

The Subpoena Gag Has Evolved— The Law Hasn't

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A client of our firm—an accountant whose firm prepared returns for a man under federal investigation—received a grand jury subpoena from the U.S. Attorney's Office for the Southern District of New York. Clipped to it was a cover letter, which closed:

Moreover, if you intend to disclose the existence of this subpoena to a third party, please let me know before making any such disclosure.

That is not a gag order. Otherwise, the Assistant United States Attorney would say so. It does not tell my client he must stay silent. It asks him to tell the prosecutor, in advance, when he intends to speak—and to whom. This polite yet firm request is now in circulation, an evolution years in the making. It is still dangerous and coercive.

The basic rules governing grand jury secrecy are well known. Federal Rule of Criminal Procedure 6(e)(2)(A) provides that “[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)” and subsection (B)’s list of persons bound does not include witnesses.

The Advisory Committee note says the rule “does not impose any obligation of secrecy on witnesses.” The Supreme Court agrees: witnesses are not bound “unless they also happen to fit into one of the enumerated classes.” *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 (1983). Silence must come from a court order or a narrow statute such as 18 U.S.C. §1510(b), 18 U.S.C. §2705, or 12 U.S.C. §3420(b)(1). Everyone in this field knows that. But it has still not stopped prosecutors from asking for you to do it on your own.

On Sept. 1, 2026, Senator Ron Wyden and Representative Pramila Jayapal asked for a fix. They asked the Chief Justice to have the Judicial Conference print on the standard grand jury and trial subpoena forms a conspicuous statement that the subpoena imposes no obligation of secrecy absent a court order or statute, and that Rule 6(e)(2) does not cover recipients and witnesses.

They also asked the Government Accountability Office—the independent non-partisan congressional watchdog—to audit the practice at

the Department of Justice and Department of Homeland Security.

That is a step in the right direction, and nearly costless, but is insufficient. A banner on the form grand jury subpoena provides disclosure but does not prevent a prosecutor from still including a polite request to keep quiet.

Clients, and their attorneys, would still face the same quandary: Either they disclose the subpoena to a customer or client even though the U.S. Attorney's Office and federal government asked them not to, risking the ire of the federal government and the additional scrutiny that brings. Or they keep silent, as requested, risking a client relationship and potentially running afoul of an agreement to disclose with that customer.

History of Cover Letters Attached to Subpoenas

Any reform proposal is best understood against the history of how such cover letters have been scrutinized until now. In 1987 the First Circuit reviewed a letter accompanying a subpoena duces tecum: "You are not to disclose the existence of this subpoena or the fact of your compliance for a period of 90 days."

The government's lawyer told the court the letters were routine: "The government uses this letter all over the country. They're in our manuals and they're sent to banks and businesses." *In re Grand Jury Proceedings (Diamante)*, 814 F.2d 61, 64 & n.1 (1st Cir. 1987). The practice violated Rule 6(e)(2), the court held, because no "reasonable, law-abiding person who received such a letter would think anything other than that he was being told that he was legally obligated not to engage in that course of action."

But it added that the government "is free to express its beliefs about the impact of any disclosure, provided it makes clear that the law does not require nondisclosure." So, Diamante did not prohibit a U.S. Attorney's Office from asking; it merely forbid asking when incorrectly phrased as law or compulsory. The government adapted accordingly.

In 2011, in *United States v. Bryant*, the Third Circuit reviewed the redraft, printed on the face of every subpoena, stating that "the United States Attorney requests that you do not disclose the existence of this subpoena." 655 F.3d 232, 237–38 (3d Cir. 2011).

The defendants argued that the placement of the language "emblazoned on the subpoena" carried an appearance of judicial imprimatur because it "suggested to witnesses they were legally obligated to comply with the government's secrecy request." The court found no obligation of secrecy imposed, while conceding its coercive effect, stating that "[c]ertainly, many forthright citizens would comply with such a request, given the context in which it was made." In a footnote it called the blanket practice "not a good policy."

Then in 2015, in *United States v. Gigliotti*, the Eastern District of New York considered grand jury subpoenas that carried the capitalized command "YOU ARE HEREBY DIRECTED NOT TO DISCLOSE THE EXISTENCE OF THIS SUBPOENA, AS IT MAY IMPEDE AN ONGOING INVESTIGATION." No. 15-CR-204(RJD), 2015 WL 13691780, at *1-3 (E.D.N.Y. Dec. 23, 2015). The government conceded impropriety, blamed support staff, called the violation "inadvertent

and unintentional,” and directed all AUSAs to “no longer include, on their face, non-disclosure requests.”

The court denied suppression as a drastic remedy, but nevertheless admonished the government, stating that the government’s response was “disappointing” and that “continued violations could well warrant severe remedies.” Yet, the court also noted the lack of accountability because the government did not yet explain “how it will ensure compliance.”

Each court that has discussed a subpoena commanding non-disclosure has merely directed the U.S. Attorney’s Office to revise its letters and discard whatever the last court found objectionable—first the mandatory verb, then the judicial letterhead. The language we now see in subpoenas—a request for prior notice before disclosure—is the next step: it discards the demand for silence itself and just requests that you inform them when you disclose at all, a deterrent in itself.

Why Nothing Changes: The Remedy Is a Letter

The remedy never changes because the injury is treated as trivial. Courts find the errors in disclosure to merely be a matter of correcting the disclosure rather than suppression of the evidence obtained through the grand jury process, or another sanction on the government’s investigation.

So, the remedy is always the same: the government merely writes to the recipients and corrects the error by telling them the truth—they are not obligated to do anything. Diamante ordered it. Bryant ordered it. The government had already

done it in Gigliotti, where the defendants could identify no authority for suppression—and neither could the court.

The problem is also based on the structure of how and when it gets challenged. It is never the subpoena recipient challenging the propriety of the language. Otherwise, they would just invite greater scrutiny and would themselves already be forecasting their disclosure to the government, as was requested in the first place. Instead, the claim is always the defendant’s, raised post-indictment, framed as a due process violation or interference with witness access. The person whose speech was chilled—the accountant, the bank, the pharmacy—is never in the courtroom.

That subpoena recipient has no damages, no stake in the prosecution, and every reason not to fight the office that just subpoenaed him. So, the interest at issue is litigated by a party who does not hold it, years late, for a remedy that costs the government a stamp. Forty years of “not a good policy” is what a costless violation looks like.

Why the Polite Version Is Worse

An advance-notice request does not restrain the recipient’s speech. It asks him to report on it. Three things follow.

First, it evades escalation. A capitalized command gets forwarded to the recipient’s attorney or legal department. “Please let me know” gets answered by the client personally, that afternoon.

Second, the whole setup hands the government a tripwire. Compliance tells the prosecutor when the target is about to learn of the

investigation, and from whom—information the government can act on in the timing of charges, an arrest or a seizure, before the target has counsel. A gag keeps the target ignorant; an advance-notice request conscripts the recipient as the government's early-warning system.

And, third, it creates exposure where no legal obligation existed. A professional who pre-clears disclosure with a prosecutor has taken on a second loyalty without telling the client whose records are at issue. A company that promised customers notice of legal process—in a privacy policy, terms of service, or a negotiated contract—may breach that promise for a prosecutor who never asked a judge for anything.

The retort "But it's voluntary" does not end the inquiry. Indeed, that answer failed more than sixty years ago in another setting. Distributors in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963) were "free" to ignore a state commission's notices "in the sense that [a] refusal to 'cooperate' would have violated no law," but the Court looked past it: "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." The absence of legal compulsion has never been the only measure of whether a government request is coercive and should not be here.

A Few Concrete Steps for the Next Subpoena You or Your Client Receives

1. Read the secrecy or notice paragraph as a separate instrument from the command to produce. One is enforceable; the other, absent an order or statute, is not. Make sure the client understands that answering it is a decision, not a courtesy.

2. Ask in writing for the legal basis and for any order—and invite the government to seek one if it needs silence. Diamante lets prosecutors explain their concerns so long as they make clear the law does not require quiet. A request that will not survive being reduced to that form is telling you something.

3. Read the client's own privacy policy. It may require the very notice the prosecutor is asking the client to withhold. If so, that privacy policy should trump any request the prosecutor has no legal basis to make.

What would actually move this is a recipient willing to say no in writing, and a court willing to treat the recipient's own speech interest as the interest at stake. Until then, the only constraint is a careful lawyer, who reads the request not to disclose from the prosecutor as closely as the request for documents or testimony from the grand jury.

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