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PRESIDENT'S MESSAGE, continued from page 1

one entry, but only one lesson per category, please.) Jot down, in 100 words or less, your thoughts about a lesson concerning the practice of law that has stood you well. Please send them to me at lawyers@american.edu. We will collect and assemble them and share your words of wisdom in a single book. Our deadline is September 27, 2007.

Here are the topics and a sample entry:

- A. The difference between in-house and outside counsel
- B. Working directly with management
- C. The joys and vagaries of having only one client
- D. Dealing with opposing counsel
- E. Managing litigation and the courthouse
- F. Balancing work and life
- G. Gender, race, and ethnicity

- H. How to make more money without going crazy
- I. Longevity in the position—what works?

Sample: Dealing with opposing counsel—I practiced in Rhode Island for a number of years and learned a valuable lesson early on. It pays to be honorable. Rhode Island is a very small state and the likelihood of bumping into the same lawyers again and again is a fact of life. If you burn a bridge on a deal with opposing counsel, you may find it hard to ask for a favor on the next deal. So make your word your bond. If you say you're going to deliver the document on a date certain—deliver it. It's hard to win back your good name and reputation once lost, so guard it, and the next deal may be a lot easier than the last.

Think of it as a gift to our Corporate Scholars.



Ilene G. Reid
WMACCA Chapter
6928 Race Horse Lane
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Mary E. Kennard President's Message

Give A Gift

I am, at heart, a teacher. In addition to my role as

general counsel, I teach each fall at American University's Washington College of Law, and am now preparing my lectures and war tales, in the hope that I bring to life in my classroom both my love of the law and my field of practice. It is because I am a teacher that I worry a lot about law students—what the future holds for them and how the practice has been shaped by us for them.

Our nine 2007 WMACCA Corporate Scholars are bright and shining examples of the future of our profession. Vanessa Allen and Brandon Fitzgerald, who direct the Scholars Program, together with a group of WMACCA volunteers, did a magnificent job selecting stellar students from the law schools in our service area. This year's class reaches from the DC metropolitan area to the University of Richmond and William & Mary law schools. We were thrilled to find some of the best and brightest applicants for our summer clerkships in corporate America.

It is hard to believe how far the program has come in four short years. In 2003, when I was the treasurer of WMACCA, we received a \$10,000 grant from the Minority Corporate Counsel Association (MCCA) to enhance diversity in the profession. Under the leadership of Robert Stern, then chapter president, WMACCA created the Corporate Scholars Program. For me, this was an important event because as a law stu-

dent, I had no idea what the life of an in-house counsel was like. I thought I wanted to be one, but I had no understanding of how one became a general counsel. And I did not have a mentor who could tell me how to get from the law school door to the general counsel's suite. It was my hope that, through the creation of this WMACCA scholarship program, law students from diverse backgrounds would see firsthand what it is like to be an in-house counsel—what it is really like to work day to day with one client's interest in mind, and to be a part of a corporation, understand its business and apply practical legal advice to the day-to-day affairs in the hope of advancing, or at least not detracting from, its progress.

Now in its fourth year, not only has the WMACCA Corporate Scholars Program become better, but other ACC chapters have implemented similar programs. We now have alumni from our Scholars Program who have gone on to law firms, agencies, and even directly into in-house with a practical knowledge base. WMACCA's fundraising efforts, particularly this year, ensure that the program will remain solvent in future years and attractive to the brightest law students in our community. Thanks to all of the people who have supported this program and helped ensure its success.

Each year when I meet our new scholars, I am struck by the fact that they are so eager to learn from all of us how to be a good—dare I say—great lawyers. Even today, I found myself in a very heartfelt conversation with a young law firm associate who is deciding whether she should remain in her

firm or strike out for some other career in law. She needed guidance, and affirmation that it was okay to take a leap of faith, to do things her way, to take a risk. She really did not need my advice. She probably already knew deep down everything I said to her. But she needed me to say the words that would validate the inner voice telling her that she can be anything she wants to be because she has the drive and ambition to take herself to the next level. I too, try to stay in contact with my mentors—the lawyers who have gone before me—to ask “Am I on the right track? Is there something I'm doing or not doing, that I should be doing?” We all need similar advice and counsel. And because we are in the advice and counsel business, it is sometimes hard to ask for what we readily give away to others.

I offer each WMACCA member the opportunity to share what you have learned with our WMACCA Corporate Scholars. Select a lesson from one or more of the categories listed below. (You may send in more than

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**All in the Corporate Family:
Privilege and Co-representation
Issues for In-house Lawyers 2**

All in the Corporate Family: Privilege and Co-representation Issues for In-house Lawyers

By Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel (ACC)

Martine Turcotte is a very happy lady—at least for a while. She recently won a decision for her client, BCE—the Canadian telecommunications giant—in a US federal court in a case that raised questions (and the specter of unpleasant results) about what many of us do on a daily basis without a lot of thought. Martine’s experience provides a caution to us all—don’t provide legal advice to subsidiaries without safeguards in place.

Many ACC members work in companies that have partially or wholly-owned parents, subsidiaries or affiliates—call them corporate family members. Many times, and certainly when the entities fully share the same ultimate ownership, in-house counsel provide advice for entities across the family (and their employer client’s “borders”), in order to ensure that appropriate policies and practices are adopted and followed by each of the entities. It’s in each of the entire family’s interests for other members of the family to stay out of trouble (avoiding reputational run-off) at least, and at best to be properly coordinated when they share a variety of common interests: the same regulators, suppliers, customers, industry partners, investors, and so on. And for the most part, this approach works very well. Indeed, we all know the repercussions that would follow a failure in a related entity that the parent or other corporate family members knew about but “ignored”: the entire family of brands would be tarnished and the entire entity group pilloried.

But even cross-counseling that works well “for the most part” still has room for the exceptions. Martine’s company, BCE, has been engaged in a grueling battle before the Delaware courts for more than five years litigating with former US subsidiaries and their creditors regarding BCE’s decision to stop financing the operations of one of its struggling former subs, Teleglobe. The two sides haven’t gotten to the meat of the underlying matter yet. They’re still arguing over privilege claims stemming from whether client services provided by BCE in-house lawyers to Teleglobe (when it was a sub) entitle Teleglobe to see BCE privileged communications and work product that would otherwise be protected from a hostile party’s discovery demands.

The disputed material pertains to BCE’s inside and outside legal advice to the client regarding its decision to pull their financing, including presentations by BCE’s chief legal officer—Martine Turcotte—to the board and opinions from outside law firms, all discussing ramifications of the company’s decisions on the defensibility of the kind of litigation it now faces. BCE claims that these events occurred after they severed joint representation of the sub; Teleglobe claims otherwise, arguing it has the right to see everything that passed through BCE’s in-house law department because in-house lawyers, at one time, had provided Teleglobe with legal advice on the financial commitments, meaning the subsidiaries share the legal privilege.

When Martine approached ACC and asked for our opinion and support, we thought the issue was one that deserved attention; after reviewing the facts and the rules, we decided to file amicus rather than risk allowing the lower court’s decisions in favor of Teleglobe’s discovery demands to become precedent. Our brief is online at www.acc.com/public/amicus/teleglobe.pdf.

The Court of Appeals agreed with BCE’s and ACC’s arguments, citing our amicus in a 93-page decision written by Judge Ambrose and handed down July 17, 2007 (www.acc.com/public/amicus/teleglobeopinion.pdf). The court vacated an order from the US District Court in Delaware that would have forced BCE to produce 900 privileged documents, remanding it back for further examination. But they didn’t stop there. They all but wrote a handbook on how parents and subsidiaries can steer through the tricky shoals of shared legal advice and keep the parent’s privilege intact. Along the way, the court discusses a number of major issues and doctrines, including (1) the attorney-client privilege, (2) the disclosure rule and the requirement that communications be in confidence, (3) privileged information sharing under (a) the co-client or joint-client privilege and (b) the community-of interest or common-interest privilege, (4) the exception for adverse litigation, and (5) the problems that arise when the interests of the clients in the joint representation begin to diverge.

What I’ll discuss further below and what the court held is this: There’s nothing wrong and a lot right with the concept of in-house counsel providing legal services across corporate family lines. But there are risks and they can be addressed with forethought. Indeed, it is advisable for in-house counsel to have paperwork in place so that the moment parent and subsidiary realize their interests might diverge through spin-off, insolvency or sale, the parent can sever its legal ties and counsel arrangement, and get the subsidiary separate legal counsel. But, as these deals can take months to play out, there’s no reason the parent can’t then continue to provide the subsidiary with legal advice on other non-related matters without putting its privilege at risk.

Good advice, but of course, when is “the moment” of realization, how can the shared legal services relationship be effectively severed, and what is now to be avoided as conflicted representation, and more?

ACC has created an important article (www.acc.com/public/attyclientpriv/parentsbcprprnttethics.pdf) that reviews the following issues for your consideration to avoid learning BCE’s lesson the hard way:

- When, and to what extent, the representation of wholly or less than wholly-owned entities by a single in-house legal department raises conflicts issues for in-house counsel.
- An overview of attorney-client and work product privilege in the context of multi-entity enterprises.
- Conflicts and privilege issues that can arise once the decision has been made to sell an entity or its assets, or once the sale has been completed.

* Please note that this article was written before the BCE case was decided, and while we’re amending it to reflect the impact of this recent decision, it may not be finished with those revisions by the time you read it!

Further, we suggest that you may wish to consider executing a form of a joint defense agreement if you/your legal team provides services to multiple entities in the corporate family. A joint defense agreement allows a counsel for one client to work with another client on matters in which they share common interests, and which they agree do not present conflicts. A joint defense agreement asks the parties to recognize that the lawyer represents one of the clients and the lawyer’s loyalties will remain with that

client should common interests at some point diverge. Thus, if a conflict arises in the future, the joint defense relationship is automatically severed. It’s a neat little tool that’s simple to execute and helps protect both you (professionally), and your client (in case business interests diverge in the future) resulting from your services provided across the corporate family. (www.acc.com/vl/index.php?action=search&full=yes&anytext=Joint+Defens.)

I’ve borrowed and consolidated some of the themes from our overview of joint representation in a multi-entity environment for your consideration below. Thanks and cudos go to Peter Jarvis of Hinshaw & Culbertson, one of ACC’s ethics specialists.

Current-Client Conflicts of Interest in a Multi-Entity Setting

There is no general black letter rule of professional conduct that defines the term “client,” and a favorite on the in-house counsel ethics hit parade is always the topic of identifying the client in thorny situations. On the other hand, ABA Model Rule 1.13, Organization as Client, provides a starting point: I’ve included some of the pertinent sections below:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows, or reasonably should know, that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding certain conflicts of interest]. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

According to Comment [1] to this rule, the words “Other constituents” refers to “the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.” Thus, it does not expressly include all ostensibly related entities. On the other hand, “constituents” can certainly include entities that are stockholders in other entities, and the rule more broadly acknowledges that representations may cross single organizational lines.

If, in fact, any non-clients appear to be in doubt about whether the lawyer represents them, the lawyer must explain that she does not. See *id.*; ABA Model Rule 4.3. Whether in a context of entity or individual clients, the test developed in caselaw and in ethics opinions to determine who is and is not a client, depends upon the subjective belief of the putative client and secondarily on proof of facts that it was, at least to some degree, reasonable for the client to hold such a belief.

Stated another way, in-house counsel who actually provides legal advice to multiple entities, or who allows those entities to form the reasonable belief that they are clients, will be held to have multiple clients. Once this conclusion is reached, the attendant duties of loyalty and confiden-

tiality that are part of the representation of any client apply to these intended or unintended entity clients. As a practical matter, the only way for counsel to seek to limit these duties once they attach is first expressly to disclaim them (in writing, if at all possible) and then to make sure that her conduct is consistent with any disclaimers. And the only way to be certain that an attorney-client relationship is at an end is to end it clearly and unambiguously. When a client has reasonable, ongoing expectations of a relationship based on a history of past work, a court may view the relationship as a current-client relationship even though, as of a particular date, the lawyer is not actually doing work for that client.

The Current-Client Conflicts Rule

ABA Model Rule 1.7 is typical of current-client conflicts rules throughout the US and, in fact, has directly been adopted in some form by most United States jurisdictions. It provides in pertinent part that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
 - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) The representation is not prohibited by law;
 - (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) Each affected client gives informed consent, confirmed in writing.

The current-client conflicts rules can briefly be summarized in terms of veto power. Although Texas takes a different approach as a matter of state law,¹ the current client always has veto power to prevent the lawyer from acting adversely to that client in all other United States jurisdictions. Indeed, in some situations (which vary from state to state) a lawyer cannot proceed adversely to a current client even with consent. See, e.g., *In re Johnson*, 300 Or. 52, 707 P.2d 573 (1985); Restatement (Third) of the Law: Law Governing Lawyers §128, reporters’ note cmt. c (2000) (“Restatement”).

It also bears mention that over time, a situation that did not initially present a conflict or require a waiver can develop into one that does. Similarly, a previously valid waiver may have to be repeated if the facts change in material and unanticipated manners. In fact, it is also possible that a situation that began as one in which no conflict existed, or in which only a waiveable conflict existed, can turn into one in which (depending upon the rules of the jurisdiction) continuing representation, even with a waiver, is not permissible. See, e.g., *In re Stauffer*, 327 Or. 44, 956 P.2d 967 (1998); Oregon Formal Op. Nos. 2005-122, 2005-40.

One final point. Legal departments are “firms” within the meaning of the conflicts rules. See, e.g., ABA Model Rule 1.0(c). Unless the situation is one in which screening to

avoid conflicts is permitted by applicable law, a current-client conflict that is attributable to one in-house lawyer will be attributed to all members of the legal department—the same rule that applies to outside firms. See, e.g., ABA Model Rule 1.10; Restatement §123, cmt. d(i) (2000).

As a general proposition, all representations of multiple “current” clients create at least a theoretical potential for conflicts, but again generally, simultaneous presentation of wholly commonly owned and solvent entities will not usually lead to conflicts problems. When common ownership is less than complete, the potential for current-client conflicts becomes greater—even if one of the entities has a sufficient ownership interest in the other to exercise effective control. When the interests of multiple but related clients are in conflict, conflict waivers must be obtained from disinterested parties in order for the joint legal representation to continue since the in-house lawyer is professionally obligated to its employer-client under the rules previously discussed.

In the situation of an insolvent related entity, it is a matter of black letter law that management and the board of the entity owe their duties to continue to run the entity for the benefit of its creditors, and not for the benefit of its equity owners (as would be the case if the business were solvent). In what are called “deepening insolvency” situations, lawyers and other advisers whose actions increase the degree of insolvency (and therefore of creditor debt) in an attempt to assist the equity owners are at risk of being sued. While there are many unknowns in these situations, it seems relatively clear that in-house counsel of a multi-entity enterprise who wish to act for the benefit of a solvent entity and to the detriment of an insolvent entity, and who appreciate that’s what they are doing, act at their potential peril.

So what about the attorney-client privilege—how is it applied in a multi-entity joint relationship? In general, if there is co-representation on an issue, then there is co-attorney-client privilege, which can be enforced against third parties, as well as now-feeding entity family members. (There can be privilege between co-entities sharing a lawyer, as well as separate privilege that is not shared if the entities have their own counsel on non-shared matters, too. They are not mutually exclusive.)

Thus, in Martine’s case, the court held that documents created by the in-house lawyers during the joint representation were discoverable to both parties. The dispute arose over documents and communications that took place after BCE claimed it had severed its joint legal relationship on all relevant counseling to its sub. And the court agreed that it is possible to not only sever the joint defense relationship in its entirety on a going-forward basis, but also possible to continue representation on non-disputed matters (say, IP management or environmental compliance) and sever it on disputed matters (relating to financial business decisions, for instance).

Of course, all of the rules pertaining to privilege still apply: it can be waived if confidentiality is broken by any party to the privilege (include the related entity which has received legal services from another family members’ lawyer and then divulges the confidential information to a third party), it does not survive the crime fraud rule exceptions, and it does not prevent anyone from investigating facts (since privilege doesn’t cover facts, it covers communications and related work product of lawyers). See ACC’s resources defining in-house privilege application, waiver, and best practices to ensure that privilege is properly protected: www.acc.com/php/cms/index.php?id=84.

The trickiest part of the equation is figuring out at what point the relationship must be severed in order to be able to claim privilege with lawyers who formerly advised from now-hostile subs: Is the point prior to any “negative” assessments or actions, or upon some form of notice? Or is there some kind of material conflict standard? The answer is not clear, and thus, ACC recommends considering adoption of joint defense agreements between entities sharing legal counsel. This enables the company to notice the affiliates, with whom it’s sharing counsel, of what the terms of the sharing are, and also to sever the relationship formally when there is concern that a notice that can be pointed to must be given.

Other Practical Considerations:

- Consider non-representation of some entities: just because you can, doesn’t mean you should. Some entities may not be well suited to share your services because of the potential for conflicts or waivers or other issues. It’s okay to just say “no” and encourage them to get their own counsel.
- Clearly limit the scope of representation (and do it in writing): don’t try to be everybody’s lawyer for everything, or you may end up being barred from being anybody’s lawyer for anything. If their needs are many, then other family members may need to hire their own in-house counsel or the family may wish to pay for outside representation where it’s needed. This is especially important if the affiliate might at some time be sold: where documents are requested by the buyer, it will be easier to limit them to those covered in the scope of representation.
- If you do need to sever the relationship, ABA Model Rules 1.9 and 1.10 allow you to do so, only if you end it prior to any material legal work impacting the severed party’s representation has begun. So don’t wait to sever a relationship until the matter raising a conflict is too ripe.
- Confirm in writing what will or will not be shared before the representation begins to help ensure that if and when it ends, the files that may be open to both parties are limited to those agreed upon in advance.
- Beware the “sale” of privilege before the sale of assets is considered in a related entity that has shared legal services and is now to be sold. See John Villa’s excellent article on this subject at www.acc.com/protected/pubs/docket/nd01/ethics1.php and www.acc.com/vl/index.php?action=search&full=yes&anytext=Villa.
- Watch what goes out the door and act promptly if a mistake is made and something is inadvertently disclosed. Generally, if inadvertently disclosed and quickly remedied, the rules and courts will allow you to put something that shouldn’t have been shared back into the privileged “box.”

The only thing that’s clear is that there is still much that is unclear for the counsel who navigates this twisting path. But the need for, and practicality of co-counseling related entities is so apparent, and the risks attendant to ignoring ill-advised behaviors in related entities is so high, that today’s in-house lawyer (and her client) has little choice but to venture forth and provide co-counsel. But, forewarned is forearmed: Exercise caution!

If you have questions or if I can be of service, please feel free to call me at 202.293.4103, x318, or email me at hackett@acc.com. ACC’s advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

Focus *Extra*

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).

continued

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.

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. Bursery 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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