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EFFECTIVE USE OF INFORMANTS AND ACCOMPLICE WITNESSES

ANN C. ROWLAND*

I. OVERVIEW

Informants are undisclosed persons who confidentially provide material information to the Government about criminal activity.¹ They may or may not be involved in the criminal activity. Rarely are informants public-spirited citizens who volunteer solely because they have information that might be useful. Informants usually receive some compensation or benefit for their information in the form of a reward, regular monetary payments, reimbursement for expenses, or other benefit. Some informants agree to testify at trial, others do not. In this Article, “informant” means any person who receives or expects to receive some compensation, monetary or otherwise, in return for testimony.

Similarly, accomplice witnesses are just that—participants in the criminal activity who agree to cooperate in the investigation and testify against other participants.² Usually, accomplice witnesses agree to “help” the Government in return for some consideration in charging or at sentencing or, sometimes, for immunity from prosecution. Witnesses involved in illegal activity can effectively provide the jury with an insider’s view of a conspiracy or joint criminal venture. The uncorroborated testimony of an accomplice is sufficient to support a conviction under federal law.³

However, it is the rare case that can be prosecuted successfully without substantial corroboration of the criminal witness. Defense attorneys routinely mount effective attacks on the motivations of accomplices and informants to testify falsely. These motivations include a reduction in sentence, immunity from prosecution, financial rewards, revenge, and elimination of the competition in criminal activity. The low esteem in which these witnesses are held is highlighted by a standard instruction a jury receives when an informer testifies:

The use of paid informants is common and permissible.

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1. BLACK’S LAW DICTIONARY 780 (6th ed. 1990).

2. *Id.* at 17.

3. *E.g.*, *United States v. Latouf*, 132 F.3d 320, 332 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1572 (1998).

But you should consider [such a witness's] testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

. . . Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.⁴

If government agents and prosecutors are not vigilant, the misconduct of their witnesses can taint the entire prosecution.⁵

To avoid pitfalls, prosecutors should follow four basic rules in using criminal witnesses:

- (1) Corroborate the witness;
- (2) Obtain a proffer before granting immunity or entering into a plea agreement;
- (3) If the witness will be pleading guilty, make sure that the plea agreement is reasonable; and
- (4) Expect the worst from the witness.

II. SELECTING THE COOPERATING WITNESS AND OBTAINING A PROFFER

Before approaching a co-conspirator or an accomplice, the Government must have sufficient leverage to induce cooperation; that is, the Government must be able to convince the potential cooperator that he is facing certain conviction, and that the sentence can be mitigated only through cooperation.

Target the right individual to approach for cooperation. The primary consideration should be the level of involvement in the offense. It is better to use a "little fish" to catch a "big fish" than the reverse. In other words, the

4. 1 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL* § 15.02, at 480 (4th ed. 1992) (pattern jury instruction for Sixth Circuit Court of Appeals).

5. See *United States v. Boyd*, 55 F.3d 239, 241-45 (7th Cir. 1995) (addressing issues raised because of unprofessionally close relationship between government prosecutors and criminal witnesses and granting new trial); *United States v. Edenfield*, 995 F.2d 197, 201 (11th Cir. 1993) (holding that under "totality of the circumstances," government acts of entering into contingent fee arrangement with confidential informant, selecting targets of investigation, and involving informant as agent of government in planning and executing drug crimes with which defendants were charged were not so outrageous as to violate the defendants' due process rights); *United States v. Olson*, 978 F.2d 1472, 1481-83 (7th Cir. 1992) (exonerating agents of outrageous misconduct as most alleged acts of misconduct, including facilitating informant reentry into the United States and housing the informant prior to approval, amounted to administrative errors and finding the use of contingent fee arrangement to pay informant did not prejudice defendant); *United States v. Barrera-Moreno*, 951 F.2d 1089, 1093 (9th Cir. 1991) (refusing to dismiss drug indictments based on government's conduct in permitting defendants' use and distribution of cocaine and not monitoring informants' drug use); *United States v. Simpson*, 813 F.2d 1462, 1470 (9th Cir. 1987) (finding agents not obligated to discontinue using an informant using heroin and engaging in prostitution during investigation of defendant).

prosecutor should first try to obtain cooperation from those who are minimally culpable and then ascend through the hierarchy of the criminal enterprise.

Once a problem witness has agreed to cooperate, a proffer should be obtained. This allows the Government an opportunity to assess the nature and the quality of the testimony before committing to a particular plea agreement or to immunity. The proffer session also serves as an opportunity to learn whether the witness has a relationship with any other law enforcement entity through which implied or express promises of leniency or favored treatment may have been made.

Solicit a proffer session by sending a letter to the witness's lawyer setting forth the terms of the proffer. Generally, the basic terms of a proffer agreement are as follows: (1) the witness must tell the truth and not make material omissions; (2) statements made during the proffer cannot be used against the witness in the Government's case in chief; (3) statements made during the proffer can be used to impeach the witness at trial and at sentencing if the witness provides information that is contrary to, or inconsistent with, statements made during the proffer; (4) the Government may use the leads and fruits of the interview against the witness;⁶ (5) the proffer itself will not be considered "substantial assistance" for purposes of section 5K1.1 of the United States Sentencing Guidelines⁷ (this term may not always apply); and (6) any limitations on the use of statements made at the proffer are void if the witness lies.

It is best to obtain the proffer directly from the witness as opposed to taking it from the attorney for the witness. If at all possible, the prosecutor should attend the proffer interview so that she can make an independent assessment of credibility. A complete record of the interview in the form of a memo should be made so that allegations of recent fabrication on cross-examination can be rebutted.⁸

During the negotiations and the proffer, the Government should reveal as little as possible about the investigation to the witness and defense counsel. This can be difficult because the Government must disclose enough of its case to convince the witness to plead guilty and cooperate. But if too much is revealed, the defense will seek to demonstrate that the witness has fabricated evidence to tell the Government what it wanted to hear. In any event, it is a good idea to make a record of what the Government tells the witness during the proffer so that an allegation of recent fabrication can be rebutted.⁹ For the same reason, witnesses should be isolated from each other whenever possible to

6. See *United States v. Claiborne*, 62 F.3d 897, 901 (7th Cir. 1995); *United States v. Maldonado*, 38 F.3d 936, 942 (7th Cir. 1994); *United States v. Rowley*, 975 F.2d 1357, 1361-62 (8th Cir. 1992).

7. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 5K1.1, at 356 (1998).

8. FED. R. EVID. 801(d)(1)(B).

9. *Id.*

rebut allegations that witnesses jointly fabricated their testimony.

During the proffer the Government should attempt to elicit details from the witness that can be corroborated with telephone records, hotel records, bank records, and other documents. Finalizing the plea agreement should be delayed until these details are corroborated and a determination of the witness's credibility has been made.

Whenever the prosecutor meets with a cooperating witness or informant, whether it be for a proffer or trial preparation, a law enforcement agent should be present to act as a witness, to memorialize the substance of the witness's statements, and to shield the prosecutor from being called in as a witness. Likewise, secretaries and paralegals should have no unsupervised contact with such witnesses.

III. PAYMENTS TO WITNESSES

Paying an informer or cooperating witness is often unavoidable. These payments may take the form of regular, interval-type payments or of a bonus at the completion of the case. An informant who has been promised a contingent fee by the Government is not per se disqualified from testifying.¹⁰ However, these arrangements should be pursued with caution because large financial rewards for successful prosecutions diminish an informant's credibility.

When authorizing witness payments, a prosecutor should try to characterize the proposed payment of a bonus as a "possibility," keeping the amount indefinite so that the witness can testify that she does not know the amount or even if the Government will pay her. If money is paid prior to testimony, the prosecutor should attempt to tie the payments to the cooperative actions of the witness and to the value of the legitimate income that she is sacrificing to gather information for the Government. This, of course, is difficult to do when the witness does not have legitimate income.

In any agreement, insert a provision setting aside money for taxes, support payments, and payments on civil judgments. This insertion will insure that the Government will not appear to have assisted the witnesses in avoiding these obligations. Even when financial incentives are so coercive as to be considered contingent fees, the properly instructed jury is the sole arbiter of the impact of such fees on the credibility of the witness.¹¹

If the investigation is still covert, explore consensual monitoring opportunities and other undercover investigations as these may provide excellent corroboration for a witness with credibility problems. Consensual monitoring can, however, end the investigation if an exculpatory conversation

10. See *United States v. Cuellar*, 96 F.3d 1179, 1183 (9th Cir. 1996); *Olson*, 978 F.2d at 1482; *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

11. See *United States v. Friedman*, 854 F.2d 535, 567 (2d Cir. 1988) (citing *United States v. Persico*, 832 F.2d 705, 716-17 (2d Cir. 1987)).

takes place between the informer and a target who suspects an investigation is under way. Therefore, do not automatically assume that a witness's willingness to perform consensual monitoring should be pursued. If there is any possibility that the subject of the investigation may suspect that an investigation has begun, it usually is a poor idea to engage in consensual monitoring. The danger of an exculpatory conversation is too great.

If undercover possibilities exist, every effort should be made to consider the early introduction of an undercover law enforcement agent to the subject of the investigation to permit the cooperating witness to withdraw from contact with the target. This allows law enforcement, rather than the witness, to control all aspects of the investigation.

Using a problem witness to record conversations can be dangerous. The witness may alert the target, fabricate a target, or engineer tape recorder "malfunctions" at critical moments of conversations.¹² For these reasons, witnesses who are tape-recording conversations should be watched carefully by the investigating agent and should not be permitted to record conversations on their own.

Advise witnesses to let the target do the talking as much as possible and to ask open-ended questions. Tapes in which the witness does most of the talking and the subject responds in grunts will not persuade a jury that the subject is orchestrating a criminal enterprise. Advise the witness to use the language of the illegal activity (for example, say "dope" instead of "stuff").

Effective conversations can often be generated by taking actions that will result in the subject becoming forceful and demanding. For example, if the investigation involves bribery or extortion, the witness can be instructed to offer less money than has been demanded or to pay it late, which might motivate the subject to be more explicit in her demands than would be the case if the transactions proceeded smoothly.

Continually remind the witness that she may not participate in any criminal activity. Despite these warnings, many witnesses do continue to commit crimes. Therefore, investigators must be continually vigilant.

IV. POLYGRAPHING THE PROBLEM WITNESS

Early in an investigation, many law enforcement agents consider polygraphing an informant or cooperating witness. The United States Department of Justice policy on polygraphs states in part:

[T]he Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use

12. See *United States v. Black*, 776 F.2d 1321, 1323 (6th Cir. 1985).

should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, the test should be preceded by Miranda warnings. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary.¹³

If the results of the polygraph test prove the witness is deceptive, then this fact must be disclosed to the defense because it constitutes *Brady* material.¹⁴ Even though polygraph reports are generally inadmissible, statements to polygraph examiners can constitute *Brady* material.¹⁵ The Supreme Court in *Wood v. Bartholomew*¹⁶ held that a state prosecutor's failure to disclose that a witness had failed a polygraph test did not deprive the defendant of material evidence under *Brady* absent a reasonable likelihood that disclosure would have resulted in a different outcome at trial.¹⁷ Because it is possible in a particular case that a defendant could establish that failure to disclose negative polygraph results was material, the better practice is to disclose.¹⁸

Negative polygraph results, giving the prosecutor early knowledge that an informant or cooperating witness is lying, may prevent the useless expenditure of Government funds on an investigation. Of course if an informant or cooperating witness passes a polygraph, then a good faith basis exists for proceeding with the investigation.

V. GRAND JURY CONSIDERATIONS

Criminal witnesses are not generally motivated to cooperate for altruistic reasons. Accordingly, they may be inclined to change their testimony at trial if they have become disillusioned with the government. Under Federal Rule of Evidence 801¹⁹ grand jury testimony can be used as substantive evidence if the

13. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-13.300 (1997) (citations omitted).

14. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

15. See *Jacobs v. Singletary*, 952 F.2d 1282, 1287-89 (11th Cir. 1992); *United States v. Patino*, 991 F. Supp. 1449, 1450-52 (M.D. Fla. 1997).

16. 516 U.S. 1 (1995).

17. *Id.* at 8.

18. See *United States v. Chandler*, 950 F. Supp. 1522, 1533 (N.D. Ala. 1996) (ordering an evidentiary hearing on the defendants' claim that failure to disclose polygraph results warranted a new trial).

19. FED. R. EVID. 801(d)(1)(A).

witness changes his testimony at trial.²⁰ For these reasons, consider putting the problem witness in the grand jury before presenting the indictment.

VI. DISCUSSIONS WITH DEFENSE COUNSEL AT THE INVESTIGATIVE STAGE

When an investigation becomes overt and defense attorneys start calling, take advantage of any opportunities to discuss the case with them and obtain information about Government witnesses. Conversations with defense counsel about problem witnesses may eliminate surprise at trial during the cross-examination of those cooperating witnesses and may give the prosecutor an opportunity to prepare the witness to deflect defense attacks. Keep in mind that the defendant will probably know more about informant and accomplice witnesses than the Government.

VII. CONSIDERATIONS REGARDING THE PLEA AGREEMENTS OF COOPERATING WITNESSES

Once a prosecutor has decided that a witness's testimony or cooperation would be useful, he should memorialize all agreements with the witness in writing. Always remember that the terms of the witness's agreement with the Government are discoverable and subject to scrutiny in the courtroom. Carefully review both the substance and the language of the plea agreement with the jury's perspective in mind. *There should be no unwritten side deals.* Also remember that all plea agreements must involve a faithful and honest application of the United States Sentencing Guidelines.²¹ The just application of the Sentencing Guidelines ensures consistency in sentencing and adds credibility to the Government's decision to use cooperating witnesses. The jury will trust witnesses more if the Government is holding them accountable for their crimes. A jury will distrust leniently treated witnesses and may believe that their motivation to testify falsely is greater when the Government offers a substantial sentencing departure in exchange for testimony.

Draft plea agreements with the assumption that the jury will read them. Include language that requires the witness to tell the truth. Do not specify that the witness is required to testify against a particular person. Such language invites the defense to establish a motive for the witness to testify falsely against

20. See *United States v. Odom*, 13 F.3d 949, 954-55 (6th Cir. 1994); *United States v. Milton*, 8 F.3d 39, 46-47 (D.C. Cir. 1993); *United States v. Thomas*, 987 F.2d 1298, 1300-01 (7th Cir. 1993); *United States v. Jacoby*, 955 F.2d 1527, 1539 (11th Cir. 1992); *United States v. Lopez*, 944 F.2d 33, 41 & n.6 (1st Cir. 1991); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Bigham*, 812 F.2d 943, 946 (5th Cir. 1987); *United States v. Wilson*, 806 F.2d 171, 175-76 (8th Cir. 1986); *United States v. Stockton*, 788 F.2d 210, 219-20 & n.14 (4th Cir. 1986); *United States v. Marchand*, 564 F.2d 983, 998-99 (2d Cir. 1977); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir. 1977).

21. For the Department's policies regarding plea agreements, see U.S. DEP'T OF JUSTICE, *supra* note 13, §§ 9-27.330 to -27.450.

the defendant. Likewise, the plea agreement should not make a downward departure contingent on the outcome of any trial or grand jury proceeding.

The following is a list of considerations for plea agreements.

- Clearly and expressly state in the plea agreement all consideration provided by the Government to a witness.
- Clearly state in the plea agreement that the ultimate sentencing decision will be made by the court and not the prosecutor. Also, make sure the plea agreement expressly states that the possibility of a downward departure is *not* contingent on the outcome of any trial or grand jury proceeding.
- Do not commit to a sentencing recommendation or to an agreement to move for a downward departure based upon substantial assistance under the sentencing guidelines,²² until the witness has fulfilled his agreement to cooperate fully.
- Carefully consider whether a polygraph requirement should be made part of the plea agreement and consult your agency's policy in this area.
- Draft the plea agreement broadly to require testimony on any matter as requested by the Government. If appropriate the plea agreement should address the question of cooperation with state and local prosecutors and administrative agencies.
- Have a provision in the plea agreement stating that if the witness engages in illegal conduct, the plea agreement will be declared void, and the witness will be subject to prosecution for all criminal activity, including perjury, making false statements, and obstruction of justice.

If the Government recommends that a witness and his family members consider a witness security program, then the plea agreement should clearly state that the prosecutor does not possess the authority to approve the witness's admission into the program. The plea agreement should also include a provision regarding any agreements about the immigration status of the witness or members of the witness's family.

VIII. IMMUNITY

Complete immunity should be granted only when necessary. If the witness committed a crime, she should usually be required to incur some criminal liability as part of any plea agreement.²³

The lawyer for an immunized witness may contend that the witness needs

22. See U.S. SENTENCING COMM'N, *supra* note 7, § 5K1.1, at 356.

23. See U.S. DEP'T OF JUSTICE, *supra* note 13, §§ 9-27.300 to -27.650.

state immunity also. The Government should resist obtaining state immunity because it will appear to the jury that the witness is receiving yet another gift in exchange for her testimony. Most important, state immunity is not necessary to protect the witness.²⁴

Prosecutors must be cautious about offering immunity because the offer itself can be used against the government. In *United States v. Biaggi*²⁵ immunity was offered to a target in exchange for cooperation.²⁶ The target rejected the offer and was prosecuted.²⁷ At trial the defendant argued that his rejection of the immunity offer was evidence of “consciousness of innocence.”²⁸ The Second Circuit concluded that it was error for the district court to exclude the evidence because the jury was “entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing.”²⁹

IX. PRETRIAL PREPARATION

Identifying and producing exculpatory evidence, impeachment material, and witness statements present a significant challenge to the Government when informants or accomplices testify as Government witnesses. The prosecutor has a significant burden to ensure that the Government discloses any such material (commonly called *Brady*, *Giglio*, and *Jencks* material) to defense counsel and that it makes a record of the disclosure. Do not underestimate the time it takes to collect such material, particularly for a witness who has testified in many different districts and has a relationship with several law enforcement agencies. Use the following checklist to ensure that you obtain all necessary information about the witness:

- *Personal Background.* True name; date of birth (DOB); all alias names, alias DOBs, and circumstances surrounding their use; and citizenship status.
- *Criminal History.* Records documenting federal, state, and foreign convictions; records documenting prior arrests; and records concerning pending charges, including outstanding warrants,

24. See *United States v. Rose*, 806 F.2d 931, 933 (9th Cir. 1986) (upholding the contempt conviction of a witness with a federal grant of use immunity who refused to testify because the Oregon immunity statute offered transactional immunity); see also *In re Grand Jury Proceedings*, No. 84-4, 757 F.2d 1580, 1582-83 (5th Cir. 1985) (holding that state courts are required to respect immunity granted under the federal immunity statute and that a witness granted immunity under the federal statute need not fear state prosecution based on testimony sought by the federal grand jury).

25. 909 F.2d 662 (2d Cir. 1990).

26. *Id.* at 690.

27. *Id.*

28. *Id.*

29. *Id.*

pending investigations, and uncharged criminal conduct.

- *Informant's Prior Relationship with Law Enforcement.* As to each agency with which the informant has worked, determine the length of the relationship and what motivated the cooperation (e.g., money, charging or sentencing benefit, immunity for prior crimes, assistance with immigration status, protection, revenge, excitement, or public spirit) and identify all controlling agents; determine the nature and amount of all compensation and other benefits received by the informant; and obtain all corroborating documents. Also determine the following: (1) if the informant is incarcerated, whether he received special privileges not normally extended to prisoners; (2) whether the informant has, in fact, received favorable treatment regarding his immigration status; (3) whether any law enforcement agency has intervened on behalf of the informant in any criminal prosecutions, arrests, citations, or civil proceedings; (4) whether the informant is in the Witness Security Program and what expenses were incurred with respect to that status; and (5) whether the informant declared any compensation received from the government (state or Federal) on his income tax returns (or whether the informant filed them at all).
- *Evaluate the Informant's Involvement in the Instant Case.* Gather information regarding the informant's role in the instant case, including: (1) when and how the witness first met the defendant(s); (2) the witness's relationship with each defendant prior to and during the criminal activity (e.g., family, romantic, friendship, business or financial, or past criminal relationship); (3) the witness's role in the instant criminal activity (e.g., did the informant initiate the activity, was he a peripheral participant or central to the scheme, did the informant use weapons or engage in violence); (4) the meetings in which the witness participated; (5) whether the witness told agents about all the meetings and conversations in which he participated; (6) if the witness was arrested in the case, whether he made any post-arrest statements; and (7) if so, obtain copies and evaluate these statements for truthfulness.
- *Prior Testimony.* Obtain copies of all prior sworn testimony given by the informant witness, whether the testimony was given by deposition, before a grand jury, in pre-trial proceedings, at trial, or at a sentencing hearing. Talk to the prosecutors from other cases in which the witness testified to determine what type of witness he is and to learn of any problems encountered.
- *Problems with Alcohol, Drugs, or Mental Health.* Ascertain whether the witness has ever used drugs. Determine whether the drug use corresponds with the events of the instant case. If the witness is incarcerated, consider sending a "drug use" inquiry

letter to the warden of the correctional facility. Determine whether the witness has ever had any alcohol or mental health problems. Finally, discover whether or not the witness has received any treatment for any such problems and, if so, whether the treatment was successful.

- *Compliance with Agency Guidelines Regarding Use of Informants.* Most, if not all, agencies are subject to official guidelines for dealing with informants. Defense attorneys frequently cross-examine agents and informants about noncompliance with these guidelines. Become familiar with these agency guidelines and make sure they were followed. If there were specific instances of noncompliance, ascertain why and be prepared to make a *Brady-Giglio* analysis to see if you must disclose any materials to the court or defense.

X. PREPARING THE INFORMANT OR ACCOMPLICE WITNESS TO TESTIFY

Preparing the testimony of an informant or accomplice is time consuming. Besides reviewing the substance of the testimony, remind the witness to tell the truth. Do not say anything to a witness that you would not want a defense attorney, a judge, a reporter, or the jury to hear. Witnesses have been known to tape their conversations with the prosecution team. Avoid becoming too friendly with any witness—especially informants and accomplices. These people are not the Government's friends, and it should not appear otherwise at trial. By keeping the relationship professional, and somewhat distant, the prosecutor and agents are less likely to overlook signs that the witness is not cooperating fully.

XI. DEFENSE REQUESTS TO INTERVIEW A PROBLEM WITNESS

If the defense asks to interview the witness, the Government must instruct the witness that she is free to submit to such an interview. Telling a witness not to speak to a defense attorney is improper. However, telling a witness that she is not required to speak to a defense attorney is permissible.³⁰

Sometimes an informer's identity must be revealed to the defense even if the Government does not intend to use the informer as a witness. Whether an informant's identity should be disclosed depends on the circumstances of each case and requires a balancing of the public's right to the flow of information

30. See *Workman v. Bell*, 160 F.3d 276, 288 (6th Cir. 1998); *United States v. Davis*, 154 F.3d 772, 785 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1090 (1999); *United States v. Black*, 767 F.2d 1334, 1337-38 (9th Cir. 1985); *Kines v. Butterworth*, 669 F.2d 6, 10-11 (1st Cir. 1981); *United States v. Walton*, 602 F.2d 1176, 1179-80 (4th Cir. 1979); *United States v. Scott*, 518 F.2d 261, 267-68 (6th Cir. 1975).

against the requirements of providing a fair trial to the defendant.³¹

XII. VOIR DIRE CONSIDERATIONS

During the voir dire of the jury, request the judge to inquire about the use of cooperating defendants and immunized witnesses. Such an inquiry helps the jury become comfortable with the idea of co-conspirator testimony and the fact that the use of these witnesses is common.

XIII. OPENING STATEMENT CONSIDERATIONS

In opening statements, it is tempting to overstate the nature of the testimony expected from a cooperating witness. Because these witnesses often do not perform as persuasively as expected, the better practice is to understate such a witness's expected testimony. Tell the jury that physical and testimonial evidence corroborates the testimony of the cooperating witness. This allows the jurors to trust the testimony before they hear it. The distasteful aspects of the witness's background and involvement in criminal activity should be disclosed to the jury during the opening statement, including the nature of any plea agreement or immunity order.

It is also important to assure the jury that plea agreements and immunity orders are commonplace and lawful (*i.e.*, "You will learn that, as provided for under the Rules of Criminal Procedure, the witness entered into an agreement with the Government . . .").

XIV. DIRECT EXAMINATION CONSIDERATIONS

Consider starting the direct examination with facts that have already been corroborated or will soon be corroborated by other witnesses. Instead of relying on records custodians, ask the witness to identify bank records, toll records, receipts, photographs, and objects seized in searches as he testifies about the events to which they relate. The witness can also authenticate tapes from wiretaps or consensual monitoring. These identifications provide instant corroboration for the testimony. After establishing credibility in this way, weave the negative material (*e.g.*, plea agreement or criminal history) into the middle of the direct examination.

Caution must be exercised in eliciting testimony on direct examination concerning witness relocation expenses paid by the Government. Defense counsel may argue that such evidence improperly suggests the defendant was dangerous or likely to retaliate against the witness.³² The Government has a

31. See *Roviaro v. United States*, 353 U.S. 53, 58-62 (1957).

32. See, *e.g.*, *United States v. Talley*, 164 F.3d 989, 1002-03 (6th Cir. 1999).

clear obligation to disclose these payments to the defense,³³ but the cautious prosecutor should consider obtaining an advance ruling by the court before questioning a witness about relocation payments.³⁴

Consider limiting the scope of direct examination with an immunized witness to limit the scope of the immunity. For the same reason, object to cross-examination beyond the scope of direct. Argue to the judge that the Government did not intend to offer immunity to matters beyond the scope of direct examination.

On direct examination an issue may arise regarding the admissibility of a cooperating co-conspirator's plea agreement. While a plea agreement cannot be used as evidence of a defendant's guilt, it may be used for a proper purpose.³⁵ For example, the prosecutor may be able to use a co-conspirator's plea agreement to rebut the argument that a defendant has been improperly selected for prosecution.³⁶ Similarly, a plea agreement may be admissible to corroborate the testimony of the cooperating co-defendant.³⁷

Defense counsel may argue about the admissibility of specific language in a plea agreement. A good example is the admissibility of plea agreement language relating to the defendant's agreement to submit to a polygraph examination or language that requires the cooperating defendant to provide "truthful testimony." The defense often argues that this language unfairly bolsters the credibility of the cooperating witness.³⁸ This argument is not insignificant as the First Circuit has stated: "A defendant may be denied a fair trial if the prosecution portrays itself 'as a guarantor of truthfulness' by making personal assurances that the witness is telling the truth or by implicitly vouching for the witness by indicating that information not heard as evidence supports the testimony."³⁹

In the Second Circuit, pursuant to what is commonly referred to as the "*Edwards Rule*," the Government can risk impeaching its own witness by introducing the plea agreement on direct examination, but it may not introduce portions of the plea agreement that could bolster the credibility of the witness

33. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (extending *Brady v. Maryland*, 373 U.S. 83 (1963), to encompass evidence regarding a government witness's credibility).

34. See *Talley*, 164 F.3d at 1003 (denying mistrial when prosecutor made limited inquiry about relocation payments, court gave limiting instruction, and defense counsel inquired extensively about witness protection program).

35. See *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994) (citing *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991)); *United States v. Townsend*, 796 F.2d 158, 162-63 (6th Cir. 1986) (citing *United States v. Leslie*, 759 F.2d 366, 378 (5th Cir. 1985)).

36. See, e.g., *United States v. Inadi*, 790 F.2d 383, 384 n.2 (3d Cir. 1986).

37. See *Gaev*, 24 F.3d at 476.

38. See, e.g., *Townsend*, 796 F.2d at 162-63.

39. *United States v. Munson*, 819 F.2d 337, 344-45 (1st Cir. 1987) (quoting *United States v. Martin*, 815 F.2d 818, 821 (1st Cir. 1987)).

unless the defense has attacked it.⁴⁰ The Second Circuit noted that it has been difficult to distinguish the impeachment attributes of a plea agreement from its bolstering provisions, admitting that if it were addressing the issues anew it might not follow the *Edwards* rule.⁴¹

Nine circuits have rejected *Edwards* and instead permit the Government to introduce the entire plea agreement of a cooperating co-defendant witness.⁴² These cases reason that cooperation agreements provide no special incentive to testify truthfully and do nothing to enhance the Government's ability to determine if the witness is lying; thus, nothing in the plea agreement implies the Government has any special knowledge of the witness's veracity. However, when the prosecutor says in opening statement that if the witness testifies truthfully "it's my intent to . . . recommend a 15 year sentence. . . ,"⁴³ the prosecutor is improperly leading the jury to believe she "ha[s] a special ability or extraneous knowledge to assess credibility, [and] the statement[] [is] improper."⁴⁴ It is also improper on direct examination to elicit testimony regarding plea negotiations with the witness where it is clear that the plea agreement materialized only after the prosecutor was personally satisfied the witness was telling the truth.⁴⁵

Note that if the defense has attacked the credibility of a witness for the Government in opening statement, the promise to testify truthfully may be

40. See *United States v. Edwards*, 631 F.2d 1049, 1051-52 (2d Cir. 1980); see also *United States v. Musacchia*, 900 F.2d 493, 497-98 (2d Cir. 1990) (finding harmless error where prosecutor questioned witnesses regarding provisions of cooperation agreements on direct exam in response to defense counsel's challenging credibility of witness in opening argument), *vacated on other grounds*, 955 F.2d 3 (2d Cir. 1991); *United States v. Borello*, 766 F.2d 46, 56-58 (2d Cir. 1985) (finding reversible error for trial court to have admitted full cooperation agreement into evidence in absence of prior attack on witness's credibility).

41. See *United States v. Cosentino*, 844 F.2d 30, 33 n.1 (2d Cir. 1988). The *Edwards* rule has been followed in the Ninth and Eleventh Circuits; see, e.g., *United States v. Knowles*, 66 F.3d 1146, 1161 (11th Cir. 1995); *United States v. Perez*, 67 F.3d 1371, 1379-80 (9th Cir. 1995), *modified*, 116 F.3d 840 (9th Cir. 1997); *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995); *United States v. Monroe*, 943 F.2d 1007, 1013-14 (9th Cir. 1991); *United States v. Cruz*, 805 F.2d 1464, 1479-80 (11th Cir. 1986).

42. See *United States v. Romer*, 148 F.3d 359, 369 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1032 (1999); *United States v. Lewis*, 110 F.3d 417, 421 (7th Cir. 1997); *United States v. Willis*, 997 F.2d 407, 414 (8th Cir. 1993); *United States v. Spriggs*, 996 F.2d 320, 324 (D.C. Cir. 1993); *United States v. Weston*, 960 F.2d 212, 215 (1st Cir. 1992); *United States v. Lord*, 907 F.2d 1028, 1030-31 (10th Cir. 1990); *United States v. Drews*, 877 F.2d 10, 12 (8th Cir. 1989); *United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989); *United States v. Walker*, 871 F.2d 1298, 1303 (6th Cir. 1989); *United States v. Mealy*, 851 F.2d 890, 898-900 (7th Cir. 1988); *United States v. Martin*, 815 F.2d 818, 821 (1st Cir. 1987); *United States v. Henderson*, 717 F.2d 135, 137-38 (4th Cir. 1983); see also *United States v. Oxman*, 740 F.2d 1298, 1302-03 (3d Cir. 1984) (stating entire plea agreement admissible at least where Government could anticipate later effort to impeach witness), *vacated on other grounds sub nom.*, *United States v. Pflaumer*, 473 U.S. 922 (1985).

43. *United States v. Francis*, Nos. 97-1129, 97-1130, 1999 WL 95039, at * 4 (6th Cir. Feb. 25, 1999).

44. *Id.*

45. *Id.*

admissible on direct examination of the witness to rebut such an attack.⁴⁶

Any claim of prejudice made by the defendant as a consequence of admitting a co-conspirator's plea agreement may be cured by requesting the court to issue a limiting instruction, such as the following:

I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness'[s] plea.⁴⁷

When a defendant introduces evidence of a witness's plea agreement, however, there is no prejudice, and no limiting instruction is required.⁴⁸

XV. CROSS-EXAMINATION CONSIDERATIONS

Prepare cooperating witnesses for cross-examination by advising them that all questions must be answered truthfully, and that they are not testifying to promote a particular outcome in the case. Consider conducting a mock cross-examination of each cooperating witness. Make sure cooperating witnesses understand the plea agreement and are prepared to respond to questions about their motives for testifying. Remind these witnesses that there is nothing wrong with pretrial interviews and that they should testify truthfully about the number and nature of pretrial meetings with prosecutors and law enforcement agents.

At trial resist the urge to object to questions on cross-examination unless absolutely necessary. Many witnesses handle themselves better on cross than

46. See, e.g., *Delgado*, 56 F.3d at 1368; *United States v. Gaind*, 31 F.3d 73, 78; *Monroe*, 943 F.2d at 1013-14.

47. *United States v. Gaev*, 24 F.3d 473, 475 (3d Cir. 1994); see also *United States v. Prawl*, No. 98-1259, 1999 WL 79653, at *3 (2d Cir. Feb. 19, 1999) ("A limiting instruction is justified when evidence—such as the guilty plea of a testifying co-defendant—is admissible for a limited purpose but might also be considered for a purpose that is impermissible."); *United States v. Universal Rehabilitation Services (PA), Inc.*, Nos. 97-1412, -1413, -1414, -1467, -1468, 1999 WL 62512, at *10 (3d Cir. Feb. 11, 1999) (stating that a limiting instruction against the use of the plea as substantive evidence of defendant's guilt will reduce the prejudice that injures the defendant by admission of co-conspirator's guilty plea); *United States v. Pennington*, Nos. 97-2847, -2888, -3152, 1999 WL 50158, at *5 (8th Cir. Feb. 5, 1999) (concluding that allowing a witness to testify that he had pled guilty to mail fraud based on his participation in fraudulent scheme was not abuse of discretion because the court gave limiting instruction that witness's plea could not be used against defendant); *United States v. Maliszewski*, 161 F.3d 992, 1003-04 (6th Cir. 1998) (concluding that when evidence of a witness pleading guilty is admitted, the party against whom the evidence is offered is entitled to a limiting instruction); *United States v. Thomas*, 998 F.2d 1202, 1206 (3d Cir. 1993) ("In several cases where evidence of a co-conspirator's guilty plea was entered, we have held that proper limiting instructions from the court cured the possible prejudice to the defendant.").

48. See *United States v. Garcia-Guizar*, 160 F.3d 511, 524 (9th Cir. 1998).

on direct. In addition the Government should not appear to be keeping information from the jury.

Before trial consider filing motions *in limine* to limit the cross-examination of the cooperating witnesses. The Sixth Amendment “guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”⁴⁹ “The [S]ixth [A]mendment requires that a defendant be granted an opportunity to explore criminal charges against a prosecution witness on cross-examination in order to bring the witness’[s] possible motive or self-interest to the jury’s attention.”⁵⁰

The opportunity to cross-examine is not unlimited.⁵¹ The court may impose limits on cross-examination as long as the court grants the defendant sufficient leeway to establish “a reasonably complete picture of the witness’[s] veracity, bias, and motivation.”⁵²

The general rule for drug informants is that cross-examination on payments received from the Government must be permitted to extend not only to her work in the case on trial, but also to previous work for the government.⁵³ In some instances it may be possible to limit cross-examination on payments received in connection with other investigations.⁵⁴ If the witness has received payments in connection with ongoing investigations, a trial judge may refuse to allow cross-examination that might jeopardize such investigations.⁵⁵ In addition it may be possible to limit cross-examination of an informant on drug use to a particular time period.⁵⁶ A trial judge may refuse to allow disclosure

49. *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (emphasis omitted) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)).

50. *United States v. Machado*, 804 F.2d 1537, 1545 (11th Cir. 1986).

51. *See United States v. Devin*, 918 F.2d 280, 292-93 (1st Cir. 1990) (holding it was within the trial judge’s discretion to preclude cross-examination of an informant on the identity of two other subjects of a public corruption investigation when there had been extensive cross-examination of the witness on payments made to other public officials who were shielded by immunity).

52. *United States v. Boylan*, 898 F.2d 230, 254 (1st Cir. 1990) (holding that the trial judge’s denial of cross-examination on witnesses’ procurement of male prostitutes and on witnesses’ sexual orientation was not reversible error where defense pursued vigorous cross-examination on grant of immunity and other crimes committed by witnesses); *see also United States v. Smith*, 145 F.3d 458, 462-63 (1st Cir. 1998) (holding that the defendant was able to provide a reasonably complete picture of the witnesses during cross-examination without questioning them about their knowledge of the defendant’s prior acquittal), *cert. denied*, 119 S. Ct. 383 (1998).

53. *United States v. Salsedo*, 607 F.2d 318, 321 (9th Cir. 1979); *United States v. Leja*, 568 F.2d 493, 499 (6th Cir. 1977) (reversing conviction for district court’s failure to allow cross-examination on informer’s total compensation package).

54. *United States v. Elorduy*, 612 F.2d 986, 989 (5th Cir. 1980).

55. *United States v. Gray*, 626 F.2d 494, 499-500 (5th Cir. 1980) (holding trial judge did not abuse his discretion in not allowing defendant to cross-examine an informant about illegal activity and payments in another case in such detail that it would induce informant to invoke the Fifth Amendment and would jeopardize ongoing investigations).

56. *United States v. Broadus*, 7 F.3d 460, 465 (6th Cir. 1993).

of the address and place of employment of a witness if the value of the evidence is outweighed by danger to the witness.⁵⁷

Cross-examination on the plea agreement and on the criminal history of the witness can also be confined. Where the defendant is permitted to conduct sufficient cross-examination to satisfy the requirements of the Sixth Amendment, the scope of any further cross-examination falls within the discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of discretion.⁵⁸ It is not an abuse of discretion to limit cross-examination of a Government witness concerning past convictions to the facts of those convictions, rather than allowing defense counsel to explore the underlying details.⁵⁹ When the jury is fully aware of the plea agreement, limiting cross-examination on the nature of the probationary sentence does not deprive a defendant of a fair trial.⁶⁰

XVI. HANDLING CREDIBILITY AND BIAS ISSUES

Federal Rule of Evidence 608⁶¹ provides that, for the purpose of attacking or supporting the witness's credibility, specific instances of misconduct cannot be proven by extrinsic evidence, other than conviction of a crime as provided in Rule 609 (impeachment by evidence of conviction of a crime).⁶² However, defense counsel may cross-examine on specific instances of misconduct by a cooperating witness if probative of truthfulness or untruthfulness.⁶³

Defense counsel may offer extrinsic evidence of misconduct on the theory that it directly contradicts the testimony of a cooperating witness. A common example arises when a Government witness denies drug use on cross-examination, and defense counsel, in an effort to attack credibility, offers a witness who is prepared to testify the Government witness used drugs. Under Rule 608,⁶⁴ prohibiting a party from introducing extrinsic evidence to prove specific instances of conduct of a witness for the purpose of attacking or supporting his credibility, the court should not admit the evidence.⁶⁵

Although the Federal Rules of Evidence do not address the issue, prior misconduct of a witness which is probative of bias may be proven by extrinsic

57. See *United States v. Rice*, 550 F.2d 1364, 1371 (5th Cir. 1997); *United States v. Watson*, 599 F.2d 1149, 1157 (2d Cir. 1979) (upholding trial court's limit on cross-examination to protect witness's secret identity).

58. *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir. 1982) (citing *Alford v. United States*, 282 U.S. 687, 694 (1931)).

59. See *United States v. Castro*, 788 F.2d 1240, 1246 (7th Cir. 1986); *United States v. Beale*, 921 F.2d 1412, 1424 (11th Cir. 1991) (holding trial court did not abuse its discretion in precluding cross-examination on underlying facts of pending charges against the witness).

60. *United States v. Atisha*, 804 F.2d 920, 929-30 (6th Cir. 1986).

61. FED. R. EVID. 608(b).

62. *Id.* 609.

63. *Id.* 608(b).

64. *Id.*

65. *United States v. Phillips*, 888 F.2d 38, 41-42 (6th Cir. 1989).

evidence.⁶⁶ But even when offered to show bias, the trial judge has discretion to exclude extrinsic evidence that is “only remotely relevant.”⁶⁷

XVII. REDIRECT EXAMINATION CONSIDERATIONS

On redirect examination be prepared to use prior consistent statements under Federal Rule of Evidence 801 “to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive” in the testimony.⁶⁸ This can be a good way of highlighting the important aspects of the testimony—list all of the evidence the witness supplied to law enforcement when first interviewed and before a plea agreement was reached. Redirect examination is also a good time to highlight that the plea agreement contains adverse consequences if the witness commits perjury. Just remember the restrictions that apply regarding improper bolstering as discussed above.

XVIII. FINAL ARGUMENT CONSIDERATIONS

In closing argument, stress evidence showing that the witness, however repugnant she may be, is telling the truth. As in opening statement and direct examination, use charts to show how other evidence corroborates the testimony of the witness. Acknowledge the distasteful background of the witnesses, thus validating the jurors’ feelings about them. Argue that the defendant picked the witnesses, not the Government (*i.e.*, “The defendant picked John Doe as a witness when he approached him with an opportunity to launder drug money.”). Remind the jury that people do not confide their criminal plans in people who are honest, law-abiding citizens.

Another effective way of rebutting a defense contention that an informant or a cooperating co-defendant witness lied in exchange for a lenient sentence is to argue that the witness would have behaved differently if she was inclined to curry favor with the Government. Support this argument by identifying the areas where the witness could have exaggerated or embellished, but did not. Likewise, remind the jury about the times when the witness admitted a lack of knowledge or a failure of memory.

If there are several cooperating co-defendants, point out their inability to have contrived consistent testimony. Remind the jury that the defendant is on trial, not the witnesses and quote the jury instruction on this point.⁶⁹

During final argument be careful when referring to that portion of a plea agreement which requires that the witness provide “truthful testimony.” This can be improper vouching. A prosecutor may not vouch for the credibility of

66. See *United States v. Meyer*, 803 F.2d 246, 249 (6th Cir. 1986) (holding extrinsic evidence of misconduct is admissible if it “relates to beliefs of the witness or to preexisting relationships” probative of bias).

67. *United States v. Maliszewski*, 161 F.3d 992, 1010 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1126 (1999).

68. FED. R. EVID. 801(d)(1)(B).

69. See, *e.g.*, 1 DEVITT ET AL., *supra* note 4, § 12.11, at 372-73.

a Government witness by: (1) placing the prestige of the government behind the witness, or (2) indicating that information not presented to the jury supports the witness's testimony. In *United States v. Young*⁷⁰ defense counsel called the Government's key witnesses "perjurers" in his closing argument.⁷¹ The prosecutor then vouched for the credibility of the witnesses by telling the jury that the Government thought the witnesses testified truthfully.⁷² The Supreme Court found that the prosecutor's remarks were improper, but upheld the conviction based upon the invited response doctrine.⁷³ However, the Court cautioned that the invited response doctrine should not be read as condoning responses in kind.⁷⁴

It may be reversible error for a prosecutor to call a witness "honest."⁷⁵ Likewise, it may be improper for the Government to argue that "the Government has done as much as [it] can do to [e]nsure [the] credibility [of] a witness."⁷⁶

XIX. CONCLUSION

It is a rare federal criminal trial that does not require the use of criminal witnesses—those who have pleaded guilty to an offense and are testifying under a plea agreement, or those who are testifying under a grant of immunity. These witnesses can be an effective component of the Government's proof if the prosecutor exercises great care in supervising the witness during the investigative phase, in corroborating the testimony, in preparing the witness for trial, in educating the jury that use of these witnesses is common and proper, and by limiting damaging cross-examination.

The relationship between government representatives and informants is best kept distant and professional. No other area of practice presents more ethical challenges for prosecutors. Consequently, a prosecutor using these types of witnesses must have a sound working knowledge of the ethical rules for disclosure of exculpatory evidence under *Brady v. Maryland*⁷⁷ and its progeny.

70. 470 U.S. 1 (1985).

71. *Id.* at 11.

72. *Id.*

73. *Id.* at 12-13.

74. *Id.* at 13.

75. *United States v. Dandy*, 998 F.2d 1344, 1353 (6th Cir. 1993).

76. *United States v. Hurst*, 951 F.2d 1490, 1502 (6th Cir. 1991); *see also United States v. Berry*, 627 F.2d 193, 198 (9th Cir. 1980) (holding it was improper for the prosecution to argue "that the [G]overnment had taken 'great pains' to keep [two Government witnesses] apart so the jury could trust them" and thus implying that the Government had "taken steps to assure the veracity of its witnesses"); *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (holding it was error for the prosecutor to state that a police officer was in court to monitor the testimony of the witness and make sure he complied with the plea agreement). It is not vouching to argue that a witness is speaking the truth because he has reason to do so. *United States v. Dockray*, 943 F.2d 152, 156 (1st Cir. 1991) (holding that informing the jury of the effect of the plea agreement on a witness's incentive to testify is not improper vouching).

77. 373 U.S. 83 (1963).

