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WHITE-COLLAR CRIME

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Handling Witnesses: The Boundaries of Proper Witness Preparation

The recent plight of government attorney Carla Martin in the trial of Zacarias Moussaoui has focused attention on an attorney's obligations concerning witness preparation and accessibility.

Ms. Martin is a lawyer with the Transportation Security Administration and a former member of the Moussaoui prosecution team. The penalty phase of Moussaoui's trial was halted abruptly last month after the court was informed that Ms. Martin had violated the court's sequestration order, which excluded witnesses so they could not hear the testimony of others, by providing trial transcripts to seven witnesses and giving pointed advice as to how they should testify to counteract what she perceived to be holes in the government's case.

In addition, after a hearing on Ms. Martin's conduct, the district court found that she had lied when she represented to the court that none of the three Federal Aviation Administration (FAA) witnesses would agree to meet with the defense before trial. Rather, "[Judge] Brinkema found [Ms.] Martin had instructed at least one of the witnesses that he couldn't speak with the defense…[and that Ms.] Martin wasn't truthful in stating that the other two had explicitly stated that they wouldn't speak with the defense."[1]

In its March 13 letter to the court, prosecutors tagged Ms. Martin a "lone miscreant" who engaged in "aberrant and apparently criminal behavior." However, her actions raise two significant issues with respect to criminal trial work and the sometimes amorphous boundaries within which trial attorneys operate. First, what constitutes permissible witness preparation versus the improper coaching of witnesses? Second, what are the respective obligations of the prosecution and defense with respect to providing the other side access to their witnesses?

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Improper Coaching of Witness

Witness preparation is a fundamental part of trial work, the primary goal being to maximize the value of a witness' testimony. Numerous practice treatises and articles counsel lawyers on how to prepare witnesses for trial and what to accomplish during witness prep sessions.[2] However, as recognized by almost all these sources, this area of practice has not received much attention from either professional organizations that regulate the ethical behavior of attorneys or courts. As a result, the lines separating valid witness preparation from improper coaching are not always clear.[3] This uncertainty is frustrating, especially in light of an attorney's coinciding obligation to zealously represent his client.

It is clear that a lawyer should not put on a witness that he knows will commit perjury. Disciplinary Rule (DR) 7-102(A)(4) of the New York Lawyer's Code of Responsibility states that a lawyer shall not "knowingly use perjured testimony or false evidence." Similarly, the Model Rules of Professional Conduct provide that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[4] Other than these admonishments related to perjurious testimony, however, there are no guidelines for attorneys to reference regarding witness coaching.

'Geders v. United States'

Furthermore, courts that have addressed improper coaching also have failed to shed much light on the subject. In *Geders v. United States*, the U.S. Supreme Court addressed the issue of whether a trial court's order, which directed the defendant not to consult his attorney during an overnight recess that occurred while petitioner was testifying, deprived him of the Sixth Amendment's right to effective assistance of counsel. Recognizing a trial court's broad power in controlling the progress and shape of a trial, the Court noted that this power included the power to sequester witnesses. Sequestration serves to restrain witnesses from tailoring their testimony to that of earlier witnesses and prevents improper attempts to influence their testimony in light of testimony already given by prior witnesses.[5]

However, the Court observed that a sequestration order affects a criminal defendant in quite a different way, as it prevents him from discussing the events of the day's trial with his attorney or making strategic decisions for the following day. According to the Court, placing a "sustained barrier to communication between the defendant and his lawyer" was an unacceptable way to deal with the government's concern about improper coaching of the witness. When addressing concerns regarding witness coaching, a court must consider the defendant's Sixth Amendment rights and, where there is a conflict between the two interests, the Court noted that the conflict must be resolved in favor of the Sixth Amendment.

The Court found that there were other ways to avoid improper witness coaching. For instance, as was seen recently with the effective line of cross-examination of Enron defendant Jeffrey Skilling, the prosecutor can cross-examine the witness about any "coaching" that might have taken place during recess; or, where reasonable, the recess can be postponed until testimony is completed.[6] Since the trial court's order prevented the defendant from discussing anything with his attorney during the 17-hour period, the Court held that it was a violation of the defendant's Sixth Amendment rights.[7]

While the Court acknowledged the issue of improper coaching of witnesses, it did not give a definition of coaching or delineate the limits of improper discussion between counsel and his client. Rather, the Court simply referred to those ethical considerations and disciplinary rules prohibiting attorneys from suborning perjury or participating in the creation of evidence that is false.[8]

Courts have acknowledged that "[i]t is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to giving testimony…."[9] Moreover, while there is no affirmative duty to

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prepare a witness for trial, a lawyer is required to diligently and zealously represent his client "within the bounds of the law."[10] The recognized rule of thumb has been that an attorney can instruct a witness how to testify, but should refrain from telling a witness what to say. As suggested by one scholar, "[i]nstead of merely refraining from telling witnesses what to say, attorneys would be better guided by focusing on whether their witness preparation techniques could have the probable effect of inducing a witness to falsify or misrepresent facts within his knowledge that are of material significance to an issue at trial, either expressly through testimony or implicitly through demeanor."[11]

Access to Witnesses

Another issue often presented is an attorney's obligation to allow his adversary the opportunity for pretrial access to witnesses he intends to call to testify. This question was addressed by the U.S. Court of Appeals for the District of Columbia in *Gregory v. United States*, where the defendant was prosecuted for murder, robbery and assault. In presenting its case, the government intended to put certain eyewitnesses on the witness stand to identify the defendant. Prior to the beginning of trial, the defense attempted to interview these witnesses, but was told that the witnesses had been instructed by the prosecutor not to talk to the defense team unless he was present. The defendant sought the court's assistance in gaining access to the witnesses.[12]

The court noted that "[w]itnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense." Rather, both sides should have an equal opportunity for access to such witnesses. Finding that the defendant was deprived of this opportunity by virtue of the prosecution's actions, the court held that the defendant was denied a fair trial. While the court noted that there was no direct suppression of evidence, it stated that "there was unquestionably a suppression of the means by which the defense could obtain evidence."[13]

The U.S. Court of Appeals for the Second Circuit addressed a similar issue in *International Business Machines Corp. v. Edelstein*, a lawsuit brought by the government alleging Shearman Act violations against IBM.[14] IBM complained to the court when it was frustrated in its attempts to interview some of the government's listed witnesses as a result of the government instructing the witnesses to cancel their interview appointments with defense counsel. In response, the court issued an order that "if any [party] seeks to interview a witness in the absence of opposite counsel,…you [must] do it with a stenographer present…." Because the scheduling of interviews with government counsel present was practically impossible and the presence of court reporters was an "unattractive alternative," the court's order proved unworkable. IBM filed a writ of mandamus seeking to have this ruling revoked.[15]

The Court of Appeals found that the court's restrictions exceeded its authority. The order "not only impair[ed] the constitutional right to effective assistance of counsel but [was] contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made." The Court further noted that there were legitimate reasons to maintain confidentiality in attorney interviews of witnesses, noting that it insured unhampered access to information and the presentation of the best possible case at trial.[16]

Ethics of Obstruction

Unlike issues related to the coaching of witnesses, the ethics of obstructing an opponent's access to a witness have been widely addressed.

A lawyer is required to diligently and zealously represent his client "within the bounds of the law." The recognized rule of thumb has been that an attorney can instruct a witness how to testify, but should refrain from telling a witness what to say.

The 2004 edition of the Model Rules of Professional Conduct, issued by the American Bar Association (ABA), states that "[a] lawyer shall not…unlawfully obstruct another party's access to evidence or… counsel or assist another person to do any such act…."[17]New York's Code of Professional Responsibility similarly provides that a lawyer shall neither suppress evidence that he or his client is legally obligated to produce nor advise or cause a person to hide or leave the jurisdiction for the purpose of making the person unavailable as a witness therein.[18] As these rules are interpreted by the American College of Trial Lawyers in its Code of Trial Conduct, implicit is the sentiment that a lawyer should not obstruct another party's access to a nonparty witness.[19]

These ethical rules also make clear that the responsibility of a public prosecutor differs from that of the usual advocate in that he must make timely disclosure to the defense of all evidence that tends to negate the guilt of the accused or mitigates the offense.[20] In addition, Standard 3-3.1(c) of the most recent edition of the ABA Standards for Criminal Justice provides that a prosecutor "should not advise any person to decline to give the defense information…."[21]

Although prosecutors are held to a high standard in this regard because of their obligation to provide exculpatory evidence to the defense, in whatever form, these ethical rules make it clear that it is improper for any attorney to deny his adversary access to witnesses. An exception to the rule, of course, is defense counsel's obligation to protect his client's Fifth Amendment privilege.

Conclusion

The recently scandalized behavior of a government attorney should put all trial attorneys on notice. The ethical preparation of witnesses is not clearly defined, but is an area that should be considered carefully by practitioners. Furthermore, counsel should be diligent in ensuring that both sides fulfill their obligations with respect to providing pretrial access to witnesses and the information they possess. Being conscious of these issues insures not only that one has fulfilled his ethical obligations, but also that the client is zealously represented.

1. G.M. Filisko, "In Trouble Over Sequester Break," 5 No. 12 A.B.A. J. E-Report 1, March 24, 2006.
2. See id.; Jeffrey L. Kestler, Questioning Techniques and Tactics (3d ed. 1999); Fred C. Zacharias & Shaun Martin, "Coaching Witnesses," 87 Ky. L.J. 1001 (1998-99); Roberto Aron & Jonathan L. Rosner, "How to Prepare Witnesses for Trial" (2d ed. 1998); Daniel I. Small, "Preparing Witnesses: A Practical Guide for Lawyers and Their Clients" (1998); Ronald L. Carlson & Edward J. Imwinkelried, "Dynamics of Trial Practice" (2d ed. 1995); Joseph D. Piorkowski, "Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of 'Coaching,'" 1 Geo. J. Legal Ethics 389 (1987).
3. See Bennett L. Gershman, "Witness Coaching by Prosecutors," 23 Cardozo L. Rev. 829, 830 (February 2002); Roberta K. Flowers, "What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors," 63 Mo. L. Rev. 699, 743 (Summer 1998).
4. ABA Model Rule of Professional Conduct 3.3(a)(3).
5. 425 US 80, 87 (1976).
6. The prosecutor effectively cross-examined Mr. Skilling about consulting not only his lawyer during a recess in testimony but also a defense consultant, who was assisting on "juror's perceptions" and "persuasive communication strategies." http://blogs.wsj.com/law (April 17, 2006).
7. Id. at 91.
8. Id. at 90, n. 3.
9. *Hamdi & Ibrahim Mango Co. v. Fire Ass'n*, 20 FRD 181, 182 (SDNY 1957).
10. New York Lawyer's Code of Professional Responsibility, DR 7-101; ABA Model Rule of Professional Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").
11. Piorkowski, 1 Geo. J. Legal Ethics at 409-410.
12. 369 F.2d 185 (D.C. Cir. 1966).
13. Id. at 188-189.
14. 526 F.2d 37 (2d Cir. 1975).
15. Id. at 41.
16. Id. at 41-42.
17. American Bar Association Model Rule of Professional Conduct, Rule 3.4(a).
18. New York Lawyer's Code of Professional Responsibility, DR 7-109 (A) and (B).
19. See American College of Trial Lawyers, Annotated Code of Trial Conduct, §14(b) and commentary (2005) (available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=198).
20. See ABA Model Rule of Professional Conduct 3.8(d); N.Y. Code of Professional Responsibility, Ethical Consideration 7-13; *Brady v. Maryland*, 373 U.S. 83 (1963).
21. David S. Caudill, "Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights," 17 Geo. J. Legal Ethics 103, fn. 14 (Fall 2003).