

## CRIMINAL DEFENSE

# ALERT

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## Third Circuit Decision Highlights the Challenges Facing Businesses Receiving Secret Grand Jury Subpoenas

By Laurel Gift

Businesses routinely receive subpoenas for records. When the subpoenas are issued in connection with a grand jury investigation, deciding how to respond can become complicated and nuanced. Grand jury secrecy and investigative demands often hamper the ability of a business to negotiate a reasonable scope and timeline for production. The viability of meaningful defenses and proactive challenges to grand jury subpoenas may also be limited by grand jury secrecy.

### The Recent Third Circuit Decision

Key aspects of these issues were addressed in a recent precedential opinion by the United States Court of Appeals for the Third Circuit. *In the Matter of the Application of Subpoena 2018R00776* explores the relationship between freedom of speech under the First Amendment – as it affects businesses and their employees and customers – and grand jury nondisclosure orders. The Third Circuit’s opinion has significant implications for First Amendment challenges to the exercise of grand jury powers, in both federal and state grand jury practice.

This new decision is also significant because Pennsylvania grand jury practitioners often rely on federal interpretation of grand jury rules, in large part due to the dearth of published opinions. Indeed, the Investigating Grand Jury Task Force reported to the Pennsylvania Supreme Court in November 2019 that uncertainty regarding the scope of grand jury secrecy was due, in part, to the lack of published opinions.

*In the Matter of the Application of Subpoena 2018R00776* involved ABC Corp.<sup>1</sup>, an electronic communications service provider, and the company’s receipt of both a grand jury subpoena and a search warrant for data associated with one of its customer’s employees, who was the target of a criminal investigation. Nondisclosure orders accompanied both the subpoena and search warrant.

### Background

As a matter of grand jury practice, a service provider that turns over information in response to a grand jury subpoena is considered to be a grand jury witness and is not subject to the general secrecy obligation. However, the Stored Communications Act of 1986 (“SCA”) authorizes courts to prohibit a service provider from notifying anyone of its receipt of legal process if disclosure may: (1) endanger the life or physical safety of an individual; (2) cause flight from prosecution; (3) result in destruction of or tampering with evidence; (4) result in the intimidation of potential witnesses; or (5) jeopardize an investigation or unduly delay a trial. If one of the foregoing risks is present, an electronic service provider may be prohibited from disclosing the federal government’s demand of data for up to one year.

In state grand jury practice, the use of nondisclosure orders is prolific. The Pennsylvania Investigating Grand Jury Act provides that a nondisclosure order may be

<sup>1</sup> A fictitious name assigned by the Court to maintain secrecy of the investigation.

issued for cause shown in a hearing before the supervising judge. The hearing with respect to subpoenas for records occurs *in camera* and *ex parte* often at the time the subpoena or search warrant is issued. Thus, service providers like ABC Corp. often receive Pennsylvania grand jury subpoenas accompanied by nondisclosure orders without the opportunity to object or be heard.

### Lower Court Actions

Ultimately, ABC Corp.'s customer/subscriber, whose employee was the subject of the government's subpoena and search warrant, filed for bankruptcy and a trustee was appointed. ABC Corp. sought to modify the nondisclosure orders to permit it to notify the bankruptcy trustee of the existence of the subpoena and search warrant. ABC Corp. alleged that the nondisclosure orders were content-based restrictions and prior restraints that infringed upon its First Amendment right to free speech.

The District Court denied ABC Corp.'s motion to amend the nondisclosure orders, finding that the SCA implicates the First Amendment rights of service providers but that the nondisclosure orders at issue served the compelling governmental interest of "maintaining the secrecy of the ongoing grand jury investigation." The District Court also determined that the nondisclosure orders were narrowly tailored because the restriction on ABC Corp.'s speech was limited to one year.

### Third Circuit Reasoning

In a matter of first impression, the Third Circuit concluded that nondisclosure orders under the SCA implicate First Amendment rights because they restrict a service provider's speech. Further, the Court concluded that the nondisclosure orders at issue were content based because they prohibited ABC Corp. from relaying information about a grand jury investigation, thus "drawing distinctions based on the message." The Court also concluded that the nondisclosure orders constituted a prior restraint on speech, which is "the most serious and the least tolerable infringement on First Amendment rights." Prior restraints are presumptively unconstitutional and subject to strict scrutiny analysis.

To survive a strict scrutiny analysis, the government must demonstrate that the restriction on speech: serves a compelling government interest; is narrowly tailored to achieve that interest; and is the least restrictive means of advancing that interest.

With respect to the government's interest, Supreme Court precedent has identified five compelling reasons to maintain grand jury secrecy, and the Third Circuit considered these factors:

1. To prevent 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 harassing the grand jurors;
3. To prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
4. To encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; and
5. To protect an innocent accused who is exonerated from disclosure of the fact that he or she has been under investigation, and from the expense of standing trial where there was no probability of guilt.

These five compelling reasons would arguably also exist in state grand jury situations but without the prerequisites or conditions mandated by the SCA.

The Third Circuit concluded that the nondisclosure orders received by ABC Corp. were narrowly tailored to achieve the compelling interest of maintaining grand jury secrecy. The Court noted that the nondisclosure orders at issue prohibited ABC Corp. only from speaking about the existence of the grand jury subpoena and search warrant. The nondisclosure orders did not prohibit ABC Corp. from discussing the government's requests abstractly and thus, the orders were narrowly tailored to preserve the secrecy of the grand jury proceeding.

Lastly, the Court evaluated whether the restriction on speech was the least restrictive means of advancing the government's interest. ABC Corp. suggested that it notify the bankruptcy trustee of the subpoena, either with or without identifying the target email account. The Court rejected these options and concluded that such disclosures would undermine the government's interest in maintaining the confidentiality of an ongoing investigation. Thus, the Third Circuit affirmed the District Court decision denying ABC Corp.'s motion to amend the nondisclosure orders.

### Practical Takeaways and Analysis

Although the Third Circuit decision ultimately went against ABC Corp., it remains helpful to businesses by establishing high standards for the government to justify the secrecy of grand jury subpoenas. The Pennsylvania Supreme Court could be expected to reach a decision similar to the Third Circuit, unless and until the recommendations of the Investigating Grand Jury Task Force are implemented. The Task Force recommended that grand jury witnesses and their attorneys be afforded the opportunity to participate in a nondisclosure hearing.

Further, the Task Force opined that supervising judges should support any nondisclosure order with written or on-the-record findings provided to witnesses and their attorneys – and that the issuance of a nondisclosure order be immediately appealable. Such a hearing, findings, and right to appeal would allow witnesses to properly assert First Amendment or other appropriate challenges. Future litigation on these issues will hopefully serve to further clarify the proper scope of grand jury secrecy.

When receiving a grand jury subpoena, likely under the cloak of secrecy, businesses should consider the potential short and long term impact on their operations. Grand jury investigations can take years to resolve – and their resolution may itself remain a secret. Strategic and realistic thinking about the subpoena's scope and impact may help to identify viable legal challenges, areas for meaningful negotiation with the government, and, ideally, minimize disruption and expense to the business. The recent Third Circuit decision highlights the difficulties

faced by businesses and the need for systemic reforms. ♦

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*For more information about Schnader's Criminal Defense Practice Group or to speak with a member of the firm, please contact:*

*Laurel Gift  
Chair of the Criminal Defense Practice Group; and  
Chair of the Internal Investigations, Ethics and  
Compliance Practice Group  
412-577-5115  
<mailto:lgift@schnader.com>*

www.schnader.com

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