

IN TROUBLE OVER SEQUESTER BREAK

Experts Ponder Possible Consequences of Order Violation in Terror Trial

BY G.M. FILSKO

Clearly, Carla J. Martin is the most infamous lawyer in the United States today. What's not clear is what's left of her legal career—or the death penalty case against terror suspect Zacarias Moussaoui after Martin's conduct during his trial.

Some legal experts can envision charges against the Transportation Security Administration lawyer ranging from contempt to witness tampering, while others question just how serious her offense might be. And, as the Moussaoui death penalty hearing goes on, some question the reach of the judge's order blocking testimony from witnesses whom Martin had contacted.

U.S. District Judge Leonie M. Brinkema said last week after a five-hour evidentiary hearing on Martin's conduct that "the evidence is uncontroverted" that Martin improperly communicated with six witnesses "in clear violation" of the court's written sequestration order.

Martin sent the witnesses trial transcripts from the first day of trial and suggested ways they could testify. The government had planned to call the witnesses to establish steps that could have been taken if Moussaoui had revealed plans for the Sept. 11 attacks.

Brinkema said Martin told a "bald-faced lie" when she said none of three Federal Aviation Administration employees scheduled to be witnesses for the prosecution would agree to meet with the defense before trial. Rather, Brinkema found Martin had instructed at least one of the witnesses that he couldn't speak with the defense. Brinkema also found Martin wasn't truthful in stating that the other two had explicitly stated that they wouldn't speak with the defense.

Prosecutors themselves reported Martin to Brinkema in a letter dated March 13 and later called her a "lone miscreant" and her actions "aberrant and apparently criminal behavior." (Beyond their statements in court documents, prosecutors declined to comment on Martin's behavior.)

The TSA has put Martin on leave. Her lawyer, Roscoe C. Howard Jr. of Washington, D.C., says those who have condemned Martin have "rushed to judgment." He also issued a statement asserting Martin has not been given an opportunity "for cross-examination or to call witnesses for herself" and that she's "preparing her response." Howard says he has "no information on a timeline" for when Martin's response will be issued, nor does he have specific information on charges that may be brought against his client.

Moussaoui's defense attorneys have filed a motion seeking an evidentiary hearing at which Martin would explain her actions. The prosecution has agreed such a hearing should go forward, but only if Martin will testify and not invoke her Fifth Amendment

right not to incriminate herself. The defense team's motion is pending.

Many criminal defense lawyers say Martin's contact with witnesses was incomprehensible. "It's so amazing," says Martin Pinales of Cincinnati, president-elect of the National Association of Criminal Defense Lawyers. "There's no problem telling a witness how to sit, how to act and to take them to court to look at the courtroom and sit in the witness chair, but you don't tell them what to say."

"I find it hard to believe she didn't know the rule of sequestration," says James K. Jenkins, a criminal defense lawyer in Atlanta. "It's trial lawyering 101. If a defense lawyer had done that, there would be a grand jury sitting next week on witness tampering."

Still, some observers have opined that because Martin isn't experienced in criminal law, she may not have known the rule of sequestration as it's applied in criminal cases.

Nonsense, says Jeralyn E. Merritt, a criminal defense lawyer in Denver. "The rule of sequestration is centuries old, and it applies equally to criminal and civil cases once it's invoked. In this case, the judge issued the order," she says. "It's inconceivable that a lawyer wouldn't know the rule."

Merritt also dismisses the idea that Martin may not have known about the order because she may not have been in the courtroom every day. Common practice, Merritt says, dictates that the lead attorney "pass the order on to other attorneys in the case." Moreover, such orders not only cover trial attorneys "but also their agents, such as FBI agents or witnesses," Merritt says.

Brinkema didn't indicate possible charges, but criminal defense lawyers say Martin could face charges for witness tampering or civil contempt. "Witness tampering can be civil contempt," Pinales says. "A judge would have wide latitude for punishment." He also suggested that misleading opposing counsel could be an ethical violation.

The ABA Model Rules of Professional Conduct, which serve as the basis for attorney conduct rules in most states, contain several provisions that may apply to this situation, says ABA ethics counsel George Kuhlman. They include:

Rule 1.1, requiring lawyers to provide competent representation.

Rule 3.4, regarding fairness to the opposing party and counsel. This rule prohibits obstructing another party's access to evidence, bars assisting a witness to testify falsely, and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal.

Rule 8.4, regarding misconduct. This rule bars conduct that is prejudicial to the administration of justice, or that involves dishonesty, fraud, deceit or misrepresentation.

Punishment for Martin "depends on what she actually knew" of the order, says Stephen Saltzburg, a professor who specializes in federal procedure at George Washington

University Law School in Washington, D.C. "Her position may turn out to be that it's not her fault that she violated the order because the prosecutors didn't tell her about it or that she knew about the order but assumed lawyers weren't covered by it."

Elizabeth Alston, a Mandeville, La., attorney and member of the ABA's Standing Committee on Ethics and Professional Responsibility, agrees that actual knowledge could affect the outcome.

"If it's shown that she [violated the sequestration order] knowingly, then she could be subject to disbarment from this particular federal court," Alston says. "If she was just stupid, and she didn't know there was such a rule, it could be argued she should get a lesser punishment. Then it would be a matter of whether [the state where Martin is licensed] reciprocates that punishment."

Even if Martin keeps her law license, Merritt says she still faces a tough road ahead. "Her reputation has been completely sullied, at least in the legal community. Is she employable after this?"

As for the case itself, testimony has resumed after Brinkema granted the prosecution's motion for reconsideration of her order last week. Brinkema originally barred prosecutors from presenting witnesses and exhibits related to their theory that had Moussaoui told FBI investigators what he knew when he was arrested, the FBI could have alerted the FAA. That agency in turn may have been able to prevent the Sept. 11 hijackers from boarding planes. Brinkema has now allowed prosecutors to present replacement witnesses for that theory.

In considering whether to modify her earlier order, Brinkema was faced with precedent from the 4th U.S. Circuit Court of Appeals in *U.S. v. Rhynes*, 218 F.3d 310 (2000). The en banc opinion reversed a trial judge's order barring a key defense witness after the defense attorney prepared the witness by discussing a prior witness's testimony. The appellate court, based in Richmond, Va., held that the judge's sequestration order barred only witnesses from communicating with each other and didn't address conduct by attorneys. Therefore, the judge's order barring the witness was improper.

In the Moussaoui case, however, Brinkema's sequestration order was more broad, and even the prosecution conceded in its motion for reconsideration of Brinkema's original sanction that Martin's communication with the witnesses violated Brinkema's order.

The difference between *Rhynes* and the Moussaoui order is the "scope of the order issued by each judge," Saltzburg says. "*Rhynes* is a reminder that although everybody knows about sequestration, the exact scope of sequestration depends on the order issued by the judge. *Rhynes* suggests that when a judge issues a broad sequestration order, it's important for all the lawyers in the case and the witnesses to know what the judge said."

"I think the first ruling Judge Brinkema made was so broad that it was a close call as to whether it went too far," Saltzburg says. "She may have thought the same. Rather than have a potential appeal and the possibility of delay as a result of the appeal, the backup position [in Brinkema's revised order] was a fair position to the defense. It removed the

possibility that the taint would hurt the defense and left open the possibility of punishing the person who may deserve punishment."

Jenkins couldn't disagree more. First, he considers Martin part of the prosecution team. "Who did she get her paycheck from? The law is, the government is the government is the government. Prosecutors can't say, 'We really don't know what this person is doing, and she wasn't involved.' "

Second, Jenkins believes Brinkema's revised order doesn't do enough to sanction the government.

"Many, many trial judges try to find the middle ground, and the end result is that the wrong message is sent to the government. It's sort of the 'no harm, no foul' approach, and allows the prosecution to suffer no serious consequences for its conduct while putting the defense at more of a disadvantage."

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