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For centuries a policy has existed of protecting the secrecy of grand jury proceedings and of safeguarding the testimony of witnesses who appear before the grand jury. Developments within the past two decades, however, have forced the courts to re-examine this policy and to determine whether reasons traditionally advanced in support of grand jury secrecy have retained the vitality previously attributed to them. The principal cause of this re-evaluation has been the growing liberalization of criminal discovery: specifically, the criminal defendant’s right to obtain his own grand jury testimony as well as the testimony of government witnesses. The expansion of the defendant’s access to grand jury materials in criminal cases has produced unexpected side effects upon civil litigation, where, despite a philosophy of liberal pre-trial disclosure, access to grand jury materials has been limited. The center of the controversy is in balancing the policy which requires secrecy for grand jury proceedings against the policy which requires full disclosure of all available evidence “in order that the ends of justice may be served.”

Texas v. United States Steel Corp. and Illinois v. Sarbaugh represent two important pronouncements concerning the scope of civil discovery of grand jury materials in private antitrust litigation. Although the cases may be reconcilable, upon closer examina-

1. See text accompanying notes 46 through 47 infra.
2. The Federal Rules of Civil Procedure, 28 U.S.C., were promulgated in 1938. The rules are intended to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). The Federal Rules of Criminal Procedure, 18 U.S.C., were adopted in 1946 but, until the amendments of 1966 and 1974, the discovery granted the defendant was very limited. See 1 C. Wright, Federal Practice and Procedure § 251, at 491 (1969) [hereinafter cited as Wright].
5. 552 F.2d 768 (7th Cir.), cert. denied, 98 S. Ct. 262 (1977).
6. Although the question of access to grand jury materials in a civil proceeding is certainly not unique to the antitrust field, it commonly arises there due to the nature of the private antitrust action. Private treble damage actions were created by Congress to aid in the “vigilant enforcement of the antitrust laws.” Lawlor v. National Screen Service Corp., 349 U.S. 322, 329 (1955). In addition to the recovery of treble damages, § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), allows private plaintiffs to recover reasonable attorney’s fees, and § 5(a) of the Act, 15 U.S.C. § 16(a)(1976), renders a prior federal criminal or civil judgment prima facie evidence of liability in a subsequent private action. See also Illinois v. Huckaba & Sons Construction Co., 442 F. Supp. 56 (S.D. Ill. 1977), appeal docketed, No. 78-1479 (7th
tion they demonstrate the current tension between courts which apply the traditional reasons for grand jury secrecy and courts which question the basis for secrecy in light of expanded criminal discovery.

This article will analyze United States Steel and Sarbaugh and attempt to determine their place in the recent development of the law of federal grand jury secrecy. The current viability of asserted justifications for grand jury secrecy will be examined in light of these decisions and the expansion of criminal discovery. Additionally, the discussion will consider whether the “particularized compelling need” standard of United States v. Procter & Gamble Co. remains a formidable barrier to disclosure in the private antitrust context. In conclusion, this article will focus on the practical difficulties that remain for the practitioner attempting to secure grand jury transcripts, and will examine the proper use of grand jury materials once they have been obtained.

THE POLICY OF GRAND JURY SECRECY

Historical Foundations

The grand jury was established in England in 1166, but the policy of secrecy in its proceedings did not arise until the Earl of Shaftesbury treason trial of 1681. A fundamental facet of English jurisprudence, the grand jury was transported to the American colonies in the seventeenth century. Its importance to the Founders as a bulwark of personal liberty is illustrated by the fifth amendment’s guarantee of the right to indictment by grand jury. Although abolished in the country of its origin and used with less frequency in

Cir. April 13, 1978) (federal criminal antitrust judgment given collateral estoppel effect in subsequent treble damage action).

The effect of these provisions is that almost invariably, private antitrust actions follow in the heels of a Justice Department criminal suit. In the civil case from which the issues in Sarbaugh arose, Illinois v. Champaign Asphalt Co., S-CIV-73-216 (S.D. Ill., filed Nov. 7, 1973), the allegations of the complaint are virtually identical to those contained in the indictment in United State v. Champaign Asphalt Co., CR-72-67 (E.D. Ill., filed Dec. 19, 1972). Because of this symbiotic relationship, grand jury testimony is of inestimable value to the private plaintiff whose suit is based upon the same conduct as the federal criminal action.

7. The scope of this article is limited to the grand jury issue in the context of federal antitrust litigation.


10. Calkins, supra note 9, at 457.

the state courts, the grand jury has been employed extensively in the federal system. Indictment by grand jury is available for all federal crimes that are punishable by more than one year in prison.

Rule 6 of the Federal Rules of Criminal Procedure provides the principal regulation of grand jury proceedings. Subsection (e) of Rule 6 perpetuates the traditional policy favoring secrecy in grand jury matters.

**Judicial Treatment of the Policy of Secrecy**

The United States Supreme Court has indicated that “[g]rand jury testimony is ordinarily confidential... But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.” Rule 6(e) commits the determination of when “the ends of justice” require disclosure to the discretion of the district court in which the grand jury was convened. The rule specifies that disclosure may be made:

1. To attorneys for the government for use in the performance of their duties...
2. Preliminarily to or in connection with a judicial proceeding...
3. When permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

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12. *Id.*
13. WRIGHT, supra note 2, § 101, at 150.
15. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

   Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of warrant or summons.
Only the second circumstance is pertinent to the disclosure of grand jury materials in a private antitrust action.

Courts have asserted five justifications in support of the policy of grand jury secrecy: (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 jury; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosure by persons who have information with request to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and free from the expense of standing trial where there was no probability of guilt. The dual purpose of these justifications is to protect the integrity of ongoing grand jury proceedings and to assure the effective functioning of future grand juries.

The need for secrecy during a grand jury investigation is almost universally conceded, but the courts and commentators have questioned the need for continued secrecy after the proceedings have been terminated. The first three policy reasons no longer apply when grand jury proceedings and all criminal actions arising therefrom have been completed and the grand jury materials are sought in a subsequent civil case. Furthermore, if the defendant is the same in the criminal and civil case, the fifth policy reason is also irrelevant. Only the fourth reason for grand jury secrecy, the encouragement of free and untrammeled disclosure by grand jury witnesses, may be relevant after the grand jury has been discharged.

601 (N.D. Ill. 1974). Judge Learned Hand defined the term “judicial proceeding” as including “any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime,” in allowing disclosure for use in a state disbarment proceeding. Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958).


20. See Illinois v. Sarbaugh, 552 F.2d 768, 774-75 (7th Cir. 1977).


22. See WRIGHT, supra note 2, § 106, at 170-71, and authorities cited in note 19 supra.

23. See In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974), and authorities cited in note 19 supra.

It is upon this ground that the battle for civil disclosure has been fought.

The standard used to determine the propriety of grand jury disclosure was developed in three Supreme Court decisions. In *United States v. Procter & Gamble Co.*, the Justice Department brought a civil antitrust action after a grand jury investigating possible criminal violations of the Sherman Act had failed to return an indictment. Thereafter the Antitrust Division used the grand jury transcripts to prepare for the civil case. The defendants moved for discovery and production of the transcripts; the district court granted their disclosure.

The lower court's decision was subsequently reversed by the United States Supreme Court. Noting the federal judicial policy of maintaining grand jury secrecy, Mr. Justice Douglas wrote that secrecy must not be broken "except where there is a compelling necessity . . . shown with particularity." The defendant's request was characterized as an attempt to obtain the "wholesale discovery and production of a grand jury transcript under Rule 34." The Court noted that "particularized need" existed only where grand jury transcripts were requested in order "to impeach a witness [at the trial], to refresh his recollection, to test his credibility and the like." The mere relevancy and usefulness of transcripts in the conduct of litigation did not constitute a sufficient showing of good cause.

Similarly, in *Pittsburgh Plate Glass Co. v. United States*, the Court declared that defendants in a criminal antitrust prosecution did not have the right to inspect the grand jury testimony of the Government's key trial witness. In *Pittsburgh Plate Glass*, the trial judge had denied the defendants' request for inspection of grand jury transcripts because no inconsistency between the witness' grand jury testimony had been demonstrated. The Supreme Court affirmed the trial court, holding that particularized need had not been shown and that the defendants' asserted "right" of inspection ran "counter to a 'long established policy' of secrecy . . . older than our Nation itself." In the Court's view, disclosure under the circumstances would restrict the grand jury's access to information:

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27. 356 U.S. at 681.
28. Id. at 682.
29. Id. at 683 (original emphasis). The showing of "good cause" for discovery under FED. R. CIV. P. 34 was eliminated by the 1970 amendment. March 30, 1970, eff. July 1, 1970.
30. Id.
32. Id. at 399.
Not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. And this "go slow" sign would continue as realistically at the time of trial as theretofore.\textsuperscript{33}

The majority cautioned, however, that secrecy was not absolute. The burden was placed "on the defense to show that 'a particularized need' exists for the for the minutes which outweighs the policy of secrecy."\textsuperscript{34} Unfortunately, the manner in which this balancing process was to be performed was stated in ambiguous terms. The Court rejected a requirement that defendants show a contradiction between trial and grand jury testimony and refused to rule on the propriety of in camera inspection by the trial court to determine if discrepancies were present.\textsuperscript{35}

Mr. Justice Brennan, joined by three other members of the Court, registered a strong dissent.\textsuperscript{36} In attempting to determine whether the reasons for secrecy were actually present he stated that grand jury secrecy was not an end in itself. Moreover, to promote the fair administration of criminal justice, secrecy could be lifted when its advantages were outweighed by a countervailing interest in disclosure.\textsuperscript{37} In the dissenters' view, not even the fourth policy reason for grand jury was applicable to the circumstances of the case:

Disclosure of Jones' relevant grand jury testimony could not produce the apprehended results of retaliation or discomfort which might induce a reluctance in others to testify before grand juries. Jones has already taken the stand and testified freely in open court against the defendants. His testimony has been extremely damaging. . . . Witnesses before a grand jury necessarily know that once called by the Government to testify at trial they cannot remain secret informants quite apart from whether their grand jury testimony is discoverable.\textsuperscript{38}

\textsuperscript{33} Id. at 400. It is difficult to see what greater showing of particularized need could have been made by the defendants. As one commentator has indicated: "petitioners specifically sought the testimony of the witness in question for the purpose of impeaching that witness, an instance which the court had characterized as a showing of particularized need [in Procter & Gamble]." Myth, supra note 11, at 27.
\textsuperscript{34} 360 U.S. at 400.
\textsuperscript{35} Id. at 400-01.
\textsuperscript{36} Mr. Justice Douglas, the author of the majority opinion in Procter & Gamble, joined the dissent along with Chief Justice Warren and Mr. Justice Black.
\textsuperscript{37} 360 U.S. at 403.
\textsuperscript{38} Id. at 406. This is a case in which the rationale of the dissenting opinion later became the law. See, e.g., Dennis v. United States, 384 U.S. 855, 872-74 (1966); U.S. Industries v.
The Supreme Court’s most recent pronouncement on grand jury secrecy is Dennis v. United States.\(^3\) In Dennis, petitioners were indicted for conspiracy to defraud the United States by filing false affidavits concerning their membership in the Communist Party. The trial judge denied defense motions requesting production or, alternatively, in camera inspection, of the grand jury testimony of key Government witnesses. A unanimous Court reversed the trial court’s decision. Citing approvingly the dissenting opinion in Pittsburgh Plate Glass and law review articles critical of grand jury secrecy,\(^4\) the Court indicated that “[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.”\(^4\) The defendants’ showing of particularized need went “substantially beyond the minimum required by Rule 6(e) and the prior decisions of this Court.”\(^4\) Significantly, the Court rejected in camera inspection as being inadequate to protect the interests of the defendant. The trial court was limited to determining the existence of particularized need, supervising production and granting protective orders in “unusual situations” that required the breach of secrecy to be minimized.\(^3\)

Criminal Discovery of Grand Jury Materials

In conjunction with the Court’s receptiveness to liberal grand jury disclosure, a movement toward broader criminal discovery was established under the Federal Rules of Criminal Procedure and the Jencks Act.\(^4\) In 1966, Rule 16(a) was amended to allow a defendant access to his own grand jury testimony. Decisions interpreting the rule held that a corporate defendant in a criminal antitrust action was entitled to inspect grand jury testimony of employees without demonstrating particularized need.\(^4\) This development was made


\(^4\) Id. at 870, 871 n. 17, 872 n.18.

\(^4\) Id. at 873.

\(^4\) Id. at 872.

\(^4\) Id. at 875.

\(^4\) 18 U.S.C. § 3500 (1976); see also Brady v. Maryland, 373 U.S. 83 (1963) (defendant has a right to discover exculpatory evidence held by prosecution).

explicit by the 1975 amendment to the rule which gave the courts the discretion to grant discovery of the relevant grand jury testimony of employees who could bind the corporation either at the time of the alleged act or at the time they appeared before the grand jury.\footnote{Fed. R. Crim. P. 16(a)(1)(A) provides: Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been legally able to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been legally able to bind the defendant in respect to that alleged conduct in which he was involved. As amended, April 22, 1974, eff. Dec. 1, 1975.}

The 1970 amendment to the Jencks Act undermined the holding in \textit{Pittsburgh Plate Glass} by permitting the defendant to discover the grand jury testimony of a government witness without showing particularized need, after the witness has given his direct testimony at trial.\footnote{The Jencks Act, 18 U.S.C. § 3500 (1976), provides in pertinent part: \text{(b)} After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. \text{(e)} The term “statement”, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means— \text{(3)} a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.} In practice, disclosure has been made prior to the witness’ testifying through voluntary production by the Justice Department or by court order.\footnote{See Brief for United States at 4, United States v. Alton Box Board Co. - In re Folding Carton Antitrust Litigation, No. 77-1694, 1697, 1698 (7th Cir. Dec. 1, 1977) [hereinafter cited as Brief for United States]. Pre-trial disclosure has been ordered under the district court’s Rule 6(e) power. United States v. Machi, 324 F. Supp. 153 (E.D. Wis. 1971).}
Although Procter & Gamble and Pittsburgh Plate Glass never addressed the question of disclosure of grand jury transcripts in aid of private antitrust litigation, that question was answered in the course of the Electrical Equipment antitrust cases. These cases represented the first attempts by a civil plaintiff to obtain the grand jury minutes of a civil defendant. Production was sought primarily for use in deposing the employees of corporate defendants, as well as for use at trial.

In City of Philadelphia v. Westinghouse Electric Co., district Judge Clary prescribed the procedure for obtaining the disclosure of grand jury materials. The practice was to call the witness for a deposition, elicit his failure to recall pertinent facts or possible inconsistencies between his current statements and his former testimony, and, having laid this foundation, request an in camera examination of the grand jury transcript by the deposition judge. If the court found inconsistencies between the deposition testimony and the grand jury transcript it would determine, in its discretion, whether there was a compelling need for disclosure. Disclosure was permitted "solely for the personal perusal of counsel attending the deposition" and the transcript was to be used only for such further interrogation of the deponent as was authorized. Copying in any form was prohibited and the transcript had to be returned to the court at the close of the deposition. At trial, either the deposition or the grand jury testimony could be used for impeachment or refreshing recollection. This procedure was followed throughout the country in the electrical cases.


52. For in-depth discussions of the in camera procedure see Hanley and National Deposition Program, supra note 49.


55. See Hanley supra note 49, at 674-75; see also text accompanying notes 136 through 139 infra.

56. See, e.g., Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233, 237 (5th Cir. 1963); Atlantic City Electric Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963), application.
Despite the unprecedented nature of the disclosure authorized by City of Philadelphia and other electrical cases, the manner in which disclosure was effected is illustrative of the judiciary's adherence to the traditional principles of Procter & Gamble and Pittsburgh Plate Glass. In City of Philadelphia, Judge Clary indicated that the breakdown of the reasons for secrecy could not alone be a sufficient basis for disclosure:

"There can be no policy in favor disclosure unless there is particular need. The lack or improbability of harm is but a factor in the evaluation of the need for secrecy. It is not a factor demonstrating a need for disclosure. . . . If judicial determination could be made by something as simple as a mechanical balance, the weight on the side of disclosure would have to clearly tip the balance in its favor."\(^5\)

This view, in the words of Justice Brennan's dissent in Pittsburgh Plate Glass, "exalt[ed] the principle of secrecy for secrecy's sake. . . ."\(^58\)

**Subsequent Developments**

Even prior to the Supreme Court's decision in Dennis, the rigid view exemplified by Judge Clary's opinion in City of Philadelphia was being tempered. In U.S. Industries v. United States District Court,\(^59\) defendants in a treble damage action moved to have a government pre-sentencing memorandum containing grand jury testimony resealed in order to prevent its discovery by the civil plaintiffs. The memo had been prepared by the Justice Department in connection with the preceding criminal antitrust prosecution and the defendants had inspected it at that time. The Ninth Circuit held that the district judge did not abuse his discretion in granting discovery of the memo to the civil plaintiffs.

Although it recognized the policy of secrecy, the court refused to apply the particularized need test "in vacuo." Instead, the court endorsed a qualitative examination of the reasons for secrecy, as applied to a particular situation. Then, "if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need."\(^60\) The prior dis-
closure of the grand jury materials to the defendants vitiated the fourth reason for secrecy "because those whom the witness most had to fear have already seen the government memorandum, viz., their own employers."61

In light of modern procedural practice, the Ninth Circuit broke with the precedents which had considered grand jury secrecy "sacred." Favoring a contemporary appraisal of the problem, the court said:

It . . . seems highly inequitable and averse to the principles of federal discovery to allow one party access to a government document and not the other. It is particularly inequitable when the policy reason for denying the other party access to the document is essentially inapplicable to the given situation.62

U.S. Industries, coupled with the holding in Dennis,63 paved the way for a number of district courts to adopt a pragmatic approach to the question of discovery of grand jury materials. Where prior disclosure of transcripts to criminal antitrust defendants had already been made, the district courts almost uniformly found particularized need and granted pre-trial discovery to treble damage plaintiffs.64 Furthermore, at least one district court indicated that

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61. Id. at 22. The defendants argued that disclosure of the pre-sentencing memo had been made only to defense counsel and not the defendants themselves and, therefore, secrecy had not been breached. The court rejected this, indicating that "knowledge of opposing counsel in itself prejudices respondents. Moreover, petitioner's counsel were not precluded from conveying what they learned from their inspection of the memorandum to their clients." Id. at 23 n.1.

Similar arguments were rejected by Judge Will in In re Folding Carton Antitrust Litigation, 1977-2 TRADE CASES (CCH) ¶ 61,807 (N.D. Ill.), aff'd sub nom. United States v. Alton Box Board Co., No. 77-1694, 1697, 1698 (7th Cir. Dec. 1, 1977), cert. denied, 46 U.S.L.W. 3763 (1978): "[The corporate defendants] are trying to make a distinction between grand jury transcripts which were examined by counsel for corporate officers, and say that it is not producible, but if it had been examined by counsel for the corporation it would be, and I say nothing doing." Transcript of Hearing on P.T.O. 18, April 22, 1977, at 31. See also text accompanying notes 112 through 114, infra.

62. 345 F.2d at 23.

63. It has been said that, in the context of disclosure for purposes of civil litigation, Dennis "is of little or any force, since it rests on the special need for fair play to criminal defendants, and the controlling case continues to be United States v. Procter & Gamble." Wright, supra note 2, § 109, at 188. This interpretation is too restrictive. The better view is that "[t]he impact of Dennis on the law lies not so much in its holding . . . but rather in the shift in policy reflected in its holding." Nitschke, Reflections on Some Evils of the Expanding Use of the Grand Jury Transcript, 37 ABA ANTITRUST L. J. 198, 202 (1968) [hereinafter cited as Nitschke]. The courts seem to have agreed with the latter statement. See Illinois v. Sarbaugh, 552 F.2d at 774-77; Baker v. United States Steel Corp., 492 F.2d 1074, 1080 (2d Cir. 1974) (Lumbard, J., dissenting); Washington v. American Pipe & Const. Co., 41 F.R.D. 59, 63 (W.D. Wash., D. Ore., D. Haw., N.D. Cal., S.D. Cal. 1966). See also, Myth, supra note 11, at 32: "The emergence of Dennis v. United States marks a new era in the federal courts' approach to the doctrine of grand jury secrecy."

64. Boise City, Idaho v. Monroc, Inc., 1976-2 TRADE CASES (CCH) ¶ 61,178 (D. Idaho,
the rationale for particularized need had no application whatsoever where there had been prior disclosure to the defendant.\textsuperscript{55} That court treated the plaintiff's motion for production as it would any other motion for civil discovery. In \textit{Baker v. United States Steel},\textsuperscript{66} however, the Second Circuit, in dictum, rejected a "slight need" standard for disclosure of grand jury materials. This case may be distinguished since no prior disclosure to the defendants had been made, and the court, citing \textit{U.S. Industries}, indicated that "[p]erhaps some relaxation of the 'particularized need' test might be justified under other circumstances."\textsuperscript{77}

\textit{Texas v. United States Steel Corp.}

As the foregoing materials illustrates, the trend toward liberal discovery of grand jury materials is a very recent development. This trend was maintained in the \textit{Sarbaugh} case. But, as \textit{Texas v. United States Steel Corp.} indicates, the traditional notions protecting grand jury secrecy are still viable. In \textit{United States Steel}, the State of Texas had filed a treble damage action subsequent to a federal criminal antitrust prosecution. During the course of the criminal case the corporate defendants had obtained transcripts of their employees' grand jury testimony pur-


In Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37 (N.D. Ill. 1969), \textit{rev'd in part on other grounds sub nom. Harper & Row Publishers, Inc. v. Decker}, 428 F.2d 487 (7th Cir. 1970), \textit{aff'd by equally divided court}, 400 U.S. 487 (1971), discovery was permitted even though there was no prior disclosure. The court emphasized the unavailability of certain witnesses for depositions and the fact that the defendants had extensively de-briefed their employees after they had returned from testifying before the grand jury, thereby obtaining the substance of their testimony. 50 F.R.D. at 42. See note 88 infra. See also \textit{S.E.C. v. National Student Marketing Corp.}, 430 F.Supp. 639 (D.D.C. 1977)(following \textit{U.S. Industries} and \textit{Cement-Concrete Block} in granting disclosure).

\textsuperscript{55} Connecticut v. General Motors Corp., 1974 \textit{Trade Cases} (CCH) \textsuperscript{65} 75,138 (N.D. Ill. 1974).

\textsuperscript{66} 492 F.2d 1074, 1079 (2d Cir. 1974).

\textsuperscript{67} \textit{Id.}
suant to Rule 16(a)(1)(A). All defendants in the criminal case pleaded nolo contendre. In the course of its discovery, the State of Texas served a Rule 349 request on the civil defendants, demanding various grand jury subpoenas, schedules, notices, summonses and transcripts by employees. When the defendants refused to release the grand jury materials, plaintiff obtained a court order directing production to be made. The order was subject to protective measures limiting disclosure to the State's attorneys for use in the treble damage case only. The court did not undertake an in camera inspection.

On interlocutory appeal, the Fifth Circuit reversed, concluding that the district court had abused its discretion in granting disclosure. The court rejected the State's arguments that the particularized need test did not apply to the circumstances of the case and that prior disclosure to the criminal defendants constituted a sufficient showing of particularized need. The language of the Fifth Circuit is reminiscent of the district court's opinion in City of Philadelphia:

The State underrates the importance of and misconceives the reasons for the cloak of grand jury secrecy: although several reasons exist, the one most pertinent is the desire to create a sanctuary, inviolate to any intrusion except on some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation.71

In a questionable analysis, the court compared the disclosure of an employee's grand jury testimony to the corporate employer with a witness' receipt of his own transcript.72 The court assumed that in the latter circumstance grand jury secrecy remains unaffected.73 It conceded that "the testimony of a hostile or disaffected employee may well be a special case"74 but the State had failed to prove that such a situation existed.

The court of appeals rejected the position that disclosure under Rule 16(a)(1)(A) meant "automatic discoverability" in a subsequent civil case because it "would restrict unduly the corporation's use of the criminal defense tool which Congress saw fit to grant. . . ."75 Thus, the State's request failed to meet the Procter

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68. See note 46 supra.
70. 546 F.2d at 628.
71. Id. at 629 (footnotes omitted, original emphasis).
72. Id. at 630.
73. Id.; see text accompanying notes 113 through 114 infra.
74. Id.
75. Id.
& Gamble test because it did not show particularized need in terms of refreshing recollection, impeaching, testing credibility and the like.

On appeal to the Supreme Court, certiorari was denied.76

**Illinois v. Sarbaugh**

The facts in Sarbaugh were similar to those presented in United States Steel. In connection with its treble damage action, the State of Illinois sought discovery of grand jury materials77 that had been disclosed to the civil defendants in connection with the prior criminal case.78 However, in addition to a Rule 34 request to the civil defendants, the State also directed a subpoena for the materials to John Sarbaugh, Chief of the Midwest Office of the Justice Department's Antitrust Division.79 As in United States Steel,80 no depositions of corporate employees who had testified before the grand jury had been scheduled at the time the request was made. The State subsequently sought an order compelling production in the Southern District of Illinois, the district where the civil case was filed. That court held that only the Eastern District of Illinois, where the grand jury had been empaneled, had jurisdiction to release the transcripts.81 After a hearing on the matter, the District Court for the Eastern District of Illinois denied disclosure, thereby declining to follow the precedent established in U.S. Industries and its progeny.82

76. 98 S. Ct. 262 (1977); see note 92 infra.
77. The state sought discovery of documents in the custody of the Justice Department that had been submitted to the grand jury by the defendants. The district court held they were not discoverable in the hands of the Department but that they would be discoverable from the defendants after they were returned. This portion of the district court's order was not appealed. 552 F.2d at 771-72 n.2. The state also sought discovery of grand jury subpoenas and the names of the witnesses who appeared in the course of the investigation. This request was also denied, but it would appear that, on this point, the holding of the Seventh Circuit overturned the district court.
78. Due to a peculiarity in the Justice Department's investigation of the highway construction industry in Southern Illinois, grand juries were empanelled and indictments were returned in both the Southern and Eastern Districts of Illinois. Corporate defendants in both cases received grand jury transcripts from the earlier Eastern District case, in connection with the Southern District case, even if they had not previously received them in the Eastern District. See Transcript of Hearings Before Chief Judge Wise, at 6-7, Illinois v. Sarbaugh, CR-72-67 (E.D. Ill. Feb. 26, 1976).
79. 552 F.2d at 771. The Seventh Circuit indicated that this factual difference had no significance in terms of the secrecy issues. 552 F.2d at 777 n.14. The Justice Department did not oppose disclosure. 552 F.2d at 772.
80. In United States Steel, Texas had held some depositions, but they were not of employees that had testified before the grand jury. See Brief of Respondents in Opposition to Certiorari at 3, Texas v. United States Steel Corp., No. 76-1710, cert. denied, 98 S.Ct. 262 (1977).
81. 552 F.2d at 770-71.
On direct appeal, the Seventh Circuit reversed, holding that the district court abused its discretion in denying disclosure of the grand jury transcripts. In contrast to the Fifth Circuit, the Sarbaugh court acknowledged that the particularized need standard of Procter & Gamble "may have 'been eroded to some extent' . . . by language in Dennis v. United States, . . . if not by decisions of lower federal courts led by U.S. Industries. . . ." These developments and the expansion of criminal discovery did not, in the court's view, eliminate the need to show particularized need, but they did lower the threshold at which particularized need exists.

In addition, the Seventh Circuit emphasized that disclosure under Rule 16(a)(1)(A) necessarily undermined the fourth policy reason for grand jury secrecy:

In an antitrust context, the force of this reason is considerably diminished by the disclosure pursuant to Rule 16(a)(1)(A) to the witness' corporate employer, who has greater incentive and power to retaliate than anyone else. Once the employer has the transcript, all that remains of the reason for secrecy is the need to protect the witness, to the extent it is still possible to do so, from potential adverse effects on his future relationships with members of the industry other than his employer. This residual need cannot

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83. The defendants in the civil case contested the appealability of the district court's order. The Seventh Circuit, declining to follow a contrary holding in Baker v. United States Steel, 492 F.2d 1074 (2d Cir. 1974), held that the disposition of the transcripts in the Eastern District was an independent proceeding and that the district court's order was final and appealable. 552 F.2d at 773-74.

That this conclusion is not limited to the case in which transcripts are sought for use in a district different from the one in which the grand jury was convened, is supported by the Seventh Circuit's decision upholding appealability in United States v. Alton Box Board Co.-In re Folding Carton Antitrust Litigation, No. 77-1674, 1697, 1698 (7th Cir. Dec. 1, 1977) cert. denied, 46 U.S.L.W. 3763 (1978). In that case, the grand jury and the civil case were both in the Northern District of Illinois.

In Sarbaugh, the State of Illinois moved to strike the appearance of the corporate defendants in the court of appeals on the ground that they had not properly intervened below and, thus, did not have standing to appeal. Noting the state's failure to object to the appearance of the defendants below, the Seventh Circuit held that the defendants were entitled to intervene in any event because "the advantages of an adversary proceeding are lost" if there is no one to oppose the release of the transcripts. 552 F.2d at 773. The irony of corporate defendants arguing in favor of the policy reasons behind continued secrecy has not gone unnoticed. "It must be with tongue-in-cheek that defendants (who are the most likely to retaliate and the least interested in effective antitrust grand jury investigations) express solicitude for the witnesses who made admissions damaging to the defendants before the grand jury." Brief for Appellee at 9, United States v. Alton Box Board Co.-In re Folding Carton Antitrust Litigation, No. 77-1674, 1697, 1798 (7th Cir. Dec. 1, 1977).

84. 552 F.2d at 774.
be dismissed as unworthy of any consideration... but it can be adequately dealt with by a protective order.85

The record in the lower court also indicated that on at least one occasion, co-defendants had exchanged grand jury transcripts among themselves.86 The Seventh Circuit recognized that this factor "will sometimes narrow the remaining zone of secrecy and further dilute what remains of the reason for secrecy."87 Although the court felt that such exchanges could possibly be limited by court order or voluntary agreement,88 when cross-delivery is made "the group of potential retaliators who do not know of the grand jury testimony is reduced and so is importance of maintaining secrecy."89

In spite of its catalogue of factors diminishing the necessity for secrecy, the court did not abrogate completely the particularized need requirement. Instead, the Sarbaugh court, citing U.S. Industries and Dennis, significantly lowered the level of need that the civil plaintiff, the State, was required to demonstrate:

[W]e believe that a particularized need for the limited disclosure we prescribe below is sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury.90

Although strict protective measures were imposed upon the process

85. Id. at 775.
86. Id.
87. Id.

Because of the absence of restrictions on witnesses, cross-delivery of transcripts violates no rule. The Sarbaugh court did not view a court order restricting cross-delivery as an invasion of the witness' freedom to disclose, however, since the restraint was pursuant to the corporation's exercise of its rights under Rules 6(e) and 16(a)(1)(A). 552 F.2d at 775. The court's reference to a voluntary agreement to restrain disclosure was a recognition of the employment of the practice in United States Steel. See 546 F.2d at 628. The efficacy of this type of "gentleman's agreement" in assuring secrecy is highly questionable. It would be virtually impossible to ensure compliance and, absent enforcement through a court order, it would seem to be freely revocable by the parties without fear of sanction.

89. 552 F.2d at 775.
90. Id. at 777.
of disclosure, the court refused to require in camera inspection as a prerequisite for discovery by the State.

On appeal, the Supreme Court denied certiorari.

SECRECY AFTER SARBAUGH AND UNITED STATES STEEL

The Decisions Compared

The Fifth Circuit rendered its decision in United States Steel without the benefit of the Seventh Circuit’s opinion in Sarbaugh. The Sarbaugh court, although attempting to minimize the disparity between the circuits, acknowledged a difference between each court’s approach. Arguably, the decisions may be harmonious, but analysis clearly places Sarbaugh in the mainstream of the liberal decisions following U.S. Industries, while aligning United States Steel with the restrictive pronouncements of the Electrical Equipment cases. Accordingly, the latter case is of limited importance in predicting future developments in this area of the law.

The court’s analysis in United States Steel is objectionable for at least two reasons. First, the Fifth Circuit completely ignored numerous prior decisions that had rejected a mechanical recitation of particularized need. Though the case discusses the issue of Rule

91. Release was made to a single attorney for the state, who was required to maintain a log recording the handling of the transcripts. No copying was allowed and the transcripts had to be returned after they had been used. The use of their transcripts was limited to impeachment, refreshing recollection and testing credibility. For criticism see text accompanying notes 119 through 124 infra.

92. 98 S. Ct. 262 (1977). In view of the difference in approach taken by the Fifth and Seventh Circuits, this denial is surprising. The Supreme Court has yet to speak on the question of disclosure in civil litigation and its last pronouncement on grand jury secrecy was in 1966. See Dennis v. United States, 384 U.S. 855 (1966). Supreme Court resolution of the grand jury issue may be forthcoming, however. See Petrol Stops Northwest v. United States, 1978-1 TRADE CASES (CCH) ¶ 61,935 (9th Cir. 1978), appeal docketed sub nom. Douglas Oil Co. of Calif. v. Petrol Stops Northwest, No. 77-1547 (Sup. Ct. April 28, 1978).

Two other factors suggest the need for Supreme Court resolution of the disclosure issue. First, this issue, as evidenced by the cases decided since Sarbaugh and United States Steel, see note 104 infra, will continue to arise with great frequency in the future. As has been noted, see note 6 supra, private antitrust suits consistently follow government criminal prosecutions, and the issue will arise in every one of these. Second, Congress recently refused to include in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976), a provision which would have expanded access to grand jury materials in parens patriae actions. See amendment of September 8, 1976 to H.R. 8532. But see In re Montgomery County Real Estate Antitrust Litigation, 1978-1 TRADE CASES (CCH) ¶ 62,070 (D. Md. 1978).

93. See 552 F.2d at 777-78.

94. See Brief for Respondent State of Illinois in Opposition to Certiorari, at 8-14, and Brief for Respondent Sarbaugh in Opposition to Certiorari, at 6-7.

95. The Fifth Circuit did cite U.S. Industries for the proposition that grand jury secrecy was designed “to create a sanctuary, inviolate to any intrusion . . . ." See 546 F.2d at 626, n.8. In light of the holding in U.S. Industries, this citation is surprising and borders upon misinterpretation of the case. See text accompanying notes 59 through 62, supra.
16(a)(1)(A) disclosure, it considers inadequately the effect of that breach of secrecy on the underlying reasons for retaining secrecy. Regardless of how broadly the court characterized the State of Texas' request for grand jury materials, the "secret" transcripts were nonetheless in the hands of the corporate defendants, the party "who has greater incentive and power to retaliate than anyone else." This factual situation was inimical to the circumstances presented in the cases that the Fifth Circuit cited to support its decision.

The second, and foremost, defect in United States Steel is the court's treatment of the "retaliation" argument. Although the Fifth Circuit acknowledged the Procter & Gamble dicta regarding the danger of retaliation from the corporate employer, it failed to realistically apply the Supreme Court's warning to the instant circumstances. Setting aside the question of whether a witness' discovery of his own transcript breaches grand jury secrecy, the Fifth Circuit's analogy of that situation to the corporate employer's procurement of a copy of its employee's transcript is a misinterpretation of the Supreme Court's principal reason for safeguarding grand jury secrecy. This rationale is suspect as a matter of statutory construction. Rule 16(a)(1)(A) treats the corporation in a manner different from the individual defendant. While the individual has a right to review his own transcript, the corporate defendant may, only in the court's discretion, be allowed to discover its employee's testimony.

Furthermore, in discussing the issues of retaliation, Procter & Gamble and Pittsburgh Plate Glass did not speak of a dichotomy between "corporate spokesman" and "disaffected employees." In those cases the Court held that if retaliation does indeed occur, it will come primarily from the corporate employer. If, as the Fifth Circuit implies, employer retaliation does not in fact occur, the sole remaining source of retaliation is others in the industry. As Sarbaugh illustrates, this residual need for secrecy may be recognized by a protective order.

Ultimately, the holding in United States Steel is not founded upon the rationale of retaliation. The court's conclusion is based

96. The Fifth Circuit characterized Texas' request as "whole hog or none" and indicated that the state had to "draw a finer bead" in its motion for discovery of grand jury transcripts. 546 F.2d at 631.
97. 552 F.2d at 775.
99. 546 F.2d at 630.
100. See note 46 supra.
101. 552 F.2d at 775.
more accurately upon sympathy for the criminal corporate defendant which, by exercising its right to petition for criminal discovery, exposes itself to disclosure in a treble damage action.\textsuperscript{102} Although this dilemma exists, it is an insufficient basis for denying the discovery of important factual data in the civil litigation. The corporate defendant has no right to discover the transcript of his employee. In seeking criminal discovery, the corporation is only making the same choice that all litigants in criminal actions faced with the possibility of a derivative civil suit must make. This is especially true in antitrust litigation where the Clayton Act facilitates the civil plaintiff’s use of a prior criminal judgment.\textsuperscript{103}

*United States Steel* is out of step with the decisive majority of cases decided since *U.S. Industries* which have indicated that the traditional reasons in support of grand jury secrecy are seriously undercut, if not irrelevant, where prior disclosure has been made. In contrast, *Sarbaugh* draws heavily from the numerous district court decisions permitting disclosure. Although the case retreats from more radical lower court decisions in that it retains the particularized need test, the *Sarbaugh* standard differs considerably from the test adopted in the Electrical Equipment cases and reaffirmed in *United States Steel*.\textsuperscript{104}

In summary, *Sarbaugh* replaces the hypothetical statements concerning retaliation made by prior courts with an investigation of the actual probability of retaliation presented by the facts of the case. Furthermore, the hoary in camera procedure of the Electrical Equipment cases is replaced by a streamlined method of produc-

\textsuperscript{102} See notes 64-65 supra. Cf. Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968); Similar arguments were rejected in *Sarbaugh*, see Brief of Intervenors-Appellees, at 41-42, and in In re Arizona Dairy Products Litigation; 1976-1 TRADE CASES (CCH) ¶ 60,910 (D. Ariz.), aff’d, (9th Cir. Nov. 17, 1975).

\textsuperscript{103} See note 6 supra.

\textsuperscript{104} There are indications that *Sarbaugh* is already being read expansively by lower federal courts. In granting disclosure to treble damage plaintiffs in the Folding Carton Antitrust Litigation, MDL-250 (N.D. Ill. 1977), Judge Will said: “I am prepared to be satisfied, as Judge Tone [author of *Sarbaugh*] apparently is, that there is a particularized need, per se, for grand jury testimony if it is not still subject to the provisions with respect to the maintaining of the secrecy of the grand jury proceedings.” See supra note 61, at 46.

See also Petrol Stops Northwest v. United States, 1978-1 TRADE CASES (CCH) ¶ 61,935 (9th Cir. 1978), appeal docketed sub nom. Douglas Oil Co. v. Petrol Stops Northwest, No. 77-1547 (Sup. Ct. April 28, 1978), in which the court followed the reasoning of *Sarbaugh* in granting disclosure. The Ninth Circuit indicated that “[t]he [district] court reasonably could conclude that a plaintiff’s need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant’s curiosity about what its employees may have disclosed.” Id. at 73, 956. For another post-*Sarbaugh* decision granting disclosure, see Little Rock School District v. Borden, Inc., 1978-1 TRADE CASES (CCH) ¶ 62,020 (E.D. Ark. 1978). The decision was certified for immediate interlocutory appeal.
tion. Under Sarbaugh, if prior disclosure has been made and the transcripts are to be used for impeachment or refreshing recollection at deposition or trial, particularized need exists, and the civil plaintiff is entitled to review the transcripts.

Questions Unanswered by Sarbaugh

The Seventh Circuit strongly emphasized the existence of previous disclosure to support the discovery of grand jury materials. It has been suggested, however, that prior disclosure is irrelevant where the grand jury has been disbanded and the criminal case has been concluded. In these circumstances only the fourth reason for secrecy, the encouragement of free and untrammeled disclosure by grand jury witnesses, may be applicable. This notion has been traditionally based upon the witness' subjective expectation that his testimony will be heard exclusively by the grand jury. In practice, however, such a subjective expectation is unrealistic. As one commentator has stated:

the witness must realize when he is first contacted by the prosecution that any testimony he gives to the grand jury will in most cases also have to be given at the trial. Any prosecuting attorney who did not so advise a key government witness, who due to ignorance or naiveté failed to recognize this fact, would seem remiss in his duty.

The remote possibility of secrecy is further exemplified by the Supreme Court’s holding in Brady v. Maryland, Rule 16(a)(1)(A) and the Jencks Act. Furthermore, the fact of actual disclosure to corporate employers should make no difference, since future employee grand jury witnesses would be aware of their corporate employer's right to review their testimony.

Therefore, since grand jury witnesses often have no right to expect the future confidentiality of their testimony, the fourth remaining ground for secrecy is effectively undermined. The residual reason for secrecy, fear of retaliation from other members of the industry, may be overcome by an appropriate protective order. Even this reason

105. See text accompanying notes 51 through 56 supra. The Fifth Circuit reserved ruling on this point in United States Steel. See 546 at 631, n.11.

106. See In re Sugar Antitrust Litigation, 1977-2 TRADE CASES (CCH) ¶ 61,808 at 73,346 n.3.


108. Knudsen, supra note 19, at 443-44. Nearly 20 years ago Mr. Justice Brennan made a similar observation in Pittsburgh Plate Glass, 360 U.S. at 406.

109. 373 U.S. 83 (1963); see note 44 supra.

110. Brief for the United States, supra note 7, at 7.
for secrecy may be eroded by defendant’s cross-delivery of transcripts and de-briefing memoranda, or by exposure to grand jury materials, or by exposure to grand jury testimony at pre-sentencing hearings.111

Assuming, however, that prior disclosure reaches the level of importance attributed to it in Sarbaugh, the opinion leaves unanswered questions which may arise in two situations: where disclosure has been made previously to counsel for individual defendants, but not corporate defendants; and where less than all of the co-defendants in the criminal case have obtained discovery of grand jury materials.112

Although the Fifth Circuit indicated in United States Steel that secrecy remained unaffected by an individual’s receipt of his own transcript, the Seventh Circuit properly signalled its disagreement.113 The equality of access rationale of U.S. Industries is as applicable when the individual defendant receives his transcript, as when the corporation gains access to it. Where the individual defendant remains an officer or employee of the corporation, it strains the corporate fiction to isolate the employee from the employer. In most cases, secrecy is destroyed where the employee has been de-briefed by corporate counsel and the substance of his testimony is disclosed without actual production of the grand jury transcript.114

The problem created by disclosure to less than all defendants may arise when a criminal defendant pleads nolo contendere or guilty but other co-defendants go to trial. The co-defendants may obtain access to grand jury materials that the former defendant could have obtained had he gone to trial, including testimony given by that party’s employee. When the treble damage plaintiff obtains discovery of all grand jury materials disclosed in the criminal case, he may be receiving materials that some defendants have never seen. Yet, in fairness to the “guilty” defendant’s defense in the civil case, disclosure should be made. Thus, the “guilty” defendant may obtain discovery of its employee’s statements in the civil case for the first time. Theoretically, the fourth policy reason for secrecy is first breached by civil, not criminal, discovery.115 In practice, however, this factual situation is more ideal than real. De-briefing, the need

111. The government’s bill of particulars may also contain excerpts from grand jury testimony and this will further reduce the remaining secrecy. See Brief for Appellants at 37, In re Folding Carton Antitrust Litigation, No. 77-1674, 1697, 1798 (7th Cir. Dec. 1, 1977).
112. See e.g., In re Sugar Antitrust Litigation, 1977-2 TRADE CASES (CCH) ¶ 61,808 at 73,345 (N.D. Cal. 1977).
113. 552 F.2d at 777-78; see note 61 supra.
114. See note 88 supra.
115. See Brief for Appellants, supra note 111, at 37.
of co-defendants to establish a common defense,\textsuperscript{116} and access to presentencing memoranda\textsuperscript{117} often will provide all defendants with a strong indication of the substance of the employee's testimony. The courts, including the Seventh Circuit, have not been persuaded by this general argument.\textsuperscript{118}

Finally, it is not uncommon for a corporate employee to invoke the fifth amendment privilege against self-incrimination when a civil plaintiff attempts to depose or examine him at trial. Under \textit{Sarbaugh}, discovery of the witness' transcript is not obtainable since the civil plaintiff cannot demonstrate the requirements for particularized need by using the transcripts to impeach or refresh recollection.\textsuperscript{119} The Seventh Circuit's conclusion, however, obviates the "equal access" rationale of \textit{U.S. Industries}. It also provides a particularly unfortunate result because the fourth reason for secrecy, if it has validity in any circumstances,\textsuperscript{120} exists to the same limited degree as it did in the factual setting of the \textit{Sarbaugh} case. At least one court has implicitly ruled that the invocation of the fifth amendment by a witness creates a sufficient showing of particularized need.\textsuperscript{121}

A similar question is presented where the witness dies prior to the civil litigation. In this situation, discovery should not turn upon the witness' availability at the deposition or trial. Where there has been prior disclosure, secrecy has been breached and equal access to relevant grand jury materials does not exist. Under this circumstance the need for disclosure is compelling because there is no alternative source of the decedent's testimony and retaliation is no longer a consideration. In \textit{Baker v. United States Steel Corp.},\textsuperscript{122} the Second Circuit rejected the proposition that a deceased witness grand jury testimony could be used in a treble damage action. However, in \textit{In re Sugar Antitrust Litigation},\textsuperscript{123} the district court expressly declined to follow \textit{Baker}, and authorized the discovery of a decedent's grand jury testimony.

Insofar as \textit{Sarbaugh} disallows the use of grand jury testimony to

\begin{thebibliography}{99}
\bibitem{116}552 F.2d at 775.
\bibitem{117}See, \textit{e.g.}, \textit{U.S. Industries, Inc. v. United States District Court}, 345 F.2d 18 (9th Cir. 1965), \textit{cert. denied}, 382 U.S. 814 (1965).
\bibitem{119}Id. at 777.
\bibitem{120}See text accompanying notes 106 through 111 supra.
\bibitem{121} \textit{United States v. Borden, Inc.}, 1976-2 \textit{TRADE CASES} (CCH) ¶ 61,177 (D. Ariz. 1976).
\bibitem{122}492 F.2d 1074, 1079 (2d Cir. 1974)(dictum); see also \textit{Illinois v. Harper & Row Publishers, Inc.}, 50 F.R.D. at 40 n.3 (N.D. Ill. 1969).
\bibitem{123}1977-2 \textit{TRADE CASES} (CCH) ¶ 61,808 at 73,347 n.5 (N.D. Cal. 1977).
\end{thebibliography}
the fullest extent possible under the Federal Rules of Evidence, it does not realistically resolve the controversies of grand jury secrecy. The policy of secrecy inherent in grand jury proceedings should yield to the paramount interest in obtaining the truth where the reasons for grand jury secrecy are absent.

A PRACTICAL GUIDE TO THE GRAND JURY TRANSCRIPT ISSUE

How Do You Get Them?

In United States Steel and Sarbaugh, the discovery of grand jury materials was initiated by a Rule 34 request to the defendants or by subpoena to the Justice Department. Although neither court attributed any significance to that difference, the Seventh Circuit indicated that, in view of the Justice Department's prosecutorial interest in the disclosure of grand jury materials, notice should be given to the Department whenever discovery is sought. Even though a court order is not a prerequisite for disclosure, a party may ask the court to impose protective conditions upon the discovery of grand jury materials.

Pursuant to the Seventh Circuit's decision in Sarbaugh, a plaintiff may obtain a deponent's grand jury transcript at the time the deposition is scheduled. However, at least one court appears not to have followed this procedure to the letter. Additionally, the Seventh Circuit recognized that once the right to production has been found to exist, only the Rule 26 test of relevancy remains. All documents, including grand jury materials, requested in the course of civil discovery must comply with this test. Thereafter, if the defendant who has received a request for transcripts believes that all, or portions, of the transcripts are irrelevant, he can refuse to

124. See text accompanying note 146 infra.
125. See 552 F.2d at 777, n.14.
126. Id.
127. The post-Sarbaugh experience of the State of Illinois' Antitrust Division has been that voluntary production of transcripts has been made by some defendants in related cases.
129. See In re Folding Carton Antitrust Litigation, 1977-2 Trade Cases (CCH) ¶ 61,807 (N.D. Ill. 1977).
130. Fed. R. Civ. P. 26(b)(1) provides in pertinent part:
(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
produce the materials and compel the court to rule on this issue.\textsuperscript{131} Conceivably, this may revive the practice of in camera inspection that was rejected by the Supreme Court in \textit{Dennis} and by the court of appeals in \textit{Sarbaugh}. In most cases, however, the court would only review the limited portions to which the relevancy objection has been directed.

This problem may be somewhat fictitious. Rule 16(a)(1)(A) provides that a corporate defendant may discover only "relevant" employee testimony. This language requires a relevancy test before the Justice Department will even disclose the transcripts in the first instance. Because of this initial relevancy determination, the propriety of discovery is settled in connection with any later disclosures that may be made. As is often the case in private antitrust litigation, the issues in the civil proceedings are identical to those presented previously in the criminal action. Consequently, the civil plaintiff should be entitled to all grand jury transcripts in the defendant's possession.

The disclosed transcript may be used like any other document at a deposition, subject to the limitations set forth in \textit{Sarbaugh} concerning impeachment and refreshing recollection. It would be more appropriate, however, to allow its use in any manner that is consistent with Rule 32 of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

\textit{Once You Have Got Them, What Do You Do With Them?}

The \textit{Sarbaugh} decision facilitates a private litigant's access to grand jury transcripts. Once these materials have been secured, however, collateral considerations regarding the proper use of grand jury testimony must be addressed.

The novelty of the Federal Rules of Evidence renders uncertain the evidentiary implications of the \textit{Sarbaugh} decision and creates possibilities for expanded use of grand jury transcripts at trial. The desirability of this expansion has been questioned. One commentator has suggested that courts may be premature in accepting the use of grand jury materials without further safeguards.\textsuperscript{132} Premising his contention on the ex parte character of grand jury proceedings and on the absence of procedural due process protections in the taking of testimony before the grand jury,\textsuperscript{133} the author has criticised courts for adopting "an uncritical acceptance of grand jury testimony as

\begin{footnotes}
\footnote{131}{552 F.2d at 777.}
\footnote{132}{Nitschke, supra note 63.}
\footnote{133}{Id. at 199.}
\end{footnotes}
more, rather than less, reliable.'" The courts have maintained, however, that grand jury testimony has sufficient guarantees of trustworthiness to allow its substantive use at trial:

Both . . . testimony and evidence before a grand jury have . . . the sanction of what Wigmore calls the "prophylactic rules" relating to the oath and to perjury, influencing "the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power.""\textsuperscript{135}

\textit{Refreshing Recollection and Impeachment}

Traditionally, a witness' grand jury testimony is used to refresh the witness' recollection or for impeachment.\textsuperscript{136} In the former situation, the witness is handed only the statement in order to revive his memory. Since the witness is testifying on the basis of an independent recollection of the events described,\textsuperscript{137} the transcript is not entered into evidence and its contents are not read aloud.\textsuperscript{138}

On the other hand, if grand jury testimony is used to impeach the witness, the impeaching portions will be read aloud in order to contradict the witness' trial statements. The jury is requested not to regard the grand jury testimony as substantive evidence, but merely to consider the statements as potential grounds for disregarding the witness' trial testimony.\textsuperscript{139}

\textit{Substantive Use: Pre-Federal Rules of Evidence}

Before the adoption of the Federal Rules of Evidence, grand jury testimony could be offered as evidence, not merely to cast doubt on the witness' trial testimony, but for the truth of the matter asserted in the transcript. As early as 1933, notes of grand jury testimony were admitted against a defendant as an admission of a party-opponent.\textsuperscript{140} Furthermore, where the witness' memory was not re-

\begin{footnotes}
\textsuperscript{134} Id. at 207.
\textsuperscript{135} United States v. DeSisto, 329 F.2d 929, 934 (2d Cir.), cert. denied, 377 U.S. 979 (1964) quoting 6 Wigmore, EVIDENCE §§ 1813, 1831 (3rd ed. 1940); see also United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976), cert. denied, 97 S. Ct. 2174 (1977).
\textsuperscript{136} United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); Felder v. United States, 9 F.2d 872 (2d Cir. 1925), cert. denied, 270 U.S. 648 (1926).
\textsuperscript{137} Fed. R. Evid. 612; C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE, § 9, at 14 (2d ed. 1972)[hereinafter cited as McCormick].
\textsuperscript{138} In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940)(dictum), the Court indicated that "there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence."; accord Gaines v. United States, 349 F.2d 190 (D.C. Cir. 1965).
\textsuperscript{139} Nitschke, supra note 63, at 199.
\textsuperscript{140} Metzler v. United States, 64 F.2d 203 (9th Cir. 1933).
\end{footnotes}
freshed by showing him his grand jury testimony, some courts allowed the substantive introduction of the transcript under the past recollection recorded exception to the hearsay rule. This action was criticized since the grand jury, in most instances, was not "contemporaneous with the occurrences as to which the witness was testifying." However, in United States v. Socony-Vacuum Oil Co., the Supreme Court noted that the use of grand jury testimony in this manner would be appropriate where "there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury."

A third substantive use of grand jury testimony developed in situations characterized by the "turncoat witness" - the witness who disavows previously sworn grand jury testimony when he testifies at trial. In this context, Judge Friendly, in United States v. DeSisto, labelled the notion of restricting grand jury testimony to impeachment purposes only "a pious fraud." The judge reasoned that the oath and penalty of perjury provided sufficient guarantees of trustworthiness to allow substantive use of the testimony.

Substantive Use: The Federal Rules Approach

The recently enacted Federal Rules of Evidence have codified the aforementioned practice and have created additional methods for introducing grand jury testimony in subsequent litigation. Under the Rules, the use of transcripts for impeachment and refreshing recollection continues, and the substantive admissibility of grand jury testimony may be expanded.

Under Rule 801(d)(1)(A), where a witness testifies at trial, is subject to cross-examination and makes a statement inconsistent with his grand jury testimony, the courts have uniformly held that the grand jury transcript may be read to the jury and considered as substantive evidence. The House-Senate Conference Report indic-

142. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 236 (1940). Under Fed. R. Evid. 803(5), the requirement of strict contemporaneity has been dropped. The rule requires that the recorded recollection be "shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." See McCormick, supra note 137, § 301, at 713-14. Under the new rule, grand jury testimony could arguably qualify as past recollection recorded.
143. 310 U.S. 150 (1940).
144. Id. at 236.
146. Id. at 933.
148. United States v. Morgan, 555 F.2d 238 (9th Cir. 1977); United States v. Mosley, 555
icates that "[t]he committee consciously intended to include grand jury proceedings within the ambit of [the] 'other proceedings' [provision of 801(J)(1)(A)]."\textsuperscript{149} Although the use of grand jury testimony is improper before an inconsistency is demonstrated,\textsuperscript{150} introduction is permissible when "a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs."\textsuperscript{151}

Despite the Rule's commitment to expanded use of grand jury materials, the reliability of this type of previous testimony is still questioned. Judge Weinstein's treatise on the Federal Rules indicates:

most prior inconsistent statements used at trials are given under circumstances where there are subtle and sometimes severe pressures operating to skew the story one way or the other. The inconsistent statement may be given . . . before a Grand Jury where the witness can be led, advertently or otherwise, to give a somewhat colored version of the events. . . . Very few such statements used at trial are given in a completely neutral and unpressured setting.\textsuperscript{152}

Nonetheless, in view of the opportunity to cross-examine the witness on both his past and present testimony, most courts have been unimpressed by this argument. This is even true where evidence suggests that the prosecution employed leading questions before the grand jury.\textsuperscript{153} Thus, the prior statement is to be considered by the jury as fully as any statement that the witness might have made on the stand. Cases in which grand jury statements of a co-conspirator have been held admissible, not only against the declarant but also against co-conspirators, are consistent with this rationale.\textsuperscript{154}

\textsuperscript{149} United States v. Castro-Ayon, 537 F.2d 1055, 1057 (9th Cir. 1976); Conference Report to FED. R. EVID. 801(d)(1)(A), 28 U.S.C.A. at 527.
\textsuperscript{150} United States v. Morlang, 531 F.2d 183 (4th Cir. 1975).
\textsuperscript{151} 4 \textsc{Weinstein's Evidence}, \S 801(d)(1)(A)(01) at 801-76 (1977) [hereinafter cited as \textsc{Weinstein}].
\textsuperscript{152} \textit{Id.} at 801-74—801-74.1.
\textsuperscript{153} United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir. 1977), \textit{cert. denied}, 98 S. Ct. 428 (1977). \textit{But see} United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); \textit{see also} Advisory Committee Comments to FED. R. EVID. 801(d)(1)(A).
\textsuperscript{154} United States v. Blitz, 533 F.2d 1329, 1345 (2d Cir. 1976); United States v. Gerry, 515 F.2d 130, 141 (2d Cir.), \textit{cert. denied}, 423 U.S. 832 (1976). Of course, the existence of a
Another ground for admissibility is Rule 801(d)(2) - the admission of a party-opponent. Since the underlying justification for admissibility here is that "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath," the stringent conditions imposed under Rule 801(d)(1)(A) are not necessary to establish the admissibility of a party's admission to the grand jury. Under these circumstances, the justification is additionally supported in that the grand jury witness was under oath and penalty of perjury.

Under the Rule, admissions comprise both actual statements of the party and statements imputed to him under various theories. In an antitrust context it is common for a corporate officer or employee to testify before the grand jury. Thereafter, the corporate employer may obtain discovery of the transcript if relevancy is demonstrated and if the employee had authority to bind the employer either at the time he testified or at the time he took part in the offensive conduct. It is arguable that once the court has determined that the corporation has the right to discover its employee's relevant testimony, a determination has also been made that those grand jury statements were given by an "agent or servant concerning a matter within the scope of his agency or employment. . . ." However, this rule applies only if the witness is still employed by the corporation at the time he testifies. In any event, the party seeking the transcript could still prove the statements were made within the scope of the agent's authority or his agency or employment.

If an agency relationship is demonstrated, the availability of the witness at trial is immaterial. "Rule 801(d)(2) represents an accommodation to the common sense view that statements of a principal actor should generally be received rather than excluded per se. Because of their value they are receivable whether or not the declarant
appears as a witness.” Thus, the intervening death of a grand jury witness should not preclude the use of his transcript at trial. Moreover, the witness's invocation of his fifth amendment privilege against self-incrimination at the civil trial should not bar the introduction of his grand jury testimony.

Inasmuch as admissions are admissible into evidence as a result of the character of the adversary system, the unavailability of the grand jury witness at trial necessarily limits the use to which the evidence can be applied. In a situation where there are co-defendants, the grand jury testimony of an unavailable employee should be admissible only against the declarant's employer. The absence of the employee forecloses the co-defendant's right of cross-examination and the "adversary system" rationale is no longer applicable. In such a case the co-defendant would clearly be entitled to a limiting instruction.

The admissibility of grand jury testimony as substantive evidence is also possible under various hearsay exceptions recognized by the Federal Rules. Where the witness is unavailable, the need for his testimony is heightened. Rule 804 provides two bases on which courts can admit grand jury transcripts in the absence of the witness: a statement against the declarant's interest and the

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161. See Weinstein, supra note 151, at 801-115; McIntosh v. Eagle Fire Co. of N.Y., 325 F.2d 99, 100 (8th Cir. 1963).

162. Contra Baker v. United States Steel Corp., 492 F.2d at 1079. But see, In re Sugar Antitrust Litigation, 1977-2 Trade Cases (CCH) ¶ 61,808 at 73,347 n.5; see text accompanying notes 122 through 124 supra.

163. Cf. United States v. Borden, Inc., 1976-2 Trade Cases (CCH) ¶ 61,177 (D.Ariz. 1976) (particularized need for disclosure of grand jury transcripts to treble damage plaintiffs shown where corporate employees of defendant invoked Fifth Amendment at deposition); see text accompanying note 121 supra.

164. Advisory Committee Comments to Fed. R. Evid. 801(d)(2).


166. For possible admissibility under the Fed. R. Evid. 803(5) exception for past recollection recorded, see note 142 supra.

167. Fed. R. Evid. 804(a) defines unavailability:

(a) Definition of unavailability. "Unavailability as witness" includes situations in which the declarant—

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
2. persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
3. testifies to a lack of memory of the subject matter of his statement; or
4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. is absent from the hearing and the proponent of his statement has been unable
"catch-all" exception for statements that exhibit sufficient trustworthiness but do not fall within any recognized hearsay exception.169

The former, Rule 804(b)(3), rests on the assumption that persons will not make damaging statements against themselves unless they are true.170 Where a corporate employee is testifying before an antitrust grand jury, he is under pressure from various sources to refrain from making statements against his, and the corporation's, interest unless they are true. His statements not only subject him and his company to possible criminal liability, but they may also be the cause of pecuniary loss to himself and his employer should he lose his job or should his employer be sued in a treble damage action. Under the circumstances, the rationale of the exception is met. Because the basis for admitting these statements is their inherent trustworthiness, which vitiates the need for cross-examination, the statements should, assuming their relevancy, be admissible against all defendants in the case.

In light of suggested weaknesses of grand jury testimony,171 commentators have argued that opposing counsel should be allowed to "demonstrate to the judge by a preponderance of evidence that the particular declarant was probably lying."172 Clearly, where the declarant's penal or pecuniary interest is not threatened,173 the basis for the exception is undermined. The Fifth Circuit recently recognized this in reversing the lower court's admission of grand jury testimony under a statement against interest theory.174 Furthermore, the trial court, in making a relevancy determination, has the discretion to inquire into the trustworthiness of the grand jury statement.175

Similarly, the factual context of a given case will greatly determine admissibility of grand jury testimony under Rule 804(b)(5).

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168. FED. R. EVID. 804(b)(3).
169. FED. R. EVID. 804(b)(5).
170. WEINSTEIN, supra note 151, at 804-77.
171. See text accompanying notes 131 through 133, and 151, supra.
173. E.g., the defendant has been convicted of a crime or granted immunity.
175. FED. R. EVID. 403; Weinstein, supra note 151, ¶ 804(b)(3)[02] at 804-85.
Courts that have considered the question have reached different results. As a consequence, generalizations regarding the results that could be reached on the facts of a particular case are inappropriate.

CONCLUSION

The viability of the policy underlying the secrecy of grand jury proceedings is undergoing radical change. The theory of secrecy reflected by the Supreme Court’s decision in Procter & Gamble has been rejected by numerous courts and legal commentators. Illinois v. Sarbaugh represents a significant recognition of this fact. However, Texas v. United States Steel retained this outmoded legal construct. The preservation of grand jury secrecy after the grand jury has been discharged is becoming indefensible. The demise of grand jury secrecy cannot be traced to the civil discovery of grand jury transcripts. Rather, the attenuating boundaries of secrecy are a product of conscious policy choices embodied in the expansion of criminal discovery. Enlightened judicial realization of this fact will contribute to the achievement of “full disclosure of all available evidence in order that justice may be served.”

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