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Avoiding a Career-Ending Mistake

The Line Between Witness Preparation and Coaching

In March 2006, Carla Martin was instantly transformed from an unknown government aviation attorney into a publicly reviled villain whose shocking misconduct threatened to derail the high-profile death penalty sentencing trial of confessed al-Qaeda conspirator Zacarias Moussaoui—the only person to appear before a jury in connection with the Sept. 11, 2001, terrorist attacks. What did Ms. Martin do that led a federal judge to conclude she had committed "egregious" errors that "irremediably contaminated" the Moussaoui trial and warranted serious sanctions?[1] To put it simply—Martin crossed the line separating acceptable witness preparation from improper witness coaching in violation of ethical rules and an explicit court order. While many commentators have criticized Martin's actions as unacceptable and unfathomable, others have recognized that instead of being vilified, Martin could have "achieved much of what she had set out to accomplish through more subtle, quite common and perfectly lawful techniques."[2] This article examines Martin's misconduct in the Moussaoui trial and discusses the ethical rules relevant to witness preparation.

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Carla Martin's Improper Coaching of Trial Witnesses

In August 2001, just weeks before the September 11 terrorist attacks, Zacarias Moussaoui was arrested by the FBI due to his suspicious activities as a student at a Minnesota flight school. He was in custody when the Sept. 11, 2001, attacks occurred, but was later charged as a conspirator in the attacks and pleaded guilty in April 2005 to conspiring with the 9/11 hijackers. In February 2006, Judge Leonie Brinkema presided over the sentencing trial in the Eastern District of Virginia to determine whether Moussaoui should receive the death penalty or spend life in prison for his role in the 9/11 terror attacks. The government's position in support of the death penalty focused on its contention that the 9/11 attacks could have been prevented had Moussaoui disclosed to the FBI in August 2001 the real reasons why he was enrolled in flight school and what he knew about al-Qaeda's plans to use airplanes in terrorist attacks. Critical to the issue of aviation security would be the testimony of witnesses from the Federal Aviation Administration (FAA) (now part of the Transportation Security Administration (TSA)).

Carla Martin was a senior TSA attorney whose limited role in the Moussaoui trial was to act as a liaison between the government and aviation witnesses. Martin's limited responsibility included arranging witness interviews and dealing with aviation witnesses and exhibits. She did not actively appear in the case or participate in the government's legal strategy.

On Feb. 22, 2006, approximately two weeks before the start of the sentencing trial, the court entered a sequestration order directing, in pertinent part, that "Fed. R. Evid. 615 (Exclusion of Witnesses) be and is in effect for non-victim witnesses who may be called to testify in this proceeding. Such witnesses may not attend or otherwise follow trial proceedings (e.g., may not read transcripts) before being called to testify."[3] In sum, the sequestration order explicitly prevented all but two government witnesses from, among other things, being present in the courtroom or reviewing trial testimony prior to their appearances as trial witnesses.

The sentencing trial began on Mar. 6, 2006. On the morning of March 13, prior to the start of that day's trial proceedings, the government informed the court and defense counsel by letter that there was a "possible violation of the sequestration order as it relates to FAA witnesses."[4] Specifically, late in the afternoon on Friday, March 10, the government had learned that Martin had provided a copy of the transcript from the first day of the trial to a potential aviation witness. The government then investigated Martin's contact with other potential aviation witnesses and learned that Martin had sent e-mails with trial transcripts to seven potential trial wit-

nesses. The e-mails, among other things, contained portions of the opening statements from both sides regarding FAA evidence, as well as Martin's opinions on various issues related to the case. For example, in a March 8 e-mail to a potential witness, Martin commented that the aviation lawyers were "stunned by the opening," that it had "created a credibility gap that the defense can drive a truck through," and that as a result, the government "MUST elicit" certain facts from the aviation witnesses.[5] The government characterized Ms. Martin's interactions with the aviation witnesses as "reprehensible" and stated that it "frankly could not fathom why she engaged in such conduct."[6]

On March 13, in response to the government's disclosures that morning, the court commented that it had "never seen such an egregious violation of a court's rule on witnesses as [had just] occurred" and that Ms. Martin's conduct had led to the "very real potential" that witnesses would be "rehearsed, coached, or otherwise, that the truth-seeking concept of a proceeding [had been] significantly eroded."[7] The court requested briefing from the parties to address Martin's misconduct. The defense filed a motion to strike the death notice in the case or, alternatively, to exclude the government's FAA witnesses from testifying, on the grounds that Martin's misconduct constituted a deliberate attempt to influence the testimony of the aviation witnesses.

On March 14, the court held an evidentiary hearing regarding Martin's violation of the court's sequestration order and to determine the extent to which the aviation witnesses were tainted by Martin's misconduct. Martin did not testify at the hearing. The court first noted that it "didn't think in the annals of criminal law that there has ever been a case with this many significant problems" and that the evidence was uncontroverted that six witnesses, two for the government and four potential defense witnesses, were tainted by Ms. Martin's communications in violation of the court's written order regarding the rule on witnesses.[8] The court characterized Martin's conduct as a "violation of the ethical canons for lawyers[.]" The court concluded that the errors in the case were so serious that a portion of the government's case had been "significantly eroded" and that the court "wouldn't trust anything that Ms. Martin had anything to do with at th[at] point" in the case.[9]

As a sanction for Martin's misconduct, the court entered an order precluding the government from introducing aviation-related evidence, including witness testimony and exhibits. The court's order effectively prevented the government from proving a critical aspect of its case regarding how the FAA could have improved airport security had Moussaoui notified the government of al-Qaeda's plans prior to 9/11. Upon the government's motion for reconsideration, the court decided to permit the government to introduce aviation-related evidence from witnesses who it could prove were untainted by contact with Martin. On May 3, 2006, the jury declined to give Moussaoui the death penalty and he was sentenced to life in prison.

As a result of her improper contact with the aviation witnesses, Martin was placed on leave from her job with the TSA and is currently the subject of various investigations. Specifically, federal prosecutors are considering filing criminal charges against her, and the Disciplinary Board of the Supreme Court of Pennsylvania (the state in which she is licensed) is investigating her conduct. In addition to possible criminal charges and disbarment, seven family members of September 11 victims, who have sued various airlines for failing to prevent the 9/11 attacks, have also filed suit against Martin in federal court, alleging that she "illegally coached witnesses and otherwise attempted to shade and alter evidence before the Moussaoui court" in order to help her "friends" in the airline industry evade potential civil liability.[10] The allegations stem from the fact that at the time of the Moussaoui trial, Martin had been playing a similar role as a government liaison with aviation witnesses in the 9/11 family members' civil suit against the airlines.

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Witness Preparation v. Improper Coaching

In connection with any trial, counsel will likely spend hours working with witnesses and preparing them to testify. As such, it is important to recognize the ethical considerations applicable to witness preparation in order to avoid unintentionally engaging in improper witness coaching. One commentator has described the distinction as follows: "Preparation is the challenging—and often overlooked—process of helping a

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witness to translate his or her knowledge to the unnatural, often counter-intuitive, language of question and answer. Coaching is telling a witness what to say." [11]

Martin's conduct in the Moussaoui trial represents an egregious example of witness coaching, thanks to the detailed e-mail exchanges memorializing her contact with the aviation witnesses. In most cases, however, improper coaching is not revealed until cross-examination of a witness at trial—if at all. Indeed, as one commentator notes, "[d]espite the notoriety of the occasional high-profile case like the Moussaoui trial, witness preparation takes place under the veil of the attorney-client privilege, making it difficult to detect abuses, and making it difficult for lawyers to see what their peers are doing and consider to be acceptable." [12] Another has similarly commented that the line between permissible conduct and impermissible coaching can be "like the difference between dusk and twilight." [13] As one court has noted, because witness coaching can be hard to detect and is rarely as evident as in the Moussaoui trial, courts "'must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court'; otherwise, the adversary process, the judicial system and the legal profession itself are in grave jeopardy." [14]

An important starting point for acceptable preparation of potential trial witnesses is a review of any court orders entered in a specific case. Courts often issue sequestration orders that require the exclusion of witnesses from the courtroom and limit the access of witnesses to information regarding the trial. "The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion." [15] In federal court, such orders are issued pursuant to Federal Rule of Evidence 615, which provides that a trial court may sequester witnesses on a court's own motion but must do so if a party requests. In Minnesota state court actions, such orders are issued pursuant to Minnesota Rule of Evidence 615 or Minnesota Rule of Criminal Procedure 26.03, subd. 7. The federal and state rule counterparts differ in that under the state rules, the decision whether to enter a sequestration order lies in the court's discretion rather than being automatic upon a party's request.

The contents of sequestration orders can vary from court to court and examination of each order is critical for determining what constitutes proper witness contact in each particular case. Indeed, proper contact with a witness in one case could be improper conduct in another. In the Moussaoui sentencing trial, a comprehensive sequestration order was issued by the court, and Martin's conduct unquestionably violated that order. As an attorney assisting the government in its prosecution of Moussaoui, Martin had no excuse for her ignorance of the order. Had Martin simply investigated whether such an order was in place prior to

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contacting potential trial witnesses, she could have avoided the public infamy and ridicule, and also the potential criminal and civil liability, she is faced with as a result of her improper actions.

In addition to court orders that outline proper conduct with regard to potential trial witnesses, there are ethical considerations relevant to proper witness preparation. Specifically, Minnesota Rule of Professional Conduct 3.4(a) and (b) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence" or "falsify evidence, counsel or assist a witness to testify falsely[.]" Rule 3.4(f) also provides that an attorney may not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." The Comment to Rule 3.4 notes that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." While Rule 3.4 sets forth the general ethical guidelines for an attorney's interactions with witnesses, it does not elaborate as to specifically what an attorney may and may not do in preparing a witness.[16]

Additional considerations regarding witness preparation are set forth in the Restatement (Third) of Law Governing Lawyers. Similar to Rule 3.4, Section 116 of the Restatement (Third) of Law Governing Lawyers provides that:

1) A lawyer may interview a witness for the purpose of preparing the witness to testify.

2) A lawyer may not unlawfully obstruct another party's access to a witness.

3) A lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify.

4) A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:

   a) the person is the lawyer's client in the matter; or

   b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.[17]

Section 116 explains that in preparing a witness to testify, "a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client." Preparation of the witness may include "discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet." The Restatement acknowledges that there is "relatively sparse authority" on witness preparation.[18]

Not surprisingly, there are few published Minnesota cases addressing improper witness coaching. In 2001, the Minnesota Supreme Court suspended an attorney from the practice of law for one year for sending a letter to a potential witness that attempted to obstruct another party's access to evidence and for sending a letter to that witness's employer, a portion of which had no substantial purpose other than to embarrass the witness, in violation of Rules 3.4(a) and 4.4.[19] The Eighth Circuit Court of Appeals has similarly affirmed a district court's disbarment of an attorney for misconduct including counseling his client to deny damaging testimony in violation of Missouri Rule of Professional Conduct 3.4(b).[20]

Although censure for witness coaching is not common due to the difficulty in identifying and establishing improper conduct, the consequences for improper coaching can be devastating to a party's case. As one court noted, as a result of coaching, "[e]vidence can be excluded or stricken; lawyers can be excluded from the courtroom; adverse inferences can be drawn; juries can be instructed that the sequestration order has been violated; a party or witness can be held in contempt; monetary sanctions can be imposed on parties or lawyers; disciplinary proceedings can be instituted." [21] Further, as Martin learned in the Moussaoui trial, engaging in improper coaching can have severe professional and personal ramifications, including possible criminal and civil liability.

In the end, the story of Carla Martin is a tragic example of what can happen when an attorney is ignorant of the ethical considerations governing his or her conduct. To avoid committing the same mistakes Ms. Martin made, attorneys should be aware of the ethical standards set forth in Minnesota Rule of Professional Conduct 3.4, and remain mindful during their interactions with trial witnesses. In addition, particularly when an attorney has a minor role in a trial, such as Martin had, it is critical to determine whether a sequestration order has been issued in a particular case prior to engaging in any interaction with witnesses. Had Carla Martin done so, she might have avoided the career-ending mistakes she made in the Moussaoui trial. Indeed, while the ethical line between preparation and coaching is blurry, it is unfortunately easy to cross if an attorney is unaware of his or her ethical responsibilities.

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[1] Transcript of Evidentiary Hearing Before the Honorable Leonie M. Brinkema, U.S. District Court Judge, United States v. Zacarias Moussaoui, No. 01-455 (E.D. Va. Mar. 14, 2006), at *217-18.

[2] Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. Times, Mar. 16, 2006. *www.nytimes.com*.

[3] Order, United States v. Zacarias Moussaoui, No. 01-455 (E.D. Va. Feb. 22, 2006), at *1.

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contingent on the efforts of those who support the process.

The collaborative law practice groups are working hard to educate their communities about collaborative law. These methods to raise awareness about collaborative law have proven to be effective. Collaborative law has now gained even more support from other professionals, such as religious leaders, mental health professionals, business and tax advisors, and even public service radio and other media, who have also begun to promote the movement.[46]

The actual practice of collaborative law will also determine the success of the movement. The satisfaction of the collaborative law clients will ensure collaborative law is recognized as a credible process. And in turn, the satisfaction of the clients rewards the collaborative law practitioners and motivates them to continue advocating for the process. With support, promotion, and effective practice by its advocates, collaborative law will no longer just have potential. It will become a main method to remove clients from the war zone of litigation and involve them in a peaceful process to resolve conflict.

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[1] Pauline H. Tesler, *Collaborative Family Law*, 5 PEPP. DISP. RESOL. L.J. 322 (2004).

[2] Zachary Z. Annable, Note, *Beyond the Thunderdome–The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Modern Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 159 (2005).

[3] John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss*, 42 FAM. CT. REV.. 280, 281 (2004).

[4] William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 355 (2004).

[5] Joshua Isaacs, Note, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 834 (2005).

[6] Lande & Herman, *supra* note 3, at 281.

[7] Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 45-46 (2004).

[8] Lande & Herman, *supra note* 3, at 283.

[9] Isaacs, *supra note* 5, at 838.

[10] Schwab, *supra note* 4, at 358.

[11] Isaacs, *supra note* 5, at 834.

[12] Tesler, *supra note* 1, at 319.

[13] 1 DAVID HOFFMAN & PAULINE TESLER, ALT. DISP. RESOL. PRAC. GUIDE § 41:6 (2005). Types of neutral experts that could be used include a financial consultant (budgeting decisions, projection of long-term financial situations), a CPA (tax implications, business interest valuation), an insurance consultant (post-divorce insurance planning), property appraisers, a career/vocational consultant, a child development specialist, and communication skills coaches.

[14] Schwab, *supra* note 4, at 360.

[15] James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 436 (2002).

[16] Cox & Matlock, *supra* note 7, at 56. In Minnesota, "If the parties to a collaborative law process reach impasse, they may use an evaluative or facilitative process to assist in breaking the deadlock, but they shall not utilize an adjudicative process." 14 Minn. Prac., Family Law § 25.6 (2d ed. 2005).

[17] Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALT. TO HIGH COST LITIG. 1, 12 (2003).

[18] Lawrence, *supra* note 5, at 436.

[19] Lande & Herman, *supra* note 3, at 283.

[20] Cox & Matlock, *supra* note 7, at 66.

[21] Gregory Firestone & Janet Weinstein, *In the Best Interests of Children*, 42 FAM. CT. REV. 203, 204 (2004).

[22] 1 JAY E. GRENIG, ALT. DISP. RESOL. § 21:53 (3d ed. 2005).

[23] Lawrence, *supra* note 5 at 436.

[24] Cox & Matlock, *supra* note 7, at 59.

[25] Isaacs, *supra* note 5, at 836. *See also* Cox & Matlock, note 7, at 52 (explaining that fees for collaborative law vary from $5,000 to $30,000, depending on how many issues are involved).

[26] Annable, *supra* note 2, at 160.

[27] Cox & Matlock, *supra* note 7, at 67.

[28] Specifically, Comment 1 of Model Rule 1.3 states, "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2005); *see also* Annable, *supra* note 2, at 164.

[29] 1 HOFFMAN & TESLER, *supra* note 13, at § 41:11.

[30] Model Rules of Prof'l Conduct R. 1.2 (2005).

[31] Schwab, *supra* note 4, at 364. Further guidance is found in Comment 6 to Model Rule 1.2, which states, "A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives." Model Rules of Prof'l Conduct R. 1.2 cmt. 6 (2005).

[32] Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 213 (2004).

[33] John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1325 (2003).

[34] 1 GRENIG, *supra* note 22, at § 21:50.

[35] Tesler, *supra* note 1, at 334 (stating actual wording of the official statute).

[36] Lande, *supra* note 33, at 1327-8.

[37] Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, 92 A.B.A. J. 52, 53 (June 2006).

[38] Cox & Matlock, *supra* note 7, at 63.

[39] 1 HOFFMAN & TESLER, *supra* note 13, at § 41:8.

[40] Chanen, *supra* note 37, at 55.

[41] *Id.* at 56.

[42] Lawrence R. Maxwell, Jr., L.L.B, *The Collaborative Dispute Resolution Process Is Catching On in the Civil Arena*, presented to IACP Core Collaborative Practice Skills Institute in Dallas (June 2005).

[43] David A. Hoffman, *Collaborative Law in the World of Business*, THE COLLABORATIVE REVIEW, 6:3 (Winter 2003).

[44] Lande, *supra* note 33, at 1379.

[45] Tesler, *supra* note 1, at 317.

[46] Cox & Matlock, *supra* note 7, at 58.

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[4] Letter from U.S. Attorney to the Hon. Leonie M. Brinkema, U.S. District Court Judge, United States v. Zacarias Moussaoui, No. 01-455 (E.D. Va. Mar. 13, 2006), at *1.

[5] E-mail from Carla Martin dated Mar. 8, 2006, attached to the Letter, *supra* note 4.

[6] Letter, *supra* note 4, at *2.

[7] Trial Transcript, United States v. Zacarias Moussaoui, No. 01-455 (E.D. Va. Mar. 13, 2006), at *1002 and *1015.

[8] Transcript of Evidentiary Hearing, *supra* note 1, at *214.

[9] *Id.* at *216-17.

[10] Jerry Markon, *Investigations, Lawsuits Still Dogging 9/11 Lawyer*, WASHINGTON POST, July 10, 2006, at B01.

[11] Dan Small, *Witness Coaching Fiasco*, THE NAT'L L.J., Apr. 3, 2006.

[12] Michael Yablonski, "The Murky Line Between Proper Witness Preparation and Witness Tampering," American Bar Association Litigation Update, at *www.abanet.org/litigation/litigationupdate/2006/may_hottopics.html*.

[13] Liptak, *supra* note 2.

[14] *Minebea Co., Ltd. v. Papsti*, 374 F. Supp. 2d 231, 237 (D. D.C. 2005) (quoting United States v. Rhynes, 218 F.3d 310, 320 (4th Cir. 2000)).

[15] *Id.* (citing cases).

[16] *Yablonski*, *supra* note 12.

[17] RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 116 (2000).

[18] *Id.* Reporter's note to cmt. b (citing cases).

[19] *In re* Disciplinary Action Against Dvorak, 620 N.W.2d 908, 907-08 (Minn. 2001).

[20] *In re* Attorney Discipline Matter, 98 F.3d 1082, 1088 (8th Cir. 1996).

[21] Minebea, 374 F. Supp. 2d at 237.