White-Collar Crime

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A One-Way Stay: Cautionary Tales From Parallel Proceedings

Should I stay or should I go now?
Should I stay or should I go now?
If I go there will be trouble.
An' if I stay it will be double.
—The Clash

BY MARANDA E. FRITZ AND ELI B. RICHLIN

The perils and pitfalls inherent in litigating against the U.S. Securities and Exchange Commission increase exponentially when the SEC brings its case as a parallel proceeding to a criminal indictment. The defense of the criminal action obviously takes precedence and, in that context, counsel must decide whether to accede to the government's usual application for a civil discovery stay or, as recently occurred in the *Martin Shkreli* matter, oppose it. Counsel who choose not to fight a stay of discovery in the parallel civil action rely in part on the belief that at least the stay goes both ways and will also prevent the SEC from pursuing discovery. However, recent proceedings demonstrate that, where the SEC is involved, discovery stays can be entirely one-sided, preventing only the defendant from gathering further information while the SEC continues to compile evidence that is then used in the pending civil and/or criminal actions. Counsel must now assume that the SEC can and will continue to gather evidence despite a court-ordered stay, changing the calculus for defense counsel and their clients when considering whether to oppose the government's motion for a stay of discovery.

Strategic Approaches

Defense counsel have long been of two minds on the issue of stays of discovery in parallel proceedings. Counsel quite rightly worry about whether the client has the resources to litigate the civil action while under indictment, whether counsel will likely be pursuing resolution of both proceedings (and wants not to antagonize either the SEC or DOJ), and potential collateral estoppel in follow-on litigation. Further, the client would likely have to assert the Fifth Amendment in any deposition, leading to the imposition of an adverse inference that may theoretically pave the way for the SEC to obtain summary judgment.[1]

On the other hand, defense counsel will have the opportunity to test the government's allegations and develop their defense through discovery devices that are unavailable under state and federal criminal procedural laws, including depositions of key government witnesses. In fact, shielding their witnesses from depositions forms a principal reason that prosecutors routinely seek stays of parallel civil proceedings.

> For a number of years, there was **considerable pushback from counsel and the courts** against the government's device of commencing parallel proceedings but then immediately seeking a stay of the civil case.

Response by Courts

Because so many defense counsel have welcomed a stay of the civil case, the government's motion has often been granted without opposition. For a number of years, however, there was considerable pushback from counsel and the courts against the government's device of commencing parallel proceedings but then immediately seeking a stay of the civil case.[2] In *SEC v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005), the government sought a stay because the continuation of the civil case would allow the defendant to obtain more discovery than would be available in the criminal case. Judge Jed S. Rakoff took the view that, having coordinated the initiation of two cases, the government should not be able to decline to litigate the civil case to maintain a strategic advantage. According to the court, "having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant," the government "wish[es] to be relieved of the consequences that will flow if the two actions proceed simultaneously." Id. at 91.

Judge Frederic Block reached the same result in *SEC v. Cioffi*, No. 08-CV-2457 (FB)(VVP), 2008 U.S. Dist. LEXIS 86088 (E.D.N.Y. Oct. 23, 2008), which involved civil and criminal charges against two former Bear Stearns fund managers. In seeking a stay of the civil action, the U.S. Attorney's Office argued that the defendants would gain the "unfair advantage of broad civil discovery rules, to the detriment of the government and its witnesses." Government's Memo. of Law in Support of Application to Intervene and to Stay, *SEC v. Cioffi*, No. 08-CV-2457 (FB)(VVP) (E.D.N.Y. Aug. 27, 2008), ECF No. 9-4. The court noted that the government had elected to file a civil case based on the same conduct, and so the circumstance was of the government's making. As for the issue of prejudice, the court reasoned that the defendants' receipt of discovery would cause no harm to the government except to reduce the government's ability "to maintain a tactical advantage." *Cioffi*, 2008 U.S. Dist. LEXIS 86088, at *4. The court therefore denied the request for a stay but confirmed that it would entertain any specific objections that implicated legitimate governmental concerns. Other courts, too, have rejected government efforts "to take advantage of the benefits of dual prosecutions, but then complain when the defendants, too, find ways to benefit from the otherwise very burdensome task of having to defend on two fronts at the same time." *Bray*, 98 F. Supp. 3d at 222 (denying stay and holding that the government's concern "about having to reveal discovery earlier than it might otherwise have to do … is a strategic and tactical consideration that has little to do with the public interest or the interests of the defendants").[3]

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Spinning **Questions of Fact** Into **Questions of Law:** 'U.S. v. Menendez'

BY LEE VARTAN AND JOSHUA McLAURIN

The U.S. Court of Appeals for the Third Circuit recently held oral argument in *United States v. Menendez*, the high-profile criminal case against sitting U.S. Sen. Robert Menendez of New Jersey.

In this second trip to the court, Sen. Menendez appeals the district court's denial of his motion to dismiss the indictment on the grounds that the Speech or Debate Clause of the U.S. Constitution, Art. I, § 6, cl. 1, prohibits his prosecution. Sen. Menendez primarily casts the district court's analysis as distorted by a misunderstanding of the Speech or Debate Clause, i.e., legal error that calls for more favorable de novo review. In turn, the government defends the district court's understanding of the governing law and urges the Third Circuit to look only for clear error in the district court's factual determinations resulting in denial of the privilege. Thus, although the substantive issue is rare, the tactical choices by Sen. Menendez and the government are not. Sen. Menendez's choices offer useful examples of what works—and what does not—when an appellant is stuck with bad facts on appeal and seeks to shift the focus to a legal question.

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Case Background

The government's indictment alleges that Sen. Menendez accepted bribes from his friend, Florida doctor Salomon Melgen, in exchange for lobbying a variety of government officials on behalf of Dr. Melgen's personal interests. Specifically, the indictment alleges that Menendez used the power of his office to, among other things, pressure the U.S. State Department to influence the Dominican Republic in its performance of a contract with Dr. Melgen; stop U.S. Customs and Border Protection from making donations to the Dominican Republic that would threaten the contract; and influence the outcome of an administrative action by Centers for Medicare and Medicaid Services to recover millions of dollars in overbillings owed by Dr. Melgen. Sen. Menendez's defense is that these alleged actions were legislative acts for which he enjoys immunity from prosecution under the Speech or Debate Clause.[1]

Initially, the scope of the Speech or Debate Clause appears to be too narrow to provide protection for the indicted acts: "for any speech or debate *in either House*, [members of Congress] shall not be questioned in any other place." U.S. Const., Art. I, § 6, cl. 1 (emphasis added). But the U.S. Supreme Court has interpreted the Clause as granting absolute immunity from prosecution for any "acts that occur in the regular course of the legislative process and [inquiry] into the motivation for

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Preparing a Target To Testify Without Immunity

BY TIMOTHY W. HOOVER

White-collar criminal defense practitioners are experienced in guiding their clients through the federal grand jury process in frequently reoccurring settings. Those include: a client subject or target who will assert the Fifth Amendment privilege but is called to do so before the grand jury; a client who has received immunity or a non-prosecution agreement, and is called to testify; and, a client who is called to testify as a witness.

Much less frequent are investigations where the client is a—or the sole—target of the investigation, and the client testifies in the grand jury without immunity or any protection whatsoever.

Such a move is extremely risky. First, there may be no real chance to avoid an indictment. Second, in cases where the proof is borderline, the client's story gets set in stone, and is impeachment fodder for the prosecutor to use when the client takes the stand at trial. Third, there is always the danger of an obstruction or perjury charge based on alleged false grand jury testimony.

This conventional wisdom of the high risk involved holds in most cases, but not in all of them. In some investigations the benefits of testifying are identifiable and make it a real option that should not be hastily dismissed, especially where there is clear information about what the investigation is about, the client has a pellucid, compelling story to tell, and the impact of an indictment would be devastating to the client's career, employment, family, reputation, and finances. In these circumstances, the high risk is sometimes outweighed by the high reward of potentially avoiding prosecution.

Allowing a Target to Testify

Unlike in most New York[1] grand jury proceedings, targets (and subjects) have no right to testify before a federal grand jury. But Assistant U.S. Attorneys (AUSAs) usually will accommodate such requests to testify. And §9-11.152 of the U.S. Attorneys' Manual[2] recommends that AUSAs give "favorable consideration" to such a request, so long as the witness: waives the privilege against self-incrimination, on the record, before the grand jury; is represented by counsel (or knowingly appears without counsel); and, consents to full examination under oath.

Whether the client will have the ability to even consider this option depends on whether he is aware of the investigation. The onus is on counsel to notify the AUSA if the client wants to testify. AUSAs are encouraged to notify targets of an opportunity to testify before the grand jury in "appropriate cases," but AUSAs are not required to provide notification, and frequently do not.[3] Where the target learns of an investigation that is well under way, there may be an extreme time crunch and need for rapid investigation and evaluation of options.

Whether to Testify?

Certain types of investigations lend themselves to more serious consideration of a target testifying (apart from whether the factual background makes testifying a viable option).

Investigations based on a discrete incident or incidents that are core to the potential charges are more likely candidates than broad-ranging, years-long conspiracies.

Investigations where there is a strong likelihood that, if indicted, the client would take the stand at trial, also are better candidates. However, the fewer prior statements by the client regarding the matter, whether by electronic mail or otherwise, the better.

And situations where the client has not previously proffered are also stronger candidates. A prior proffer gives the AUSA an obvious preparation and strategic advantage, to say nothing of the fact that an indictment is being sought notwithstanding the client's prior explanation.

And, certain types of potential defendants—such as police officers in criminal civil rights excessive force investigations—are better candidates to testify.

A crucial consideration beyond understanding the AUSA, and whether she will give your client a fair opportunity to testify, is understanding what is actually under investigation.

> The **onus is on counsel** to notify the AUSA if the client wants to testify. AUSAs are encouraged to notify targets of an opportunity to testify before the grand jury in "appropriate cases," but **AUSAs are not required to provide notification,** and frequently do not.

Defense counsel must demand from the AUSA advance notification of what incidents or conduct the investigation relates to (or "covers"). Nothing in the U.S. Attorney's Manual mandates such disclosure. But a careful reading suggests that it should be provided by the AUSA so that the "appearance of unfairness" is avoided when the target testifies.[4] Defense counsel, in advising the AUSA that the client wants to testify, should indicate that the client desires to do so, but demands and requires sufficient information from the AUSA about the incidents under investigation (including dates/locations as appropriate) and the criminal charges being considered. The AUSA may not provide everything that is requested, but enough information should be given to guide the preparation and inform whether the client actually testifies.

Interactions With the AUSA

Counsel should be prepared to immediately engage the AUSA on whether the client will testify. And counsel should deal from the strongest possible position. Weak proclamations that the client may want to testify or is deciding whether to testify, without any actual intention to do so, are ineffective. Similarly, mixing plea negotiations with discussions on the target testifying do nothing to advance the ball for

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BY JOSEPH W. MARTINI AND ROBERT S. HOFF

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Individuals Face **New Challenges** Following Yates Memo

BY JOSEPH W. MARTINI AND ROBERT S. HOFF

It is never a good time to be an individual under criminal investigation. While corporate punishment is often harsh, involving fines, reputational damage and possible suspension and debarment, individuals facing criminal prosecution are confronted with a potential loss of liberty, forfeiture and fines.

Every decision made in response to a criminal investigation is significant. The recently issued Yates Memorandum has redoubled the complexity of advising an individual with potential criminal exposure.

The Yates Memorandum makes individuals a focus of the U.S. Department of Justice's enforcement efforts, and requires a company to disclose all information about individual wrongdoing in order for the company to be considered for cooperation credit.[1] Because of the Yates Memo's focus on individuals, employees of companies may be reluctant to cooperate in civil lawsuits and internal investigations for fear—justified or not—that what they say will be disclosed by their employer to the DOJ in an attempt to garner cooperation credit. This, in turn, raises difficult issues about whether to assert one's Fifth Amendment right against self-incrimination and whether to refuse to cooperate at all in a company's own internal investigation. Of course, refusing to cooperate in an employer's investigation can have consequences all their own, but perhaps not as dire as the alternative. Individuals and their counsel will have to navigate these challenging issues carefully as the Yates Memo metastasizes into daily prosecutorial decision-making.

Issue Triggered by the Yates Memo. On Sept. 9, 2015, the DOJ issued a policy memorandum authored by Deputy Attorney General Sally Yates that signaled a sea change in how the government investigates and prosecutes cases of corporate wrongdoing. Simply put, the Memo places a significant focus on prosecuting responsible individuals, not just amorphous corporations. The emphasis on individual accountability is not surprising given the tenor of public opinion toward Wall Street in the wake of the most recent financial crisis.

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The Yates Memo marks an official policy shift whereby companies under investigation, in order to cooperate, *must* provide to the Department of Justice *all* relevant facts about individuals involved in corporate misconduct in order to be eligible for *any* cooperation credit. More particularly, the Memo states: "Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."[2] And it is only by meeting that threshold requirement of providing all relevant facts that companies

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will even be considered *eligible* for credit. The government will still evaluate the extent of that credit, if any.[3] In other words, the DOJ has established an "all or nothing" standard for companies under federal investigation: If the government believes that a company has failed to either investigate or turn over all of the factual information about individual wrongdoers involved in an alleged misdeed, the company's cooperation will not be considered a mitigating factor in the government's charging decision.

This policy shift creates serious challenges for corporations about which many commentators have written. But here, we focus on the consequences and challenges facing corporate employees.

It is not unusual for conduct that gives rise to white-collar criminal investigations to also trigger civil lawsuits or investigations, or corporate internal investigations. Because white-collar matters often involve a civil and criminal component, an employee might find his or her corporate employer under investigation for criminal wrongdoing by the DOJ at the same time that a regulator such as the SEC or a private plaintiff is investigating the matter for civil liability. Additionally, a company may also be conducting its own internal investigation of the matter, knowing that the DOJ is lurking with potential criminal charges. Individuals who are being deposed in a civil lawsuit or interviewed in an internal investigation therefore may be forced to grapple with a difficult choice of what to do in the face of investigations into their employer's conduct from multiple angles and multiple actors.

A corporate employee asked to testify in a civil suit or asked to submit to an employer's interview during an internal investigation in connection with allegations of misconduct must consider that his or her employer has an incentive to find individual wrongdoing and to turn all information over to the DOJ to qualify for cooperation credit. Furthermore, the DOJ's pronouncement requiring the disclosure of all pertinent facts could cause companies to choose to disclose both privileged as well as non-privileged communications and documents. Although the Yates Memo does not explicitly ask companies under investigation to waive attorney-client privilege, the "all or nothing" nature of the directive puts immense pressure on companies to serve up implicated employees to the government, regardless of whether the relevant evidence is privileged. While companies and the DOJ will likely attempt fairly and reasonably to identify whether conduct constitutes civil or criminal wrongdoing, the Yates Memo unavoidably incentivizes company counsel to find improper conduct to demonstrate complete cooperation and incentivizes prosecutors who have been instructed to prosecute individuals as well as corporations that engage in wrongful conduct.

Take, for example, an insider trading investigation. An employee may be asked to submit to an interview by an outside law firm conducting an internal investigation into trades in the company's stock. At the same time, the SEC, civil plaintiffs, and the DOJ may be looking into the trades. At the interview, the employee is given the usual Upjohn warnings—that the law firm conducting the interview represents the company, not the employee, and that the investigation is privileged but the company can decide to waive privilege and share the information the employee provides with outsiders, including the government. The employee does not believe she did anything wrong, but she is in a tough spot because her employer may be more sensitive, after the Yates Memo, to try to find evidence of individual wrongdoing.

In the past, employees who did not believe they did anything wrong and who believed their employer did not think they did anything wrong, routinely cooperated with internal investigations. In theory, that should not change because of the Yates Memo. An individual who legitimately does not believe she engaged in any wrongdoing should still be able to cooperate in an internal investigation and give civil testimony without fear that her conduct will be the subject of civil or criminal charges by the DOJ. But the practical reality may be different.

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Companies need to protect themselves in response to government investigations, and they often do that by cooperating with the government and then asking the government to forgo prosecution in favor of a deferred prosecution agreement or some other lesser charge. Cooperation credit continues to be the Holy Grail but now *requires* the company to provide *all* information about individual employees' misdeeds. A company therefore may need to try to ferret out individual wrongdoing from the moment it starts an internal investigation. That could mean more aggressive investigation tactics, more frequent waiver of privileged communications, and an interpretation of facts and circumstances that trends toward a finding of individual wrongdoing versus a more defensive posture by the company. And the individual employees are caught squarely in the cross-hairs.

Refusing to Cooperate in Investigations or Invoking the Fifth Amendment in Civil Cases. One way for the individual to protect herself in an internal investigation is to refuse to answer the investigator's questions. The company cannot force an employee to provide information, but there certainly may be employment consequences for the uncooperative employee, including termination.

An option in civil cases, where the employee is asked to give deposition testimony but is concerned about parallel criminal proceedings, is to invoke the privilege against self-incrimination. The well-known Fifth Amendment privilege against self-incrimination—or "right to remain silent"—is a bedrock of our criminal justice system.[4] In practice, however, navigating the Hobson's choice of deciding whether to invoke the privilege against self-incrimination is difficult where there are civil proceedings that parallel a criminal investigation. The Yates Memo has made it even more difficult for individuals to decide whether to give testimony in a civil matter when there is a prospect of criminal prosecution hanging overhead.

It is easy enough for an individual to decide not to speak with a criminal prosecutor when the individual is a known subject or target of a criminal investigation. But what if the individual is giving a deposition in a civil case and there is only the possibility of a parallel criminal matter relating to the same conduct? The calculus behind an employee's decision whether to testify in that civil case has long yielded murky tradeoffs: On the one hand, talking could result in self-incrimination for the employee; on the other hand, not talking could damage his or her or the company's defense in a civil suit, as triers of fact in federal civil proceedings are permitted, in some cases, to make a negative inference based on a witness's invocation of the Fifth Amendment.[5] Moreover, an individual's invocation of the Fifth Amendment can result in the DOJ drawing an adverse inference in connection with a civil charge against the individual, which the DOJ is authorized to pursue, and which the Yates Memo encourages, when appropriate. In addition, an individual's refusal to testify could result in adverse employment actions.

The Yates Memo makes this decision even more difficult. Now, an employee needs to consider that her employer may be looking for wrongdoing to obtain cooperation credit, which could be motivation for employees to invoke the Fifth Amendment more readily than they did in the past. However, invoking the Fifth Amendment is not uniformly an available option. As the Supreme Court said many years ago, the protection of the Fifth Amendment "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."[6] A witness cannot simply declare that, by testifying, he will incriminate himself.[7] It is possible that an employee's fear that her employer will consider her statements evidence of wrongdoing will cause the employee to invoke the Fifth Amendment where she is not otherwise justified in doing so. This could raise significant questions for courts that are tasked with assessing the appropriateness of invoking the privilege.[8]

Conclusion. How the DOJ, companies and individual employees respond to the Yates Memo is a work in progress. But one thing is certain: The Memo's focus on individual accountability gives rise to difficult choices that employees, employers and counsel will have to consider when the government comes knocking.

1. Sally Quillian Yates, U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (2015) (emphasis in the original).
2. Id.
3. Id.
4. U.S. Const. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").
5. See, e.g., *Louis Vuitton Malletier S.A. v. LY USA*, 676 F.3d 83, 97-98 (2d Cir. 2012) ("A defendant in a civil proceeding who invokes the Fifth Amendment as a result of an overlapping criminal investigation or proceeding "risk[s] the adverse inference arising from [his or her] assertion of the privilege.").
6. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
7. Id.
8. Id. at 486-87.

Questions

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those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The reasoning underlying the Supreme Court's interpretation of the Clause is simple: Not all legislative activity takes place within the Capitol building, and separation of powers requires that Congress be able to engage in its deliberative and legislative processes without undue interference. Sen. Menendez's defense is an attempt to appeal to this basic practical reality of American government.

The challenge for Sen. Menendez is that he must prove his various alleged lobbying efforts were part of any legislative process. His first opportunity to make such a showing came in advance of the indictment, when certain grand jury witnesses invoked the privilege under the Clause on his behalf and refused to testify. The district court compelled their testimony, and Menendez appealed, asserting before the Third Circuit for the first time that his communications with other government officials were legislative in nature as opposed to political activity on behalf of a single interest. The panel held that the record was too sparse to rule outright on the issue. Distinguishing between acts that are "manifestly legislative"—such as speaking on the floor of a chamber of Congress—and more "informal" activity that could be either legislative or political depending on context, the panel concluded that Sen. Menendez's acts were not manifestly legislative and that further fact-finding was needed "regarding the content and purpose of the acts and communications." *In re Grand Jury Investigation*, 608 F. App'x 99, 100-01 (3d Cir. 2015).

On remand, the district court followed the Third Circuit's mandate to perform a "careful analysis of the record evidence already before [it], including the contemporaneous emails, calendar entries, and notes related to each communication." Id. at 101. In one example, the district court referenced the memorialized understanding of an assistant secretary within the State Department that one of the indicted communications was solely about Dr. Melgen's interests. Relying on this sort of detailed circumstantial evidence, the district court analyzed each indicted act individually and found that Sen. Menendez's efforts were predominantly "case work," or political activity unprotected by the Speech or Debate Clause. See *United States v. Menendez*, Criminal No. 15-155, 2015 WL 5682403, at *10 (D.N.J. Sept. 28, 2015); see generally *Brewster*, 408 U.S. at 512; *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994). In reaching this conclusion, the district court rejected Sen. Menendez's arguments that each act represented a broader legislative policy preference or amounted to "oversight" of executive actions by Congress.

Parties' Arguments on Appeal

Given the district court's careful and detailed factual support for its conclusion that the indicted communications were not legislative, Sen. Menendez has spent less effort challenging the court's factual findings as clearly erroneous on appeal. After all, the district court's findings involved judgments about Sen. Menendez's intentions, which are exceedingly difficult for appellate judges to question on a cold record, let alone to find clearly erroneous. Instead, he primarily focuses on a strategy that often offers the only hope for reversal in these circumstances: He argues that the district court's factual findings rest on an error of law. Sen. Menendez zeroes in on the district court's mysterious, unqualified proclamation that "[a]ttempting to influence the Executive Branch is … a non-legislative activity." See id. at *3.

Given the district court's careful and detailed factual support for its conclusion that the indicted communications were not legislative, Sen. Menendez has spent **less effort challenging the court's factual findings** as clearly erroneous on appeal.

This statement has a basis in Supreme Court precedent, but the way the district court cites it is not as clear as it could be. The Supreme Court has held that, although "[m]embers of Congress may frequently be in touch with and seek to influence the Executive Branch of Government … this conduct, though generally done, is not protected legislative activity." *Doe v. McMillan*, 412 U.S. 306, 313 (1973) (internal quotation marks omitted). To read this principle as consistent with later cases is straightforward; the implication is just that a legislator's attempt to influence the Executive Branch is not automatically sufficient on its own right to trigger protection by the Speech or Debate Clause. The error of law would be to read this principle to mean that no attempt to influence the Executive Branch *can* be a legislative act. Thus, Sen. Menendez argues that such a categorical rule, if applied strictly, runs counter to the Third Circuit's clear guidance that "informal" oversight could be legislative depending on the context.

One could see how the court might conclude that the district court erred in this way. For example, in analyzing Sen. Menendez's contacts with Secretary of Health and Human Services Kathleen Sebelius, the district court seemed to base its conclusion on its observation that the communication "was an attempt to influence CMS rather than an attempt to gather legislative information." See id. at *13. There would have been room to argue that the district court focused impermissibly on whether Sen. Menendez simply desired a certain outcome, when the relevant question would have been "for whom" or "for what broader purpose."

Nevertheless, Sen. Menendez mostly focuses his argument on a theory of protected legislative oversight that would immunize a broad swath of legislators' activities. To begin, he cites several secondary authorities observing that Congressional oversight takes different forms and relies on a complex web of informal interactions. His implication is that efforts to persuade executive officials to take individual actions can be part of a much broader scheme of legislative oversight. He then asserts, as a consequence, that the Speech or Debate Clause provides unqualified protection to the "informal" category of legislative actions on which the Third Circuit refused to rule categorically in its first panel opinion. See, e.g., Appellant's Br. at 13 ("'[I]nformal legislative fact-finding and informal oversight' are protected.") (citing *In re Grand Jury Investigation*, 608 F. App'x at 100).

This view appears to be directly contrary to the first panel opinion. Rather than hold that the privilege available under the Clause shields him from any inquiry as to the purpose of any oversight efforts, the panel held that the Clause requires further inquiry when the nature of the oversight is ambiguous as to its legislative or political nature. In its response brief, the United States asserts that Sen. Menendez's definition of protected "oversight" would explode the scope of the Speech or Debate Clause and outlines how Third Circuit law addresses different types of oversight:

> protected oversight (i.e., manifestly legislative conduct, such as "committee hearings," *McDade*, 28 F.3d at 300), unprotected oversight (i.e., manifestly non-legislative conduct, such as "routine casework for constituents," id.), and a middle category of oversight that is neither manifestly legislative nor manifestly non-legislative, but requires further inquiry to determine its legislative or non-legislative character (e.g., "letters or other informal communications to Executive Branch officials from committee chairmen, ranking members, or other committee members," id.).

Appellee's Br. at 30. Under this framework, Sen. Menendez's characterization of governing law appears incorrect.

Conclusion

It appears likely that the Third Circuit will affirm the district court's denial of Sen. Menendez's motion to dismiss. The case is instructive for practitioners who find themselves stuck with bad facts on appeal. The most strategic decision available may be to argue an error of law, especially if the factual findings are of a kind that are difficult to question. *Menendez* offers two main lessons for such cases. First, appellants must be extremely careful in developing their own theory of the governing law. A party cannot credibly argue that the district court misstated the law if the party makes a similar mistake. Second, a theory of the district court's error of law is stronger to the extent an appellant can cite specific clues that the district court has misunderstood the governing law.

1. It is undisputed that the government may prosecute Sen. Menendez for allegedly receiving bribes in exchange for promised actions. Sen. Menendez argues, however, that the government may not rely on the indicted acts themselves to prove its case.

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Immunity

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your client. A target testifying is most likely to be successful when the defense position is clear: The client desires to and plans to testify but requires sufficient notice of what is being investigated; the client should not be indicted because he committed no crime; even if the AUSA could get an indictment given the low threshold for one, there are substantial considerations as to why he should not be indicted; and, if the client is indicted, the matter will be aggressively litigated through a jury verdict.

Pressing the AUSA for the incidents under investigation is crucial. What the AUSA will share—or whether anything is shared—will go a long way toward determining whether the client will testify or not. Counsel should also press the AUSA for an advance opportunity to review any evidence, documents, or video/audio that the AUSA will show to the target. The AUSA may refuse to do so, but may at least describe the types of evidence or documents to be used, and whether video or audio exists.

A crucial aspect of the pre-testimony discussions is getting the AUSA to commit to allowing the client to provide narrative testimony regarding his conduct and the incident (or incidents). The narrative serves several purposes. It allows the client to provide relevant personal background. It allows the client to more fully explain his actions regarding the events under investigation. And, it allows the client a chance to reveal, through his manner of testifying, his good personal character that will appeal to grand jurors who have an open mind and who are carefully listening. AUSAs often will permit the narrative testimony, although they may try to restrict it once the client is testifying. Counsel should insist on the opportunity and, based on strategic considerations, negotiate when it is to occur. Savvy prosecutors may offer the opportunity at the beginning of the testimony, before any questions are asked, so that the narrative has little context, takes place without the witness knowing the exact incidents that are going to be examined, and devolves into a jumbled ramble. A narrative taking place at or near the end of the questioning allows the witness to more surgically fill in the details that the AUSA neglected to ask about or glossed over.

Counsel must seek to determine whether the AUSA is going to ask the grand jury to indict immediately after the client testifies. Some AUSAs will tell you in advance that they will not, because, unsurprisingly, they want to the opportunity to call additional witnesses or do not want to convey that the grand jury process is a mere formality and that your client's testimony is meaningless. After all, many AUSAs want the client to testify. Counsel usually should ask for an opportunity, post-testimony, to meet with the prosecutors to discuss the reasons why an indictment should not be sought. If an AUSA states that she or he intends to seek an indictment immediately after the client testifies, counsel may want to meet face-to-face with the prosecutors or a supervisor before the client testifies to discuss the importance of the grand jury process, the impact an indictment will have on an innocent client, and in broad strokes why the client's testimony will establish that the client is not guilty.

The AUSA will likely provide a written waiver of rights document for the client to sign before the testimony, and will go over the waiver with the client in the grand jury. The client has little choice but to sign the document. However, counsel should make clear that the waiver of rights relates only as to incidents disclosed by the AUSA that the AUSA intends to ask about. If the client is asked about other incidents, he reserves the right to assert the Fifth Amendment.

Preparation of the Client

Many of normal preparation benchmarks for a witness with immunity will be applicable to the target testifying without immunity, such as setting the scene, mastering the facts of each incident, preparing for aggressive questioning, and holding three or more extensive preparation sessions (including a final one with staff playing the role of grand jurors). But there are special preparation issues that should be canvassed with the client.

They may be rare, but certain cases are tailor-made for a **target testifying in the grand jury without immunity.**

Unlike the deposition witness or the witness with immunity, this *is* the time for the target to tell his story. The client should be responsive to the questions that are asked, but should be ready to give more expansive answers to give a fuller picture of the incidents at issue.

The lawyer and client must work extensively on the accurate narrative testimony that the lawyer should insist the client be given an opportunity to provide. There are at least three key aspects of the narrative testimony: relevant personal and professional background (without a gratuitous resume dump), especially any professional characteristics/training or medical/memory/stress issues that tie into the incidents under investigation; a discussion of each incident under investigation, designed to cover favorable areas or details that the AUSA ignored or breezed over; and, a brief wrap-up or concluding statement that provides a careful appeal to the grand jury as to the lack of criminality of the client's conduct. The narrative needs to be accordion-like, because the client may have covered relevant points in response to questions.

While the client will be prepared to speak to counsel at any time and, if absolutely needed, assert the Fifth Amendment privilege, both of these things are contrary to making a positive impression on the grand jurors and, except for surprise questions or undisclosed incidents, should be avoided if possible. Any break request should be couched as generically as possible.

Beyond just being respectful, humble and remaining non-argumentative, the client must hold his ground under questioning that is unfair, argumentative, or hypothetical. A client's testimony that is reasonable and firm in the face of unreasonableness will resonate with grand jurors.

The client needs to be prepared to be observant and to mentally note what occurs in the grand jury, beyond just the simple questions and answers. Was all of the narrative delivered? What exhibits were used and if recordings were used, were they excerpts or complete? How much time was spent on what incidents? And, how many grand jurors were present, and what were their reactions to the questions and answers that stood out. This information can be crucial in helping counsel understand the chances of an indictment.

During the Testimony

During the testimony, three points are crucial. First, the attorney should be seated as close to the grand jury room as possible. Not three offices away, or down the hall. Second, particularly when the client comes out near the end of the testimony when the AUSA is determining what questions the grand jurors have, counsel should determine from the client whether the client was given a fair opportunity to get all of the key narrative testimony points out. If the client has not, counsel should intervene with the AUSA to make sure the opportunity is given, at that time. Third, if the client comes out to talk to the attorney, the attorney and client should resolve the issue as quickly as possible.

After the Testimony

The demeanor of the AUSA immediately after the session, what is said, and is not said, and what the AUSA believes the next steps are, can provide important clues about how the session went.

Apart from the comprehensive, immediate debriefing of the client, counsel should consider demanding that the AUSA present any other exculpatory information that exists to the grand jury, whether the information is truly exculpatory or simply casts doubt on an aspect of the potential case (such as civil suits by victims or witnesses against the client). AUSAs are afforded discretion whether to call other witnesses requested by the target where the testimony is non-exculpatory.[5] However, it is DOJ's policy that an AUSA who is personally aware of "substantive evidence that directly negates the guilty of a subject of the investigation ... must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."[6] Counsel should have a letter ready to hand the AUSA at the conclusion of the session, with the information that counsel demands be presented.[7]

If the government ultimately decides not to seek an indictment, or the grand jury no bills the matter, be aware that the AUSA may refer the conduct and information to the local district attorney for review and investigation. When the AUSA informs counsel that the client will not be charged, counsel may want to confirm with the AUSA that this is the end of the matter and that counsel can so advise the client.

Conclusion

They may be rare, but certain cases are tailor-made for a target testifying in the grand jury without immunity. In borderline proof cases, where the client has a clear, compelling story to tell, and where the consequences of an indictment would be devastating, the reward may outweigh the risk. Careful preparation and strategic representation will enhance the possibility that prosecution is declined or that a no bill results.

1. N.Y. Crim. Proc. Law §190.50(5)(a)-(b); see generally N.Y. Crim. Proc. Law, Article 190. There are a slew of other differences between New York and federal procedure. Among others, attorneys for federal grand jury witnesses are not allowed in the grand jury room (compare N.Y. Crim. Proc. Law §190.52).

2. Defense counsel must be intimately familiar with U.S. Attorney's Manual §§9-11.000-9-11.330, the DOJ's policy on grand jury presentment.

3. U.S. Attorney's Manual §9-11.153.

4. U.S. Attorney's Manual §9-11.152.

5. Id.

6. U.S. Attorney's Manual §9-11.233.

7. Post-indictment motion practice regarding the unfairness of the grand jury presentation is unlikely to result in the dismissal of the indictment. However, it can help educate the judge as to the client's clear position that he did nothing criminal, that the government secured the indictment without a full airing of all relevant and potentially exculpatory evidence, and set the stage for a fair trial to come.

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Stay

« Continued from page 9

Most courts, though, grant the application, even over defense opposition; this trend has increased in recent years. Last month, for example, Judge Kiyo Matsumoto of the E.D.N.Y. granted the U.S. Attorney's Office's application to stay a parallel SEC proceeding filed against Martin Shkreli and others. Memorandum & Order, *SEC v. Shkreli*, 15-CV-7515 (KAM) (RML) (E.D.N.Y. March 22, 2016), ECF No. 33. The defense had opposed the stay, and Judge Matsumoto recognized the defendants' "desire to resolve both their criminal and civil cases." Id. at 14. Still, the court granted the stay, motivated by its interest in the efficient use of judicial resources, and the view that "[i]t is in the public interest . . . to prevent circumvention of the limitations on discovery in the criminal proceedings." Id. at 17 (quoting *SEC v. Treadway*, 04 Civ. 3464 (VM) (JCF), 2005 U.S. Dist. LEXIS 4951, at *11 (S.D.N.Y. March 30, 2005)).[4]

Is the Stay a One-Way Street?

Even counsel who oppose the issuance of a stay have taken some comfort from the belief that the SEC will also be prevented from continuing to delve actively into every aspect of the conduct, diverting defense resources and developing new evidence and witnesses outside the bounds of discovery devices permitted under the rules of criminal procedure.

Two recent matters demonstrate, however, that this is not the case. In both matters, the government sought and obtained a stay of discovery in the civil case, with the SEC's lack of opposition. Yet in each matter, the SEC then proceeded apace with its investigation into precisely the same conduct, developing additional evidence concerning the defendants—who remained bound by the pending stay. The rationales in those cases were slightly different, but the effect was the same: While the defendants remained barred from obtaining discovery, the SEC continued to develop evidence that became fair game for subsequent use. Indeed, in one of the cases, the new information even resulted in the return of a superseding indictment and an expanded civil complaint, each bolstered by the information obtained by the SEC during the pendency of the stay.

In the parallel actions of *United States v. Discala*, 14 CR 399 (ENV) (E.D.N.Y.) and *SEC v. Discala*, 14 CV 4346 (ENV) (E.D.N.Y.), civil and criminal proceedings were initiated simultaneously in July 2014 based on an alleged securities fraud associated with the trading of stock in a company called CodeSmart as well as other securities. The DOJ promptly filed its application in the civil case, seeking to stay discovery in that proceeding. The SEC did not oppose the application, and defense counsel consented as well. The court granted the application for a stay on Nov. 19, 2014, ordering that "the Civil Case proceedings are stayed and the Securities and Exchange Commission [and the defendants] will not seek discovery in the Civil Case from one another or from third parties." Order, *SEC v. Discala*, 14 CV 4346 (ENV) (E.D.N.Y. Nov. 19, 2014), ECF No. 15.

After a lull in the action, the SEC resumed its investigation and subpoenaed witnesses for investigative testimony regarding the same issue: the trading of CodeSmart by, among others, the defendants in the pending civil case. When counsel for the subpoenaed witnesses referenced the stay and questioned whether the continued gathering of evidence in relation to the civil case violated that stay, the SEC responded that the information was not sought through or for the pending cases, it was a "different case" and the SEC was relying on its investigative powers as opposed to the discovery process of the stayed case.

Months later, and based on the information developed by the SEC after the issuance of the stay, both the U.S. Attorney's Office *and* the SEC used that information not to initiate a separate matter but rather to literally expand the pending cases. The government used it to obtain a superseding indictment and add the individuals who were the subject of the SEC's interim investigation, and the SEC filed a motion to amend the complaint to add some of those same individuals. Notice of Motion to Amend Complaint and Memorandum in Support of Motion, *SEC v. Discala*, 14 CV 4346 (ENV) (E.D.N.Y. Nov. 30, 2015), ECF Nos. 30-31.

Defense counsel in the civil case opposed the SEC's motion to amend the complaint, arguing that the SEC's conduct constituted a violation of the stay and that the fruits of that violation—information used in the amended complaint—should not be allowed. In support of that position, the defense cited a 2012 opinion from the Tenth Circuit Court of Appeals that confirmed that a litigant may not use purported "investigative devices," rather than formal discovery, after the court had ordered a stay in pending civil litigation. *Martinez v. Carson*, 697 F.3d 1252 (10th Cir. 2012). In *Martinez*, a magistrate judge had issued an order requiring "that *all discovery* in this case be stayed." Id. at 1256 (emphasis in original). Notwithstanding this order, the plaintiffs conducted what they termed "consensual interviews" of certain defendants without notifying other defendants. Id. at 1256-57. The Tenth Circuit confirmed that the recorded interviews had not been performed merely "for investigatory or settlement purposes," but rather "possess[ed] characteristics of a discovery proceeding" and therefore violated the stay order. Id. at 1257-58 (internal quotation marks omitted). The appeals court further upheld the district court's sanctions for the plaintiffs' violations. Id. at 1258.

Counsel should now expect that the **SEC will treat the stay as one-sided** and continue to gather material under the cover of a separate "investigation," but then not hesitate to use information discovered in the pending civil and criminal cases.

Counsel also argued that the SEC's own internal rules cast doubt on the appropriateness of this conduct. See SEC Rules of Practice Rule 230(g), 17 C.F.R. §201.230(g) (requiring SEC hearing officers in administrative proceedings to "order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings"); SEC Enforcement Manual § 3.1.3 (providing that "staff should not use investigative subpoenas solely to conduct discovery with respect to claims alleged in the pending complaint" as a court might conclude, even without a pending stay, that this "is a misuse of the SEC's investigative powers and circumvents the court's authority and the limits on discovery in the Federal Rules of Civil Procedure").

The SEC responded that *Martinez* was distinguishable because the plaintiffs in that case did not conduct their interviews for investigatory or settlement purposes—in contrast to the SEC's activities, which had been for such an "investigatory purpose." The SEC further argued that Commission Rule of Practice 230(g) did not apply because the rule governed administrative proceedings before the Commission and not civil actions.

The court in *Discala*, without explanation, granted the SEC's motion to amend, apparently endorsing the SEC's fairly aggressive use of its investigative powers to continue to develop evidence in the exact same case despite the pendency of a stay. Minute Entry, *SEC v. Discala*, 14 CV 4346 (ENV) (E.D.N.Y. Jan. 14, 2016).

In summary, and ironically, the SEC in *Discala* had to file a motion to *lift a stay* for the purpose of filing an amended complaint predicated on new information that they obtained *after* the stay was issued. After that flurry of activity, the court then promptly reinstated the stay.

SEC v. Blumberg, 14 CV 4962 (KM) (MAH) (D.N.J.), presented a similar dynamic. The SEC filed a civil proceeding parallel to a federal indictment of individuals associated with trading activities at a brokerage firm. The criminal authorities sought and obtained a civil stay from the magistrate judge that provided that all discovery would remain stayed pending the outcome of the related criminal case; following an appeal by the defense, the district judge ultimately affirmed the magistrate's decision.[5] Meanwhile, the defense proceeded to call foul in a series of letters to the magistrate describing how the SEC had, pursuant to administrative subpoena, taken testimony from an employee of the brokerage firm concerning the defendant and the subject matter of the case despite the pendency of the stay.[6] The defense asked that discovery be allowed to proceed on *both* sides. The SEC responded that it had acted properly because it had labeled the deposition "investigative testimony," and because it had "not used its investigative powers to further develop evidence in its case against the Defendant."[7] The magistrate has yet to rule on the allegations of SEC misconduct.

Active Response Required

For years, counsel defending parallel proceedings have understood that the government's playbook includes simultaneous filings by the SEC and prosecutors coupled with an immediate stay application. Counsel should now expect that the SEC will treat the stay as one-sided and continue to gather material under the cover of a separate "investigation," but then not hesitate to use information discovered in the pending civil and criminal cases. Counsel should carefully consider opposing stay applications or seeking to tailor their scope to constrain overlapping investigative activities. Following the entry of a stay order, counsel must actively monitor SEC compliance with the stay and remain prepared to seek relief from the court should the SEC's investigation amount to discovery under another name.

1. Courts have been willing to allow some discovery to proceed while staying the deposition of the defendant so he can "avoid facing the dilemma of either choosing to make statements that could be used against him in the criminal case, or suffering an adverse inference if he refuses to answer questions at a deposition." *SEC v. Bray*, 98 F. Supp. 3d 219, 223 (D. Mass. 2015).

2. Where counsel is unwilling to agree to a stay, the courts are directed to consider a variety of factors including the interests of the litigants, the courts and the public. Second Circuit courts often weigh the following factors in considering stay applications: "1) the extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; 4) the private interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest." *Louis Vuitton Malletier S.A. v. LY USA*, 676 F.3d 83, 99 (2d Cir. 2012) (quoting *Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)).

3. See also *SEC v. Sandifur*, No. C05-1631C, 2006 U.S. Dist. LEXIS 89428, at *7 (W.D. Wash. Dec. 11, 2006) (stating that "[c]ourts regularly deny stays when civil regulators have worked directly in concert with the criminal prosecutors during the investigation and the Government has used parallel proceedings to its advantage"); *SEC v. Reyes*, No. C 06-04435 CRB (N.D. Cal. Oct. 4, 2006) (denying U.S. Attorney's request for a stay); *SEC v. Kornman*, Civil Action No. 3:04-CV-1803-L, 2006 U.S. Dist. LEXIS 37788, at *12 (N.D. Tex. May 31, 2006) (criticizing the SEC for attempting to "have its cake and eat it too"); *SEC v. Oakford*, 181 F.R.D. 269, 273 (S.D.N.Y. 1998) (Judge Rakoff criticized as "troubling" and a "misuse of the processes of the courts" that the SEC wanted to obtain "the advantage of filing charges without having to support them.").

4. But see *SEC v. Chakrapani*, No. 09 Civ. 325 (RJS), 2010 U.S. Dist. LEXIS 65337, at *22 (S.D.N.Y. June 28, 2010) (finding that "the discovery advantage enjoyed by the government under Rule 16 of the Federal Rules of Criminal Procedure is not a right guaranteed or even recognized by Rule 26 of the Federal Rules of Civil Procedure," and thus "the government's assertion that '[d]iscovery in a civil proceeding may not be used to circumvent the limitations on discovery in a criminal action' is simply incorrect").

5. Id., Memorandum and Order (March 8, 2016), ECF No. 72.

6. The defense cited, in particular, an order by a Western District of Texas court sanctioning the SEC for obtaining ex parte testimony via an administrative subpoena, thereby violating the Federal Rules of Civil Procedure. Order at 4, *SEC v. Life Partners Holdings*, 12-cv-00033 (JRN) (W.D. Tex. Aug. 17, 2012), ECF No. 47 (holding that the SEC "cannot administer an extra-judicial deposition regarding an investigation, elicit testimony during that deposition regarding allegations made in the Complaint for use against Defendants, and then claim immunity from the FRCP by labeling the deposition as 'investigative'").

7. The DOJ pointed out—correctly—that it did not have the power to prevent the SEC from continuing its investigation. Some of the parties' filings regarding this dispute remain under seal.

DECISIONS WANTED!

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