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WHITE-COLLAR CRIME

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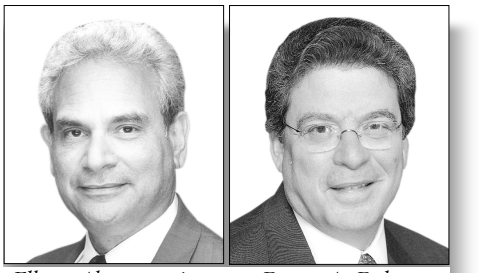
The Confidentiality of Sentencing Submissions

The submissions and proceedings in connection with the sentencing of a defendant often touch upon the most private and sensitive aspects of an individual's personal life. Many letters are submitted on behalf of the defendant with the intent that they not be made part of the public record, but are provided to the court for its consideration on a confidential basis.



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At the recent sentencing of Frank Quattrone in the U.S. District Court for the Southern District of New York, an attorney for Mr. Quattrone argued to the court that it would be detrimental for his client to be separated from his family for a long period because Mr. Quattrone's wife was chronically ill and his teenage daughter was suffering from psychological problems. In response, the judge disclosed in open court the teenager's condition. The judge declined a defense request to maintain the confidentiality of letters that had been submitted directly to the court in support of Mr. Quattrone in connection with his sentencing — particularly portions that dealt with Mr. Quattrone's family — stating that he was not aware of support letters being sealed in his time on the bench. The letters were then filed as part of the record of the case.[1]

Mr. Quattrone's lawyers immediately asked the U.S. Court of Appeals for the Second Circuit to order the district judge to seal or at least redact those letters discussing the medical and psychological condition of Mr. Quattrone's family members and containing details about his daughter's school and her extracurricular activities. The court of appeals, in a one-page order, agreed to seal those letters temporarily.[2]

The events surrounding the *Quattrone* (*USB v. Quattrone*, No. 03CR582(RO)) sentencing raise the question of the appropriateness and legality of releasing personal letters submitted to the sentencing judge in support of a defendant. Three cases out of district courts in the Second Circuit have addressed the issue: *United States v. Boesky*,[3] *United States v. Lawrence*[4] and, most recently, *United States v. Gotti*.[5] In addition, the Second Circuit itself previously has considered whether presentence reports should be disclosed to third parties in *United States v. Charmer Industries*.[6]

A Supreme Court case and a group of Second Circuit cases from the 1980s and 1990s dealing more generally with the right of access to criminal proceedings and judicial records, along with *Charmer*, provide the background for the more recent district court decisions. The courts deciding these cases relied on the First Amendment, common law or a combination of the two.

First Amendment

In *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*,[7] where the right of access to a pretrial suppression hearing was at issue, the Supreme Court held that the public enjoys a qualified First Amendment right of access to criminal proceedings. The Court stated that a right of access attaches when the process historically has been open to the public and that access plays a significant, positive role in the functioning of the particular process in question.

In accordance with *Press-Enterprise II*, the Second Circuit in *Matter of New York Times*[8] concluded that a qualified First Amendment right of access extends to judicial documents. Quoting *Press-Enterprise II*, the court held that access to pretrial motion papers in a criminal proceeding should not be denied the public unless "specific, on the record findings are made demonstrating that 'closure is essential to preserve high values and is narrowly tailored to serve that interest.' "

Common Law

In two opinions in the case of *United States v. Amodeo*,[9] the Second Circuit for

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the first time applied the common-law right of access, which predates the Constitution, to judicial records. In reviewing the propriety of a district court's decision to release a partially redacted version of a sealed investigative report filed with the court, the Court of Appeals in *Amodeo I*, while noting that the presumption of access is strong, also acknowledged that "the fact that a document is a judicial record does not mean that access to it cannot be restricted."

The Court of Appeals remanded the case to the district court to consider competing interests such as the law enforcement privilege to protect confidential law enforcement information and the privacy claims of a party whose actions were discussed in the report. On the second appeal, the court reiterated that "[t]he privacy interests of innocent third parties" were a paramount factor, noting that, "[c]ourts have long declined to allow public access simply 'to cater to a morbid craving for that which is sensational and impure.' " The court also instructed trial courts that the presumption of access "must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts."

The 'Charmer' Case

In *United States v. Charmer Industries* — decided some years before *Amodeo I* and *II* and *Matter of New York Times* — the Second Circuit held, without discussion of common law or the First Amendment, that presentence reports are not public documents and courts therefore have no obligation to disclose them. Faced with a request by the Arizona attorney general for disclosure of a presentence report, the *Charmer* court noted that "requiring disclosure of a presentence report is contrary to the public interest as it may adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused, and from sources independent of the accused, for use in the sentencing process." Thus, the court concluded that a district court should not disclose a presentence report absent "a compelling demonstration that disclosure of the report is required to meet the ends of justice."

Building on *Charmer* and the First Amendment and common-law cases, the more recent district court decisions concerning sentencing letters focus more specifically on issues such as whether the letters were submitted directly to the judge or filed with the court and whether the sentence was based significantly on the specific contents of letters. These decisions, which have uniformly rejected requests for the release of letters submitted to the court for consideration in sentencing, also consider the common practice in the respective districts concerning the release of sentencing materials.

'United States v. Boesky'

In the *Boesky* case, the American Lawyer Newspaper Group moved to unseal the presentence report and a handful of the letters sent to the court on the defendant's behalf relating to his sentence. These letters either were from third parties and contained text "which … le[ft] [the court] with the strong impression that the writers presumed that their letters would be confidentially treated, although the letters themselves do not say so" or were from the defendant's immediate family and "obviously of a confidential nature." Without any further discussion of the letters, the court denied the motion, noting that access to 35 letters that were attached to the defendant's presentence memorandum, which already had been made public in edited form, was not an issue.

In discussing the presentence report, Judge Morris E. Lasker noted that *Charmer* had analogized presentence reports to grand jury proceedings in explaining why they ordinarily should not be disclosable and concluded "that *Charmer* is controlling … and that American Lawyer has not met its burden of establishing a particularized need for the material contained in the presentence report." The court backed up its decision by "further review[ing] the presentence report" and finding that "disclosure of the report or any part of it is neither required nor justified to meet the ends of justice." Specifically, the court was influenced by the fact that the report "consist[ed] of material which is either confidential in nature, or readily known to the public, or available from other sources." The court also believed the public would be "thoroughly informed" as a result of a publicly available transcript of the hearing on the sentence and the open discussion that would take place at the actual sentencing.

Judge Lasker also observed that

> [i]t has been the universal practice in this district, and I believe in most … district courts throughout the country, to make probation reports and annexed material available only to the defendant, his counsel and the United States Attorney's Office. So emphatically is this the case, that the United States Probation Officer of this district advises me that he knows of no instance of the release of such information in the last 30 years, which is the period of his experience.

'United States v. Lawrence'

In *United States v. Lawrence*,[10] a 2001 case in the U.S. District Court for the Northern District of New York, the court made a point of separating the letters at issue there into two categories: those that had been submitted directly to the court and those that had been filed with the clerk of the court, including those attached to or explicitly referenced in the defendant's sentencing memorandum or other submissions. Relying significantly on *Boesky*, in addition to *Press-Enterprise II*, *Amodeo I* and *II*, and *Charmer* — the court held that under the First Amendment and common law, the press should not have access to the former but could obtain access to the latter.

As in *Boesky*, the letters at issue in

Lawrence "clearly evinced an expectation of privacy and confidentiality." The court found that these "privacy expectations of citizens," together with "the benefit of honest, uninhibited commentary on sentencing issues far outweigh[ed] the need for public access to these letters." The court worried about a "chilling effect" if letters such as those at issue in *Lawrence* "were routinely disclosed and made part of the public record." Also as in *Boesky,* the court was confident that "the media and the public were thoroughly informed at the sentencing hearing of the nature and quantity of the letters."

The court also made a couple of points not made in *Boesky*. First, the court noted that it had not relied on the specifics of any particular letter, but rather had been "impressed by the sheer quantity of letters" sent in support of the defendant. Citing *Amodeo II,* the court found that "the specific contents of the letters … did not play a significant role in the exercise of this [c]ourt's judicial power" and thus were of no value "to those monitoring the federal courts."

Second, the court was concerned that, like grand jury material, the letters contained "unsubstantiated opinions and expressions as to the character of [d]efendant and others and, in some instances, could contain damaging, and possibly untrue, allegations and statements that are not subject to cross-examination."

'United States v. Gotti'

The facts of *Gotti* are more involved and colorful than most. The assistant U.S. attorney who handled the case against Peter Gotti furnished to the New York Post several letters from a woman, Marjorie Alexander, who had a personal relationship with Mr. Gotti for 14 years. Ms. Alexander had submitted the letters directly to Judge Frederic Block, who referred to them during Mr. Gotti's sentencing while identifying the documents in the judge's sentencing file. At that time the court also referred to letters from the defendant's wife and son. Neither the government nor defense counsel had seen any of these letters before the sentencing.

The assistant U.S. attorney requested and received copies of the letters from the court, and then provided them to the Post while the court's decision as to whether they could be made public was pending. The court learned that the letters had been given to the Post when the newspaper printed excerpts from them in reporting the suicide of Ms. Alexander a few days after the sentencing.

The court stated in its opinion that its "normal practice was that personal letters to the [c]ourt in respect to sentencing were not routinely docketed with the clerk's office and remained in the [c]ourt's sentencing file." The court learned, however, that "there was no uniform practice by its colleagues as to when, if at all, sentencing letters should be docketed and made public" and thus decided to "research[] the issue" and publish an opinion, even if the determination was "somewhat academic."

In its lengthy opinion, the court identified the three possible standards for evaluating sentencing letters sent directly to the court: *Charmer,* the common law and the First Amendment. After reviewing the relevant cases, the court concluded that "the common law provides a perfect standard for evaluating the disclosure of sentencing letters since it embraces both the public's right to be assured that the court is appropriately attending to its judicial responsibilities and the privacy interests of third parties." The court further found that the public's right to know depends on whether the letters have "a significant impact" on the sentence.

In the *Gotti* case, the court chose to "give little weight to the common law presumption of access to the sentencing letters as they did not influence the sentence" and would "cater to a morbid craving for that which is sensational and impure." The court further noted that the letters "reveal[ed] the nature of the writers' personal relationships with the defendant," with Mrs. Gotti urging the court to impose a harsh sentence and Ms. Alexander asking the court for leniency. The court also was influenced by the fact that Ms. Alexander "presents herself as extremely emotionally labile" to the extent that "she undoubtedly would have experienced great emotional pain and anguish" had she learned the letters had been released.

The court set forth procedures it planned to follow in future sentencings concerning letters sent directly to it, including making all letters available to counsel prior to sentencing and publicly disclosing the general nature of such letters.

Conclusion

Should the Second Circuit choose to unseal any of the personal letters at issue in the *Quattrone* case that were submitted directly to Judge Richard Owen, it likely will cast grave doubt on the holdings in *Boesky, Lawrence* and *Gotti*. In all events, counsel should be mindful of the factors that courts have considered in determining what aspects of the record of sentencing proceedings will be deemed confidential.

1. See Chad Bray, "Quattrone Asks Appeals Court to Seal Some Support Letters," Dow Jones Newswires, Sept. 13, 2004, available at www.morningstar.com; Ann Woolner, "Why Quattrone's Prison Time Is Triple Stewart's," Bloomberg newswire, Sept. 10, 2004, available at www.bloomberg.com; Kara Scannell, "Quattrone Gets Prison Sentence of 18 Months," Wall St. J., Sept. 9, 2004; Reuters newswire, "Ex-Banker Quattrone Gets 18 Months Prison," N.Y. Times, Sept. 9, 2004.

2. See Associated Press, "Appeals Court Temporarily Seals Quattrone Sentencing Letters," Sept. 15, 2004, available at www.usatoday.com; Dow Jones Newswires, "Court Seals Letters in Quattrone Case," Wall St. J., Sept. 15, 2004; Chad Bray, "Quattrone Asks Appeals Court to Seal Some Support Letters," Dow Jones Newswires, Sept. 13, 2004, available at morningstar.com.

3. 674 FSupp 1128 (SDNY 1987).

4. 167 FSupp2d 504 (NDNY 2001).

5. 322 FSupp2d 230 (EDNY 2004).

6. 711 F2d 1164 (2d Cir. 1983).

7. 478 US 1 (1986).

8. 828 F2d 110 (2d Cir. 1987).

9. 44 F3d 141 (2d Cir. 1995) ("*Amodeo I*"); 71 F3d 1044 (2d Cir. 1995) ("*Amodeo II*").

10. 167 FSupp2d 504 (NDNY 2001).