New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
Litigation
An ALM Publication
WWW.NYLJ.COM
VOLUME 257—NO. 29
TUESDAY, FEBRUARY 14, 2017

Navigating **Subpoena Disclosure Directives:** The Art of **Striking a Balance**

BY JOCELYN E. STRAUBER, DAVID MEISTER AND ELI RUBIN


SHUTTERSTOCK

In a 2015 cocaine importation investigation, the U.S. Attorney's Office for the Eastern District of New York issued three grand jury subpoenas (one to an accounting firm and two to other recipients) that inadvertently included the following language:

> YOU ARE HEREBY DIRECTED NOT TO DISCLOSE THE EXISTENCE OF THIS SUBPOENA AS IT MAY IMPEDE AN ONGOING CRIMINAL INVESTIGATION.

United States v. Gigliotti, 15 CR 204, slip op. at 2 (E.D.N.Y. Dec. 23, 2015).

The defendants moved pre-trial to preclude the government from offering at trial evidence obtained pursuant to these grand jury subpoenas, arguing that the above-quoted language was improper. There was no dispute on that point—the defendants, the district court and the Eastern District's U.S. Attorney's Office, all agreed that Federal Rule of Criminal Procedure 6(e)(2) imposes no obligation of secrecy on grand jury witnesses and therefore the language directing non-disclosure should not have been used. Id. at 3. The U.S. Attorney's Office explained that the language was used unintentionally, and prior to the district court's decision on the defendants' motions, notified the subpoena recipients of the error and advised them that they had no legal obligation to refrain from disclosing their receipt of, or response to, the subpoena. Id. The district court found that the corrective notification provided by the government to the subpoena recipients was sufficient and that suppression of the evidence obtained by subpoena was unwarranted. Id. at 1.

The U.S. Attorney's Office further explained to the court that its policy was to include "a request, not a command" concerning non-disclosure, stating:

JOCELYN E. STRAUBER *and* DAVID MEISTER *are partners, and* ELI RUBIN *is an associate, in Skadden, Arps, Slate, Meagher & Flom's government enforcement and white-collar crime practice.*

PLEASE DO NOT DISCLOSE THE EXISTENCE OF THIS SUBPOENA, AS IT MAY IMPEDE AN ONGOING INVESTIGATION.

Letter for Government at 3, *United States v. Gigliotti*, 15 CR 204 (E.D.N.Y. Nov. 17, 2015).

The court expressed no concern about the above-referenced request language, and indeed, government requests that subpoena recipients refrain from disclosure are common practice. Such requests are intended to protect investigations, and to address the risk that a target made aware of a subpoena may flee, destroy evidence, retaliate against potential witnesses or otherwise interfere with the investigation. However, when prosecutors make such a request, and accompany it by a statement that disclosure may impede an ongoing investigation, a recipient may be left with the mistaken impression that he—or the entity he represents—is legally obligated not to disclose the subpoena's existence and that to do so could amount to obstruction of justice. As a result, individuals or entities that receive subpoenas (or their counsel)—especially those that lack experience in dealing with federal government investigations—may be unwilling to speak to the defense pretrial, thereby hampering the defense's trial preparation. Recipients also may be hesitant to confer with other potential subpoena recipients—which they have every right to do—and thus may be unable to assess the scope and nature of the government's investigation, and to determine the best way to respond.

Request Versus Demand

To balance the risks that flow from non-disclosure requests against the government's need to protect investigations, U.S. Attorney's Offices that request non-disclosure, and that reference the risk of impeding an investigation should, in an exercise of their discretion, frame their requests so as to minimize the risk that subpoena recipients will mistakenly view the request as a demand, or conclude that they have a legal obligation to refrain from disclosure lest they obstruct justice.

The grand jury secrecy rules and the relevant case law make two points clear. *First*, federal prosecutors lack the authority to demand non-disclosure of grand jury subpoena recipients, unless authorized by statute or court order. *Second*, even a "request" from a federal prosecutor concerning non-disclosure, especially when accompanied by a reference to potential obstruction of a criminal investigation, can readily be mistaken for a demand.

With respect to the limits of prosecutors' authority to require non-disclosure, Federal Rule of Criminal Procedure 6(e)(2), relating to grand jury secrecy, states that "no obligation of secrecy may be imposed on any person accept in accordance with Rule 6(e)(2)(B)." That provision prohibits disclosure of matters "occurring before the grand jury" by various categories of individuals, but does not include within that prohibition recipients of grand jury subpoenas. See *United States v. Sells Eng.*, 463 U.S. 418, 425 (1983) ("Rule 6(e) of the Federal Rules of Criminal procedure codifies the traditional rule of grand jury secrecy … . Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes."). According to the Advisory Committee Note, the Rule, first enacted in 1946, was intended to eliminate the common law practice of requiring grand jury witnesses to remain silent, finding that requirement "an unnecessary hardship" that "may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Rule 6 Advisory Committee Notes, 1944 Note to Subdivision (e). Since the enactment of the Rule, Congress has imposed non-disclosure obligations on grand jury subpoena recipients for certain limited classes of crimes, and enacted other statutes permitting courts to issue non-disclosure orders in certain situations. See, e.g., 12 U.S.C. §§3409 and 3420(b); 18 U.S.C. §1510(b). District courts also have authority pursuant to the All Writs Act to issue non-disclosure orders where necessary to protect an investigation, generally on application of the government. 28 U.S.C. §1651. But outside of these limited circumstances, subpoena recipients have no legal obligation to refrain from disclosure and the government cannot demand that they do so.

Perhaps because it is clear that prosecutors lack authority to demand non-disclosure, courts have been sensitive to the fact that even a request from a federal prosecutor's office may understandably be misinterpreted as a demand. For example, in a 2007 investigation, the U.S. Attorney's Office for the District of New Jersey issued subpoenas stating: "Disclosure of the nature and existence of this subpoena could obstruct and impede a criminal investigation into alleged violations of federal law. Therefore, the U.S. Attorney *requests* that you do not disclose

the existence of this subpoena." *United States v. Bryant*, 655 F.3d 232, 237-38 (3d Cir. 2011) (emphasis added). While this ask was styled as a "request," the district court, on the defendants' motion to dismiss the indictment, ordered the government to inform witnesses that they had no legal non-disclosure obligation, although the court declined to dismiss. As a result, five months before trial, witnesses were informed that they had "an absolute right" to speak to anyone about the matters under investigation, including their subpoena and testimony, and that the government would not take adverse action against them for doing so. Id. at 238.

The Third Circuit affirmed. In so doing the court recognized that not only witnesses, but also defendants, can be harmed by non-disclosure directives—instructions to witnesses not to communicate with defense counsel can interfere with a defendant's access to witnesses, and with the fundamental fairness of a criminal trial. The Third Circuit further stated that "many forthright citizens would comply with [the government's non-disclosure request] given the context in which it was made." *Bryant*, 655 F.3d at 239. The court found, however, that the request to grand jury witnesses in this case was not the equivalent of an instruction not to speak, that no affirmative steps were taken to restrict or stop witnesses from speaking with the defense and that "[e]ven if there were witnesses … with the mistaken impression that they could not speak with the defense, the District Court took measures to clarify such a misunderstanding well before trial." Id.

A 1987 First Circuit decision went a step further, recognizing that most subpoena recipients, if warned by the government that disclosure could impede an investigation, would believe they had a legal obligation not to disclose. *In re Grand Jury Proceedings*, 814 F.2d 61, 70 (1st Cir. 1987). In that case, the government's non-disclosure request was phrased as a demand, stating "You are not to disclose the existence of this subpoena or the fact of your compliance for a period of 90 days[.]" Id. at 63. But the First Circuit focused principally on this language that followed: "Any such disclosure could seriously impede the investigation being conducted and, thereby, interfere with the enforcement of the federal criminal law." Id. at 64. The court made the common sense observation that when a U.S. Attorney's Office informs a subpoena recipient that a particular course of conduct could "impede" a criminal investigation and thereby interfere with the enforcement of the federal criminal law, "we fail to see how a reasonable, law-abiding person who received such a letter would think anything other than that he was being told that he was legally obligated not to engage in that course of action." Id. at 70. The court commented that the language of the demand portrayed the risks of disclosure in "terms substantially identical to those used to describe a very serious federal crime." Id. These decisions recognize that even a permissible non-disclosure request may have the unintended and impermissible effect of conveying to a grand jury subpoena recipient that they are obligated not to disclose and that doing so could be viewed as a legal violation.

Clear Language

To ensure that prosecutors can protect their investigations—in contexts where disclosure in fact could jeopardize them—but do not exceed their limited ability to request (but not demand) non-disclosure, and to adequately address the real risk that recipients of subpoenas will treat requests from prosecutors as demands, non-disclosure requests should include language that makes clear both the limits of the government's authority and the rights of the subpoena recipients. Particularly where prosecutors make reference to the fact that disclosure could impede a criminal investigation, the government's request for non-disclosure should expressly state that (1) the request is not a demand or directive, (2) no legal non-disclosure obligation exists and (3) disclosure will not, in itself, be deemed an effort to impede or interfere with an investigation. The public interest requires prosecutors to protect their investigations, but also that they do so within the bounds of their legal authority, such that the rights of defendants and the recipients of grand jury subpoenas are also protected. To properly balance those rights, the government should request non-disclosure only where necessary to protect its investigations, and should make clear in those situations that it is making a request and not a demand.