Evidence Blocking: How the Defense Can Define the Legal Landscape at Trial

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Abstract

A defense attorney can use the rules of evidence and procedural aspects of the court to turn evidence rulings in his favor. In this Article, Professor Rapping outlines several methods of challenging evidence put forth against the defense.

I. Introduction: The World Versus Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, "yes." However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury's own viewpoint. In the end, the picture the

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The term "evidence blocking" and the ideas set forth in this Article come from the author's colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this Article that was not taken from Mr. Stern, including examples presented.

jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture painted for the jury is the one that matters is central to the trial lawyer's ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are those facts that actually occurred surrounding the event in question in a given case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are those facts that are presented at trial. It is from those facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, defense attorneys have a huge advantage over the prosecution. The prosecutor tends to believe he knows the "truth." He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He cannot move from the picture he has concluded in his mind to be "true." Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the "truth." She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, which were not anticipated. In that sense she is better equipped to see the picture the jury sees and to effectively argue that picture as one of innocence; or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. It is necessary to reject the version of events that are sponsored by the prosecution, as they are a version that points to the client's guilt. A

defense attorney must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete, they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory, but to an objective observer has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution's theory ultimately is right or wrong, this mindset taints the ability to critically think about the case.

Good defense attorneys do not get caught in this trap! They understand that the "truth" is something they will almost certainly never know and, more importantly, will not be accurately represented by the evidence that makes it into the trial. They understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. They know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, defense attorneys understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. That will never be known. Defense attorneys deal with the facts that will be available to the fact-finder; to do otherwise would be to do a disservice to the client.

For example, imagine a case that hinges on one issue: whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom claim to have witnessed the incident in question. Each of

the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. Defense attorneys must also see the case as a red light case. These are the only facts of the case; even assuming the ten nuns were correct–that the light was green–those facts are irrelevant to this case and the jury that decides it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming the facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become the facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant.[1] The prosecution must build that case beyond a reasonable doubt.[2] The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if the defense attorney can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts

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[1] United States v. Gooding, 25 U.S. 460, 471 (1827) (stating that "the general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction").

[2] *In re* Winship, 397 U.S. 358, 364 (1970) (stating "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

that can successfully be kept out of the case, the less bricks available to the prosecution from which to build the case against the client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove defense attorneys to assume that, if the prosecutor wants a piece of evidence admitted, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent; assume he knows what he is doing; assume that fact is good for his case, and, therefore, bad for your client. Thus, a defense attorney does not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of the defense before considering whether that fact can be excluded from the trial and how the case will look without it. Far too often, defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from trial. This strategy puts the cart before the horse. Every fact must be viewed critically, and there must be consideration on whether that fact is necessarily going to be a part of the case before embracing it.[3]

The prosecutor obviously knows his case, and how he plans to build it, much better than the opposition does. If defense attorneys accept the premise that prosecutors tend to do things for a reason–that is, to help convict your client–then it follows that any fact the prosecution wishes to use to build its case against the client is one that should be kept out of evidence. Even if defense attorneys are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This strategy defines a method of practice coined by Jonathan Stern as "evidence blocking." Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

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[3] Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the "facts of the case." These are "facts beyond control." At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

It is helpful to think of evidence blocking in four stages: (1) suppression or discovery violations, (2) witness problems, (3) evidence problems, and (4) presentation problems.

A. Suppression or Discovery and Other Statutory Violations

The first stage to consider when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. Defense attorneys must think creatively about how evidence gathered by the State may be the fruit of a constitutional violation. Generally, they consider violations of the Fourth, Fifth, and Sixth Amendments to the United States Constitution. They look to any physical evidence seized by the government, statements allegedly made by the client, and identifications that arguably resulted from a government-sponsored identification procedure. They consider theories wherein this evidence was obtained illegally and move to suppress that evidence. They also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example is a motion to exclude evidence based on a violation of the law of discovery. How defense attorneys litigate these issues will define how much of the evidence at issue is admitted at trial and how it can be used. They must use their litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness's basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. A defense attorney must be thoughtful about whether a witness has a Fifth Amendment privilege.[4] The attorney must also consider marital privilege, attorney-client privilege, and any

[4] The Fifth Amendment states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. Defense attorneys should always be on the lookout for information that arguably renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These examples are merely a sample of the witness problems that exist, but nonetheless are indicative of the overall caution a defense attorney must take.

C. Evidence Problems

While witness problems relate to the witness herself, defense attorneys must also consider a third stage of evidence blocking: problems with the evidence. Even with a witness who has no problems such as those described above, there may be problems with the evidence the Government wishes them to present. Perhaps the information the witness has is barred because it is hearsay. A defense attorney must also consider whether the evidence is arguably irrelevant or whether the evidence is substantially more prejudicial than probative. These examples are again simply a small fraction of the evidentiary problems that are present and that a defense attorney must face.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. For example, maybe the Government is unable to complete the necessary chain of custody, i.e. the prosecutor may be missing a witness who is critical to completing the chain of custody. Further, suppose the prosecutor has never been challenged with respect to chain of custody and is unaware of what witness he needs to get the evidence admitted. By being alert and proactive, a defense attorney may successfully exclude the evidence the prosecutor needs to make a case against your client. Another example of a presentation problem occurs when the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is one where a prosecutor is unable to ask a proper question (*e.g.*, leading on direct). These are all examples of problems the prosecutor could have in getting evidence

before the jury if the defense attorney is paying attention and making the appropriate objections.

IV. How Do You Raise an Issue?

If a defense attorney decides there is evidence that should not be admitted at trial, she must consider the best method for bringing the issue to the court's attention. She essentially has three options: (1) file a pretrial written motion in limine, (2) raise the issue orally as a preliminary matter, or (3) lodge a contemporaneous objection. There are, of course, pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing.[5] For any motions that must be filed pretrial, a defense attorney should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should the defense attorney anticipate an evidentiary issue in advance of trial she may raise it with the court, which may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? First consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives the defense attorney a chance to educate the judge on the issue. Judges, like most people, do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to

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[5] In Georgia, for example, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion. GA. CODE ANN. § 17-7-110 (2008).

guide her, it is more often than not the prosecutor.[6] Therefore, the defense attorney is often better off having had the chance to educate the judge than to rely on her ruling in the defense attorney's favor on a contemporaneous objection when the answer is not obvious.

A second reason for filing a written motion pretrial is that the defense attorney is entitled to a response from the prosecutor. This response benefits her in several ways. First, every time she forces the prosecution to commit something to writing, she learns a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If the prosecutor characterizes a witness's testimony in a particular way and that witness ends up testifying differently, defense counsel has an issue to litigate. Presumably, the prosecutor accurately stated in his response to her motion what the witness told him or his agent. Defense counsel now is entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had she not forced the response to her motion.[7]

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion the defense attorney is in a position to ask for sanctions. Possible sanctions a defense attorney could request include having the motion granted, excluding some evidence, or receiving a jury instruction. A defense attorney should be creative in the sanctions requested.

A fourth reason is that when a defense attorney files a motion, she gets a hearing. Pretrial hearings are great. They give us a further preview of

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[6] To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, it may factor into your decision about whether to object contemporaneously.

[7] One of Jonathan Stern's cardinal rules I have taken to heart is that you always want to be litigating something other than guilt or innocence.

the prosecution's case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever possible is that it increases the size of the client's court file. Although perhaps not obvious, a thick court file can be beneficial to the client in several ways. The sheer size of a large court file is intimidating to judges and prosecutors, as it is often an indicator of the amount of work that will go into trying the case. Judges like to move their dockets. Thick case files tend to mean trials that take a long time to complete. Judges may be less likely to force a defense attorney to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas for, or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to the client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, the defense attorney is better preparing herself to deal with the issue and to consider how it impacts the trial strategy.

A final reason for filing pretrial motions even when not required is that the defense attorney appears to be honest and concerned with everyone getting the right result. By appearing to be on the "up and up," a defense attorney can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial? One is certainly that the defense attorney gives the prosecution a heads up to an issue she seeks to raise. To the extent that she identifies a problem with the government's case, they may be able to fix it with advance notice.[8] Certainly this is an important consideration that must be factored into her decision about whether to raise an evidentiary issue in a pretrial writing. A second issue–which is much less of a concern–is that it allows the prosecutor to do the research he needs to do to address the legal issue

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[8] Some problems are easier for the prosecution to address in advance of trial if it is aware of them. An example may be an inconsistency in the testimony of two prosecution witnesses. If alerted to the inconsistency prior to trial, through witness preparation the prosecution may be able to better explain the discrepancy. Other problems cannot be so easily corrected. One example may be a piece of evidence that was lost by the police department. Because this error cannot be so readily undone, there is less likely a risk to raising it in a pretrial motion.

the defense attorney raises. Certainly by filing a pretrial motion she allows everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling. To the extent this holds up the trial, there is always the risk the judge will fault the defense attorney for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How to handle any given issue must be the product of careful thought and analysis.

V. Conclusion

Defense attorneys must take advantage of any tools at their disposal to alter the landscape of the trial in their client's favor. In order to do this they must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against their client, they may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against the client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues the defense attorney stands to derive residual benefits that will shape the outcome of the trial.