New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 235—NO. 25 TUESDAY, FEBRUARY 7, 2006 ALM

WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Use of Unusual Trial Management Procedures by District Courts

Court-directed innovation is a concept rarely applied in federal criminal trials. Despite being vested with wide discretion in trial management techniques, the format and trial of federal criminal cases has remained rather constant throughout the years.

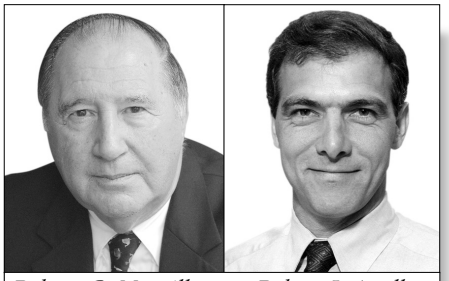
Even in the context of long and complex trials, with thousands of exhibits, courts have introduced few changes designed to assist jurors in assimilating information and understanding the myriad of facts often involving confusing accounting, economic or financial concepts. For the most part, this function has been delegated to trial attorneys.

A recent U.S. Court of Appeals for the Second Circuit case demonstrates the danger of court-guided experimentation and limits devices that risk injecting unfairness into the process. The court's decision in *United States v. Yakobowicz* makes clear that trial judges should employ uncommon trial management procedures only in those cases categorized as especially complex or unique.

The Second Circuit in 'Yakobowicz'

In *Yakobowicz,* the defendant was convicted by a jury in the U.S. District Court for the Eastern District of New York for filing false federal excise tax returns and attempting to impede the administration of internal revenue laws. Mr. Yakobowicz appealed his conviction arguing that his right to a fair trial was compromised by the trial court's use of an "interim summation" procedure which allowed both sides to make a short statement to the jury at the end of each witness' testimony. The Second Circuit vacated the conviction.[1]

During the trial, the government used its interim summations to state how the testimony of the witness "fit[] in the overall scheme of the case" and to "argue and reargue its theory of the case." This included posing rhetorical questions as to the defendant's state of mind and asking the jury to "decide for yourself" various critical factual issues. In reviewing these statements, the appellate court found no distinction between the content of the government's interim summations and its final summation. By comparison, the defendant's interim summations merely pointed out the lack of evidence on the issue of concealment by the defendant. Further, the defendant presented no witnesses in his defense. Subsequently, he was convicted by the jury on all counts.[2]



Robert G. Morvillo *Robert J. Anello*

Stating that it intended to review the case for abuse of discretion because the issue was one of trial management, the court noted that the standard practice in criminal cases is to allow for summations only after the closing of evidence as clearly anticipated by Federal Rule of Criminal Procedure 29.1. According to the court, this traditional order of events at a criminal trial serves two goals: first, it enables jurors to avoid forming opinions before the close of evidence and second, it allows the defense to rely upon the presumption of innocence by forcing the prosecution to set forth its entire case before framing a defense.[3]

Although the court noted that some form of interim summations had been successfully used in lengthy or complex civil trials, it stated that there does not "appear to exist any authority or advocacy for the use of interim summations in criminal cases, much less in the form used here." Indeed, the court observed that the use of such a procedure raises very different issues in civil and criminal cases. First, interim summations in civil cases are not inconsistent with the recent trend in many civil cases to allow the separate disposition of discrete issues through bifurcation or use of special verdicts. However, neither this trend, nor the use of these techniques, applies to criminal cases.

Furthermore, the use of interim summations in civil cases will not necessarily result in the advantage of one party over the other. Conversely, in a criminal context, interim summations almost always will favor the prosecution which typically calls more witnesses than the defense and therefore will be able to argue repeatedly the merits of its theory of the case—strengthening its position "cumulatively as well as repetitively." Moreover, the court observed that this advantage to the prosecution is increased as a result of the limited discovery available to criminal defendants. "The government generally has, therefore, a clearer vision of the entire case than does the defense and can unveil its evidence with interim summations in mind."[4]

In any event, the court found that use of an interim summation procedure, whether in criminal or civil cases, should be reserved for those cases that "differ[] from the garden variety of cases in which summations only at the close of evidence are sufficient." These differences might arise because of the length of the trial or the complexity of issues. However, the court found no such distinction in the instant case. Declining to extend its decision to all criminal cases, the court held that the use of interim summations in this case not only was unjustified, but amounted to a violation of Mr. Yakobowicz's constitutional right to a fair trial.

"[O]ur system of justice anticipates that a criminal defendant is entitled to see the prosecution's whole case before deciding on a defense and to be judged by a jury that is strongly warned to keep an open mind until deliberations." The court determined that the cumulative use of interim summations in this case altered this scheme, forcing the defendant to respond to each of the points made by the government in its interim summations or appear to be acquiescing in the government's argument. Because this violated the defendant's right to a fair trial, his conviction was reversed.[5]

Judge Sotomayor dissented from the majority's decision, although she began her opinion by agreeing that "the use of interim summaries in criminal trials [was] suspect at best." Nonetheless, Judge Sonia Sotomayor said that the district court's use of interim summations constituted trial error, subject to a harmless error review, rather than structural error as determined by the majority. Applying the traditional harmless error review, the dissent found that the use of interim summations did not prejudice the defendant based on the fact that out of 26 witnesses the government made only 10 interim summaries and that the trial judge repeatedly instructed the jury that it was not to form any conclusions until the close of all evidence. On this basis, Judge Sotomayor said that she would have affirmed the conviction.[6]

Other Techniques

• ***Preclusion of Opening Statements.*** Although the majority in *Yakobowicz* found that the technique of interim summations used by

Robert G. Morvillo *and* **Robert J. Anello** *are partners at Morvillo, Abramowitz, Grand, Iason & Silberberg.* **Gretchan R. Ohlig,** *an attorney, assisted in the preparation of this article.*

the district court was improper, trial judges generally have been granted broad discretion in employing atypical procedures during criminal trials. For instance, in the federal district courts in Connecticut, opening statements in both civil and criminal cases are permitted only upon application to the court. This practice, codified in the district's local rules,[7] was acknowledged by the district court in *United States v. Young & Rubicam, Inc*.[8] In that case, the court rejected the government's motion for leave to make an opening statement, noting that permitting the parties to make opening statements to the jury is a matter for the discretion of the court which "must be guided by the purpose of a trial; to permit a [party] a fair opportunity to present its case." In an effort to strike a fair balance, Connecticut federal courts commonly permit counsel for both parties to submit suggested introductory statements to the court for review and incorporation into the judge's opening statements to the jury. The Second Circuit has upheld the validity of this practice, finding that a criminal defendant does not have a constitutional right to make an opening statement.[9]

Note Taking by Jurors

Broad discretion also has been afforded to trial courts when it comes to allowing jurors to take notes during a trial. The issue of juror note taking was discussed in *United States v. Bertolotti,* where the defendants argued that the trial court's failure to examine notes taken by the jury during the trial prior to permitting their use in deliberations constituted reversible error. The Second Circuit rejected this argument, stating that "[i]t has been long-established in this Circuit that it is within the trial court's discretion to allow the jury to take notes and use them in the course of their deliberations." The court further noted that as long as the trial court instructed the jury that the notes should serve only as a memory aid, but should not take precedence over the juror's independent memory of the facts, no error existed in allowing the notes to be taken or used during deliberations.[10]

Similarly, courts also have wide discretion in permitting jurors to visit a crime scene. As observed by District Court Judge Jack Weinstein in *In re Application to Take Testimony in Criminal Cases Outside District,* the trial courts' discretion is "extremely broad" in this respect. Quoting various evidence treatises, Judge Weinstein stated that such views provided the jury with independent evidence to be considered during deliberations.[11] Thus, although district courts enjoy a great deal of control in managing trials, the Second Circuit's decision in *Yakobowicz* demonstrates that their discretion is not without limits. As seen in that case, the procedure of interim summations is permitted only in cases that differ from the "garden variety of cases."

Witnesses: Jurors' Questions

The notion that district courts may stray from typical trial management procedures only in those cases deemed to be unique or atypical is one echoed in other cases as well.

For instance, in *United States v. Ajmal,* the Second Circuit addressed the issue of whether jurors should be allowed to put questions to witnesses. As an initial matter, the court observed that the decision to allow juror questioning of witnesses lies within the district court's discretion and is "well-entrenched in the common law and in American jurisprudence." Nonetheless, the court noted that appellate courts disapprove of the general practice and "strongly discourage its use."[12]

The court said that trial judges must use their discretion to balance the potential benefits and disadvantages of juror questioning. Disadvantages include the possibility of jurors abandoning their role as neutral fact-finders to become inquisitors and prematurely evaluating evidence before all the facts are presented. The court found that jurors should be allowed to put questions to witnesses only where the case presented sufficiently "extraordinary or compelling circumstances" as to justify the use of this technique. Furthermore, even where a case so justifies, the Second Circuit has held that trial courts should employ the procedure set forth in its 1981 decision in *Ronder.* This procedure requires that juror questions be submitted to the judge, who reviews the questions with counsel and, if approved, puts the questions directly to the witness.[13]

Multiple Jury Panels

Another innovative trial technique used by courts in criminal cases is the practice of impaneling multiple juries to separately hear evidence against co-defendants. The need for such procedure arises when the government seeks to admit the confession or admissions of one defendant, the use of which against a co-defendant would violate the latter's Sixth Amendment rights. Each jury hears only the evidence admissible against the particular defendant whose case they are considering and delivers a verdict only as to that defendant. The Second Circuit has acknowledged the efficacy of this procedure noting that it is a method that can be employed by a court to remedy possible prejudice to a defendant, especially given the law's stated preference for the joint trial of all defendants accused of participating in the same act or transaction.[14]

Despite the value of this procedure, its use is not without limits. In *United States v. Bin Laden,* a court in the U.S. District Court of the Southern District of New York considered impaneling multiple juries in response to the defendants' motion for a severance. Viewing the procedure as a "type" of severance that would not prolong pretrial detention, the court noted that although many appellate courts had found the procedure constitutionally permissible, many had expressed reservations about its use. The court found particularly persuasive the point made by a state court in New Jersey that the procedure should be used only in "relatively uncomplicated situations which will not require the excessive moving of juries in and out of the courtroom." Because the *Bin Laden* case did not fall into this category, the court declined to employ this procedure.[15]

Attorney Voir Dire

A practice discouraged in our local federal courts is allowing attorneys to conduct voir dire of potential jurors. In *United States v. Wilson,* the court acknowledged that trial courts are vested with the discretion whether to conduct voir dire examination or permit counsel to conduct such examination by virtue of Federal Rule of Civil Procedure 24(a). In ruling against the defendant's request to have his attorney conduct voir dire, however, the court observed that "[i]t is a blunt fact that at times the thrust of inquiry where lawyers conduct voir dire, as in the state courts, is not to obtain a fair and impartial jury, but rather by a calculated effort to establish a rapport with a juror or jurors in the hope of encouraging partiality in favor of the client." For this reason, the trial court denied the defendant's request, holding that barring attorney voir dire was not a violation of his Sixth Amendment rights.[16]

Consistent among these decisions is the idea that trial judges generally are afforded a great deal of latitude in determining how to conduct criminal trials within their courtrooms. Despite the fact that courts are reined in on occasion, such as when judges have attempted to free up their time by delegating trial functions to clerks,[17] federal courts, no doubt, have the ability to employ a wide array of techniques to increase efficiency and juror comprehension during criminal trials.

Trial lawyers have done a very good job of incorporating various technological advances into their courtroom presentations. However, many of these devices are expensive and not available to all defendants. More thought and effort should be given to simplifying the presentation of factual and legal material to juries so that verdicts remain fair and not the result of supposition.

•••••••••••••••●●•••••••••••••••

1. *United States v. Yakobowicz,* 427 F3d 144 (2d Cir. 2005).
2. Id. at 147, 149.
3. Id. at 150.
4. Id. at 151-152.
5. Id. at 153-154.
6. Id. at 155-158.
7. The prior Local Rule 12(e) stated that a party could not make an opening statement in a jury trial except on application made to the court outside the hearing of the jury. The recently amended Local Civil Rules include Rule 83.4 of the U.S. District Court of Connecticut, providing that in civil cases, counsel shall be permitted to make opening statements subject to limitations imposed by the judge. No such change was made to the Local Criminal Rules, however.
8. 741 F. Supp. 334, 352-353 (D. Conn. 1990) (citations omitted).
9. *United States v. Salovitz,* 701 F.2d 17 (2d Cir. 1983).
10. 529 F.2d 149, 159-160 (2d Cir. 1975).
11. 102 F.R.D. 521, 524 (EDNY 1984).
12. 67 F3d 12, 14 (2d Cir. 1995) (citing *United States v. Bush,* 47 F.3d 511 (2d Cir. 1995)). However, after a period of experimentation with juror questions, a recent report from the N.Y. Jury Trial Project analyzed the use of such questions in 74 trials and found that (1) jurors rarely submitted improper questions, (2) jurors did not go on evidentiary fishing expeditions, (3) juror questions were not time consuming and (4) no evidence emerged to indicate that the jurors became advocates. See Final Report of the Committee of the Jury Project, pp. 49-72, N.Y.S. Unified Court System (2005).
13. *United States v. Bush,* 47 F.3d at 516 (citing *United States v. Ronder,* 639 F.2d 931, 934 (2d Cir. 1981)).
14. *United States v. Yousef,* 327 F.3d 56, 149-150 (2d Cir. 2003).
15. 109 FSupp2d 211, 215 fn. 8 (SDNY 2000) (citing *State v. Corsi,* 86 N.J. 172, 430 A.2d 210, 213 (1981)).
16. 571 FSupp 1422, 1428-1429 (SDNY 1983).
17. *People v. Ahmed,* 66 NY2d 307 (1985) (reversal of conviction where trial judge delegated his duties to law secretary during jury deliberations); *People v. Silver,* 240 AD 259 (1st Dept. 1934) (judge absent from prosecutor's summation); *People v. Pinkey,* 272 AD2d 52 (1st Dept. 2000) (absence from voir dire).