UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 00-083-T

VINCENT A. CIANCI, JR.,
a/k/a "BUDDY;"
FRANK E. CORRENTE;
ARTIN H. COLOIAN;
RICHARD E. AUTIELLO;
EDWARD E. VOCCOLA; and
JOSEPH A. PANNONE

MEMORANDUM AND ORDER

This is the third motion filed by the Providence Journal which is not a party to this case.[1] The latest motion seeks access to various memoranda of law filed by the parties and seeks modification of the Court's "Order Regarding Filing of Documents Under Seal and Memorandum," dated May 23, 2001 (the "May 23 Order").

For reasons hereinafter stated, the Journal's motion is GRANTED IN PART and DENIED IN PART.

Background

In order to put this matter in proper context, a brief explanation is required regarding the nature of memoranda of law filed by counsel; the manner in which they, historically, have been treated in this district; and the manner in which they have been

[1] A previous motion for access to a search warrant affidavit was denied by Judge Lagueux on July 29, 1999. That motion, later, was renewed and, again, denied by this Court. See United States v. Cianci, 175 F. Supp. 2d 194 (D.R.I. 2001).

treated in this case.

Requests by litigants that the Court take some described action in a case are made in the form of motions. There is nothing inherent in the nature of a motion requiring that it be accompanied by a memorandum of law. Indeed, in many courts, including the Rhode Island state courts, it is not the usual practice to submit memoranda, particularly in criminal cases.

This Court, however, requires most motions to be accompanied by memoranda citing the legal authority upon which the motions are based. The principal purpose of the memorandum requirement is to assist the judge in identifying the statutes and legal precedents that may be applicable in deciding the motion. In that respect, counsel's memoranda are similar to memoranda of law prepared by the judge's law clerk. Copies of each motion and memorandum must be provided to all other parties in the case. Any party opposing a motion is allowed a period of time in which to file an objection to the motion and to submit a memorandum of law citing the legal authority supporting the objection.

All motions and objections are filed with the Clerk of Court and, except in rare cases, immediately become part of the case file which is available for public inspection. In those rare cases where the motion, itself, properly cannot be made part of the public record because it relates to a matter being presented to a grand jury or for some other compelling reason, the motion is

presented to the judge together with a request to seal it so that it is not available for public inspection at that time.

Nearly all motions of any substance are scheduled for hearings in open court where counsel state why they contend that the motions should be granted or denied. Anyone who wishes to do so may attend the hearing and the proceeding is stenographically recorded. Moreover, the Court's decisions and the reasons for them are either announced in open court or set forth in a written decisions that are placed in the Court file as soon as they are issued.

In accordance with the long-standing practice in this District, memoranda are not filed with the Clerk and are not immediately made part of the Court file. Rather, they are submitted to the judge who reviews the legal authorities cited. Memoranda relating to matters of public interest generally have been made available to the media upon request; and, in any event, they are preserved by the judge so that if the case is appealed, they can be included with the materials forwarded to the Court of Appeals.

There were several reasons for adopting the practice of treating memoranda in this manner. First, as already noted, memoranda are directed to the judge and their purpose is to alert the judge to any applicable statutes and/or legal precedents, not to provide a vehicle for an occasional overzealous counsel to circumvent the Code of Professional Responsibility by including

statements that, otherwise, would not be permissible in order to gain an unfair tactical advantage. Second, there was some concern that incorporating numerous and sometimes voluminous memoranda into the Court file would needlessly burden the already taxed storage facilities of the Clerk's office. Third, filing memoranda with the judge lessens the need for the judge to bring a file into chambers, where it is not available for public inspection, in order to review memoranda relating to a pending motion. Finally, it was felt that, in criminal cases, there is a heightened risk that memoranda may refer to grand jury matters that, by law, cannot be disclosed[2] and/or matters that prejudice the parties' rights to a fair trial. This case provides an apt illustration of the reasons for this last concern. See, e.g., May 15, 2001 Order Governing Extra-Judicial Statements and Disclosures Likely to Prevent Fair Trial; United States v. Cianci, 175 F. Supp. 2d 194 (D.R.I. 2001) (denying renewed motion for access to search warrant affidavit).

In any event, whether or not one agrees with this practice, the practice has little bearing on the Journal's motion. Months ago, in response to the Journal's request for access to the memoranda of law filed by counsel, this Court recognizing the unusual and understandable public interest in the case, agreed that, after reviewing those memoranda, it would file them with the

[2] The Federal Rules of Criminal Procedure prohibit the disclosure of matters occurring before a grand jury. Fed. R. Crim. P. 6(e)(2).

Clerk where they would be available for public inspection, unless the memoranda contained references to matters that could not properly be made public in advance of trial. That has been done.

The gist of the Journal's complaint is that the memoranda have not been filed quickly enough and that, with respect to the few substantive memoranda that the Court has determined should not be filed, the reasons for that determination have not been separately stated for each such memorandum and/or the Court has not created and filed a redacted version.

Facts

In support of its motion, the Journal has filed several affidavits. One purports to identify all memoranda which have been submitted by counsel but not placed on file with the Clerk. See Affidavit of Judith Cady. Another describes what the affiant says has been the delay in filing those memoranda that have been placed on file with the Clerk. See Affidavit of Tracy Breton. After examining those affidavits and conducting its own review, the Court finds the relevant facts to be as follows.

I. The Memoranda Not Placed on File

The Journal's affidavit lists 42 memoranda that have not been placed on file with the Clerk. That count is both inaccurate and somewhat misleading.

In fact, 11 of the 42 memoranda listed have been placed on file. Moreover, the affidavit fails to state that 38 more

memoranda have been placed on file, bringing to 49 the total number of memoranda filed.

Of the remaining 31 memoranda that the affidavit lists as not having been filed, 17 related to discovery motions. In accordance with the established practice, those memoranda, and the motions to which they relate, automatically were referred to the magistrate judge assigned to this case and, therefore, were not presented to or reviewed by this Court.

Because most discovery motions raise no substantive legal issues, the memoranda accompanying them, generally, are very brief and have little content. For that reason, and because when the Journal first requested access, it gave no indication that its request extended to the memoranda filed in connection with discovery motions, this Court did not arrange to copy those memoranda and place them on file with the Clerk.

Three of the remaining 14 "memoranda" not filed were responses to the Court's requests for clarification of counsels' positions with respect to such mundane matters as which exhibits presented during the hearing they desired the Court to consider. Once again, this Court did not place them on file because it assumed, apparently erroneously, that they were of no interest to the Journal.

The 11 non-discovery substantive memoranda that have not been placed on file have been reviewed by the Court, and the Court has

determined that they cannot properly be made part of the public record before trial because they refer to grand jury matters and/or matters, the dissemination of which would prejudice the parties' rights to a fair trial.[3]

II. The Delay in Filing

It is true, as stated in Ms. Breton's affidavit, that the memoranda relating to a given motion are not filed with the Clerk immediately upon receipt. Indeed, in some cases, there has been an appreciable lapse of time between the submission of memoranda and their placement in the court file. Some delay is unavoidable because time is required to review the memoranda in order to determine whether they contain material that cannot properly be made part of the public record before trial. In addition, the need to attend to the approximately 230 other active cases for which the Court is responsible sometimes prevents the Court from promptly reviewing the memoranda especially when the motions to which they relate are not scheduled to be heard for some time.

However, Ms. Breton's affidavit overstates the delays, in part, because it appears to be based on a misunderstanding of when memoranda are submitted. Thus, in listing the dates on which various memoranda were submitted, she erroneously assumes that all memoranda submitted in connection with a given motion are submitted

[3] Some of the memoranda were submitted in opposition or reply to memoranda that contain such references.

simultaneously. In fact, only the memorandum submitted in support of a motion is submitted contemporaneously with the filing of the motion. Parties opposing or objecting to the motion have a period of at least ten days in which to file their objections and submit memoranda citing the legal authority supporting their objections. Moreover, the time for filing an objection, sometimes, is extended upon request. When an objection is filed, the proponent of the motion, then, is permitted an additional period of time in which to file a reply memorandum. Since the Court, ordinarily, does not begin considering a matter until all interested parties have had an opportunity to present what they believe to be the relevant law, it does not review any of the memoranda until all of them have been received.

The Breton affidavit also fails to take into account that many of the memoranda, at issue, were submitted during the last week of December of 2001 and the beginning of January of 2002 when the Court was in the process of moving back into the courthouse from the "temporary" quarters it had occupied while the courthouse was being renovated. Consequently, during a period of several weeks beginning with packing for the move and ending with unpacking after the move, it would have been difficult to provide access to the Court files and even more difficult for the Court to review the various memoranda submitted by counsel.

Discussion

The Journal asks the Court to modify its May 23 Order by making all memoranda public unless sealed pursuant to a motion to seal and by providing redactions of memoranda containing matters that cannot properly be made part of the public record.

I. The Procedure for "Sealing"

There are a variety of ways in which the Court may seek to ensure that memoranda containing matters that cannot properly be disclosed before trial are not made part of the file that is available in the Clerk's office for public inspection. The premise underlying the Journal's proposal that all memoranda be made public unless the Court otherwise directs is perfectly consistent with the procedure that the Court has followed in this case. All memoranda (except memoranda relating to discovery motions, as previously noted) have been filed in the Clerk's office unless the Court has determined that they contain matters that cannot properly be made public before trial. The principal difference between the Journal's proposal and the procedure followed by the Court is that the Journal advocates that the determinations be made pursuant to formal motions to seal. In fact, that procedure was followed during the earlier stages of this case; and, because it proved to be unworkable, led to the May 23 Order.

Once again, a little background is instructive. Before the case was assigned to this Court, there had a been a series of leaks

to the media regarding evidence presented to the grand jury and other matters that violated various Court orders and rules and threatened the parties' right to a fair trial. Those events prompted this Court to appoint a special prosecutor to investigate whether criminal contempt charges should be brought against whomever was responsible and to remind counsel of their obligations under Rule 39 of this Court's Local Rules and Rule 3.6 of the Rules of Professional Conduct that prohibit statements and disclosures the dissemination of which is likely to threaten a party's right to a fair trial. They also prompted this Court to issue its May 15, 2001 "Order Governing Extra-Judicial Statements and Disclosures Likely to Prevent Fair Trial," which the Journal euphemistically describes as a "gag" order. That order described the events leading to its adoption and expressly required that documents filed by counsel "making reference to information the disclosure of which otherwise would be prohibited, shall be filed under seal . . . subject to periodic review by the Court. . . ."

Taking their responsibilities seriously, counsel began filing motions to seal not only their memoranda but also their motions. That resulted in what the Court viewed as a needless delay in making the motions part of the public record.

In an effort to expedite the process of making the motions, themselves, public and to eliminate the additional motions to seal which served little purpose, this Court issued its May 23 Order.

That order sought to discourage counsel from unnecessarily including in the documents that they filed matters that might prevent those documents from being made part of the public record. The order also required counsel to indicate whether any memorandum submitted does or does not contain matters that may not properly be disclosed.

That process has worked reasonably well. Few motions to seal motions have been filed since the May 23 Order was entered. Moreover, with a few exceptions, counsel have faithfully and conscientiously accompanied their memoranda with statements indicating whether the memoranda may contain grand jury information or other matters that cannot properly be disclosed before trial.

One difficulty with the Journal's proposal that determinations as to whether a particular memorandum should be placed on file with the Clerk be made in response to motions to seal filed by the party submitting the memorandum, is that the party submitting the memorandum generally has no incentive to prevent dissemination of matters contained in the memorandum that might unfairly prejudice an adverse party. On the contrary, the dissemination of such matters may confer a perceived tactical advantage on the party submitting the memorandum. Moreover, under the Journal's proposal, in the absence of a motion to seal, the memorandum would become a matter of public record before the adverse party has an opportunity to be heard with respect to the propriety of placing the memorandum

on file. Once the memorandum is filed and published by the media, it is too late for the party adversely affected to object. Once rung, the bell cannot be un-rung. Thus, while it is helpful to ask counsel submitting a memorandum to make a judgment as to whether the memorandum properly can be included in the public record before trial, the Court cannot rely solely on the unilateral determination of counsel submitting the memorandum in making that decision. What is required is a procedure that permits the adverse party to weigh in and the Court to make its decision before the memorandum is filed and disseminated.

If there is a deficiency in the existing procedure, it is that the Court has not made a specific record of its determination with respect to each individual memorandum. Rather, the Court has simply adhered to the policy stated in the May 23 Order of reviewing each memorandum and placing them on file unless they contain grand jury information or other information that may not properly be disseminated prior to trial. Since making a record with respect to each individual motion that the Court determines ought not to be filed with the Clerk may assist interested persons in ascertaining whether a particular memorandum has not been filed because the Court has not yet reviewed it or because the Court has determined that it should not be filed, henceforth, the Court will make such a record.

II. Redaction

Apart from the Court's aversion to censoring portions of counsel's memoranda and thereby, perhaps, altering their meaning, there are a number of practical difficulties that prevent redaction from being a feasible alternative.

First, in those rare cases where counsel find it necessary to refer to grand jury matters or other matters not properly disclosable, those references are almost invariably dispersed throughout the memoranda and inextricably intertwined with the references to applicable legal authority. Thus, it would be virtually impossible to redact them without grossly distorting the memoranda or rendering them utterly incomprehensible. See United States v. Cianci, 175 F. Supp. 2d 194, 204 (D.R.I. 2001).

Even if redaction were possible, it would impose a burden on the Court that is difficult to justify. In addition to determining which individual words, phrases, sentences, paragraphs, and/or sections of memoranda should be redacted, the Court, then, would be required to physically alter the documents in order to make the redactions. Fairness also would require that the Court give each party an opportunity to be heard with respect to the proposed redactions. It is difficult to justify diverting the resources and energy that such a process would entail from dealing with the substantive issues in this case and the many other cases on the Court's docket.

Finally, knowledge that the Court will attempt to redact their memoranda would lessen counsel's incentive to avoid including in the memoranda matters that cannot properly be disclosed and, in turn, is likely to increase the number of memoranda that cannot be filed with the Clerk; or, at least, delay their filing.

Conclusion

Since the deadline for submitting motions has passed, the Court does not anticipate any future dispute arising with respect to the procedures set forth in the May 23 Order; however, in the unlikely event that further motions may be filed, and for the reasons previously stated, the Journal's motion is GRANTED IN PART and DENIED IN PART. It is GRANTED to the extent that paragraph 3 of the May 23 Order is hereby amended to include the following provision: "All memoranda filed by counsel in support of or in opposition to any motions, including discovery motions, shall be subject to this order and when the Court determines that a particular memorandum ought not to be placed on file with the Clerk, the Court will make a specific record of such finding."

In all other respects, the Journal's motion is DENIED.

IT IS SO ORDERED,

Ernest C. Torres, Chief Judge
United States District Court
Date: March , 2002