St. John's Law Review

Volume 60
Number 2 *Volume 60, Winter 1986, Number 2*

Article 10

CPL § 190.25(4): The Disclosure of Grand Jury Testimony in a Subsequent Civil Action

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ther judicial or legislative guidance is necessary to define the ability of tenants to transfer the right to make such purchases. It is suggested, however, that future guidelines should not restrict transferability to an extent which might discourage home ownership and the societal benefits which flow therefrom,[25] but rather, should regulate to the degree necessary to resolve the disputes which will undoubtedly arise as both tenants and sponsors struggle to devise more creative means of promoting their respective interests in the transferability issue.

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CPL § 190.25(4); The disclosure of grand jury testimony in a subsequent civil action

Since the fourteenth century, grand jury proceedings have been held in secret.[1] In New York, this practice has been codified

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469 (Sup. Ct. N.Y. County 1985)(executor had both right and duty to purchase unit for deceased tenant's estate); Hohenstein v. Hohenstein, 127 Misc. 2d 53, 56, 485 N.Y.S.2d 170, 172 (Sup. Ct. Queens County 1984)(husband remained "tenant in occupancy" and was entitled to purchase at insider price after separation from wife even though he could not physically occupy apartment until her death).

[25] *See* Ch. 555, § 1, [1982] N.Y. Laws 2396. "[T]he conversion of residential real estate from rental status to cooperative or condominium ownership is an effective method of preserving, stabilizing and improving neighborhoods and the supply of sound housing accommodations." *Id.*; *see* Rohan, *"The Model Condominium Code" - A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 599 (1978)("occupier-ownership in the form of . . . condominiums offers the best long-range solution to the problem of urban decay").

The condominium form of ownership may provide a lower-income family with its only opportunity to purchase a unit having the same characteristics as the "traditional single-family detached house." *Id.* In addition to the tax advantages and the ability to share in the management of the condominium, such families would gain a sense of pride and fulfillment in being the owners of the apartment. *Id.* This pride of ownership cannot exist without the right to profits. *Id.* at 133.

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[1] *See* M. FRANKEL & G. NAFTALIS, THE GRAND JURY 9 (1977). The grand jury dates back to 1166 when King Henry II formed the Assize of Clarendon to serve as an investigatory and law enforcement body. *See id.* at 6-7. The hearing of testimony in private became a practice of the grand jury during the fourteenth century. *See id.* at 9. It was not until some 200 years later, however, that the grand jury broadened its role to include the protection of the innocent from unfounded accusation. *See id.*

The five most frequently cited reasons for maintaining grand jury confidentiality are:

in CPL section 190.25,[2] which proscribes the disclosure of "the nature or substance of any grand jury testimony" except "upon written order of the court."[3] The New York Court of Appeals has held that a trial court may direct the disclosure of grand jury testimony[4] upon an initial showing by the moving party of a "compelling and particularized need,"[5] and if in its discretion, the court

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(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so they will be willing to testify freely.

People v. Di Napoli, 27 N.Y.2d 229, 235, 265 N.E.2d 449, 452, 316 N.Y.S.2d 622, 625-26 (1970) (citations omitted). These aims were first stated in United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954) and later cited by the United States Supreme Court in United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958). *See* Note, *The Use of Grand Jury Transcripts in Private Antitrust Litigation: An Argument for Automatic Access*, 58 TEX. L. REV. 647, 650-51 (1980) [hereinafter cited as Note, *The Use of Grand Jury Transcripts*].

The grand jury's traditional functions include the investigation of crime, *see* People v. Calbud, Inc., 49 N.Y.2d 389, 394, 402 N.E.2d 1140, 1142-43, 426 N.Y.S.2d 238, 240 (1980), and the protection of citizens from unfounded prosecution through its power to decide whether to issue indictments, *see* United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983); Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623, 1626 (1984).

[2] *See* CPL § 190.25(4) (McKinney 1982). Section 190.25(4) provides in pertinent part:

Grand Jury proceedings are secret, and no grand juror, or other person . . . may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, . . . or other matter attending a grand jury proceeding.

Id.

[3] CPL § 190.25(4) (McKinney 1982). *See also* Larry W. v. Corporation Counsel, 55 N.Y.2d 244, 251, 433 N.E.2d 517, 521, 448 N.Y.S.2d 452, 456 (1982) (fundamental policy of secrecy can only be breached when authorized by statute or court). Section 325(1) of the Judiciary Law also directs the grand jury stenographer to provide the district attorney with a transcript of all testimony, "but he shall not permit any other person to take a copy . . . nor to read . . . except upon the written order of the court duly made after hearing the said district attorney. . .." N.Y. JUD. LAW § 325(1) (McKinney 1983).

[4] *See In re* District Attorney, 58 N.Y.2d 436, 444, 448 N.E.2d 440, 443-44, 461 N.Y.S.2d 773, 776-77 (1983); People v. Di Napoli, 27 N.Y.2d 229, 234, 265 N.E.2d 449, 451, 316 N.Y.S.2d 622, 625 (1970).

[5] *See In re* District Attorney, 58 N.Y.2d 436, 444, 448 N.E.2d 440, 444, 461 N.Y.S.2d 773, 776-77 (1983). *In re* District Attorney involved a civil 'RICO' suit brought by the district attorney on behalf of the county to recover damages from political figures and businessmen who allegedly defrauded Suffolk County. *See id.* at 440, 448 N.E.2d at 441-42, 461 N.Y.S.2d at 774-75. The Court of Appeals vacated an *ex parte* order obtained by the district attorney which had authorized the use of testimony given before the grand jury that had investigated the fraud. *See id.* at 440-41, 448 N.E.2d at 441-442, 461 N.Y.S.2d at 774-75.

The Court of Appeals held that grand jury secrecy is not absolute and that a trial court,

determines that "the public interest in disclosure outweighs the interests in secrecy."[6] Recently, in *Melendez v. City of New York*[7], the Appellate Division, First Department applied this standard in a civil action in which private litigants sought disclosure of grand jury testimony, and held that the movants had failed to establish the requisite "compelling and particularized need" to warrant pretrial disclosure of a third party's grand jury testimony.[8] The court, however, ruled that disclosure of the plaintiffs' own grand jury tes-

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in its discretion, may grant disclosure when it would promote a public interest that outweighs the strong interests in secrecy. *Id.* at 444, 448 N.E.2d at 443-44, 461 N.Y.S.2d at 776-77. The court further stated that "one seeking disclosure first must demonstrate a compelling and particularized need for access." *See id.*

The *In re* District Attorney court indicated that to the extent that disclosure is not essential to establish a prima facie case, the "compelling and particularized need" standard is not met. *See id.* at 445-46, 448 N.E.2d at 444-45, 461 N.Y.S.2d at 777-78. In addition, if application for disclosure is not narrowly drawn to minimize encroachment on grand jury secrecy, the standard is also not met. *See id.* at 445, 448 N.E.2d at 445, 461 N.Y.S.2d at 778; *see also* Note, *Preserving Grand Jury Secrecy: United States v. Baggot*, 16 CONN. L. REV. 371, 373 (1984) (disclosure should be limited to extent justified by movant's need). The mere fact that grand jury testimony was shown to be useful and relevant was held insufficient by the Supreme Court to satisfy this standard. *See* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); Note, *The Use of Grand Jury Transcripts*, *supra* note 1, at 649.

One author has argued that the "compelling and particularized need" test does not adequately protect the secrecy of grand jury proceedings. *See* Note, *The Use of Grand Jury Transcripts*, *supra* note 1, at 651 (commentator suggests that test actually may inhibit witnesses from testifying freely before the grand jury because they can never be sure when a compelling need for their testimony might arise).

[6] *See In re* District Attorney, 58 N.Y.2d at 444, 448 N.E.2d at 443-44, 461 N.Y.S.2d at 776. The petitioner must show a "compelling and particularized need" before the court will balance the interests in disclosure against the interest in secrecy. *See id.* at 448 N.E.2d at 443-44, 461 N.Y.S.2d at 776. This balancing test originated in People v. Di Napoli, 27 N.Y.2d 229, 234, 265 N.E.2d 449, 451, 316 N.Y.S.2d 622, 625 (1970). In granting disclosure of grand jury minutes to the Public Service Commission for use in a hearing involving alleged utility overcharges, the court stated that there was a strong public interest in disclosure since the Commission could use the information to prevent similar victimization of consumers in the future. *Id.* at 235, 265 N.E.2d at 452, 316 N.Y.S.2d at 628. The court based its decision to grant disclosure on three factors: the character of the litigant seeking disclosure, the nature of the inquiry, and the fact that the grand jury had completed its investigation and those indicted had pleaded guilty and paid their fines. *See id.* at 238, 265 N.E.2d at 454, 316 N.Y.S.2d at 628. For additional cases in which the courts have found a public interest in disclosure, see *In re* Scotti, 53 App. Div. 2d 282, 288-89, 385 N.Y.S.2d 659, 663-64 (4th Dep't 1976) (disclosure to superintendent of state police and Commissioner of Department of Corrections for considering disciplinary action against officers); People v. Werfel, 82 Misc. 2d 1029, 372 N.Y.S.2d 510 (Sup. Ct. Queens County 1975) (investigation of judicial nominee). *But see* Zinna v. Rensselaer County Grand Jury, 63 App. Div. 2d 800, 801, 404 N.Y.S.2d 1015, 1016 (3d Dep't 1978) (mem.) (no compelling public interest when defendant in civil action for malicious prosecution sought grand jury minutes to prepare for trial).

[7] 109 App. Div. 2d 13, 489 N.Y.S.2d 741 (1st Dep't 1985).

[8] *Id.* at 19, 489 N.Y.S.2d at 746.

timony was proper when it had a bearing on the issues in the civil litigation.[9]

In *Melendez*, the plaintiffs, Hector Melendez and his family, sued the city of New York for damages arising from injuries sustained by Mr. Melendez after he was shot by a police officer during an arrest.[10] The district attorney's office investigated the incident and presented the matter to a grand jury, which neither indicted Melendez nor took any action against the officer.[11] After the dismissal of the criminal charges against Melendez, the plaintiffs moved to compel disclosure of the grand jury testimony of Melendez, his wife, and the arresting officer.[12] The district attorney cross-moved for a protective order,[13] alleging that the public interest in grand jury secrecy outweighed the litigants' private interest in disclosure.[14] Special Term granted the plaintiffs' motion in full without discussing the issues involved.[15]

On appeal, the First Department modified the lower court's order by denying disclosure of the police officer's grand jury testimony and affirming the disclosure of the plaintiffs' own testimony.[16] Writing for a unanimous court, Justice Kassal held that the plaintiffs' conclusory assertions that the officer's testimony was

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[9] *Id.* at 22, 489 N.Y.S.2d at 748.

[10] *Id.* at 15, 489 N.Y.S.2d at 743. The plaintiffs did not sue the officer but charged the city with negligence in the hiring, training and retention of the officer, and with excessive force and negligence in connection with the shooting. *Id.* at 15, 489 N.Y.S.2d at 743.

[11] *Id.* at 14-15, 489 N.Y.S.2d at 743. The officer testified at the grand jury under a waiver of immunity. *Id.*

[12] *Id.* at 15, 489 N.Y.S.2d at 743. The plaintiffs in *Melendez* were joined in the motion by the defendant city. *Id.* The plaintiffs argued that there were no longer any interests in secrecy because no indictments were returned and that they were unable to conduct adequate discovery because the officer had invoked his privilege against self incrimination during the pre-trial examination. *Id.*

[13] 109 App. Div. 2d at 15, 489 N.Y.S.2d at 743; *see* CPLR § 3103(a) (McKinney 1983)("court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.").

[14] 109 App. Div. 2d at 15, 489 N.Y.S.2d at 743. The district attorney also argued that disclosure would have a "chilling effect" on future grand jury probes and that disclosure could only be obtained during the trial for the impeachment of witnesses or to refresh recollection. *Id.*

[15] *Id.*

[16] *Id.* at 23, 489 N.Y.S.2d at 748-49. The *Melendez* court also denied the disclosure of a tape recorded statement of the arresting officer which had been given to the district attorney in the course of his investigation, holding that it was protected by the 'public interest' privilege. *Id.* at 21, 489 N.Y.S.2d at 747. The court explained that this privilege was qualified, and that the statement could be disclosed upon a balancing of the interest in disclosure against the public interest in secrecy. *Id.*

useful for trial preparation and impeachment purposes failed to satisfy the "compelling and particularized need" standard, thus precluding the exercise of judicial balancing.[17] The court noted that disclosing this testimony would compromise the guarantee of secrecy given to witnesses and would thereby impair the ability of future grand juries to obtain witnesses willing to testify freely.[18] However, the court maintained that the need for confidentiality did not bar disclosure of the plaintiffs' own testimony.[19]

It is submitted that the *Melendez* court correctly applied the established standard for disclosure of a third party's grand jury testimony in a subsequent civil action. Mere conclusory assertions that the testimony would be useful for trial preparation do not satisfy the "compelling and particularized need" prong of this test.[20] A party will only satisfy this requirement if he or she can demonstrate that it will be impossible to establish a prima facie case without the third party's testimony.[21] Even if this prong is met,

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[17] *See* 109 App. Div. 2d at 20, 489 N.Y.S.2d at 746. The *Melendez* court held that if the moving party failed to make the initial showing of compelling and particularized need, the court could not exercise its discretion by balancing the competing interests. *See id.* at 20, 489 N.Y.S.2d at 746 (citing *In re* District Attorney, 58 N.Y.2d 436, 444, 448 N.E.2d 440, 444, 461 N.Y.S.2d 773, 777 (1983)). The court held that the motion for disclosure could be renewed before the trial court if the officer's testimony and statements to the district attorney were needed for impeachment purposes or to refresh a witnesses' recollection. *Id.* at 20, 489 N.Y.S.2d at 746-47. *Accord* People v. Di Napoli, 27 N.Y.2d 229, 237, 265 N.E.2d 449, 453, 316 N.Y.S.2d 622, 627 (1970) (limited disclosure for impeachment purposes proper).

[18] 109 App. Div. 2d at 21, 489 N.Y.S.2d at 747. The court noted several other factors that militated against the disclosure of the officer's testimony. First, the disclosure was sought by a private litigant for his own personal interests. 109 App. Div. 2d at 20, 489 N.Y.S.2d at 747. Second, the police officer had not authorized the production of his testimony. *Id.* at 22, 489 N.Y.S.2d at 748. Finally, nondisclosure did not prevent the plaintiffs from establishing a prima facie case because other witnesses to the incident were available, and the disclosure devices of CPLR article 31 provided an "ample remedy." *Id.* at 21, 489 N.Y.S.2d at 748.

[19] 109 App. Div. 2d at 22, 489 N.Y.S.2d at 748. In support of disclosing the plaintiffs' own testimony, the court cited CPL § 190.25(4), which provides that a witness may disclose his own testimony, and CPLR 3101(e), which permits a party in a civil action to obtain a copy of his statement. *Id.* Finally, the court gave significant weight to the fact that the grand jury proceeding had ended without an indictment. *Id.*

[20] *See In re* District Attorney, 58 N.Y.2d at 445, 448 N.E.2d at 445, 461 N.Y.S.2d at 778 (1983) (general allegations leave trial court without requisite tools to minimize invasion into grand jury); Ruggiero v. Fahey, 103 App. Div. 2d 65, 70-71, 478 N.Y.S.2d 337, 341 (2d Dep't 1984) (strong presumption of confidentiality not overcome by conclusory assertions of need). *See generally supra* note 5 (discussing compelling and particularized need prong).

[21] *See Melendez*, 109 App. Div. 2d at 21, 489 N.Y.S.2d at 747. The court stated that "[i]t does not appear that plaintiffs are in any way precluded from making out a prima facie case . . ." *Id.* Similarly, in *In re* District Attorney, in denying the motion for disclosure, the court noted that a shortfall in the motion existed because the District Attorney had failed to

however, it is unlikely that disclosure will be granted to a private litigant in a civil action because a private litigant rarely demonstrates a public interest in disclosure that is strong enough to overcome the interest in secrecy.[22]

Finally, it is submitted that the *Melendez* court erred in releasing the transcript of the plaintiffs' own grand jury testimony without requiring the plaintiffs to meet the standards set forth by the Court of Appeals. Because protection of the officer's reputation represented a substantial interest in secrecy,[23] the plaintiffs should not have been entitled to a transcript of their own testimony based solely upon the conclusory assertion that it would be useful in their subsequent civil action.[24] Such a disclosure compromises the inher-

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identify "what made it impossible for [him] to establish his case without resort to the minutes." 58 N.Y.2d at 446, 448 N.E.2d at 445, 461 N.Y.S.2d at 777-78. *Cf. In re* Buffalo, 57 App. Div. 2d 47, 51, 394 N.Y.S.2d 919, 922-23 (4th Dep't 1977) (no showing that other sources were inadequate to provide movant with information sought); Ruggiero v. Fahey, 103 App. Div. 2d 65, 70, 461 N.Y.S.2d 337, 341 (2d Dep't 1984) (no showing that liberal discovery devices would be insufficient or unavailing).

[22] *See supra* note 6 (discussion of balancing test). The *Melendez* court stated that a "factor which militates against disclosure . . . is that relief is sought by private litigants to promote their own personal interests." 109 App. Div. 2d at 20, 489 N.Y.S.2d at 747. Private litigants are almost uniformly denied disclosure for trial preparation purposes. *See In re* U.S. Air, 97 App. Div. 2d 961, 469 N.Y.S.2d 39 (4th Dep't 1983) (mem.) People v. Judge, 88 App. Div. 2d 789, 789, 451 N.Y.S.2d 537, 537 (4th Dep't 1982) (mem.); *In re* Buffalo, 57 App. Div. 2d 47, 50, 394 N.Y.S.2d 919, 922 (4th Dep't 1977).

While the Court of Appeals has never defined what is meant by a "public interest," it has referred to three factual situations in which it would find a "public interest in disclosure." *See In re* District Attorney, 58 N.Y.2d at 445, 448 N.E.2d at 44, 461 N.Y.S.2d at 777 (public interest found in "county's efforts to recover damages from those who allegedly defrauded taxpayers"); *Di Napoli*, 27 N.Y.2d at 235, 265 N.E.2d at 444, 316 N.Y.S.2d at 625 (public interest best served by disclosure in case involving fraud against customers); *In re* Buffalo, 57 App. Div. 2d at 48, 394 N.Y.S.2d at 920 (court held that public interest in city's investigation of municipal "no show" job scandal did not outweigh secrecy where no need was shown) (cited by Court of Appeals in *In re* District Attorney, 58 N.Y.2d at 444, 448 N.E.2d at 444, 461 N.Y.S.2d at 777). For other courts which have found a public interest in disclosure, see *supra* note 6.

[23] *See supra* note 1 for discussion of interests served by secrecy. Since the police officer was investigated but not indicted, *see* 109 App. Div. 2d at 15, 489 N.Y.S.2d at 743, the interest in the "protection of an innocent accused from unfounded accusations" exists. *See id.* at 17, 489 N.Y.S.2d at 745.

[24] *See* 109 App. Div. 2d at 22, 489 N.Y.S.2d at 748. The *Melendez* court based it decision to disclose plaintiffs' own testimony on two factors: first, the grand jury had closed with no indictments. *Id.* The Supreme Court, however, has noted that the interests in secrecy are only diminished, not eliminated, when the grand jury has ended its activities. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Secondly, *Melendez* recognized that § 190.25(4), discussed *supra* note 2, codified the common law rule allowing a witness to disclose his own testimony. *See* 109 App. Div. 2d at 22, 489 N.Y.S.2d at 748; People v. Naughton, 38 How. Pr. 430, 440 (1870). The Court of Appeals, while recognizing this rule,

ent secrecy of the proceedings since the right of a witness to *disclose* his own testimony is not the same as the right to a *transcript* of that testimony.[25]

In conclusion, the court in *Melendez* recognized the utmost importance of the secrecy of grand jury proceedings. Although the court properly applied this principle to the request for the disclosure of a third party's testimony, it erroneously disregarded the need for secrecy when it failed to require the same compelling and particularized need from the party seeking a transcript of his own testimony.

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commented that insofar as this disclosure is permitted, the secrecy of grand jury proceedings is diminished. *See* People v. Minet, 296 N.Y. 315, 326, 73 N.E.2d 529, 533 (1947). In addition, the Court of Appeals has recently stated that "the rule of secrecy applies equally to either one who gives evidence or to one concerning whom evidence is given." *In re* District Attorney, 58 N.Y.2d at 443, 448 N.E.2d at 443, 461 N.Y.S.2d at 776 (holding that persons discussed in evidence have standing to object to disclosure).

[25] *See* Kinsella v. Andreoli, 95 Misc. 2d 915, 922, 408 N.Y.S.2d 717, 722 (Sup. Ct. Onondaga County 1978). In addressing the issue of whether a witness may obtain transcripts of his own grand jury testimony, the *Kinsella* court denied the movant's request for a transcript of his own testimony, holding that disclosure would "[lead] to the inescapable and inevitable conclusion that grand jury proceedings are not, in fact, secret." *Id.*

Rule 6(e) of the Federal Rules of Criminal Procedure allows a witness to disclose his own testimony, but the majority of federal courts require witnesses to show a particularized need before obtaining a transcript of their own testimony. 18 U.S.C § 6(e) (Supp. 1985). *See, e.g.*, Bast v. United States, 542 F.2d 893, 897 (4th Cir. 1976) (strong policy in secrecy and independence of grand jury served only by showing of particularized need); Valenti v. United States Dep't of Justice, 503 F. Supp. 230 (E.D.La 1980) ("integrity and efficacy of grand jury is maintained only by allowing disclosure upon showing of demonstrable need"). *But see In re* Russo, 53 F.R.D. 564, 571 (C.D. Cal. 1971) (since witness may disclose testimony, availability of transcripts does not affect grand jury functions).

The federal courts that have granted transcript requests base their decisions on the fact that witnesses are free to disclose their testimony. *See In re* Ferris, 512 F. Supp. 91, 92 (D. Nev. 1981). The Fourth Circuit in *Bast*, however, pointed out that this argument "leaves unanswered the Pandora's box of problems necessarily arising from the sale or delivery of such transcript to anyone should the witness be able to acquire it on demand." 542 F.2d at 896 n.3.

Therefore, it is submitted that where interests in secrecy remain, the party seeking disclosure must satisfy the tests set forth by the Court of Appeals. Where the interests in secrecy are diminished, however, the party seeking disclosure should have a lesser burden. *See Douglas Oil Co.*, 441 U.S. at 223.