

discretion.”); accord 29 Wright & Miller, *Federal Practice & Proc.*, § 6246 (2005) (“Imposition of [serious sanctions such as a mistrial] may be appropriate where the prejudice associated with violation of the exclusion order cannot otherwise be mitigated by permitting attack on the witness’ credibility or where the violation was procured with the connivance of a party.”). See also *United States v. Jimenez*, 780 F.2d 975, 978 (11<sup>th</sup> Cir. 1986). Although dismissal is a drastic remedy, it is employed where the prejudice associated with the violation of the exclusion order cannot otherwise be cured.

On March 7, Tuesday afternoon, Martin received the transcripts of the government and defense openings from the law firm representing various government witnesses from the airlines. She immediately sent the transcripts to Claudio Manno and Lynne Osmus, the government’s FAA witnesses who were expected to provide the evidence supporting the second half of the government’s argument that the FAA would have prevented the attacks if Moussaoui had not lied.

Martin not only sent the transcripts but in an e-mail to the witnesses expressed her concern about errors in the government’s opening regarding the FAA and “how it could have caught the hijackers and prevented 9/11.” Martin then sent an e-mail to Osmus and Manno pointing out “some the highlights that she is not happy about” with quotes from the openings by the parties. A few minutes later, Martin sends Osmus and Manno another e-mail discussing errors in agent Anticev’s testimony regarding the FAA’s knowledge of planes flying into buildings and how it should be corrected and further that the government’s trial attorneys need to go over the testimony with them.

The e-mails Martin sent to Osmus on March 7 at 6:32 p.m. and on March 8 at 11:52 a.m. demonstrate that Martin knew exactly what she was doing and that she immediately realized that there were problems in the government's opening regarding the actions that the FAA would have taken. Martin intended to coach the witnesses to make sure that their testimony provided support for the government theory of the case. Martin clearly realized that what she was doing was unethical and improper because she told Osmus not to respond to the e-mail. Realizing that not only keeping knives off the planes was an essential part of the government's case but also keeping the hijackers off of the plane was essential, Martin stressed to Osmus the importance of testifying about the "multilayered system of aviation security" which would have "thwarted the attacks." There is no question that Martin understood the import of the error of the government's opening statement and sought a means to correct it by coaching Osmus, who was the government's FAA witness on the countermeasures that the FAA would have ordered the airlines to institute to prevent the attacks of 9/11.

When Osmus replies the next morning that 100 percent gate screening could not be accomplished in the short term, Martin e-mails Osmus that the aviation lawyers were stunned by the opening and that it created a credibility gap that the defense can drive a truck through. Martin then goes on to tell Osmus what must be elicited from Osmus and the other airline witnesses on direct to prevent the defense from cutting the witnesses credibility on cross-examination. The emphasis being the "multilayered system of aviation security."

In an e-mail on Wednesday morning, Martin informed Manno that she is having Matt, presumably Matt Kormann an FAA defense witness, conduct a search of various

documents to support the FAA's position on flying planes into buildings which she will review with Manno. Martin then discusses trial strategy with Manno regarding how to blunt various areas of questioning that the defense was expected to raise which might affect Manno's credibility. Clearly, the issues Martin raises, the Phoenix memo and the CIA briefing on "Islamic Fundamentalist learns to Fly" was information known to various government agencies, but not the FAA, prior to 9/11. Martin tells Manno how to respond to those areas to prevent the defense from exploiting the FAA's lack of knowledge.

After the e-mails with Manno, Martin then e-mailed Patrick McDonnell, a former FAA employee who is listed as a defense witness. Martin sent him portions of the opening statements of the parties indicating that there are big gaps that the defense can exploit and that he and the other FAA witnesses and the airline industry witnesses "will have their work cut out for them."

There is no way to un-ring the bell. The FAA witnesses have been tainted and no matter how much they contend that they can be truthful, they have been coached concerning the defects in the government's case and how to overcome those defects. Whether the witnesses would have testified concerning a multilayered system of aviation security which would have been ordered by the FAA as security countermeasures would have been implemented in a timely fashion by the airlines and whether those measures would have prevented 9/11 can no longer be determined. The witnesses have been instructed to testify in that fashion. The only alternative would be for them to testify that the countermeasures would not have been sufficient. That