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Witnesses display allegiance in probation trial

Some probation testimony hostile

By [Milton J. Valencia](#) | GLOBE STAFF JULY 07, 2014

One of the prosecution witnesses in the ongoing corruption trial of three former probation officials seemed to change his testimony so often that a defense attorney asked him, "Are we making this up as we go along?"

Other witnesses wanted to recant earlier statements, forcing prosecutors to "impeach" them. This was done so many times, a juror had to ask the judge what it meant.

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And still some witnesses, like former state senator Jack Hart, have testified that they could barely remember anything at all.

Hostile witnesses in white-collar criminal trials are not unusual. But they have been especially plentiful, and vexing, in the trial of former probation commissioner John O'Brien and two of his deputies on charges that they conducted an illegal hiring process within the department, exchanging jobs to politically connected candidates for legislative favor.

Legal analysts say that hostile witnesses are characteristic of the type of white-collar trial that is playing out in the federal courthouse in Boston, in which prosecutors are basing their case on a complex legal theory. Witnesses will either embrace the theory that crimes were committed or reject it.

"This is why we have trials," said Stephen G. Huggard, a defense attorney with Edwards Wildman and a former federal prosecutor and former head of the US attorney's public corruption unit in Boston.

"If you're asking someone to testify in a case, and they don't think it's a crime, they're going to be a difficult witness," Huggard said.

And difficult witnesses pose challenges for lawyers on both sides of the case.

“How can you use a witness to support your position, if you’re fighting with the witness to get your point across?” said Thomas Drechsler, a trial attorney in Boston.

Martin Weinberg, a Boston defense attorney, said jurors can tell when witnesses aren’t being cooperative, and the goal for the lawyers in the case is to make sure the witness looks aggressive, not the questioner.

“You don’t need the words, the testimony,” Weinberg said. “Juries can be just as impressed by testimony that is evasive, that’s not responsive, that’s inflammatory, and you try to elicit that from the witness.”

He added, “The goal is . . . to get the jury to understand that the witness, because of their bias . . . is not looking the jury in the eye and telling them the honest truth.”

O’Brien, the Probation Department commissioner from 1998 to 2010, and deputies Elizabeth Tavares and William Burke III face up to 20 years if convicted of charges including racketeering and mail fraud. Prosecutors have accused them of running the department like a criminal enterprise by hiring job candidates sponsored by legislators over more qualified applicants, effectively bribing them for legislative favors.

Defense lawyers contend that their clients did nothing illegal, saying the department’s hiring was political patronage typical of Beacon Hill.

Throughout the trial, witnesses have used their testimony to declare their own views on the case. Legislators who have testified, for instance, said they saw nothing wrong with recommending candidates for jobs.

“I got to know Jack, Commissioner O’Brien, during my years on the public safety committee,” state Representative Michael Costello, a Democrat from Newburyport, told jurors early last month. “I think I called the commissioner the day this story broke to wish him luck on what was happening.”

Costello testified under an immunity agreement with prosecutors, though he refused to meet with them to go over his testimony before taking the stand.

Other witnesses more favorable to the prosecution have been challenging for the defense.

Edward Dalton, a former regional administrator who acknowledged he had opposed O’Brien’s appointment and resented that he was passed over for a promotion, was so snarky toward defense lawyers that they asked him at one point, “Do you find these proceedings to be amusing?”

Other witnesses have appeared to not want to be there at all. Hart said he could not recall specific occasions so many times that Assistant US Attorney Fred M. Wyshak Jr. asked if he had a memory problem.

State Representative Anne M. Gobi, a Democrat from Spencer, insisted that she had not known that then-representative Robert A. DeLeo was seeking to become house speaker when he called her randomly in early 2008, asking if she wanted to recommend anyone for a Probation Department job.

The Boston Globe and Statehouse News Service had published multiple articles in the previous months, reporting that DeLeo and others were jockeying to replace House Speaker Salvatore F. DiMasi.

“Do you read the newspaper?” Assistant US Attorney Karin M. Bell asked Gobi. Bell was not allowed to press further.

On multiple occasions, prosecutors have had to impeach witnesses who they say have not been forthcoming and have contradicted their previous testimony.

Prosecutors argued, for instance, that Brian Murphy, a regional administrator for the Probation Department, gave conflicting accounts of some candidates’ qualifications. And Kelly Manchester, a Probation officer from New Bedford, allegedly recanted previous testimony that state Senator Mark Montigny lobbied Probation officials for her to be hired in 2007. Manchester was dating Montigny at the time.

A juror asked US District Court Judge William G. Young to explain what it meant to impeach a witness, after prosecutors had done so several times. Young explained that it meant pointing out inconsistent prior statements, to question the credibility of the testimony.

Janet Mucci, a longtime probation official who retired in 2011, was one of the few witnesses who conceded testimony for both sides. She acknowledged for prosecutors that regional administrators complained they were being forced to hire O’Brien’s pre-selected candidates, which goes to the heart of the prosecution’s case.

Mucci later acknowledged for defense lawyers, though, that patronage had long been part of hiring in the Probation Department.

“You liked Commissioner O’Brien, right?” she was asked.

“I did,” she said. “I do.”

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