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April 6, 1984
By Hand

Lynne Lester
District of Columbia Bar
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Dear Lynne:

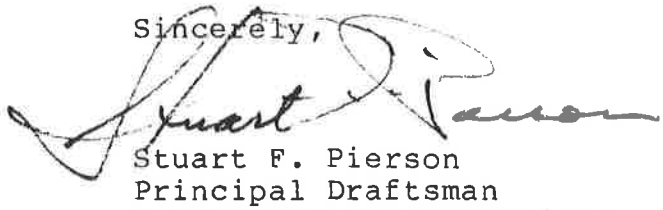
Pursuant to D.C. Bar Division Guidelines concerning emergency procedures, I submit herewith for distribution to the Board of Governors and the other Divisions of the Bar, comments of Division 18, Litigation, concerning the Advisory Committee's proposed amendments to Rule 6 of the Federal Rules of Criminal Procedure.

The Advisory Committee proposes to amend: Rule 6(a) to permit impaneling alternate grand jurors, Rule 6(e)(3)(A)(ii) to permit federal prosecutors to attach state personnel to their prosecution teams, and Rule 6(e)(3)(C) to permit disclosure of matters occurring before the grand jury to state criminal authorities without a showing of particularized need or connection with a judicial proceeding. Our comments express the following views: that the proposed amendment to Rule 6(a) should include a provision to assure that subsequently impaneled alternate grand jurors will be fully informed of prior evidence on pending matters; that the proposed amendment to Rule 6(e)(3)(a)(ii) should not be adopted, principally because it fails to take account of inherent conflicts in the duties to separate sovereigns of state personnel who are attached to federal grand jury teams; and that the proposed amendment to Rule 6(e)(3)(C) should not be adopted, principally because it does not justify eliminating the requirement of a showing of

particularized need for disclosure to state criminal law enforcement officials. With respect to the rule of grand jury secrecy generally our comments state further that, considering the complexities and uncertainties which remain in the law, it would be best to approach amendment of Rule 6(e) as part of a comprehensive evaluation and revision of the entire Rule.

Having previously approved the substance of these comments, the Steering Committee of Division 18 formally approved them in their present form today, April 6, 1984.

Sincerely,



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Principal Draftsman
For the Steering Committee,
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COMMENTS OF DIVISION 18 (LITIGATION), DISTRICT OF COLUMBIA BAR, ON PROPOSED AMENDMENTS TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Division 18
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April 5, 1984

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The views expressed herein represent only those of Division 18 (Litigation) of the District of Columbia Bar and not those of the D. C. Bar or its Board of Governors.

COMMENTS OF THE LITIGATION DIVISION (DIVISION 18), DISTRICT OF COLUMBIA BAR, CONCERNING PROPOSED AMENDMENTS TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Division believes that the proposed amendment to Rule 6(a) concerning alternate jurors should be clarified so as to require that such new jurors will be thoroughly informed of all prior evidentiary presentations concerning matters pending at the time they are impaneled.

The Division opposes the proposed amendments to Rule 6(e) which would permit federal prosecutors to attach state personnel to their grand jury teams and would authorize disclosure of matters occurring before the grand jury to state criminal officials without a showing of particularized need.

The law of federal grand jury secrecy is complex, difficult and continues to be uncertain in important respects. Any amendments to Rule 6(e) should be designed to relieve these problems without expanding the potential for harmful breaches of secrecy. The language of the proposed amendments and the Advisory Committee Note fail to provide sufficient assurance that they will improve the Rule. Practical limitations, inherent conflicts in the duties of employees of separate sovereigns, and the Advisory Committee's unexplained determination to eliminate the requirement of particularized need for disclosure to state criminal officials lead the Division to conclude that the proposed amendments are not well advised.

Further, we submit that any further amendments to Rule 6(e) should proceed not on a piecemeal basis, but upon a comprehensive approach designed to confront lingering questions concerning the practical and literal meaning of the rule of grand jury secrecy, 1/ the breadth of the term "matters occurring before the grand jury", and the appropriate mechanisms for recording any disclosure of grand jury materials outside the federal prosecution team. The views and expertise of knowledgeable prosecutors and criminal defense lawyers who are experienced in grand jury matters should be sought before piecemeal amendments to the Rule are adopted.

Rule 6(a)(2) Alternate Jurors

It appears that the proposed amendment to Rule 6(a) would permit impaneling of an alternate grand juror after the grand jury has heard evidence on pending matters. In such circumstances, the rule should provide that the alternate juror is fully informed of relevant matter which has been presented earlier. The Division proposes that the amendment be appropriately modified.

1/ While the Supreme Court's decision in United States v. Sells Engineering, 103 S.Ct. 3133 (1983), serves the virtue of certainty, its division of entitlement to disclosure between two segments of the same Justice Department may not prove to be a workable rule for attorneys having continuing responsibility for both civil and criminal enforcement. This matter should be considered in a comprehensive approach to revision of Rule 6(e).

Rule 6(e)(3)(A)(ii): "(including personnel of a state or subdivision of a state)"

This proposed amendment to Rule 6(e)(3)(A)(ii) raises serious problems in view of practical difficulties which may arise when state personnel are joined in a federal grand jury team.

We recognize that a federal grand jury may require the assistance of state employees in order to acquire an adequate understanding of events or documents related to its inquiry. We recognize also that, because such state employees would be under no obligation of secrecy if they testified merely as witnesses, 2/ because their expert assistance usually requires that they examine testimony and documents presented to the grand jury, and because it is more efficient and convenient for them to prepare their assistance outside the grand jury room, federal prosecutors have sought to bring such people into the prosecution team in order legitimately to enhance the government's presentation to the grand jury.

We are concerned, however, first, that the proposed amendment and the Advisory Committee Note do not adequately address the increase in risk of improper disclosure to state employees who have an inherent conflict in obligations; and

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2/ Rule 6(e)(2); Sells, 103 S.Ct. at 3138.

second, that there are insufficient procedural protections against breaches of grand jury secrecy, whether purposeful or inadvertent.

1. While the limits of grand jury secrecy remain uncertain and complex, expansion of the group allowed access will increase the risk of improper disclosure.

Decisions rendered over the past ten years indicate that well informed and responsible federal attorneys have disagreed with the courts concerning the bounds of grand jury secrecy. Rule 6(e) has become intricate and complex both on its face and in its construction, as the courts have addressed new prosecution approaches. The Supreme Court's 1983 decisions in Illinois v. Abbott & Assoc., 103 S.Ct. 1356 (1983) [Abbott], United States v. Baggot, 103 S.Ct. 3164 (1983) [Baggot], and United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983) [Sells] illustrate fundamental differences between views of the Justice Department and attorneys representing private parties. Important disagreements remain: Does the rule of secrecy cover only what actually occurs before the panel in the grand jury room, or does it extend to such material as agents' interview reports, testimonial summaries, and organizational memoranda circulated

within the prosecution team? 3/ May attorneys in the Civil Division of the Department of Justice participate both in a grand jury investigation and thereafter in related civil litigation? 4/ May an Assistant U. S. Attorney with both civil and criminal responsibilities have access to grand jury material or share it with an Assistant in the office next door who has only civil responsibility. 5/

In a time of complex and unsettled legal principles, to expand to state employees the group of those who must interpret and apply the complicated federal rule of grand jury secrecy may raise an unwarranted additional risk of breaches of grand jury

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3/ See In re Doe, 537 F. Supp. 1038, 1043 (D.R.I. 1982); In re Sells, 719 F.2d 985, 988, footnote 2 (9th Cir. 1983); and compare Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 857, 868-870, 211 U.S. App. D.C. 267, 278-280 (1981); In Re: 1975 Grand Jury (Baggot), 662 F.2d 1232, 1237-1238 (7th Cir. 1981), aff'd on other grounds, sub nom., United States v. Baggot, 103 S.Ct. 3164 (1983); S.E.C. v. Dresser Industries, 628 F.2d 1368, 202 U.S. App. D.C. 345, cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, 280 F.2d 52 (2nd Cir. 1960). See also the Supreme Court's discussion in Sells, footnote 11, 103 S.Ct. at 3140-3141, holding that authorized government attorneys who do not appear before the grand jury are nonetheless permitted to examine matters occurring before the grand jury.

4/ See Sells, footnote 15, 103 S.Ct. at 3141, where the Court expressly declined to address the question whether an attorney who conducted a criminal prosecution may use grand jury materials in his later conducting of the civil phase of the same matter.

5/ Id.

secrecy. To adopt such an amendment in a vacuum, when so many related questions remain unanswered, is particularly troublesome.

2. Joinder of state employees in a federal grand jury team raises a fundamental conflict in their duties.

Currently, under Rule 6(e)(3)(A)(ii) an Assistant United States Attorney may bring into the prosecution team and share grand jury material with any federal personnel whom he deems necessary for the performance of his duty to enforce federal criminal law. 6/ The proposed amendment to expand the group of available assistants to state employees would introduce a substantially different set of loyalties.

The performance of a state employee's duty requires that he uphold, protect and defend state law -- both civil and criminal. A federal employee has no such duty. If a state employee who has been joined in a federal prosecution team should learn of evidence of a violation of state civil or criminal law because of his examination of matters before the grand jury, he would be naturally inclined and probably duty-bound to disclose them to appropriate state authority. Yet, the requirements of current Rule 6(e)(3)(B) would prohibit such a disclosure without

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6/ As held in Sells, the Assistant may not share such information with an attorney for the government who is not involved in the enforcement of federal criminal law.

an order of court based on a showing of particularized need and connection with a judicial proceeding. Abbott.

A possible substantive solution to this dilemma would be to condition disclosure to the state employee upon an overriding duty to the federal grand jury. If such a duty were not imposed, we believe that the probability of a fundamental conflict would be unfair to the non-federal employee and may seriously risk well intentioned but improper disclosure of matters occurring before the grand jury to unauthorized state officials.

It may be argued that the proposed amendment to Rule 6(e)(3)(C) concerning disclosure to state criminal authorities provides a procedural resolution to such a conflict. We question this. If all that is required is that the state employee would tell the federal attorney that there is grand jury material showing evidence of a violation of state law, whereupon the attorney would tell the federal court and an order for disclosure would be entered, state authorities would gain almost unfettered access to federal grand jury investigations merely upon a federal attorney's choice to seek their assistance. See our comments on proposed amentment to Rule 6(e)(3)(C), below. Further, even if the amendment to Rule 6(e)(3)(C) would solve the state employee's conflict with respect to state criminal law, it would not alleviate his conflict with respect to state civil law.

3. The protections against improper disclosure do not appear adequate.

If federal courts can impose a practically effective, overriding pledge of secrecy on a state employee joined in a federal prosecution team, the current and proposed provisions of Rule 6(e) do not appear adequately explicit and comprehensive to assure that such state employees will clearly recognize and comply with their obligations to the federal grand jury. If the proposed expansion of the available group of grand jury assistants is adopted, we would recommend simultaneous amendment to Rule 6(e)(3)(B) providing at least:

1. That all personnel not charged with enforcement of federal criminal law who are permitted disclosure under Rule 6(e)(3)(A)(ii) execute an oath:

   - acknowledging that they will use the disclosed material solely to assist the attorney for the government in the performance of his duty to enforce federal criminal law;

   - acknowledging that this duty overrides any conflicting duty under state law;

- recognizing that disclosure of matters occurring before the grand jury may be made only to agents and attorneys of the grand jury, or as permitted by a federal court; and

- recognizing that such state personnel may not possess grand jury materials separately from the controlled custody of attorneys for the prosecution team.

2. That federal attorneys responsible for the prosecution team shall:

- retain controlled custody of all secret grand jury materials unless ordered to do otherwise by a federal court;

- transmit comprehensive prophylactic instructions to assisting personnel;

- keep a grand jury docket (including a description of the investigation; the identity of targets, personnel with access to materials, agency supervisory personnel, and the supervising federal attorney; records of receipt of grand jury materials, consideration of grand jury materials,

and the date when assistance of the personnel terminated); and

- certify to the court when the assistance of the personnel has concluded that their oath has been executed and complied with.

These elemental measures have been carefully considered and applied to federal-agency assisting personnel in some district courts already. 7/ We believe that they embrace reasonably necessary and adequate protection, should the proposed amendment be adopted. 8/

Rule 6(e)(3)(C)(iv): disclosure to state authorities of evidence of state criminal violations

It appears from the Advisory Committee Note that the purpose of this amendment is to eliminate the dual requirement of "preliminary to or in conjunction with a judicial proceeding" and particularized need, as those two elements are required under

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7/ See Robert Hawthorne, Inc. v. Director, I.R.S., 406 F. Supp. 1098 (E.D. Pa. 1976).

8/ While the rule enunciated in Sells stands, such measures would also apply also to federal attorneys not members of the prosecution team, providing needed certainty concerning their obligations regarding grand jury materials. Even if Sells were overturned, at least some of these measures would be necessary to assure fully informed determinations of claims of grand jury abuse. Compare Sells, 103 S.Ct. at 3142.

Rule 6(e)(3)(C)(i) and the Supreme Court's holding in Abbott. The Division opposes eliminating the requirement of particularized need. With respect to the other requirement for disclosure, connection with a judicial proceeding, we recognize that criminal investigations are not judicial proceedings, 9/ and therefore, we do not oppose modification of this requirement in conjunction with improving other safeguards.

1. The standard for disclosure is not clear.

The law concerning grand jury secrecy is a creature both of rule and of tradition. 10/ Although the phrase "particularized need" does not appear in the much amended text of Rule 6(e), it has been an essential part of the judicial standard for grand jury disclosure since United States v. Procter & Gamble, 356 U.S. 677 (1958). 11/

If, as appears, the proposal is meant to eliminate both particularized need and connection with a judicial proceeding, we are concerned first that the proposed substitute standard is not clear. Neither the amendment nor the Advisory Committee Note sets forth the strength of the new "showing" required to

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9/ Baggot.

10/ Sells, 103 S.Ct. at 3138-3140.

11/ See also Sells and Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

authorize disclosure. They are silent also on such questions as: whether the court has discretion to deny disclosure if the required showing is made; and what procedure the federal attorney and the court are to follow in presenting the request, deciding it, and implementing any permission to disclose.

Particularly in the area of grand jury secrecy, federal attorneys, courts and others involved with grand jury proceeding should be clearly advised of the applicable standards and procedures.

2. Disclosure merely upon a showing of relevance to state criminal law is not wise.

The Supreme Court's decision in Abbott squarely rejected an assertion that state antitrust authorities could obtain disclosure of grand jury materials merely upon a showing of relevancy. Even where there was an articulated congressional policy to foster cooperation between federal and state antitrust authorities, the Court held that the dual showing of a judicial proceeding and particularized need must be made. Id.

The proposed amendment would overrule the holding in Abbott directly, and would overrule by implication the established general principles articulated in Procter & Gamble, Douglas Oil, and Sells, as they relate to state criminal officials. We believe that the requirement of particularized

need has been wisely imposed. The Advisory Committee Note does not convince us that it should be eliminated for the benefit of state criminal law enforcement.

3. Retention of the requirement of particularized need would be more consistent with the tradition and principles of Rule 6(e).

If the amendment is meant only to eliminate the judicial proceeding requirement while retaining the requirement of particularized need, we perceive less of a problem. Assuming the existence of particularized need, there is less chance of harmful disclosure if the amendment merely substitutes a showing of substantial evidence of criminal violation for that of an actual or impending judicial proceeding. If the Advisory Committee adopts such an approach, the amendment should also include a requirement that, in addition to the showing of particularized need, the disclosure must be supported by a certification of the chief state law enforcement official that the material provides substantial evidence of a state violation.

4. The amendment would prefer state criminal authorities over federal civil authorities.

Federal agencies and civil attorneys in the Department of Justice cannot obtain access to matters occurring before a grand jury without showing both particularized need and connection with a judicial proceeding. Sells, Baggot. The proposed amendment would permit state criminal authorities access to such materials under a much lower standard than applicable to federal civil authorities. Further, unlike disclosure to such federal authorities, the amendment would permit transmission of secret materials to state criminal authorities without notice. Compare Rule 6(e)(3)(C)(i), 6(e)(3)(D) and (E). The Advisory Committee Note gives no justification for this disparate treatment. Its failure to do so and to address the implications of Sells and Baggot on the general issue of disclosure of grand jury materials further support our view that a more comprehensive analysis should precede adoption of further amendments to the Rule.

5. The amendment may permit circumvention of limitations on state investigatory power.

Neither federal attorneys nor federal courts are normally responsible for interpreting and applying state criminal

law in federal grand jury proceedings. The proposed amendment would impose such a responsibility on them independently of their duty to enforce and apply federal law. At the same time, if the federal attorney's request and the court's order are accomplished ex parte, there is a significant probability that limitations on state power of compulsory process would be circumvented by denying interested persons an opportunity to appear and challenge the proposed disclosure. Compare Sells, 103 S.Ct. at 3142-3143; J. R. Simplot Co. v. United States District Court, 77-1 U.S.T.C. ¶ 9416 (9th Cir. 1976), withdrawn as moot, 77-2 U.S.T.C. ¶ 9511 (1977); Rule 6(e)(3)(D) and (E).

6. The amendment may risk broader and untimely disclosure by state authorities.

Unlike the proposed amendment to Rule 6(e)(3)(A)(ii), there is no provision in the proposed amendment which would bind state authorities under the new rule to use secret materials disclosed to them consistently with the work and purposes of the federal grand jury. Because they have a duty to enforce state civil and criminal law, state authorities receiving disclosure will surely use, and where effective disclose the secret materials whenever they feel it their duty to do so. Such disclosure could occur under the proposed amendment in a purely civil context before any judicial proceeding is in prospect. It

could occur before the federal grand jury deems disclosure of its secret material appropriate to its purpose and function. It could occur in circumstances which seriously compromise otherwise legitimately protected private cooperation with the grand jury.

We do not perceive any reason for giving state authorities such latitude, and we are seriously concerned that disclosure under the amendment will inhibit the work of federal grand juries, render less likely full candor from witnesses, and jeopardize the rights of innocent people, all of which the rule of secrecy is designed to avoid. Sells, 103 S. Ct. at 3138.