

## Second Circuit Rejects Need Requirement for Attorney Subpoena: In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick)

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# COMMENTS

## SECOND CIRCUIT REJECTS NEED REQUIREMENT FOR ATTORNEY SUBPOENA: *IN RE GRAND JURY SUBPOENA SERVED UPON JOHN DOE, ESQ. (SLOTNICK)*

The sixth amendment, which guarantees every criminal defendant the right to assistance of counsel,<sup>1</sup> includes within its ambit the attorney-client privilege<sup>2</sup> and the right to choice of coun-

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<sup>1</sup> See U.S. CONST. amend. VI, which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." *Id.*

The constitutional guarantee to the assistance of counsel took modern shape in *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Zerbst*, the Supreme Court placed an affirmative duty upon a federal criminal court to appoint counsel to those unable to secure representation, *id.* at 462-63, unless that right was intelligently and competently waived by the accused. *Id.* at 465. The guarantee of appointed counsel for a defendant who pleaded guilty was affirmed by the Supreme Court in *Walker v. Johnston*, 312 U.S. 275, 286 (1941). In 1963, the Court held that the due process clause of the fourteenth amendment requires the furnishing of counsel to an indigent defendant in all state criminal proceedings. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). "[A] defendant who must face felony charges in state court without assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

The sixth amendment right to an attorney arises not only at trial, but also when adversarial judicial proceedings are brought against a defendant. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). The defendant's right is triggered by a formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* at 689. "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967).

<sup>2</sup> See *Weiner, Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 AM. CRIM. L. REV. 95, 101 (1985) (Sixth Amendment right to effective assistance of counsel protects confidentiality of attorney-client relationship); Note, *Attorney-Client Communications of Criminal Defendants: Evidentiary and Constitutional Protections*, 62 WASH. U.L.Q. 739, 756 (1985) (attorney-client privilege under sixth amendment meant to guarantee fair trial to accused); Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437, 441 (1982) (privilege interrelated with constitutional guarantees,

sel.<sup>3</sup> According to the defense bar, these rights have recently come under attack by government prosecutors.<sup>4</sup> One technique used by

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even though it lacks express constitutional authorization); *cf.* *Fisher v. United States*, 425 U.S. 391, 403 (1976) (confidential disclosures by client to attorney privileged when made to obtain legal assistance).

The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients. *Upjohn v. United States*, 449 U.S. 383, 389 (1981); *Fisher*, 425 U.S. at 403. When the client is certain that what he tells his lawyer cannot be used against him, full disclosure to the attorney is promoted. Sobel, *The Confidential Communication Element of the Attorney-Client Privilege*, 4 CARDOZO L. REV. 649, 658-59 (1983). Protection of such disclosures enables attorneys to act more effectively, justly, and expeditiously. *In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984). The privilege recognizes that sound legal advice and advocacy serves public ends by promoting broad public interests in the observance of lawful administration of justice. *See Upjohn*, 449 U.S. at 389. "The benefits of the privilege . . . outweigh the detriment to the search for truth that occurs when certain facts are kept out of court." Sobel, *supra*, at 659.

The recognized components of the attorney-client privilege are:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection [may] be waived.

8 J. WIGMORE, WIGMORE ON EVIDENCE § 2292 (3d ed. 1940). The privilege protects only those disclosures which may not have been made absent the privilege. *Fisher*, 425 U.S. at 403. "If the information conveyed was not intended to be confidential or if there has been any breach of confidentiality, if the communication did not pertain to legal advice, or if the attorney-client relationship has furthered some ongoing crime, the privilege is unavailable." Weiner, *supra* at 100 (emphasis original).

<sup>3</sup> *See Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice"); *United States v. Curcio*, 694 F.2d 14, 23 (2d Cir. 1982) (defendant who retains counsel has right of constitutional dimensions to counsel of his choice); *United States v. Laura*, 607 F.2d 52, 55-56 (3d Cir. 1979) (sixth amendment protects defendant's right to select particular individual to serve as his attorney).

The defendant's right to choose his attorney emanates from the sixth amendment principle that a defendant has a right to decide, within limits, the type of defense he wishes to mount. *Laura*, 607 F.2d at 56. The most important decision a defendant makes in shaping his defense is the selection of his attorney. *Id.* The attorney informs the defendant of the legal issues involved, legal options open to the defendant and potential weaknesses in the prosecution's case. *See id.* The defendant may also authorize his attorney to make binding trial strategy decisions. *See id.* Therefore, a defendant's choice of counsel should not be treated lightly or arbitrarily, *United States v. Flanagan*, 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 1051 (1984); *Laura*, 607 F.2d at 57; *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970), and should not be unnecessarily obstructed by the court, *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984).

<sup>4</sup> *See e.g.*, Appleson, *Ohio State Bar Fights Lawyers' Subpoenas*, A.B.A. BAR-LEADER, Jan.-Feb. 1983, at 7 (lawyers called before grand jury to testify about their clients); Frank, *Att'y Subpoenas*, 72 A.B.A. J., March 1986, at 32, 33 (defense attorneys concerned about protecting privileged lawyer-client relationship, losing legal fees and conflict of interest caused by government subpoenas); *Are Prosecutors Invading the Attorney Client Relation-*

prosecutors is the service of a subpoena *duces tecum*<sup>5</sup> on an attorney whose client is under grand jury investigation.<sup>6</sup> The defense bar argues that such subpoenas have a chilling effect upon the attorney-client relationship,<sup>7</sup> and, in some instances, may actually

*ship?*, 71 A.B.A. J., Sept. 1985, at 38, 38 [hereinafter *Attorney Client Relationship*] (prosecutors demand that lawyers disclose sources of fees and other information); Galante, *The Defense Bar: On the Defensive*, NAT'L L.J., Dec. 9, 1985, at 3, col. 2 (prosecutor's increasing use of lawyer subpoenas and fee-forfeiture requests have harmful effect on right to counsel and criminal defense bar's ability to represent clients); Chambers, *Criminal Lawyers in Study Say New Laws Inhibit Case Choices*, N.Y. Times, Nov. 21, 1985, at A20, col. 1 (defense lawyers revamp method of handling white collar, racketeering, and drug cases as result of new Federal laws) [hereinafter Chambers]; Riley, *Judge Quashes Lawyers' Subpoenas*, NAT'L L.J., Aug. 6, 1984, at 3, col. 1 (New Hampshire federal judge accuses local U.S. attorney of harrasing five criminal defense lawyers with grand jury subpoenas).

<sup>5</sup> The Federal Rules of Criminal Procedure § 17(c) provide that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein." FED. R. CRIM. P. 17(c).

<sup>6</sup> See *In Re Klein*, 776 F.2d 628 (7th Cir. 1985); *United States v. (Under Seal)*, 774 F.2d 624 (4th Cir. 1985), cert. denied, 106 S. Ct. 1514 (1986); *In re Grand Jury Proceedings, John Doe (Arnold Weiner, Doe's Attorney)*, 754 F.2d 154 (6th Cir. 1985); see also *In re Grand Jury Matters (Appeal of United States)*, 751 F.2d 13 (1st Cir. 1984) (grand jury subpoena issued to attorneys who, in state criminal prosecutions, served as defense counsel for grand jury targets); *In re Shargel*, 742 F.2d 61 (2d Cir. 1984) (grand jury subpoena *duces tecum* requiring attorney to reveal fee arrangements and property transfers involving certain named persons); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (9th Cir. 1983) (former attorney of grand jury target served with subpoena *duces tecum* as to documents drawn up while target retained attorney).

Through the use of subpoenas *duces tecum*, prosecutors have sought to compel lawyers to disclose the sources of their fees and other information concerning the client. *Attorney-Client Relationship*, *supra* note 4, at 38; Chambers, *supra* note 4, at A20, col. 1. Prosecutors contend that the subpoenas may be relevant to establish unexplained wealth or the existence of an "association in fact" for grand juries investigating racketeering activity. *Attorney Client Relationship*, *supra* note 4, at 38-39. Grand juries also used the subpoenas to discover the identity of a drug ring leader who guaranteed legal assistance to his associates if they got caught, and in identifying a benefactor who paid the legal expenses of persons who attempted to stifle a grand jury investigation through their lack of cooperation. See Weiner, *supra* note 2, at 116.

<sup>7</sup> See Kreiger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737, 744 (1984) (lawyer's compelled admissions diminish confidentiality implicit in attorney-client relationship); Weiner, *supra* note 2, at 96 (subpoena to attorney casts pall over attorney-client relationship); see also Cates, *Fee Information Not Privileged, Judge Rules*, NAT'L L.J., March 25, 1985, at 10 col. 1 (defense bar worried about chilling effect on attorney-client relationship where attorney ordered to disclose his fees from client indicted in drug trafficking to grand jury).

Compelling the attorney to provide evidence against his client arouses distrust and anxiety, the defense bar argues, and thus chills the flow of information from the client to the attorney. Weiner, *supra* note 2, at 96. If the client fears that his opponents may gain access to privileged communications, he will inevitably be less likely to openly converse with his attorney. See Note, *Government Intrusions Into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1145 (1984) [hereinafter Harvard Note]. See also Rannii, *Law Offices: A Sanctuary Under Siege*, NAT'L L.J., Feb 8, 1982, at 1, col. 4 (law

force attorneys to disqualify themselves from representing the client in future judicial proceedings arising from the investigation.<sup>8</sup> Thus, it has been argued that the government should be required to demonstrate "need" as a prerequisite to the enforcement of such subpoenas.<sup>9</sup> Recently, in *In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick)*,<sup>10</sup> the United States Court of Appeals for the Second Circuit held that where an attorney for the target of a grand jury investigation<sup>11</sup> is served with a subpoena duces tecum

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enforcement officers' use of warrants to search lawyers' offices has potentially chilling effect on sixth amendment right to counsel). As a result of the chill in the flow of communication, the attorney may lack a full understanding of his client's case and he may thus be unable to represent his client's interests as effectively as possible. *Harvard Note, supra*, at 1145.

<sup>8</sup> See *Mob Defenders: As Corrupt as Their Clients?*, 71 A.B.A. J., July 1985, at 32, 33 (prosecutors seek to disqualify lawyers who appear to be involved in criminal activities with their clients); Krieger & Van Dusen, *supra* note 7, at 742 (when lawyer is called as witness or his records subpoenaed, he becomes witness to material element of offense and withdrawal is mandated); Galante, *supra* note 4, at 3, col. 2 (subpoenas of defense lawyers create conflicts of interest that force disqualification).

The basis for an attorney's disqualification is drawn from the ABA Model Code of Professional Responsibility. The Code provides that:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1986).

The defense bar argues that prosecutors might abuse process to disqualify "successful, recalcitrant, obnoxious, or obfuscating defense lawyers from pending cases," Riley, *supra* note 4, at 3, col. 1, and affect selection of the defendant's counsel. See *Attorney-Client Relationship, supra* note 4, at 39; Krieger & Van Dusen, *supra* note 7, at 743; Galante, *supra* note 4, at 8.

<sup>9</sup> See Weiner, *supra* note 2, at 129-30 (need requirement should be included in Justice Department guidelines for issuance of subpoenas); Galante, *supra* note 4, at 3, col. 2 (prosecutors should file affidavit stating necessity for subpoenaed information); DePetris & Bachrach, *supra* note 7, at 1, col. 3 (government should be prepared to make clear showing of need when issuing post-indictment subpoenas).

The need test involves "an assessment of the probative value and the importance of the proof, the ability of the Government to acquire proof of the same facts or other proof of similar value from other sources and a weighing of these against an assessment of the prejudice to the defendant's sixth amendment right, both in terms of likelihood of occurrence and of seriousness." *United States v. Badalamenti*, 614 F. Supp. 194, 200 (S.D.N.Y. 1985). The defense bar argues that such a showing will help control the tremendous chill in attorney-client relationships caused by government practices. Galante, *supra* note 4, at 1. A failure to demonstrate need would cause the subpoena to be quashed by the district court judge. See FED. R. CRIM. P. 17(c) ("[t]he court . . . may quash . . . the subpoena if compliance would be unreasonable or oppressive").

<sup>10</sup> 781 F.2d 238 (2d Cir.), cert. denied, 106 S. Ct. 1515 (1986).

<sup>11</sup> See Arkin, *Target or Subject of Inquiry—Defense Counsel's Dilemma*, N.Y.L.J., Oct. 18, 1984, at 1, col. 3. Target means "a person as to whom the prosecutor of the grand jury has substantial evidence linking him to the commission of a crime and who, in the

concerning benefactor payments, the client has no constitutional right, statutory protection, or common law privilege from which a need requirement may be derived or implied.<sup>12</sup>

In *Slotnick*, a grand jury investigated the activities of an alleged organized crime family faction known as the "Anthony Columbo crew."<sup>13</sup> The grand jury, which sought to determine whether Columbo paid or arranged for the legal representation of members of his crew, served Barry Slotnick, the attorney for Columbo, with a subpoena *duces tecum*.<sup>14</sup> Slotnick moved to quash the subpoena pursuant to Federal Rule of Criminal Procedure 17(c),<sup>15</sup> asserting that the government failed to establish the need for the information, or its relevance.<sup>16</sup> The district court denied the motion to quash,<sup>17</sup> but a panel decision of the circuit court of appeals reversed this decision.<sup>18</sup> After a rehearing *en banc*, the Second Circuit vacated the judgment and opinion of the panel and affirmed the order of the district court.<sup>19</sup> Subsequent to the panel decision, but before the *en banc* rehearing, Columbo and members

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judgement of the prosecutor, is a putative defendant." *Id.* (quoting United States Attorney's Manual § 9-11.250).

<sup>12</sup> See *Slotnick*, 781 F.2d at 250.

<sup>13</sup> *Id.* at 242. A number of serious offenses were under investigation, including murder, racketeering, gambling, extortion, interstate transportation of stolen property, and other federal crimes. *Id.*

<sup>14</sup> See *id.* at 242. The prosecutor affirmed at oral argument that the subpoena would be limited specifically to benefactor payments made by Columbo on behalf of his crew members. *Id.* Evidence of such benefactor payments made to Slotnick could have established Columbo as the head of an "enterprise" as that term is defined in the Racketeer Influenced and Corrupt Organization Act (RICO). See Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961(a)(4) (1982). The government assured the court that the subpoena would not encompass Columbo's payments to Slotnick for his own representation in the past, nor for Columbo's representation in connection with other outstanding indictments. *Slotnick*, 781 F.2d at 242.

<sup>15</sup> See FED. R. CRIM. P. 17(c). The rule allows a district court judge "on motion made promptly [to] quash or modify the subpoena if compliance would be unreasonable or oppressive." *Id.*

<sup>16</sup> See *Slotnick*, 781 F.2d at 242; see also *supra* note 9 and accompanying text (discussion of need requirement).

<sup>17</sup> See *Slotnick*, 781 F.2d at 242.

<sup>18</sup> See *id.* The panel decision held that "when a subpoena is issued to an attorney to testify before a grand jury investigating his client whom he has theretofore represented, and where the attorney will be disqualified if he testifies, the Government should make a preliminary showing of relevance and reasonable need." *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 759 F.2d 968, 975 (2d Cir. 1985), *vacated en banc*, 781 F.2d 238 (2d Cir.), *cert. denied*, 106 S. Ct. 1515 (1986).

<sup>19</sup> See *Slotnick*, 781 F.2d at 242.

of his "crew" were indicted on several federal charges.<sup>20</sup>

Writing for the court, Judge Timbers reasoned that because no adversarial judicial proceedings had been initiated against Columbo at the pre-indictment stage, his sixth amendment rights did not yet attach.<sup>21</sup> Columbo's interest in continued representation by his present counsel was not constitutionally protected,<sup>22</sup> and therefore no constitutional requirement mandated a preliminary showing of need or relevancy.<sup>23</sup> Judge Timbers also asserted that since client identity and fee information did not fall under the protection of the attorney client privilege,<sup>24</sup> a preliminary showing was not required by statute or under the common law.<sup>25</sup> Furthermore, the court reasoned that a preliminary showing of need would unjustifiably impede the investigative function of the grand jury.<sup>26</sup>

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<sup>20</sup> See *id.* However, the charges did not include the alleged RICO violations which led to the subpoena *duces tecum.* *Id.* at 243.

<sup>21</sup> See *id.* at 244. See *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (plurality opinion); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); *Carvey v. LeFevre*, 611 F.2d 19, 21 (2d Cir. 1979), *cert. denied*, 466 U.S. 921 (1980). The *Kirby* plurality opinion declared that a person's sixth amendment right to counsel attaches only at or after the time that adversarial judicial proceedings have been initiated against him. *Kirby*, 406 U.S. at 688. *Kirby* also stated that these proceedings are initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* at 689. The Second Circuit adopted this reasoning in *Carvey*, 611 F.2d at 21, and has also held that the sixth amendment rights of an undicted target of a grand jury investigation do not attach by virtue of that investigation. See *Vasquez*, 675 F.2d at 17. The Supreme Court has emphatically stated that "[a] witness before a grand jury cannot insist . . . , on being represented by his counsel." *In re Groban*, 352 U.S. 330, 333 (1957).

<sup>22</sup> See *Slotnick*, 781 F.2d at 244.

<sup>23</sup> See *id.*; see *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (where no valid constitutional privilege raised, no reason to require a preliminary showing); *In re Liberatore*, 574 F.2d 78, 82-83 (2d Cir. 1978) (where no constitutional rights implicated, government has no burden whatsoever to make preliminary showing of relevancy or need).

<sup>24</sup> See *Slotnick*, 781 F.2d at 247-48; see *In re Shargel, Esq.*, 742 F.2d 61, 63 (2d Cir. 1984) (disclosure of client identity and fee information not covered by attorney-client privilege, even when client faces incrimination); *Colton v. United States*, 306 F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

<sup>25</sup> See *Slotnick*, 781 F.2d at 247. The court also reasoned that at the time a benefactor offers an attorney payment for the legal representation of others, the attorney should be aware that fee information is not privileged. *Id.* at 248. The attorney should at that time explain to his client that a potential conflict may arise. *Id.* Since both attorney and client would then be aware of the potential conflict at this early stage of communication, the court asserted that they should not complain that disclosure of benefactor payments might chill their relationship. *Id.*

<sup>26</sup> See *id.* at 248. The *Slotnick* Court stated that:

Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of criminal laws. The grand jury may not always serve its historic role as a protective bulwark standing solidly between the

The court held that the potentially competing interests which may result in disqualification should be examined at the pre-trial stage, not during the grand jury investigation stage.<sup>27</sup>

The Second Circuit declared that upon indictment, Columbo's sixth amendment rights attached.<sup>28</sup> However, the court concluded that the indictment did not bar Slotnick from testifying about benefactor payments before the grand jury.<sup>29</sup> The court stated that despite the indictment, the fee information sought by the government was still unprotected by the attorney-client privilege.<sup>30</sup> Moreover, the court held that Rule 17(c), applied together with sixth amendment considerations,<sup>31</sup> adequately protected the accused from unreasonable or oppressive demands upon his counsel.<sup>32</sup> After applying the standards of Rule 17(c),<sup>33</sup> and finding the information that the government sought to be relevant and highly probative,<sup>34</sup> the Second Circuit held that Columbo's sixth amendment interests did not outweigh the grand jury's need for the information.<sup>35</sup> The risk of disqualification, Judge Timbers ruled, did not provide a sufficient reason to quash the subpoena,<sup>36</sup> but was an issue for determination at an *in limine* hearing held by the trial judge.<sup>37</sup>

ordinary citizen and an over-zealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

*Slotnick*, 781 F.2d at 249 (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)). Since neither attorney nor client raised any valid constitutional claims or statutory privileges, the Second Circuit determined that there was no infringement upon their rights. *See id.*

<sup>27</sup> *See id.* at 249-50. The court determined that at the pre-trial stage, a district court could "weigh the public interests—the probative value of the lawyer's testimony, the need to preserve ethical standards in the legal profession, and the integrity of the judicial system—against the accused's right to counsel of his choice." *Id.* at 250.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 250-52.

<sup>30</sup> *See id.* at 250.

<sup>31</sup> *See id.*; *see infra* notes 44 to 51 and accompanying text.

<sup>32</sup> *See Slotnick*, 781 F.2d at 251.

<sup>33</sup> The court determined that the record was comprehensive enough to deny the motion to quash the subpoena under Rule 17(c) instead of remanding to the lower court. *See id.*

<sup>34</sup> *See id.* The court said that evidence of benefactor payments was clearly relevant to the grand jury's investigation of the Columbo crime family and highly probative of the role of Columbo as the head of that "enterprise." *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 252.

<sup>37</sup> *See id.* at 250. At the pre-trial hearing, the judge will weigh the probative value of the information sought by the government against the loss of counsel of the accused's choice. *Id.*

In his dissent, Judge Cardamone argued that when defense counsel is served with a subpoena after his client has been indicted, the government must make a showing of need to justify an intrusion on the attorney-client relationship.<sup>38</sup> He reasoned that if Slotnick was subpoenaed without a showing of need and subsequently disqualified, Columbo would be arbitrarily deprived of his counsel's representation for the indicted offenses, thus violating his sixth amendment rights.<sup>39</sup> Judge Cardamone argued that calling an attorney before a grand jury seriously disrupts the attorney-client relationship<sup>40</sup> and can result in disqualification of the attorney,<sup>41</sup> thereby depriving the client of his fifth amendment due process rights.<sup>42</sup> Therefore, the dissent concluded that requiring defense counsel to appear before a grand jury without any showing of need violates the sixth amendment right to counsel in this case and the fifth amendment due process clause in all cases.<sup>43</sup>

It is suggested that, while the rationale presented by the Second Circuit coherently addressed the issues, the need to maintain grand jury secrecy, as well as its important investigative function, outweighs the desirability of a "need" requirement. Furthermore, the court failed to adequately discuss the fifth amendment right to counsel, as independent from the sixth amendment right, and its effect on the need requirement. After demonstrating that the sixth amendment choice of attorney privilege is not absolute, this Comment will examine the importance of grand jury secrecy as compared to the target's sixth amendment right to counsel. The Comment will then address the possible effect of an independent fifth amendment right to counsel.

#### SIXTH AMENDMENT CHOICE OF ATTORNEY NOT ABSOLUTE RIGHT

Although a criminal defendant has a constitutional right to

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<sup>38</sup> See *id.* at 256 (Cardamone, J., dissenting).

<sup>39</sup> See *id.* at 257 (Cardamone, J., dissenting).

<sup>40</sup> See *id.* at 260-61 (Cardamone, J., dissenting); see *supra* note 7 (discussion of chilling effect).

<sup>41</sup> See *Slotnick*, 781 F.2d at 261-62 (Cardamone, J., dissenting); see *supra*, note 8 (discussion of attorney disqualification).

<sup>42</sup> See *Slotnick*, 781 F.2d at 259-62 (Cardamone, J., dissenting).

<sup>43</sup> See *id.* at 254. Chief Judge Feinburg also dissented. *Id.* at 252-54 (Feinburg, C.J., dissenting). He agreed with the conclusions reached by the majority in the panel decision and by Judge Cardamone in his dissenting opinion. The need requirement, he asserted, struck a sensible balance between the need to protect sixth amendment rights and the grand jury's investigative function. *Id.* at 253 (Feinburg, C.J., dissenting).

representation by the attorney of his choice,<sup>44</sup> this right is not absolute.<sup>45</sup> The defendant must be provided with a fair and reasonable opportunity to secure counsel of his choice,<sup>46</sup> and courts are prohibited from arbitrarily dismissing such chosen counsel.<sup>47</sup> However, these rights must be weighed and balanced against the public need for the efficient and effective administration of criminal justice.<sup>48</sup> Moreover, the sixth amendment guarantees reasonably effective counsel,<sup>49</sup> but not any particular lawyer, nor the best lawyer money can buy.<sup>50</sup> Therefore, where the choice of a particular attorney will cause undue delay, subvert judicial proceedings, or otherwise impede the efficient and effective administration of justice,

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<sup>44</sup> See *supra* note 3 and accompanying text.

<sup>45</sup> See *In re Klein*, 776 F.2d 628, 633 (7th Cir. 1985); *United States v. Curcio*, 694 F.2d 14, 23 (2d Cir. 1982); *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981); *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States v. Dolan*, 570 F.2d 1177, 1182 (3d Cir. 1978).

<sup>46</sup> See *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (defendant entitled to fair opportunity to secure counsel of his choice); *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981) (same); *United States v. Fernandez*, 576 F. Supp. 397, 402 (E.D. Tex. 1983) (sixth amendment mandate satisfied when defendant given fair and reasonable opportunity to obtain particular counsel), *aff'd sub. nom.* *United States v. Mitchell*, 777 F.2d 248, 253 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1493 (1986).

The fair opportunity to secure chosen counsel reflects the fact that the choice of counsel is ordinarily one for the accused alone. *In re Klein*, 776 F.2d 628, 633 (7th Cir. 1985); *but cf.* *United States v. Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978) (indigent defendant does not have choice of counsel; appointment left to sound discretion of court). A voluntary arrangement between the defendant and a lawyer is likely to be the one most satisfactory to the defendant. *Klein*, 776 F.2d at 633. Therefore, unless the government has a strong reason for interfering with this presumptively satisfactory representation, it may not do so. *Id.*

<sup>47</sup> See *Davis*, 650 F.2d at 479; *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970); *supra* note 3. The "sixth amendment guarantee [to counsel] 'contemplates that such assistance will be untrammelled and unimpaired.'" *United States v. Dolan*, 570 F.2d 1177, 1180 (3d Cir. 1978) (quoting *Glasser v. United States*, 315 U.S. 60, 70 (1942)). The right should not be unnecessarily obstructed by the court. *United States v. Curcio*, 694 F.2d 14, 23 (2d Cir. 1982), *cert. denied*, 106 S. Ct. 1792 (1986).

<sup>48</sup> *Carey*, 409 F.2d at 1214; *see also Davis*, 650 F.2d at 479 (defendant's counsel choice balanced against fair and proper administration of justice); *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979) (same).

<sup>49</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where the defendant complains of the ineffectiveness of his counsel's assistance, he must show that the attorney's performance fell below the objective standard of reasonableness, *id.* at 688, and that the counsel's deficient assistance was so prejudicial as to deny the defendant a fair trial. *Id.* at 692. "The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards. . . . [T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

<sup>50</sup> See *Klein*, 776 F.2d at 633; *Dolan*, 570 F.2d at 1182; *Carey*, 409 F.2d at 1215.

the court may require the defendant to secure other counsel.<sup>51</sup>

### GRAND JURY PROCEEDINGS

An important policy underlying a grand jury proceeding is the need to vest the grand jury with broad investigatory powers.<sup>52</sup> The majority in *Slotnick* held that imposing a "need" requirement at the pre-indictment stage would severely and unjustifiably hamper the investigatory function of the grand jury.<sup>53</sup> It is suggested that the need to maintain grand jury secrecy also overrides the desirability of a need requirement.

#### A. Grand Jury Secrecy

"[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."<sup>54</sup> Maintaining grand

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<sup>51</sup> See *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982) (criminal defendant forced to relinquish chosen counsel because inability of retained counsel to serve would have caused unreasonable delay and inconvenience in completing trial); *United States v. Ostrer*, 597 F.2d 337, 340-41 (2d Cir. 1979) (based on principle that attorney should be disqualified from opposing former client if during his representation of client he obtained information relevant to controversy at hand, court ruled that the fair and proper administration of justice called for attorney's disqualification, thus overriding defendant's right to choice of counsel); *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978) (where actual conflict of interest impairs ability of criminal defendant's attorney to conform to ABA Code of Professional Responsibility, court is not required to tolerate inadequate representation of defendant that might impugn fairness of proceeding).

<sup>52</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). The Supreme Court has stated that because the grand jury's task is to inquire into possible criminal conduct and return only well-founded indictments, its investigative powers are necessarily broad. *Id.* The grand jury "generally is unrestrained by the technical, procedural, and evidentiary rules governing the conduct of criminal trials." *United States v. Calandria*, 414 U.S. 338, 343 (1974). The authority to compel the attendance and testimony of witnesses and require the production of evidence is indispensable to the exercise of the grand jury's power. *United States v. Mandujano*, 425 U.S. 546, 571 (1976); see also *Branzburg*, 408 U.S. at 688 (essential to grand jury's task is authority to subpoena witnesses). Attendance before a grand jury in order to testify is a public duty which every person within the jurisdiction is bound to perform upon being properly summoned. *Blair v. United States*, 250 U.S. 273, 281 (1919). "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

<sup>53</sup> See *Slotnick*, 781 F.2d at 248-49; see *supra* note 26 and accompanying text.

<sup>54</sup> *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); see also *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (making public any part of grand jury proceeding inevitably detracts from its efficiency); *In re Grand Jury Proceedings in Matter of Freeman*, 708 F.2d 1571, 1576 (11th Cir. 1983) (need to preserve secrecy of grand jury investigation of paramount importance).

The Supreme Court has stated that the main reasons for maintaining grand jury secrecy are:

jury secrecy is fundamental to the promotion of free, independent grand jurors.<sup>55</sup> Despite assertions of a statutory right to automatic disclosure of grand jury materials, such disclosure has been denied to Justice Department attorneys<sup>56</sup> and state attorney generals.<sup>57</sup> The Supreme Court has recognized the secrecy of a grand jury proceeding as "indispensable."<sup>58</sup>

The Federal Rules of Criminal Procedure codify the traditional rules of grand jury secrecy.<sup>59</sup> Under Rule 6(e), a document is protected from disclosure when it may tend to reveal what took place before the grand jury, regardless of whether the document is a government memorandum, transcript of the proceeding, or list of documents used in the proceeding.<sup>60</sup> When documents are sought

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

<sup>55</sup> See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959); Walker, *United States v. Sells: Engineering a Result to Promote Grand Jury Secrecy*, 21 AM. CRIM. L. REV. 99, 101-02 (1983).

<sup>56</sup> See United States v. Sells Eng'g, Inc., 463 U.S. 418, 427-35 (1983). In *Sells*, the government contended that under the Federal Rules of Criminal Procedure 6(e)(3)(A)(i), all attorneys of the Justice Department qualified for automatic disclosure of grand jury materials regardless of the nature of the litigation in which they intended to use the materials. *Id.* at 427. The Court held that such disclosure was limited to use by those attorneys who conduct the criminal matters to which the materials pertain. *Id.*

<sup>57</sup> See Illinois v. Abbot & Assoc., Inc., 460 U.S. 557, 568-73 (1983). In *Abbot*, the Attorney General of Illinois asserted that section 4F(b) of the Clayton Act, 15 U.S.C. § 15(f)(b) (1976), made it unnecessary for him to meet the particularized need standard (see *infra* note 63 and accompanying text) generally required in order to obtain access to grand jury materials. *Id.* at 559-60. The Court rejected this contention, holding that such a blanket disclosure request was not permitted by law. *Id.* at 573.

<sup>58</sup> See United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958); United States v. Johnson, 319 U.S. 503, 513 (1983).

<sup>59</sup> FED. R. CRIM. P. 6(e); see *Sells*, 463 U.S. at 425. Rule 6(e)(2) states that:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under [certain rules] shall not disclose matters occurring before the grand jury. . . .

FED. R. CRIM. P. 6(e).

<sup>60</sup> David, Lengyel, Manuelian & Sutko, *The Federal Grand Jury: Practice and Procedure*, 13 U. Tol. L. REV. 1, 7 (1981); see also *In re Grand-Jury Investigation*, 610 F.2d 202,

for their own intrinsic value, they are excluded from Rule 6(e) protection, but not if the wholesale disclosure would reveal the nature, scope, and direction of the grand jury investigation.<sup>61</sup>

In order to overcome the rule of grand jury secrecy, there must be a compelling necessity for the disclosure.<sup>62</sup> Furthermore, the party seeking disclosure must demonstrate that a particularized need exists that outweighs the need for secrecy.<sup>63</sup> A mere demonstration of relevancy or usefulness does not meet movant's burden. There must be a showing that denial of disclosure will result in severe prejudice or injustice.<sup>64</sup> Even when disclosure is warranted, the request must be narrowly structured to encompass only the material for which a compelling necessity has been demonstrated.<sup>65</sup>

### B. Grand Jury Secrecy v. the Need Requirement

The requirement of a preliminary showing of need as to benefactor payments unjustifiably burdens the necessity of grand jury secrecy. Requiring the government to establish need will force the grand jury to disclose a substantial amount of information about the state of the investigation.<sup>66</sup> This revelation will not only undermine grand jury secrecy,<sup>67</sup> but may also compromise the integrity of the investigation.<sup>68</sup> Furthermore, it is suggested that requiring

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216 (5th Cir. 1980) (Rule 6(e) applies not only to transcripts but to anything which may tend to reveal what transpired before grand jury).

<sup>61</sup> David, Lengyel, Manuelian & Sutko, *supra* note 60, at 7.

<sup>62</sup> See *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958); Walker, *supra* note 55, at 102.

<sup>63</sup> *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958). "Parties seeking grand jury transcripts under Rule 6(e) must show . . . that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material so needed." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

<sup>64</sup> See *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958).

<sup>65</sup> See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); David, Lengyel, Manuelian & Sutko, *supra* note 60, at 12.

<sup>66</sup> See *In re Sinadinos*, 760 F.2d 167, 170 (7th Cir. 1985). The grand jury may be forced to disclose the facts it had discovered, the source of these facts, the direction of the investigation, and other information still required. See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *In re Grand Jury Subpoena Duces Tecum Served Upon John Doe Corp.*, 570 F. Supp. 1476, 1480 (S.D.N.Y. 1983). During the time of the grand jury investigation, secrecy is most important. *In re Sinadinos*, 760 F.2d 167, 170 (7th Cir. 1985). In addition, the person seeking the disclosure may be deeply involved in criminal activities. *Id.* Moreover, the grand jury and the prosecutor have the right to select the course and direction of the investigation, not the court or the witness. *Id.* "The grand jury and the prosecutor best know the status of the investigation, the value of pursuing additional leads or shedding new light on traveled

the government to show need eliminates the compelling necessity and particularized need burdens traditionally placed upon the party seeking such disclosures.<sup>69</sup> Thus, it seems apparent the integrity of grand jury secrecy must prevail at the pre-indictment stage. At the post-indictment stage, when the information is unprivileged and highly probative,<sup>70</sup> the target should be required to sustain the burden of demonstrating compelling necessity and a particularized need before the grand jury must disclose otherwise secret information.

#### THE FIFTH AMENDMENT RIGHT TO COUNSEL

A fifth amendment right to an attorney was not recognized until the Supreme Court decided *Miranda v. Arizona*<sup>71</sup> in 1966. The *Miranda* Court held that in order to safeguard the fifth amendment privilege against self-incrimination, an individual held for interrogation must be clearly informed that he has a right to consult an attorney, and all interrogation must cease until the attorney, if requested, is present.<sup>72</sup> The sixth amendment protections differ in that the guarantee of a right to counsel is a fundamental right.<sup>73</sup> In order to demonstrate a waiver of the sixth amendment right to counsel, the state must prove comprehension by the defendant and an intentional relinquishment or abandonment of his right.<sup>74</sup> The waiver of a sixth amendment right to counsel is measured by a

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paths, or curtailing the investigation." *Id.*

<sup>69</sup> See *supra* notes 62-65 and accompanying text. The party seeking to quash a subpoena carries the burden of showing that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury. *In re Libertore*, 574 F.2d 78, 83 (2d Cir. 1978).

<sup>70</sup> See *Slotnick*, 781 F.2d at 251; *supra* notes 34-35 and accompanying text.

<sup>71</sup> 384 U.S. 436 (1966). See Note, *Pretrial Rights to Counsel Under the Fifth and Sixth Amendments: A Distinction Without a Difference*, 12 Loy. U. CHI. L.J. 79, 87 (1980) (until *Miranda*, suspect's rights to attorney entirely predicated upon sixth amendment).

<sup>72</sup> *Miranda*, 384 U.S. at 471, 474.

<sup>73</sup> *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The sixth amendment does more than require the state to appoint counsel for indigents. *Id.* at 344. The right to counsel prevents the State from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance. *Id.* The sixth amendment right to counsel "is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

<sup>74</sup> See *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see also *Johnson v. Zerbst*, 304 U.S. 458, 462-65 (1938) (court must appoint attorney to indigent unless right is intelligently and competently waived); *United States v. Mohabir*, 624 F.2d 1140, 1147 (2d Cir. 1980) (state has heavy burden of proving knowing and intelligent waiver of sixth amendment rights).

higher standard than the waiver of a fifth amendment right.<sup>75</sup>

It is submitted that because a grand jury target's fifth amendment right to counsel operates as a derivative or implied right, it does not warrant the same higher level of protection afforded the explicit and fundamental guarantee of the sixth amendment.<sup>76</sup> Accordingly, since Columbo's sixth amendment right to an attorney did not require the government to demonstrate need at the pre-indictment stage, then his fifth amendment right also will not require a demonstration of need. At the post-indictment stage, because Columbo's sixth amendment right to counsel yielded to the grand jury's need for the highly probative information, his fifth amendment right to counsel must also yield.

### CONCLUSION

This Comment has suggested that while the Second Circuit reached the correct result, an additional argument may be advanced to buttress the court's holding. The need to maintain grand jury secrecy is unjustifiably burdened by a "need" requirement at the pre-indictment stage. At the post-indictment stage, where the

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<sup>75</sup> *United States v. Mohabir*, 624 F.2d 1140, 1146 (2d Cir. 1980); *See Carvey v. Lefevre*, 611 F.2d 19, 22 (2d Cir. 1979) ("What might suffice to comply with *Miranda* will not necessarily meet the higher standard with respect to waiver of the right to counsel that applies when the sixth amendment has attached"), *cert. denied*, 466 U.S. 921 (1980); *United States v. Satterfield*, 558 F.2d 655, 657 (2d Cir. 1976) ("Even if [the defendant's] statements were voluntary for purposes of the fifth amendment . . . they were involuntary with regard [to] the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached") (citation omitted). Columbo asserted that requiring his attorney to testify as to fee arrangements would implicate his fifth amendment due process rights. *Slotnick*, 781 F.2d at 245-46. The Second Circuit stated that the fifth amendment due process clause provides no greater opportunity for Columbo to halt a grand jury investigation than does the sixth amendment. *Id.* at 246. It determined that Columbo's due process rights under the fifth amendment were not more expansive than the protection afforded by the sixth amendment, and therefore do not require a greater showing before the government can enforce the subpoena. *Id.* Thus, Judge Timbers concluded, the fifth amendment does not require a preliminary showing of need prior to enforce a subpoena served upon the counsel for an unindicted target of a grand jury investigation. *Id.*

<sup>76</sup> Recent Supreme Court decisions reflect this difference. For example, in *United States v. Henry*, 447 U.S. 264 (1980), the Court stated that the fifth amendment is not implicated by the use of undercover government agents before indictment because of the absence of potential for compulsion. *Id.* at 272. However, the Court asserted that the concept of a knowing waiver of sixth amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the government. *Id.* at 273. Compare *Brewer v. Williams*, 430 U.S. 387 (1977) (where the Court reversed the conviction by ruling that defendant had not waived his sixth amendment rights) with *Rhode Island v. Innis*, 446 U.S. 291 (1980) (where, on facts almost identical to *Brewer*, the Court upheld defendant's conviction on grounds that his *Miranda* rights were not violated).

information sought is relevant and highly probative, the target must demonstrate compelling necessity and a particularized need before the grand jury should be forced to make disclosures. Furthermore, when considering a grand jury target's fifth amendment right to counsel, courts should consider the higher level of protection traditionally afforded the sixth amendment right to counsel. Therefore, when the sixth amendment's fundamental right to counsel does not call for a preliminary showing of need, neither does the derivative right to counsel of the fifth amendment. Although the defense bar argues that the recent use of grand jury subpoenas is unconstitutional, such complaints are unjustified when the subpoena seeks information regarding benefactor payments.

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