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New York Law Journal

Prosecuted for a Proffer

By Evan T. Barr
May 01, 2024

A recent development in the corruption prosecution of Senator Robert Menendez should set off alarm bells in the white-collar defense bar. Specifically, the New Jersey senator and his wife have been charged with obstruction of justice for allegedly causing defense counsel to make false and misleading statements in a proffer to the U.S. Attorney's Office.

While prosecutors have often sought to use statements made by counsel against defendants, bringing criminal charges against a client based on information conveyed during an attorney proffer is unprecedented. In so doing, federal prosecutors in the U.S. District Court for the Southern District of New York have undermined the attorney-client relationship and discouraged defense counsel in other cases from coming forward to convey their client's side of the story.

Attorney Proffers

In an attorney proffer, defense counsel offers a hypothetical preview of what they believe the client would say about the facts at issue. Often the government will ask for a proffer to assess the usefulness of the client as a potential cooperating witness. Defense counsel also may choose to make a so-called innocence proffer in the hopes of dissuading the prosecutor from bringing a case. Either way, the attorney proffer plays a key role in facilitating the transmission of information while insulating the client (for the time being) from direct exposure to questioning.

Courtesy photo

Evan T. Barr of Reed Smith.

But there are pitfalls to the proffer. It may prematurely lock counsel and client into a version of events before the defense team has had sufficient time to fact-check. Discrepancies may arise between the proffer and testimony that the client later provides, especially if the initial account was obtained under exigent circumstances. Those differences can undermine the credibility of the client and the lawyer. If the client ends up on the witness stand, proffer-related discrepancies can become fodder for cross examination.

The Menendez Case

Robert Menendez and his wife Nadine are charged with participating in a scheme to use the senator's official duties to benefit two New Jersey businessmen, Wael Hana and Fred Daibes. Hana operated a company that had the exclusive right to certify American food imported into Egypt as complying

with halal requirements. Daibes was a prominent real estate developer who was facing federal bank fraud charges in New Jersey.

The government alleges Menendez agreed to pressure an official at the Department of Agriculture to protect Hana's business monopoly and to disrupt the prosecution of Daibes in exchange for hundreds of thousands of dollars in bribes. As part of the quid pro quo, Hana agreed to cover the mortgage on Nadine's house and to provide her with a Mercedes-Benz convertible; the car payments, in turn, were handled by Hana's friend and business associate, Jose Uribe.

In June 2022, agents executed search warrants and served grand jury subpoenas seeking documents pertaining to the payments. According to the recent superseding indictment, Uribe ceased making payments for the Mercedes-Benz right after the search. Thereafter, Nadine and Uribe met and agreed that if asked, Uribe would say that the payments had been loans. Subsequently, Robert and Nadine also sought to return some of the funds to both Hana and Uribe by writing checks with accompanying documentation falsely characterizing them as loan repayments.

About a year later, the indictment asserts, Senator Menendez caused his then-counsel to meet with the U.S. Attorney's Office. At those meetings, defense counsel, relying on statements made by the client, asserted that Menendez had been unaware until 2022 that Hana had made a mortgage payment for Nadine, or that Uribe had paid for the Mercedes-Benz. Menendez also caused his lawyer to claim that he understood any such payments were loans.

Similarly, Nadine allegedly caused her lawyer to meet with the government and represent that the funds from Hana and Uribe were loans. The government alleges that, contrary to the information provided to counsel and conveyed to the prosecutors, Robert and Nadine knew the payments were bribes, not loans.

Menendez and his wife are charged (in addition to the corruption counts) with conspiracy and obstruction of justice in violation of Title 18, United States Code, Sections 1503 and 371. In March 2024, Uribe pled guilty, pursuant to a cooperation agreement, to a felony information that includes charges related to the obstruction scheme. The senator's trial is set to begin in May; the court severed Nadine's case for medical reasons.

Evidentiary Hurdles

Menendez and his wife will likely move in limine to preclude the government from using information conveyed in the attorney proffers to support the obstruction charges. While there is no Second Circuit precedent squarely on point, the available case law suggests the government may face some evidentiary hurdles.

In *United States v. Valencia*, 826 F.2d 169 (2d Cir. 1987), for example, the court confronted the question of whether statements made by defense counsel during initial conversations with a prosecutor could be admitted against a criminal defendant.

Valencia was charged with conspiring with Bolivar to sell drugs to an informant. Valencia retained an attorney who contacted the AUSA to persuade the government to release him on bail. The lawyer asserted that Valencia claimed he was innocent and had never even met Bolivar prior to the day of the alleged drug deal. The government later obtained evidence contradicting that account, proving instead that Bolivar and Valencia had been in a longstanding relationship well before the arrest.

The government sought a pre-trial ruling that counsel's remarks were admissible at trial, as admissions of a party opponent under Federal Rule of Evidence 801(d)(2) or, alternatively, as statements by a party's agent within the scope of employment under Rule 801(d)(2)(D). The district court denied the prosecution motion, saying it

would impinge on the attorney-client privilege and set a dangerous precedent. The government took an interlocutory appeal.

The U.S. Court of Appeals for the Second Circuit, in affirming the district court ruling, noted the need to exercise care in admitting such statements in a criminal case. The court held that the lawyer's statements in question, made during informal discussions, would need to come in through testimony of a person who heard them, generating dispute as to precisely what was said (in contrast to situations involving transcribed comments in court, for instance).

It held that admitting the lawyer's statements also could inhibit frank discussions between defense counsel and the prosecutor on assorted topics that help to expedite trial preparation and could chill the prospects for eventual plea negotiations.

Lastly, the court ruled that the government did not need the proposed statements to establish an element of the crime, but rather only offered them for the less important purpose of showing consciousness of guilt.

Policy Considerations

Even if the proffers are admissible under *Valencia*, the U.S. Attorney's Office should not have moved forward with obstruction charges against Menendez and his wife under the circumstances.

First, the charges significantly undermined the attorney-client relationship and the defendants' Sixth Amendment right to counsel.

After filing the obstruction charges, the government announced that Nadine's lawyers were potential fact witnesses related to discussions about the Hana and Uribe payments and the subsequent proffers. Under Rule 3.7 of the New York Rules of Professional Conduct, a lawyer typically may not function as an advocate at a trial in which the lawyer is likely to be a necessary witness. Although Nadine knowingly and voluntarily waived any potential conflict arising from that issue following a *Curcio* hearing, shortly afterward her lead counsel moved to withdraw.

Second, the defendants did not engage in the kind of conduct (such as threatening witnesses or destroying documents) that prosecutors must deter to protect the integrity of the judicial system. Here by contrast the government only asserted that Menendez and his wife had (through counsel) falsely claimed the payments from Uribe and Hana were loans and not bribes. But that distinction (loan vs. bribe) also happens to be the couple's defense to the underlying charges and thus the ultimate issue to for the jury. It is hard to imagine the government could argue that this (garden variety) exculpatory narrative dramatically impeded the course of their investigation. The government should reserve obstruction counts for situations where there is alleged wrongdoing beyond a denial of criminality.

Third, from a policy perspective, this case could chill constructive dialogue between the government and the defense bar. It is important for both sides to be able to engage in frank discussions as they seek a way forward potentially to resolve the case. Careful defense lawyers have always understood the need to exercise caution before making an attorney proffer. But the possibility that the mere act of making such a proffer could lead to additional criminal charges being filed against the client could well dissuade some lawyers from taking any chances.

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