ALM | LAW.COM

New York Law Journal

5 Do's and Don'ts to Avoid a Preindictment Presentation Becoming a Trial Exhibit

By Bonnie M. Baker

July 26, 2024

Experienced white-collar defense counsel well know that persuading a prosecutor not to indict a client can be fraught with peril. They must strike a delicate balance between keeping their best cards close to their vest and providing the prosecutor with enough information to understand the context surrounding the client's alleged misdeeds and intentions.

And if, in consultation with the client, defense counsel have determined to make such a presentation to a prosecutor as they explain their client's version of the facts to the government, it is critical to take extreme care not to lock the client into an account that may continue to evolve as the investigation progresses. Defense counsel should be mindful that in making a presentation to a prosecutor, the attorney's work product may one day be weaponized against the client.

Prosecutors sought to do exactly that in the recent corruption trial of U.S. Sen. Robert Menendez, D-New Jersey, before Judge Sidney Stein in the Southern District of New York, which resulted in the July 16 conviction of Menendez on 16 counts that included bribery, honest services wire fraud, obstruction of justice and conspiracy to commit those offenses.

Courtesy photo

Bonnie M. Baker of Friedman Kaplan Seiler Adelman & Robbins.

In an aggressive move during the Menendez trial, and over the objection of defense counsel, the U.S. Attorney's Office for the Southern District of New York introduced into

evidence redacted slides from a presentation that Menendez's former defense counsel had shared with the U.S. Attorney's Office weeks before Menendez was indicted. In the government's view, statements in these slides about what Menendez knew, and when, were false and supplied proof that Menendez had "caused his then-counsel to make false and misleading statements" to the prosecutors to cover up the underlying bribery scheme. This was one of the overt acts underpinning the indictment's charges that Menendez had conspired with his wife to commit obstruction of justice, and committed such obstruction.

How can defense counsel avoid having a preindictment presentation to the prosecutor appear on the government's exhibit list at trial?

This article provides five recommendations to consider in strategizing how to most safely communicate a client's story.

1. Do Emphasize to the Client the Risk a Misstatement Presents

The use of Menendez's counsel's presentation against Menendez at the subsequent trial demonstrates that prosecutors will take it seriously if they believe they have been presented with false statements or evidence by a defendant or defense counsel. A client must understand that when the client's legal team makes a preindictment presentation to the government, it is paramount not to create or produce false records, nor should a client shade the truth in ways that could cause defense counsel inadvertently to make false statements to, or otherwise mislead, the prosecutor. Counsel must have a frank discussion with the client about the nature of an obstruction charge and should use the Menendez prosecution as an example to help the client understand the potential repercussions of misstatements in a preindictment presentation to the prosecutor.

2. Do Caveat Everything, Both Orally and in Writing

As advocates, defense counsel should avoid locking themselves and the client into a version of the facts that may be subject to continued refinement as the case progresses. In an oral presentation to prosecutors, as well as any written materials that are shared with them (more on that below), counsel should expressly note that statements in the presentation are based on defense counsel's present knowledge only; that counsel's investigation is ongoing; that counsel have not yet reviewed all discovery in the matter; and that the client understands that defense counsel are sharing with the prosecutors their best understanding of the evidence at that time. Moreover, and consistent with this approach, any written materials shared with the government should have a disclaimer on each page stating that the information is "subject to material revision."

To avoid having the government later assert that statements in a preindictment presentation were unqualified assertions of fact, counsel should couch factual statements, such as when the client learned of particular transactions and events, as hypotheticals—that is, if the client were to come in for a

proffer or testify, this is what the client would be likely to say. Additionally, in many white-collar prosecutions, the client's intent is a key issue which is hotly disputed at trial. Keeping this firmly in mind at the preindictment stage, defense counsel should make explicit in any presentation to the government that statements about the client's knowledge are made "without prejudice."

Additionally, while it is best practice for defense counsel to tell the prosecutor that statements in a presentation are made as part of settlement discussions subject to the protections of Federal Rule of Evidence 408, the rule contains a carve-out allowing a statement made during compromise negotiations to be admitted into evidence for the purpose of proving an effort to obstruct a criminal investigation or prosecution. This means that defense counsel cannot rely on Rule 408 to preclude an obstruction charged based on counsel's presentation.

3. Do Try to Ensure an Accurate Record of the Presentation

With the Menendez situation in mind, one can imagine a scenario in which defense counsel attend a meeting with a prosecutor and share the client's present understanding of the facts, but the client is ultimately indicted and charged with obstruction arising out of statements counsel made at that meeting. At trial, the government may seek to introduce the testimony of a witness to that meeting, perhaps another government employee, to establish that defense counsel presented the client's account as unambiguous statements of fact, devoid of any caveats. Bringing a colleague to the meeting with the prosecutor, for example, an associate or paralegal, and tasking them to take careful and detailed notes of everything that transpires, positions defense counsel and their client to offer a reliable competing version of events to help convince a judge or jury, if necessary, that counsel's presentation included the appropriate caveats, disclaimers and hypotheticals.

Also, when preparing to meet with a prosecutor, defense counsel should ask whether a government agent will be preparing a memo summarizing the meeting. If the answer is yes, defense counsel should make an explicit request that the agent include in that memo a reference to all caveats given during the presentation.

4. Don't Assume the Presentation Is Only for the Prosecutor

Even at the preindictment stage, while strategizing about a presentation to the government, defense counsel should carefully consider whether and to what extent they are comfortable with potential co-defendants ultimately having insight into their strategies. Most seasoned white-collar practitioners will have seen notes of both their telephone calls with government agents, as well as their oral presentations to prosecutors, turn up in the government's discovery pursuant to Federal Rule of Criminal Procedure 16. This means that the client's co-defendants will also see these notes in discovery, so they will become privy to whatever arguments and theories

defense counsel shared with the prosecutor in the preindictment phase.

Also, white-collar counsel should approach any presentation to the government as if it will be presented to a grand jury. Anything defense counsel tell the prosecutor, and any written materials they share with the government, even if the presentation is made at the earliest stages of defense counsel's involvement in the case, without the benefit of discovery and full examination of all of the client's records, could form the basis of an obstruction-of-justice charge against the client, if the prosecutor determines that the statements the client caused defense counsel to make were untrue. In that event, a prosecutor will likely take the position, as the government did in the Menendez trial, that the client is guilty of obstructing a grand jury proceeding regardless of whether defense counsel requested that the prosecutor share the presentation or its substance with the grand jury.

5. Don't Leave a Presentation in the Prosecutors' Hands

In the event that a preindictment presentation is unsuccessful at staving off an indictment, the last thing defense counsel will want to see on the government's trial exhibit list—months or even years later—is the carefully crafted slide deck that was prepared and delivered to the prosecutor before the client was indicted. To minimize the risk that defense counsel's best efforts to avoid an indictment backfire and form the basis for an obstruction charge, defense counsel should not leave any presentation materials with the prosecutor or government agents. Instead, counsel should tell the prosecutor that they prefer to keep control over their work product and offer instead to answer any follow-up questions the government may have about the presentation, including providing any citations to legal authorities that counsel referenced in discussions with the prosecutor.

While a prosecutor's use of a defense attorney's preindictment presentation to prove an obstruction charge may be rare, the Southern District U.S. Attorney's Office use of the Menendez presentation at trial may be a harbinger of a worrisome trend. If defense counsel are determined to make a preindictment presentation to a prosecutor, all steps possible should be taken to avoid having that presentation become a weapon in the government's arsenal in the event the client is ultimately charged.

Bonnie M. Baker *is of counsel at Friedman Kaplan Seiler Adelman & Robbins.*

Reprinted with permission from the July 26, 2024 edition of the NEW YORK LAW JOURNAL © 2024 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or asset-and-logo-licensing@alm.com. # NYLJ-8022024-57877