ALM | LAW.COM

New York Law Journal

WHITE-COLLAR CRIME

Putting Counsel in an Uncomfortable Spot: The Witness Chair

By Robert J. Anello and Richard F. Albert
August 7, 2024

By **Robert J. Anello**

And **Richard F. Albert**

For good reason, ordinarily courts are reluctant to admit statements of counsel as evidence in a criminal trial. Rulings in two recent high-profile local cases defy the common wisdom. In *U.S. v. Menendez*, No. 23-cr-490 (S.D.N.Y.), the prosecution of New Jersey Sen. Bob Menendez and others on bribery and related charges, the court admitted a PowerPoint presentation Menendez's counsel made to prosecutors prior to indictment as part of an attorney proffer. The government offered the presentation in support of obstruction charges included in a subsequent indictment against the senator. Not surprisingly, the government's aggressive step has gotten the attention of the defense bar. Although the government has indicated that it expects such uses of attorney proffers to be rare, as discussed below, its action is troubling and not unique. The government's step suggests precautions that defense counsel should consider in making attorney proffers.

In *U.S. v. Coburn & Schwartz*, No. 19-cr-120 (D.N.J.), a District of New Jersey prosecution of former senior executives of Cognizant Technology Solutions Corporation (Cognizant) on Foreign Corrupt Practices Act (FCPA) charges based on the alleged bribery of Indian government officials, the court upheld a defense subpoena seeking trial testimony from the prominent law firm that conducted an internal investigation in the matter. The ruling confirms the well-recognized risk that presenting information regarding an internal investigation to prosecutors waives any privilege regarding what was presented. The ruling also illustrates how a narrowly tailored demand for testimony about what an internal investigation

failed to find can be a potentially valuable tool for defense counsel.

'U.S. vs. Robert Menendez,' No. 23-cr-490 (S.D.N.Y.)

On Sept. 11, 2023, in the late stages of an investigation conducted by the U.S. Attorney's Office for the Southern District of New York (SDNY), Menendez's then-attorney, Abbe Lowell, met with senior SDNY prosecutors and made a PowerPoint presentation outlining his client's theory of the facts. The presentation included the express statement that two categories of payments, a payoff of Menendez's then-girlfriend Nadine's mortgage, and payments on her behalf for a Mercedes, were "unknown to [the] Senator" until after the government's investigation began. The presentation also included statements characterizing the payments as loans, which Menendez repaid after learning about them, again, after the investigation began.

Counsel's efforts to avoid indictment were unsuccessful. On Sept. 21, 2023, the government obtained an indictment charging Menendez, his now-wife Nadine, and three New Jersey businessmen with three counts of bribery conspiracy, honest services conspiracy and extortion conspiracy based on allegations that Menendez accepted hundreds of thousands of dollars of bribes to use his influence to benefit the businessmen and Egypt. Menendez apparently retained new counsel after indictment; Lowell did not appear on his behalf. The grand jury issued a superseding indictment on March 5, 2024, adding additional counts, including two counts charging Menendez and Nadine with conspiring to and obstructing justice by creating documents referencing "loans," and by causing their "then-counsel to make false and misleading statements" to SDNY prosecutors, including at the September 2023 meeting.

The court severed Nadine's case, and in May 2024 the remaining defendants proceeded to trial before Judge Sidney H. Stein. During trial, the government sought to admit a redacted version of the PowerPoint presentation to support its obstruction charges. Menendez objected to its admission as unfairly prejudicial under Federal Rule of Evidence 403. The senator argued against the government's proposal to introduce the exhibit through a government paralegal who attended the presentation because this could cause the jury to infer that presentation's statements were authorized by Menendez—an element of the offense—even though the paralegal had no knowledge of any authorization. Menendez noted that the government had been "insisting for several months that it intended to call Mr. Lowell" to introduce the exhibit, and that he "would not object to the government calling Mr. Lowell to testify" as to Menendez's review or authorization of the presentation.

In opposition, the government argued that the jury was entitled to draw the inference that "unambiguous statements about what Menendez purportedly did not know" were reviewed and authorized by him, as supported by case law regarding the agent/principal relationship between attorney and client. The government argued that Menendez had ample information in the 3500 material regarding what his former counsel would say about the preparation of the PowerPoint; that Menendez

had rejected a proposed stipulation setting forth those facts without disputing its accuracy; and that Menendez could call Lowell as a witness if he wished. The court sided with the government, and the presentation was admitted at trial through a paralegal. Neither side called Lowell to testify.

In summation, the government pointed to the presentation's statements as evidence of the senator's intent on several charges, and also argued that the presentation formed part of a larger scheme to obstruct justice, which involved falsely describing some bribes as loans and providing that information to the grand jury. Menendez's summation on these issues focused on the absence of evidence of the senator's authorization of the statements in the presentation. The jury convicted Menendez on all counts.

'Menendez''s Import for Attorney Proffers

This column previously has addressed the critical role that attorney proffers play in facilitating necessary communication between defense counsel and prosecutors. See Anello & Albert: "Attorney Proffers: Practical Considerations and Some Law Too," (New York Law Journal, Feb. 13, 2020). In the leading decision on attorney proffers, *U.S. v. Valencia*, 826 F.2d 169, 173 (2d Cir. 1987), the Second Circuit upheld a district court's decision excluding counsel's statements at a meeting with prosecutors, reasoning that admitting them threatened to "inhibit frank discussion between defense counsel and prosecutor on various topics that must be freely discussed," and that admitting such statements could lead to protracted disputes about precisely what was said at informal meetings. An unreported decision reaching the contrary conclusion confirms that *Menendez* is not the first time that the government has charged a defendant with obstruction based on an attorney proffer. In *U.S. v. Ahmed*, 2006 WL 3210037 (D. Mass. Aug. 3, 2006) the government's indictment included an obstruction charge against Ahmed based on an allegedly false presentation by counsel at a meeting with prosecutors. In allowing evidence regarding the meeting, the court relied in part on the existence of written evidence, including a chart, that illustrated what had been said.

These decisions suggest that counsel may be well advised to avoid written presentations at attorney proffers when possible. When it is not possible, counsel should make all factual statements in the form of a "hypothetical," perhaps including disclaimers on every page of any writing, which supports the argument that any such material is not a "statement" at all. See Anello & Albert, "Attorney Proffers," (discussing common law rule against admissibility of information expressed hypothetically).

More important, however, is for prosecutors to recognize that charges based on attorney proffers are ill-advised. The *Menendez* prosecutors had ample evidence of obstruction, much less guilt on the underlying substantive conduct, without need to rely on the proffer meetings. As offensive as prosecutors may find the occasional proffer they believe to be false, in the long run the damage such charges cause by chilling the ability of defense counsel and the government to freely have critical communications is not worth it. The additional risk of forcing

the disqualification of trial counsel or, via stipulated testimony, making trial counsel a witness against counsel's own client, further militate against the practice.

In recent communications with the defense bar, SDNY leaders, to their credit, have stressed that they recognize that defense presentations typically serve important purposes and that the *Menendez* case was a highly unusual circumstance. The *Ahmed* case, however, illustrates that *Menendez* is not unique. As the Supreme Court repeatedly has recognized in rejecting claims that prosecutorial discretion will forestall overly aggressive practices, counsel will likely need to look to the courts to protect the efficacy of attorney proffers.

'U.S. v. Coburn & Schwartz,' No. 19-cr-120 (D.N.J.)

In February 2019, the Department of Justice's Fraud Section and the U.S. Attorney's Office for the District of New Jersey (DNJ) entered into an agreement with Cognizant confirming the government's declination to prosecute Cognizant for alleged FCPA violations based on, among other things, Cognizant's prompt self-disclosure, its active remediation and cooperation with the government, and its agreement to pay over $19 million in disgorgement. According to the declination letter, Cognizant had authorized payment of approximately $2 million in bribes, through a conduit construction company, Larsen & Toubro Construction (L&T) to Indian government officials for a construction permit. DNJ thereafter indicted Cognizant's former president Gordon J. Coburn, and its former executive vice president and chief legal and corporate affairs officer, Steven Schwartz, charging them with participating in the same bribery scheme, among other charges.

L&T, which is reportedly India's largest construction company, retained a prominent New York-based law firm (the Law Firm) to conduct an internal investigation into the FCPA allegations. The Law Firm undertook an extensive inquiry, including witness interviews, and regularly reported its findings to the government. Apparently, the Law Firm's investigation did not find evidence of bribery. Indeed, L&T sent a letter to a stock exchange in India stating that it was unaware of any evidence supporting its involvement in making improper payments.

Accordingly, over years of pretrial proceedings, counsel for Coburn and Schwartz made strenuous efforts to obtain exculpatory evidence from L&T, including trying to serve subpoenas on L&T in the U.S.; pursuing a letter rogatory in India; and filing a motion seeking a letter rogatory to depose seven overseas witnesses. L&T and the U.S. government opposed these efforts, which were generally unsuccessful. The defense ultimately had some success in convincing the district judge to persuade the government to obtain evidence from India through the Mutual Legal Assistance Treaty process. Indeed, the court recently adjourned trial to March 2025 to allow the parties to take depositions of L&T witnesses in India through that process.

In a further effort to highlight the absence of evidence within L&T supporting the government's case theory, defense counsel subpoenaed the Law Firm for trial testimony. In a cover letter, counsel specified the topics they would seek to elicit at trial, including testimony regarding L&T's retention of the Law Firm; the

scope, methodology, and limitations of the Law Firm's internal investigation; and the results the Law Firm reported to the government.

The Law Firm moved to quash the subpoena. The Law Firm argued that the subpoena sought testimony that was cumulative of documents already available in discovery produced by the government, and that material beyond those disclosures was protected by the attorney-client privilege or work product doctrine. The Law Firm also claimed that much of the testimony that a witness for the firm would address would be hearsay learned from third parties.

Coburn and Schwartz argued that pointing to documentary discovery ignored their fundamental right to present evidence through a live witness, and that such writings skirted the most probative aspect of the expected testimony: the absence of key expected evidence. As to privilege, defendants expressly limited their request for testimony regarding information already shared with the government, over which any claim of privilege had thus been waived.

The court declined to quash the subpoena, holding that the defendants had a right to put on vivid evidence through the Law Firm's testimony. The court noted that it was not inclined to admit hearsay statements as to what third parties told the Law Firm, but that it would defer a specific ruling until trial. The court permitted defendants to elicit only testimony concerning the investigation as to which any applicable privilege had been waived by disclosure.

The Law Firm doubtless believed that disclosing information regarding its investigation to the government was in L&T's interest, despite any waiver. Practitioners well recognize that disclosing otherwise privileged information about an internal investigation to prosecutors risks waiver. See, e.g., *U.S. v. Treacy*, No. S2 08 CR 366 (JSR), 2009 WL 812033, at *1 (S.D.N.Y. Mar. 24, 2009). Corporate counsel often seek to mitigate this risk by limiting their presentations to "facts" rather than disclosing details of what specific witnesses said in interviews. Nevertheless, *Coburn & Schwartz* illustrates that, in response to a properly tailored demand, investigating counsel may indeed be forced to testify in subsequent litigation regarding information revealed to the government.

For practitioners representing individual defendants, *Coburn & Schwartz* offers a lesson in the value of doggedly pursuing exculpatory evidence from overseas, and the importance of carefully tailoring a trial subpoena. The hurdles defendants faced in pursuing overseas evidence undoubtedly made the trial court more receptive to enforcing their subpoena to the Law Firm. Further, defense counsel's care in specifying limits on the testimony they sought to elicit presented the court with a sound basis to rule their way.

Robert J. Anello *and* **Richard F. Albert** *are partners at Morvillo Abramowitz Grand Iason & Anello.* **Alex Peacocke,** *an associate of the firm, assisted in the preparation of this article.*