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EXPANDING THE EVIDENTIARY FRAME FOR COOPERATING WITNESSES

*Daniel Richman**

One telling feature of this conference as a whole has been the extent to which speakers have focused on the cooperation dynamic outside the courtroom. Prosecutors should take more pains to avoid suborning or even unconsciously encouraging perjury by the cooperator who is looking for a lower sentence. Courts and disciplinary authorities should ensure that such pains are taken.[1] What's interesting is how little attention has been given to changing what happens in front of the jury. Since our assignment has been to think "outside of the box" (which usually means proposing something interesting but really wrong or dangerous), I'd like to broach the question of whether we should do more to align the zealous prosecutor's interest in winning with an institutional interest in justice, by expanding the range of proof that a jury ordinarily considers when it comes to cooperation.

Trials of course are a rarity in our system.[2] But interactions with prospective witnesses do take place in the shadow of evidentiary rules.[3] In our effort to structure the interaction between prosecutors and cooperators, it is worth considering the incentives, or more precisely the lack of incentives, that prevailing evidentiary rules give to prosecutors.

Consider the skilled and ethical prosecutor. When a defendant comes in saying he wants to cooperate, the prosecutor does not tell the defendant what she's looking for. Nor does she

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[1] *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829 (2002); Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875 (2002).

[2] *See* UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 418 tbl. 5.20, 454 tbl. 5.51 (Ann L. Pastore & Kathleen Maguire eds., 1999), *available at* http://www.albany.edu/sourcebook (last visited Sept. 5, 2001).

[3] *See* Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 975-79 (1997).

sit passively when the defendant's first tale minimizes not just his own culpability but that of his friends. She won't throw him out of the room—after all, if she didn't think she needed his testimony, she wouldn't have met with him in the first place. She'll confront him, trying to walk the fine line between showing the defendant that she can tell when he's lying (good) and giving the defendant a road map of what he needs to say to make the government happy (bad). This truly is a fine line, since the perceptions of prosecutor and defendant may differ greatly.

The delicate dance will have to continue until trial, and will include agents as well as prosecutors. The signals that all of these government actors convey, sometimes subtly sometimes not, will incorporate allusions to other sources of information (which may or may not be admissible at trial), references to the consequences of perjury, and indications about the government's readiness to pursue such sanctions in the event the defendant lies. These signals can be misused, but in this particular case, the prosecutors and agents act carefully and responsibly, adhering closely to Judge Trott's precepts.[4]

Then comes trial. What does the standard cooperator trial look like? It usually has the prosecutor pointing to all the corroboration of the cooperator's testimony (which, as noted, probably is incomplete)[5] and then arguing why the cooperator, although maybe a bad person, has no motive to lie here, or at least has a stronger motive, given the potential sanctions, to be truthful. Barred from "vouching,"[6] the prosecutor will take pains to avoid putting the government's imprimatur on the testimony. The defendant will respond by focusing on the cooperator's motive to stretch the truth and curry favor with the government. If the

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[4] *See* Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

[5] *See* Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENTENCING RPTR. 292 (1996). There may be a tendency, however, for prosecutors to "overbuy" cooperator testimony. *See id.* at 293.

[6] *See* United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 283 (3d Cir. 1999) ("Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury.") (quoting United States v. Walker, 155 F.3d 180, 184 (3d Cir. 1998)); United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999) (stating that a prosecutor's implication that he "is in a special position to ascertain whether the witness was, in fact, testifying truthfully . . . leads quickly to improper vouching"); United States v. Munoz, 150 F.3d 401, 414 (5th Cir. 1998) (holding that a prosecutor "may not personally vouch for the credibility of a government witness, as doing so may imply that [she] . . . has additional personal knowledge about the witness and facts that confirm the witness' testimony, or may add credence to such testimony") (quoting United States v. Washington, 44 F.3d 1271, 1278 (5th Cir. 1995)).

government has disclosed the cooperator's initial lies to the prosecutor,[7] the jury will probably hear about them, and about the great deal the cooperator received. Perhaps defense counsel will try to highlight the mechanics of the government's witness preparation, but this is difficult to do, and efforts in that direction are generally desultory. In some exceptional cases, the impeachment effort will go beyond this, but it generally does not.

If one steps back from this spectacle, it's pretty odd. There is frequently little question that the prosecutor's integrity is on the line (implicitly, and sometimes explicitly). Alternatively, if the defendant uses the "honorable man" approach[8] and characterizes the prosecutor as the dupe of the conniving cooperator, the prosecutor's acumen is in issue. Yet these are the last things that the honest prosecutor will talk about. All the pains she took in the delicate dance with the cooperator are not for naught. But the jury generally won't hear much about them, however relevant they might be for assessing the cooperator's credibility.

Why is this? Given the diversity of viewpoints represented at this conference, I am sure some would explain the common scenario by suggesting that prosecutors generally mishandle their cooperators and that they don't want defense counsel or juries to find that out. However, while empirical certainties are impossible here, I don't think this is the case, and believe that explanations must be sought elsewhere. One factor may be the interaction of procedural rules and institutional choices. To the extent that the prosecutor trying a case has played a role in debriefing and preparing a cooperator for trial, the rule against unsworn testimony will largely preclude her from exploring that process in front of the jury through other witnesses.[9] Even were a side-lined prosecutor actually to take the stand, inquiry into her dealings with the cooperator would likely be hampered by the inadmissibility of information that, although not directly conveyed to the

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[7] *See* United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1999) (granting defense motion to compel government's pretrial disclosure of documents relating to process leading up to accomplice witness's cooperation agreement).

[8] *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

[9] *See, e.g.*, United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993) (stating that an attorney may not "subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination"). Courts do tolerate references to the fact that a prosecutor played a role in some out of court drama, so long as this does not become a major issue in the case. *See, e.g.*, United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir. 1996) (holding that disqualification was not required where the Assistant U.S. Attorney made two references in front of trial jury to his presence during interviews between the cooperating witness and the FBI); United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (denying motion to disqualify an Assistant U.S. Attorney who had participated in early interviews with the defendant).

cooperator, played a part in the government's testing process. Such inquiry would also have to avoid references to the prosecutor's experience in such matters, lest they be considered improper "vouching." Moreover, the practice of calling the prosecutor most familiar with the case as a trial witness would prevent a prosecutorial office from reaping the considerable benefits of a vertical system in which the same prosecutor works a case from beginning to end.

Rules and institutional choices are probably not the only reasons for prosecutors' failure to explore the cooperation dynamic in front of the jury. Another part of the problem might be the limitations of narrative in this area. Even if she could put herself on the stand, how exactly would our skilled, ethical prosecutor actually convey to a lay jury the pains she has taken with a cooperator? What struck me about Ellen Yaroshefsky's insightful article on prosecutors and cooperators was how ill-equipped the prosecutors who thought justice was being done were to explain *how* they knew what they knew. The risks of using cooperator testimony are so great as to be self-evident to all but the most unreflective (and inept) prosecutor, and most of the prosecutors or ex-prosecutors whom Professor Yaroshevsky quoted were candid about them. Nonetheless, seventy-five percent of the people she interviewed "expressed the belief that they obtained most of the truth and 'could get to the bottom of things.'"[10] The point is not that these prosecutors' confidence was necessarily well-founded. Rather, it offers yet another reason why our hypothetical prosecutor will be hamstrung in conveying at trial how she handled her witness.

These various explanations are well and good, some a function of sensible evidentiary protections, some of rational prosecutorial choices. But we should at least consider the costs of *not* exploring the details of each cooperation dynamic in front of the jury.

Judge Trott's precepts about handling cooperators aren't just pieces of professional advice. They are also sensible rules for getting the truth out of cooperators, or at least enabling the proper evaluation of cooperator testimony. A great many jurors would understand and appreciate them. If they could, these jurors would reward the prosecutor who abided by them, and disadvantage the prosecutors who didn't. In the best of worlds, the prosecutor abiding by her ethical commitment to "seek justice" would not need this incentive. But one of the standard ways to address

[10] *Id.* at 934 n.75.

agency problems is to structure systems that align personal goals with broader institutional goals. And this might help do so.

Were our ethical prosecutor able somehow to lay out the entire cooperation dynamic at trial, the effects on her incentives might extend to discovery as well. One reason why prosecutors fail to fully abide by their *Brady* and statutory discovery obligations,[11] or limit the creation of discoverable material, is an unfortunate zeal to win at any cost.[12] But another reason surely is a belief that such materials are simply misleading, when taken out of context. Were such context to be provided, this second concern would be substantially diminished. Again, the point is not that the cooperator's initial false statements to the government necessarily have little evidentiary weight. Rather it is that a prosecutor confident that they have little weight may still worry that the jury, lacking knowledge of the full cooperation dynamic, will misuse the statements.

Could we ever give a jury a complete picture of the cooperation dynamic? Probably not, as the inherent limitations of narrative presentation (and indeed even of videotaping) would prevent any witness or series of witnesses from fully capturing it. Prosecutors could, however, be encouraged to do a lot more in the direction of such an exploration. What might be done? I'm not quite sure. Courts already permit the government to introduce prior consistent statements by cooperators, at least for purpose of rehabilitation, even when those statements were made after the cooperator's alleged motive to fabricate arose (i.e. after the witness began cooperating).[13] We could be even more receptive to such proof. Just as the Federal Rules, recognizing the artificiality of in-court identifications, explicitly invite evidence relating to the circumstances of out-of-court identifications by testifying witnesses,[14] so might they, for the same reason, invite evidence relating to cooperation dynamics. At the very least, courts could be less dismissive of the probative value of such evidence,[15] and less ready to label as cumulative the testimony of agents about how a cooperator was handled.

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[11] *See* Panel Discussion: Criminal Discovery in Practice, 15 GA. ST. UNIV. L. REV. 781 (1999).

[12] *See* Gershman, *supra* note 1, at 848-49; Yaroshefsky, *supra* note 10, at 961-62.

[13] *See* United States v. Simonelli, 237 F.3d 19, 25-29 (1st Cir. 2001) (explaining that Federal Rules of Evidence Rule 801(d)(1)(B) does not preclude admission of prior consistent statements that do not meet rule's requirements when they are offered to rehabilitate credibility and not for their truth), *cert. denied*, 70 U.S.L.W. 3234 (U.S. 2001) (mem); United States v. Ellis, 121 F.3d 908, 919-21(4th Cir. 1997) (same).

[14] *See* FED. R. EVID. 801(d)(1)(C).

[15] *See* United States v. Forrester, 60 F.3d 52, 64-65 (2d Cir. 1995) (reversing conviction in part because prior statement of government witness erroneously introduced).

Would these and other similar measures encourage more responsible behavior from prosecutors even in those cases that never made it to trial? Quite possibly. There is an inevitable artificiality to our entire trial process. Witnesses don't just take the stand and produce nice narratives in response to non-leading questions without considerable work that the uninitiated cannot possibly appreciate.[16] But whatever limitations juries may have—and the work of Saul Kassin and others has made us painfully aware of jurors' particular limitations when it comes to judging credibility[17]—it is surely true that more information about the cooperator's odyssey from target to government witness would improve jurors' credibility assessments in this area. As Gerry Lefcourt[18] and others in this symposium have argued, more probing cross-examination about this journey is needed, and defense counsel should be given the tools to do it. We should, however, consider more probing direct and redirect examination as well. One need not accept claims of widespread prosecutorial malfeasance or ineptitude to support efforts to expand the evidentiary frame. Were prosecutors to perceive inquiry into the cooperation process as an opportunity to improve their case, not just defend it, we might do a better job in separating the more professional from the less, and even increase the number of professional ones.

16 *See* Bruce A. Green, *"The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699 (1992).

17 *See* Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687 (1990).

18 *See* Remarks of Gerald B. Lefcourt, at the Benjamin N. Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) (on file with author).