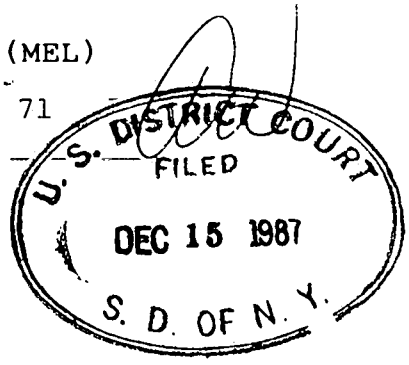
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Plaintiff, v. IVAN F. BOESKY, Defendant.	)	87 Cr. 378 (MEL) Misc. No. 71



OBJECTIONS OF IVAN F. BOESKY
TO PETITION TO UNSEAL DOCUMENTS

American Lawyer Newspapers Group, Inc. ("American Lawyer") has petitioned the Court to unseal the documents filed with the Court in connection with the sentencing of Ivan Boesky.[1/] Before the filing of the American Lawyer application, the Court had already entered an order permitting public disclosure of selected portions of some of these materials and sealing other portions for good cause. Mr. Boesky submits these objections to public disclosure of any materials in addition to those already covered by the Court's order.

1/ Newsday, Inc. has also filed an informal letter request seeking public disclosure of the same materials.

ARGUMENT

THE QUALIFIED RIGHT OF PUBLIC ACCESS IS SATISFIED BY THE PUBLIC DISCLOSURES THE COURT HAS ALREADY ORDERED.

The petitioner seeks public disclosure of the report of presentence investigation, the Sentencing Memorandum submitted by the U.S. Attorney's office, and the Sentencing Memorandum submitted by Mr. Boesky. The Court's Sealing Order, dated November 30, 1987, already requires public filing of redacted Sentencing Memoranda of the U.S. Attorney's office and Mr. Boesky, finding that public release of the unredacted Sentencing Memoranda would "both unfairly disclose the identities of the subjects of pending government and grand jury investigations and would compromise those investigations." Exhibit A at ¶ 1.[2/] As we show below, the redacted memoranda satisfy the qualified First Amendment right of public access to court documents, and there are compelling arguments against further public disclosure.

A. Public Availability of the Redacted Sentencing Memoranda Satifies the Public Right of Access.

The petitioner acknowledges that "recognition of a qualified First Amendment right of access . . . does not mean that the papers must automatically be disclosed." In re New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987). The Sentencing

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2/ The sealing order also covers the copies of the Sentencing Memoranda appended to the presentence report.

Memoranda of the United States and Mr. Boesky were filed in redacted form on December 14, 1987, and are available for review and dissemination by the media.[3/] We understand that the Government redacted only so much as was necessary to avoid jeopardy to the ongoing investigations resulting from Mr. Boesky's cooperation. For the same reason -- to avoid prejudicing ongoing investigations -- Mr. Boesky's Sentencing Memorandum was redacted to the extent, and only to the extent, requested by the Government.

Public disclosure of the redacted memoranda will enhance public confidence in the fairness of the sentencing process. The qualified right of public access to court documents does not require more. The public's confidence in the effective prosecution of offenses that seriously threaten the integrity of the financial markets is also important. The procedures already ordered by the Court properly accommodate both of these concerns.

B. The Court Should Not Unseal the Report of Presentence Investigation of the U.S. Probation Department.

There does not appear to be any federal case in which a sentencing court has released a presentence report to the

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3/ The sealing order originally provided for the redacted Sentencing Memoranda to be filed on December 18, 1987, the date of sentencing, but the Court subsequently orally instructed counsel to file the redacted Sentencing Memoranda on December 14, 1987.

public.[4/] Indeed, the Court of Appeals for the Second Circuit has made clear that, as a general proposition, presentence reports should not be disclosed to third parties. United States v. Charmer Industries, Inc., 711 F.2d 1164 (2d Cir. 1983). The courts that have discussed the standards that would have to be met if presentence reports were to be released suggest use of "a standard approaching that for release of grand jury materials. . . ." Id. at 1174. The Charmer court held that presentence reports are not be disclosed to any third person "unless that person has shown a compelling need for disclosure to meet the ends of justice." Id. at 1176. American Lawyer has made no showing that there is any "compelling need" for disclosure or that disclosure is necessary to "meet the ends of justice."

The presentence report at issue here includes text prepared by the United States Probation Department, a submission

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4/ Petitioner American Lawyer asserts that "it is clear" that it has a right of access to presentence reports, but cites no authority for that view. American Lawyer Mem. at 11. In fact, the Supreme Court has made clear that the existence of a qualified First Amendment right of public access depends both on "whether the place and process has historically been open to the press and the general public," and on whether "public access pays a significant positive role" in the proper functioning of the process. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2740-41 (1986). Presentence reports fail both of these tests, as the Second Circuit's decision in Charmer Industries shows. United States v. Charmer Industries, Inc., 711 F.2d 1164 (2d Cir. 1983); see also Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (no First Amendment right publicly to disseminate materials obtained in pretrial discovery).

from the Government that discloses grand jury materials and targets of ongoing criminal investigations, a submission from the Government of the United Kingdom that describes Mr. Boesky's cooperation with that Government, a draft of Mr. Boesky's Sentencing Memorandum, materials requested by the Probation Department from Mr. Boesky, including personal financial statements, several letters that are not appended to his Sentencing Memorandum, and other materials submitted in confidence.[5/] The text of the report draws on a wide range of sources, including confidential statements to the probation officer from Mr. Boesky, from his psychiatrist, and others, and it incorporates statements from the documents appended to it.

There is no "compelling need" for disclosure of these materials, and there are at least four reasons that the report should not be disclosed to the public. First, presentence reports are protected from public disclosure -- and sometimes even from disclosure to the defendant -- in order to facilitate the free flow of information, including information obtained in confidence, to the sentencing judge. Second, this particular report contains inaccuracies. Third, it contains material relating to the government's ongoing investigations. Fourth, it contains materials that were obtained in confidence and were intended to remain private.

5/ In addition, the Court has letters from Mr. Boesky's family and others that were submitted in confidence.

Reports of presentence investigation under Rule 32 have been traditionally -- indeed universally -- protected from public disclosure to facilitate the flow of information to probation authorities for the benefit of the sentencing court. If presentence reports become public documents, friends, acquaintances, associates, and even enemies of the defendant will be less likely to provide their unvarnished views of the defendant to the probation authorities and the court will be deprived of useful information in the sentencing process. Indeed, it was for these reasons that even the defendant was long denied access to presentence reports. Only the defendant's due process rights now justify the defendant's limited access. The press has no comparable justification or need for access.

By design, presentence reports are not subject to the safeguards imposed upon the rest of the criminal process. Presentence reports are broadly intended to help the sentencing judge "understand the world in which the defendant lives" and the "problems and needs" of the defendant. Charmer Industries, 711 F.2d at 1170-71. To provide insights into the defendant "[t]here are no formal limitations on the contents of presentence reports." Id. at 1170. The rules of evidence and procedural protections of a trial do not apply to presentence reports, and the defendant may be permitted only to read portions of the report, but not to retain a copy of it. In some cases, even the defendant is prohibited from reading all or portions of the

report. Such reports have "many of the characteristics -- and frailties -- of material presented to the grand jury." Id. at 1175.

The report sought by American Lawyer has these frailties. Mr. Boesky has objected to portions of the report because they are inaccurate. The Court has decided that it need not hear evidence concerning disputed portions of the report because those portions will not be material to its sentencing decision. Because the Court has concluded that it need not rely on disputed portions of the report, their disclosure would not enhance public understanding of the basis for the sentence.

Moreover, the presentence report contains materials derived directly from Mr. Boesky's cooperation with the Government, and it includes materials derived from the grand jury proceedings. It quotes or paraphrases from those materials, sometimes inaccurately. It includes a submission from the Government of the United Kingdom. For the same reason that the Court ordered the unredacted versions of the Government's and Mr. Boesky's Sentencing Memoranda to remain under seal, so should it decline to unseal the presentence report. The public interest in understanding the basis for Mr. Boesky's sentence is adequately met by public review of the redacted Sentencing Memoranda submitted by his lawyers and by the Government. The interest will be more than fully satisfied when the public benefits of Mr.

Boesky's cooperation become known, through future criminal and civil proceedings.

The presentence report also contains materials that were submitted in confidence and are extraordinarily private. Statements to the probation officer from Mr. Boesky and from his psychiatrist were not intended for public consumption.[6/] Many of the statements made to the probation officer, including Mr. Boesky's, were given in reliance on the confidentiality accorded to presentence reports under Rule 32. If disclosures to the Probation Department of subjective and untested information are made a part of the public domain, the result would likely be to "inhibit the flow of information to the sentencing judge." Charmer Industries, 711 F.2d at 1173.

Mr. Boesky also asks the Court to weigh his own privacy interests in the balance. Mr. Boesky already is the subject of a great deal of adverse public commentary. The most difficult part of Mr. Boesky's self-inflicted ordeal has been dealing with the suffering of his family, including minor children, and his virtual abandonment by friends. Some friends and members of his family have submitted highly personal letters to the Probation Department and the Court. There is certainly no "compelling need" to invade even this modest remaining corner of Mr. Boesky's

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6/ Letters from family members, including minor children, and Mr. Boesky's religious advisors were likewise not intended for public consumption.

privacy. Withholding these materials from public view will not impair the public's ability to understand the sentence imposed on Mr. Boesky.

CONCLUSION

The public interest in understanding the basis for the sentence imposed upon Mr. Boesky will be satisfied by public disclosure of the redacted Sentencing Memoranda filed by the government and by Mr. Boesky, and the Court should therefore deny the application for disclosure of additional sentencing materials.

Respectfully submitted,

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