Limiting case agent testimony – strategic and ethical considerations

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Alison Brill
alison_brill@fd.org

Why are we concerned about the testimony of the case agent/main law enforcement witness?

Case agents can be fact or expert witnesses
. . . or both (“dual capacity”)

Much damning case agent testimony is unavoidable –

- The case agent might have been the arresting officer when your client gave a spontaneous *exculpatory* statement that will be used to demonstrate consciousness of guilt.
- Or the case agent was the lead officer in the search of your client's house and can properly catalogue that the firearm was neatly stuffed in a seat cushion within reach of plastic bags, drugs, and a scale.
- Or the case agent helped chart out your client's fraud and may permissibly summarize complex or numerous documents by demonstrative evidence admissible under Fed.R.Evid. 611(a) or substantive evidence admissible under Fed.R.Evid. 1006.

Or the case agent can qualify as an expert to explain, for example:

- Organized crime (code of silence, membership requirements) – *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990)
- Drug courier profiles (travel to/from certain cities, no luggage) - *United States v. Caraballo–Rodriguez*, 632 Fed. Appx. 712 (3d Cir. 2015).
- Coded words - *United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017)
- Characteristics of illegal drug activity (quantity, purity, price, stash houses), *United States v. Watson*, 260 F.3d 301 (3d Cir. 2001).
- The ultimate issue of fact, unless it is a criminal defendant's mental state. *See* Fed.R.Evid. 704. *But see United States v. Davi*s, 397 F.3d 173, 179 (3d Cir. 2005) (no abuse of discretion in allowing expert testimony suggesting that the facts of the case were "consistent" with an "intent to distribute").

Fed.R.Evid. 602. Need for Personal Knowledge
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Fed.R.Evid. 701. Opinion Testimony by Lay Witnesses
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed.R.Evid. 702. Testimony by Expert Witnesses
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 703. Bases of an Expert Opinion
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed.R.Evid. 704. Opinion on an Ultimate Issue
(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Under these rules, how can case agent testimony cross the line?

The case agent places your client in an organizational chart.

- Arguably this is an impermissible legal conclusion.
- But cases have justified this as being an opinion on an ultimate issue of fact, and therefore permissible under Rule 704. *United States v. Davi*s, 397 F.3d 173, 179 (3d Cir. 2005).
- *But see United States v. Slade*, 627 F.2d 293 (D.C. Cir. 1980) (finding agent's testimony about the "Stampede organization" was the ultimate question for the jury about whether a conspiracy existed).

Case agent testimony, particularly when agents act in a dual capacity (fact and expert) or when they are the first or last witness (overview/summary), is rife with problems of:

- Imprimateur (repeat the testimony of a fact witness so it seems corroborated),
- Hearsay, "based on the investigation" (Confrontation Clause),
- Vouching (case agent explains how he vetted a witness or trusts them because . . .),
- Bolstering, *United States v. Fulton*, 837 F.3d 281, 293 (3d Cir. 2016) (explaining while prosecutors may argue in summation that certain evidence supports an inference of guilt, the case agent's testimony amounted 'to simply dressing up argument as evidence")
- Legal conclusions disguised as a factual investigation.

Courts are starting to better police this testimony.

***United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017**)

- District Court (WDPa) improperly admitted the case agent testimony interpreting clear phone calls but not reversible under plain error review.
- Most egregious example: agent interpreted "you can go ahead and send him" to mean "it is okay now to send [a co-conspirator] to purchase cocaine in Dallas."
- This testimony did not meet Rule 701's requirement that testimony be helpful; instead, the case agent usurped the jury's role as fact-finder.

***United States v. Fulton*, 837 F.3d 281 (3d Cir. 2016)**

- District Court (DNJ) improperly admitted officer's testimony in a bank robbery trial but not reversible on plain error review.
- The factual question was whether a third party could have committed the robbery.
- Analyzing the third-party's phone records, an officer excluded the third party as a suspect because he would have had to have been on the phone during the robbery.
- Comparing the photographs of the defendant and the third party to the surveillance footage, two officers concluded the defendant looked more like the robber.
- Failed under 701(b) as not helpful.

All other Courts of Appeals agree. *See, e.g.*,

United States v. Flores–de–Jesus, 569 F.3d 8 (1st Cir. 2009)

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008)

United States v. Nixon, 694 F.3d 623 (6th Cir. 2012)

United States v. York, 572 F.3d 415 (7th Cir. 2009)

United States v. Freeman, 498 F.3d 893 (9th Cir. 2007)

United States v. Brooks, 736 F.3d 921 (10th Cir. 2013)

How to prevent impermissible case agent testimony

- Motion in limine to exclude overview or summary testimony
- Motion in limine to require the government to file a motion detailing the law enforcement witnesses' intended testimony so the court can guard against overreach
- Objections at trial (602, 701, 702, 704)
- First time on appeal – Noooooooo!

Ethical considerations

Let's start by looking at

1. New Jersey's Rules of Professional Conduct (RPC), and
2. The ABA Standards for Prosecutors and Defense Attorneys

RPC 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) **make a false statement of material fact or law to a tribunal**;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
* * *

RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence . . . or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or [unlawfully] offer an inducement to a witness . . . ;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal . . . ;
(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;
(e**) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused**; or
* * *

ABA Criminal Justice Standards, Fourth Edition

Standard 3-1.3 The Client of the Prosecutor

The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. . . .

Standard 3-1.4 **Prosecutor's Heightened Duty of Candor**	**Standard 4-1.4** **Defense Counsel's Tempered Duty of Candor**
(a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office. (b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder. * * *	(a) In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution. (b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false. * * *

Ethical considerations for defense attorneys

Hypothetical 1

You wait until the case agent begins to testify to object, just to jam up the new Assistant United States Attorney's flow.

Any ethical problems?

Ethical considerations for defense attorneys

Hypothetical 2

You object to the AUSA using her case agent in semi-expert capacity without qualifying him, but then ask similar questions of that case agent on cross-examination

Any ethical problems?

Ethical considerations for prosecutors/prosecutorial misconduct

- Prosecutors are not permitted to make argument in their opening statement, but they can put on a case agent as their first witness to do just that. *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003) ("We unequivocally condemn th[e] practice [of presenting overview testimony] as a tool employed by the government to paint a picture of guilt before the evidence has been introduced.").

- Prosecutors can use case agent testimony to work around hearsay rules. *E.g.*, United States v. Smith, 640 F.3d 358, 367 (D.C. Cir. 2011) (citing cases criticizing this prosecutorial tactic); *see* RPC 3.4(e) (prohibiting lawyer from alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence)

Ethical considerations for prosecutors/prosecutorial misconduct

- Case agents can improperly vouch for witnesses. *See* RPC 3.4(e) (prohibiting lawyer from asserting personal knowledge of facts in issue except when testifying as a witness or stating a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of an accused).
- Case agents can make up facts that they believe to be true. RPC 3.3 (a)(1) (prohibiting lawyer from knowingly making a false statement of material fact or law to a tribunal); *see, e.g.*, *United States v. Hopes*, Appeal No. 16-1644 (agent contradicted the government's witness on what she had sold the defendants (baggies or drugs, making a stronger case for the government to prove quantity) (pending decision).