

Thursday, January 10, 2008

**What justifies a prosecutor telling a witness to withhold documents from a defense lawyer?**

Photo from website of U.S. District Court (W.D. Mi.). One day while waiting for court to start, I approached the chemist in my client's drug possession case. He said he would talk to me only if the prosecutor was present. Once I got the three of us together, he opened his file, and started to give me its contents to review. However, the prosecutor advised: "You do not need to give that [particular document] to him." I suggested that the prosecutor rethink what he just said, but he stood firm. I told him I felt his comment ran afoul of the applicable lawyers' professional conduct rule. The prosecutor expressed his irritation at my making such a suggestion. The chemist finally showed me the withheld document, which was of no help to me other than to know that he had no other documents in his file. At trial, whether or not the prosecutor was distracted by my earlier challenge about the rules of professional conduct, I proceeded to win the trial at a stage where I little expected to do so. The judge overruled my objection to the stop of my client's car, despite my argument that no evidence had been presented about the cop's speedometer calibration nor about sufficient procedures for pacing my client's car to ascertain it was exceeding the speed limit. For whatever reason, revisiting his victory over my motion to suppress the stop, the prosecutor proceeded to ask the cop questions to show that he had made a good stop, and I thoroughly enjoyed the cop's confirming that it was a new car and had not yet been calibrated, and the judge's sustaining all my objections to all further calibration questions (since I suppose the judge did not feel that one can assume that a car's speedometer is properly calibrated when it leaves the factory assembly line, and he did not see subsequent calibration as admissible). Frustrated by all my sustained objections on this line of questioning, the prosecutor rested, I moved for judgment of acquittal, the judge granted it, and my client and I immediately proceeded to the court clerk's office to file an application to expunge the case from his record. Of course, a lawyer should tread carefully in suggesting to an opponent that his or her actions violate any professional conduct rules. The governing professional conduct rules address that. It should be proper to tell an opposing lawyer that his or her behavior is not in harmony with the professional conduct rules, when there is a good faith basis to do so and when the intention is to seek compliance with those rules for the benefit of a client. However, lawyers should proceed with caution and in compliance with the professional conduct rules before threatening to report a professional conduct violation to the ethics authorities. (I strongly believe in confronting an opponent directly, have never filed a grievance about any lawyer, and hope not to do so in the future.) In the foregoing scenario with the prosecutor and chemist, my comments to the prosecutor had nothing to do with wanting to throw him off balance for trial, as opposed to getting the document I wanted. In Maryland, at least, I think a reasonable reading of the professional conduct rules (I found no other relevant provision in the law) prohibits prosecutors from doing anything to prevent cops from giving information to criminal defense lawyers, based on Md. R. Prof. Conduct 3.4(f), which provides that "A lawyer shall not ... (f) 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." I say this even though Maryland criminal discovery rules apply both to material in the hands of prosecutors and police. Virginia's parallel rule seems to prohibit a lawyer from asking any non-client to withhold information in a criminal case: "A lawyer shall not ... [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Va. R. Prof. Conduct 3.4(h) (emphasis added). Note 4 to the foregoing provision states: "The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. See also Rule 4.2." To what extent does the foregoing Virginia professional conduct rule clash with the grossly limited discovery available in Virginia criminal District Court under Va. Sup. Ct. Rule 7C:5? In some counties, including Fairfax, judges' discovery orders (yes, not only is Virginia District Court criminal discovery practically non-existent, but a Defendant ordinarily must move in advance of the trial date for a discovery order even to obtain it, aside from Brady/exculpatory evidence, which must always be provided) allow prosecutors to provide the discovery orally thirty minutes before trial (if they mean 30 minutes before the court's scheduled trial time versus the time the case is called for trial, the thirty minute rule is not being honored very often in places like Fairfax). Often, huge court dockets combined with frequent police officer reluctance to talk to anybody but prosecutors, lead to the oral discovery coming only from an overworked prosecutor who has not enough time to assure that all required discovery, particularly Brady evidence, is provided to defense lawyers. (By the way, I view video recordings from police cruisers to be Brady/exculpatory evidence, at least in drunk driving cases, because inevitably some of the video will show some positive coordination to counterbalance claims of poor performance on field sobriety tests; yet, I have not yet had a Virginia prosecutor volunteer whether a video exists (I end up needing to inquire; I wonder whether some don't even ask the cops about videos), even though cops have videos in at least one county where I regularly appear.) In Virginia, prosecutors might have more leeway than do Maryland prosecutors with telling

police what they should or should not tell defense lawyers, because in Virginia, police often are considered agents of the Commonwealth for purposes of discovery: "[Where an agency is involved in the investigation or prosecution of a particular criminal case, agency employees become agents of the Commonwealth for purposes of Rule 3A:11 and must be considered a party to the action for purposes of Rule 3A:12." Ramirez v. Commonwealth, 20 Va. App. 292, 296-97, 456 S.E.2d 531 (1995). This same court case re-emphasizes the nauseating Virginia rule that: "'There is no general constitutional right to discovery in a criminal case.' Spencer v. Commonwealth, 238 Va. 295, 303, 384 S.E.2d 785, 791 (1989), cert. denied, 493 U.S. 1093 (1990) (citations omitted). [Va. S. Ct.] Rule 3A:11 provides for limited pretrial discovery by a defendant in a felony case. Hackman v. Commonwealth, 220 Va. 710, 713-14, 261 S.E.2d 555, 558 (1980)." Id. at 294-95. As a related aside, the foregoing rule leads Virginia judges again and again to refuse to issue document subpoenas (judges must issue them) for cops. For drunk driving cases, sometimes I have successfully argued that the foregoing exemption should not apply to alcohol breath testing technicians, in that their role is solely ministerial and not investigatory, and to have the rule apply to breath testing technicians could encourage cops to do all their scientific analyses in-house to prevent forensic-related subpoenas from being issued. Back to Maryland. Many of the busier Maryland District Courts make it wise sometimes for criminal defense lawyers to go to trial by fire, at least in terms of not phoning the prosecutor or opposing witnesses until the trial date lest the case alert the prosecutor to have all the necessary witnesses present. The upside of such an approach is to increase the chances that the case will be dismissed for the non-appearance of witnesses; the downside is that some cases are too sensitive or require too much advance preparation not to talk to the prosecutor or witnesses in advance. In any event, in a recent misdemeanor case where I took the approach of not contacting the prosecutor or cop before trial (but I did file a timely discovery request), on the trial date the prosecutor asked if I wanted to see the cop's discovery, and I answered yes. However, as the cop started flipping through his documents, the prosecutor said: "You don't need to give that to him; those are your personal notes." Rather than bothering saying anything about the professional conduct rules generally prohibiting lawyers from telling witnesses to withhold information from opponents, I said: "If you're not going to give me the officer's notes, it will just irritate the judge during trial to know that the delay in my reviewing the documents is because you waited until before I cross-examine the officer to provide me the information." (More on the applicable Jencks law (and its absence in Virginia) is here.) Admittedly, I had not done much to help save the prosecutor's face, by saying this right in front of the cop, and the prosecutor said he was done providing me for discovery (for the moment only, it turned out). In any event, for similar reasons to those in the beginning of this blog entry, I do not know how the prosecutor's telling the cop not to give me his notes comported with the governing professional conduct rules. All this is not automatically to say that I do not have disputes with certain aspects of the professional conduct rules, including some of the lawyer marketing rules that run afoul of the First Amendment. However, I think justice is disserved very much when prosecutors go telling anybody but employees of their prosecutor's office (and I am not including cops in that definition) not to talk with or to provide certain information to criminal defense lawyers. I welcome your thoughts on this topic, as I do with all my blog entries. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00