Lessons From High-Profile Witness Tampering Allegations

By **Kenneth Notter** (September 6, 2023, 5:05 PM EDT)


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Witness tampering has been in the news recently thanks to two high-profile criminal defendants — former President Donald Trump and FTX founder Sam Bankman-Fried.

Days before a fourth grand jury indicted him, Trump attacked a grand jury witness in social media posts, calling the witness a "loser" and saying that the witness shouldn't testify.

Trump separately warned in an all-caps post: "IF YOU GO AFTER ME, I'M COMING AFTER YOU!"[1]

The Superior Court of Fulton County, Georgia — which is overseeing the Georgia v. Trump case — took note, imposing bail conditions to prohibit any "direct or indirect threat of any nature" against any co-defendant or witness.[2] Likewise, the judge in the Washington, D.C., election interference case warned Trump about witness tampering.

Bankman-Fried has drawn similar accusations of witness tampering. According to the government, he supplied a reporter with pages from a government witness's diary to harass or discredit the witness.[3]

As a result of that and other conduct, the U.S. District Court for the Southern District of New York revoked Bankman-Fried's bail after finding probable cause that Bankman-Fried had attempted to tamper with witnesses.[4]

As these high-profile cases illustrate, allegations of witness tampering carry substantial consequences. By following certain best practices, however, defense counsel can mitigate the risks to the client — and to themselves.

Witness Tampering Basics

A classic example of witness tampering is the mob defendant who threatens to break a witness's legs if the witness testifies at the defendant's trial.

But the federal and state witness tampering statutes cover far more than that. They broadly prohibit intentionally interfering with an official proceeding or the investigation or reporting of a crime.

The federal witness tampering statute, for example, covers everything from corruptly hindering someone from reporting a possible crime to intentionally harassing a person on social media to dissuade them from attending a congressional hearing.[5]

State witness tampering statutes are similarly broad.[6]

The penalties for witness tampering are stiff. Under federal law, witness tampering is punishable by 20

or even 30 years' imprisonment depending on the means used.

State witness tampering statutes are only mildly less punitive, with maximum sentences typically ranging from five to 10 years' imprisonment.

Risks

Every criminal case or investigation presents the possibility, though typically remote, that the client or defense counsel will face accusations of witness tampering.

The chief risk for clients and lawyers from such allegations is indictment. For clients, that risk is grave enough that, as the U.S. Court of Appeals for the Ninth Circuit put it last year in its U.S. v. Lonich decision, the "best advice for a potential criminal defendant is not to talk to anyone about anything."[7]

Though federal law provides a safe harbor for bona fide legal representation services, defense lawyers are at risk, too, and must affirmatively prove their conduct falls within the safe harbor provision.[8]

Beyond indictment, allegations of witness tampering can lead to a client's bail being revoked. As illustrated by the Bankman-Fried case, the allegations need not be proved; there need only be probable cause to believe witness tampering has occurred for a court to revoke a defendant's bail if the other relevant factors suggest pretrial detention is necessary.[9]

And pretrial detention inflicts a serious toll. The loss of freedom and social isolation may pressure some detained defendants to forgo potentially winnable trials in favor of guilty pleas. Those defendants who do go to trial are at a disadvantage; with only limited access to counsel, detained defendants may struggle to effectively assist counsel in preparing for trial.

Short of revoking bail entirely, courts may impose more onerous conditions of release for defendants accused of witness tampering. Stringent protective orders limiting access to discovery may impede or increase the cost of pretrial preparations. And conditions like house arrest or travel restrictions may make it impossible for a defendant to make a living while awaiting trial.

For defense counsel, witness tampering allegations carry their own risks. Allegations that counsel tampered with a witness may create an unwaivable conflict of interest requiring disqualification, or lead to bar discipline, sanctions or contempt if counsel is accused of tampering.[10]

If the client is accused, counsel still may be disqualified from serving as trial counsel if they are likely to be a necessary witness.[11]

Any allegation can sap the lawyer's credibility with the court and prosecutors. As a result, prosecutors may refuse to provide early discovery or identify potential witnesses, and the court may even allow prosecutors to withhold important information until the eve of trial or a witness testimony.

And, once earned, a reputation for untrustworthiness will undermine a defense lawyer in every future case.

Best Practices

Though nothing can eliminate those risks entirely, defense counsel can take steps to avoid accusations

of witness tampering.

Educate clients about witness tampering.

Most witness tampering statutes are broadly worded and capture seemingly innocent conduct. Some nonlawyers may not grasp that texting a former colleague to discourage them from testifying before Congress, for example, might be viewed as witness tampering.

Counsel must therefore educate clients about how broad the witness tampering statutes are. This means clarifying that the statutes apply not only to bribes and threats of violence, but also to any conduct that could be seen as intimidating, harassing or misleading, or as intended to prevent, influence, delay, or hinder any testimony or communication with law enforcement or investigators.

Clients must also understand that under the federal witness tampering statute, an official proceeding includes, among other things, grand jury, congressional and agency proceedings in addition to judicial proceedings.

The safest course in every case is to advise clients to avoid all contact with anyone who could conceivably be a current, former, or future witness or informant.

Of course, social media makes that difficult. A potential witness could see a post even if the client did not direct the post at the witness, for example. So counsel should advise clients to lock — but not delete without preserving account data — all social media accounts so that they are not viewable by other users without permission.

To avoid unsolicited communications from potential witnesses, clients may also wish to change email addresses or block calls from known witness phone numbers.

But clients often cannot cut off all contact with everyone tangentially related to the case. Counsel should therefore stress how important it is for clients to avoid discussing the case or the underlying facts with anyone not within the attorney-client privilege.

To protect against later allegations of tampering or other obstruction, counsel should remind clients not to delete communications. That often requires changing phone or computer settings that may be set to automatically delete messages after a certain period.

Because many messaging apps automatically delete messages, clients should be advised to avoid using those apps to communicate with anyone remotely associated with the case.

It is critical to also explain why these precautions are necessary. Many legal rules appear arbitrary to nonlawyers. To counteract that perception, counsel must both review all the risks described above with clients and explain why it is in their strategic interest to avoid even the appearance of witness tampering.

If possible, counsel should offer an example of how prosecutors could use even a well-intentioned communication with a potential witness against the client at trial.

Educating clients on the risks of witness tampering and these necessary precautions also protects defense counsel. It reminds counsel of the line between zealous advocacy and tampering, and the

consequences of crossing that line.

It also documents good faith efforts to prevent tampering that may prove useful if later allegations arise.

Chart a path forward for the client.

Clients facing trial or under investigation understandably feel helpless. That feeling of helplessness can drive clients to make rash decisions, such as leaking embarrassing information about a witness to the press or attacking a witness on social media.

Defense counsel can alleviate some of that pressure by charting how the lawyer plans to protect clients' interests. Just knowing that someone is doing something to fight back can lighten a client's emotional burden and lessen the chances that they will do anything to undermine the case.

Part of that conversation should include walking clients through the stages of a typical investigation or prosecution, and noting where in that process they'll have a chance to tell their side of the story. That way, clients are prepared for stretches where nothing appears to be happening, such as while counsel reviews discovery or while awaiting a ruling on dispositive motions.

Consider retaining a public relations consultant.

In high-profile cases, retaining a public relations consultant can help ensure that the client's narrative is heard without risking that the client or counsel say anything that could be misconstrued as witness tampering.

Of course, counsel must educate the consultant on witness tampering and monitor the consultant's statements.

Counsel, not the client, should ordinarily retain the consultant to preserve the attorney-client privilege. And the engagement letter should state why the consultant's services are needed to provide legal advice to the client.

Clients and lawyers should mark communications with the consultant "confidential" and "attorney-client privilege." Even then, whether a given communication with a consultant will be privileged is fact-specific and jurisdiction-specific.

Take precautions when speaking with potential witnesses.

Witness interviews are invaluable, but counsel must take appropriate precautions when speaking with potential witnesses or any other third party.

The most basic precaution is to review all applicable ethical rules, such as the rules of professional conduct governing communications with persons represented by counsel and dealings with unrepresented persons, and scrupulously adhere to those rules.[12]

If in doubt, seek a confidential opinion from the appropriate bar authority.

Counsel should always have at least one additional team member present for any conversation with a third party. Doing so ensures that counsel can focus on the interview or conversation without having to

take notes, and that there is someone to confirm what occurred during the interview should a dispute about what was said arise.

Preparation is essential. Before approaching any potential witness, counsel must review any relevant documents, research the witness's background and outline the interview with annotations that support each factual representation.

This preparation limits the chance that a witness misinterprets a comment or question as intimidating or harassing, or that counsel inadvertently misleads the witness with incorrect information.

For similar reasons, subterfuge is best left to TV lawyers. At the start of an interview, counsel should identify themselves and their client and state the purpose of the interview. Not doing so may qualify as misleading conduct under the federal witness tampering statute. The same goes for misrepresenting evidence or other tricks to elicit the desired answers to questions.

Whether other potential precautions, such as recording or transcribing the interview, are appropriate is too intertwined with case-specific strategic considerations to recommend any best practices. But before settling on how or if to memorialize an interview, counsel must always consider the risk of even the appearance of witness tampering.

Conclusion

As demonstrated by the Trump and Bankman-Fried cases, allegations of witness tampering can carry serious consequences. Though defense counsel cannot eliminate all risk, following certain best practices can reduce the chances that any allegations arise and rebut any allegations that may arise.

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[1] See Aaron Blake, Trump's Habitual Line-Stepping on Witness Tampering, The Washington Post (Aug. 7, 2023), https://tinyurl.com/3naczyn5.

[2] Consent Bond, Georgia v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct.), filed Aug. 21, 2023.

[3] See Gov't Letter, United States v. Bankman-Fried, No. 1:22-cr-673 (S.D.N.Y.), Dkt. 184.

[4] Order Revoking Bail, United States v. Bankman-Fried, No. 1:22-cr-673 (S.D.N.Y.), Dkt.200.

[5] 18 U.S.C. §1512.

[6] See, e.g., 720 ILCS 5/32-4(b); GA Code §16-10-93.

[7] United States v. Lonich, 23 F.4th 881, 907 (9th Cir. 2022).

[8] 18 U.S.C. §1515(c); see, e.g., United States v. Kloess, 251 F.3d 941, 948-49 (11th Cir. 2001) (allowing

witness tampering charge to proceed against lawyer).

[9] 18 U.S.C. §3148(b); see id. §3142(g) (listing relevant factors).

[10] See United States v. Lewis, 850 F. App'x 81, 83 (2d Cir. 2021) (affirming disqualification of counsel accused of witness tampering).

[11] See ABA Model Rules of Prof'l Responsibility 3.7.

[12] E.g., ABA Model Rules of Prof'l Responsibility 4.2, 4.3.