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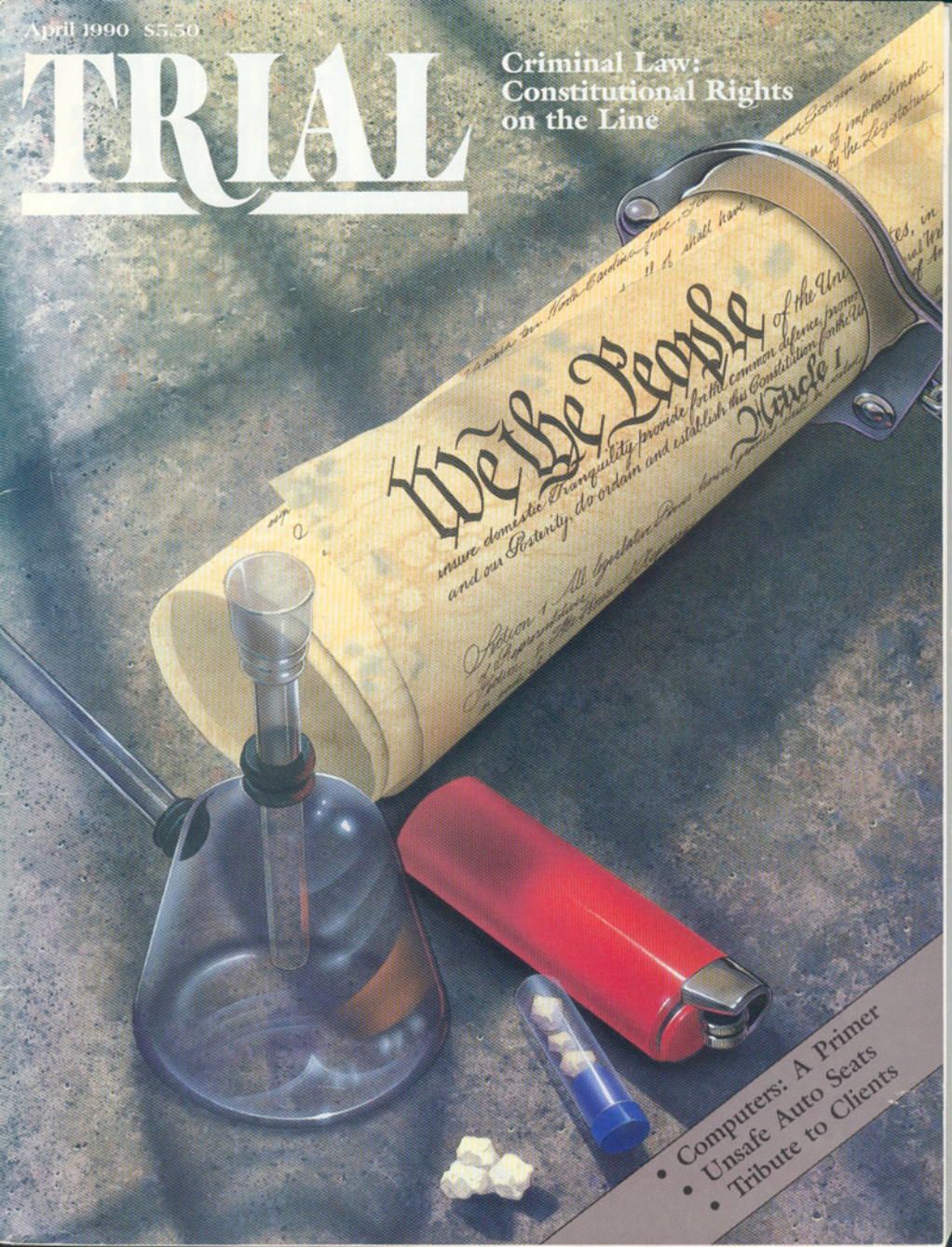
TRIAL

Criminal Law: Constitutional Rights on the Line



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Attorney Subpoenas Imperil Choice of Counsel

Jack B. Zimmermann and Jim E. Lavine

The United States government, through the Department of Justice, appears to be taking a brash new approach to preventing people who are accused of crimes from getting effective legal representation. Removing the competent, aggressive defense lawyer makes it much easier to achieve the goal of "placing the guilty scoundrels in the pen."

The so-called war on drugs—"crusade" is a more accurate term—has caused major changes in our criminal justice system. The newest approach seems to be to subpoena a suspect's criminal defense attorney to testify before a grand jury investigating the suspect's conduct.

Unfortunately, that policy strikes at the very core of the adversary system, and certainly will not be restricted to the area of criminal law. The Justice Department represents the United States government in civil cases as well. If the tactic proves effective in the criminal law context and is approved by the courts, there is no reason to expect that it will not be used against opposing counsel in the civil law arena. Nor is there any reason to assume that it will not be expanded to the trial subpoena stage.

What is so bad about requiring a lawyer to testify about his or her client in an ongoing investigation? For starters, the practice inflicts a severe blow to the viability of the attorney-client privilege.

An often confused client, whose world seems to be crumbling about him, has been told, "I'm your lawyer, I'm on your side. I will do everything legal and ethical to protect your interests. Whatever you tell me about what has happened is forever confidential. Trust me."

The next thing the client knows, his lawyer is being questioned in secret about *his* case. How can the client trust or be honest with that lawyer in the future? Who is there to counterbalance the weight and resources of the state?

The Issues

Prophetically, in 1982, Judge Henry Politz of the United States Court of Appeals for the Fifth Circuit foresaw the danger to our constitutional system if the country engaged in an all-out "take no prisoners" war on crime.

> The drug traffic is abhorrent. This cancer on our social fabric must be eradicated. The desire to pursue vigorously all suspected participants is understandable and [laudable]. Many things may be sacrificed in this effort, but the attorney-client privilege is not, to me, a forfeitable item. This privilege is of such value to our civilized society and system of criminal justice that I must regretfully dissent from today's ruling, and its natural consequence—defense counsel becoming the government's unwilling instrument for the investigation and prosecution of clients for *past* criminal acts. I am convinced that society's momentary gain from this development will be far outdistanced by its ultimate loss.[1]

Equally offensive to our system of justice is the government's use of this tactic to choose its legal adversary. When the defense lawyer is involuntarily transformed into a fact witness, he or she becomes disqualified to represent the accused. The prosecutor has a much better chance of winning a case if he or she can unilaterally veto the adversary's choice of counsel. What lawyer wouldn't love to be able to pick his opponent? The attitude seems to be, "To hell with the sixth amendment, we need information to indict guilty people and clean up the (streets) (drug problem) (S&L crisis) (whatever)."

The Response

So what is being done about the problem? Some lawyers are capitulating because they are intimidated, they do not want to risk the wrath of the all-powerful United States Attorney's office, or they cannot afford the financial drain of

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a fight. But some are fighting back. They are filing motions to quash the grand jury subpoenas. They are upholding their oath of office and risking being held in contempt of court. They are taking the fight to the appellate courts. Some are winning—and the Association of Trial Lawyers of America has had a part in one such win, to be discussed below.

The courts are getting involved because some lawyers are resisting the erosion of our adversary system. Many judges don't like criminal defendants any better than prosecutors do. In some courtrooms there is no discernible difference between the Assistant U.S. Attorney and the judge except that the judge wears a black robe and the people in the court stand up when he or she enters.

However, good judges—those who remember their oath—are becoming more sensitive. Some are risking the disapproval of the Department of Justice and even using the authority given them under Rule 17 of the Federal Rules of Criminal Procedure to do the right thing under the circumstances of the case. (Rule 45 of the Federal Rules of Civil Procedure gives them comparable authority should the problem arise in a civil case.)

As to the ethical problems created by this practice, the United States Court of Appeals for the First Circuit said in *United States v. Klubock*—

> That there are latent ethical issues in the serving of a subpoena on . . . [opponent counsel] should be perceived without much difficulty. . . . The serving of a subpoena under such circumstances will immediately drive a chilling wedge between the attorney/witness and his client. . . .
>
> More subtle, but perhaps more important in terms of the ethical setting . . . is the immediate conflict of interests created between the attorney/witness and his client by the serving of a subpoena in [this] context. . . . As a witness, the attorney/witness has separate legal and practical interests apart from those of his client. These interests may or may not coincide with those of the attorney/witness and his client. The mere possibility of such a conflict is sufficient to create a problem.[2]

Courts have held that where an attorney is subpoenaed to testify against his or her client in an ongoing criminal proceeding, the timing of that subpoena may justify quashing it.[3] Also, one court has said it would quash a grand jury subpoena under Rule 17 when the timing is unreasonable and oppressive because it directly interferes with the attorney's ability to represent the client in a noncriminal matter before the Immigration and Naturalization Service.[4]

The Courts of Appeals for the Fifth and Eleventh Circuits have quashed subpoenas that would require attorneys to produce information that, although not normally privileged, "would yield substantially probative links in an existing chain of inculpatory events or transactions."[5] If, after an analysis of the facts, such substantial probative links exist,

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these courts consider the information to be within the attorney-client privilege.[6]

Some organized bar groups have acted courageously. In Massachusetts, it is now unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a current client. This ethical rule was promulgated by the Massachusetts Supreme Judicial Court at the urging of the Massachusetts Bar Association[7] and then adopted by the United States District Court for the District of Massachusetts.[8] The rule has withstood attack as a violation of the supremacy clause, the district court's rule-making power, and Rule 17.[9]

The New Hampshire Bar Association intervened in a case as one of several amici curiae opposing enforcement of federal grand jury subpoenas requiring lawyers to produce fee information.[10] The clients had actions pending in state criminal courts that were based on the same conduct being investigated by the federal grand jury.

The United States District Court for the District of New Hampshire quashed the subpoenas, citing the negative effect that testifying would have had on the lawyers' preparations for the state proceedings, the danger of jeopardizing the attorney-client relationship at a critical time in the state proceedings, and the negative effects that such forced testimony would have had on the criminal defense bar as a whole. The case was affirmed on appeal.

Bar associations in other states need to take similar protective measures. Just because this tactic has not been used in a state does not mean it won't be in the future when a new United States Attorney is appointed.

Even the Justice Department realizes that there is a problem. Justice Department guidelines[11] have been adopted to restrict issuing such subpoenas without prior approval of the headquarters in Washington, D.C. Unfortunately, experience indicates that the threshold of need required to obtain that approval is very low.

Texas Case

The most recent successful challenge to this practice occurred in the United States District Court for the Southern District of Texas.[12] Mike DeGeurin, a respected criminal defense lawyer, was subpoenaed to testify before a grand jury investigating his client. The client, an indigent old man, had been arrested during the execution of a search warrant of a house. He had been alone in the house, asleep in the living room. The authorities discovered a large quantity of cocaine in a bedroom. Because it was known that DeGeurin was usually well compensated for his work, and the old man apparently could not have afforded to pay him, the government ostensibly wanted information about the source of his legal fee.

ATLA joined the National Association of Criminal Defense Lawyers (NACDL), the Texas Criminal Defense Lawyers Association (TCDLA), and the Harris County Criminal Lawyers Association (HCCLA) as amici curiae. DeGeurin argued that the subpoena violated the Justice Department guidelines, infringed the sixth amendment, chilled the attorney-client privilege, and required him to violate the Code of Professional Responsibility.

ATLA argued that compliance with the subpoena would destroy the attorney-client relationship, the accused's right to effective assistance of counsel, a valid claim of privilege, and public confidence in the justice system. ATLA emphasized that, except for the sixth-amendment issue, all of these dangers existed for the civil trial lawyer as well

as the criminal trial lawyer. ATLA contended that Rule 17 gave the court authority to quash the subpoena.

NACDL argued that the subpoena was an attack on a lawyer carrying out his duty and that it deprived the accused of counsel of his choice, violated the sixth amendment, and conflicted with the lawyer's ethical duty to protect the attorney-client privilege. TCDLA argued the attorney-client privilege and sixth-amendment issues and also contended that the subpoena allowed one-sided discovery and conflicted with the lawyer's ethical duty. TCDLA urged the adoption of a local rule of court regulating the practice. HCCLA emphasized the attorney-client and work-product privileges, the sixth amendment, denial of counsel of choice, and the chilling effect on vigorous representation.

"Last Link" Exception

Judge David Hittner addressed each issue and granted the motion to quash the subpoena.[13] The court accepted the arguments that the practice violated the attorney-client privilege and the defendant's sixth-amendment right to counsel of his choice, was unreasonable and oppressive under the circumstances, and therefore was subject to being quashed under Rule 17.

Judge Hittner's analysis of the attorney-client privilege centered on the so-called "last link" exception to the rule that client identity and fee information generally are not privileged. The exception is available if "so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions."[14] The probable result of applying the exception would be to give the government the final piece of evidence necessary to indict the client.

The exception is available when an attorney is subpoenaed during the pendency of a criminal proceeding for which he has been retained. The testimony of an attorney who represented a client previously in an unrelated case would probably not provide substantially probative links in the chain of evidence leading to indictment of the client on a current charge. Thus, testimony pertaining to the current charge would be privileged; testimony pertaining to prior proceedings would not. Also, the privilege may not be used by clients or third-party benefactors to shield illicit activity from detection or to further an illegal scheme.

Judge Hittner held that, because mere presence where a crime is committed and knowledge that the crime is being committed are insufficient as a matter of law to prove guilt, the lawyer's testimony regarding who paid his fee could have provided an affirmative connection between the indigent client and the cocaine, thus providing a stronger case against him than "mere presence." In other words, forcing DeGeurin to testify could have yielded information showing that the client knew of the cocaine's presence.

Further, DeGeurin's testimony could have been used to find a conspiracy, resulting in additional charges against the client. Finally, because DeGeurin was subpoenaed to testify regarding ongoing proceedings in which he currently represented the client, the result would have been to use him as an adverse witness against his own client.

Finding the facts to fit the last-link exception, Judge Hittner held that the fee information was privileged. He further found that there was no use of the privilege as a shield for illicit activity.

Therefore, he quashed the subpoena.

After doing so, Judge Hittner went further and applied Rule 17(c) of the Federal Rules of Criminal Procedure. That rule allows a court to quash a subpoena if enforcing compliance with it would be "unreasonable or oppressive."

Timing is commonly cited as the reason that enforcing compliance would be unreasonable or oppressive. Specifically, subpoenaing an attorney to testify regarding ongoing matters in which he is involved as counsel of record is unreasonable or oppressive because it requires the attorney to reveal information about the *current* proceedings in which he is involved.

This practice is said to have a "chilling effect" on the attorney's ability to represent his client. The term "chilling effect" is an understatement since, in this situation, the attorney could be transformed into an adverse witness.

Furthermore, aside from the obvious destruction of the attorney-client relationship, Judge Hittner noted that the diversion of the attorney's attention and time would severely hinder his effectiveness in preparing the defense. For those reasons, Judge Hittner held that Rule 17(c) also provides a valid basis to quash the subpoena in circumstances such as these.

Finally, the judge found a constitutional basis to quash the subpoena. He first noted that the government had not asserted that the sixth-amendment right to counsel had not attached. He then cited a recent Supreme Court holding that the appropriate inquiry into a sixth-amendment issue focuses on the adversarial process, not on the defendant's relationship with his lawyer.[15]

'I'm your lawyer, I'm on your side. I will do everything legal and ethical to protect your interests. Whatever you tell me about what has happened is forever confidential. Trust me.'

Using this reasoning, any chilling or compromising of that process would be a threat to its integrity and hence a denial of an accused's sixth-amendment right to effective assistance of counsel. When an attorney is subpoenaed to testify about the matter for which he was retained, the integrity of the adversarial system is violated because the client can no longer trust the attorney and because the lawyer has become an adverse witness. Once the lawyer has been transformed into a fact witness, that lawyer is disqualified from representing the defendant.

Since the Supreme Court has found a presumption in favor of a defendant's choice of counsel, the government's transformation of the lawyer into an adverse fact witness, which leads to disqualification of that lawyer, clearly denies the defendant counsel of choice. This denial essentially contravenes the sixth amendment.

Judge Hittner found no overriding government interest to justify allowing these violations of the sixth amendment. Thus, although he quashed the subpoena on attorney-client privilege grounds, he found constitutional grounds to support the same result. The opinion is an enlightened and well-reasoned one, which should rightfully influence future decisions by other judges.

Undaunted, however, the government filed an appeal of Judge Hittner's

order. The case is currently before the United States Court of Appeals for the Fifth Circuit, and ATLA has been asked to join the other amici who participated at the trial level. It appears that the American Bar Association will also be joining as amici at the appellate court level.

The government is not going to give this weapon up easily. The prospect of being able to get rid of effective opposing counsel is too alluring. Criminal lawyers are not too much more popular than those who have been accused of crime, and many people today are so obsessed with winning the war against crime that they don't seem to mind losing a few of their own constitutional rights in the process.

We trial lawyers need to live by our oaths, protect the lawful interests of our clients, and refuse to be coerced. We've got to gain strength from each other—and do the right thing for the right reason. If we don't protect these rights that generations of Americans have fought for, who will? □

Notes

1 *In re* Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1034 (5th Cir. 1982) (en banc).
2 832 F.2d 649, 653, *vacated*, 832 F.2d 664 (1st Cir. 1987)(en banc). This vacated panel opinion was referred to and published in conjunction with the evenly divided en banc decision that affirmed a local rule of the United States District Court for Massachusetts that required prior individual judicial approval for attorney subpoenas.
3 *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d 26, 29-30 (2d. Cir. 1985); *In re* Williams, 717 F. Supp. 1502 (S.D. Fla. 1987); *In re* Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd*, 751 F.2d 13, 17 (1st Cir. 1984).
4 *In re* Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958, 969-70 (D. Mass. 1985).
5 In re *Williams*, 717 F. Supp. 1502, (S.D. Fla. 1987) (quoting *In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 674 (5th Cir. 1975)).
6 In re *Williams*, 717 F. Supp. 1502, 1504.
7 *Klubock*, 832 F.2d 649, 650.
8 *Id.*
9 *Id.* at 651-56.
10 In re *Grand Jury Matters*, 593 F. Supp. 103, 107.
11 United States Department of Justice, Attorney Subpoena Guidelines, Executive Office for the United States, Department of Justice, United States Attorneys' Manual §9-2.161(a) (1988 Supp.).
12 *In re* Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena, 724 F. Supp. 458 (S.D. Tex. 1989).
13 *Id.*
14 *Id.* (quoting In re *Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674).
15 *Id.* (citing Wheat v. United States, 486 U.S. 153 (1988)).