A Trap for the Unwary: Comparing Federal and State Practices Regarding Admonitions of Secrecy Made to Grand Jury Witnesses

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As an assistant U.S. attorney in Los Angeles for 25 years, I became very familiar with the federal grand jury secrecy provisions of Rule 6(e). Now that I'm in private practice, I sometimes represent clients in state grand jury proceedings, and I've been quite surprised at how much the state practices can differ from the federal practice, particularly regarding whether grand jury secrecy obligations extend to witnesses. For instance, although federal grand jury secrecy rules generally do not apply to witnesses at all, district attorneys in Los Angeles routinely admonish grand jury witnesses that they may not disclose the substance of their testimony to anyone. Similarly, the DA's letters that accompany grand jury subpoenas routinely advise the recipients that they may not disclose even the fact of the subpoena.

The differences between federal and state practices in this area can create a "trap for the unwary" federal practitioner, which prompts this short article on the subject. Under Rule 6(e), absent a court order, "matters occurring before the grand jury" generally may not be disclosed by prosecutors, case agents, grand jurors, court reporters, or interpreters. Violations are punishable by contempt.

Grand jury witnesses, however, are not bound by this rule and therefore may tell friends, family, lawyers, the press, or even the target of the investigation about their testimony in the grand jury. Likewise, federal prosecutors generally may not direct or admonish witnesses not to disclose their testimony. State grand jury practice is sometimes very different from the federal practice. In particular, states do not uniformly exempt witnesses from the obligation of grand jury secrecy. Roughly a dozen states prohibit witnesses from disclosing their grand jury testimony—including, for example, New York, New Jersey, and New Mexico.

Adding to that uncertainty, some state-law prohibitions on witness disclosure are not set forth expressly; they are simply inferred from the state's general provisions regarding grand jury secrecy. California law, for example, is silent on the question of the witness's obligation of secrecy. Nonetheless, California grand juries routinely admonish witnesses not to disclose their testimony. That practice is based on a 1983 Opinion of the California Attorney General, which is based on inferences from the state's overall goal of conducting grand-jury sessions in secret.

In states where grand jury witnesses are covered by the obligation of secrecy, some unfamiliar questions arise regarding the scope of the prohibition. For example, "How long does the secrecy obligation last for witnesses?" In the federal system, where the secrecy obligation applies principally to grand jurors, prosecutors, and case agents, that obligation generally lasts forever or until a court order permits disclosure. In states where witnesses are under an obligation of secrecy, however, the rules are a bit more lax, because witnesses have a stronger countervailing First Amendment interest in discussing their testimony. Most states permit witnesses to speak publicly after the case has been indicted or the investigation has been terminated. Other states are not quite so clear about when or even whether such witness disclosure is permitted.

An important related question is, "What is the witness prohibited from disclosing—is it just the grand jury testimony itself, or is it also the historical facts underlying that testimony?" In theory, the answer to this question should be quite clear: At most, witnesses should be barred from discussing only their testimony, not the underlying facts. Otherwise, entire blocks of important historical facts could effectively be made unavailable simply because a prosecutor chose to ask the witness some questions about them.

The state statutes, however, are not always so accommodating. In 1990, the U.S. Supreme Court addressed the two above-described disclosure issues in Butterworth v. Smith, 494 U.S. 624 (1990). There, the Court considered a Florida grand jury secrecy statute that imposed an obligation of secrecy on witnesses; prohibited any discussion of either the testimony or the historical facts underlying that testimony; and imposed that obligation forever. The Court acknowledged that states may have a right to forbid witnesses from making some disclosures about their testimony, but held that Florida's interests in such an extensive prohibition were outweighed by the witness's First Amendment interests. The full implications of Butterworth are not entirely clear, however, because the invalidated Florida law combined several kinds of witness restraints in the same statute.

A surprising third issue is occasionally noted by commentators: "In states where grand jury secrecy rules apply to witnesses, are witnesses permitted to disclose their testimony to their own counsel?" As a matter of common sense, that question should be easy to answer. After all, an attorney stands in the shoes of the client, and an attorney could not meaningfully represent a grand jury witness if the attorney could not learn what the witness had been asked or told. Most states that prohibit grand-jury-witness disclosure also expressly exempt a witness's disclosures to his own counsel—examples are New York, Michigan, and Colorado—but three states do not (Mississippi, Missouri, and Washington).

Despite the commentators, I firmly believe that courts would permit such disclosure even without express statutory authorization, but the matter is not clearly settled. At a minimum, attorneys should be aware that their clients may become confused by the prosecutor's nondisclosure admonition, and should be prepared to explain that obligation authoritatively.

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was the failure to provide such procedural safeguards, not the failure to appoint counsel by itself, that warranted reversal. See the opinion at www.supremecourt.gov/opinions/10pdf/10-10.pdf.

David v. United States, No. 09-11328

Davis v. United States (09-11328), decided on June 16, 2011, addressed the retroactive application of *Arizona v. Gant*, 556 U.S. __ (2009). Davis was convicted of possessing a firearm discovered during a routine traffic stop after unsuccessfully moving for its suppression. Gant was decided while his case was on appeal with the Eleventh Circuit. Although the Eleventh Circuit agreed that the search incident to arrest violated Gant, it nevertheless upheld his conviction, concluding that excluding evidence obtained in reliance on prior circuit case law would do little or nothing to deter future Fourth Amendment violations. The Supreme Court, 7-2 in an opinion by Justice Alito, agreed, holding that a good faith exception to the exclusionary rule applies. Absence of police culpability at the time of the search precludes application of the exclusionary rule and thereby limits retroactive application of Gant.

Justice Breyer and Ginsburg, dissenting, commented on the Court's finding that, as in Gant a Fourth Amendment violation lead to the evidence resulting in conviction, but unlike Gant, Davis lacks a remedy. The dissenters stated that Gant does not articulate a new rule, but rather the correct interpretation of the Constitution, and worries that the "good faith" approach further undermines the exclusionary rule. See the opinion at www.supremecourt.gov/opinions/10pdf/09-11328.pdf.

Freeman v. United States, No. 09-10245

Freeman v. United States (09-10245), June 23, 2011, considered whether a defendant entering into a F.R.C.P. 11(c)(1)(C) plea agreement, which provides for a particular sentence of incarceration, is eligible for a sentence reduction if his guideline is subsequently lowered. Justice Sotomayor, casting her vote with only a portion of Justice Kennedy's plurality opinion, limited such reductions to a narrow class of 11(c)(1)(C) cases: those where the plea agreement specifically states that the sentence is based upon the Sentencing Guidelines. See the opinion at www.supremecourt.gov/opinions/10pdf/09-10245.pdf. **IHP**

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To sum up, defense counsel who practice predominantly in federal court should think twice and do their homework when practicing before an unfamiliar state grand jury, because the applicable state grand jury secrecy provisions may be quite different than they expected. These grand jury secrecy issues are likely to arise more and more, as states are increasingly using grand juries to investigate complex crimes and avoid the difficulties of conducting full-blown preliminary hearings. That trend is significant, because in states that prohibit such witness disclosure, attorneys engaged in pre-indictment representation will find it much more difficult to monitor investigative developments and advise their clients meaningfully. **IHP**

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Photos from the 2010 Annual Meeting and Convention in New Orleans

(l to r) Judge Gerard Lynch, U.S. Court of Appeals for the Second Circuit; Mike Sklaire, section chair; and Ashley Belleau, FBA national president.

(l to r) Mike Sklaire, Seth Rodner, Jeffrey Tsai, and L.T. Lafferty hosted a panel on Corporate Fraud in the Post-Madoff Era.