTH EXCEPTION: DISCLOSURE TO NON-FEDERAL LAW
ENFORCEMENT PERSONNEL

Prior to 1985, Rule 6 provided no express method by which local law enforcement personnel could either participate in a federal grand jury investigation or receive information involving local crimes developed by the grand jury. Various procedures had been used to get around this gap in the rule. Where a joint federal-state investigation is involved, for example, the state investigators are sometimes sworn in as deputy U.S. marshalls, thereby making them federal law enforcement officials who may receive access to grand jury information pursuant to the second exception to the rule of secrecy.

The more difficult problem had been to reconcile the need to provide information of state crimes to local law enforcement personnel with the "particularized need" test of the third exception to the rule of secrecy, and the requirement that the disclosure be necessary "to avoid a possible injustice in another judicial proceeding."¹²¹ Two amendments to Federal Rule of Criminal Procedure 6(e)(3) were proposed and adopted resolve this issue in favor of disclosure.

The first amendment to Federal Rule of Criminal Procedure 6(e)(3)(ii)¹²² amends the definition of "government personnel" to include "personnel of a state or subdivision of a state." The Advisory Committee Notes explain that this amendment is designed to promote efficient law enforcement:

It is clearly desirable that federal and state authorities cooperate, as they often do, in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations where federal and state criminal jurisdictions overlap. Because of such cooperation, government attorneys in complex grand jury investigations frequently find it necessary to enlist the help of a team of government agents. While the agents are usually federal personnel, it is not uncommon in certain types of investigations that federal prosecutors wish to obtain the assistance of state law enforcement personnel, which could be uniquely beneficial. The amendment permits disclosure to those personnel in the circumstances stated.

It must be emphasized that the disclosure permitted is limited. The disclosure under this subdivision is permissible only in connec-

¹²¹ *Douglas Oil Co.*, 441 U.S. at 222.

¹²² FED. R. CRIM. P. 6(e)(3)(ii) (adopted August 1, 1985).

tion with the attorney for the government's 'duty to enforce federal criminal law' and only to those personnel 'deemed necessary . . . to assist' in the performance of that duty. Under subdivision (e)(3)(B), the material disclosed may not be used for any other purpose, and the names of persons to whom disclosure is made must be promptly provided to the court.¹²³

Thus, this disclosure is designed to permit local law enforcement authorities to participate only in a federal grand jury investigation of violations of federal laws, and precludes this information from being used for any other purposes.

The second amendment allows a court to authorize disclosure to local law enforcement personnel of information developed in a federal grand jury information that involves possible violations of state laws. Specifically, Federal Rule of Criminal Procedure 6(e)(3)(C)(iv) provides that disclosure may also be made "when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law."¹²⁴

Several conclusions may be drawn from this new procedure for disclosure. First, such disclosure may occur only when authorized by the court. This is unlike the first amendment where no prior court approval is necessary to involve a local law enforcement official in the federal investigation of a federal crime. Second, the standard for the court to apply in determining whether to allow the disclosure is a very minimal test. The federal prosecutor need show only that the matters sought to be disclosed *may* disclose a violation of a state criminal law. This is a far easier and different test than the particularized need test. Disclosure would be almost automatic under this exception.

Third, the federal prosecutor, not the local law enforcement agency or prosecutor, must be the moving party.¹²⁵ Normally, only the federal prosecutor knows of the information developed by the grand jury. Where the local district attorney or police department has learned of the result of the federal grand jury investigation, however, as a result of the first amendment, for example, disclosure cannot be sought under this subsection unless the federal prosecutor agrees to seek the disclosure. Finally, the disclosure may be made only for the purpose of the enforcement of the state's criminal

¹²³ FED. R. CRIM. P. 6(e) advisory committee note.

¹²⁴ FED. R. CRIM. P. 6(e)(3)(c)(iv) (adopted August 1, 1985).

¹²⁵ The U.S. Dept. of Justice requires that an Asst. Attorney General authorize any application to a court for disclosure pursuant to this exception. Steven S. Trott, Asst. Attorney General, Criminal Division, Dept. of Justice Teletype, August 26, 1985.

law by the local law enforcement official. It does not seem, however, that the local official receiving the information is limited in his use of it, as are federal prosecutors as a result of *United States v. Sells Engineering, Inc.*,¹²⁶ because Federal Rule of Criminal Procedure 6(e)(2) does not specifically prohibit local officials from disclosing the information to others.

The Advisory Committee Notes explain that this new procedure resolves the problems presented by the particularized need test.

It sometimes happens that during a federal grand jury investigation evidence will be developed tending to show a violation of state law. When this occurs, it is very frequently the case that the evidence cannot be communicated to the appropriate state officials for further investigation. For one thing, any state officials who might seek this information must show particularized need. *Illinois v. Abbott & Associates*, 103 S.Ct. 1356 (1983). For another, and more significant, it is often the case that the information relates to a state crime outside the context of any pending or even contemplated state judicial proceeding, so that the "preliminary to or in connection with a judicial proceeding" requirement of subdivision (e)(3)(C)(i) cannot be met. This inability lawfully to disclose evidence of a state criminal violation—evidence legitimately obtained by the grand jury—constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws. It would be removed by new subdivision (e)(3)(C)(iv), which would allow a court to permit disclosure to a state or local official for the purpose of enforcing state law when an attorney for the government so requests and makes the requisite showing.¹²⁷

CONCLUSION

As the rule of secrecy currently is interpreted, relevant material is denied to parties who have a legitimate interest in and need for it. Witnesses and their counsel do not fall within any of the current exceptions in Rule 6(e); thus, witnesses may be denied their own prior grand jury testimony. Where substantial time has passed between a witness' first appearance before the grand jury and scheduled second appearance, fairness requires that the witness be allowed access to the witness' own prior testimony. Where a witness has retained new counsel after the first appearance and before the second appearance, that new counsel will not be able to adequately advise the witness without access to that prior testimony.

From the government's point of view, in a situation like that in *Baggot*, why should the IRS not have the fruits of a proper grand jury investigation once the defendant has been convicted or pled guilty?

¹²⁶ *Sells Engineering*, 463 U.S. at 427.

¹²⁷ FED. R. CRIM. P. 6(e)(3)(c)(iv) advisory committee note.

Forcing the IRS to begin anew to develop the same information is a costly duplication of effort that serves no purpose other than the frustration of a proper governmental inquiry. The only one who benefits is the defendant who has already been convicted.

The basic stumbling block for a more reasonable application of the rule of secrecy is *Douglas Oil's* requirement that disclosure is appropriate only where it is necessary to avoid an *injustice* in another proceeding. Courts should have the ability to weigh the need for secrecy—and the interests that secrecy protects—against the competing and legitimate needs of a witness, the government, or perhaps a third party, and decide on a case-by-case basis whether disclosure would in any way frustrate the reasons for secrecy, jeopardize any person's rights, or invite collusion or misconduct on the part of the government. If a court decides that disclosure is appropriate after such an inquiry, then disclosure should be permitted.

Although the Supreme Court has described the *Douglas Oil* test as a "highly flexible one,"¹²⁸ the language of the test is sufficiently absolute to cause even the most innovative of district court judges to decline an otherwise proper request for disclosure because of their inability to point to an injustice in another proceeding that must be avoided. Courts must begin to follow the Supreme Court's most recent pronouncements on flexibility and allow reasonable access where, on balance, the reasons behind the rule of secrecy are outweighed by the legitimate needs of the party seeking disclosure.

¹²⁸ *Sells Engineering*, 463 U.S. at 445.