

Outside Counsel

Expert Analysis

Recent Trials Show Importance Of Investigating Cooperating Witnesses

Criminal trials are often won or lost based on the credibility of cooperating government witnesses. Frequently derided as snitches, rats or turncoats, cooperating witnesses usually carry serious baggage but also provide critical and damning testimony about how the crime was committed.

Cooperating witnesses testify pursuant to an agreement with the government. Pursuant to such agreement, the cooperating witness agrees to plead guilty to his or her criminal conduct, provide what the government is satisfied is full and truthful information about the witness's criminal conduct and the charged offenses, and agrees to be available to the government for testimony at trial. In exchange and assuming the cooperating witness adheres to the terms of the cooperation agreement, the government agrees to bring the witness's cooperation to the attention of the court at sentencing and to move the court for

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a downward departure from the sentencing guideline range based on such cooperation.

Cooperation agreements long have offered defense lawyers a potentially powerful avenue of attack. Underlying the agreement, of course, is the

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witness's admission to committing a crime, likely a strike to his or her credibility in the eyes of many jurors. Then there is the cooperating witness's hope of avoiding a long prison sentence through his or her cooperation, arguably a powerful incentive to shade the truth.

But this typical line of attack on cross-examination of cooperating witnesses should be part of a much broader strategy to undermine their credibility. Everything about a cooperating witness should be open for scrutiny—employment history, prior convictions, marital records, and litigation history, as well as what he or she has told prosecutors during pre-trial interviews, proffers, and trial preparation sessions.

Walters Insider Trading Trial

The insider trading trial of legendary Las Vegas gambler Billy Walters shows what a deep dive into a cooperating witness's background can accomplish. Prosecutors alleged that Walters netted more than \$43 million from inside information he received about the milk supplier Dean Foods from the company's former chairman, Thomas Davis, who served as the government's star witness.

Ultimately, following a three-week trial, a jury in Manhattan federal district court convicted Walters on all 10 counts of the indictment. In July, he was sentenced to five years in prison. But at trial, the defense landed devastating blows to the credibility of Davis, which may become a focal point on appeal.

Before the trial, Davis had pled guilty to a dozen charges related to the alleged insider trading scheme, including securities fraud and obstruction of justice. On direct examination, Davis testified that he supplied Walters with inside information on more occasions that he could count going back as far as 2008. He described using a pre-paid phone to communicate under the radar with Walters and employing the code word “Dallas Cowboys” for Dean Foods.

Davis also admitted on direct examination to making some “poor decisions” in his life, which included taking \$100,000 from a charity for battered women and children to pay off a gambling debt; paying for sex with women in Las Vegas; and using two bookies for illegal gambling.

Damaging admissions like those from Davis are not uncommon from cooperating witnesses in criminal trials. When solicited on direct examination by the government, however, the admissions can be softened and used to preempt attacks by the defense.

But on cross-examination in the Walters trial, the defense brought to light additional areas that made Davis’s character and credibility even more vulnerable to suspicion. As reported in the press, the defense produced text messages Davis sent threatening his second wife with litigation; evidence his gambling habit was more extensive than what he had admitted previously to the government; and telephone records indicating he called escort services during business trips while married to his third wife, seemingly contradicting his prior statements to prosecutors that he had not paid for sex during that time period. After cross-examination, the prosecution

reportedly conceded that Davis had been “impeached significantly” by the defense.

Evidence presented by Walters’s defense team also appeared to cast doubt on a critical part of Davis’s testimony surrounding the circumstances under which Walters gave Davis the pre-paid cell phone. Davis testified on direct examination that Walters and he used the pre-paid phone throughout 2012, including before Dean Foods announced the spinoff of its WhiteWave

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division. During pre-trial interviews with the government, Davis stated that he had received the pre-paid phone from Walters at the Signature Aviation terminal for private jets at Dallas Love Field in 2011. He stuck to those facts at trial.

But through a combination of flight and phone records, Walters’s defense team presented evidence that the only day Walters could have handed off the pre-paid phone to Davis at the Dallas airport was on Dec. 18, 2012, long after the Dean Foods spinoff.

In post-trial briefing, Walters’s defense team argued that the government had to have been aware that Davis had perjured himself with respect to the hand-off of the pre-paid phone, creating the need for a new trial. The government, in response, has argued that Walters cannot prove that Davis willfully lied and that such a lie would not have affected

the verdict even if it were clear Davis had lied about the timing of the handoff of the pre-paid phone.

Ultimately, in an order on July 6, 2017, U.S. District Judge P. Kevin Castel ruled against Walters, finding he had not shown that the government knowingly presented false testimony. Regardless, the cross-examination of Davis demonstrates the fruitful impact of an aggressive investigation of cooperating witnesses.

Venezuela Drug Trafficking Trial

The credibility of a key government witness also was at issue in the trial of two nephews of Venezuela’s first lady. The nephews, Efrain Antonio Campo Flores and Franqui Francisco Flores de Freitas, were charged with conspiring to import 800 kilograms of cocaine into the United States. After a two-week jury trial in Manhattan federal court, the two men were found guilty late last year. But again, not before the credibility of a government witness was seriously undermined through information obtained through diligent defense investigation, and which again could prove important on any potential appeal.

In the Flores and de Freitas prosecutions, the government’s key witness, Jose Santos-Pena, was a paid informant working for the U.S. Drug Enforcement Agency (DEA). During the course of several years, Santos-Pena’s son and Santos-Pena had been paid more than \$1 million by the DEA for information about various drug traffickers. It was Santos-Pena who secretly recorded conversations with the two nephews about a deal to import cocaine into the United States—recordings that were crucial evidence at trial.

But on cross-examination, Santos-Pena was confronted with prison phone recordings obtained by the defense suggesting he was trafficking in drugs while in prison and communicating with his son. Under prior questioning on direct from the government, he had testified to the contrary.

The revelations of the prison calls forced the government to announce, in dramatic fashion before the jury, that it was ripping up Santos-Pena's cooperation agreement. In instructions to the jury, U.S. District Judge Paul A. Crotty also made it clear that the government had told Santos-Pena he would not receive his cooperation letter and that the jury could discount his testimony.

Again, although the jury ultimately convicted the defendants, the trial demonstrates the advantages of vigorously investigating government witnesses, especially cooperating witnesses.

Use of Private Investigators

Under *Brady v. Maryland and Giglio v. United States*, the government is obligated to disclose material exculpatory evidence as well as evidence that could impeach the character or testimony of a government witness. But as the two trials discussed above show, it is not sufficient to rely on the government's disclosures, especially when it comes to cooperating witnesses. To thoroughly vet a cooperating witness for potential impeachable material, it may be helpful to hire a properly licensed private investigator or investigative firm.

An investigator can compile relevant background information on government witnesses, including financial and personal records, which can diminish their credibility before the

jury. Private investigators also can attempt to interview a witness's family, colleagues, and business partners to gain further information.

The job of the investigator also is to seek to corroborate disclosures made by the government. A good investigator often can find inconsistencies that can be exploited at trial.

There are, however, significant risks with using a private investigator. Rule 5.3 of ABA Model Rules of Professional Conduct establishes the responsibilities regarding non-lawyer assistance. Comment 3 of the Rule addresses the use of investigators: "When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."

Generally, courts take a dim view of investigators who obtain information through deceptive means. In *Midwest Motor Sports v. Arctic Cat Sales*, 347 F.3d 693 (8th Cir. 2003), a dispute between a manufacturer and two dealers, the U.S. Court of Appeals for the Eighth Circuit affirmed a district court's ruling to impose evidentiary sanctions on the manufacturer whose lawyers hired an investigator who secretly record conversations with the employees of the dealers. The court referenced Rule 4.2 of the ABA's Model Rules of Professional Conduct, which states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The court held that the investigator in that

case had violated the rule by contacting critical non-party witnesses without the consent of their lawyers. Importantly, the court further held that the attorneys were responsible for actions taken by the investigator on their behalf.

Lawyers also should be aware of the licensing requirements for private investigators. In almost every state, private investigators are required to obtain a license. Using an unlicensed private investigator can lead to serious ramifications, ranging from the commission of a misdemeanor to the loss of the work-product privilege. Last year, a court in the Eastern District of Oklahoma, in *Haley v. State Ex Rel. Oklahoma State Department of Human Services*, 14-CV-562 (JHP), 2016 U.S. Dist. LEXIS 74567 (E.D. Okla. June 8, 2016), granted a request to compel a party to produce all files related to the appointment of a private investigator who was licensed in Texas, but not in Oklahoma, where he traveled to conduct interviews.

Conclusion

Trials often turn on the credibility of witnesses. It is up to defense lawyers to look beyond the government's disclosures to find other potentially incriminating evidence. In doing so, it may make sense to use the services of a private investigator or investigative firm, making sure to pay special attention to the ethical landmines of that engagement.