Witness Maintenance in Long-Term Violent Crime Cases

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I. Introduction

Long-term violent crime cases pose many challenges to federal prosecutors. Prosecutors must constantly: direct agents to develop and enhance portions of the case; draft subpoenas, 2703(d) orders, wiretap applications, indictments and prosecution memoranda, capital case submissions and RICO review submissions; and coordinate and schedule grand jury time. In the crush of all of these responsibilities, witness development and maintenance sometimes results in no more than simply meeting the witness, debriefing him or her, and then placing that person in the grand jury, all on the same day.

For most cases, such limited contact with a witness would most likely be sufficient. Long-term violent crime cases, however, demand more attention to witness development, testimony preservation, and basic witness maintenance. A long-term racketeering investigation into a structured gang or enterprise can often require two years or more of work, and depending on the number of indicted defendants, the ensuing prosecution can take another two or more years before completion of trial and, hopefully, sentencing.

Thus, the victim or witness of a violent incident faces the prospect of testifying in court many years after the incident actually occurred. The passage of so much time, in turn, poses unique problems for prosecutors. The witness's memory might well deteriorate over time. The witness's physical or mental health may undergo drastic changes over the span of two or more years. Especially in gang cases, a witness's personal circumstances may have changed so dramatically that it would impact their willingness or ability to participate in the criminal case. Such changes include changes in place of residence, whether they have been arrested or convicted for crimes; changes in relationships to victims or other witnesses; and receiving threats or other forms of intimidation or influence from defendants or their supporters. And of course, the witness may lose interest in the case or the desire or motivation to participate. All of these concerns only grow with the passage of time.

Accordingly, especially in long-term, violent crime investigations and prosecutions, witness development and maintenance are of paramount concern. Thus, prosecutors, working with their case agents, should develop a plan to secure a witness's testimony, preserve it in a way consistent with any *Jencks*/*Giglio* concerns, but that still allows a witness's memory and truthful testimony to be memorialized in useable fashion, and attempt to maintain a witness's long-term cooperation with the investigation. Such a plan does not necessarily require a tremendous amount of work, but it does require a commitment, especially from the agents, to work with witnesses throughout the entire pendency of the investigation and litigation.

II. Develop a Witness Maintenance Plan

A witness maintenance plan requires steps both by agents and prosecutors. The suggestions below are some examples of how to develop a plan and maintain witnesses. Law enforcement agents play a key

role in witness maintenance. They must develop a decent working relationship with every witness to insure the witness's short-term and long-term cooperation, and assess their credibility and state of mind as a case slowly winds its way through the court system.

To develop these relationships, the agents should consider meeting with every witness in the case, and have that initial meeting well before the case is charged. This requirement would seem obvious, yet there are many agents and prosecutors, especially in long-term racketeering cases, that will include a particular incident in a Racketeer Influenced and Corrupt Organization (RICO) indictment based solely on police reports and other law enforcement paperwork, and not attempt to have even telephonic contact with victims or witnesses until after indictment, or right before trial. Whether to meet with every witness is a judgement call for the prosecutor and agents to make. In certain cases it is essential. That decision depends on several considerations including the type of witness. For example, is the witness a key eye witness or a record keeper. It also depends on the nature of the case. Is it a one- count gun case investigated by an officer the prosecutor has worked with on numerous cases or is it a complex RICO prosecution. Also, there are case secrecy concerns. Would talking to a witness alert the defendant to the coming charge and give him the opportunity to flee or destroy evidence. All of these factors should be taken into consideration in deciding whether to interview witnesses.

Failing to meet with witnesses prior to charging is quite inappropriate in certain cases for several reasons. First, agents and prosecutors must meet, face to face, with victims and witnesses prior to indictment to assess the witness's credibility, the strength of the witness's proposed testimony, the nature and strength of any evidence that would tend to corroborate or undercut that testimony, and the defendant's guilt for both the incident in question and the overall case. Moreover, early face-to-face contact with every witness is necessary in order to determine whether the witness will be available to testify at trial. Finally, as purely a defensive matter, it is important to meet early with potential witnesses to determine whether they have been contacted by defense attorneys or experts, which can enable an agent or prosecutor to learn if the defense is aware of an investigation, is developing affirmative or other defenses to particular crimes, or is potentially tampering with witnesses.

Further, agents must develop some type of professional, on-going relationship with every civilian witness, if not all witnesses, in a case. Given the potential duration of a long-term investigation and prosecution, there is a great risk that witnesses will no longer become cooperative, may endure personal physical or mental challenges that may make their availability for trial questionable, or may simply move away or disappear during the pendency of a case. Thus, it is of paramount importance that agents maintain regular contact with as many witnesses as possible during the pendency of a case.

To accomplish this important task, agents and prosecutors should develop a witness maintenance plan. Especially in larger cases, agents should divide the work so that as many witnesses can be covered as possible. Special attention should be paid to whether an agent can develop a connection with a witness. Agent-witness contact can be detrimental to a case if an agent is antagonizing the witness or otherwise disrupting a witness's life. Indeed, some agents simply do not possess the interpersonal skills necessary to develop and maintain good working relationships with certain, or all, witnesses, and thus a prosecutor must pay close attention to how witnesses are reacting to individual agents, and insure that the right agent is working with the right witness in each case.

Once agents begin to contact witnesses and develop some type of professional relationship with each witness, it is imperative that agents maintain that relationship throughout the pendency of the case. In most cases, that simply involves some periodic contact with each witness to insure that the witness is still alive, the witness's personal situation is relatively unchanged, and the witness is still cooperative and prepared to testify at trial. Of course, the frequency and nature of these "check-up" contacts must be determined by the individual needs and circumstances of each witness. Some witnesses may only need a telephone call every 6 to 8 weeks, while other witnesses may need weekly or even daily contact. As part of an overall witness maintenance plan, agents and prosecutors should discuss the frequency and nature of

each "check-up" contact with each witness.

Moreover, especially in long-term violent crime cases, many witnesses will have needs that go far beyond a simple telephone call. Some witnesses may have substance abuse issues, financial problems, difficulty securing housing, domestic issues, problems securing state or federal subsidies and benefits, and physical or mental issues. Many state prosecutors offices have entire units dedicated to connecting witnesses with state and federal assistance programs and providing needed counseling and other services to victims and witnesses. There is nothing quite like that in the federal system. However, agents and prosecutors should make full use of the United States Attorney's Office victim-witness coordinators whenever possible. As these resources are limited, agents will most likely be called upon to fill any resultant gaps and assist witnesses with obtaining needed services.

In certain circumstances, the prosecutor must take the lead in developing a relationship with witnesses or victims. For example, in capital-eligible cases, the death penalty protocol requires prosecutors to speak with family and survivors to determine their views on the death penalty. Specifically, the United States Attorney Manual provides that

> [u]nless extenuating circumstances exist, the United States Attorney or Assistant Attorney General should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney or Assistant Attorney General should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney or Assistant Attorney General should notify the family of the victim of all final decisions regarding the death penalty.[29]

Indeed, it is quite difficult to broach this emotionally difficult topic and explore these views without the prosecutor first developing some kind of relationship with family members and other involved individuals. Similarly, in cases involving particularly traumatic events, such as rapes or very violent assaults, prosecutors should spend additional time with witnesses simply to prepare the witness for testimony that could be quite difficult, if not traumatic. A good working relationship with such witnesses, developed early in the investigation, can greatly assist a prosecutor to effectively develop and prepare a witness for trial.

Of course, prosecutors must be fully cognizant of their statutory obligations concerning victims and witnesses as well. Pursuant to 18 U.S.C. § 3771, crime victims possess certain rights, including:

> **(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
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> . . . .
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> **(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
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> **(5)** The reasonable right to confer with the attorney for the Government in the case.
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> . . . .
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> **(10)** The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.[30]

These specific provisions of the statute require a bare minimum of contact between the prosecutor

[29] USAM § 9-10.100.
[30] 18 U.S.C. § 3771 (2012 & Supp. III 2015).

and each victim and witness. However, as discussed, long-term investigations and prosecutions require far more contact with all witnesses and victims to effectively develop and maintain a case.

III. Preserving Witness Testimony for Trial

In addition to supervising and coordinating agent efforts to develop and maintain relationships with witnesses and victims, prosecutors have additional responsibilities in securing and preserving witness testimony for trial. Due to the fact that witnesses' memories deteriorate over time, and their motivations and allegiances may shift during the course of an investigation and prosecution, prosecutors will want to insure that the most detailed and accurate account of a witness's observations and knowledge are memorialized and preserved such that the government will be in the best position to present its case at the time of trial.

A prosecutor has limited options for preserving a witness's testimony. The prosecutor may simply interview the witness from time to time, without memorializing the statement, and hope that that their statement does not vary or deteriorate over time. The prosecutor or agent may write a report of his or her recollection of that witness's statement. The prosecutor could ask the witness to adopt the statement as well. The prosecutor could have the witness provide sworn testimony before a grand jury. Finally, if the witness has criminal exposure, the prosecutor could require the witness to plead guilty to a cooperation agreement that provides for penalties for providing false, incomplete, or misleading testimony.

As a threshold matter, absent unusual circumstances, there is little way to preserve a witness's prior statements for use at trial without that witness being available to actually testify at trial. Even prior sworn testimony of a witness cannot simply be introduced wholesale at trial without that witness on the stand in court absent truly unusual circumstances. Specifically, pursuant to Federal Rule of Evidence 804(b)(1), former testimony of a witness may be admissible when that witness is unavailable and the prior testimony:

> **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
>
> **(B)** is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.[31]

Moreover, former testimony of a witness who is unavailable to testify at trial may be admissible, when:

> A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.[32]

Both of these situations are highly unusual. More typically, government witnesses will be available for trial, but they may no longer fully remember the relevant events, or their loyalties or motivations may have shifted such that they may no longer wish to provide full, truthful testimony.

In such situations, the government may refresh the recollection of, or impeach, its own witnesses. The Federal Rules of Evidence specifically permit "any party, including the party that called the witness" to attack or impeach a witness's credibility.[33] In such situations, however, the material that the government has to conduct the impeachment can have significantly different evidentiary value. Specifically, a prior police or agent report may not effectively impeach a witness, since the witness can refuse to adopt the report as his or her prior statement, or may otherwise contest the validity or accuracy

[31] FED. R. EVID. 804(b)(1).
[32] FED. R. EVID. 804(b)(6).
[33] FED. R. EVID. 607.

of that prior statement. Indeed, courts have rejected government attempts to introduce into evidence an agent's report to impeach a witness precisely on those grounds.[34]

However, a witness's prior sworn grand jury testimony does not suffer from the same infirmities. It is considered completely reliable, and thus a hostile witness's prior grand jury testimony not only can be used to impeach that witness, but also may be admitted into evidence substantively at trial as well.[35]

Accordingly, in determining how to preserve a witness's testimony, the prosecutor must weigh important factors. First, the prosecutor must consider the witness's short term and long-term ability to remember the relevant facts in question, and the ability of an otherwise cooperative witness to give consistent testimony over a long period of time. Some memorialization is usually appropriate, but a prosecutor may decide that a witness is relatively reliable and stable, and thus there is no need to have that witness testify in the grand jury.

Second, the prosecutor must consider whether the witness will remain cooperative over the duration of the investigation and prosecution. Family members, friends, romantic partners, and even individuals who live in the same community as the defendant may be willing to cooperate in the short term, but outside pressures may cause those witnesses to refuse to cooperate, or become hostile to the government, by the time of trial. For such witnesses, the safer course would be to "lock in" that witness's testimony, provided it is truthful, accurate, and complete, by having that witness testify in the grand jury, and thus have the witness's grand jury transcript ready and available at trial.

Finally, the prosecutor must determine whether the witness should be charged with crimes, if applicable, and required to plead guilty to a cooperation agreement. Where a cooperation agreement exposes a witness to a significant penalty if he or she lies, or gives incomplete or untruthful testimony, there is often sufficient motivation for the witness to continue to cooperate, and thus little need to needlessly create *Jencks* material by requiring the witness to testify before the grand jury. However, even if the witness executes a cooperation agreement, the prosecutor must also decide whether the agreement is sufficient to motivate the witness to cooperate with the government on the case in question, and whether, because of memory or other issues, the witness's testimony, nevertheless, should be preserved via grand jury testimony.

At bottom, many of these questions revolve around evaluating the risks of creating potentially damaging *Jencks* material, and the rewards of possessing sworn prior statements of one's witnesses. The prosecutor must make that evaluation on an individual basis, witness by witness, to engage in the most accurate cost-benefit analysis possible. Significantly, the prosecutor's cost-benefit analysis in that regard is best informed by a well-established professional relationship between the government and the witness, through agent-witness contact, prosecutor-witness contact, or both.

IV. Conclusion

The investigation and prosecution of a long-term gang or violent crime case is necessarily labor and resource intensive. There are incredible demands placed on agents and prosecutors as they struggle to coordinate disparate aspects of an investigation and prosecution to bring a case to indictment and trial. As a result, some seemingly more mundane tasks, like keeping in regular contact with witnesses, and servicing their sometimes annoyingly frequent requests and demands, can fall by the wayside. However, it is critically important for the long-term success of these complex cases that agents and prosecutors,

[34] *See, e.g.,* United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977).
[35] *See, e.g.,* United States v. LaVictor, 848 F.3d 428, 452 (6th Cir. 2017).

early on, develop a comprehensive plan for securing witness testimony, preserving that testimony, and ensuring that the witnesses will remain part of the government's case during the long pendency of an investigation and trial.

ABOUT THE AUTHOR

❑ **David Jaffe** joined the Department of Justice in 2002 as an Assistant U.S. Attorney for the Southern District of New York. In 2006, David joined the Criminal Division with the Gang Squad, which later became the Organized Crime and Gang Section. David has prosecuted numerous gang and large-scale drug trafficking conspiracies. He has held the position of Deputy Chief, Principal Deputy Chief, and is currently the Acting Chief of the Organized Crime and Gang Section, Criminal Division.