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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Protective Orders and Civil Litigants With Potential Criminal Exposure

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Civil litigants frequently produce documents and provide testimony pursuant to protective orders with the expectation that, thereafter, they will be able to prevent the materials' public disclosure. A substantial risk exists, however, that the documents or testimony will later be made public, especially if they are used in connection with court proceedings. For civil litigants whose conduct has criminal implications, a separate but equally substantial risk exists that the materials will find their way into the hands of a government prosecutor.

In *United States v. Maxwell*, 2021 WL 2776658 (S.D.N.Y. June 25, 2021), U.S. District Judge Alison J. Nathan for the Southern District of New York recently addressed an attempt by the criminal defendant, Ghislaine Maxwell, to suppress evidence that she had produced pursuant to a protective order in an earlier civil litigation. Maxwell argued that because the evidence had been produced pursuant to a protective order, the government was now seeking to use it against her in violation of her Fifth Amendment right against compelled self-incrimination and her Fourth Amendment right against unreasonable searches and seizures. Judge Nathan rejected Maxwell's arguments, finding that (1) Maxwell had not been compelled to provide the evidence (she could have invoked her Fifth Amendment right and refused to do so), and (2) she had no reasonable expectation that the evidence covered by the protective order would be shielded from the government (because, as Judge Nathan put it, the protections offered by a protective order are "porous and ephemeral").

> The risks to civil litigants of providing incriminating evidence cannot be avoided through a protective order.

'United States v. Maxwell'. In 2015, Virginia Giuffre sued Maxwell for defamation, alleging that Maxwell defamed her by accusing her of lying about Maxwell and Jeffrey Epstein sexually abusing her. See *Giuffre v. Maxwell*, No. 15-cv-7433-LAP (S.D.N.Y.). Giuffre was represented by Boies Schiller Flexner (BSF). The judge presiding over the case, the late Judge Robert W. Sweet, entered a protective order that allowed the parties to designate documents and other information produced in discovery as confidential. As is often the case, the protective order prohibited the parties from disclosing confidential information to anyone other than people involved in the case, but it allowed the court to modify the order at any time for good cause after notice to the parties. The order also allowed the parties to use confidential information at trial, at which point the information would become public.

After entry of the protective order, Maxwell testified at two depositions. Her deposition testimony was designated as confidential pursuant to the protective order. In 2017, the parties settled the case. Thereafter, in 2018,

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the government opened an investigation into Epstein. In connection with that investigation, the government served a grand jury subpoena on BSF seeking to obtain documents from Maxwell's prior civil case. BSF informed the government that many of the requested document fell under the protective order, at which point the government applied ex parte for an order modifying the protective order to allow BSF to comply with the subpoena. Then-Chief Judge Colleen McMahon, who heard the government's ex parte application, granted the motion, and as a result, BSF produced the requested documents to the government, which included transcripts of Maxwell's depositions.

Maxwell thereafter objected to the government having obtained her deposition transcripts on the ground that they were covered by the protective order. Maxwell sought to suppress the evidence, claiming that she agreed to testify in the civil case only because of the protective order, and thus that the government's use of her deposition testimony against her would violate her Fifth Amendment right against compelled self-incrimination. Maxwell also argued that she had a reasonable expectation of privacy in the documents covered by the protective order, including her deposition transcripts, and thus, under the Fourth Amendment, the government should not have been able to obtain them without a warrant.

The Government Obtaining and Using Civil Deposition Transcripts Does Not Violate a Criminal Defendant's Right Against Self-Incrimination. In rejecting Maxwell's self-incrimination argument, Judge Nathan observed that to establish a violation of her right against self-incrimination, "Maxwell must demonstrate the existence of three elements: 1) compulsion, 2) a testimonial communication, and 3) the incriminating nature of that communication." 2021 WL 2776658, at *3 (citation omitted). Judge Nathan ultimately found that Maxwell could not establish "compulsion," and that her self-incrimination argument—that "she testified only because she believed the protective order … would prevent the Government from obtaining her testimony and using it in a subsequent criminal case against her"—was "expressly foreclose[d]" by "Second Circuit precedent." Id.

Citing multiple Second Circuit cases, Judge Nathan noted that "[a] Rule 26(c) protective order, no matter how broad its reach, provides no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution." Id. (citation omitted). Judge Nathan explained that, as in this case, a civil protective order may be "overturned or modified by another court in another proceeding"; it may be "limited by its terms to pretrial proceedings, in which case the parties must expect that confidential documents will come to light as the case progresses"; and a court may "unseal documents covered by a civil protective order in the public interest." Id. (citations omitted).

Because the protections provided by a protective order are "both porous and ephemeral," Judge Nathan observed that, under settled Second Circuit law, "a non-consenting witness may not be forced to answer potentially incriminating questions in reliance upon such an order." Id. at *4 (citation omitted). Accordingly, Maxwell could have asserted her Fifth Amendment right in her civil case and refused to provide incriminating information during her depositions. Id. Having failed to do so, Judge Nathan concluded that (1) Maxwell could not establish that she was compelled to provide the incriminating testimony, and (2) her Fifth Amendment right against self-incrimination thus did not prevent the government from obtaining her deposition testimony and using it against her in a subsequent criminal case. Id.

Judge Nathan also rejected an alternative argument raised by Maxwell: that BSF's act of turning over her deposition transcripts itself constituted unlawful compulsion. Id. Judge Nathan observed that "the act of producing documents in response to a subpoena implicates the Fifth Amendment only in narrow circumstances," specifically, "when the existence of responsive documents, rather than their content, is inculpatory." Id. Judge Nathan concluded that "[t]his is no such case," because the mere "existence of [the] deposition transcripts in Maxwell's civil case is not inculpatory," but rather "[i]t is the content of those transcripts that is at issue." Id.

A Civil Protective Order Does Not Confer a Reasonable Expectation of Privacy. Turning to Maxwell's Fourth Amendment argument, Judge Nathan observed that for the government to have needed a warrant to obtain the civil discovery materials, Maxwell would have to establish a "reasonable expectation of privacy in the documents produced during the civil litigation." Id. at *5. Judge Nathan found that Maxwell could not make the required showing, because although "[the] documents may not have been public," under the

protective order, "they were hardly private." Id. Consistent with the protective order, the documents could "be shared freely" with various categories of people—including "[f]act witnesses" and "[p]otential witnesses"—and "be publicly used at trial." Id.

Judge Nathan also found that Second Circuit precedent precluded a finding that "Maxwell had [a] reasonable expectation that documents covered by the protective order would remain shielded from view of the public or prosecutors." Id. Specifically, "Second Circuit precedent allows a court in a subsequent proceeding to modify a protective order," and "creates a strong presumption that [confidential materials that turn out to be relevant to a court's ruling] will be made public notwithstanding any protective order." Id. (citing cases). Judge Nathan noted that "[t]hese are not remote … possibilities," as "[e]ach of them predictably came to pass in this case." Id.

Accordingly, Judge Nathan found Maxwell's "subjectively harbored … belief" that, due to the protective order, the government would be unable to obtain her deposition testimony or other discovery materials to be "unreasonable." Id. "Because Maxwell had no reasonable expectation of privacy in documents shared with third parties during [her] civil case," Judge Nathan concluded that her Fourth Amendment rights against a warrantless search or seizure were not implicated when the government obtained the documents from BSF by subpoena. Id.

After rejecting Maxwell's foregoing arguments, Judge Nathan also declined to suppress the evidence under an additional argument Maxwell raised: that the government violated her due process rights by misrepresenting information about the status of its investigation to Judge McMahon in its ex parte application for a modification of the protective order. Id. at * 6. To prevail on this argument, Judge Nathan noted that Maxwell would have to establish both that (1) in support of its application, the government deliberately misrepresented facts to Judge McMahon, and (2) absent such misrepresentation, Judge McMahon would have denied the government's application. Id. at *7 (citation omitted). Judge Nathan found that Maxwell could not make the required showing, because, based on Judge McMahon's reasoning in granting the government's application to modify the protective order (i.e., that the government had demonstrated extraordinary circumstances justifying modification of the order), the allegedly omitted information, if disclosed, would not have caused Judge McMahon to deny the government's application. Id. at *8-9.

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'Martindell v. Int'l Tel. & Tel.' Does Not Provide a Basis for Suppression. Judge Nathan then turned to, and swept aside, Maxwell's final argument—that *Martindell v. Int'l Tel. & Tel.*, 594 F.2d 291 (2d Cir. 1979), provided an independent basis for suppression. Id. at *9. *Martindell* held that (1) a party should not provide materials to the government that are subject to a protective order absent a formal motion or subpoena, and (2) a court should modify a protective order on which a party reasonably relied only if the order was improvidently granted or upon a showing of extraordinary circumstances or compelling need. Id. at *2. After observing that Judge McMahon had found that the government had established the requisite extraordinary circumstances and that a substantial basis existed for Judge McMahon's decision, Judge Nathan declined to disturb Judge McMahon's "reasoned and supported decision." Id. at *9-10.

Conclusion

The risks to civil litigants of providing incriminating evidence cannot be avoided through a protective order. Just as normal civil litigants cannot be assured that a protective order will prevent their confidential information from being made public, civil litigants with potential criminal exposure rarely can rely on a protective order to prevent incriminating confidential information from being disclosed to the government and used against them in a subsequent criminal proceeding.