

Leaky prosecutions draw fire from defense lawyers

By Jeff Chorney

RECORDER STAFF WRITER

Leaks — confidential information passed to journalists by anonymous sources — have for decades gone hand-in-hand with government investigations from Watergate to Whitewater.

But lately reporters' stock in trade has become a royal pain for the local defense bar. Attorneys blame federal prosecutors and agents for tipping journalists about grand jury proceedings and say a recent trend of supposedly secret testimony appearing in news stories hurts their clients.

And the government, they say, hasn't done enough to turn off the faucet.

"The power to investigate is the power to destroy in some cases," said Cristina Arguedas of Emeryville's Arguedas, Cassman & Headley. "So [prosecutors] have to run that grand jury like a military commando operation where no mistakes are made."

Leaks are defining two high-profile federal cases in the Northern District: the BALCO steroids prosecution and the public corruption probe of state Sen. President Pro Tem Don Perata, D-Oakland. Arguedas represents clients in both matters, which involve public figures whose livelihoods are based on their reputations.

The office of Northern District U.S. Attorney Kevin Ryan referred all questions regarding leaks to the U.S. Department of Justice in Washington, D.C. DOJ spokesman Bryan Sierra would not respond to allegations of leaks in specific cases, but discussed the issue generally and said complaints are not going unheeded.

"Obviously, the department has a responsibility to enforce the law, and if there's a situation that makes it impossible to get a fair trial, that is something we do care about," Sierra said. "The department takes its responsibility very seriously in that regard."

In connection with BALCO, Arguedas was hired by Tim Montgomery, the sprinter who was never indicted but whose grand

"THE POWER TO DESTROY": Defense attorney Cristina Arguedas says federal prosecutors have an obligation to ensure that leaks don't ruin the reputations of people under investigation

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jury testimony was quoted at length in the *San Francisco Chronicle*. Arguedas was also retained by Perata's daughter, Rebecca Perata Rosati, whose name was tied to the probe of her father's activities.

Arguedas said the leaks raise concerns that go beyond media stories.

"Grand jury investigations are supposed to be unbiased, and they're supposed to be confidential," she said. "When they are not kept confidential, the world has to wonder if they're also not being unbiased."

Controversy over the BALCO leaks erupted last summer, when U.S. District Judge Susan Illston chastised attorneys on both sides and ordered them to submit affidavits swearing that they had no hand in re-

leasing confidential grand jury testimony.

Now Arguedas and another attorney — Keker & Van Nest partner Elliot Peters, who represents Sen. Perata's son, Nick Perata — have taken things a step further. Last week, they sent a letter to FBI Director Robert Mueller and Attorney General John Ashcroft demanding that the government investigate and prosecute leaks in connection with Perata.

Several newspapers, including the *Chronicle*, *Los Angeles Times* and *East Bay Express*, have reported on the federal investigation into the senator. The stories have cited grand jury subpoenas and "law enforcement" or other sources close to the investigation.

Arguedas and other defense attorneys said they have no problem with grand jury witnesses exercising their First Amendment right to discuss their own testimony. But law enforcement officials are barred by federal court rules from discussing grand jury proceedings outside the courtroom.

Doron Weinberg, who represents Lily Hu, a political consultant linked to Perata, said he finds it curious that subpoenas apparently weren't sent out until just after the Nov. 2 election and only days before Perata is supposed to take over control of the state Senate.

Arguedas and Peters agreed that politics may play a role.

"As Republicans ... it is of the utmost importance that you take action to spot the apparent leaking of grand jury information for partisan political purposes," according to their letter.

Although Sierra would not directly respond to the letter, he called claims of political motivation "an overly broad characterization." He pointed out that while political appointees supervise prosecutors, the people closest to a case are typically career lawyers who "have a responsibility to abide by the principles of federal prosecution."

Indeed, the court rule on grand juries requires prosecutors to inform anyone working on behalf of the government that the investigation is secret.

David Anderson, a former assistant U.S. attorney who is now a partner at Pillsbury Winthrop, said everyone he worked with knew about the secrecy rules. If there was ever any doubt — such as using a law enforcement officer unfamiliar with federal courts — he made it a practice to admonish people to keep quiet. Anderson said he took extra precautions if he believed a matter was of special interest to the press.

Particularly galling to Arguedas and Peters is the characterization of the Per-

ata probe as a "public corruption" investigation. Arguedas said that description could not have come from subpoenaed witnesses because none of them would have that kind of broad sense of the probe. It's proof, therefore, that law enforcement is doing the talking, she said.

"It's not only horribly unfair, it's

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flat-out disheartening," said Peters, who worked as a federal prosecutor in New York. "And no one in the Justice Department seems to care." Peters said he hadn't yet received any response from Mueller or Ashcroft.

But that doesn't necessarily mean his complaints are going nowhere. In 2001, the latest year statistics are available, the DOJ's Office of Professional Responsibility opened 78 new investigations into alleged ethics violations by prosecutors. The probes involved 113 separate charges of misconduct, including five purported violations of grand jury secrecy.

Besides the court rule, judges can also conduct their own inquiries into

leaks and hold people in contempt for violations.

Sierra described a handful of other options the DOJ uses to quash leaks. They include criminal investigations — such as the current attempt to determine who gave up the name of CIA agent Valerie Plame — to administrative actions against prosecutors and federal agents.

Some prosecutors already know what can happen when you speak out of turn to the press. One of Ryan's predecessors, Michael Yamaguchi, resigned in 1998 after getting in trouble for making comments to reporters during a federal trial.

Although Arguedas and Peters are dissatisfied with the government's response, they have reason to hope that something eventually will be done to find the leakers.

In the BALCO matter, Ryan's office sent letters to *Chronicle* reporters demanding to know the source of leaks. The paper refused to comply.

But that kind of response isn't good enough for Peters, who said he could find out who leaked the Perata information within a few days if he had prosecutors' subpoena power.

Arguedas said it's the responsibility of the U.S. attorney's office to keep an investigation confidential. "It's their responsibility to control their agents ... and it's their responsibility to make sure if they release grand jury [testimony] to do so in a way that's protected," she said.

Sierra said prosecutors are well aware of the secrecy rules. "We do agree that there is a harm done by unauthorized and illegal disclosures," he said, adding that the DOJ will launch investigations if appropriate.

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