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Words of Warning for Prosecutors Using Criminals as Witnesses

by
THE HONORABLE STEPHEN S. TROTT*

A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its action the government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.¹

I. Introduction

A. A Different Kind of Witness

In the early stages of a prosecutor's career, most prosecution witnesses are normal citizens who, by virtue of some misfortune, have been either the victim of, or a witness to, a criminal act. Mr. Jones, for example, is called to the stand, and testifies that he was swindled out of his life's savings; Mr. Wilson tells the jury about his stolen car; Mrs. Johnson identifies the body of her son who was killed in a robbery; or Agent Bond recounts his discovery of cocaine in the defendant’s luggage at the airport.

With these kinds of witnesses, character, credibility, and integrity are usually not critical issues either during the investigation of the case or in court. The most that can generally be expected from the other end of the table is a defense based on the assertion that such a witness—although admittedly a good person—is simply mistaken as to what he or she believes was seen or heard.

Sooner or later, however, another type of not-so-reliable witness starts to make an occasional appearance on the subpoena list, and the

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[1381]
prosecutor begins to venture out onto a totally different sea where he or she is frequently ill-prepared to navigate—the watery and treacherous straits of the accomplice, the co-conspirator, the snitch, and the informer. After Mr. Jones testifies about the swindle, the swindler himself is called to the stand in an attempt to convict the mastermind who cooked up the scheme and who hid all the money in foreign bank accounts. After Mr. Wilson laments the disappearance of his Mercedes, the car thief is called in pursuit of the kingpin who runs hot German cars into Mexico. After the mother of the murdered clerk identifies her dead son, the defendant’s cell-mate is called to recount a jailhouse confession; and after Agent Bond identifies the cocaine, the mule in turn points the finger of guilt at the brains of the organization.

The usual defense to this kind of criminally involved witness is never just a polite assertion that he is mistaken. Not surprisingly, the rejoinder ordinarily mounted amidst loud, indignant, and sometimes even enraged accusations is that the witness is lying through his teeth for reasons that should be patently obvious to every decent person in the courtroom.

The prosecutor on such occasions will be surprised to discover that his or her own personal integrity is on the line. Such an unexpected turn of events is not a laughing matter. It is neither helpful to a prosecutor’s case nor very comforting personally to have the defense persuasively arguing to the court and jury, for example, that you, as a colossal idiot, have given immunity to the real killer in order to prosecute an innocent man. Alan Dershowitz in his book, The Best Defense, describes this tactic as follows:

In representing criminal defendants—especially guilty ones—it is often necessary to take the offense against the Government; to put the Government on trial for its misconduct. In law as in sports, the best defense is often a good offense.2

In this perilous world, “character,” “bias,” and “credibility” aren’t just interesting issues in a book about evidence—they become the pivotal win or lose elements in the prosecution’s case, from start to finish. How these witnesses are managed and how these issues are approached and handled when they arise may determine the success or failure of the case.

B. Two Cardinal Considerations

There are two principal reasons why this type of frontal offensive can be marshaled against these kinds of witnesses. The two reasons

and their legal and tactical ramifications seem obvious enough on pa-
per but are usually not fully appreciated by a prosecutor or an investi-
gator until he or she has been in the profession long enough to
observe firsthand a case or an investigation go monumentally sour be-
cause of a treacherous witness. Working with the Joneses, the Wil-
sons, the Johnsons, and the Bonds of the world gives an unseasoned
prosecutor a false sense of security with all witnesses.

The first of the two reasons relates to the general nature of a
witness predisposed to criminality. Read it and commit the message
to memory:

1. Criminals are likely to say and do almost anything to get what
they want, especially when what they want is to get out of trouble with
the law.

This willingness to do anything includes not only truthfully spill-
ing the beans on friends and relatives, but also lying, committing per-
jury, manufacturing evidence, soliciting others to corroborate their
lies with more lies, and double-crossing anyone with whom they come
into contact, including—and especially—the prosecutor. A drug ad-
dict can sell out his mother to get a deal, and burglars, robbers, mur-
derers and thieves are not far behind. Criminals are remarkably
manipulative and skillfully devious. Many are outright conscienceless
sociopaths to whom “truth” is a wholly meaningless concept. To
some, “conning” people is a way of life. Others are just basically un-
stable people. A “reliable informer” one day may turn into a consum-
mate prevaricator the next.

In case you have any doubts about the observation that criminals
are capable of unfathomable lies under oath, consider this essentially
accurate article from the front page of the Los Angeles Times:³

| Marion Albert Pruett’s is an appalling but compelling story. |
| Held in federal prison, he bartered his way to freedom by |
| agreeing to testify against a prisoner accused of killing Pruett’s |
| cellmate [who himself was scheduled to testify for the government]. |
| In exchange, the U.S. government took him into its secret witness |
| security program, giving him a new identify and a new start in life. |
| By last October and by his own account, however, Pruett had |
| committed a string of bank robberies and had murdered two con-
| venience store clerks near Denver, another in Fort Smith, Ark., and |
| a savings and loan employee in Jackson, Miss. Now back in jail, |
| Pruett recanted the testimony that had led to his freedom and de-
| clared that he, Marion Pruett, had actually killed his cellmate.⁴ |

⁴. Id.
Or, if Mad Dog Pruett doesn’t stand up the hair on the nape of your neck, how about the story of Willie Kemp, who, in return for money, trumped up criminal cases against 32 innocent people as recounted by the *National Law Journal*:

Scam Exposed

For 15 months, Willie Kemp and the others had infiltrated the Cleveland Post Office, ostensibly looking for evidence against drug users and dealers. Flush with government money, they lived to the hilt, renting fancy cars, living in pricey condos, wearing expensive clothes and hosting parties.

"The inspectors had arranged for them to be hired as postal workers, so they were getting regular paychecks," Mr. Maloney [the ex-prosecutor] says. “But they also were being paid about $100 extra per transaction. On top of that, they were pocketing the drug buy money the inspectors were giving them.”

Prosecutors and defense attorneys believe the inspectors obtained the names of postal employees who had signed up voluntarily for substance abuse counseling. At the beginning of the investigation, it appears, agents gave informants a list of workers who could be targets. Several of them were in drug counseling, a fact that was supposed to be confidential . . . .

The postal inspectors wired their informants and sent them out with thousands of dollars in buy money. The inspectors never saw the targets and only heard barely audible tapes of the informants striking up conversations and describing the deals.

Then the informants returned to the inspectors with drugs they’d allegedly just purchased.

"If they had searched the informants, the inspectors would have known that the informants were bringing drugs to the deal and had the buy money hidden in their socks following the deal," says Mr. Maloney.

The other voices on the tapes, he says, were "friends paid by Willie Kemp and the other informants to play the role of the postal workers." The drugs, too were phony. Bags of white powder they said was cocaine purchased from postal employees was [sic] really baking soda.

When Mr. Moore was arrested, a public defender recommended that he plead guilty. Insisting that he was innocent, he demanded a trial. "I was certain that once the agents and informants saw me in court, they would recognize I was the wrong person and I would be immediately let go," he told the NLJ.

Instead, in a bench trial, Common Pleas Judge Richard J. McMonagle believed the informants and found Mr. Moore guilty in December 1992 on all four counts of drug trafficking. In February 1993, as the scheme began to unravel, the judge set aside the conviction.

In November, Leroy Lumpkin became the last of the 32 postal workers indicted to have his case dismissed, according to Mr. Malo-
ney and Cuyahoga County Asst. Prosecutor Sean Gallagher, who took over the investigation when Mr. Maloney went into private practice last year.

Mr. Gallagher says an investigation into the inspectors' conduct is pending.

Informants Convicted

“All of the informants involved have been convicted of perjury and falsifying evidence and are in prison,” Mr. Gallagher says. “The focus now is on the postal inspectors. Did they know what was happening? Did they knowingly commit any crimes?”

The two inspectors in charge of the investigation—Timothy Marshall and Daniel Kuack—were fired. Both declined requests for interviews, and their attorneys did not return calls for comment.

The 19 postal workers fired after they were arrested in September 1992 have been reinstated to their jobs.5

Shades of Operation Corkscrew in Cleveland in the early 1980s come to mind. In that embarrassing meltdown, an informer undercover operative who promised to make cases against allegedly crooked judges pocketed the intended bribe money and then manufactured bogus tape recordings of the supposed bribes.6 On the tapes, the informer pretended to be a crooked judge who had just taken the money.7 The informer and two other impostors who also falsely played the parts of judges ended up in jail.8

The second of the two reasons why converted criminals as witnesses come under such heavy fire pertains to the general disposition of people who become jurors towards informers. To a prosecutor, it is of equal importance as the first.

2. Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who “sell out” and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such “scum.”

A clear example of this hostile attitude is found in this accurate newspaper report about a failed federal prosecution of eleven Hell’s Angels:9

7. Id.
8. Id.
After two mistrials and a cost in the millions, the government gave up Wednesday trying to convict the notorious Hell's Angels motorcycle gang on conspiracy and racketeering charges. . . .

. . . .

Federal prosecutors had attempted to prove that the maverick and frequently violent motorcycle gang had become engaged in full-time criminal activity sometime in the 1960s and was deeply involved in an extensive drug and narcotics operation in Northern California and elsewhere, using illegal firearms, murder, threats and assaults to further its enterprise.

. . . .

But a second trial, which began last October, ended late Tuesday with the jury of nine men and three women advising [Federal District Judge William] Orrick it was hopelessly deadlocked. An earlier trial which began in 1979 and concluded last July also ended in a hung jury for most of the defendants. [The rest were acquitted.]

A juror in the latest trial . . . told reporters that the vote was 9 to 3 for acquittal . . . [and described] the government's key witnesses, including a former Hell's Angel who admitted being paid $30,000 in exchange for his testimony, "despicable and beneath contempt."

And even the U.S. Attorney here . . . conceded that government witnesses were a "despicable set of characters."10

Another graphic example of jurors' unfavorable reactions to an informant-witness can be found in the DeLorean case. The following is an excerpt from the American Lawyer about one of the government's main witnesses:11

Testimony from a "Creep"

Ruthe Sutton remembers that when James Timothy Hoffman, a jowly 43-year-old 225-pounder in a government-purchased brown polyester suit, took the stand as the prime witness against John DeLorean, "he never looked anyone in the eye. He was just not believable from the minute he spoke."

"I believed nothing Hoffman said," recalls Jo Ann Kerns. "And I kept thinking to myself, 'If Hoffman can do this to DeLorean, he can do this to any of us.'" Kerns's point should not be mistaken for a broader argument about entrapment or sting operations: "I'm all in favor of going after people if the government knows or has reason to believe that they are dealing in narcotics. Then anything goes. Any tricks that the government can come up with. But here it was just Hoffman's word. And then we never saw DeLorean on the tapes actually participate in the conspiracy."

Prosecutor Walsh took Hoffman through the story of how he had befriended DeLorean because his son and DeLorean's had played together when the two were neighbors near San Diego in 1980. Hoffman explained that it was the sons' friendship—not an

10. Id.
intention to try to snare DeLorean in a drug deal—that had led Hoffman to call DeLorean two years later (on June 29, 1982)—by which time Hoffman, coincidentally, had become a government informant. "This guy’s father of the year," [juror] Holladay recalls thinking to himself. "He’s using his own son to make up a story to get money as an informant."

.....

Why hadn’t all of Hoffman’s conversations with DeLorean been taped, once DeLorean had made his supposed drug deal overture? Because the equipment hadn’t been available or had been faulty, Hoffman said.

If DeLorean had really asked on June 30 whether Hoffman still had his “connections in the Orient” necessary to do a drug deal, and Hoffman had said yes, why had DeLorean, desperate as he was, waited until July 11 to come to California to meet with Hoffman? And why, asked Weitzman repeatedly, hadn’t that meeting been taped? Hoffman said he didn’t know why DeLorean had waited and that the meeting hadn’t been taped because the federal agents didn’t think it was important enough to arrange for a taping on a Sunday.

“I still figured I was pretty sure DeLorean had been in a conspiracy with Hetrick after Hoffman testified,” says Hal Graves, “but I knew one thing for sure: Hoffman is a pitiful, psychopathic liar—the kind that believes what he’s saying but can’t tell the truth. I can tell people like that. My own father used to tell stories and they’d change over the years, yet he’d still believe them. That’s how this guy was.”

Every juror, except Wolfe, uses words and phrases like “completely unbelievable” (Jackie Caldwell’s description) in assessing Hoffman, while Wolfe says “he was probably lying a lot.” For some, like Andersen, Sutton, Kerns, Dowell, Lahr, and Holladay—jurors who would never see the full elements of conspiracy—this was not as important as it was for the others, like Graves, Caldwell, Gelbart, and Hoover. Later, their view of the case—that DeLorean had indeed conspired in some way with Hetrick but that Hoffman couldn’t be counted on to be telling the truth about his initial contact with DeLorean—would be the fulcrum of the jurors’ entrapment decision.12

A third example of this ever present problem with jurors occurred in a major federal corruption/fraud case in Los Angeles in 1985. The headline and partial text from the Los Angeles Times follows:13

Jury Acquits Bank Official in Moriarty Fraud Case
A Los Angeles federal jury Monday acquitted former Orange County bank official Nelson Halliday of conspiring with confessed

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political corruption figure W. Patrick Moriarty in an alleged money laundering-scheme.

The verdict stunned federal prosecutors and prompted a suggestion by Halliday’s attorney that the government may have problems in its continuing investigation of political corruption because of Moriarty’s lack of credibility as a witness.

“They flat didn’t believe the man,” Byron McMillan, Halliday’s attorney, said of the jury’s verdict Monday afternoon. “I would love to defend anybody with Moriarty as a complaining witness.”

Charles Williamson, 49, of Garden Grove, one juror who said he believed that Halliday was guilty on all counts, confirmed that the jurors “simply didn’t believe Moriarty’s testimony.”

“Had he not been on the stand maybe the evidence would have been enough.”

C. How an Informer Can Sink Your Case

With the foregoing in mind, let me put a different spin on this and confront you with some observations that color the answer to the threshold question of whether or not to use accomplices or snitches as witnesses in the trial of any particular case.

First, calling to the stand an actual participant/eyewitness to the crime who knows the criminals and can easily identify them—normally a devastating witness—can backfire and have the unintended effect of making your case worse rather than better if the eyewitness is a crook who has bartered for some sort of consideration in return for his testimony.

Second, evidence amounting to a complete confession—normally the end of a defendant’s chances with a jury—can actually have the unanticipated effect of making your case weaker rather than stronger if the witness upon whom the jury has to rely for the truth of the testimony is a person they will not trust.

Why? Because in the hands of a skillful defense tactician, all the liabilities and the unseverable baggage that such a witness brings to your case, along with the “confession” or the “identification,” become the elements of reasonable doubt the defense is looking for and the brush with which the rest of your case is then tarred. The issue of the defendant’s guilt can seep away—as it did in the Moriarty/Halliday case—while the prosecutor attempts to defend against the forceful assertions of deceit and misconduct on the part of the government’s wit-

14. Id. (emphasis added).
nesses. Once a prosecutor loses control and begins in desperation to defend rather than prosecute, disaster is right around the corner! The defense will go after these witnesses with everything it can find, hoping to make them the vulnerable links in your chain. (Remember, "the best defense is a good offense.")

A sure way to compound this problem is to call more informer witnesses to the stand than you have to. As with alibi witnesses, if one cracks, they all go down, and possibly so does your case. Listen to this defense attorney's glee at a case too full of vulnerable witnesses:  

The trial of Willy Falcon and Sal Magluta will best be remembered for the 27 informants called by prosecutors to testify, each of whom was then decimated by the defense's tag-team approach to cross-examination. "Before the trial started," [defense attorney] Black concedes, "we thought the most frightening thing would be if the government tried the case in three or four weeks, pared it down to a handful of their major witnesses, worked on those witnesses, put them on, and then got out and put on whatever corroboration they had. If they did that, we thought it would be a tougher case. Thankfully, that didn't happen."

Instead, Black and his defense teammates say, the government called informant after informant—each more sleazy that the last—all of whom testified against Falcon and Magluta in hopes of having their prison terms reduced.

"[W]hat happened in this case is that their worst witnesses spilled over and poisoned the better witnesses. We were able to create not just reasonable doubt but to prove perjury. And when you prove perjury about witnesses A, B, and C, then the jury automatically distrusts witnesses D, E, and F."

[Defense attorney] Krieger agrees: "Some of the witnesses were so bad they infected those who were not so bad."

According to the article, the jury foreman reported after a defense verdict that the jurors distrusted the cooperating witnesses because they had so much to gain from their testimony: "The prosecution presented so many witnesses we got inundated with evidence, but it wasn't good evidence."

In 1991, the Miami Herald devoted much of its front page and first section to a negative series of stories about informers. The lead article in the spread demonstrates how ambivalent we are about criminals as witnesses and how their misuse can create chaos:

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16. Id.
17. Id.
Privileged criminals—lying, cheating and stealing for the United States of America—infest the courtrooms of the land.

The government labels them CIs, or confidential informants, and they are a booming, megabuck industry that thrives in secrecy—and almost no public oversight.

Some get rich. Some corrupt cops. Some fabricate testimony. Some trap innocent people. Some get away with—if not murder—assault, robbery, and cocaine trafficking.

Some CIs are extremely effective and proud of what they do. “I’m a magnet for maggots,” says Alex Spiegel, 41, sipping Amstel Light at R.J.’s Landing on the Intracoastal.

Gregarious and charming, Spiegel and his breed could easily call their shadowy enterprise Rats ‘R Us.

Bankrolled by burgeoning U.S. drug forfeitures, tax bounties and undercover funds, CIs buy leniency for themselves and twist deftly through a sometimes-careless criminal justice system.

Lawmen argue emphatically they need rats to catch rats. Police simply could not crack big drug and public corruption cases without CIs. “They don’t line up to meet you in the National Cathedral,” says Thomas V. Cash, special agent in charge of Miami’s Drug Enforcement Administration office.

As the government enrolls more and more informants, almost like an addict, questions about costs, fairness, and effectiveness intensify. So do complaints.

“If Benedict Arnold were alive today, the government would give him an ID, a Mercedes and call him a hero,” says attorney Fred Haddad. “There is such a mania over drugs. No one gives a damn what it takes to stop it.”

What this article should teach you among other things is how fast the media will turn against you if something goes wrong.

D. The Question is When and How to Use Criminal Witnesses

Notwithstanding all the problems that accompany using criminals as witnesses, however, the fact of the matter is that police and prosecutors cannot do without them—period. Often they do tell the truth, and on occasion they must be used in court. If a policy were adopted never to deal with criminals as prosecution witnesses, many important prosecutions—especially in the area of organized and conspiratorial crimes—could never make it to court. In the words of Judge Learned Hand:

 Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to

19. Id.
rely on them or upon accomplices because the criminals will almost certainly proceed covertly.20

Our system of justice requires percipience from a person who would testify in court. It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves. Terrorist cells are difficult to penetrate. Mafia leaders use underlings to do their dirty work. They hold court in plush quarters and send their soldiers out to kill, maim, extort, sell drugs, run rackets, and corrupt public officials. To put a stop to this, to get at the bosses and ruin their organizations, it is necessary to turn underlings against those at the top. Otherwise, the big fish go free and all you get are the minnows. They are criminal minnows to be sure, but one of their functions is to assist the sharks to avoid prosecution. Snitches, informers, co-conspirators, and accomplices are therefore indispensable weapons in a prosecutor's battle to protect a community from criminals. For every setback such as the ones mentioned above, there are scores of sensational triumphs in cases where the worst scum of the earth have been called to the stand by the government. The prosecutions of Charles Manson, the Watergate conspirators, the infamous Hillside Strangler, the Grandma Mafia, the Walker-Whitworth espionage ring, and the last John Gotti prosecution are only a few of the thousands of examples of cases where such witnesses have been effectively used with stunning success.

This background perspective is not designed to scare you off or make you gun-shy but to help you to become more effective when you are compelled to enter this arena by introducing you to the pitfalls you may encounter. If you know where the pitfalls are, you will be able to successfully avoid them.

The appropriate questions, therefore, are not really whether criminals should ever be used as government witnesses, but when and if so, how? The material covered in the following outline is designed to do nothing more than to accomplish the two main goals of a prosecutor and an investigator:

(1) To discover the truth, the whole truth, and nothing but the truth; and
(2) To present persuasively what you have unearthed to a jury and convince them to rely on it in arriving at a just verdict.

In this regard, there are a few important rules of thumb that should normally be observed. The following section will outline these gen-

eral rules. Section III will expand these principles into step by step instructions on avoiding the worst mistakes.

II. General Rules of Thumb for the Careful Prosecutor

A. Use Little Fish

Make agreements with “little fish” to get “big fish.” Jurors will understand this approach, but they may reject out of hand anything that smacks of giving a fat deal to a “big fish” to get a “little fish.” It will offend their notion of basic fairness and will play into the hands of the defense. In a well known east coast legal disaster, a police chief was let off the hook relatively easily in order to prosecute subordinates. Angered at this inverted set of priorities, juries acquitted all the subordinates. It is also the case that sometimes, even though you have a bigger fish in mind, the one you already have in the net is simply too big to give anything substantial in return for his cooperation. Don’t keep going when the stakes are no longer favorable. You must be prepared to defend and justify the deal you have made to the jury in compelling terms in your final argument, after it has been attacked by the defense. “Why did we give this witness immunity? Because it is unacceptable to get just the bag man and let the crooked senator get away, that’s why. The integrity of government—indeed our very way of life—demands it.”

B. Drive a Hard Deal

Do not give up more to make a deal than you have to. This is a temptation to which too many prosecutors succumb. If you have to give up anything at all, a plea to a lesser number of counts, a reduction in the degree of a crime, or a limitation on the number of years that an accomplice will serve is frequently sufficient to induce an accomplice to testify; and it sounds better to jurors when they discover that both fish are still in the net. Total immunity from prosecution should be used only as a last resort. Convict them and then make them testify before the grand jury. Resort to post-conviction “use immunity” if necessary. Sometimes if the smaller fish is firmly in the net, all you have to give him is “an opportunity to help himself” at sentencing. Tell him it’s his choice. All you will do is advise the judge of his cooperation, or lack thereof, as the case may be. This frequently works because the criminal has no other options to get what he wants.

Section 9-27.610 of the Department of Justice Manual makes it clear as a matter of policy that if possible, an offender should be re-
quired "to incur . . . some liability for his/her criminal conduct." 21
Non-prosecution agreements must only be used as a last resort and
should be avoided unless there is no other avenue that will lead to
your objective. 22

It is a good idea to remind the defendant's attorney in a non-
threatening way that a sentencing court may properly consider the
defendant's refusal to cooperate in the investigation of a related criminal
conspiracy after his Fifth Amendment rights are gone. 23 He can stand
before the judge as a person who helped or a person who did not help.
The option is his. You will be surprised how often this will be all you
need. Acceptance of responsibility becomes a premium at sentencing.
Be tough. The crook will respect you. It must appear that he needs
you, not vice versa.

C. Stay in Control

You must always be in control, not the witness! The moment you
sense that the witness is dictating terms and seizing control of the situ-
ation, you are in very deep trouble and you must reverse what has
happened. For an example of how careers can be ended if informers
are mismanaged, consider this article which chronicles the fallout
from a flawed federal prosecution in Chicago of the notorious El
Rukn street gang: 24

These days however, the El Rukns are returning to court for a
reason that could scarcely have been imagined when Hogan was
convicting them: they are being released. They are being released
because of what may be one of the most significant cases of
prosecutorial misconduct in the history of the Justice Department—
prosecutorial misconduct by Bill Hogan. The convictions have
evaporated because of accusations that Hogan's cooperating wit-
nesses were given drugs and alcohol and allowed to have sex in
prison and in the prosecutors' offices, and that the prosecutors con-
doned these practices and then covered them up. 25

The full story of this catastrophe is found in United States v. Burn-
side 26 and United States v. Boyd. 27 Remember, you must be in control,

21. U.S. DEP'T OF JUSTICE MANUAL, TITLE 9, CRIMINAL DIVISION, § 9-
27.610(B)(1)(b) (1993-2 Supp.).
22. See id. for Department policy and procedure in this area.
23. See Roberts v. United States, 445 U.S. 552, 556 (1980) (rejecting due process and
First Amendment challenges to the use of evidence of non-cooperation as a factor in
sentencing).
24. Jeffrey Toobin, Capone's Revenge: How far can a prosecutor go to secure crucial
testimony from plea bargainers?, NEW YORKER, May 23, 1994, at 46.
25. Id.
not your informers. Do not fix their parking tickets, smooth over their rental car defalcations, or intervene in all their problems with the law without expecting repercussions later on. Inexperienced prosecutors tend to coddle such witnesses for fear of losing their testimony. This fear stems from not understanding what drives them. The basic deal is all you need to keep them on board. As to all the rest, they are just using you, and you have lost control. Be resolute. If they won't cooperate with you, get rid of them!

The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air:

In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward. Now lawyers and prosecutors must ponder whether fiction was often their method.

That is the unhappy implication behind the crisis in law enforcement that has been unfolding in Southern California since an inmate, Leslie Vernon White, who has testified in many highly publicized cases, demonstrated in October [1988] how he could fabricate the confessions of other inmates without ever having talked with them. He said later he had lied in a number of criminal cases.

Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some sentenced to death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.28

The precautionary rule of thumb with a jailhouse confession presented by another inmate is that it is false until the contrary is proved beyond a reasonable doubt. If you do not know how Leslie White was able to concoct credible confessions without talking to the alleged confessor, you had better find out.

Do not call criminals to the stand as witnesses unless, in the most careful exercise of your judgment, such a move will significantly advance your ability to win your case. Remember, this is an area where less can be more! When you do call an informer, be prepared for war. The injection of a dirty witness into your own case gives tremendous ammunition to the defense, ammunition that frequently is more powerful than the benefit you expect. Here, for example, is a laundry list

27. 833 F. Supp. 1277 (N.D. Ill. 1993), aff'd, 55 F.3d 239 (7th Cir. 1995).
from the National Association of Criminal Defense Lawyers of the kinds of weaknesses your opponent will be looking for:29

If the informant was addicted to drugs or alcohol during the time to which the statement relates, witnesses and medical records showing this addiction must be introduced. If the informant failed urinalysis tests while on pretrial release and while "cooperating" with the government, the pretrial services reports showing continued drug use should be offered. If you can document inconsistencies or critical omissions between what the informant claimed during one interview or grand jury appearance and what he said in another, these must be carefully set forth during the hearing. Similarly, any evidence you have about other false statements made by the informant, particularly those made under penalty of perjury (such as false statements on loan applications or tax returns) should be introduced. Prior convictions of the informant (admissible to impeach credibility under Rule 609) or opinion or reputation evidence showing the informant was not a truthful person (admissible under Rule 608) must be put in the record. If you have evidence tending to show the informant had a reason to lie about your client or any evidence of bias, it must be offered. And, of course, you need to establish what sentence the informant was facing, what the mandatory minimum and guideline ranges were without cooperation, and what other benefits (such as immunity for relatives) the informant got in return for his or her cooperation. All these factors are indicia of a lack of credibility of the declarant and, hence, are indicia of a lack of trustworthiness of his statements.30

Juries expect prosecutors to be men and women of integrity. If you don’t show the proper distance between yourself and the witness in court, and if you haven’t handled your witness correctly beforehand, your own credibility can become suspect. A prosecutor without credibility in court might as well throw in the towel. You must always ask not only what the witness has to say, but also what the jury will think (1) of the witness as a person, and (2) of you as the prosecutor, for how you have handled the situation.

Don’t try to make these tough calls by yourself. Call in an experienced prosecutor who is not involved in your case for advice. Try it out on a friend who is not a lawyer. Your friend’s reaction will surprise and inform you regarding your decision.

If I were responsible for running a prosecutor’s office, I would require all assistants to run these decisions by an experienced non-involved supervisor before going ahead. Line prosecutors are so close to the action that they sometimes lose perspective on these issues.

30. Id.
D. Keep Your Distance from the Witness

If you decide to call an informer as a witness, you will end up spending much time with him preparing for his testimony. Not all such witnesses are hard core street criminals, and some of them are affable and will try to ingratiate themselves into your good favor. Remain courteous, but do not let down your guard and share the kind of information with them you might share with a friend or colleague. Today, he might be testifying for you, but as in the El Rukn case, tomorrow he may decide to turn against you. Never say anything to a witness—or for that matter to anybody including people on your own team—that you would not repeat yourself in open court or want to see on the front page of the Washington Post or your hometown newspaper. The last witness for the defense in the DeLorean case was an ex-DEA agent who testified that one of the prosecutors boasted of seeing the investigative team on the cover of Time magazine. The agent claimed that the investigation was driven by “blind zeal” to convict a celebrity. Although this claim was untrue, it was damaging to the government’s attempt to rebut the claim of entrapment. Assume at all times—especially when you are on the telephone—that you are being taped. If you want to read a chilling account of an informer who secretly tape recorded the improper remarks of an investigator trying to get him to cooperate, read the chapter in Alan Dershowitz’s book The Best Defense entitled “The Boro Park Connection.”31 When the investigator discovered for the first time on the witness stand that he had been taped, his chair turned into a true hot seat.32

Consider also the testimony at the O.J. Simpson trial regarding Craig Anthony Fiato, a federally protected mafia enforcer, and his brother Larry. According to this testimony, Detective Philip Vanatter had allegedly made statements to the Fiato brothers that were inconsistent with his testimony regarding the reason why he went to Simpson’s house after Simpson’s wife was found murdered.33 These statements to the Fiatos were used by the defense to mount a vigorous claim that Vanatter was a perjurer.34 Whatever Vanatter may or may not have said to the Fiatos, both of whom were called to the stand by the defense, it is certain that he learned (or relearned) (1) not to talk to informers about sensitive case-related matters; and (2) that

31. DERSHOWITZ, supra note 2, at 3-84.
32. See id.
34. Id.
criminals are as prone to testify against you as they are to testify for you. It all depends where they see the best butter for their bread.

Remember, informers are not your friends. Keep a healthy arm’s length between yourself and such a witness. In this same vein, keep them away from strategy discussions about your case. If the witness starts to believe he is one of the team, or a “junior G-man,” he may be tempted to try to help you by manufacturing evidence that doesn’t exist.

The agents handling informers can unintentionally cause significant problems. The agents simply do not appreciate the courtroom and credibility implications of getting too close to an informer witness. In the 1995 prosecution of attorney Patrick Hallinan in Reno, Nevada, for example, Ciro Mancuso was being used against his ex-attorney Hallinan. The agents became very friendly with Mancuso, even to the point of permitting him to prepare and type their police reports (DEA 6s). Moreover, the agents permitted Mancuso to gather evidence without supervision, evidence that the defense at trial successfully attacked as fraudulent. In addition, the agents allowed Mancuso to keep $2,000,000 in excess of the $5,000,000 already provided for in the plea agreement, all of which went untaxed. Remarkably, the agents also allowed Mancuso to keep a firearm, even though he was a convicted felon. All of these unnecessary mistakes evince a lack of control of the witness, and they were successfully exploited during the trial by the defense to attack Mancuso’s motives and credibility and to besmirch the government’s bona fides. The lesson here is that your agents must be as aware as you of the need for appropriate and careful handling of informers, i.e., people of questionable character who are profiting from their cooperation. You must meet with the agents early in an investigation to discuss this problem and to establish appropriate ground rules.

In certain circumstances the defense may try to prove that your witness, and not the defendant, actually committed the crime. The jury argument goes like this: “Of course he has extensive knowledge of the facts of this crime. He is the one who committed it, that is why! Now, ladies and gentlemen, he is lying to save his own skin, en-

couraged by the disreputable plea bargain given to him by the prosecutor."

III. Covering Your Bases, Step by Step

A. The Initial Contact

(1) Communicating with a Represented Witness

Your first hurdle involves ethical considerations. Is the prospective witness represented by an attorney? Has he been indicted? If so, are you required to work through that attorney, even if you suspect his or her integrity? The American Bar Association’s Model Rule of Professional Conduct 4.2 and Disciplinary Rule 7-104(A)(1), for example, prohibit contacting a person represented by a lawyer on the subject of the representation without going through the lawyer. Many states have similar ethical standards for lawyers. Also, Standard 3-4.1 of the “Prosecution Function” section of the ABA Standards for Criminal Justice provides, in part, that “[a] prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel’s approval.”

If the prospective witness is under indictment and he calls you and says that he wants to cooperate but that he doesn’t want his lawyer to know about it, be very careful. You will be confronted not just with Fifth Amendment waivers, but Sixth Amendment waivers, which carry a greater burden. And remember, a defendant may be able to waive his rights, but he cannot waive your ethical obligations.

The best response is to take the witness who wants to talk to you without his lawyer before a judge to confirm his wishes, securing for him a new confidential lawyer if necessary. But before you do, you must read United States v. Lopez. In Lopez, the Ninth Circuit concluded that the prosecutor misled the court regarding the facts surrounding Lopez’s request to speak directly with the prosecutor. What did the Circuit believe should be done with the offending prosecutor? “[W]e are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions [than dismissing the indictment], such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to disci-

39. 4 F.3d 1455 (9th Cir. 1993).
40. Id. at 1464.
pline and punish government attorneys who attempt to circumvent the standards of their professions.\textsuperscript{41}

Check the law of your own jurisdiction on this issue, and if you work for the Justice Department, make sure you have a copy of the latest Department regulations covering this area. To be protected by these regulations, your conduct must comport with them.\textsuperscript{42} Because these regulations were promulgated pursuant to the notice and public comment rules of the Administrative Procedures Act,\textsuperscript{43} they have the force of law, a fact of considerable importance in connection with Model Rule 4.2.\textsuperscript{44} Please note that this model rule was amended by the ABA in August 1995 in an attempt to counter the Department’s policy.\textsuperscript{45} As of November 1994, the Department of Justice has Professional Responsibility Officers in each office who will help you in this area. The rules vary depending on whether and how you are dealing with a represented person, a represented party, a formal target of a grand jury investigation, or a represented organization.

\textit{Caveat:} The law on this subject is in a state of flux. Many of the key issues were litigated in United States v. Ferrara,\textsuperscript{46} but the result of that litigation leaves many issues unanswered. In Ferrara, the federal district court dismissed an attempt by the Justice Department to enjoin disciplinary action by New Mexico against an assistant United States attorney who allegedly violated the Rules of Professional Conduct by talking to a represented defendant.\textsuperscript{47} The district court rejected the government’s argument that the Supremacy Clause protects United States attorneys from state disciplinary boards.\textsuperscript{48} However, the District of Columbia Circuit dismissed the lawsuit on appeal for lack of personal jurisdiction over the defendant, leaving this issue up in the air.\textsuperscript{49} The state bar associations and the supreme courts of many states have indicated disagreement with the Department’s pol-

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} \textit{See also} United States v. Hammad, 858 F.2d 834, 837-42 (2d Cir. 1988) (holding that suppression of evidence may be an appropriate remedy for a prosecutor’s violation of DR 7-104(A)(1)), \textit{cert. denied}, 498 U.S. 871 (1990).
\item \textsuperscript{42} \textit{See} Communications with Represented Persons, 28 C.F.R. § 77 (1996); \textit{U.S. DEP’T OF JUSTICE MANUAL, TITLE 9, CRIMINAL DIVISION,} § 9-12.210-260 (1995-1 Supp.).
\item \textsuperscript{43} Administrative Procedures Act § 1, 5 U.S.C. § 552 (1996) (requiring agencies to make their proposed rules public before they can be used in any way affecting citizens).
\item \textsuperscript{44} \textit{Model Rules of Professional Conduct Rule} 4.2 (1983).
\item \textsuperscript{45} \textit{See Memorandum from Jamie S. Gorelick, Deputy Attorney General, to U.S. Attorneys (Nov. 22, 1995)} (on file with the author).
\item \textsuperscript{46} 847 F. Supp. 964 (D.D.C. 1993), \textit{aff’d}, 54 F.3d 825 (D.C. Cir. 1995).
\item \textsuperscript{47} \textit{Id.} at 968-70.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{See} United States v. Ferrara, 54 F.3d 825, 832 (D.C. Cir. 1995).
\end{itemize}
icy and the regulations. Congress is currently studying a bill that would negate the Department's policy and require U.S. attorneys to comply with state ethical rules. Thus, federal prosecutors must exercise extreme caution when considering contact with a represented defendant.

(2) Ongoing Crimes

A second complication with which you may be confronted in this context is the situation in which the witness at some point during debriefing begins to tell you about ongoing or new crimes in the offing in addition to those that have already happened. For a general look at the problem of handling new or ongoing crimes that crop up during the handling of a case, read Maine v. Moulton and check the Department's regulations on the subject.

This particular hurdle can become unusually touchy when the witness with whom you are dealing is an attorney who himself is under suspicion of criminal conduct and suddenly offers up his own clients with respect to new or ongoing offenses in return for leniency or immunity. This rare but real situation should immediately set off loud alarm bells in your analytical mind, raising questions of privilege, Fifth Amendment rights, Sixth Amendment rights, conflict of interest, and disciplinary rules, especially if the suggestion is made that the attorney wear a wire and question his clients with respect to crimes in progress. If you are not extremely cautious, you may succeed in convicting the attorney's clients, but you may do so at the expense of your own license to practice law, a kamikaze mission that I do not recommend.

The case of United States v. Ofshe provides a graphic example of the problems lurking in this situation. The bottom line for prosecutors is found in footnote six of the opinion which reads as follows:

While we have not found the government's conduct [in using attorney Glass to make a case against his client Ofshe] sufficiently

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50. The bill would require that "an attorney for the government shall be subject to state laws and rules, and federal local rules, governing attorneys in each State where such attorney engages in that attorney's duties to the same extent as other attorneys in that State." H.R. 3386, 104th Cong., 2d Sess. (1996).

51. 474 U.S. 159 (1988) (holding that the defendant's Sixth Amendment right to counsel was violated when a wired confidential informant prodded him into making incriminating statements about new crimes).

52. 817 F.2d 1508 (11th Cir. 1987). In Ofshe, one of the defendant's attorney's began cooperating with the government because of an unrelated investigation into the lawyer's own criminal activities. He wore a hidden wire while talking to his client. He convinced his client to request numerous continuances of his trial while eliciting ever more information. Id. at 1510-12.
outrageous to warrant the dismissal of his Indictment, we do believe
that [the attorney’s and the Assistant United States Attorney’s] con-
duct was reprehensible. Because the district judge is more familiar
with the attorneys’ conduct, we assume he will refer the matter to
The Attorney Registration and Disciplinary Commission ... for ap-
propriate action.\textsuperscript{53}

\textit{Ofshe} was a drug case in which no lives were directly at risk.
Would the analysis differ if the ensnared lawyer were to have come to
you and reported that his client with his knowledge had engaged the
services of an unknown contract killer to murder a witness, or a prose-
cutor, or a judge? Probably so, based on the elements of the outra-
geous government conduct test that requires an examination of the
totality of the circumstances,\textsuperscript{54} but this remains another area in which
one should tread with great caution.

(3) \textit{The Common Defense Camp}

Take great care in the debriefing of any recruited codefendant
you plan to use against his cohorts to avoid “invading the common
defense camp.” If the witness without warning begins to tell you the
particulars of a defense strategy meeting he has attended with his co-
defendants and their attorneys, you are in trouble. This pitfall can
easily be avoided from the beginning by advising the witness \textit{in writing}
not to tell you about any such meeting.

B. Who Goes First, You or the Witness?

(1) \textit{Get a Proffer}

The first problem that usually arises is the “Catch 22” situation
where you want to know exactly what the witness has to offer before
committing yourself to a “deal,” but the witness, even though desirous
of cooperating, is afraid to talk for fear of incriminating himself unless
he is promised something first. When you get into such a situation,
never buy a pig in a poke! If you first give a criminal absolute immu-
nity from prosecution or commit irrevocably to a generous deal and
then ask him what he knows, the probability is that you will get noth-
ing but hot air. Remove the witness’ incentive to cooperate and you
will lose all the fish, both big and little. Never forget that they are

\textsuperscript{53} \textit{Id.} at 1516 n.6.

\textsuperscript{54} \textit{See} \textit{id.} at 1516; \textit{see also Model Rules of Professional Conduct Rule 1.6(b)
(1983) (allowing an attorney to breach the duty of confidentiality when the attorney be-
lieves that his or her client is about to commit a criminal act that will result in imminent
death or substantial bodily injury).
almost always cooperating because you have them in a trap. Open the
door too early and their willingness to cooperate will evaporate.

The answer to this seeming dilemma is very simple. Get a pro-
fer! Promise the witness in writing that you will not use what he tells
you at this stage of the proceedings against him, but make it equally
clear that your decision whether or not to make a deal will not be
made until after you have had the opportunity to assess both the value
and the credibility of the information. I tell them: “It’s an opportunity
to help yourself; take it or leave it.” If they don’t trust you enough to
go first, how in the world are you going to trust them? You can talk
possibilities, but that is all! And remember, once you have committed
to something, your word must be as good as gold, both with respect to
what you will do if the witness delivers and what you will do if he
doesn’t. Caveat: If the witness later tells you something different from
what he told you in the proffer, Brady v. Maryland is implicated.

(2) Put it in Writing

Make sure that the full extent of the preliminary understanding is
in writing and signed by all parties. Try to anticipate all problems that
you may be confronted with down the road. Consider adding a “Mez-
zanatto provision,” by which the informer agrees that any statements
he makes during meetings and negotiations can be used to impeach
any contradictory testimony he might give at his own trial should co-
operation break down.

Remember, the document may come back to haunt you if it is
badly drafted. Make sure you examine it as a probable court exhibit
and try to avoid drafting it so it can somehow be used against you, or
that you can’t use it yourself. Do not forget that your side of the
agreement—immunity or whatever—will be used in court by the de-
fense as the “reason the witness is lying.” The defense will character-
ize it as a “payoff,” a “bribe,” etc. Do not cause yourself unnecessary
problems by giving away too much.

Do not negotiate on tape. Transcribing the tapes may drive you
to distraction. At the same time, do not try to hide anything. Be per-
suasive, but not coercive, with respect to your attempts to convince a

55. 373 U.S. 83, 86-88 (1963) (holding that due process requires prosecutors to turn
exculpatory evidence over to the defendant).
56. United States v. Mezzanatto, 115 S. Ct. 797, 804 (1995) (holding that such a provi-
sion is a valid waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Proce-
dure 11(e)(6)).
criminal to be cooperative. This is a fine line, but it must be respected. Coercive tactics may backfire.

(3) Side Deals

Probe for "side-deals" with the police. If they exist, get them out in the open. The defense is entitled to know everything that the witness or his relatives or friends for that matter have been promised in return for cooperation. If for the first time on cross-examination the jury finds out that the chief investigator on the case has been paying the witness $100 a week pending the trial or fixing his parking tickets, you will be in deep trouble.

C. Extracting Information from the Witness

First, do not forget the appearances of your initial encounter with the witness. A prosecutor must never conduct such an interview without an investigator present. Never say anything to a crook that you do not want repeated in open court. He may be taping you!

Once the preliminary understanding is arrived at and the witness is now prepared to tell you what he or she knows about the case, the suspect, etc., precautions must still be taken to get the witness to tell the whole truth, not just parts of it.

Your first line of defense here is the witness' attorney. Impress the requirements of absolute honesty and full disclosure on the witness' attorney and ask the attorney to have a private discussion with the witness to try to pound this into the witness' skull. These witnesses invariably hold back information that makes themselves "look bad." It is devastating in front of a jury to find out that the first thing such a witness did was lie to the prosecutor or the case agent! Deliberate omissions are just as bad as outright lies. Don't start the interview until the attorney assures you that he believes that his client is ready to come completely clean.

When you start the interview, repeat the necessity of complete "honesty" and "full disclosure." Discuss perjury, liability for false evidence, etc. The objective is to "get at the truth," not to "get the suspect." Let the witness know that if he gets to court, the truth will certainly come out on cross-examination. Tell him that the defendant isn't going to sit there and let him gild the lily. You want to hear it now, not later. One frequent problem confronted here is that the witness will falsely minimize his own role in the scheme. Warn him not to do this and be on the lookout for evidence that this is what he is doing. It will stand out like a sore thumb, if you are looking for it.
One incredible mistake I’ve seen made on more than one occasion—especially by agents—is to listen to the informer’s story and then tell him, “That’s not enough, you’ll have to come up with more.” The impetus for such a statement comes from agents’ knowledge that informers hold some material back, but such a can opener should not be used for two reasons. First, the informer may react by making up “better stuff,” an eventuality for which you do not want to be responsible. Second, when jurors become aware of such a tactic, they will become very willing to believe that you and your agents have solicited false information. This mistake played a significant role in the failed prosecution of attorney Patrick Hallinan in Reno, Nevada, in 1995. When the jurors found out that the cooperating informer Mancuso had not fingered his own lawyer Hallinan until after agents told him he needed to come up with more, the force of the government’s case slipped away.

Do not feed the witness key information. First, let the witness tell the complete story on his or her own; then ask any questions needed to fill in the gaps. One of your best jury arguments is that “the witness must have been there (or talked in confidence to the defendant) because he knows details that only somebody who was there would know!” Don’t give this away by being arguably the source of the inside information. Make sure everybody on your team understands this and doesn’t let the cat out of the bag. The investigators should watch for this kind of evidence during the interview and make good discoverable notes.

The defendant knows more about the informer than you do! This advantage may enable the defendant to mount an attack on cross examination, etc., based on facts or circumstances of which you are unaware and about which the informer has not told you. To avoid being caught unprepared, ask the informer what the defendant might bring up to discredit him or his testimony. Take your time on this because you’re now probing for information that the informer may not want to tell you. Once again, a real story from a real trial is the best example of this problem:

The Impossible Victory

Experts say it is rare for prosecutors to face defense attorneys who know more about the government’s witnesses than the government itself does. But that is exactly what happened in the Willy and Sal case. In addition to spending untold millions on attorneys, Fal-

57. DeFede, supra note 15, at 1.
con and Magluta also hired a score of private investigators who fanned out across the United States and throughout Latin America to track down incriminating information about the government's witnesses. "What made the difference was the fact that Sal Magluta and Willy Falcon were willing to fight this and fund an investigation that could expose all of these things," says [defense attorney] Black, who adds this victory to a growing string of wins, including his representation of William Kennedy Smith and former Miami police officer William Lozano. "How many people can afford to hunt these things down? Do you know how many witnesses we investigated before the trial? They called about 30 accomplice witnesses, but they had given us notice on their witness list of about 81, and added 4 or 5 just before trial."

Among the government's many witnesses, Nestor Galeano proved to be a favorite of the defense team. His testimony, they believe, was also a turning point in the case. Before the trial commenced, defense attorneys obtained several letters Galeano had written in prison to a friend in Columbia, fellow cocaine smuggler Manuel Garces. In those letters, Galeano eloquently explained his belief that the American justice system is corrupt, and that the only way to deal with it is to play along, to do whatever it takes to get out of prison, including, defense attorneys claimed, lying on the witness stand to please prosecutors. "Those letters were an overwhelming embarrassment to the government," says [defense attorney] Krie-ger. "Or at least they should be."58

Be on the lookout for any telltale suggestions that the informer is really the one who committed the crime under investigation and that he is falsely casting the blame on someone else to save his own skin. If he knows much of the inside information about the crime, the defense may argue that he learned it not from the defendant, but because he is the perpetrator! To understand the dimensions and ramifications of such a defense, read Kyles v. Whitley.59

D. Test the Witness' Story

(1) What Motivates the Witness?

Do not be afraid to subject the story and the witness to intense scrutiny and cross-examination. Do not fear that the witness will crack. If he does, it's better that it happen in your office than in court. Prosecutors without much experience tend to treat such witnesses far too softly for fear they will not hold up. This is wrong. Bear down!

58. Id.
59. 115 S. Ct. 1555, 1571-73 (1995) (holding that the prosecution's failure to divulge evidence tending to inculpate the government's witness and exculpate the defendant denied the defendant due process).
Mistrust everything he says. Be actively suspicious. Look for *corroboration* on everything you can; follow up all indications that he may be fudging. Secure information on the witness' background: mental problems, probation reports, prior police reports. Contact prior prosecutors who have either prosecuted the witness or used him in court and read the sentencing memoranda from previous cases. What do the prosecutors think about his credibility? How did the jurors react to him? Was he a helpful witness or was he more trouble than he was worth?

Assess the motivation of the witness. Why did he decide to cross over? You must understand why he has turned in order to keep him on your side once he has crossed over. This understanding will keep you from making mistakes caused by thinking you have to be friendly and generous to keep him on the team. Normally he will stay with you so long as the carrot he seeks is still in the future.

On occasion you will get a witness who is really and truly sorry for what he did. Play this for all it's worth with the jury—but first make absolutely sure that the sentiment is real. Usually it is phony.

Be wary of drug addicts. Consider a medical examination and find out from a doctor the effect of the drug your witness abuses on his capacity as a witness. Does valium ruin your memory? You might want to call the doctor during your case-in-chief.

If your witness is "on loan" from a foreign government where due process is not a high priority, be careful the witness has not been given a script or a mission. *Wang v. Reno* chronicles the tale of an assistant United States attorney caught in the deadly fallout caused by an informer witness who took the stand for the government, lied on direct, and then subsequently revealed his lie, explaining that he was under pressure by the government of the People's Republic of China falsely to incriminate the defendant. Now the witness is seeking asylum in this country because he fears that he will be killed if he returns to China, and the U.S. attorney is under investigation for allegedly lying to the court and committing other ethical violations as this mess unraveled.

(2) *Corroborate*

The key to whether or not a jury will accept the testimony of a criminal is the extent to which the testimony is *corroborated*. Devitt

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60. 81 F.3d 808, 811 (9th Cir. 1996).
and Blackmar 17.06,62 which allows the conviction of a defendant based on the uncorroborated testimony of an accomplice, may protect you from Federal Rule of Criminal Procedure 29,63 but it will cut very little ice with jurors.

In its discussion of the Friedman corruption case (prosecuted by Rudy Giuliani), the New York Times put it this way:64

The Government's greatest strength in the case was also its greatest weakness: Mr. Lindenauer. His strength was his intimate knowledge of the bribery and extortion schemes that suffused the parking bureau, and his ability to describe them at length and in detail on the witness stand; his weakness was that he had been part of the scheme, and collected nearly $250,000 from it, working in concert with Mr. Manes.

Mr. Lindenauer pleaded guilty last March to federal charges of racketeering and mail fraud, reduced from a 39-count indictment as part of an agreement with the Government for his testimony. He faces a prison term of 25 years and $500,000 in fines, but is not expected to be sentenced until his role is completed in other trials relating to the municipal scandal.

Mr. Lindenauer had a long history of lying and other fraudulent behavior, which defense lawyers forced him to admit during his cross-examination and exploited as they sought to undermine his credibility. But piece by piece, portions of his testimony were corroborated by other Government witnesses. In the end, the jury of seven women and five men agreed with Mr. Giuliani, returning guilty verdicts on all but a handful of counts against the four defendants.65

Check out everything your witness says. Look for documentary evidence, corroborating witnesses, prior consistent statements—everything. If he says he made an important telephone call, bring in the phone company records. If he says he was in Las Vegas, prove it independently of what he says with hotel clerks and records. In a well-publicized espionage case in Los Angeles, the person who passed secret documents to the spy testified that he received money in return, which he put into his bank account. The prosecutor corroborated this with excellent charts and bank and payroll records, showing conclusively that he put more money than he earned from his salary into his account while he was spying. The excess matched his statement to the FBI and his testimony with regard to the amounts of the payoffs. In

63. Federal Rule of Criminal Procedure 29 allows the defendant to move for acquittal before submission of the case to the jury.
65. Id. (emphasis added).
United States v. Martinez,66 the prosecutor was allowed to prove that others against whom the witness had informed pleaded guilty, in order to rebut Martinez’ attack on the witness’ motives and credibility.67 Martinez holds that when the defense attacks a witness’ credibility, evidence that might not have been admissible on direct can be ad-
duced on redirect to rehabilitate the witness.68

(3) **Wire the Witness**

Never overlook the appropriate opportunity to have your witness contact the suspect to try to extract from him some incriminating statements—on tape, of course. This is dynamite if you can get it. Your investigator will help you and the witness come up with a plausible scenario for such a contact. But don’t stumble over Massiah v. United States.69

(4) **Polygraph Testing**

Consider the polygraph, but don’t use it just because it’s there. The machine is fallible! It is a tool, not a guarantee. Many experienced prosecutors will counsel you not to use it on a bet. Criminals testifying as witnesses are notorious for setting polygraph tests on their ears. In a major case against ultra right wing terrorists, the prosecutors made “the deal” contingent on passing the polygraph. Although they became convinced that the witness was telling the truth, he couldn’t pass the test. The defense had a field day with this on cross-examination, and the prosecutors now cite this as a mistake. Talk to your polygraph operator about its efficacy. Don’t refer to it in court if you use it as an investigative tool.

The latest from the Supreme Court on polygraph results and Brady is Wood v. Bartholomew,70 holding that polygraph results are not Brady material, per se.

(5) **Anticipate the Defense View**

The best way to anticipate the downside to many a witness is to cast yourself in the role of the defense attorney for your suspect. How

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66. 775 F.2d 31 (2d Cir. 1985).
67. Id. at 36-38.
68. Id. at 37.
69. 377 U.S. 201, 206 (1964) (holding that a prosecutor’s use of a confidential informant to elicit information from a represented defendant violates the Sixth Amendment).
70. 116 S.Ct. 7, 11 (1995) (holding that Brady did not compel the prosecution to disclose that its witness failed polygraph tests when the defense counsel admitted that such information would not have affected his cross-examination of the witness).
would you attack this witness and his testimony if you were defending your target? Hire yourself, as if you were to take the other side of the case. What does it look like from that side of the tracks? Then cross back over and ask: Can the weaknesses be explained? Spend a lot of time at this exercise. Call in a friend to help you. Every minute will be well worth it. It enables you to determine how to shore up your witness before the defense even gets to him. Do not pass up any opportunity you can find to watch defense attorneys cross examine cooperating criminals. Then you will be able to anticipate and to prepare for the onslaught.

E. The Agreement

If you’re convinced, negotiate a final agreement; but don’t give up too much, and don’t give it away too soon!

(I) Cash Rewards

Put the total agreement in writing, but before you do, read United States v. Dailey. This case contains a very educational discussion about what a plea agreement can and cannot say. Rewards and payments are tricky. Money for a witness will be trouble if not handled openly and with clean hands. There exists no outright legal prohibition against rewards, and indeed they have been sanctioned on the grounds of public policy interests in bringing witnesses to crimes forward with their information. Payments to an informer on a contingency basis, however, may be viewed as an inducement to entrapment. If a witness asks for some sort of a “cut” or “percent-

71. 759 F.2d 192, 200 (1st Cir. 1985) (reversing a district court’s refusal to allow a co-defendant’s testimony because the plea agreements were likely to cause perjurious testimony).
72. Id.
74. But see United States v. Civella, 666 F.2d 1122, 1129 (8th Cir. 1981) (upholding a conviction where the informant was paid according to the quality of the information produced).
age” or “reward,” such a request may be discoverable even if it is turned down. By way of example, consider this New York Times coverage of this issue in the DeLorean case:  

Federal District Judge Robert M. Takasugi today characterized James Timothy Hoffman, the Government’s informer and star witness in John Z. DeLorean’s trial on narcotics charges, as “a hired gun.”

He said he found it “quite offensive” that the Government had failed to disclose sooner that Mr. Hoffman had “demanded” a share of any money seized in the case.

Mr. Hoffman instigated the Government’s investigation of Mr. DeLorean when he told a Government agent in 1982 that Mr. DeLorean had asked him for help arranging a narcotics deal.

Mr. DeLorean’s lawyers, Mr. Weitzman and Donald M. Re, contended that the prosecution had improperly withheld documents that would lead them to learn last week that Mr. Hoffman had demanded up to 10 percent of any assets seized as a result of the investigation of Mr. DeLorean. Mr. Hoffman made the demand Sept. 3, 1982 and was rejected.

The Government had hoped to seize several million dollars in cash and property belonging to William Morgan Hetrick, an admitted cocaine smuggler charged with Mr. DeLorean as a co-conspirator, and $2 million that was to have been invested by Mr. DeLorean, according to the Government’s version of the purported drug scheme.

Judge Takasugi, saying he was addressing the issue in “real world” terms characterized Mr. Hoffman’s demand as “a percentage of the take,” and said he found it “quite offensive,” particularly since Mr. Hoffman had testified that he was “motivated in part by good” to furnish information.

“If there is such a thing as a smoking gun in terms of the credibility of Mr. Hoffman,” the judge said, Mr. Hoffman’s demand was it.

Although a reward or a monetary inducement does not automatically disqualify the recipient as a competent witness, the jury must be advised of the arrangement. The issue is not one of competency, it is one of credibility; and that is an issue for the jury. In my opinion, juries look askance at any arrangement whereby a prosecution witness will benefit financially from his testimony. So do some judges. Read

76. Id.
77. See United States v. Friedman, 854 F.2d 535, 563 (2d Cir. 1988) (holding that the effect of a contingency fee arrangement between the prosecutor and the witness on the witness’ credibility is an issue for the jury).
what Judge Wiggins has to say about money and informers in *United States v. Cuellar.*

Make sure that the agreement will make sense to the jury if it ever gets in evidence, but be aware of the law that governs how plea agreements can and cannot be used. They are not automatically admissible in their entirety in evidence! Consider adding a paragraph to the effect that, if the witness backs out, everything that he has said during the negotiations can be used against him.

(2) *Avoid Scripting*

Don’t lock the witness in so strongly to a particular evidentiary script that the ground rules violate the defendant’s rights to confrontation. If you require a witness to stick to his or her original story in order to secure a “deal,” this effectively makes the witness immune from cross-examination! Such agreements have produced reversals on appeal! All you can require substantively is that the witness tell the truth.

(3) *Tell the Witness All the Ground Rules*

Make sure the witness has a clear understanding of what he will have to do in terms of testifying, i.e., grand jury, two trials, or whatever. Tell him how long it will take. Do not underestimate!

Also, he does not have a credit card to go around committing other crimes while you are using him as a witness. Tell him not to call you if he gets a parking ticket. Do not leave this to the imagination.

Security precautions may be in order. Decide what is necessary; what is available. If the witness is going into a witness security program, make sure that you and the witness understand exactly what

78. 96 F.3d 1179, 1183-89 (9th Cir. 1996) (Wiggins, J., concurring) (decrying the payment of over half a million dollars to an informant in exchange for his testimony).

79. *See* United States v. Edwards, 631 F.2d 1049, 1051-52 (2d Cir. 1980) (holding that the existence of a cooperation agreement may be elicited by the government on direct examination without detail, although greater detail would be allowed on redirect if the witness' credibility is attacked based on the agreement); United States v. Spriggs, 996 F.2d 320, 323-24 (D.C. Cir.) (holding a cooperation agreement admissible), *cert. denied,* 510 U.S. 938 (1993).

80. *See* United States v. Stirling, 571 F.2d 708, 730 n.16 (2d Cir.) (example of such language), *cert. denied,* 439 U.S. 824 (1978); United States v. Mezzanatto, 115 S. Ct. 797, 805 (1995) (holding that plea agreement waivers of admissibility are valid for this purpose).

81. *See* People v. Medina, 116 Cal. Rptr. 133, 151 (Cal. 1974) (reversing a conviction where the informants had agreed not to change their testimony from the version previously given to the police or to resort to silence on the stand).
this entails. Get a copy of the witness' memorandum of understanding with the Marshal's Service and read it yourself.

(4) **Hold Something Back**

The witness must perform first. If you give him everything to which he is "entitled" before he testifies, you may be unpleasantly surprised when he disintegrates on the witness stand. I prefer, if possible, to have such a witness plead guilty before testifying and be sentenced afterwards. If the witness' motivation to cooperate is removed, you will be lost. Do not rely on his sense of honor! See *United States v. Insana* \(^{82}\) and *Darden v. United States*, \(^{83}\) which sanction this approach.

(5) **Put the Statement in Writing**

Have the witness execute a signed and witnessed statement regarding what he knows that can be used in case he goes sour, either during the trial or later. This will be available as an admissible prior inconsistent statement should he "go south" on the stand and as protection for you and the case after a conviction if he decides to change his tune when confronted as a "snitch" in prison by other inmates. Take out an insurance policy, as it were. Be familiar with the law of impeaching your own witness, prior inconsistent statements, prior consistent statements, etc. A case on this subject that ought to be read by all prosecutors intending to use a turncoat as a witness is *United States v. DiCaro*, \(^{84}\) one of the leading cases on the subject of witnesses who are "overcome by amnesia" when they take the stand. The latest word by the Supreme Court on attempting to use a co-conspirator's statement as a declaration against penal interest can be found in *Williamson v. United States*, \(^{85}\) holding that confessions of arrested accomplices may be admitted under Rule 804(b)(3) "if they are truly self-inculpatory rather than merely attempts to shift blame or curry favor." The Supreme Court has used a similar approach with respect to prior

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82. 423 F.2d 1165, 1168 (2d Cir.) (holding that the prosecution did not exert undue influence on its witness by delaying sentencing until after the witness testified), *cert. denied*, 400 U.S. 841 (1970).

83. 405 F.2d 1054, 1056 (9th Cir. 1969) (holding that the practice of delaying sentencing until after the cooperating witness testifies does not amount to coerced testimony).

84. 772 F.2d 1314, 1322 (7th Cir. 1985) (approving of the allowance of a false "amnesiac" witness' prior grand jury testimony into evidence in the prosecution's case-in-chief), *cert. denied*, 475 U.S. 1081 (1986).

consistent statements: they will be admissible only if they were made before the alleged motive to fabricate or improper influence arose.86

F. Is Your Case Stronger Without Calling the Informer to the Witness Stand?

Quite possibly the most effective (and safest) way to use a cooperating accomplice is to use the information obtained from him to develop other evidence of your target's guilt, independent evidence strong enough to relieve you of the necessity of calling him to the stand. In fact, this should be your tactical goal: to build a case that does not depend on the testimony of the accomplice. Use him to help you do this. Ask him if he knows of any independent way to corroborate what he tells you. He may be useful in identifying other excellent witnesses to what he has told you.

For a blueprint of how to use an informer's tape recorded conversation with a suspect without calling the informer to the stand, read United States v. Davis87 and United States v. McClain.88 In both, the government's tactic of keeping a notorious informer off the stand survived objections based on the Sixth Amendment and Federal Rules of Evidence 607 and 806.

Remember, however, that such an approach should not be used dishonestly to milk helpful information from a witness and then unfairly dump him without consideration on the proverbial ash heap. The integrity of your office requires that you play fair, even with criminals. A witness you may decide not to call to the stand may nevertheless have given you sufficient assistance in building your case to merit substantial consideration.

G. Managing the Witness' Environment

Be mindful of where the witness is going after you take his statement and secure his cooperation. If he is going back to jail, serious problems may occur unless you take precautions to keep him away from other potential troublemakers. If he goes back into the "general population," chances are some other inmate will find out he is a snitch and confront him as an enemy. When this happens, it is not unusual for the witness to lie to his accuser and deny everything or worse, to say that he was coerced into lying by you and the police. You then have a scared witness who may recant all, and you have a defense

88. 934 F.2d 822, 832 (7th Cir. 1991).
witness who will come in and tell the jury that your witness said he made it all up "just to get a deal," etc. These people also have a disquieting way of showing up unexpectedly as the predicate for a writ of error *coram nobis* or a motion for a new trial. One answer to this problem, of course, is to take advantage of the federal Witness Security Program which has a very effective chapter behind bars as well as on the outside.

You must keep the witness out of harm's way. Warn him against saying *anything* to anybody and especially to other prisoners, and have your investigator contact him *frequently* to keep the fires of cooperation burning. If you neglect the baby-sitting aspects of this business, you will get burned. If you do have access to a witness security program, know what it can do for you, how it does it, and what it can't. Then use it! If you don't have one available, start one. It is an essential ingredient of the fight against organized crime. Take note: if you fail to protect your witness and he gets killed or injured because he is cooperating, you may find yourself on the short end of a civil law suit. To understand your exposure, read *Miller v. United States*,89 *Galanti v. United States*,90 and *Wallace v. Los Angeles*.91

Please take a moment in this regard to reflect on the tragic and sobering fate of Collier Vale, as recounted by the *Los Angeles Times*:92

Collier Vale was one of the most respected lawyers in the Monterey County district attorney's office, a driven prosecutor who won numerous high-profile convictions and was a prime candidate for a judgeship.

But after 10 years as a prosecutor, where he frequently worked 60 to 70 hours a week and slowly rose through the ranks in the office, Vale felt that a single case had ruined his reputation and destroyed his career.

On a Thursday evening last month, after telling friends he was tired of defending himself against accusations that never seemed to end, Vale put a pistol in his mouth and pulled the trigger.

89. 561 F. Supp. 1129, 1139 (E.D. Pa. 1983) (holding that the government had a duty to protect its informant but not his girlfriend because she had no special relationship with the police), aff'd, 729 F.2d 1448 (3d Cir. 1984).

90. 709 F.2d 706, 710 (11th Cir. 1983) (holding that the government owed no duty of care to a bystander killed as part of the assassination of a government informant), cert. denied, 465 U.S. 1024 (1984).

91. 16 Cal. Rptr. 2d 113, 121-27 (1993) (holding that the police owed a duty of care to their witnesses and had no governmental immunity to suit).

The case that friends say led to Vale’s suicide involved the death of a confidential informant in one of his murder investigations. He was unjustly blamed for the woman’s death, his colleagues say, and he was haunted by the case.

His ordeal highlights the pressures and responsibilities prosecutors face when dealing in the shadowy world of confidential informants. It is a world where prosecutors try to protect people who sometimes can’t be protected, where blame is quickly assigned when the interests of witnesses and suspects suddenly collide.

Collier’s case was a “prosecutor’s nightmare,” said Ann Hill, a deputy district attorney who worked with Vale. “What makes it so frightening is something like this could happen to any of us, no matter how conscientious we are . . . and Collier was maybe the most conscientious of us all.”

Vale’s informant was killed in a burst of automatic gunfire, after her identity was inadvertently revealed. Local press reports appeared to blame Vale for the mix-up, and the story eventually received national attention on the tabloid television show, “A Current Affair.” Vale was extremely upset, friends said, when the controversy became a major issue in the June election campaign for district attorney.

When the family of the murdered informant filed a wrongful death suit against the county and a local police department, Vale knew he would soon face a series of hostile depositions and possibly an embarrassing, highly publicized trial.

Vale, 39, was a proud man, friends said, and he could no longer endure the indignity of being constantly blamed for a witness’s death.

“Collier saw this whole thing as humiliation and a failure,” said his girlfriend Melinda Young. Her eyes filled with tears and she slowly shook her head. “He just couldn’t let it go.”

H. Discovery

The defense has a right to everything that reflects on the credibility of the witness—maybe even your “work product” notes as a “statement of a government witness.” If you put something on paper, expect that it will have to be turned over. If it does, you won’t be embarrassed. If it doesn’t, so be it. Don’t forget United States v. Harris, which required the FBI to preserve rough notes of witness interviews. If you have any doubt about a piece of evidence, that very doubt should cause you to seek a pretrial Brady ruling from the court,

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93. Id.

94. See Goldberg v. United States, 425 U.S. 94, 101-08 (1976) (holding that a prosecutor’s notes taken during a witness interview may well be statements under the Jencks Act); see also United States v. Oqbehi, 18 F.3d 807, 810-811 (9th Cir. 1994) (following Goldberg).

95. 543 F.2d 1247, 1253 (9th Cir. 1976).
ex parte, in camera if possible. If you haven’t read Giglio v. United States\(^96\) in a while, you might want to do so.

On April 19, 1995, the Supreme Court decided a very important case discussing a prosecutor’s Brady duty to disclose “favorable evidence” to the defense, Kyles v. Whitley.\(^97\) If you are a prosecutor and have not read this case, you must do so immediately because it establishes certain affirmative discovery duties on the part of a prosecutor that, if neglected, may wreak havoc with your work. Kyles involves a prosecutor’s failure in a murder case to turn over to the defense: (1) impeachment evidence concerning key eyewitnesses; and (2) inconsistent statements made by an informant, Beanie, who was never called to the stand but who the defense claimed was the real killer of defendant Kyles’ alleged victim.\(^98\) Because five Justices decided that, had this evidence been turned over to the defense, a different result was reasonably probable, Kyles’ conviction and death sentence were overturned.\(^99\)

In rendering this decision, the Court held that a prosecutor has an affirmative duty to inquire promptly of all agencies involved in the case whether evidence favorable to the defense exists.\(^100\) Justice Souter described this duty as follows:

While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S., at 87, 83 S.Ct. at 1196-1197), the prosecution’s responsibility for failing to disclose known,

\(^96\) 405 U.S. 150, 154 (1972) (finding defendant’s due process rights were violated where information on a deal granting a prosecution witness immunity in exchange for testimony was not given to the defendant even though the prosecutor who tried the case was unaware of the deal his office had made with the witness).


\(^98\) Id. at 1563.

\(^99\) Id. at 1575.

\(^100\) Id. at 1567-69.
favorable evidence rising to a material level of importance is inescapable.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See Agurs, 427 U.S. at 108, 96 S.Ct. at 2399-2400 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. . . . The prudence of the careful prosecutor should not therefore be discouraged.101

Kyles is not the first case to put an affirmative duty on prosecutors to search out impeaching information regarding informer witnesses. In United States v. Osorio,102 the Court held that a "prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows [about the witness] simply by declining to make reasonable inquiry of those in a position to have relevant knowledge. . . . The government, as represented by its prosecutors in court, is under a duty of inquiry regarding information concerning the criminal past of its cooperating witnesses."103 The Osorio panel went out of its way to castigate the government for what it called "sloppy practice" because of its tardy disclosure to the defense of impeaching evidence.104

Equally important in the Supreme Court's opinion in Kyles is the Court's blessing of an attack by the defense on the caliber of the investigation conducted by the police as a way to defeat the legitimacy of the prosecution's case.105 In particular, Justice Souter identifies the failure of the police to investigate whether the informer Beanie was the actual killer as fair game.106 This means that a prudent investigator or a prosecutor will investigate the informer's possible complicity and duplicity in any situation where a potential defense might be (as in Kyles) that "the informer did it." Not only is such an investigation an excellent way to make sure that you have the right defendant, but

101. Id. (emphasis added).
102. 929 F.2d 753 (1st Cir. 1991).
103. Id. at 761-62.
104. Id. at 760.
105. See Kyles, 115 S. Ct. at 1571.
106. Id. at 1570 n.14, 1572 n.15.
it will save you when you do have the right defendant from the fate of the prosecutors in *Kyles.* Kyles, by the way, provides a textbook on how not to put together a case. To say that the investigation shot itself in the foot is charitable.

If, on discovery, you knowingly fail to turn over information to which the defense is entitled, you will be in big trouble. Read *United States v. Kojayan* for an example of how awful that trouble can be. Not only did the assistant U.S. attorney get into trouble in that case, but his whole office was taken to task.

See *United States v. Hickey* for a case which denied defense access to the file of a witness in the Witness Security Program on the ground that the witness was in danger. The court held that, under such circumstances, a general outline of the deal with the witness was all that the defendant was entitled to.

I. Trial tactics

(1) Motions in limine to limit cross examination and opening statement.

Although discovery is virtually limitless when it comes to factors weighing on the credibility of a cooperating criminal, careful consideration should be given to making a *motion in limine* to preclude the defense from going into inflammatory areas on cross-examination that are really a general attack on character rather than credibility.

The key to such a motion, of course, is Rule 403 of Federal Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 has been interpreted on numerous occasions to limit cross-examination of government witnesses.

107. See id. at 1571.
108. 8 F.3d 1315, 1325 (9th Cir. 1993) (vacating the defendant’s conviction and remanding on the issue of dismissing the indictment as a sanction for the government’s failure to disclose discovery and related misleading statements to the jury).
110. Id. at 710.
111. FED. R. EVID. 403.
112. See United States v. Bari, 750 F.2d 1169, 1178-79 (2d Cir.) (precluding cross-examination relating to the psychiatric history of a government witness), cert. denied, 472 U.S. 1019 (1984); United States v. Burke, 700 F.2d 70, 82-83 (2d Cir.) (allowing cross-examination on the involvement of a witness in a significant robbery but precluding cross-examination on the details), cert. denied, 464 U.S. 816 (1983); United States v. Singh, 628 F.2d 758,
In this regard, it should be argued (when appropriate) that permitting the defense to elicit extraneous and highly inflammatory information flies in the face of Rule 403 and prejudices the government by causing the jury to focus unduly on elements of the witness’ character not relevant to credibility.

This, however, is an area in which a prosecutor should tread with care. The right to confront and cross-examine a witness is a guarantee of constitutional dimensions, and a successful motion in limine in this area may backfire on appeal unless it is carefully crafted so as not to deprive the defendant of too much. United States v. Mayer113 ought to be read and digested when you are contemplating erecting a protective barrier around a testifying criminal. Mayer states in this regard that:

cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope . . . . This is especially true where a prosecution witness has had prior dealings with the prosecutor or other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecutor in exchange for the prosecutor’s actions in having some or all of the changes against the witness dropped . . . securing immunity against prosecution for the witness . . . or attempting to assure that the witness received lenient treatment in sentencing.114

The Ninth Circuit agrees with the Fifth Circuit in Mayer. In United States v. Brooke,115 Judge Reinhardt said:

We have previously pointed out that “[w]hen the case against a defendant turns on the credibility of a witness, the defendant has broad crossexamination rights.” United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984). We cannot overemphasize the importance of allowing full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary.

These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through

763-65 (2d Cir.) (limiting cross-examination based on privacy concerns), cert. denied, 449 U.S. 1034 (1980); United States v. Rabinowitz, 578 F.2d 910, 912 (2d Cir. 1978) (upholding trial judge’s refusal to permit cross-examination with respect to government witnesses’ prior act of sodomy and psychiatric treatment therefor); United States v. Glover, 588 F.2d 876, 878-79 (2d Cir. 1978) (precluding cross-examination on psychiatric history after in camera review of psychiatric records); United States v. Nuccio, 373 F.2d 168, 171 (2d Cir.) (excluding cross-examination of homosexuality), cert. denied, 387 U.S. 906 (1967).

113. 556 F.2d 245 (5th Cir. 1977).
114. Id. at 248-49 (citations omitted).
115. 4 F.3d 1480 (9th Cir. 1993).
cross-examination and otherwise is indisputably in the interests of justice. Ordinarily, such inquiries do not require the expenditure of an inordinate amount of time, and courts should not be reluctant to invest the minimal judicial resources necessary to ensure that the jury receives as much relevant information as possible. Nor should unwarranted fear of juror confusion present any impediment. Federal jurors, who are expected to follow the complex testimony and even more intricate instructions that are presented in many of our criminal cases, such as multiple conspiracy prosecutions, are unlikely to be confounded by a defendant’s inquiry into the bias and credibility of a key government witness. In any retrial, the district court should afford Brooke a full and fair opportunity to question Kearney regarding any of his past activities that are probative as to the credibility of his testimony or as to any bias that may underlie it.116

If such a motion is made, and if it is successful, it obviously has ramifications with respect to opening statements and what counsel can and cannot say.

(2) Voir Dire

Let the jury know, without making a “big thing” about it, that you are going to call a witness that is getting something in return for his testimony. Ask if the jurors will reject such a witness out of hand or if they will fairly listen to what the witness has to say. Adopt early an attitude that you are not very pleased to have to do this, but crimes aren’t all committed in heaven so all our witnesses aren’t angels, etc. Preempt the defense. If a judge is reluctant to ask these questions, point out that such questions are no different from asking a prospective juror whether he or she will give undue credibility to a police officer just because he is a police officer, etc.

(3) Opening Statement

Front matter-of-factly and briefly all the “bad stuff” including the deal, but don’t dwell on it. Follow up the bad stuff with references to matters that corroborate what the witness says. This is sometimes called the “doctrine of inoculation.” But don’t put all your eggs in the accomplice’s basket. The case stands on its own two feet. Refer as matter-of-factly as possible to the witness. The objective here is to control the manner in which the jury first hears of the dirt. If you do not do this and instead turn over the opportunity to the defense to “uncover the government’s dirty laundry,” you will be in deep tactical trouble.

116. Id. at 1489.
A trap lies waiting for you, however, unless you are careful. If you under-inform the jurors about the extent of the witness' negative baggage, a clever defense attorney might accuse you of hiding relevant information, or "gilding the rotten lily." In the prosecution of Robert Wallach, for example, the prosecution only briefly referred in its opening statement to the fact that its principal witness was a multiple felon. The defense countered by expanding in detail and revealing that the witness had committed 113 felonies, all of which except one had resulted in virtually no sentence because of his cooperation with the prosecution. The jury was then asked: "Why did these facts not come from the government? Why is the government not honest with you about the facts?" To avoid this trap, be thorough and clinical in your presentation.

(4) Jury Instructions

You must be familiar with the instructions that cover accomplices, corroboration, perjurers, drug addicts, immunity, prior convictions, the witness security program, etc. Always review them with care long before jury selection. This will cause you to look for effective ways to cope with the cautionary admonitions that always crop up when an accomplice or an informer enters into a case. Figure out your jury arguments as early as possible.

The following is excerpted from favorable jury instructions on the credibility of accomplices given in the case of United States v. Friedman, a case successfully prosecuted in 1987 in Connecticut involving corrupt New York City politicians. One significant feature of the instruction is that it advises the jury not to second-guess a prosecutor's decision to make a deal with a witness. It also advises the jury that dislike for a witness is not a basis standing alone to disregard his testimony.

INSTRUCTION

I now turn to the question of accomplices. Almost all of the important witnesses in this case are accomplices of one sort or another. An accomplice is a person who is guilty of and could be prosecuted for any crime or crimes of which the defendants are accused. The law lays down several rules which govern your treatment of accomplice testimony. In the first place, it is no concern of yours or of mine why the Government chose not to indict a certain person or if it did indict him, why it determined to treat that with leniency.

117. 854 F.2d 535 (2d Cir. 1988).
118. Id. at 568 n.7.
119. Id.
The decision of what persons should be prosecuted and what pleas of guilty should be accepted from persons who are indicted are matters which the Constitution and Statutes of the United States have delegated to the Attorney General of the United States, who, in turn, has delegated it to the United States Attorney and his counterparts in other judicial districts. It is an awesome responsibility, but the Constitution and statutes do not give you or me any authority to supervise its exercise.

Also, as I believe I told you when you were being selected, if you once come to the conclusion that an accomplice witness has given reliable testimony, you are required to act on it exactly as you would act on any other testimony you found to be reliable, even though you may thoroughly dislike the witness giving it to you.

However, the law imposes upon you stringent requirements as to how to evaluate such testimony before concluding it to be reliable. Obviously, it's much more pleasant to be a witness than a defendant. The law requires that you scrupulously examine an accomplice’s motives in persuading the Government to accept him as a witness rather than prosecuting him as a defendant. So, you can be sure that he's neither made up a story to incriminate someone nor colored the facts of an otherwise true story to make someone appear to be more guilty than he actually is.

I'm going to discuss with you in some detail the testimony of the Witness Lindenauer, not because I think his testimony is more important than any other witness—that is a question wholly within your province to determine—but simply because all attorneys in the case spent so much time on this particular aspect of his testimony that it lends itself to illustrating the principles involved.

In the first place, Lindenauer told you that he had lived a life characterized by acts of wrongdoing, many of which involved deception. This is obviously a factor you will take into account in determining the reliability of his testimony.

In the second place, he was able to negotiate a plea which considerably reduced the total scope of the sentence that might have been imposed upon him had he been convicted of all his wrongdoings.

And finally, he hopes, as he specifically told you, that the testimony he gave in the case will induce the judge before whom he pled guilty to be lenient in imposing sentence.

These circumstances could have affected Lindenauer in at least three possible ways. They could have caused him to make up imaginary facts in order to incriminate some or all of the defendants, or they could have caused him to color existing facts to make them appear to be more incriminating than they actually were. Or, on the other hand, they might have caused him to conclude that his best hopes of salvation was to be able to convince the judge who ultimately sentences him that he was scrupulously honest in his testimony before you. You should take account of these and any other possibilities that might occur to you in evaluating his testimony.

The foregoing principles apply in varying degrees to all so-called accomplice witnesses. Some face sentences and some testi-
fied under grants of various types of immunity, which greatly reduced the possibility of their ever being prosecuted. They all, in one way or another, could conceive it to be in their own best interest to achieve and retain the good will of the Government.

Now, in this connection, what you're concerned with is the witness' perception of this situation. And much has been argued about the risk he runs of perjury if he testified untruthfully. In that situation you must look at his perception of what would happen to him, and it might well be argued that his perception is that the best way of avoiding such things would be to curry favor with the only person who can prosecute him for perjury; namely, the Government.

On the other hand, it may just as logically result in his thinking that the best way to avoid it is to avoid the commission of perjury. It's his perception that you focus on, what you think he thinks, how you think that would influence his testimony.

Of course, that's not the only thing you consider. You consider every element of credibility in dealing with the witness, how his testimony fits in with other evidence in the case, and all the other things that I mentioned to you.120

(5) Direct Examination

Make it pointed, and at times make it sound to the jury like cross-examination. You are not the champion of the witness. You are a person charged with getting at the truth; and you aren't at all embarrassed by having to call a crook to do it. Bring out all the problems such as every benefit being extended to the witness in consideration of his testimony, previous inconsistent statements, etc., and confront the witness with them. Don't wait for the defense. You must control the manner in which the jury first hears of the dirt or the dirt will end up on you. Go on the offensive. Section 607 of the Federal Rules of Evidence allows you to do this.121 See also United States v. Necoechea,122 United States v. Winter,123 United States v. Hedman,124 and United States v. Craig,125 for the proposition that this kind of anticipatory material is appropriate on direct. The jury must rely on you to get at the truth! If a witness lied to someone, you must bring that out. Ask the witness whether he lied, and then tell him to explain why he did that. Probe his attitude about testifying. Frequently it can be

120. Jury instructions on file with the author. A more redacted version of the instructions can be found in Friedman, 854 F.2d at 568 n.7.
121. Rule 607 of the Federal Rules of Evidence states: "The credibility of a witness may be attacked by any party, including the party calling him."
122. 986 F.2d 1273, 1280 n.4 (9th Cir. 1993).
convincing—if it is candid. If there is a lot of negative information, weave it in slowly rather than giving the jury too much to swallow in one bite.

Your goal in this regard is to steal every bit of legitimate thunder that the defense might be able to muster on cross. Vaccinate the jurors by controlling the manner in which they are exposed to the problems. If the jury has already heard it from you, it loses a lot of its sting. Put in a different perspective, the best defense that you can provide for a witness against vigorous cross-examination is to have revealed the problems yourself to the jury during opening statement and then on direct. If the jury first hears about such damaging and troublesome matters from you, the defense is disarmed and you build your own credibility. Under your skillful questioning, you can couch these matters in a sterile setting, minimize their dramatic impact, and cushion them with an appropriate explanation. Examples of such material are prior convictions, grants of immunity or leniency, deals, promises, rewards, perjury, mistakes, and inconsistencies. In *People v. Gordon*, the California Supreme Court even went so far as to sanction an admonition by a prosecutor to a jury in opening statement that one of his own witnesses might not be completely truthful. The court noted that “a party does not necessarily have a free choice of witnesses but must take those who know the facts, and therefore cannot vouch for them.”

As discussed above, cast yourself temporarily in the role of the defense attorney and figure out how you would cross-examine your own witness. Make a list of the areas you would attack, and then seek ways to prevent the attack by neutralizing the area before the defense attorney gets a chance.

If the witness is in the federal Witness Security Program and receiving subsistence payments, go into it on direct. Otherwise, on cross-examination the defense will ask—“How much are you getting for your testimony?”—and the answer may crush your case. Have a game plan to handle every aspect of the program if it is attacked as a

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126. *See* United States v. Henderson, 717 F.2d 135, 137-38 (4th Cir. 1983) (allowing the prosecutor to introduce evidence of its witness' plea agreement before it was attacked on cross-examination); United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984) (allowing the prosecution to introduce the fact that its witnesses had been granted immunity).


128. *Id.* at 304.

129. *See* United States v. Partin, 601 F.2d 1000, 1009-10 (9th Cir.) (providing an example of a jury instruction about payments to witnesses), *cert. denied*, 446 U.S. 964 (1979).
method of purchasing testimony. What will you say in final argument?

If you anticipate a defense based on the argument that the informer/witness is really the perpetrator, after *Kyles* you probably have the option of using direct to put on evidence in the form of “conscientious police work,”\(^{130}\) that the police investigated this possibility and concluded that it was not true. Or, you might want to wait until redirect to wheel out these guns. The point here is that you must have a cogent plan to meet this contingency *before* the trial starts.

If you like to write out verbatim the questions that you intend to ask a witness with the answers that he has told you he will respond with, be careful that you are not accused of perjuriously scripting the witness’ testimony. Whatever you do, do not give a copy of such a document to the crook. If you do, it may come back to haunt you if the crook decides to cross back to the underworld with the “script” in his possession. Such a script was used (unsuccessfully) to accuse a U.S. attorney in Oklahoma of manufacturing evidence.

(6) Corroboration

As I have already mentioned, when evaluating your evidence and planning your case, always start from the proven rule of thumb that the jury will not accept the word of a criminal unless it is corroborated by other reliable evidence. The jurors will also pick and choose, accepting that part of a crook’s testimony that is corroborated and rejecting that part that is not. I cannot stress this point too strongly. If you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informer, get back out in the field and go back to work. Corroboration is to an accomplice’s testimony what gasoline is to a car: without it you get nowhere. The best thing that can happen to you is that the leads provided to you by the witness will uncover so much other good evidence that *you won’t have to call him at trial*. Deciding not to use an accomplice, however, can be a difficult judgment call, especially when his evidence is very probative. On occasion, you may not have to make this decision until late in a trial when you can get a better sense of how everything is going than is possible before a trial starts. To retain the option of calling him, simply do not refer to his identity during voir dire or your opening statement. Simply say, “And we will prove that the defendant personally made the decision to execute his rival” without saying

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how you intend to do so. Then, if you decide at the end of your case-in-chief that you need the accomplice's testimony, you can use it without fear of claims of sandbagging—so long as you have completed discovery and notified the court you are retaining this approach as an option. Do not surprise the judge. Some might deny you this opportunity if you do.

At the risk of repeating myself, let me offer yet another example of this important principle: the Walker/Whitworth espionage series of cases. Because of glaring weaknesses in the Whitworth case, John Walker himself was called as a witness against his accomplice. This tactic was successful, but the jurors' observations as reported in the *Washington Post* are very educational:\textsuperscript{131}

Jurors expressed considerable sympathy for Whitworth and extreme distaste for Walker, the chief witness against the former Navy colleague he recruited into the spy ring.

In the first afternoon of deliberations, when they were finally permitted to express their views about the long trial, jurors "vented our individual feelings," [juror] Young said, and there was an outpouring of hostility against Walker.

"The man gives a new meaning to the word low," juror Minda Amsbaugh, a bank officer, said.

Foreman Neumann called Walker "the most villainous person I've ever seen," and added, "I personally would feel that it's not just," if Walker were released from prison before Whitworth.

"John Walker was clearly a worm, clearly a despicable character," Young said. "There was a feeling it was just too bad there wasn't another person on trial," he added, referring to Walker. "Walker seems to have gotten the better of this deal and Jerry's left holding the bag."

But, he said, the jury believed that Walker was "essentially telling the truth" in his testimony about Whitworth's participation in the ring.

Walker agreed to plead guilty to espionage and is to be sentenced to life in prison in return for more lenient treatment for his son, Navy Seaman Michael Lance Walker, who also pleaded guilty and is to be sentenced to 25 years.

"We all had our favorite little lies that we thought we detected" in Walker's testimony, Browne said, "but in the end it didn't make a difference because there was enough corroborating testimony on all the major issues." He said he thought payment schedules seized in both men's homes were "especially damning," a factor also cited by Neumann.\textsuperscript{132}


\textsuperscript{132} Id. (emphasis added).
Physical evidence is the best. Corroborate *everything* you can. Prove the guilt of the witness as well as the guilt of the defendant. Corroboration is what the jurors want and what they look for—make it visual. Prepare charts, blow up pictures, etc.

In choosing the order of witnesses, consider corroborating the witness before you put him on the stand where it makes chronological sense; for example, have the storekeeper identify him first as the bystander robber, then he can take the stand and identify his killer accomplice. You are allowed to prove the substantive guilt of your witness to establish the truth of his claim to firsthand knowledge of the crime in question. The fact of his guilty plea is also admissible, but a limiting instruction is required. Such testimony, is tricky, and should be handled with great care. The witness' plea is not admissible directly to prove a defendant's guilt, only to reflect on the witness' credibility, on his first-hand knowledge, or to dampen claims that the witness has been given a free ride for his cooperation. Whatever you do, don't say, "And our turncoat witness George Bultaco will tell you he has pleaded guilty to the very same crime for which the defendant is on trial."

If he is going to testify about his arrest, put the arresting officer on first to tell the jury what happened. If the jurors have already heard it from someone else, it is easily accepted by them when the same thing comes from him.

(7) Preparation of the Witness for Cross-Examination

Prepare the witness for cross-examination, but be careful not to create a rehearsed witness who can be unmasked as such by the defense. Your witness must be able to survive a vigorous cross-examination to have any substantial value in the eyes of the jurors.

The main thought to pound into the witness' head is that he must not play games with the defense attorney or allow himself to get upset. The only specific instructions I ever gave a witness was to remember at all times that testifying is not designed to "get anyone" or to protect himself, it is a time to tell the truth about everything no matter who asks the questions—me, the defense attorney, or the judge. If a foolish defense attorney ever asked such a witness what I told him to say

133. See United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981) (holding that a guilty plea is admissible for the limited purpose of evaluating the witness' credibility).

or do on the stand, he was told "Mr. Trott told me to answer all the questions truthfully no matter who asks them, Mr. Trott, you (referring to the defense attorney), or the judge." Also, the witness should not play to the jury by looking at them. Jurors do not like this.

(8) Final Argument

Accentuate the corroboration. Brush off the defense. Tell the jury:

We know that. I told you all about that during my opening statement and again during the direct examination! The issue in this case isn't whether Terry Miller is a crook with a prior felony conviction who lied to the police after he was arrested. The issue for you to decide is whether he has told the truth under oath here in court about his crime partner (point out the defendant) Alfred Mason, the defendant. And with that in mind, let's talk about the evidence that corroborates his testimony and proves independently and conclusively that Alfred Mason murdered David Kernan.

One of my favorite tactics was to suggest to the jurors that they set aside at the outset of their deliberation the testimony of the accomplice for the purpose of testing the case on the basis of the rest of the evidence. The jury will do this anyway, and it enables you to argue that the case is "there" without his testimony. "Let's suppose that Terry Miller (the accomplice witness), himself, was killed during the shooting and never made it into this courtroom," I would tell them, "and let's see what the rest of the evidence shows." Then I took a Sherlock Holmes approach to "solving the case," and the jurors usually loved it. They want to be the detectives, not just the jurors. Invite them to solve it with you. Dwell on the strength of the circumstantial evidence. Then after I described an airtight case against the defendant, I then told the jurors to add the accomplice's testimony to the mix and the defendant's guilt is established not only beyond a reasonable doubt, but to an absolute certainty. "Terry Miller's testimony is just frosting on the cake; he is not the government's 'key witness,' as the defense would have you believe."

In making this argument, you can fashion out of the corroborating and circumstantial evidence a web that points towards and snares the defendant. If you work towards this argument from the beginning of your case preparation, it will frequently fall easily into place. Its purpose among other things is to give the jury a device to shift the focus from your witness back to the defendant and to the incriminating and corroborating evidence. Do not buy into what the defense attorney says the case is all about.
One aspect of the witness that you can emphasize is his motive to tell the truth. Point out that he can only have a motive to tell the truth because that is what will get him what he wants. Lies will only destroy the deal and cause him to be prosecuted for perjury:

He wants to stay out of jail. All he has to do to stay out is tell the truth, not lie. Lies will put him right where he doesn’t want to be, in prison. His motive based on the evidence and the record can only be to tell the truth!

To this you can add that “by stepping forward and telling you what he knows, he has made himself publicly into an informer, a snitch. Do you think that a person does that lightly? Of course not. That is not something that a person would willingly do if it were just make believe!”

During your rebuttal argument, be prepared if necessary to justify and defend any deal that you have made, but do not vouch for the witness! Read United States v. Smith135 to see what you cannot say to a jury in this regard. Point out that crooks don’t usually commit their crimes on videotape and leave copies lying around for everyone to review. Point out also that we can’t go to central casting to get our witnesses; we have to go to people who know something about the crime and, unfortunately, some of those people are going to be the crooks themselves. You didn’t choose these witnesses; the defendant did by recruiting them into his scheme. They aren’t the government’s friends, they are his!

You are not at all happy about having had to make this deal, but you are not apologizing for it either. “The integrity of the government demands it. It is simply unacceptable to convict only the bagman and let the crooked politician get off. If we never made deals with the little fish, the smart big fish would always get away. Is that what you want to happen?” Once again, get the spotlight off your witness and onto the real crook.

This is also a good time to dust off the tried and true argument to the effect that, when a defense attorney has the law on his side, he talks about the law; when he has the facts, he talks about the facts; but when he has neither, he attacks the prosecutor and the government.

Be very careful how you use the plea agreement. Again, you may not “vouch” for the witness. A number of cases in different circuits

135. 962 F.2d 923, 933-36 (9th Cir. 1992) (holding that the prosecutor wrongfully vouched for his witness by telling the jury that the witness would not lie because he knew that he would be subject to prosecution for perjury).
have severely criticized prosecutors for misuse of the terms of a plea agreement, referring to the polygraph, etc. For a comprehensive view of the problems in this area, read *United States v. Brown*,136 *United States v. Kerr*,137 *United States v. Smith*,138 and *United States v. Perez*.139

In 1883, over a century ago, Prosecutor William H. Wallace assumed the task of prosecuting the infamous Frank James, brother of Jesse, for murder.140 To do so, Wallace called a member of the James gang to the stand, one Dick Liddil.141 Liddil was a convicted horse thief, an accused murderer, and a traitor to the band who was trying to evade the punishment his crimes deserved.142 As was to be anticipated, Liddil's credibility and character came under fierce attack by the defense as did the State for "its misconduct" in making an unholy deal with him.143 Here is Wallace's reply to the jury. Although some of it certainly would be inappropriate under today's standards, you might find much of it useful:

Dick Liddil was a member of a band of train robbers, known as the James gang. This nobody denies. If he had not been, he could not have rendered the State the vast benefit that he has. When men are about to commit a crime they do not sound a trumpet before them. They do their work in secret and in darkness. Neither when they are forming bands for plunder or death, do they select conscientious, honest citizens. A man contemplating murder would not say, "come along, Mr. Gilbrath, or Mr. Nance [both jurors], and join me in my fiendish task." Their work is done when honest, law-abiding men are asleep, and "beasts creep forth." For this reason, when the State would break up a band of criminals, it must depend upon the assistance of one of their peers in crime to do it. Hence, it is a custom, as old as the law, to pick out from a desperate band one of

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136. 720 F.2d 1059, 1069-72 (9th Cir. 1983) (holding that the admission of a witness' plea agreement with special attention paid to a clause in which the witness promised to undergo polygraph testing was error).
137. 981 F.2d 1050, 1052 (9th Cir. 1992) (finding error where the prosecutor told the jury that he had accepted a plea agreement from a witness because of his belief that it was truthful).
138. 962 F.2d 923, 933-36 (9th Cir. 1992) (finding error where the prosecutor responded to defense attacks on a criminal witness' credibility through multiple statements by the prosecutor claiming that he would only put on truthful evidence and that his witnesses were therefore truthful).
139. 67 F.3d 1371, 1379 (9th Cir. 1995) (upholding conviction where a prosecutor merely responded to a defense attack on the plea agreements of witnesses after the defense introduced the agreements into evidence).
140. *See William A. Settle, Jr., Jesse James Was His Name* 139 (1966).
141. *Id.* at 140.
142. *Id.*
143. *Id.*
their own number, and use him as a guide to hunt the others down. No honest, law-abiding man objects to this. When men go about where this is done, crying "perfidy," "traitor," "treason," you can put them down as the enemies of good government, or so steeped in prejudice that they know not what they do. Liddil, the least depraved man in the most secret, desperate band perhaps the world ever saw, has thus been used; and the State has chosen, also, to call him as a witness in this case. Mountains of abuse have been heaped upon him; the English language has been ransacked for terms of vilification. Once, forsooth, and after he got to be a train-robber, too, he was a splendid fellow; splendid enough to be the boon companion of so pure and great a man as Frank James. You remember that the defendant himself testified that Liddil, passing under an alias, was his guest, ate at his table, and slept under his roof. Liddil was one of the heroes then of whom we have heard so much. But suddenly he makes a change. He leaves the shades of crime and comes out into the sunlight of law and order; and all at once, strange to say, he is transformed into a "viper," a "villain," a "scoundrel," a "demon," or such "execrable shape," as his old tutor's counsel can give him. But let the attorneys for the defense go on with their abuse; it is part of their business. I shall not retort by calling the defendant a "viper," a "perjurer," a "demon," and the like....

It is said that Dick Liddil surrendered, and bargained with the Governor of the State, and [Police Commissioner] Craig and [Sheriff] Timberlake to convict Frank James, guilty or innocent, in order to obtain immunity for himself. I deny that. There is no proof about it, and I have a right, in answer, to emphatically and positively deny it. The only contract with Liddil was that always made with those turning State's evidence, as we call it, namely, that he should tell the whole truth, and nothing but the truth; and if he told a falsehood he did it at his peril, and the contract was ended.\footnote{William H. Wallace, Prosecutor, Closing Argument in State v. James, (Sept. 1883) Daviess County Circuit Court Records, Criminal Files No.27 and No. 44, Gallatin, Missouri (on file with the author).}

I'm sorry to report the tag to this story: Frank James was acquitted.\footnote{See \textit{Settle}, supra note 140, at 140.} Why? Because the \textit{only} evidence tying him to the murder came from Dick Liddil.\footnote{\textit{Id.}} So there's nothing new to my claim that an absence of corroboration will be fatal to your case.

Finally, and I repeat, never at any time lose control of the witness. He will try to manipulate you if he can, thinking that you need him, not vice versa. Be prepared to say "no" to outlandish requests and let him know at all times that you are in charge. This can be done very politely, and believe it or not, he will usually respect you for it. He must trust you to a certain degree, but it doesn't hurt to have an element of fear built into the trust and respect. You do not want to let
him think he can cross you and get away with it. If he commits perjury, prosecute him for it. That’s your duty. The truth is your stock in trade!

**Conclusion**

Unfortunately, using informers is both central and extremely perilous to many prosecutions. As you decide how or whether to use them, remember what effect their background and their inherent conflicts will have on average jurors. However, jurors will understand the need for snitches, co-conspirators, and informers and will not attach their disgust with them to your case if you are careful in your approach. Stay mindful of the welter of ethical, constitutional, and strategic issues that surround the use of such witnesses, and you will keep your head above water and be able to successfully prosecute criminals who might otherwise escape punishment.