

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12064

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 5, 2005

In the Matter of	:	
	:	ORDER ON MOTION FOR
GREGORY M. DEARLOVE, CPA	:	COMPLIANCE WITH JENCKS ACT
	:	
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 30, 2005. The hearing is scheduled to begin on January 23, 2006.

By motion dated November 29, 2005, Respondent Gregory M. Dearlove, CPA (Dearlove), requested the production of Jencks Act material, pursuant to Rule 231(a) of the Commission's Rules of Practice and the Jencks Act, 18 U.S.C. § 3500. By pleading dated December 2, 2005, the Division of Enforcement (Division) stated that it has no such witness statements other than those already produced to Dearlove. The Division further stated that, if it obtains the kind of statement Rule 231 requires it to produce, it will produce the statement to Dearlove.

Rule 231(a) provides that any respondent in a disciplinary proceeding may move that the Division produce for inspection and copying any statement of any person called or to be called as a witness by the Division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act. Such production shall be made at a time and at a place established by the presiding Administrative Law Judge.

The term "statement" for purposes of production means: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by the witness to a grand jury. 18 U.S.C. § 3500(e).

The Division's prospective witness list, dated November 29, 2005, identified the transcripts of testimony previously given by several of its prospective witnesses. The Division's prospective witness list also represented that such transcripts have already been made available to Dearlove. This is certainly a good start, but it does not completely resolve the matter.

The Division's obligations under Rule 231(a) to produce Jencks Act material are ongoing until the witness testifies at the hearing. As noted in the comment to Rule 231, the obligation encompasses statements made during the investigation prior to the institution of the proceeding, as well as after institution of the proceeding and prior to the witness's testimony at the hearing.

It is unclear whether the Division has interviewed any prospective witness, before or after issuance of the OIP, where a verbatim transcript of the interview was not contemporaneously prepared. See United States v. Lieberman, 608 F.2d 889, 897 (1st Cir. 1979).

Dearlove is entitled to argue that any summaries of such untranscribed interviews made by the Division's staff in notes during informal meetings or telephone conversations should be excerpted and produced as Jencks Act material. In the alternative, he is entitled to request that I direct the Division to submit any such notes for in camera review. For its part, the Division is entitled to resist producing staff notes of interviews with witnesses, or summaries of those notes, if it believes that they are work product and/or do not constitute "statements" as defined by Rule 231(a) and 18 U.S.C. § 3500(e). However, until the Division clarifies whether such untranscribed interviews have taken place, the issue cannot be resolved.

IT IS ORDERED THAT, on or before December 19, 2005, the Division shall inform Dearlove in writing whether it has interviewed any prospective witness in circumstances where a verbatim transcript was not contemporaneously prepared. If the Division has not conducted any such interviews, it shall so state. If the Division has conducted such interviews, it shall name the prospective witness, and identify the date(s) of the interview(s), the name(s) of any interviewers who took notes or prepared summaries, and the pages of materials involved. If the Division does not produce such notes and/or summaries voluntarily, it must assert any defenses it may have to production under Rule 231(a) and 18 U.S.C. § 3500(e). The Division's December 19 response must include information about interviews conducted during the investigation leading to the OIP and up to December 19, 2005.

IT IS FURTHER ORDERED THAT, two weeks before the start of the hearing, the Division shall update its written response to Dearlove, identifying any untranscribed interviews of prospective witnesses conducted between December 19, 2005, and the date of its updated response.

IT IS FURTHER ORDERED THAT, before each witness testifies, the Division shall verbally update its written responses.



James T. Kelly
Administrative Law Judge