PODIUM

CIVIL LIBERTIES *By Harvey A. Silverglate*

A Fine Line Between Suborning and Encouraging

KENNETH STARR holds the title independent counsel in the Whitewater investigation, but it has become increasingly clear that while independent of the Department of Justice he is hardly independent of the informant witness techniques honed by the DOJ in recent decades. It is equally clear that these techniques of trading cash, reduced charges and sentences and other favors in exchange for pro-prosecution testimony would be indictable conduct if engaged in by defense lawyers.

The intriguing question asked by those interested in the ideal of equal justice under the law is why these tactics would not constitute indictable conduct when engaged in by prosecutors. A review of federal obstruction-of-justice statutes indicates that there is no satisfactory explanation for enforcement of such statutes against defense lawyers and private investigators but not prosecutors and federal agents.

Yet such conduct has been engaged in routinely by career prosecutors in ordinary cases, by Independent Counsel Lawrence Walsh in pursuit of former President Ronald Reagan in the Irangate scandal, and by Mr. Starr in pursuing Bill and Hillary Clinton today.

First, some Whitewater history.

In 1993, David Hale, a former Arkansas businessman and judge, had his office raided by then-Independent Counsel Robert B. Fiske. Shortly thereafter, reports emerged that Mr. Hale was negotiating with prosecutors. He was seeking favorable treatment in exchange for testimony that then-Gov. Bill Clinton had pressured him into making an improper $300,000 loan, with federal funds, to Susan McDougal, then a Clinton business partner. Mr. Fiske was replaced as independent counsel by Mr. Starr, and Mr. Hale cut a deal to cooperate in exchange for a reduced sentence.

Then the nation witnessed a spectacle now common in federal criminal justice. Even though Mr. Hale pleaded guilty to two fraud charges in early 1994, sentencing was delayed at Mr. Starr's request. Judge Stephen M. Reasoner complained that the long delay (most defendants in his court, he said, begin serving their sentences four months after conviction or plea) "may create the appearance that Mr. Hale is receiving preferential treatment," but the judge nonetheless did Mr. Starr's bidding.

Only in late March 1996, some two years after his plea, was Mr. Hale finally sentenced—to half the maximum he could have received under the guidelines, on the prosecutor's recommendation of leniency for his cooperation. Whitewater prosecutors also acknowledged that they spent at least $57,000 to accommodate Mr. Hale's demands for privacy after he turned government witness.

Benevolent Gesture

When Ms. McDougal was convicted (in part by Mr. Hale's testimony), she charged on the "Larry King Live" TV program that the prosecutors "are not people who want the truth" but only want testimony that "they can use against the Clintons." In his defense, Mr. Starr claimed that his offer of leniency was aimed simply at giving Ms. McDougal the "opportunity to voluntarily provide complete and truthful information about matters within the jurisdiction of this office."

One must ask, however, whether Mr. Starr would have been satisfied with whatever testimony was offered by Ms. McDougal as "complete and truthful" if it had conflicted with his suspicions. And there's the rub. Only testimony deemed useful by the prosecution would suffice to cut a deal, and everyone involved knew what version that meant.

There are four major federal statutes that govern tampering with the legal process, any one of which—on the surface at least—would appear to cover the application of powerful incentives, regardless of the source, to get a witness to give a certain version of events or to change his or her prior version. Three of these statutes have long been around.

The statute on subornation of perjury, 18 U.S.C. 1622, provides a five-year sentence for anyone who "procures another to commit any perjury." Of course, since a prosecutor claims to be applying force and promising leniency to get to the truth, and since intent to get the witness to lie must be proven beyond a reasonable doubt in a prosecution for subornation, conviction of a plea-bargaining prosecutor would be nearly impossible.

The obstruction-of-justice statute, 18 U.S.C. 1510, provides a five-year sentence for anyone who "willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." Since the prosecutor is trying to facilitate rather than delay or prevent the giving of such testimony, he or she would have a pretty good defense.

The witness bribery statute, 18 U.S.C. 201, allows conviction only if someone "corruptly gives, offers, or promises anything of value to any person, with intent to influence the testimony under oath or

[SEE 'LENIENCY' PAGE A20]

Mr. Silverglate is a bimonthly NLJ columnist and a partner in the Boston firm of Silverglate & Good.

see reverse →

Suborning Or Simply Prodding?

['LENIENCY' FROM PAGE A19]
affirmation of such person as a witness." Prosecutors have a ready-made defense in the argument that the effort to enforce criminal laws can hardly be said to be corrupt, and the government would have the burden of proving corrupt intent.

But a statute adopted in 1982 to cover tampering with or influencing a witness seems far more applicable. While it covers "corrupt" attempts at witness persuasion, it also has language that covers a broader array of conduct. It provides a 10-year sentence for anyone who "knowingly uses intimidation or physical force, threatens, or engages in misleading conduct toward another person, with intent to influence the testimony of any person." Rather than require the government to prove corrupt intent, this statute reverses the burden of proof, putting the onus on defendants to prove that all they were doing in their dealings with the witness was trying to adduce truthful testimony. Because of this unusual language and the shifting of the burden to the defendant, it is conceivable that a charge of interfering with a witness could be brought against a prosecutor who has placed undue pressure on a witness to testify in a certain way.

When this statute was adopted, the criminal defense bar charged it was enacted at the request of the DOJ to dissuade defendants and their lawyers from seeking to interview government witnesses, actual or potential. Contact with a witness could be deemed an effort to lead, mislead or influence testimony, with the burden on defense lawyers to persuade the jury that they were simply seeking the truth. It created, the defense bar charged, an uneven playing field.

Long-Standing Practice

In a recent op-ed piece in the Wall Street Journal, Harvard Law Prof. Alan Dershowitz responded to critics who claimed President Clinton's offer to reimburse Whitewater witnesses for legal fees was a corrupt effort to influence testimony. Mr. Dershowitz pointed out the long-standing practice of prosecutors offering witnesses leniency, money and other favors. He noted that Mr. Clinton's offer was made "openly," and hence not "corruptly," not unlike a prosecutor's offer of leniency when disclosed to a defendant and to the court and jury.

Neither Mr. Dershowitz nor the president's critics, however, dealt with the above-quoted section of the 1982 statute that does away with the requirement of proof of corrupt intent and requires, instead, mere proof of intent to influence testimony by means of intimidation, threats or misleading conduct. This amorphous language would appear to cover a broad range of witness interviewing techniques used by attorneys on both sides.

After all, can it confidently be said that the Whitewater prosecutors, by threatening witnesses with heavy sentences for refusal to cooperate but promising leniency for assistance, are not trying to influence that testimony? Arguably, such plea offers constitute a prima facie violation of the statute, leaving the indicted prosecutor to persuade a jury, by a preponderance of the evidence, that he or she meant only to cause the witness to testify truthfully.

If only defense lawyers get charged with this prohibition against influencing witnesses, it likely will not be because of the failure of the statute's language to cover prosecutorial activity, but because of the obvious but crucial fact that prosecutors, not defense lawyers, have the power to decide whom to charge. NLJ