FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury

Andrea M. Nervi†

Consider the following scenario: Company D imports electronic components from Asia. Company P distributes components to end-use manufacturers. Companies P and D enter into a joint venture where orders placed with P will be filled by D, and the net proceeds upon resale split equally. Company D, however, falsely inflates its import costs, thereby cheating P out of a portion of the profits. A federal grand jury is convened, subpoenas all of Company D's financial records, and returns an indictment charging D with mail fraud, wire fraud, and criminal RICO.

Meanwhile Company P files suit against Company D, pursuant to civil RICO provisions, seeking treble damages. Central to P's case are documents chronicling D's component purchasing, including actual invoices and accounting entries. P serves D with a request for production of those documents. D responds that it no longer has the documents: they have been subpoenaed by the grand jury. Company P then contacts the United States Attorney supervising the investigation—or, perhaps, the court directly—requesting access to the documents. Will Company P's request be granted?

A starting point for analysis is Federal Rule of Criminal Procedure 6(e)(2), which provides:

> 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 . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule . . . .

The Company P/Company D example illustrates a persistent and troubling question of interpretation under Rule 6(e): Are documents "matters occurring before the grand jury" to which the

---

† A.B. 1985, Princeton University; J.D. Candidate 1990, The University of Chicago.

rule's secrecy requirements apply? Or are documents outside the complex framework regulating disclosure under Rule 6(e), and thus discoverable like any other non-privileged item? This issue is fundamentally a conflict between the traditional policies underlying grand jury secrecy—such as protecting grand jurors, ensuring the full cooperation of witnesses, and preventing civil litigants from exploiting the grand jury's extensive investigative powers—and the liberal discovery policies embodied in the modern Federal Rules of Civil Procedure.

Unlike, for example, transcripts of grand jury testimony, which always implicate Rule 6(e) by revealing the entire substance of the investigation, documents are only *potential* sources of disclosure. To continue the above example, assume that Company P's request for production of documents—directed initially at Company D but subsequently at the U.S. Attorney and the district court—sought "Company D's invoices of semiconductor purchases between January 1986 and November 1987." Disclosure of the documents would reveal no information about the grand jury's line of questioning, its reason for reviewing the items and the conclusions it drew, or Company D's explanation of the documents. The only potential revelation occurred prior to disclosure, when D told P of the grand jury subpoena: Company P knows that the grand jury reviewed those documents. Absent any knowledge of the value the grand jury attributed to the documents, however, this information seems to add nothing.

In contrast, suppose that Company P, upon learning from D of the investigation, had requested "all documents subpoenaed by the federal grand jury investigating Company D." Here, Company P is clearly engaged in a fishing expedition designed to benefit from the existence of a grand jury with coercive powers. Compliance with such a request might yield documents that Company P did not know existed, and that it might have been unable to obtain under normal civil discovery rules. The release of documents requested in this general way seems to threaten grand jury secrecy far more than in the case in which specific documents were requested. Ideally, one would want to design a test that could distinguish between such polar examples.

Recognizing, often implicitly, a need to balance the competing considerations of grand jury secrecy and liberal discovery, courts have developed a variety of tests for determining whether particular documents are in fact within the scope of Rule 6(e). Some courts have adopted blanket rules: documents always are consid-

ered "matters occurring before the grand jury," or never are.[1] These "per se" rules, while offering a bright line test that requires minimal judicial resources, fail to adequately address the secrecy and discovery considerations, making errors in disclosure or suppression more likely. Other courts have developed highly fact-based inquiries, in which the effects of or motives for disclosure are examined by the district judge evaluating the document request.[2] While these tests recognize that documents implicate secrecy and discovery considerations to varying degrees, they consume significant judicial resources and provide little guidance to future courts and litigants.

While this Comment strongly supports accommodation of the secrecy and discovery concerns implicated by requests for grand jury documents, it concludes that any test for determining whether documents are "matters occurring before the grand jury" must accord primary deference to secrecy considerations. One court has recently suggested weighing these concerns in a test under which documents are presumed to fall within the scope of Rule 6(e) unless the party seeking disclosure can adequately rebut the presumption.[3] This Comment proposes a variant on such a presumptive approach. It suggests that the rebuttal factors be tailored to reflect the principal situations where disclosure would pose minimal or no dangers to grand jury secrecy: (1) when the plaintiff makes a request for specific documents, framed without reference to the grand jury; and (2) when the documents sought were created for an independent purpose unrelated to the grand jury.[4] In addition to facilitating discovery in those instances where grand jury secrecy is least likely to be compromised, this test reduces the administrative burdens and uncertainty of fact-based inquiries as well as the error costs of blanket rules.

Section I begins by examining the structure and operation of Rule 6(e) and then turns to a consideration of the conflicting goals that animate the document disclosure question: grand jury secrecy and liberal discovery. Section II presents and critiques the various judicial methods for classifying documents under Rule 6(e). Finally, section III proposes an alternative test for classifying documents, and illustrates its operation by applying it to several cases.

---

[1] See text at notes 64-71.

[2] See text at notes 46-63.

[3] See text at notes 76-78.

[4] See text at notes 78-94.

I. Rule 6(e): Structure and Policies

A. The Operation of Rule 6(e)

Federal Rule of Criminal Procedure 6(e)(2) establishes the general rule of grand jury secrecy. It prohibits disclosure of "matters occurring before the grand jury, except as otherwise provided for in the[] rules." In order to outline the context of the document dispute, this subsection surveys the Rule 6(e) framework. First, to whom does the rule apply? Second, what is a "matter[] occurring before the grand jury," and what support is there, either in the text of the rule or the legislative history, for calling a document a "matter"? And finally, what are the consequences of classifying an item as a "matter"—may it nonetheless be disclosed under one of the exceptions to the general rule of secrecy listed in Rule 6(e)(3)?

1. Persons subject to the obligation of secrecy.

Rule 6(e)(2) lists those individuals subject to its general rule of secrecy: grand jurors, interpreters, stenographers or operators of recording devices, typists who transcribe recorded testimony, attorneys for the government, and government personnel who assist government attorneys in the enforcement of federal criminal law.[5] The rule further states that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." Noticeably absent from this list are witnesses—those individuals who provide testimony or materials to the grand jury.[6] A witness may be the target of the grand jury investigation (a person against whom an indictment is sought), a subject of the investigation (a person who may have criminal exposure from the matters under investigation), or an ordinary witness (a person with information but no criminal involvement).[7] Documents are usually sought in subsequent civil litigation only from targets or subjects, those parties most likely to have committed a wrongful act.

An interesting consequence of Rule 6(e)'s exclusion of witnesses arises in the document disclosure context. Consider the Company P/Company D example presented earlier. In that case, Company P originally requested the documents from Company D, by definition a "witness," since it had provided materials to the

---

[5] See FRCrP 6(e)(2) (general rule); 6(e)(3)(A)(ii) (government personnel).

[6] See Sara Sun Beale and William C. Bryson, 2 *Grand Jury Law and Practice* § 7.05 at 19-26 (Callaghan, 1986) for further discussion of the witness exclusion.

[7] Candace Fabri and Rebecca Cochran, *Criminal Discovery for the Civil Litigator*, 15 Litig 13, 14 (Fall 1988).

grand jury. Nothing in Rule 6(e)(2) would appear to prevent Company D from disclosing copies of the documents (had it made any) to Company P through ordinary civil discovery methods. There are, however, several possible reasons why this situation rarely arises.[8] First, Company D, for strategic reasons, may not retain copies of the documents if they can be discovered under the relatively lenient standards of the Federal Rules of Civil Procedure.[9] Second, even if Company D retains copies, it may assert a Rule 6(e)(2) "privilege" against disclosure; the reviewing court may respect the asserted privilege in order to advance the policies of Rule 6(e) and prevent strategic behavior on an issue like photocopying.

In any case, the prosecutor or the court are usually the parties to whom civil plaintiffs ultimately address their document disclosure requests.[10] Government attorneys and assisting personnel are clearly subject to Rule 6(e)(2)'s obligation of secrecy. And the court may certainly order disclosure, but only upon determining that (1) the requested item is not a "matter" under Rule 6(e)(2); or (2) even if it is a "matter," some exception to Rule 6(e)(2) permits disclosure. The next sections address these issues.

2. The scope of "matters occurring before the grand jury."

Once it is established that Rule 6(e)(2)'s obligation of secrecy applies, the next step in deciding whether an item may be disclosed is determining whether the item sought is a "matter[] occurring before the grand jury." This is the heart of the Rule 6(e)(2) inquiry: if the item is not a "matter," then the rule does not apply; but if the item is a "matter," the rule prohibits disclosure unless one of the exceptions listed in Rule 6(e)(3) applies.[11]

---

[8] No case or article reviewed in this Comment addressed this issue.

[9] FRCP 34 compels production of documents, described by the discovering party "with reasonable particularity," that constitute "matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . ." FRCP 26(b)(1) in turn describes the scope of discovery as "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Relevance is construed "broadly and liberally" for discovery purposes. James W. Moore, Jo Desha Lucas, and George J. Grotheer, Jr., 4 *Moore's Federal Practice* ¶26.56[1] at 94 (Matthew Bender, 2d ed 1989) ("*Moore's*").

[10] See, for example, *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F2d 996 (3d Cir 1980) (commission initially subpoenaed documents from companies, but upon learning of grand jury investigation, asked court); *United States v Interstate Dress Carriers*, 280 F2d 52 (2d Cir 1960) (agency initially asked defendant, who no longer had the records, so Justice Department, which had the records, applied to the court for leave to allow the agency access to the records); and *In the Matter of Special March 1981 Grand Jury (Almond Pharmacy)*, 753 F2d 575 (7th Cir 1985) (agency first asked defendant, who had not made copies, and then prosecutor filed motion with court asking for disclosure).

[11] See text at notes 26-28 for a discussion of the Rule 6(e)(3) exceptions.

Certain classes of materials, such as transcripts of grand jury proceedings and the names of witnesses testifying before the grand jury, are clearly "matters occurring before the grand jury."[12] But once we move beyond these areas of universal agreement, the phrase "matters occurring before the grand jury" poses problems. On the one hand, it can be read broadly by focusing on the word "matters," which suggests the drafters were concerned about a whole range of potentially revealing items, not just transcripts or the identity of witnesses. Alternatively, it can be read narrowly by focusing on the verb "occurring," which suggests events that—unlike documents—actually take place before the grand jury.[13]

The legislative history of Rule 6(e) does not indicate whether Congress intended to include documents within the scope of the rule when it adopted the Federal Rules of Criminal Procedure in 1946.[14] The Advisory Committee's notes accompanying Rule 6(e) similarly offer little guidance. The notes explain in general terms that the rule "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure."[15] None of the cases cited as examples addresses the question of whether documents are protected by the "traditional practice."[16]

Several years ago an amendment to Rule 6(e) was proposed that would have eliminated the confusion surrounding the appropriate treatment of documents. The Advisory Committee circulated a proposal that would have expressly included "the nature

---

[12] See Beale and Bryson, 2 *Grand Jury Law* §7.06 at 26 (cited in note 6) (testimony and witness identity); William B. Lytton, *Grand Jury Secrecy—Time for a Reevaluation*, 75 J Crim L & Criminol 1100, 1105 (1984) (transcripts); *Fund for Constitutional Government v National Archives*, 656 F2d 856, 869 (DC Cir 1981) (witness names); and *In the Matter of Disclosure of Testimony Before the Grand Jury (Troia)*, 580 F2d 281 (8th Cir 1978) (lists of witnesses and portions of testimony).

[13] See Comment, *Civil Discovery of Documents Held by a Grand Jury*, 47 U Chi L Rev 604, 607 (1980).

[14] Id at 608 n 20, discussing early drafts of the rule. See generally Lester B. Orfield, *The Federal Grand Jury*, 22 FRD 343, 346-57 (1959).

[15] FRCrP 6(e), Notes of Advisory Committee on Rules.

[16] See *Schmidt v United States*, 115 F2d 394 (6th Cir 1940) (private interview of grand jury members who had participated in indictment of attorney's client violated jurors' oath); *United States v American Medical Ass'n.*, 26 F Supp 429 (D DC 1939) (grand juror's oath of secrecy is permanent, and may be broken only upon court order). Note, however, that the oath administered in *Schmidt* did commit the jurors to keep secret both testimony and documents.

and contents of any books, papers, documents or other objects subpoenaed or otherwise obtained for use by the grand jury" within Rule 6(e)(2)'s secrecy provisions.[17] Citing considerable confusion among courts regarding the proper treatment of documents under Rule 6(e), the Committee advanced the amendment "to emphasize that the secrecy provisions of the rule apply both to the testimony of subpoenaed witnesses and the nature and content of effects subpoenaed or otherwise obtained for use by the grand jury."[18] The Advisory Committee, however, eventually withdrew the amendment as "unnecessary."[19]

The withdrawal of the amendment is as ambiguous as the current text of the rule. Was Rule 6(e)'s coverage considered sufficiently broad to encompass documents without requiring a formal change in the rule, or did the Committee decide that expanding the rule to include documents would be unwise? It is also possible that the Advisory Committee decided not to inhibit further judicial development of solutions to document disclosure. Such hesitancy to impose statutory solutions has clearly underlain Committee restraint in other aspects of Rule 6(e).[20]

Given the textual and historical ambiguity of the phrase "matters occurring before the grand jury," it is not surprising that judicial characterization of documents has been inconsistent and confusing. The breadth of the category may contribute to the problem: "documents" can range from ordinary corporate financial records to evidence collected in a homicide investigation.[21]

---

[17] See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Federal Rules of Criminal Procedure* 1-3 (October 1981) ("*Preliminary Draft*"); see also Charles Alan Wright, *Federal Practice and Procedure* § 106 at 249 n 23 (West, 1982) ("*Wright*").

[18] Advisory Committee Note to Rule 6(e)(2), *Preliminary Draft* at 6 (cited in note 17).

[19] Communication from the Chief Justice of the United States, Amendments to the Rules of Criminal Procedure for the U.S. District Courts, HR Doc No 98-55, 98th Cong, 1st Sess 19 (1983). See also, Amendments to Rules, 97 FRD 245, 260 (1983).

[20] See Advisory Committee Note to Rule 6(e)(3)(C), *Preliminary Draft* at 8 (cited in note 17), explaining the Committee's decision *not* to codify a long-accepted judicial gloss on Rule 6(e)(3)(C)(i). Rather, the "applicability and meaning of that standard [was] left to further development in the case law."

[21] For cases addressing ordinary corporate financial records, see *Almond Pharmacy*, 753 F2d 575; *United States ex rel Woodard v Tynan*, 757 F2d 1085 (10th Cir 1985); *New Jersey State Commission of Investigation*, 630 F2d 996; *In re Sells*, 719 F2d 985 (9th Cir 1983); and *Interstate Dress Carriers*, 280 F2d 52. Other financial or business-related documents appearing in the cases include: purchase and sale statements for securities trading accounts, *In re Special February, 1975 Grand Jury (Baggot)*, 662 F2d 1232 (7th Cir 1981), aff'd on other grounds sub nom *United States v Baggot*, 463 US 476 (1983); auditors' analyses of a firm's records, *In re Grand Jury Matter (Garden Court)*, 697 F2d 511 (3d Cir 1982); commercial bank records, invoices, and delivery receipts, *United States v Penrod*, 609 F2d 1092

Another factor potentially complicating the determination of Rule 6(e)'s applicability to documents is the manner in which the documents are received by the grand jury. In most of the reported cases, the documents have been subpoenaed.[22] In other cases, documents have been "otherwise obtained," presumably voluntarily presented to the grand jury.[23] Some courts suggest that the grand jury's use of its coercive powers necessitates stricter disclosure standards for subpoenaed documents.[24] There is an obvious problem with such a distinction, however. Voluntary presentation is unlikely to occur unless the documents are accorded the same protection as subpoenaed materials. Targets or subjects of a grand jury investigation will fear disclosure to civil plaintiffs, and ordinary witnesses will fear reproach or reprisal by subjects and targets who discover the witnesses' cooperation with the grand jury. Thus, all documents reviewed by a grand jury—whether subpoenaed or voluntarily presented—should be treated equally for the purposes of characterization under Rule 6(e).[25] The remainder of this Comment will use the term "document" to refer both to subpoenaed and voluntarily produced materials.

(4th Cir 1979); and all books, documents, and work papers prepared by employees and outside agents for a company under investigation, *In re April 1956 Term Grand Jury*, 239 F2d 263 (7th Cir 1956).

Other examples of documents include: evidence collected in a homicide investigation, *Senate of Puerto Rico v U.S. Department of Justice*, 823 F2d 574 (DC Cir 1987); a government memorandum recommending sentencing and fines for corporations and officers indicted by a grand jury for antitrust violations, *U.S. Industries, Inc. v United States District Court*, 345 F2d 18 (9th Cir 1965); employee lists of federal and local agencies, and welfare recipient lists, *United States v Stanford*, 589 F2d 285 (7th Cir 1978); records of the Watergate Special Prosecution Force, *Fund for Constitutional Government*, 656 F2d 856; summaries of FBI interviews, *Cullen v Margiotta*, 811 F2d 698 (2d Cir 1987); travel agency records of a client, *In re Grand Jury Proceedings (Diamante)*, 814 F2d 61 (1st Cir 1987); the Selective Service files of certain delinquent registrants, *United States v Weinstein*, 511 F2d 622 (2d Cir 1975); and tape recordings of individuals indicted, *United States v Benjamin*, 852 F2d 413 (9th Cir 1988), vacated on other grounds, 109 S Ct 1948 (1989).

[22] Witnesses provide documents to the grand jury pursuant to a subpoena duces tecum. Beale and Bryson, 1 *Grand Jury Law* § 6.09 at 55 (cited in note 6).

[23] The number of documents produced voluntarily is probably small. See id at 57-58 (suspects are not likely to voluntarily produce physical evidence if they are aware of its incriminating nature; disinterested third party witnesses will be reluctant to cooperate informally for fear of incurring suspect's wrath).

[24] See *In re Grand Jury Proceedings*, 851 F2d 860, 866 (6th Cir 1988).

[25] See *Preliminary Draft* at 1 (cited in note 17) (would have amended Rule 6(e)(2) to include "objects subpoenaed or otherwise obtained for use by the grand jury"). See also *Wright* § 106 at 249 n 23 (cited in note 17). The Advisory Committee notes to the proposed amendment indicate that it was intended to "encourage voluntary disclosure of such objects to the grand jury." *Preliminary Draft* at 10.

3. The consequences of classifying a document as a "matter[] occurring before the grand jury."

Once a document is classified as a "matter[] occurring before the grand jury," Rule 6(e)(2) prohibits disclosure unless one of the exceptions listed in Rule 6(e)(3) applies. Most of the exceptions are not relevant to this Comment;[26] one, however, is. Rule 6(e)(3)(C)(i) permits disclosure of matters occurring before the grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding." The Supreme Court has held that a party seeking disclosure pursuant to Rule 6(e)(3)(C)(i) must demonstrate "particularized need"—namely, (1) that the material is needed to avoid a possible injustice in another judicial proceeding; (2) that the need for disclosure outweighs the need for continued secrecy; and (3) that the request is structured to cover only the material needed.[27]

Thus, even when an item has been held to be a matter occurring before the grand jury, possibilities for disclosure still exist. However, the requesting party must demonstrate a high level of particularity and need, in contrast to the relatively lenient civil discovery standards that would govern an item outside the Rule 6(e) framework.[28]

B. Competing Policies in the Rule 6(e) Document Disclosure Context

1. The traditional practice of grand jury secrecy.

The tradition of grand jury secrecy can be traced as far back as seventeenth-century England, and was codified in federal practice in 1946 with the enactment of the Federal Rules of Criminal

---

[26] For example: (1) disclosure to an attorney for the government for use in the performance of such attorney's duty, FRCrP 6(e)(3)(A)(i); (2) disclosure to government personnel assisting an attorney for the government, FRCrP 6(e)(3)(A)(ii); (3) disclosure upon a showing that grounds may exist to dismiss the indictment against the defendant, FRCrP 6(e)(3)(C)(ii); (4) disclosure to another federal grand jury, FRCrP 6(e)(3)(C)(iii); and (5) disclosure to an appropriate state official upon a showing that such matters may reveal a violation of state criminal law, FRCrP 6(e)(3)(C)(iv).

The 1981 proposed amendment to Rule 6(e), discussed above, would also have added an exception to Rule 6(e)(3) allowing court-directed disclosure of books, papers, documents, and other objects "upon a showing which would suffice to compel disclosure of the objects if they had remained in the custody of the person from whom they were subpoenaed or otherwise obtained for use by the grand jury." *Preliminary Draft* at 2-3 (cited in note 17).

[27] *Douglas Oil Co. v Petrol Stops Northwest*, 441 US 211, 222 (1979). See also *United States v Sells Engineering, Inc.*, 463 US 418, 442-44 (1983).

[28] See note 9.

Procedure.[29] Judicial pronouncements of the inviolability of that tradition abound. Courts have proclaimed that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,"[30] and that "[t]he secrecy of the grand jury is sacrosanct."[31] Despite suggestions from some commentators that the rule of secrecy may have "outlived its usefulness,"[32] the Supreme Court recently reaffirmed the tradition's importance:

> Grand jury secrecy . . . is as important for the protection of the innocent as for the pursuit of the guilty. Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized.[33]

The policies underlying the general rule of grand jury secrecy have been frequently cited: (1) to prevent the escape of persons whose indictment is contemplated; (2) to provide the grand jury freedom in its deliberations, and to prevent badgering of the grand jurors by persons subject to indictment; (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 disclosure by persons with relevant information; and (5) to protect the innocent accused from publication of the fact that he has been under investigation.[34]

In many of the cases where a civil litigant seeks disclosure of documents, the grand jury has already concluded its investigation. In this situation, the first three policies behind grand jury secrecy, which aim to protect the particular grand jury investigation at issue, are inapplicable.[35] The fifth reason for grand jury secrecy, protecting an innocent accused, is implicated only when the grand jury fails to return an indictment.[36] Documentary disclosure often involves, then, only the fourth, or "institutional" concern: how will

---

[29] Beale and Bryson, 2 *Grand Jury Law* §7.02 at 5-7 (cited in note 6).

[30] *Douglas Oil*, 441 US at 218.

[31] *United States v Phillips*, 843 F2d 438, 441 (11th Cir 1988).

[32] Beale and Bryson, *Grand Jury Law* § 7.02 at 6 (cited in note 6).

[33] *Sells Engineering*, 463 US at 424-25 (citation omitted).

[34] *United States v Procter & Gamble*, 356 US 677, 681-82 n 6 (1958), quoting *United States v Rose*, 215 F2d 617, 628-29 (3d Cir 1954).

[35] See *Wright* § 106 at 244 (cited in note 17). See also *United States v John Doe, Inc. I*, 481 US 102, 114 (1987) (termination of grand jury mitigates damage of disclosure). Note, however, that concern about "witness tampering" will remain after a grand jury investigation if the target is indicted and the witness is scheduled to testify at trial.

[36] See *Wright* § 106 at 244 (cited in note 17).

disclosure affect the proper functioning of future grand jury proceedings?[37] The Supreme Court has continually emphasized the importance of this institutional concern, warning that "[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties."[38]

An additional reason for grand jury secrecy, not part of the traditional lore, centers on the broad investigative powers of the grand jury. A grand jury subpoena duces tecum, calling for production of physical evidence, can issue "without any firm basis to believe that evidence will provide proof of the commission of a particular offense."[39] One commentator has stated that "the grand jury is often permitted fishing expeditions unheard of in civil litigation."[40] Given these broad subpoena powers, it seems only reasonable to protect the subject of the investigation from disclosure of the materials to civil litigants who would otherwise be unable to obtain them. To the extent that secrecy—or, at least, strict document disclosure standards—minimizes such appropriation of grand jury work product, the integrity of the criminal justice system is furthered.

2. The need for liberal discovery in civil litigation.

There is a competing—but less compelling—consideration pertinent to the question of document disclosure, and that is the need for liberal discovery in civil litigation. With the enactment of the Federal Rules of Civil Procedure, a broad brush test of "relevance" replaced the older practice of limiting discovery to facts supporting the discovering party's case.[41] The bywords of "broad and liberal" construction drowned out the "time-honored cry of 'fishing expedition.' "[42] Liberal discovery is favored primarily because it equalizes

---

[37] Id at 244-45.

[38] See *Douglas Oil*, 441 US at 222 ("[I]n considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries."). See also *Sells Engineering*, 463 US at 432.

[39] Beale and Bryson, 1 *Grand Jury Law* § 6.26 at 176 (cited in 6).

[40] Fabri and Cochran, 15 Litig at 15 (cited in note 7).

[41] *Moore's* ¶ 26.56[1] at 94 (cited in note 9). See also FRCP 26(b)(1) (discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

[42] See *Hickman v Taylor*, 329 US 495, 507 (1947) ("[T]he . . . discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

parties' access to information.[43] An over-inclusive definition of "matters occurring before the grand jury" may frustrate this equalization principle by prohibiting access to documents except through the Rule 6(e)(3) provisions. The Rule 6(e)(3)(C)(i) "preliminarily to or in connection with a judicial proceeding" exception, for example, requires a much greater showing of particularized need than do the ordinary discovery rules.[44]

Yet, despite the importance of liberal discovery to the Federal Rules of Civil Procedure and modern litigation, concerns about discovery should not outweigh grand jury secrecy in the document disclosure context. First, liberal discovery lacks the traditions and institutional primacy of grand jury secrecy. While the Supreme Court and many lower courts have affirmed the integral role of grand jury secrecy in the criminal justice system, few would assert that restricting discovery of grand jury materials would jeopardize the civil litigation system.

Furthermore, a determination that a document is a "matter occurring before the grand jury" does not *foreclose* disclosure: the party may still make a showing of particularized need under Rule 6(e)(3)(C)(i) and thereby obtain the document. The existence of such an escape device minimizes concerns that civil litigants will be denied access to crucial documents. An improper breach of grand jury secrecy, on the other hand, threatens the functioning of future grand juries. Thus, while any test for determining whether documents are subject to Rule 6(e) should promote liberal discovery, grand jury secrecy concerns must, on balance, prevail.

II. Current Judicial Approaches to the Classification of Documents Under Rule 6(e)

This section explores the six distinctive tests courts have developed for classifying documents as "matters occurring before the grand jury."[45] It evaluates the tests not only on the balance they strike between secrecy and discovery concerns, but more generally, on their efficiency, certainty, and accuracy. An optimal approach to the classification of documents under Rule 6(e) would, with a limited expenditure of judicial resources and discretion, distinguish among disclosure requests according to the degree they intrude upon grand jury secrecy.

---

[43] See *In re Grand Jury Proceedings, GJ-76-4 & GJ-75-3*, 800 F2d 1293, 1302-03 (4th Cir 1986).

[44] See text at notes 26-28.

[45] The approaches are analyzed in order of most to least prevalent in the courts.

A. The Effect Test

In the sheer number of opinions advocating it, the "effect" test dominates in the federal courts. Under this approach, the trial court must determine whether disclosure of the particular item sought would "reveal the inner workings of the grand jury"[46]—whether, for example, disclosure would reveal "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like."[47] If such revelations would occur, the document is deemed subject to Rule 6(e), and disclosure is permitted only via the Rule 6(e)(3) exceptions.

The Third, Seventh, Eighth, Tenth, and District of Columbia Courts of Appeal have embraced this effect test,[48] as have various commentators.[49] An important attribute of the test is its recogni-

---

[46] *In the Matter of Grand Jury Proceedings, Miller Brewing Co.*, 687 F2d 1079, 1090 (7th Cir 1982).

[47] *Senate of Puerto Rico*, 823 F2d at 582 (citation omitted).

[48] Third Circuit: *In re Grand Jury Matter (Catania)*, 682 F2d 61, 63 (3d Cir 1982) ("Rule 6(e) applies . . . to anything which may reveal what occurred before the grand jury"); *New Jersey State Commission of Investigation*, 630 F2d at 1001; and *Garden Court*, 697 F2d at 512.

Seventh Circuit: *Stanford*, 589 F2d at 291 ("[u]nless information reveals something about the grand jury proceedings, secrecy is unnecessary"); *Baggot*, 662 F2d at 1244 ("[o]nly those subpoenaed documents should be subject to Rule 6(e) which when reasonably considered in the context of the particular grand jury investigation are determined by the trial court to reveal some secret aspect of the grand jury investigation"); and *Miller Brewing Co.*, 687 F2d at 1090.

Eighth Circuit: *In re Grand Jury Proceedings Relative to Perl*, 838 F2d 304, 306 (8th Cir 1988) ("[u]nless a document reveals something about the intricate workings of the grand jury itself, the documents are not intrinsically secret just because they were examined by a grand jury").

Tenth Circuit: *Woodard*, 757 F2d at 1087 (Rule 6(e) "is intended to protect only against 'disclosures of what is said or what takes place in the grand jury room' "); and *Anaya v United States*, 815 F2d 1373, 1379 (10th Cir 1987) ("[w]hen documents or other material will not reveal what actually has transpired before a grand jury, their disclosure is not an invasion of the protective secrecy of its proceedings").

District of Columbia Circuit: *SEC v Dresser*, 628 F2d 1368, 1383 (DC Cir 1982) (documents "do not reveal what has occurred before the grand jury; they reveal only what has occurred in Dresser's foreign operations"); *Fund for Constitutional Government*, 656 F2d at 870 ("[t]he relevant inquiry is . . . whether revelation in the particular context would in fact reveal what was before the grand jury"); *In re Sealed Case*, 801 F2d 1379 (DC Cir 1986); and *Senate of Puerto Rico*, 823 F2d at 582 ("[t]he touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation' ").

[49] See Lytton, 75 J Crim L & Criminol at 1107 (cited in note 12) (citing effect test with approval). For a detailed explanation of the effect approach, see Note, *The Federal Grand Jury: Practice and Procedure*, 13 U Toledo L Rev 1, 7 (1981); and *In re Doe*, 537 F Supp 1038, 1044-47 (D RI 1982), in which Judge Pettine surveys the existing case law and formulates his own version of the test.

tion that not all documents will compromise grand jury secrecy if disclosed. By requiring the trial court to analyze the specific dangers of release, the effect test ensures that neither disclosure nor suppression is lightly ordered. Furthermore, the careful fact-based inquiry into the competing secrecy and discovery considerations is more likely to reach the "correct" normative result than the mechanical approaches discussed below.

The effect approach suffers from several flaws, however. First, factual inquiries conducted on a document-by-document basis to determine the particular effects of disclosure require considerable judicial time and resources.[50] Second, the test is an unstructured, open-ended inquiry into what the trial court believes may be revealed through disclosure. One court's finding that disclosure will not compromise the nature, scope, or direction of the grand jury investigation may differ greatly from another's.[51] Nonuniformity of outcome is especially troublesome because the "substantial discretion" accorded district court determinations under Rule 6(e) limits appellate review.[52] Thus, even though the fact-based inquiry promotes "correct" results, the absence of specific guidelines within the effect test still produces error costs.

Finally, the effect test's individuated decision making process can also result in high uncertainty costs, since it is difficult to predict how a given trial court will rule on the applicability of Rule 6(e) to particular documents. These uncertainty costs are significant for several reasons. First, a party considering suit against the subject of a grand jury inquiry will be hampered in assessing the likelihood of victory, since she will be unsure what documents will be available to her and upon what showing of need. In addition, uncertainty impedes the proper functioning of the judicial system. Lower courts and even other appellate panels faced with document disclosure questions often receive little guidance from prior appli-

---

[50] See *In re Grand Jury Proceedings*, 851 F2d at 865; and *In re Doe*, 537 F Supp at 1046.

[51] Consider, for example, the differing consequences that two courts attributed to the discovering party's mere knowledge that the documents it requested had been reviewed by a grand jury. The panel in *In re Sealed Case* found the documents *within* the scope of Rule 6(e), explaining that "[d]isclosure of which documents the grand jury considered reveals, at the very least, the direction of the grand jury's investigation." 801 F2d at 1381. In contrast, the court in *Fleet National Bank v Export-Import Bank of the U.S.* held that the documents at issue were *not* within the scope of Rule 6(e). The court dismissed the effect that mere knowledge of grand jury review would have, noting that "[i]t is obvious that any review of documents subpoenaed by a grand jury might alert an intelligent reader to the subject matter of the grand jury's inquiries." 612 F Supp 859, 868 (D DC 1985).

[52] See *Douglas Oil*, 441 US at 223.

cations of the prevailing effect test in their circuits. The ad hoc qualities of the effect test limit the value of precedent, both for litigants and the courts.

B. The "Intrinsic Value"/Purpose Test

A second approach to determining whether documents constitute "matters occurring before the grand jury" within the scope of Rule 6(e) focuses on the purpose of the party seeking disclosure. The Second Circuit advanced the classic formulation of this test in 1960:

> [W]hen . . . data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same . . . documents had been, or were presently being, examined by a grand jury.[53]

Although this language from *United States v Interstate Dress Carriers* has endured for thirty years,[54] courts and commentators have criticized the purpose test as insufficiently protective of grand jury secrecy. The existence of a legitimate purpose for disclosure may not prevent a party from incidentally learning a great deal about matters occurring before the grand jury.[55] In addition, some courts' definitions of a "legitimate" purpose for obtaining disclosure are so broad as to encompass virtually all civil litigation.[56] When interpreted this broadly, the test approximates a blanket rule that documents are not subject to Rule 6(e).

One illustration of the perverse results the purpose test yields can be found in *United States v Saks*.[57] In this case, the Federal Trade Commission requested access to all documents obtained by

---

[53] *Interstate Dress Carriers*, 280 F2d at 54. See also, *United States v Saks & Co.*, 426 F Supp 812, 814 (S D NY 1976); *SEC v Everest*, 87 FRD 100, 105 (S D NY 1980); *In re United States v 6918 North Tyron St., Charlotte, NC*, 672 F Supp 890, 896 (W D NC 1987); and *Capitol Indemnity Corp. v First Minnesota Construction Co.*, 405 F Supp 929, 931 (D Mass 1975).

[54] See generally Lytton, 75 J Crim L & Criminol at 1106 (cited in note 12) (finding that the "prevailing view among the courts" is that there are no secrecy concerns when documents are sought for their intrinsic value).

[55] See *In re Doe*, 537 F Supp at 1046; Comment, 47 U Chi L Rev at 612 (cited in note 13); and Advisory Committee Note to Rule 6(e)(3)(C), *Preliminary Draft* at 8-9 (cited in note 17).

[56] See *Everest*, 87 FRD at 105 (citing "use in a civil proceeding" as a legitimate purpose for seeking documentary disclosure).

[57] 426 F Supp 812 (S D NY 1976). See generally Advisory Committee Note to Rule 6(e)(3)(C), *Preliminary Draft* at 9 (cited in note 17).

the grand jury investigating antitrust violations in the women's clothing industry.[58] Unlike the discovering parties in other cases who requested specific documents,[59] the FTC made no attempt to particularize its request or define the documents in any terms beyond grand jury possession. The court granted the FTC's broad request, reasoning that the documents were sought for their intrinsic value and not "merely to learn what took place before the grand jury."[60]

There are two problems with this result. First, the FTC (or a civil litigant in a similar position) might not be able to obtain all the requested documents under normal civil discovery standards. Not only do the discovery rules require some particularity of identification, but they also limit discovery to materials in the possession of the opposing *party*. In *Saks*, the documents the FTC obtained came from a variety of sources.[61] Any time parties obtain more documents as a result of a Rule 6(e) classification than they could otherwise have obtained under normal civil discovery standards, the policy of preventing appropriation of grand jury investigative powers is implicated.

Second, as others have pointed out, the mere fact that a party seeks documents for their intrinsic value does not dispel the harm that might arise from the party's learning, with delight, what transpired before the grand jury.[62] Thus, the purpose test's focus on "motive" to the exclusion of "effect" fails to adequately accommodate important secrecy concerns.

Like the effect test, the purpose test requires costly case-by-case judicial inquiry. But unlike the effect test, which often reaches the "correct" result, the purpose test focuses on an issue—the party's motive in seeking disclosure—ultimately unrelated to the question of whether grand jury secrecy is violated through release of the document. The uncertainty costs of the purpose test are also high, since litigants are unsure what documents will ultimately be available to them, and lower courts receive little guidance from prior applications of the fact-based inquiry.[63]

---

[58] *Saks*, 426 F Supp at 813-14.

[59] See *Interstate Dress Carriers*, 280 F2d at 53 (Interstate Commerce Commission sought "certain of [subject's] records" in connection with a routine administrative investigation). See also *Capitol Indemnity Corp.*, 405 F Supp at 930 (surety company sought documents in possession of defendant "relating to the construction of the apartment complex").

[60] *Saks*, 426 F Supp at 814-15.

[61] Id.

[62] Comment, 47 U Chi L Rev at 612 (cited in note 13).

[63] In addition to the standard purpose inquiry, several courts have adopted what ap-

C. The "Per Se Subject to Rule 6(e)" Approach

A third approach adopted by some courts treats documents as always subject to the secrecy provisions of Rule 6(e), so that disclosure is available only through the Rule 6(e)(3) exceptions. Appellate courts employing this approach assume that documents, like testimony, are encompassed within the phrase "matters occurring before the grand jury," but provide little discussion or analysis of the issue.[64] Several district courts have made the same implicit assumption.[65] A number of other district courts, however, have made an explicit decision to accord documents and testimony equal treatment under Rule 6(e), largely to promote grand jury secrecy policies.[66]

Although this approach provides a bright line rule and requires minimal judicial involvement in determining whether docu-

---

pears to be a hybrid purpose/effect test. Although the Seventh Circuit cases discussed at notes 46-52 espouse the effect test, two other cases cast some doubt on the circuit's position. See *Almond Pharmacy*, 753 F2d at 578 ("[i]f a document is sought for its own sake rather than to learn what took place before the grand jury, and if its release will not seriously compromise the secrecy of the grand jury's deliberations, Rule 6(e) does not forbid its release"); and *Lucas v Turner*, 725 F2d 1095, 1101-02 (7th Cir 1984) (citing *Interstate Dress Carriers*, 280 F2d 52, with approval). See also *Cumis Insurance Society, Inc. v South-Coast Bank*, 610 F Supp 193, 198 (N D Ind 1985) (citing both effect test and *Interstate Dress Carriers'* purpose test with approval). Other cases adopting this hybrid approach include *In re Grand Jury Proceedings*, 505 F Supp 978, 981-82 (D Me 1981); and *Davis v Romney*, 55 FRD 337, 341 (E D Pa 1972). Note that in practice the purpose prong essentially drops out of the hybrid test, since there are few, if any, instances where the purpose test would prohibit disclosure when the effect test does not.

[64] See, for example, *Petrol Stops Northwest v Continental Oil Co.*, 647 F2d 1005 (9th Cir 1981); *Texas v United States Steel*, 546 F2d 626 (5th Cir 1977); *In re Grand Jury Proceedings*, 309 F2d 440 (3d Cir 1962); *United States v RMI Co.*, 599 F2d 1183 (3d Cir 1979); and *In re Grand Jury Proceedings (Kluger)*, 827 F2d 868 (2d Cir 1987). See also *Garden Court*, 697 F2d at 512 (dicta) ("[w]ere we writing on a clean slate, we might well hold that disclosure of any material generated in connection with a grand jury proceeding is governed by Rule 6(e)(2)").

[65] See *United States v Climatemp, Inc.*, 482 F Supp 376, 388 (N D Ill 1979) ("[i]t is undisputed that the secrecy of the grand jury applies to documents as well as testimony"); and *Petition of the United States for the Disclosure of Grand Jury Matters (Miller Brewing Co.)*, 518 F Supp 163, 168 (E D Wis 1981).

[66] See *In the Matter of Grand Jury*, 469 F Supp 666, 671 (M D Pa 1978) (explaining that the grand jury might suffer as a public institution through the disclosure of documents); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 516 F Supp 1008, 1022 n 17 (D Conn 1981) ("having reviewed the case law concerning grand jury secrecy, the court has found no convincing reason to apply different standards, or to accord different treatment, to subpoenaed documents"); and *In re Grand Jury Disclosure*, 550 F Supp 1171, 1175-77 (E D Va 1982) ("[t]he language of Rule 6(e), the traditional policy of grand jury secrecy, and the case law require that documents subpoenaed by a federal grand jury be protected from disclosure except as provided by Rule 6(e)"). See also *Index Fund, Inc. v Hagopian*, 512 F Supp 1122, 1128 (S D NY 1981); and *In re Grand Jury Proceedings (Daewoo)*, 613 F Supp 672, 680 (D Or 1985).

ments may be disclosed, it unduly frustrates discovery. When documents are always subject to Rule 6(e), a civil litigant that requests a specific document coincidentally reviewed by a grand jury will not be able to obtain it (absent a showing of particularized need under Rule 6(e)(3)(C)(i)), even though the document's release would reveal little about the nature and scope of the grand jury investigation not already known to the litigant from the defendant's inability to produce it.[67] In addition, potential for abuse of such a regime exists, since companies under grand jury investigation could make anticipated civil discovery more difficult simply by disclosing incriminating documents to the grand jury.[68]

D. The "Per Se *Never* Subject to Rule 6(e)" Approach

An opposite "per se" approach has been suggested by several courts.[69] They read "matters occurring before the grand jury" as including testimony and transcripts, but excluding documents and other exhibits before the grand jury. Just as the prior approach unduly restricts discovery, this approach pays "insufficient attention to the important privacy and confidentiality purposes embodied in rule 6(e) and to the need for judicial supervision of the release of material obtained by coercion with the promise of secrecy."[70]

Consider, for example, the request in *United States v Saks*[71] for all documents obtained by the grand jury. Wholesale release of those documents to the plaintiff would not only inform him of the

---

[67] See *In re Doe*, 537 F Supp at 1045; and Advisory Committee Note to Rule 6(e)(3)(C), *Preliminary Draft* at 9-10 (cited in note 17). But see *In re Grand Jury Disclosure*, 550 F Supp at 1175 ("[d]isclosure of *any* document subpoenaed and reviewed by the grand jury constitutes at least indirect disclosure of 'matters occurring before the grand jury' ") (emphasis added).

[68] See *In re Grand Jury Proceedings*, 851 F2d at 865; Advisory Committee Note to Rule 6(e)(3)(C), *Preliminary Draft* at 9-10 (cited in note 17); and Comment, 47 U Chi L Rev at 613 (cited in note 13). Note, however, that this concern is likely limited to documents that do not particularly expose the defendant to criminal liability, but that might admit a high degree of civil exposure. If the document were highly suggestive of criminal liability, the defendant would not voluntarily turn it over, no matter how damaging from a civil perspective.

[69] See *Weinstein*, 511 F2d at 627 n 5 ("[i]n any event it is questionable whether Rule 6(e) applies to documents"); and *In re Grand Jury Investigation of Ven-Fuel*, 441 F Supp 1299, 1303 (M D Fla 1977) ("it is doubtful whether mere documentary information was ever included within the scope of Rule 6(e)"). See also *Golden Quality Ice Cream Co. v Deerfield Specialty Papers, Inc.*, 87 FRD 53, 59 (E D Pa 1980); and *Illinois v Sarbaugh*, 552 F2d 768, 772 n 2 (7th Cir 1977).

[70] *In re Grand Jury Proceedings*, 851 F2d at 864-65. See also *In re Doe*, 537 F Supp at 1044-45.

[71] 426 F Supp 812. See text at notes 57-63 for discussion of this case.

direction and scope of the grand jury investigation, but would give him an advantage over normal civil discovery practices. Consider also materials prepared by an outsider (for example, an accountant) for grand jury use. Such documents, if disclosed, would reveal the grand jury's investigative focus and lines of questioning. Materials prepared specifically for grand jury use in fact approximate transcripts of testimony in their level of disclosure. Thus, an approach to the classification of documents under Rule 6(e) that always ignores the dangers of disclosure is inconsistent with the critical secrecy policies underlying the rule.

The costs to the judicial process of the two per se approaches are slight; they consume minimal resources and produce low uncertainty costs, since there is virtually no room for judgment or discretion. These approaches do, however, result in high error costs. Under an "always subject to Rule 6(e)" approach, many documents that would not compromise grand jury secrecy are nevertheless subject to the restrictive Rule 6(e) framework, thereby limiting civil discovery opportunities without an offsetting benefit to the cause of grand jury secrecy. The same can be said for the "never subject to Rule 6(e)" approach, where documents that may truly reveal the inner workings of the grand jury are disclosed without invoking the protective machinery of the Rule 6(e)(3) exceptions.

E. The Grand Jury Secrecy "Policies" Test

Although later vacated on other grounds, a recent Ninth Circuit case suggested a fifth possible test for determining whether documents or other items are "matters occurring before the grand jury."[72] In *United States v Benjamin*, the court stated that "[i]f any of the policies underlying grand jury secrecy may be adversely affected by a disclosure, Rule 6(e) should apply."[73] Although the court's attention to the policies behind grand jury secrecy is commendable, the test as applied will almost always result in subjecting documents to the Rule 6(e) framework.

In *Benjamin*, the court found the documents (tape recordings) to be "matters occurring before the grand jury" because disclosure implicated the policies of (1) protecting an accused from unwarranted reputational damage, and (2) protecting the grand jury from outside interference. Since the individual to whom the docu-

---

[72] See *United States v Benjamin*, 852 F2d 413 (9th Cir 1988), vacated on other grounds, 109 S Ct 1948 (1989).

[73] Id at 418. See text at note 34 for list of policies underlying grand jury secrecy.

ments were disclosed was involved in civil litigation against the defendants, the court found that he had an interest in damaging their reputations and influencing the grand jury.[74] Thus, the court concluded that disclosure of the tape recordings could only be made upon a showing of particularized need under Rule 6(e)(3)(C)(i).

Unlike *Benjamin*, most efforts to obtain documents do not involve actual interference with grand jury proceedings. But in proposing its test, the court explicitly recognized the institutional concern behind grand jury secrecy—"protect[ing] witnesses' willingness to come forward and testify fully and frankly."[75] Any disclosure of a document arguably implicates this policy: future witnesses will refuse to cooperate with the grand jury if they fear eventual release of the materials. With the "policies underlying grand jury secrecy" thus implicated in almost every document disclosure case, the *Benjamin* test may bring too many documents within the Rule 6(e) framework. Like the per se rule that all documents fall within the scope of Rule 6(e), this test gives insufficient consideration to liberal discovery policies.

Although the uncertainty costs of such an approach are low—one can usually predict that the test will classify a document

---

[74] *Benjamin*, 852 F2d at 418. The facts of the case are complicated, but important in understanding the Ninth Circuit's test. A federal grand jury was investigating Benjamin and various co-defendants, members of the Synanon organization. Dr. Richard Ofshe, a sociologist studying Synanon, testified before the grand jury as a witness. The government subsequently enlisted Ofshe's aid in its investigation of Synanon, and obtained an order from the trial court disclosing tape recordings of the defendants to him. Id at 416-17. These tape recordings were the "documents" at issue in the case.

The Ninth Circuit decided that the secrecy policies of preventing outside interference with the grand jury and protecting the accused from reputational damage were implicated because, at the time of the disclosure, Ofshe was involved in a multi-million dollar civil suit against Synanon and some of the defendants. Id at 416-18. At least one of Ofshe's claims in the civil suit (destruction of evidence) also underlay the criminal charges. Id at 417. Although the court did not elaborate on its reasoning, it must have envisioned a scenario in which Ofshe would manipulate the evidence he reviewed in his investigative capacity in order to ensure the defendants' indictment (and, later, conviction) on the criminal charges. The defendants' conviction would presumably have buttressed Ofshe's own civil claims.

The connection between the documents (the tape recordings) and the grand jury policies seems somewhat tenuous, however. As a member of the federal investigative team, Dr. Ofshe could "influence" the grand jury (and damage the defendants' reputations) in the manner described above without ever reviewing the tape recordings; he could commit perjury while testifying as an expert witness, or develop false evidence that the government would present to the grand jury. Criminal sanctions exist for such actions, however. The real concern should have been that Ofshe might use the tape recordings—which he may have been unable to obtain under normal civil discovery standards—to his personal advantage *in the civil suit.*

[75] Id at 417.

as a "matter[] occurring before the grand jury"—there are no corresponding savings in judicial resources. Under the *Benjamin* test, a court must still examine disclosure in light of "grand jury policies," a highly fact-based inquiry.

F. The Rebuttable Presumption that Documents are "Matters Occurring Before the Grand Jury"

The Sixth Circuit recently advanced another approach to the treatment of documents under Rule 6(e).[76] Documents are presumed to be "matters occurring before the grand jury," but the party seeking disclosure may rebut that presumption by showing: (1) that the information is public; (2) that the grand jury did not obtain it through coercive means; or (3) that "disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry."[77] The court claimed that this method combines the better aspects of the "effect" and "per se subject to Rule 6(e)" tests, "providing more certainty while avoiding too-technical rigidity."[78]

Although the rebuttable presumption approach offers advantages over other existing approaches, the particular factors selected by the Sixth Circuit fail to identify the key elements distinguishing a genuine breach of secrecy from a minimal disclosure. The next section discusses the flaws in the Sixth Circuit's approach, and proposes an alternative set of rebuttal factors.

III. A Proposed Approach to the Classification of Documents Under Rule 6(e)

A. Analysis

1. Problems with the Sixth Circuit approach.

A presumptive approach offers a compromise between the two types of tests discussed in the prior section: (1) per se rules, which minimize administrative and uncertainty costs but increase error costs through over- and under-inclusiveness; and (2) case-by-case approaches, which require significant judicial resources but more closely approximate desired outcomes. If designed properly, a rebuttable presumption can minimize the error costs plaguing the per se rules, while simultaneously reducing the administrative and uncertainty burdens of the case-by-case methods.

---

[76] *In re Grand Jury Proceedings*, 851 F2d 860 (6th Cir 1988).
[77] Id at 866-67.
[78] Id at 867.

In the same way that the effect test reduces the error costs associated with blanket rules by requiring judicial inquiry into the facts of the case, a rebuttable presumption reduces those costs by permitting the party seeking disclosure to make the necessary showing. The residual error costs remaining with the effect test due to a lack of specific guidelines are largely eliminated by a presumption rebuttable upon proof of any of several clear circumstances requiring disclosure. Uncertainty costs are reduced since parties contemplating suit will know in advance the showing they must make to obtain disclosure. These parties can weigh the likelihood of success against the importance of the documents to their case. Administrative costs are reduced by focusing the court's inquiry on the circumstances that rebut the general presumption and the sufficiency of the moving party's proof.

For these reasons, the Sixth Circuit was correct in advocating a presumptive approach to the treatment of documents under Rule 6(e). The court was also correct in structuring the test to favor grand jury secrecy over liberal discovery.[79] It could just as easily have reversed the presumption (i.e., "documents are presumed *outside* Rule 6(e) unless the party resisting disclosure rebuts the presumption"), but its policy choice correctly weighed the competing concerns.

The rebuttal factors the court proposed,[80] however, fail to distinguish between critical and unimportant disclosures. No cases have yet applied the Sixth Circuit's test, which thus must be evaluated on the basis of a single sentence in the court's opinion.[81] But the rebuttal factors seem to suffer from several problems. One general concern is the loose structure of the test. If the party seeking disclosure can make a sufficient showing of *any* of the three factors, the presumption that the documents are covered by Rule 6(e) is rebutted. Such a structure is appropriate only if *each* factor independently captures key discovery and disclosure concerns.

The first factor requires the moving party to show that the information sought is public. Most items we think of as public, however, like periodic financial statements required by federal and state law, are mass-produced and available to a civil plaintiff without resort to discovery. The court probably included this exception as a concession to the practical difficulties of obtaining some allegedly "public" documents from sources other than the owner.

---

[79] See discussion in text at notes 29-44.

[80] See text at note 77 for list of rebuttal factors.

[81] *In re Grand Jury Proceedings*, 851 F2d at 867.

The second showing, that the information was not obtained by coercive means, distinguishes between documents that are subpoenaed by the grand jury and those that are voluntarily presented. As discussed in section IA, however, all documents reviewed by a grand jury—whether subpoenaed or voluntarily presented—should be treated equally for the purpose of classification as "matters occurring before the grand jury." The Sixth Circuit's decision to permit disclosure of only documents voluntarily produced to the grand jury will certainly eliminate whatever voluntary production actually occurs. Furthermore, the absence of coercion does not reduce the likelihood that excessive disclosure will permit civil litigants to appropriate the grand jury's broad investigative powers for their own gain.

The court's third rebuttal factor requires the moving party to show that disclosure would otherwise be available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry. The first part of this showing simply imports the relevancy, non-privilege, and particularity requirements of Federal Rules of Civil Procedure 26 and 34.[82] The second half of the showing seems to undermine the advantages of a rebuttable presumption. By requiring a party to show that disclosure will not reveal the nature, scope, or direction of the grand jury inquiry, the court introduces a fact-intensive "effect" analysis. If a party cannot rebut the presumption via the first or second factors (i.e., the item is not public and was subpoenaed), the court *must* conduct an effect test review. This eliminates the advantages of a rebuttable presumption by introducing administrative, uncertainty, and error costs.

2. The proposed test.

One need not abandon the presumptive approach just because the Sixth Circuit's rebuttal factors are troublesome. Several cases using an effect approach have suggested circumstances in which disclosure can be permitted without infringing secrecy concerns. By converting these into rebuttal elements, one can create a test superior to both the Sixth Circuit's presumptive approach and the effect test. Thus, this Comment proposes that documents be subject to the Rule 6(e) secrecy framework unless the party seeking disclosure can show: (1) that the request lists specific documents

[82] See note 9.

and is framed without reference to the grand jury;[83] and (2) that the documents sought were created for an independent purpose unrelated to the grand jury investigation.[84]

To return to the example with which this Comment began, the first rebuttal factor contemplates a situation where Company P requests, first from Company D but then from the U.S. Attorney or the court, "invoices of semiconductor purchases between January 1986 and November 1987." Since Company P will already be aware of the identity of the documents and the fact that they are being reviewed by the grand jury, "release . . . will not disclose any additional information as to why the grand jury subpoenaed the documents or what conclusions were reached in reviewing them."[85] Imagine, in contrast, that Company P seeks all documents reviewed by the grand jury in connection with the Company D investigation. Such a release would not only reveal the scope and nature of the investigation, but might also disclose documents that Company P would have been unable to obtain under normal civil discovery standards.

The second rebuttal factor ensures that the moving party does not profit from the existence of the grand jury by obtaining documents prepared specifically for the investigation. For example, Company D might have retained a financial expert to prepare reports and analyses for the grand jury concerning the propriety of various invoices and book entries. Alternatively, the grand jury itself may have commissioned the help of outside experts. Company P would benefit from the grand jury investigation if it could obtain these reports by specific request. Liberal discovery should extend no further than the underlying documents from which the expert's analysis was drawn.

B. Application

For purposes of illustration, it may be useful to explore how this proposed test would have resolved the question of documentary classification in several actual cases. In some cases, the results would have been the same, but the requisite analysis would have been quicker and cleaner. In *Almond Pharmacy*,[86] for example, the

---

[83] See *Dresser*, 628 F2d at 1383; *Senate of Puerto Rico*, 823 F2d at 583; *Tigar & Buffone v United States Department of Justice*, 590 F Supp 1012, 1016 (D DC 1984); and *In re Doe*, 537 F Supp at 1046-47.

[84] See *Dresser*, 628 F2d at 1383; and *Senate of Puerto Rico*, 823 F2d at 583.

[85] *In re Doe*, 537 F Supp at 1047.

[86] 753 F2d 575.

Illinois Department of Public Aid sought to obtain business records from several pharmacies. The Department needed these records to comply with auditing requirements under the Medicaid program, but a federal grand jury had previously subpoenaed the records. The Court of Appeals permitted disclosure, concluding on the basis of a hybrid "effect/purpose" inquiry that the records were not "matters occurring before the grand jury."[87]

Under the proposed approach, the documents would be presumed "matters occurring before the grand jury," but the Department of Public Aid would be able to rebut the presumption. First, the Department sought specific business documents from the pharmacies as part of its routine auditing procedures, not "all documents before the grand jury." This kind of limited disclosure would not reveal the inner workings of the grand jury. The Department already knew of the existence of the documents and would have been able to obtain them from the pharmacies pursuant to its audit powers had the grand jury investigation never occurred. Second, the business records in question were clearly prepared for a purpose independent of the grand jury investigation—namely, the normal operation of a business. Thus, the Department could easily have made the showing required to rebut the presumption and classify the documents as outside the scope of Rule 6(e).

On the facts of *Garden Court*,[88] the proposed approach would again yield the result actually reached, this time protecting the documents from disclosure save possibly under one of the Rule 6(e)(3) exceptions. In *Garden Court*, a nursing home and its operator had been the subject of a federal grand jury investigation into mail fraud and Medicaid abuse, resulting in indictments and eventual guilty pleas. In connection with a state income tax liability investigation, the Pennsylvania Department of Revenue sought disclosure of " 'all of the grand jury materials pertinent to its investigation.' "[89] Among the key items at issue were "auditors' analyses of Garden Court's books and records, prepared to assist the grand jury."[90] Using the effect test, the Court of Appeals concluded that the auditors' analyses were "matters occurring before the grand jury," and hence subject to Rule 6(e).[91]

---

[87] Id at 579.

[88] 697 F2d 511.

[89] Id at 512.

[90] Id.

[91] Id at 513.

Under the proposed approach, the Department of Revenue would be required to rebut the presumption that the analyses are "matters occurring before the grand jury" in order to avoid the restrictive Rule 6(e) framework. Such a showing would have been difficult for the Department to make. First, the Department did not seek specific items from the nursing home that happened, coincidentally, to be under subpoena from the grand jury; rather, it sought a blanket disclosure of all the grand jury materials pertinent to its investigation. Such an attempt to convert the grand jury's coercive powers to civil advantage would clearly reveal not only details of the grand jury's investigation but its nature, scope, and direction, as well. Thus, the phrasing of the Department's request alone would have prevented it from rebutting the presumption that the materials are subject to Rule 6(e).

Second, the auditors' analyses of Garden Court's books and records subpoenaed by the grand jury were clearly not created for an independent purpose; instead, they were specifically prepared to assist the grand jury in its investigation. As such, they would reveal the grand jury's questions and the auditors' conclusions about Garden Court's operation. The Department would thus have been unable to show that the documents were prepared independent of the grand jury investigation. In order to obtain the documents, the Department would have had to satisfy one of the Rule 6(e)(3) exceptions allowing disclosure of matters occurring before the grand jury.

One last example illustrates how the proposed approach to classifying documents under Rule 6(e) may produce results different from those reached under other approaches. In *Baggot*,[92] the Internal Revenue Service sought disclosure of materials that had previously been subpoenaed by a federal grand jury for use in a civil tax investigation.[93] Using the effect test, but without much discussion of the nature of these items, the Court of Appeals affirmed the district court's finding that the business records were " 'matters occurring before the grand jury' and therefore subject to Rule 6(e)."[94]

---

[92] 662 F2d 1232.

[93] Among the specific items sought by the IRS were: "all purchase and sale statements for accounts 21, 22, 4100, and 4101 in the name of James Baggot at Pacific Trading Company for the year 1975; all purchase and sale statements at Central Soya, Inc. for account 509 . . . , account 608 . . . and account 605 . . . for the year 1975 . . . ." Id at 1234-35.

[94] Id at 1238.

Under the proposed approach, however, the IRS could have obtained disclosure fairly easily. First, the IRS made a request for specific trading statements, framed without reference to the grand jury's investigation. Second, the purchase and sale statements had clearly been prepared independent of and prior to the grand jury investigation; they were ordinary accounts of trading activity that contained no grand jury-tailored analysis, unlike the reports in *Garden Court*. These documents, contrary to the Court of Appeals' holding, should not have been considered "matters occurring before the grand jury." They implicated none of the key concerns about disclosure of proprietary grand jury information embodied in the rebuttable presumption approach.

CONCLUSION

This Comment proposes a presumptive approach to the treatment of documents under FRCrP 6(e). Documents are presumed to be "matters occurring before the grand jury" and discoverable only via the Rule 6(e)(3) exceptions to the general rule of grand jury secrecy, unless the party seeking disclosure can show: (1) that the request lists specific documents and is framed without reference to the grand jury, and (2) that the documents sought were created for an independent purpose unrelated to the grand jury investigation. If the moving party adequately rebuts the presumption, then the documents fall outside the scope of Rule 6(e) and are discoverable under the Federal Rules of Civil Procedure like other relevant, non-privileged material.

The text and legislative history of Rule 6(e) provide little guidance in classifying documents as "matters occurring before the grand jury," and judicial interpretation has produced a myriad of unsatisfactory tests. Some of these tests fail to balance the important competing considerations of grand jury secrecy and liberal discovery. Others devote significant judicial resources to fact-intensive inquiries without providing adequate guidance to future courts and litigants. The proposed presumptive test minimizes the normative errors produced by the former category of tests, while simultaneously reducing the administrative and uncertainty burdens of the latter group. In addition, the suggested rebuttal factors better differentiate between critical breaches of secrecy and minimal disclosures than the rebuttal factors advanced by the one court that has heretofore advocated a presumptive approach.