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DC Circuit Ruling Provides Increased Access to Grand Jury Testimony

By James W. Cooper, Arnold & Porter LLP

You might think that it is a simple and uncontroversial proposition that a witness in a federal grand jury investigation is entitled to review a transcript of her testimony. Yet this principle, recently upheld by a unanimous panel of the D.C. Circuit, broke new ground. The decision undoubtedly comes as a surprise to prosecutors accustomed to tight control of grand jury proceedings and skeptical of the motives of witnesses and their counsel.

In *In re: Grand Jury*, __ F. 3d __, 2007 WL 1791101 (June 22, 2007), the court found that grand jury witnesses' legitimate interest in ensuring that transcripts of their testimony reflected what they had, in fact, said, and, more importantly, what they had intended to say, outweighed whatever interest prosecutors might have in non-disclosure. The court observed that the grand jury is a forum that can be tense and confusing, in which prosecutors control the dynamic, and in which counsel are limited in the advice they can give because they are locked outside the room.

Recognizing that allowing witnesses to review their testimony would permit them to avoid inadvertent misstatement that might otherwise place them in jeopardy of prosecution for perjury,[1] the court announced a blanket rule. Witnesses may demand the opportunity to review transcripts of their testimony, while an investigation is ongoing, "in private at the [prosecutor's office] or a place agreed to by the parties or designated by the district court." Although several earlier cases had held that witnesses could, in certain circumstances, show that their need for copies of the transcripts outweighed the government's interest in secrecy,[2] this case was the first to hold that the witnesses' interest in at least reviewing the transcripts always trumps whatever interest the government may have in secrecy.

The court reserved judgment about whether witnesses are entitled to keep copies of their transcripts, noting that counsel for the witnesses had only sought access for purposes of review. Moreover, the court left it to the discretion of the district court whether to permit witnesses to take notes or to allow counsel to review the transcripts and take notes.

Although these open questions remain, defense counsel are equipped to argue persuasively for their participation in any transcript review. The point of In re: Grand Jury is that a witness is entitled to protect herself. Given the weight accorded by the court of appeals to the honest witness's interest in preventing misunderstanding and innocent error, it is difficult to identify a legitimate reason to force her to proceed without benefit of fully informed counsel. Therefore, a district court applying the transcript review rule should wisely permit attorney participation, absent some significant showing by the government of a real threat of obstruction (as opposed to legitimate, informed discussions among counsel for persons within the scope of the investigation about the precise nature of the inquiry and strategies to defend against it).

The government had advanced two distinct, but related, arguments against disclosure. First, the government argued, grand jury secrecy required the government to keep the transcript from the witness. Second, they said, if witnesses were permitted to obtain transcripts of their testimony, they might be intimidated into doing so, or even subjected to physical harm, by persons seeking to influence their testimony.

The court gave the first argument the back of the hand, calling it illogical to suggest that a witness who has testified before the grand jury somehow impinges on the secrecy of the process by reading from a transcript what she already has spoken, heard, and seen in person. As the court observed, witnesses are free to proclaim what occurred before the grand jury on the courthouse steps, and their reports of what occurred can be broadcast on national television or posted on the web.[3]

Furthermore, Federal Rule of Criminal Procedure 6(e) defines the universe of persons, including attorneys for the government, who are prohibited from disclosing "matters occurring before the grand jury" in federal practice. This rule sets the parameters for the secrecy of grand jury proceedings, and witnesses are conspicuously unbound by it.

Perhaps because they do not really consider Rule 6(e) a barrier to disclosure of a grand jury matter to a witness where the "matter" is the witness's own prior testimony, prosecutors routinely disclose grand jury transcripts to cooperative witnesses and their counsel when preparing those witnesses to testify in criminal trials. And they routinely make these disclosures without seeking a court order permitting disclosure (sometimes allowing counsel to obtain copies and retain them for hours, days, or weeks to facilitate counsel's assistance in witness preparation).

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Prosecutors do sometimes decline to allow witnesses to review prior testimony, such as when they view a witness as hostile. But that non-disclosure is designed to achieve tactical advantage: should the witness "spin" the prosecutor on the stand, the un-reviewed grand jury transcript could be used to bludgeon the witness with inconsistencies. It has nothing to do with preserving "grand jury secrecy," except insofar as the prosecutor might assert "grand jury secrecy" as her authority to play hardball.

The bottom line was that, whether the prosecutor shares a transcript or declines to do so is viewed, by prosecutors at least, as a matter within the prosecutors' discretion, not as a matter governed by Rule 6(e). Therefore, the government's reliance on grand jury secrecy as the reason for preventing witnesses from reviewing their transcripts on demand understandably failed to persuade the court.

At the heart of the government's argument was, of course, prosecutorial fear about losing exclusive dominion over the grand jury. Witnesses' counsel can insist on being present during interviews or debriefings with agents and prosecutors. In stark contrast, the grand jury is the prosecutor's sanctum. There, defense counsel is relegated to sitting outside the room and hoping 1) that his or her client can remember what the prosecutor asked and 2) that the prosecutor was forthright about his or her areas of interest during any pre-grand jury conversations. That is a tall order if a witness testifies for four, six, eight, or more hours, or on multiple dates—a not infrequent occurrence.

Prosecutors and government agents fear and mistrust defense counsel armed with too much knowledge about what they are doing. The more perfect the knowledge in the defense camp, they reason, the more opportunities arise for concoction of defenses, either in isolation or in joint defense. The government made this concern explicit in the D.C. Circuit.

This kind of argument flows from many prosecutors' unwillingness (or inability, given the limits of their own knowledge of a given set of facts and circumstances) to recognize that defenses may not be contrived, but may be, instead, a version of the facts and the law viewed by a less jaundiced eye. The government was certainly correct that sharing of information, if done corruptly, can constitute obstruction. That fact conceded, preventing a witness from reviewing her own testimony does little to prevent her from sharing information. At the same time, it works great potential harm on the witness, who, as the court recognized, may have made inadvertent errors in her testimony.

Whatever government consternation flows from this decision, the playing field is now a bit more even for defense counsel. What documents are being used as grand jury exhibits? What documents does the prosecutor think exist that she can't find? Who is the focus of the government's interest? What nuggets of information do the prosecutors (and grand jurors, if you are thinking about what will or will not play to a petit jury down the road) view with skepticism or delight?

Counsel who learn the answers to these and similar questions can be more precise in shadowing the grand jury investigation and not relying solely on the frustrated, emotional, or frightened witness's recollection. Armed with this superior information, defense counsel can 1) promptly seek to correct any misstatements; 2) marshal the facts through their own investigations and be better prepared to argue for declination of prosecution; 3) compare notes with counsel for other witnesses, thereby preventing innocent discrepancies in the testimony of witnesses; and 4) know whether to fight or to go early to the government to try to resolve the case as favorably as possible.

This increased knowledge by witnesses' counsel will naturally redound to the benefit of both in-house and outside corporate counsel. In-house counsel, as participants in any joint defense, will be better equipped to evaluate the risk to the corporation and respond to it more effectively, because other joint defense counsel will themselves know more precisely what is occurring before the grand jury.

In re: Grand Jury reflects the court's recognition that prosecutors go too far in viewing efforts by defense counsel to track and counter information presented to the grand jury as sinister. The court also made clear that, whatever the government thinks, keeping a transcript secret from a witness is an ineffective means to combat the harm the government imagines.

With the disclosure of transcripts at an early stage and the resultant more frank discussions between prosecutors and defense counsel, both sides may learn valuable information that prevents them from acting precipitously, or even foolishly. The reality is that, although they may be troubled by the D.C. Circuit's decision, prosecutors may find that the new openness engendered by the decision will serve the ends of justice.

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1. The court emphasized the witness's statutory right, under 18 U.S.C. § 1623(d), to avoid perjury prosecution by timely recantation of false testimony.
2. *E.g.*, *In re Sealed Motion*, 880 F.2d 1367, 1371 (D.C. Cir. 1989) (witness in independent counsel's investigation that did not lead to indictment entitled to obtain transcript to protect witness's reputation in light of statutory requirement that independent counsel, unlike other prosecutors, write report summarizing investigation); *Bast v. United States*, 542 F.2d 893, 896 (4th Cir. 1976)(witness not entitled to transcript absent showing of particularized need; witness's need to correct inadvertent errors and rebut rumors that the witness was a government informant did not constitute particularized need, where the grand jury did not return an indictment and the witness was not a probable defendant); cf. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) (fundamental fairness dictates that, in successive appearances before a grand jury, witnesses be offered some protection from the risk of perjury from repetitious questioning).
3. Although the court was more sympathetic to the government's second argument—that routine disclosure of grand jury transcripts might subject witnesses to intimidation from third parties seeking to get copies—it sidestepped this issue by fashioning a rule permitting inspection only, without resolving whether witnesses should be permitted to obtain transcript copies.

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