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WHITE-COLLAR CRIME

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Government Attempts to Shield Its Witnesses From the Defense

The struggle to control actual and potential witnesses and, thus, retain primary possession of the facts, is a constant in most criminal proceedings and investigations.

The government uses a variety of techniques to deny the defense access to its witnesses ranging from clauses in cooperation agreements signed at the investigatory stage requiring the cooperator to deal only with the government to expressions that shared information could affect the strength of the government's sentencing pitch for a cooperating defendant.

In a recent prosecution involving the crash of the Staten Island Ferry,[1] the Office of the U.S. Attorney for the Eastern District of New York (the government) moved to prohibit the city of New York (the city) from interviewing its own employees during the pendency of the criminal case, after the city informed the government that it intended to share whatever information it obtained with the attorney for one of the indicted defendants.

The implications of corporations being denied access to their employees during criminal cases are far-reaching and potentially onerous to the defense function. Thus, exploration of the reasoning on the part of both sides to this unusual[2] dispute is informative.


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Background[3]

The criminal case arises out of the October 2003 collision of the ferry boat, Andrew J. Barberi, with a maintenance pier, resulting in 11 passenger deaths and numerous injuries. The city faces civil suits brought by the victims' families seeking damages in excess of $3 billion. These cases have been partially stayed during the pendency of the criminal proceedings. In August 2004, a federal indictment was unsealed against Patrick Ryan (among others), the former director of ferry operations, who is charged with 11 counts of negligent homicide pursuant to the Seaman's Manslaughter Act.[4] Mr. Ryan presently is scheduled to go to trial in April 2005.

In the immediate aftermath of the accident, the city interviewed 23 of its employees. In November 2003, the city, at the request of the government, agreed to suspend its interviews until the government had the opportunity to speak to the witnesses as part of its criminal investigation. The city and the government reached agreement in December 2003 for the city to resume interviewing its employees. By June 2004, the city had interviewed or had been given access to 56 of its employees.

When the government unsealed the indictment against Mr. Ryan in August 2004, the city issued a public statement supporting him. The city denied that he had been negligent in the performance of his duties and said it would assist and fund his defense against the government's charges. Mr. Ryan's alleged negligence, of course, is an important factor in the civil cases which the city is defending. After the indictment was unsealed, in October 2004, the city announced its intention to actively resume interviews of its employees, many of whom are expected to be witnesses for the government.

In November, the U.S. attorney moved to enlarge the stay in the civil cases or for a protective order barring the city from interviewing its employees. The government justified its attempt, stating, "[T]his unusual issue emerges only because of the unprecedented combination of the City's public pronouncement of a criminal defendant's innocence coupled with its stated intention to conduct interviews of [Mr.] Ryan's subordinates on whose information the charges against [Mr.] Ryan are predicated."[5]

In its papers responding to the government's motion, the city explained that it needed to speak to its employees about the accident to ensure the continued safe and efficient running of the ferry service, to defend the civil claims

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that have been filed against it as a result of the ferry collision and to assist in the defense of Mr. Ryan, "whom it believes the Government has charged unfairly, and whose conviction would prejudice the City's interests."[6]

The Legal Arguments

• **The Court's Authority.** In its motion papers, the government argued that the court has the power to prohibit the interviews that the city wishes to conduct of its own employees both through the court's "broad" and "inherently discretionary" authority and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.[7]

Relying on U.S. Supreme Court cases,[8] Court of Appeals for the Second Circuit cases,[9] New York district court opinions[10] and cases from other jurisdictions, the government argued that courts have the inherent discretionary authority, in the words of the Supreme Court in *Degen v. United States*, to "protect their proceedings and judgments in the course of discharging their traditional responsibilities."[11] This includes the power to issue stays and protective orders to protect the integrity and fairness of judicial proceedings. The government further contended that courts "have recognized that a criminal proceeding may be compromised by the liberal discovery rules that are applicable to civil cases"[12] and accordingly are permitted to intervene in civil cases "to avoid interference with the criminal case."[13] However, the government conceded that it had failed to find a case in which a defendant, party or other entity had been judicially precluded from conducting voluntary witness interviews outside of the discovery process.

The city, not surprisingly, argued that federal courts have no "inherent authority" to enjoin employers from speaking to their employees about pending cases and that "protecting" the criminal case does not include "restraining the City from using a means lawfully at its disposal to support its own litigation position." The city pointed out that no precedent exists for enjoining an employer from interviewing its employees about the subject of pending litigation and distinguished *Degen*, which it stated "had nothing at all to do with restrictions on discovery."[14]

In *Degen*, a case involving the "fugitive disentitlement doctrine," the district court struck a foreign citizen's claims in a civil forfeiture case because the defendant refused to submit to the court's jurisdiction in a related criminal matter. The Supreme Court found that the district court, by doing so, had overstepped its authority. The Supreme Court acknowledged that federal courts "have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." But, the Supreme Court also cautioned against the "danger of overreaching" and held that "[p]rinciples of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it."[15]

The magistrate questioned the government: "Protect? Protect you against [what]? You had unfettered [access to city employees] … to give you secret opportunities …."

Magistrate Judge Viktor V. Pohorelsky sided strongly with the city on the issue of "inherent authority" and specifically as to whether the court needed to act to "protect" the case, as urged by the government. During the hearing before him, Magistrate Judge Pohorelsky questioned the government: "Protect? You see, here's what I don't get. Protect you against? You had unfettered [access to city employees] and, in fact, they forwent the opportunity to speak to these witnesses for a year to give you complete and secret opportunities to speak to these witnesses."[16]

As noted above, the government also argued that in addition to the court's "inherently discretionary" power, Rule 26(c), also permits the court to bar the city from conducting employee interviews. The Advisory Committee Notes to the 1993 Amendments to Rule 26, the government pointed out, "explicitly recognize that discovery may encompass 'interviews of potential witnesses and other informal discovery.' "[17]

In response, the city argued that Rule 26(c) provides no basis for preventing the city from fact-gathering and cannot be used to enjoin conduct that does not involve any use of the court's processes.[18]

The city cited *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*,[19] where the Second Circuit held that Rule 26 "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes."[20] Magistrate Pohorelsky agreed with the city and denied the government's application. The government's appeal to Chief Judge Edward R. Korman is pending.

• **Undermining of Criminal Proceedings.** The government has further argued that, should the city conduct the interviews, it would undermine the criminal proceedings in several ways. One effect, the government contended, would be that employees would be presented with an untenable choice. According to the government, in light of the city's public support for Mr. Ryan and its post-indictment assertion of his innocence, employees (many of whom worked on the ferries) would have to either tell their employer's lawyers that the city's public pronouncements were wrong or defend themselves from the city's claims that they were unjustifiably unaware of the city's rules. The government expressed concern that city interviews "could be construed by the employees as an offer — not to be refused — to change or repudiate past statements or testimony in order to adopt the City's and Ryan's litigating positions."[21]

Citing the Supreme Court's opinion in *Garrity v. New Jersey*,[22] the government also expressed a specific fear that the city's interviews would interfere with potential perjury or obstruction of justice

prosecutions. The city, the government argued, exercises substantial sway over its employees, thereby creating the threat that the city's interviews of them would hamper potential perjury or obstruction prosecutions of the employees because the employees would argue that the city's power over them rendered their statements necessarily compelled. Finally, the government discounted any prejudice to the city in its civil cases noting the discovery stays in effect.

The city, of course, disagreed. It contended that the government has not been able to cite "a single example of a City employee who has felt spoken or unspoken pressure to say anything other than the complete truth, or who has experienced any consequences (positive or negative) as a result of the content of his or her statements."[23]

The city further contended that *Garrity* provides only that "if a municipal employee invokes his or her Fifth Amendment right to refrain from answering an employer's question, and if the employer forces the employee to answer the question on pain of termination, the employee's answer cannot be used against him or her in a subsequent criminal proceeding."[24] *Garrity* does not, the city argued, stand for the proposition that any questioning of employees by the city might lead to *Garrity* immunity, regardless of whether any employee invokes his or her Fifth Amendment privilege or has any reason to do so.

While dressed up in legal verbiage, the fight here deals with tactics. The government seeks to confine Mr. Ryan's access to information in accordance with the formalities of the Federal Rules of Criminal Procedure and the city seeks to expand Mr. Ryan's knowledge to enable him to win and thus reduce the city's potential civil liability.

Similar Action in California

A recent California case depicts a more blatant example of the government's coveting of witnesses. In the very different — though similarly high-profile — FBI spy case of *United States v. Leung*,[25] in which the defendant Katrina Leung was indicted on five counts of unauthorized possession and copying of classified materials, prosecutors entered into a plea agreement with the main witness in the case, who previously had been in a joint defense agreement with Ms. Leung, that prevented him from any "further sharing of information relating to this case with Leung, counsel for Leung, or the employees of counsel for Leung." Last month, Judge Florence-Marie Cooper of the U.S. District Court for the Central District of California rejected the government's contention that this wording did not prohibit the witness from being interviewed by Ms. Leung's attorneys and dismissed the charges against Ms. Leung due to prosecutorial misconduct. "In this case," the judge concluded, "the government decided to make sure that Leung and her lawyers would not have access to [the witness]. When confronted with what they had done, they engaged in a pattern of stonewalling entirely unbecoming to a prosecuting agency."

Conclusion

Witnesses, of course, belong to neither party to a proceeding. While the government has, in some instances, legitimate fears of obstruction of justice and witness intimidation, these issues arise far less frequently in white-collar cases. Attempts to conceal government witness identities and the substance of their testimony, while tactically advantageous, can impair the fairness of criminal cases.

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1. The writers of this article represented a subject of this investigation.

2. The government itself has conceded that its motion is "unusual." See Government's Motion for an Enlargement of the Stay or for a Protective Order at 7, *In re Complaint of the City of New York as Owner and Operator of the M/V. Andrew J. Barberi*, 03 CV 6049 (ERK/VVP), Nov. 5, 2004 (11/5 Govt Motion).

3. The sources for the procedural history and facts recited in this article concerning the ferry case are (1) the motion papers filed by the City and the government in connection with the government's motion before Magistrate Judge Pohorelsky for an enlargement of the stay or for a protective order; (2) the transcript of the 12/10/04 hearing before Magistrate Judge Pohorelsky and (3) the papers filed in connection with the Government's objections to Magistrate Judge Pohorelsky's 12/10/04 decision.

4. 18 U.S.C. §1115. Mr. Ryan and a second defendant are also charged with obstruction of justice (18 U.S.C. §1512) and making false statements to Government officials (18 U.S.C. §1001).

5. See 11/5 Govt. Motion at 8.

6. See City of New York's Opposition to Government's Motion for an Enlargement of the Stay or for a Protective Order at 3, *In re Complaint of the City of New York as Owner and Operator of the M/V. Andrew J. Barberi*, 03 CV 6049 (ERK/VVP), Nov. 23, 2004.

7. The government relied on that portion of Rule 26(c) which authorizes a court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense."

8. See *Degen v. United States*, 517 U.S. 820 (1995); *Landis v. North American Co.*, 299 U.S. 248 (1936).

9. See *United States v. International Brotherhood of Teamsters et al.*, 948 F.2d 1338 (2d Cir. 1991); *Securities and Exchange Comm. v. Chestman*, 861 F.2d 49 (2d Cir. 1988).

10. See, e.g., *In re Ivan Boesky Securities Litigation*, 128 F.R.D. 47 (S.D.N.Y. 1989); *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985).

11. 517 U.S. at 823.

12. Government's Memorandum in Support of Its Objections to the Dec. 10, 2004 Decision of Magistrate Judge Pohorelsky and in Support of Its Motion for an Enlargement of the Stay or for a Protective Order at 14, *In re Complaint of the City of New York as Owner and Operator of the M/V. Andrew J. Barberi*, 03 CV 6049 (ERK/VVP), Dec. 27, 2004 (12/27 Govt. Memorandum).

13. 517 U.S. at 827.

14. City of New York's Memorandum of Law in Opposition to the Government's Objections to the Dec. 10, 2004 Decision of Magistrate Judge Pohorelsky, and in Opposition to the Government's Motion for an Enlargement of the Stay or for a Protective Order at 6, *In re Complaint of the City of New York as Owner and Operator of the M/V. Andrew J. Barberi*, 03 CV 6049 (ERK/VVP), Jan. 14, 2005 (1/14 City Memorandum).

15. The city also argued against the government's reliance on a Second Circuit case, *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338 (2d Cir. 1991), where the union and its counsel appealed a district court's imposition of sanctions for alleged violations of a consent decree. The court of appeals held that courts have "inherent power … to assess costs and attorney's fees … where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," but that the case at issue presented no such facts. See 1/14 City Memorandum at 6-7.

16. Transcript of Dec. 10, 2004 Hearing before Magistrate Judge Pohorelsky (attached to 12/27 Govt. Memorandum) at 33.

17. See 11/5 Govt. Motion at 6-9; 12/27 Govt. Memorandum at 14 (quoting Advisory Comm. Notes).

18. See 1/14 City Memorandum at 4.

19. 710 F.2d 940 (2d Cir. 1983).

20. The city also cited *Feyemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319 (S.D.N.Y. 1997) ("None of the enumerated examples [in Rule 26(c)] provide a court with a basis for limiting the use of evidence obtained outside of discovery.").

21. 12/27 Govt. Memorandum at 20.

22. 385 U.S. 493 (1967).

23. 1/14 City Memorandum at 10.

24. Id.

25. No. CR 03-434, 2005 WL 40822 (C.D. Cal. Jan. 6, 2005).