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The Prince and the Proffer

In recent months, the U.S. Attorney for the Southern District of New York has issued forceful public statements regarding the apparent failure of Britain's Prince Andrew to cooperate in an ongoing investigation of alleged sex-trafficking by the late Jeffrey Epstein and his associates. In this Corporate Crime article, Evan Barr examines whether these unusual actions were justified under the circumstances, and some of the challenges that lawyers for the Prince will surely confront as the investigation continues.

BY EVAN T. BARR

On two separate occasions in recent months, Geoffrey Berman, U.S. Attorney for the Southern District of New York, has issued forceful public statements regarding the apparent failure of Britain's Prince Andrew to cooperate in an ongoing investigation of alleged sex-trafficking by the late Jeffrey Epstein and his associates. Berman called upon Prince Andrew to live up to a purported undertaking to assist in the government's inquiry by meeting with federal authorities to discuss his friendship and contacts with the deceased financier. In making these public remarks, Berman departed from the traditional practice of avoiding official comment related to ongoing investigations. This article will examine whether the U.S. Attorney's unusual actions were justified under the circumstances, and some of the challenges that lawyers for the Prince will surely confront as the investigation continues.

By **Evan T. Barr**

The Events in New York and London

In an indictment unsealed in July 2019, the U.S. Attorney's Office for the Southern District of New York charged Epstein with conspiracy to commit sex trafficking of minors, in violation of Title 18, United States Code, §1591 and related offenses. On Aug. 10, 2019, authorities found Epstein dead in his jail cell. U.S. Attorney Berman issued a statement that day asserting that "our investigation of the conduct charged in the Indictment—which included a conspiracy count—remains ongoing." On August 12, Attorney General William Barr also vowed in a speech to "continue on against anyone who was complicit with Epstein."

In October 2019, [redacted], a victim in the Epstein matter, recorded a televised interview with BBC *Panorama* in which she reiterated claims previously incorporated in various civil litigations alleging that Epstein and Epstein's former girlfriend Ghislaine Maxwell had sex-trafficked [redacted] to Prince Andrew on multiple occasions in 2001 when she was underage. On Nov. 16, 2019, facing intense pressure to explain his association with Epstein, Prince Andrew gave a lengthy interview on BBC *Newsnight*. During the program, the Prince acknowledged a longstanding friendship with Maxwell, denied any involvement with [redacted], and claimed he could not "shed light" on Epstein's illicit activities. He also questioned the authenticity of a snapshot showing him with [redacted] and insisted he was at a restaurant with family on the night in March 2001 when [redacted] claimed they had sex. The Prince concluded by noting he would need to consult with his lawyers in advance of testifying under oath about his relationship with Epstein.

The press widely criticized the Prince following the BBC interview for his lack of sympathy and

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unpersuasive denials. As a result, on Nov. 20, 2019, the Prince issued a statement announcing that he would be stepping back from his public duties for the foreseeable future. Expressing regret for his association with Epstein, the Prince noted "[o]f course, I am willing to help any appropriate law enforcement agency with their investigations, if required."

The interview clearly touched a nerve at the U.S. Attorney's Office. On Jan. 27, 2020, during a press conference held outside Epstein's Upper East Side mansion, Berman was asked about the Prince's November 20 offer to help and stated, "[t]o date, Prince Andrew has provided zero cooperation." According to the *New York Times*, Berman went on to say his office did not typically comment on cooperation in an ongoing investigation, but he felt that it was "fair" for the public to know that Prince Andrew had failed to live up to his promise. Berman noted that the "investigation is moving forward" and added that "Jeffrey Epstein couldn't have done what he did without the assistance of others."

On March 8, 2020, the *Daily Telegraph* reported that Prince Andrew had hired "an eminent team of lawyers" including an expert in extradition matters in the United Kingdom to fend off the American investigation. The *Times* had previously reported that following the BBC interview in November, federal prosecutors and FBI agents had reached out to Prince Andrew's lawyers and asked to interview him but got no response.

Then, on March 9, 2020, at a press conference in another matter, Berman stated in prepared remarks that "[c]ontary to Prince Andrew's very public offer to cooperate with our investigation into Epstein's co-conspirators, an offer that was conveyed via press release, Prince Andrew has now completely shut the door on voluntary cooperation." Berman added that his office was "considering its options." On March 13, 2020, the *Telegraph* reported that a spokesman for the U.S. Attorney's Office had confirmed "[t]here have been communications through [the Prince's] attorneys, but we have been informed that he is not willing to submit to an interview." The article went on to say that sources close to Prince Andrew had described him as "angry and bewildered" by the suggestion that he had refused to cooperate.

Applicable Legal Standards and Principles

Berman's remarks at these press conferences stand out for many courthouse observers because they were so unusual. In late 2016, then-FBI Director James Comey wrote two letters to members of Congress (which were immediately revealed to the public) providing updates on the status of the Bureau's review of Hilary Clinton's emails. (In 2018, the DOJ Inspector General, Michael Horowitz, issued a report that criticized Comey for violating DOJ guidelines in writing the letters.) Aside from that infamous episode, however, as a general matter DOJ personnel studiously refrain from making any substantive comments regarding the status of an ongoing investigation. In so doing, they are following well-established rules and regulations.

As a threshold matter, Federal Rule of Criminal Procedure 6(e)(2) bars the disclosure of any "matter occurring before the grand jury" by, among others, attorneys for the government and law enforcement agents privy to such grand jury material. The grand jury secrecy rule is intended both to "encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes" and "to protect the innocent accused who is exonerated from the disclosure of the fact that he has been under investigation." *United States v. Procter & Gamble*, 356 U.S. 677 (1958). Although Rule 6(e) does not define when a matter is one "occurring before the grand jury," courts have construed that phrase to include, among other things, the following types of information: revelations of the identify of expected witnesses; information about expected testimony of witnesses or likely questions; and information that reveals the strategy or direction of a grand jury investigation. See *United States v. Skelos*, 2 No. 15 Cr. 317 (KMW) (S.D.N.Y. Oct. 20, 2015). Notably, however, Rule 6(e) does not apply to disclosures of information obtained independently of the grand jury process, even if the information might later be presented to the grand jury.

The Department of Justice has issued regulations dealing with the release of information to the media in criminal and civil cases. 28 C.F.R. §50.2. The regulations principally prohibit DOJ personnel from furnishing any statement which might reasonably be expected to influence the outcome of a pending or future criminal trial. But the regulations also apply "from the time a person is a *subject* of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise." 28 C.F.R §50.2(b) (emphasis added).

The regulations specifically command DOJ personnel to refrain from making available certain types of information that generally tend to create a danger of prejudice without serving a significant law enforcement function, including, inter alia: (1) observations about a defendant's character; (2) statements, admissions confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement; and (3) statements concerning the identity, testimony, or credibility of prospective witnesses. 28 C.F.R. §50.2.(b)(6).

The U.S. Attorney's Manual likewise includes a policy statement establishing guidelines for prosecutors to comply with the above regulations. Of relevance here, U.S.A.M. 1-7.530 (A) (Disclosure of Information Concerning Ongoing Investigations) provides that "components and personnel of the Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document." U.S.A.M. 1-7.530(B) allows that comments about or confirmation of an ongoing investigation may need to be made "in matters that have already received substantial publicity or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare" but in such "unusual circumstances" they are subject to pre-approval by the U.S. Attorney or Department Division handling the matter.

The Prince's Precarious Position

The Prince will face significant pressure going forward to cooperate with the U.S. authorities. The U.S. Attorney's extraordinary comments obviously add to that pressure. Berman warned on March 9 that the government was "considering its options" and he has a number of them at his disposal. In the absence of a voluntary appearance, the Department of Justice could invoke the mutual legal assistance treaty (MLAT) with the United Kingdom to request Prince Andrew's testimony under oath in England. Lawyers for Giuffre and the other victims also have vowed to use the process set forth in the Hague Convention to serve the Prince with a subpoena. While British authorities are unlikely to facilitate or prioritize such demands, and while the Prince would retain the right to decline to testify under the Fifth Amendment to the United States Constitution, the impact on his already diminished reputation would be considerable and an adverse inference could be drawn against him in the related civil litigations, leading to a possible default judgment. If defense counsel decides to make the Prince available voluntarily, he or she will likely seek immunity or a non-prosecution agreement, as even a Prince probably should not appear with only a "queen for a day" proffer letter to protect him. (A "queen for a day" or proffer letter is a written agreement between a federal prosecutor and a defendant or prospective witness that allows the defendant or witness to provide information about an alleged crime under investigation while limiting, to some degree, the prosecutor's ability to use that information directly against him or her in subsequent criminal proceedings. The letter explicitly permits the prosecutor to use the information to pursue other leads and to impeach the defendant/witness with his prior proffer statements on cross examination.)

On the other hand, defense counsel might well conclude that the safest approach is to hunker down in the U.K. First, Prince Andrew's close relationships with both Epstein and Maxwell will presumably place him squarely in the category of subject rather than

witness. Second, although the allegations at issue date back to 2001, there is no statute of limitations for federal sex trafficking offenses involving minors. Third, as a result of his BBC interview, the Prince has "locked himself in" to a version of events (including some highly specific alibis) that leave him little room to adapt should new evidence come to light. Thus, even if he does agree to testify before a grand jury or (more likely) participating in an informal proffer session, he risks possible perjury or false statement charges (not to mention likely leaks to the media). Fourth, notwithstanding the fact that the Prince is a member of a royal family that enjoys close ties with the United States, he lacks any formal diplomatic or sovereign immunity and is facing a prosecutor who has already shown a willingness to pursue high profile foreign leaders such as the former President of Venezuela.

Assessing the U.S. Attorney's Conduct

In light of all of the surrounding circumstances, and the applicable rules and regulations that govern extrajudicial statements by federal prosecutors, did the U.S. Attorney cross the line when he discussed his frustrations with Prince Andrew's failure to cooperate during the January and March press conferences?

First, even assuming arguendo that a federal grand jury is investigating Epstein's co-conspirators, the U.S. Attorney would not have violated Rule 6(e) merely by discussing the fact that the Prince had not been cooperative. Those statements do not disclose any actions "occurring" before the grand jury (indeed, the gravamen of Berman's complaint is that the Prince has *not* made himself available to be a part of the investigation).

Second, the Department of Justice press regulations found at Title 28 of the Code of Federal Regulations are clearly focused on trials and protecting the rights of charged defendants, which are not relevant to this situation. However, there is some residual ambiguity here because the regulations do state that they apply "from the time a person is a subject of a criminal investigation" until the end of any case, and Prince Andrew might well be a subject of the inquiry. If Prince Andrew is presently a subject, and a case against him is ultimately filed, calling him out for having refused to cooperate would appear to run afoul of the regulations insofar as they prohibit disclosure of information about "the refusal or failure of the accused to make a statement."

Third, the U.S. Attorney's Manual clearly discourages any and all comments like these concerning the "nature or progress" of an ongoing investigation. That clause plainly applies to the comments about the Prince made at the January and March press conferences, especially since the implication of those remarks was that such cooperation would be important in advancing the inquiry. On the other hand, the Manual does allow comment in "matters that have already received substantial publicity or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident." The U.S. Attorney could try to justify his press statements under either or both of these exceptions, especially where the Prince arguably had injected himself into the dialogue by appearing on a high-profile television program to field questions.

Conclusion

Even if the U.S. Attorney technically avoided violating any of the applicable legal standards, such remarks are discouraged for good reason. The U.S. Attorney may have concluded that he needed to apply public pressure to obtain the Prince's information, and this aggressive tactic might even bear fruit. But a lawyer properly representing the Prince, or any white-collar client for that matter, must carefully consider a number of factors before choosing to make his or her client available for questioning by the authorities. That process generally will entail sensitive and protracted discussions between counsel over the time, place and ground rules for any such meeting. To instill an atmosphere of trust and fair play, such negotiations should take place in private and not on the front page of tomorrow's paper.