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Menendez Corruption Ruling Highlights Attorney Proffer Risks

By **Carrie Cohen and Savanna Leak** (August 1, 2024, 4:19 PM EDT)


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In June, in the criminal trial of U.S. Sen. Bob Menendez on federal corruption charges in the U.S. District Court for the Southern District of New York, U.S. District Judge Sidney Stein permitted the prosecution to introduce into evidence four slides from a slide deck that Menendez's former lawyer, Abbe Lowell, presented to federal prosecutors in September 2023.[1]

Lowell presented these slides to the U.S. Attorney's Office as part of an attorney proffer in an effort to convince the office not to seek an indictment against Menendez.

Attorney proffers to the government are a common practice in criminal and regulatory matters. Proffers can be offered for a number of reasons including as part of an attempt to cooperate with prosecutors in preindictment investigations, in order to share with prosecutors another way to view the facts, and to try to demonstrate to prosecutors why charges should not be brought against a client.

As part of these proffers, defense attorneys may employ a variety of visual aids, such as charts, graphs and slide decks, but the recent admission of slides used in an attorney proffer at Menendez's trial necessitates a renewed and careful consideration of the potential pitfalls of using visual aids in attorney proffers.

Admission of Attorney Proffer Slides at the Menendez Trial

In September 2023, Lowell presented a slide deck, titled "Senator Robert Menendez, Presentation to U.S. Attorney's Office, Southern District of New York, September 11, 2023," to federal prosecutors prior to that office seeking an indictment against Menendez.[2]

The slides contained descriptions of certain payments made to Menendez's wife, Nadine Menendez, and details regarding Menendez's knowledge of certain of those payments.[3] The slides also included a footer that stated: "Confidential — Presentation Made Under Federal Rule of Evidence 408."[4]

The proffer did not succeed in convincing the U.S. Attorney's Office not to seek charges against Menendez, and the grand jury issued an indictment 10 days later.[5]

Menendez proceeded to trial less than a year later. At an evidentiary argument on June 12, the government indicated it would seek to introduce certain slides from Lowell's proffer, although it would

seek to do so through a government paralegal rather than Lowell, through whom the government had previously indicated it would seek to admit the slides.[6]

In seeking to admit the slides, the government agreed to a limiting instruction that the slides would not be offered for the truth of any matter asserted.[7] According to the government, the slides being offered contained false information that was relevant to and supported the obstruction of justice charge against Menendez.[8]

Notably, in the indictment, the government alleged that Menendez fed Lowell false information to present to prosecutors in an effort to cover up the alleged conspiracy that resulted in the bribery, fraud and corruption related charges.[9]

Shortly after oral argument, the defense submitted a letter to the court objecting, pursuant to Rule 403 of the Federal Rules of Evidence, to the introduction of the slides "through a paralegal who lacks any substantive knowledge" of those slides.[10]

The defense argued that presenting the slides through the government paralegal, rather than through Lowell, would likely lead the jury to unfairly conclude, based on the title and structure of the presentation, that "Menendez authorized his counsel to deliver the statements therein, in precisely the form in which they are written."[11]

As the defense noted in its letter, Menendez's authorization of the attorney's statements to prosecutors is "an essential element of the government's obstruction case."[12]

For this reason, the defense argued it was essential to admit the slides through Lowell — and for Lowell to be subject to cross-examination — because only he could explain whether Menendez authorized the statements in the slides to be made "only in limited or caveated form," and whether Lowell made typical disclaimers and qualifications to the government regarding his understanding of the facts and the state of his investigation at the time of the proffer.[13]

According to the defense, evidence of such disclaimers could "negate the mens rea required to sustain an obstruction of justice conviction."[14]

In its response letter, the government countered that Menendez's argument about the prejudicial nature of introducing the slides goes to the weight, rather than admissibility, of the evidence.[15] The government argued that the inference that Menendez authorized Lowell to deliver the statements in the form in which they are written in the presentation is a "logical" and "proper inference," given that "the relationship between a lawyer and client is one of agent and principal."[16]

And what would be unfair is not allowing the slides to be introduced through a government paralegal but, instead, forcing the government to call Lowell in its case-in-chief, thereby making the trial longer and more complicated "simply to authentic[ate] and have admitted what is plainly authentic and admissible."[17]

On June 17, the court ruled in favor of the government.[18] Finding that the slide deck contained information that "in all probability had to have been confirmed by Menendez" — e.g., when Menendez became aware of certain payments — the court held that it was "perfectly proper" for the jury to infer Menendez's role in Lowell's statements to the government given the agent-principal relationship between a client and his attorney.[19]

The court thus concluded that the probative value of the slides, presented through a government paralegal, was not substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.[20]

Neither the parties' letters nor the court's decision discussed Rule 408 of the Federal Rules of Evidence, which was referenced in the footer of the slides and provides that settlement offers and negotiations are not admissible at trial.

But Rule 408 allows the admission of that type of evidence for the purpose of "proving an effort to obstruct a criminal investigation or prosecution," so the footer in these particular circumstances provided little protection.[21]

Other Cases Involving Admissibility of Defense Statements to the Government

The court in Menendez is not the first to allow proffer-related materials to be admitted at trial.

Nearly two decades ago, in United States v. Ahmed, the U.S. District Court for the District of Massachusetts considered the admissibility of a factual stipulation entered into by the defense and the prosecution that contained statements from defense counsel's preindictment attorney proffer and a chart defense counsel presented during that proffer.[22]

The Ahmed case involved an alleged scheme by Abdul Razzaque Ahmed to defraud Medicare by falsely representing that certain patients who suffered from one skin disease also suffered from a different, rarer disease.[23] The chart presented by defense counsel purported to show blood test results for patients Ahmed had claimed suffered from both conditions.[24]

After the proffer, the government obtained an indictment against Ahmed charging him with various types of fraud, as well as obstruction of justice for causing "false documents to be prepared and produced, through [Dr. Ahmed's] retained defense counsel."[25] The parties entered into the factual stipulation after the government moved to disqualify Ahmed's defense counsel and the court denied that motion.[26]

Before trial, the admissibility of the stipulation was raised in the parties' motions in limine.[27] As to the chart, the defense argued that the court should treat the proffer meeting as a pre-plea discussion under Rule 410 of the Federal Rules of Evidence and, like in United States v. Valencia in the U.S. Court of Appeals for the Second Circuit in 1987, rely on the court's discretion to preclude the admission of evidence and testimony relating to the meeting.[28] The court rejected the argument and held that the chart was admissible.[29]

The court in Ahmed distinguished Valencia, which held that certain defense statements during "informal conversations" with a prosecutor regarding bail were not admissible against the defendant as admissions by an agent.[30]

According to the court, unlike in Valencia, the "chart and conversations at issue were not part of informal discussions," and rather, were part of a "specific meeting set up where the defendant, through his counsel, elected to make a formal presentation of facts which had been gathered specifically by the defense for the purpose of presenting evidence to the government."[31]

The court also held that Rule 410 of the Federal Rules of Evidence — which dictates that "pleas, plea discussions, and related statements" are inadmissible at a criminal trial — did not apply because the meetings were only preliminary discussions that took place while the government was trying to build a case against the defendant and thus were not plea negotiations.[32]

Notably, the factual stipulation at issue in Ahmed explicitly stated that Ahmed had provided the chart to his attorney and "authorized his attorney to present that chart to and discuss that chart with the prosecutors and agents."[33]

The court rejected the defense's argument that such statements were privileged, noting for example that the fact that statements were made by Ahmed's lawyer and that they were made "on behalf of" Ahmed, "i.e., within the scope of [defense counsel's] authority," was not privileged.[34]

Implications

The decisions in Menendez and Ahmed demonstrate that defense attorneys should carefully assess whether using visual aids in an attorney proffer is worth the risk that those materials become admissible at trial should the government decide to pursue charges against their client.

Courts may be inclined to admit proffer-related materials that directly bear on charges against a defendant, and such materials may even be introduced without the need to call the attorney who prepared them as a witness. Defense attorneys should be particularly careful in cases in which there might be grounds for obstruction of justice charges.

While it is not clear whether Lowell made any disclaimers or qualifications prior to his attorney proffer — though the defense speculated he made them — it remains a best practice to do so. As the defense in Menendez noted in its letter to the court, defense attorneys often make disclaimers or qualifications regarding the information being presented at the outset of attorney proffers.[35]

These disclaimers can include a note that the proffer is "based only on the facts as counsel presently understands them, that counsel's investigation is ongoing, [or] that counsel has not yet reviewed all discovery in the matter," according to the ruling.[36]

In light of the Menendez decision, it now is increasingly important to make such disclaimers.

Even though the court in Menendez determined that the slides at issue did not need to be introduced through Lowell, if the government in future cases seeks to admit proffer materials through the attorney who prepared them, evidence of such disclaimers during attorney proffers, especially where the facts are still being developed, is likely to be helpful when arguing against admission of such materials.

Ideally, where a visual aid would greatly assist an attorney proffer, defense lawyers should ask the government to stipulate that it will not seek to admit the visual aid at trial. In addition, defense lawyers should avoid including detailed information in visual aids and instead rely on basic descriptions with further information in undisclosed talking points.

Finally, defense lawyers should not provide hard copies of the visual aid to the prosecution team and resist requests by the government for copies of such aid.

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[1] United States v. Menendez, No. 23-Cr-490 (SHS), 2024 U.S. Dist. LEXIS 107539 (S.D.N.Y. June 17, 2024).

[2] Gov't Opp. Ex. 1, June 14, 2024, ECF No. 468-1.

[3] Id. at 4–5.

[4] Id. at 1–5.

[5] Indictment, Sept. 21, 2023, ECF No. 1.

[6] Def.'s Mot. 1–2, June 13, 2024, ECF No. 462.

[7] Gov't Opp. 1, June 14, 2024, ECF No. 468.

[8] Def.'s Mot. 1–2, ECF No. 462.

[9] S4 Indictment ¶¶ 116(g), 118, Mar. 5, 2024, ECF No. 238.

[10] Def.'s Mot. 1, ECF No. 462.

[11] Id. at 1–2.

[12] Id. at 2.

[13] Id.

[14] Id.

[15] Gov't Opp. 2, ECF No. 468.

[16] Id.

[17] Id. at 3.

[18] Menendez, 2024 U.S. Dist. LEXIS 107539.

[19] Id. at *1.

[20] Id. at *1–2.

[21] Fed. R. Evid. 408.

[22] United States v. Ahmed , No. CRIM. 05-10057-RCL, 2006 WL 3210037, at *2 (D. Mass. Aug. 3, 2006).

[23] Id. at *1.

[24] Id.

[25] Id. at *2.

[26] Id. at *1.

[27] Id. at *2.

[28] Id. at *2–3.

[29] Id. at *9.

[30] Id. at *3–5.

[31] Id. at *4.

[32] Id. at *4–5; Fed. R. Evid. 410.

[33] Id. at *8.

[34] Id. at *9.

[35] Def.'s Mot. 2, ECF No. 462.

[36] Id.