PROGRAM MATERIALS
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Hot Topics in Ethics for In-House Litigation Counsel

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HOT TOPICS IN ETHICS FOR IN-HOUSE LITIGATION COUNSEL

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JOHN B. HARRIS

- **John B. Harris** is a litigation partner with the law firm of Frankfurt Kurnit Klein & Selz, P.C. He has more than 25 years experience representing clients in high stakes civil and white collar criminal matters. In his legal ethics and professional responsibility practice, Mr. Harris frequently defends law firms, lawyers, and other professionals against claims of legal malpractice, breach of fiduciary duty and fraud. He also represents law firms in disputes with current and former partners and in internal investigations. He has testified as an expert witness in ethics matters.

- Mr. Harris is a former Chair of the Professional Responsibility Committee of the New York City Bar Association, and has served on the City Bar's Committees on Professional and Judicial Ethics, Professional Discipline, Judiciary and the Task Force on Multi-Disciplinary Practice. He is a member of the New York State Bar" s Committee on Professional Discipline. He acts as a mediator for the US District Court for the Southern District of New York.

- Mr. Harris is also the National Civil Rights Chair of the Anti-Defamation League. He has been recognized in *Super Lawyers* magazine as a New York-area Super Lawyer for eight consecutive years.

CATHERINE M. FOTI

Catherine M. Foti has more than twenty-five years of experience in complex civil and white collar criminal matters, including frauds, employment discrimination, sexual harassment, and attorney disciplinary matters. She conducts internal investigations for corporations and also counsels individuals involved in such investigations.

Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms & Attorneys has recognized Cathy as a "Future Star" in the areas of White-Collar Crime/Enforcement/Investigations and Labor & Employment. Cathy has also been listed under *Who's Who* and recognized in the area of Criminal Defense: White Collar by *Best Lawyers in America*. Since its inception, she has been listed in Thomson Reuters' *Super Lawyers* and was recently named to its Top 50 Women list.

Cathy is currently the Chair of the Sentencing Guidelines Committee of the New York Council of Defense Lawyers and represented the Committee before the United States Sentencing Commission when it heard testimony on proposed amendments to the Guidelines. She also now serves as a member of the Advisory Committee of the New York Women's Bar Association, after sitting for many years on its Board of Directors as well as serving as its Vice-President and Co-Chair of its Judiciary and Professional Ethics and Discipline Committees. Cathy is a member of the American Bar Association, the Federal Bar Council, and the New York City Bar Association, where she sat on the Committee on Professional Discipline and on the Criminal Law Committee.

OVERVIEW

- This program will focus on the pressing issues confronting in-house lawyers who receive notice of potential workplace misconduct.
  - Should the in-house lawyer conduct his or her own investigation?
  - What steps can a lawyer ethically take to gather evidence?
  - What steps can a lawyer ethically take in negotiations to resolve a workplace claim?
  - What can a lawyer do to limit public disclosure of the misconduct and/or preserve confidentiality?

SALLY SMITH'S RISE AND FALL

- Sally Smith is a senior VP at a large media company. In her role, she works closely with the company's powerful Chairman and CEO Hank Wolf.
- They have frequently traveled together and Sally was a rising star in the Company … until 3 months ago when she suddenly was demoted and transferred to a backwater office and was the subject of anonymous social media postings suggesting that she was incompetent and lazy.

SALLY'S DEMANDS

- A week ago, Judy Prudence, the Company's General Counsel, received a lengthy letter from a lawyer for Sally, Joe Simpson.
- The letter alleged that Wolf had repeatedly propositioned Sally, touched her inappropriately, demeaned men she was dating and retaliated against her for rejecting his propositions.
- Simpson urges an immediate meeting before things "escalate."

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- Should Prudence speak to Wolf and, if so, interview him? She has handled three earlier claims of harassment by herself, should she do the same here?
  - If Wolf asks Prudence whether he should obtain counsel, what can she say?
    - N.Y. Rule 4.3 (Communicating With Unrepresented Persons) – "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."
    - ABA Model Rule 4.3 is substantively the same.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- When can in-house counsel conduct the investigation?
  - It is appropriate in many investigations for in-house lawyers, taking care that privilege is protected, to undertake targeted initial inquiries.
  - Once in-house counsel gathers basic facts and assesses the problem, the company can determine whether to retain outside counsel and can choose outside counsel with expertise in the issues being examined.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- When should outside counsel conduct the investigation?
  - When resources do not permit a thorough inquiry by in-house counsel.
  - When outside counsel can give an investigation greater credibility.
  - When there are privilege concerns, such as in investigations with international aspects.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- When should <u>independent</u> outside counsel conduct the investigation?
  - When the credibility of the investigation is a great concern.
    - It is important to retain independent outside counsel when an investigation may touch directly or indirectly on the conduct of senior management, and when the results of the investigation are likely to be disclosed outside of the company.
  - Independence here means counsel that does not routinely represent the client and/or derive from the client substantial fee income on a regular basis.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- Can Judy Prudence contact Sally Smith?
  - N.Y. Rule 4.2(a): In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
    - Comment 4: "This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."
  - ABA Model Rule 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- If Wolf asks her not to inform anyone else at the Company about the allegations because he "will take care of it personally," can Judy Prudence comply?
  - N.Y. Rule 1.13 (Organization As Client):
    - (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- N.Y. Rule 1.13 (Organization As Client) cont'd:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- N.Y. Rule 1.13 (Organization As Client) cont'd:

  (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

  (d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- ABA Model Rule 1.13 (Organization as Client):

  (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

  (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

  * * *

  (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- Can Judy Prudence access Smith and Wolf's email accounts, including their personal email accounts accessible through the Company's servers?
  - Stored Communications Act, 18 U.S.C. § 2701 et seq. – makes it a criminal offense to "intentionally access[] without authorization a facility through which an electronic communication service is provided; or [] intentionally exceed[] an authorization to access that facility."
    - It also creates a civil cause of action under Section 2707 for victims of such offenses.
  - Wiretap Statutes, 18 U.S.C. § § 2510-2511 – broadly prohibits intentional interception, use, or disclosure of wire and electronic communications, unless a statutory exception applies. Consent is a statutory exception under 18 U.S.C. § 2511 (2)(c)-(d).

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- ABA Model Rule 4.4 (Respect for Rights of Third Persons):

  (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

  (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

- N.Y. Rule 4.4 (Respect for Rights of Third Persons):

  (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

  (b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- Can Judy Prudence use the password Smith provided IT three months ago when there was a glitch?
  - N.Y. Rule 8.4 (Misconduct):

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:
(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

WHAT CAN/SHOULD THE GENERAL COUNSEL DO?

- ABA Model Rule 8.4 (Misconduct):

  It is professional misconduct for a lawyer to:

  (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

  (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

  (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

  (d) engage in conduct that is prejudicial to the administration of justice;

  (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

  (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

  (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

THE GC LOCATES AN INTERESTING DOCUMENT

- Prudence's search of the Smith's computer uncovers a chronology that appears to have been created by Smith and that contains detailed information about Smith's interactions with Wolf over the past year.
- There is no indication on the document of why it was created or for whom it was created, but Prudence believes it appears to be the type of information that Smith would have shared with her attorney.
- Does Prudence have an obligation to investigate further? What can Prudence do with the document?

THE GC LOCATES AN INTERESTING DOCUMENT

- To determine whether documents maintained on a company computer system are privileged courts consider whether the employee, as a practical matter, had a reasonable expectation that the attorney-client communications would remain confidential despite being stored on a company's computer system.
  - Some courts have considered the following factors: "(1) does the corporation maintain a policy banning personal or other objectionable use; (2) does the company monitor the use of the employee's computer or e-mail; (3) do third parties have a right of access to the computer or e-mails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *United States v. Hatfield,* 2009 WL 3806300 (E.D.N.Y. 2009) (citing *In re Asia Global Crossing, Ltd.*, 322 BR 247, 257 (Bnkr. S.D.N.Y. 2005) (No protection if company maintains a policy banning personal use, company monitors the use of employee's computer and email, third parties have a right to access the computer or emails and the corporation notifies/or employee is aware of the use and monitoring policies.); *see also Bingham v. Baycare Health System*, 2016 WL 3917513 (M.D. Fla. July 20, 2016) (collecting decisions applying the four-factor test to determine whether a reasonably expectation of privacy exists with respect to workplace emails and documents).

THE GC AND SALLY'S COUNSEL MEET

- Simpson demands $5 million for his client and $10 million in guaranteed future billings for himself, claims he has "on board" other women, and says that, without a resolution, he will hold a press conference the next day to expose the Company's treatment of Smith and to advise the Justice Department that the Company has bribed foreign officials to obtain business.
- Prudence vehemently denies Smith's allegations, states that the Company would "never" offer more than $500,000 and says there is no insurance.

THE NEGOTIATORS' PUFFERY/LIES

- In fact, Simpson has no other witness "on board."
- For her part, Prudence:
  - knows that the Company has quietly resolved similar past claims for over $2 million, and
  - is awaiting word whether the Company's carrier would cover a claim.
- Has either lawyer violated the ethical rules?

ETHICAL RULES FOR NEGOTIATIONS

- N.Y. Rule 4.1: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
  - Comment 2: In negotiations, "estimates of price or value" placed on the subject of a transaction and "a party's intentions as to an acceptable settlement" are ordinarily not taken as statements of fact.
  - A lawyer generally has no affirmative duty to inform the adversary about relevant facts, e.g., the statute of limitations has expired.
    - BUT: A lawyer must disclose that his/her client has died.
- N.Y. Rule 4.1 mirrors the language of ABA Model Rule 4.1.

LIMITS ON PUFFERY?

- ABA 06-439 (2006): It is a generally understood negotiation tactic that parties posture or "puff," i.e., they are "less than entirely forthcoming" about issues such as their bottom line, the importance of a deal term or the strength of their positions is acceptable but it is not okay to exaggerate the cost of a settlement term, such as saying that it will cost defendant $100 to implement safety upgrades when really will cost only $20.

LIMITS ON PUFFERY?

- OK to be less than candid about negotiating positions (*U.S. v. Weimert*, 819 F.3d 351 (7th Cir. 2016)(Deception about negotiating positions was immaterial in fraud case "the sophisticated parties in this case … do not expect complete candor.")
  - BUT ABA 93-370: Misrepresenting a party's bottom line to a judge would be an ethical violation since an "actual bottom line" or a lawyer's "settlement authority" are material facts.
- Not OK to say that documentary evidence will be submitted at trial when it doesn't exist or is inadmissible.
- Not OK for either side in a criminal case falsely to say during plea negotiations that an eyewitness exists.
- Not OK to claim plaintiff employee can't find a job when he has one. (*In re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013)).
- Not OK to misstate amount of insurance coverage *(In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983)).

FEDERAL LAWS PROHIBITING EXTORTION

- 18 U.S.C. § 875(d):
  - "(d)Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both."
- Hobbs Act - 18 U.S.C. § 1951:
  - "(a)Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."
  - "(b)(2)The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

NEW YORK LAW PROHIBITING EXTORTION

- NY Penal Law § 155.05(e)- The crime of extortion under NY criminal law is facially very broad.
  - A person is guilty of extortion if he "compels or induces" another person to deliver property (usually money) by "instilling in him a fear" that, if the property is not delivered, the actor (or someone else) will:
    - Cause physical injury or damage to property;
    - Accuse a person of a crime or cause criminal charges to be instituted against him;
    - Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
    - Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
    - "Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships."

DEFENSE TO EXTORTION AND COERCION

- Where the threat is to report a crime, it is an affirmative defense that the speaker "reasonably believed the threatened charge **to be true**" and that his/her "sole purpose was to compel or induce the victim to take **reasonable action to make good the wrong**" that was the subject of the threatened charge. § 155.15.

COERCION, NY PENAL LAW § 135.60

- Almost identical to extortion, but instead of using threats to obtain **property,** the victim is compelled "to engage in conduct which the [victim] has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage."
- Extortion is a Class E felony, ordinary coercion a misdemeanor.

THE ETHICS OF THREATENING CRIMINAL PROSECUTION

- No universal standard exists regarding the ethics of threatening criminal prosecution. NYSBA Comm. on Prof'l Ethics, Formal Op. 772 (Nov. 14, 2003)
- **While Rule 3.4(e) says it is NOT OK** to present/threaten criminal charges "**solely to obtain an advantage in a civil matter,**" such threats are permitted "**when honestly claimed in an effort to obtain restitution or indemnification for the harm done**" (Comment 5 to Rule 3.4).
- *See also* Formal Op. 772; Rule 3.4(e) and Comment 5: It is OK to threaten criminal charges to get the accused to perform a certain act to **remedy a civil wrong**.
- Also OK to refer to apparent criminality and **ask for an explanation.** Formal Op. 772.
- It is generally considered NOT OK if the threat involves conduct of the third person **unrelated to the criminal harm** (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute). (Comment 5 to Rule 3.4).

APPROPRIATE SETTLEMENT DEMANDS VERSUS EXTORTION?

- Federal cases suggest that it is not okay to demand settlement terms to which you have no claim.
  - *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999), *on reh'g* 196 F.3d 383 (2d Cir. 1999)
    - Holding that wrongfulness was an implied element of 18 U.S.C. § 875(d).
    - "[W]here a threat of harm to a person's reputation seeks money or property to which the threatener does not have and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful." (180 F.3d at 71.)
  - *Michael Avenatti* extortion prosecution pending in SDNY (Threat to reveal alleged criminal activity unless attorney was paid > 10 million to conduct internal investigation).
    - In January 2020, a federal district judge denied Avenatti's motion to dismiss holding that the indictment pled facts demonstrating that Avenatti engaged in "wrongful" conduct because it pled facts "demonstrating that Avenatti used threats of economic and reputational harm to demand millions of dollars from Nike, for himself, to which he had no plausible claim of right." (*United States v. Avenatti*, No. 19-CR-373 (S.D.N.Y. Jan. 6, 2020), ECF No. 120).
  - *Timothy Litzenburg* extortion prosecution pending in W.D. Va. (Threat to make public statements claiming that a global company had significant civil liability for manufacturing a dangerous chemical unless attorney was paid > $200 million in "consulting fees.")

THE PARTIES REACH A DEAL

- The Company reaches a deal with Smith. Prudence proposes several terms as conditions:
  - (a) a broad confidentiality provision precluding her from disclosing her allegations against Wolf or anything else that happened at the Company;
  - (b) sign an affidavit attesting that she was treated fairly and appropriately by the Company; and
  - (c) refrain from cooperating with any other employee making claims against the Company.
- Do any of the terms implicate ethical issues?

STATE LAWS LIMIT THE USE OF NDAS

- In the last two years, at least 26 states and the District of Columbia have introduced bills to limit nondisclosure agreements (NDAs) in sexual harassment/assault cases.
- At least 10 states have passed laws limiting employers from requiring employees to sign NDAs in settlement agreements.
  - Arizona, California, Illinois, Louisiana, Maryland, Nevada, New Jersey, New York, Oregon, Tennessee, Vermont

VARIANCE AMONG LAWS LIMITING NDAS

- Do the restrictions apply only to sexual harassment claims, or are discrimination and retaliation claims covered as well?
- Is there an outright ban on confidentiality clauses or can these terms be included if the complainant prefers them?
- What subjects must the complainant be permitted to discuss?
- Are private employers covered?

NEW JERSEY

- A provision in any…settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment…shall be deemed against public policy and unenforceable against a current or former employee…who is a party to the…settlement. (P.L.2019, c.39)

NEW YORK

- [N]o employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, … any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference. (General Obligations Law Section 5-336)

CALIFORNIA

- Prohibits any settlement agreement provision that "prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action regarding, *inter alia*, "[a]n act of workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex or an act of retaliation against a person for reporting harassment or discrimination based on sex .... [A] provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity,...may be included within a settlement agreement at the request of the claimant." (Cal. Code of Civ. Pro. Section 1001).

MARYLAND

- Voids any provision in an employment contract, policy, or agreement "that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment." (MD Labor & Employment Code Section 3-715)
- Prohibits an employer from taking an adverse action against an employee because the employee fails or refuses to enter into an agreement that is void under this section.

TENNESSEE

- Prohibits employers from requiring an employee or prospective employee to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment. (Tenn. Code Ann. Section 50-1-108)

PROBLEMATIC WORK-AROUNDS

- "Your client prefers confidentiality, right? We wouldn't agree to pay this much money unless that was her preference."
- "The employer could purchase the exclusive rights to the employee's story of their time with the employer … to prohibit the employee from going public with their claims[]."
- "This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of [other state]…"

HYPO: THE SETTLEMENT DEMANDS OF SIMPSON

- The Company also insists that Simpson agree:
  - (a) never to represent any other employee of the Company;
  - (b) to aver that he is not currently representing any other employee;
  - (c) to sign the settlement agreement binding himself not to use or disclose any information learned during his representation of Sally on behalf of other clients; and
  - (d) never to refer publicly to his representation of Sally or his adversity to the Company, including in any social media postings or advertising.

NY RULE OF PROFESSIONAL CONDUCT 5.6.

- N.Y. Rule 5.6 (Restrictions On Right To Practice):
  - (a) A lawyer shall not participate in offering or making:

    (2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.
- This rule forbids a lawyer from asking for a restriction on another lawyer's right to practice and forbids a lawyer from acquiescing to such a request.
- ABA Model Rule 5.6 contains the same prohibition.

819 F.3d 351
United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
David WEIMERT, Defendant–Appellant.

No. 15–2453.
|
Argued Jan. 22, 2016.
|
Decided April 8, 2016.

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of Wisconsin, James D. Peterson, J., of wire fraud, and was ordered to pay restitution, 2015 WL 4644576. He appealed.

Holdings: The Court of Appeals, Hamilton, Circuit Judge, held that:

[1] defendant did not commit wire fraud by misleading potential purchaser of asset about whether his bid was "stalking horse" bid, and

[2] defendant's misrepresentation to asset owner's board of directors that potential purchaser of its interest required his participation in purchase did not amount to wire fraud.

Reversed.

Flaum, Circuit Judge, dissented and filed opinion.

West Headnotes (14)

[1] Criminal Law
Nature of Decision Appealed from as Affecting Scope of Review

Criminal Law
Review De Novo

Criminal Law
Construction in favor of government, state, or prosecution

Court of Appeals reviews de novo denial of motion for judgment of acquittal, construing evidence in light most favorable to government, and asking whether rational trier of fact could have found elements of crime beyond reasonable doubt.

8 Cases that cite this headnote

[2] Telecommunications
Nature and elements of offense in general

To convict person of wire fraud, government must prove that he (1) was involved in scheme to defraud; (2) had intent to defraud; and (3) used wires in furtherance of that scheme. 18 U.S.C.A. § 1343.

4 Cases that cite this headnote

[3] Telecommunications
Nature of scheme or device in general

Telecommunications
False pretenses or representations

To prove scheme to defraud in wire fraud prosecution, government must show that defendant made material false statement, misrepresentation, or promise, or concealed material fact. 18 U.S.C.A. § 1343.

7 Cases that cite this headnote

[4] Telecommunications
Knowledge and intent in general

Intent to defraud necessary to convict defendant of wire fraud requires proof that defendant acted willfully with specific intent to deceive or cheat, usually for purpose of getting financial gain for one's self or causing financial loss to another. 18 U.S.C.A. § 1343.

2 Cases that cite this headnote

[5] Telecommunications

Nature of scheme or device in general

Telecommunications

False pretenses or representations

Concept of misrepresentation under wire fraud statute is broad, reaching not only false statements of fact but also misleading half-truths and knowingly false promises, as well as omission or concealment of material information, even absent affirmative duty to disclose, if omission was intended to induce false belief and action to schemer's advantage and victim's disadvantage. 18 U.S.C.A. § 1343.

6 Cases that cite this headnote

[6] **Telecommunications**

False pretenses or representations

Wire fraud does not require false statement to be made directly to scheme's victim; deception of someone else can suffice if it carries out scheme. 18 U.S.C.A. § 1343.

1 Cases that cite this headnote

[7] **Telecommunications**

Nature of scheme or device in general

It is no defense to charge of wire fraud that intended victim was too trusting and gullible or, on other hand, was too smart or sophisticated to be taken in by deception. 18 U.S.C.A. § 1343.

[8] **Postal Service**

False Pretenses or Representations

Telecommunications

False pretenses or representations

Federal mail and wire fraud statutes reach seller's or buyer's deliberate misrepresentation of facts or false promises that are likely to affect decisions of party on other side of deal. 18 U.S.C.A. §§ 1341, 1343.

3 Cases that cite this headnote

[9] **Telecommunications**

Nature of scheme or device in general

Wire fraud statute does not criminalize deceptive misstatements or omissions about buyer's or seller's negotiating positions. 18 U.S.C.A. § 1343.

3 Cases that cite this headnote

[10] **Telecommunications**

Nature of scheme or device in general

Corporate seller's president did not commit wire fraud by misleading potential purchaser of asset about whether his bid, which was not successful, was "stalking horse" bid, even though he represented to asset's other owner that potential purchaser would be terrible partner, but also that he would be attractive partner, where there was no evidence that bid was anything other than good-faith bid, potential purchaser was aware that president was hoping to elicit another bid, and bid included $75,000 break-up fee. 18 U.S.C.A. § 1343.

[11] **Telecommunications**

False pretenses or representations

Misrepresentation by corporate seller's president to its board of directors that potential purchaser of its interest in asset required his participation in purchase did not amount to wire fraud, even if president's actions constituted civil breach of his fiduciary duty to corporation, where corporation was not misled as to nature of asset it was selling or consideration it received, deception amounted to no more than false prediction about how potential purchaser would respond to counteroffer to exclude his participation, president's interest in sale was fully disclosed to board, and board received independent advice from counsel about conflict and transaction before approving it. 18 U.S.C.A. § 1343.

1 Cases that cite this headnote

[12] **Corporations and Business Organizations**

Fiduciary Duties as to Management of Corporate Affairs in General

Corporations and Business Organizations

Loyalty

Corporate officers and directors owe fiduciary duties of loyalty and honesty to corporation.

[13] **Postal Service**
Nature of scheme or device in general
Telecommunications
Nature of scheme or device in general

Proof of breach of fiduciary duty is neither necessary to, nor sufficient proof of, mail or wire fraud. 18 U.S.C.A. §§ 1341, 1343.

4 Cases that cite this headnote

[14] **Postal Service**
Nature of scheme or device in general
Telecommunications
Nature of scheme or device in general

Breach of fiduciary duty combined with mailing or wire communication is insufficient alone to establish mail or wire fraud, and government must still demonstrate scheme to defraud, including some sort of fraudulent misrepresentation or omissions calculated to deceive persons of ordinary prudence and comprehension. 18 U.S.C.A. §§ 1341, 1343.

2 Cases that cite this headnote

Attorneys and Law Firms

***353** Antonio M. Trillo, Attorney, Office of the United States Attorney, Madison, WI, for Plaintiff–Appellee.

Stephen J. Meyer, Attorney, Meyer Law Office, Madison, WI, for Defendant–Appellant.

Before BAUER, FLAUM, and HAMILTON, Circuit Judges.

Opinion

HAMILTON, Circuit Judge.

In the midst of the 2008–09 financial crisis, a Wisconsin bank called AnchorBank was struggling to stay above water. Under pressure to find cash to pay its own lenders, the bank's president told vice president David Weimert to try to sell the bank's share in a commercial real estate development in Texas. Weimert, who is the defendant and appellant in this criminal wire fraud case, successfully arranged a sale that exceeded the bank's target price by about one third. The deal also relieved the bank of a liability of twice the sale price.

Given the version of the facts we must accept for this appeal, however, Weimert saw an opportunity to insert himself into the deal personally. He persuaded two potential buyers that he would be a useful partner for them. Both buyers included in their offer letters a term having Weimert buy a minority interest in the property. The bank agreed. It also agreed to pay Weimert an unusual bonus to enable him to buy the minority interest. We must also assume that the successful buyer, at least, would have been willing to go forward without Weimert as a partner, and that Weimert deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if he were not included as a minority partner. The government prosecuted Weimert for wire fraud on the theory that his actions added up to a scheme to obtain money or property by fraud, and the jury convicted ***354** him on five of six counts of wire fraud under 18 U.S.C. § 1343.

We reverse and order judgment of acquittal. Federal wire fraud is an expansive tool, but as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of parties to a business deal. In commercial negotiations, it is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction. When we look closely at the evidence, the only ways in which Weimert misled anyone concerned such negotiating positions. He led the successful buyer to believe the seller wanted him to have a piece of the deal. He led the seller to believe the buyer insisted he have a piece of the deal. All the actual terms of the deal, however, were fully disclosed and subject to negotiation. There is no evidence that Weimert misled anyone about any material facts or about promises of future actions. While one can understand the bank's later decision to fire Weimert when the deception about negotiating positions came to light, his actions did not add up to federal wire fraud. Weimert is entitled to judgment of acquittal. We order his prompt release from federal prison, on the stated terms of supervised release in his sentence, pending issuance of our mandate.

I. *The Standard of Review*

[1] We review *de novo* the denial of a motion for judgment of acquittal. *United States v. Durham,* 766 F.3d 672, 678 (7th Cir.2014), citing *United States v. Claybrooks,* 729 F.3d 699, 704 (7th Cir.2013). We construe the evidence in the light most

favorable to the government, asking whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Durham,* 766 F.3d at 678, quoting *United States v. Love,* 706 F.3d 832, 837 (7th Cir.2013).

Given our deference to jury determinations on evidentiary matters, we rarely reverse a conviction for mail or wire fraud due to insufficient evidence. See *United States v. Mullins,* 800 F.3d 866, 870 (7th Cir.2015) ("Sufficiency challenges are very difficult to win...."). We have sometimes said that such appeals face "a nearly insurmountable hurdle." E.g., *United States v. Domnenko,* 763 F.3d 768, 772 (7th Cir.2014), quoting *United States v. Torres-Chavez,* 744 F.3d 988, 993 (7th Cir.2014). The hurdle is not actually insurmountable, though. See, e.g., *Durham,* 766 F.3d at 678–79 (reversing on two counts); *United States v. Dooley,* 578 F.3d 582, 588–89 (7th Cir.2009) (reversing on one count); see also *United States v. Lake,* 472 F.3d 1247, 1260 (10th Cir.2007); *United States v. Izydore,* 167 F.3d 213, 220 (5th Cir.1999); *United States v. Goodman,* 984 F.2d 235, 239–40 (8th Cir.1993). Even more to the point, the Supreme Court has reversed mail and wire fraud convictions that would have dramatically expanded the scope of the statutes. *Skilling v. United States,* 561 U.S. 358, 413–15, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (affirming the reversal of honest-services wire fraud conviction); *Cleveland v. United States,* 531 U.S. 12, 26–27, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000) (reversing wire fraud conviction for failure to demonstrate loss of property); *McNally v. United States,* 483 U.S. 350, 360–61, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (reversing wire fraud conviction on honest services theory of fraud prior to statutory revision). We take a similar step here.

II. *The Limits of Mail and Wire Fraud*

A. *The Breadth of Mail and Wire Fraud*

[2] Before giving a detailed account of the evidence, we explain the legal standards ***355** we apply. The wire fraud statute prohibits schemes to defraud or to obtain money or property by means of "false or fraudulent pretenses, representations, or promises" if interstate wire or electronic communications are used to execute the scheme. 18 U.S.C. § 1343. To convict a person under § 1343, the government must prove that he "(1) was involved in a scheme to defraud; (2) had an intent to defraud; and (3) used the wires in furtherance of that scheme." *United States v. Faruki,* 803 F.3d 847, 852 (7th Cir.2015), quoting *Durham,* 766 F.3d at 678.

[3] **[4]** To prove a scheme to defraud, the government must show that Weimert made a material false statement, misrepresentation, or promise, or concealed a material fact. *United States v. Powell,* 576 F.3d 482, 490 (7th Cir.2009); see also *Neder v. United States,* 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (holding "materiality of falsehood" is an element of federal mail and wire fraud statutes). Intent to defraud requires proof that the defendant acted willfully "with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *Faruki,* 803 F.3d at 853, quoting *United States v. Howard,* 619 F.3d 723, 727 (7th Cir.2010).

Like its cousin mail fraud, the wire fraud statute has been interpreted to reach a broad range of activity. Courts have taken an expansive approach to what counts as a material misrepresentation or concealment in a scheme to defraud. As we will see, it is possible to put together broad language from courts' opinions on several different points so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go.

First, for example, materiality has been defined in broad and general terms as having a tendency to influence or to be capable of influencing the decision-maker. *Neder,* 527 U.S. at 16, 119 S.Ct. 1827; *United States v. Seidling,* 737 F.3d 1155, 1160 (7th Cir.2013).

[5] Second, the concept of a misrepresentation is also broad, reaching not only false statements of fact but also misleading half-truths and knowingly false promises. *Powell,* 576 F.3d at 490–91; *United States v. Sloan,* 492 F.3d 884, 890 (7th Cir.2007), citing *United States v. Stephens,* 421 F.3d 503, 507 (7th Cir.2005); see generally *Durland v. United States,* 161 U.S. 306, 312, 16 S.Ct. 508, 40 L.Ed. 709 (1896) (mail fraud not limited to common law fraud but includes "representations as to past or present, or suggestions and promises as to the future"). It can also include the omission or concealment of material information, even absent an affirmative duty to disclose, if the omission was intended to induce a false belief and action to the advantage of the schemer and the disadvantage of the victim. *United States v. Morris,* 80 F.3d 1151, 1160–61 (7th Cir.1996), quoting *Emery v. American General Finance, Inc.,* 71 F.3d 1343, 1346 (7th Cir.1995); see also *United States v. Keplinger,* 776 F.2d 678, 697–98 (7th Cir.1985).

[6] Third, wire fraud does not require the false statement to be made directly to the victim of the scheme. Deception of

someone else can suffice if it carries out the scheme. *Seidling,* 737 F.3d at 1160.

[7] Fourth, it is no defense that the intended victim of wire fraud was too trusting and gullible or, on the other hand, was too smart or sophisticated to be taken in by the deception. *United States v. Coffman,* 94 F.3d 330, 333 (7th Cir.1996); see also *United States v. Colton,* 231 F.3d 890, 903 (4th Cir.2000) ("If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible ***356** or skeptical, dull or bright.") (citation omitted).

These and other expansive glosses on the mail and wire fraud statutes have led to their liberal use by federal prosecutors. As one future federal judge put it during his tenure as a prosecutor, these statutes are "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 Duq. L.Rev. 771, 771 (1980). Mail and wire fraud statutes "have long provided prosecutors with a means by which to salvage a modest, but dubious, victory from investigations that essentially proved unfruitful." John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes,* in White Collar Crime: Business and Regulatory Offenses § 9.05, at 9–73 (1990).

The mail and wire fraud statutes have "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior," creating uncertainty in business negotiations and challenges to due process and federalism. *Sorich v. United States,* 555 U.S. 1204, 129 S.Ct. 1308, 1308–11, 173 L.Ed.2d 645 (2009) (Scalia, J., dissenting from denial of certiorari on scope of "honest services" theory of fraud). We must take care not to stretch the long arms of the fraud statutes too far. See *Pasquantino v. United States,* 544 U.S. 349, 377, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (Ginsburg, J., dissenting) (Supreme Court has "also recognized that incautious reading of the statute could dramatically expand the reach of federal criminal law, and we have refused to apply the proscription exorbitantly").

B. *Fraud and Commercial Negotiations*

This case presents a test of how far the mail and wire fraud statutes reach when parties negotiate a substantial commercial transaction that involves, as almost all will, the use of the mails or interstate wire communications. Some deceptions in commercial negotiations certainly can support a mail or wire fraud prosecution. A party may not misrepresent material facts about an asset during a negotiation to sell it. For example, a seller or his agent may not falsely tell potential buyers or investors that a piece of property has no history of environmental problems if soil and groundwater contamination on the property was discovered the year before. The buyer would be led to purchase a property worth far less than she was led to believe, given the looming remediation costs. Similarly, a company may not inform a potential investor that it expects patent protection for its key intellectual property if its patent application was recently rejected as barred by prior art. The investor would be led to believe that he was investing in a valuable asset that was actually worthless. The misrepresentations materially alter one party's understanding of the subject of the deal.

[8] In prior cases, we have also said that a company may not hide behind disclaimers while deliberately understating expected losses in disclosures to investors. The information would be material to the price buyers of securities are willing to pay. *United States v. Morris,* 80 F.3d 1151, 1167–68 (7th Cir.1996). Nor may a company choose to advertise the success of one investor in isolation while omitting the crippling losses of ninety percent of its investors. *United States v. Biesiadecki,* 933 F.2d 539, 541–43 (7th Cir.1991). Nor may a party falsify loan documents to defraud mortgage lenders, *United States v. Sheneman,* 682 F.3d 623, 629 (7th Cir.2012), forge a buyer's signature on a check, *United States v. Powell,* 576 F.3d 482, 491 (7th Cir.2009), or use false advertising ***357** to guarantee investors impossible returns, *United States v. Sloan,* 492 F.3d 884, 890–91 (7th Cir.2007). In short, the federal mail and wire fraud statutes reach a seller's or buyer's deliberate misrepresentation of facts or false promises that are likely to affect the decisions of a party on the other side of the deal.

These practices deviate far from behavioral norms for business transactions in a market economy governed by the rule of law. There are more difficult cases, however. "Not all conduct that strikes a court as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.' " *United States v. Colton,* 231 F.3d 890, 901 (4th Cir.2000) (alteration omitted), quoting *Reynolds v. East Dyer Development Co.,* 882 F.2d 1249, 1252 (7th Cir.1989) (affirming summary judgment and sanctions for defendants in civil RICO case alleging failure to disclose information that home lots were not suitable for building). The mail and wire fraud statutes "do not cover all behavior which strays from the ideal." *United States v. Colton,* 231 F.3d at 901 (citation and internal quotation marks omitted). We have also explained that a corporate officer's

breach of fiduciary duty, when combined with a mailing or wire communication, is not sufficient to show mail or wire fraud. *United States v. Kwiat,* 817 F.2d 440, 444 (7th Cir.1987) (reversing convictions). And "we do not imply that all or even most instances of non-disclosure of information that someone might find relevant come within the purview" of the mail and wire fraud statutes. *United States v. Keplinger,* 776 F.2d 678, 697–98 (7th Cir.1985) (affirming mail fraud convictions for scheme to submit false laboratory results on safety of medications).

C. *Fraud and Negotiating Positions*

As shown below, the central issue in this case is whether the mail and wire fraud statutes can be stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price or how important a particular non-price term is. We conclude that they cannot.

From strands of case law, it is true, one can piece together a mail or wire fraud case based on such deception about negotiating positions. To track the specific rules we discussed above: First, information about a party's negotiating position is surely material in the sense that it is capable of influencing another party's decisions. Second, actionable deception can include false statements of fact, misleading half-truths, deceptive omissions, and false promises of future action. All of these descriptions may fit deceptions about negotiating positions, at least if a negotiator's present state of mind is treated as a fact. Third, the false statement may be made to someone other than the owner or holder of the money or property targeted by the scheme. And fourth, it is no defense that the intended victim either trusted the defendant too much or was too savvy to be fooled.

[9] But Congress could not have meant to criminalize deceptive misstatements or omissions about a buyer's or seller's negotiating positions. See *United States v. Coffman,* 94 F.3d 330, 334 (7th Cir.1996) ("it would not do to criminalize business conduct that is customary rather than exceptional and is relatively harmless"). Buyers and sellers negotiate prices and other terms. To state the obvious, they will often try to mislead the other party about the prices and terms they are willing to accept. Such deceptions are not criminal.

To take a simple example based on price, suppose a seller is willing to accept $28,000 for a new car listed for sale at $32,000. A buyer is actually willing to pay ***358** $32,000, but he first offers $28,000. When that offer is rejected and the seller demands $32,000, the buyer responds: "I won't pay more than $29,000." The seller replies: "I'll take $31,000 but not a penny less." After another round of offers and demands, each one falsely labeled "my final offer," the parties ultimately agree on a price of $30,000. Each side has gained from deliberately false misrepresentations about its negotiating position. Each has affected the other side's decisions. If the transaction involves interstate wires, has each committed wire fraud, each defrauding the other of $2,000? Of course not. But *why* not?

The government's answer at oral argument was the absence of "intent to defraud." That answer begs the question. How do we recognize "intent to defraud" if a party has gained a better deal by misleading the other party about its negotiating position? If a party's negotiation position is material for purposes of the mail and wire fraud statutes, each has obtained a financial gain by deliberately misleading the other. [1]

The better answer is that negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior. Deception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material for purposes of mail and wire fraud statutes.

Even after receiving the government's post-argument supplemental authority, we know of no other case in which a court has found that deceptive statements about negotiating positions amounted to a scheme to defraud under the mail or wire fraud statutes. This absence is consistent with more general understandings in the law.

In the Restatement (Second) of Torts treatment of fraud, for example, statements about a party's opinions, preferences, priorities, and bottom lines are generally not considered statements of fact material to the transaction. See Restatement (Second) of Torts § 538A cmts. b, g (distinguishing between representations of facts—where the maker has definite knowledge—and opinions—including a "maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ"). Rules of professional conduct for attorneys require honesty in dealing with others, but they draw a similar line on negotiation positions. See Model R. Prof. Conduct 4.1(a) cmt. 2 ("Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable

settlement of a claim are ordinarily in this category....”); see also G. Richard Shell, *When Is It Legal to Lie in Negotiations?,* 32 Sloan Management Rev. 93, 96 (1991) (“There are thus no legal problems with lying about how much you might be willing to pay or which of several issues in a negotiation you value more highly. Demands and reservation prices are not, as a matter of law, material to a deal.”).

To show how these general considerations govern this case, we lay out in Part III the sequence of negotiations in this sale. Then, in Part IV, we work through ***359** the more detailed legal analysis of the government's case against Weimert, including the issues posed by Weimert's status as a corporate officer of one party to the deal, acting under a disclosed conflict of interest. We recount the facts in the light reasonably most favorable to the government. The question to keep in mind is whether the facts here go beyond misstatements or omissions about negotiating positions or are otherwise sufficient to support the wire fraud convictions.

III. *The Sale*

A. *AnchorBank, Its Affiliates, and the Crisis of 2008–09*

This case stems from a bank's attempts in late 2008 and early 2009 to sell its interest in a commercial real estate development. The bank was actually several companies, with a publicly traded holding company, Anchor BanCorp Wisconsin, Inc. (“ABCW”), at the top. ABCW owned both AnchorBank, fsb, a federal savings bank, and a non-bank subsidiary called Investment Directions, Inc., or “IDI,” which invested in real estate.

The boards and officers of the three companies interlocked. Defendant David Weimert was both a vice president of AnchorBank and the president of IDI. As IDI president, Weimert identified investment opportunities and managed development projects. In that capacity, he reported to the IDI board of directors, which had to approve any sales or purchases.

The financial crisis of 2008 put AnchorBank and ABCW in a difficult financial position. They were trying to negotiate extensions on a $116 million loan from U.S. Bank, with a sizable payment due on March 31, 2009. By late December 2008, the holding company realized it would have a difficult time avoiding default. Adding to the pressure, federal bank regulators had told AnchorBank that its balance sheet was so shaky that it could not send a cash dividend to the parent holding company to help with the payment to U.S. Bank.

B. *The Push to Sell Chandler Creek*

One possible source of cash for the holding company was to have IDI sell assets and transfer the cash to the parent holding company to help with the loan payment. On December 29, 2008, Mark Timmerman, president of the bank, told Weimert to try to sell IDI's 50 percent interest in a Texas commercial real estate development known as Chandler Creek. Timmerman told Weimert he wanted to sell IDI's interest for no less than the book value of its investment, about $6 million.

Weimert faced a big challenge. Witnesses testified uniformly that in the first quarter of 2009, the market for selling commercial real estate was just terrible. Adding to the challenge, IDI owned only 50 percent of Chandler Creek. The other 50 percent was owned by The Burke Real Estate Group, which was the general partner, meaning it had management control of the property. The Burke Group also had a right of first refusal if IDI tried to sell to anyone else. In addition, IDI and The Burke Group were each liable for the full $15 million mortgage on the property, and IDI had to carry the full $15 million as a liability on its books. Adding even more to the challenge, Timmerman wanted Weimert to sell the property in time to obtain cash for the March 31 payment to U.S. Bank.

Weimert had already tried twice in 2008 to sell the IDI interest to The Burke Group. Those overtures had been rebuffed. After receiving Timmerman's December 29 email, Weimert tried again, treating the sale as an urgent matter for the whole AnchorBank enterprise. In early January 2009, he put together a written ***360** investor proposal for IDI's Chandler Creek interest and circulated it to potential buyers. The proposal estimated that IDI's 50 percent interest was worth approximately $16.8 million but said that IDI was willing to accept $9 million. Weimert's efforts to find a buyer in January were not successful, though. Time was running out.

C. *Weimert Secures Two Offers to Buy Chandler Creek*

On January 27, 2009, Weimert went back to Brian Burke of The Burke Group in hopes of arranging a sale. Burke was still not interested, but he was shaken when he saw Weimert's investor proposal. Realizing that IDI might sell to a stranger who would then become his partner, he continued talking with Weimert. The two sketched some possible terms of a transaction. Giving the government the benefit of Burke's

confused and inconsistent testimony on the point, we assume that Weimert suggested in this meeting that he buy about five percent of IDI's 50 percent share and that The Burke Group buy the other 45 percent.

While the Burkes considered the proposal, Weimert also contacted another potential buyer, Nachum Kalka, with whom Weimert had done deals before. Despite The Burke Group's right of first refusal, he was interested in making a deal. Kalka's interest could also help Weimert and IDI push The Burke Group to make an offer without further delay. Because of The Burke Group's right of first refusal and the possibility that a bid by Kalka would help IDI even if The Burke Group bought the property, Weimert and Kalka discussed having IDI agree to pay Kalka a break-up fee to compensate him for his trouble if IDI sold to someone else. Kalka received the proposal and Chandler Creek's financial statements from Weimert and forwarded the information to his investment partner.

In the second half of February, events moved quickly. About February 16, Weimert asked Richard Petershack, an outside lawyer for IDI, to draft a proposed "template" letter of intent for potential buyers of the Chandler Creek interest. Petershack testified that Weimert told him to use $8.5 million as the purchase price, with financing of $6.5 million available through AnchorBank. Weimert also told Petershack to include a term that Weimert said buyers were requiring: that Weimert himself "stay in the deal because of my institutional knowledge of the project." Petershack also testified that Weimert told him that IDI had agreed to compensate him for his efforts in "facilitating the deal and finding potential investors" by paying him a fee of four percent of the purchase price. On this record, we must assume that Weimert was lying to Petershack at that time about the buyers requiring that he participate and IDI agreeing to the four percent fee.

Petershack prepared the template letter of intent as instructed. He sent copies to Weimert and to Kalka, and also to AnchorBank president Timmerman. By sending the draft to Timmerman, Petershack sought to confirm authority for Weimert's participation in the deal and the fee. He also wanted to inform Timmerman of Kalka's role as a "stalking horse" to push the Burkes to make an offer. Petershack received no word back from Kalka or Timmerman on the substance of the letter of intent, either generally or on Weimert's involvement in particular.

Two days later, on February 18, Weimert had dinner in California with Brian Burke and his father and business partner, William Burke. Weimert gave them a copy of the template letter of intent. He told them of Kalka's interest as a competing buyer. To Weimert's frustration, ***361** though, the Burkes were not yet willing to make a formal offer, at least until another buyer had made an offer.

On February 22, 2009, Weimert called Kalka and his investment partner. Both Weimert and the partner agreed that Weimert's involvement as a buyer would be beneficial; Weimert knew the property and had worked with the Burkes for several years. (Kalka's testimony was unclear as to whether his partner or Weimert first proposed that Weimert participate as a buyer.) In a follow-up email to Weimert, Kalka later confirmed "it is imperative that you David Weimert be involved personally in the Chandler Creek transaction." Weimert's involvement needed to be "economic" to assure Kalka of Weimert's services in overseeing the investment. Kalka wrote that Weimert "might show this," presumably the email, "to your Board to make sure that this is happening."

The following day, February 23, Weimert sent the IDI board of directors a memorandum on the Chandler Creek negotiations. He summarized key points from his conversations with Kalka and his partner. Kalka was to serve as a "stalking horse" in the investment and had ample funds to make the investment. In exchange, Kalka would receive $75,000 as a break-up fee if his offer was not selected. Finally, Weimert added: "It is imperative that Mr. Weimert be involved economically to assure his management—and investment liaison involvement in perpetuity while Mr. Kalka and or his investors are involved." Weimert went on to note as a "bottom line ... [that] Kalka will not do this without me being a Manager of the Investment and Liaison to his Group and the Burke's...." As best we can tell from the record, this statement to the board about Kalka and his partner was true.

Turning to The Burke Group as a possible buyer, Weimert told the board that the Burkes' participation was still possible, with the Burkes signaling in preliminary discussions that "they also desire my involvement both economically ... and my 10 year contribution toward the successful direction of this Project." (Note the difference at this stage between what Kalka "required" and what the Burkes "desired.") Weimert suggested that, to have sufficient funds to buy his share, he would require a fee of at least three percent of the purchase price and an additional one percent to help him pay off an outstanding note to AnchorBank.

About the same time, attorney Petershack sent Weimert a revised template letter of intent, which Weimert forwarded to Kalka on February 24. The revised template listed Weimert as buying a four and seven-eighths percent ownership of Chandler Creek and included the four percent fee for Weimert. Later that day, Kalka submitted a signed version of the letter of intent offering $8.5 million for the property. On February 25, Weimert forwarded the Kalka offer to The Burke Group. He explained that the IDI board would meet soon and encouraged the Burkes to make an offer. The Burke Group quickly responded by sending its signed letter of intent to Weimert, but it offered only $8 million.

D. *The IDI Board Approves and Sells to The Burke Group*

By late February 2009, then, Weimert had secured two offers that exceeded Timmerman's target price for Chandler Creek by at least $2 million. But both offers also posed what all IDI directors and other bank officials recognized as a conflict of interest: Weimert was both a buyer and an officer of the seller. Weimert submitted both letters of intent to the IDI board ***362** of directors along with two memoranda that were central to the government's case. [2]

The first, called "A Personal Note," was a short summary of the evolution of the deal. Weimert wrote falsely that he had "had no intention of being involved in this Project." But the deal had evolved, he said, so that "The Kalka's Group required [Weimert's involvement], ... and Bill Burke actually felt that [Weimert] would continue to 'Add a Positive Dimension' to the Management of Chandler Creek." In addition to describing his involvement falsely as "inadvertent," Weimert said he needed to participate to close the deal.

Weimert's second document, called "Evolution of This Deal," also reported on his negotiations with Kalka and the Burkes. As part of the Kalka offer, Kalka had "insisted" that Weimert "run this investment" and "have money in the deal so 'I don't run away.' " As for the Burkes, Weimert falsely told the board that they continued to "be especially focused on my continued involvement." Weimert concluded by recommending selling to The Burke Group. Although it was offering a lower purchase price, the Burke deal would also release IDI from its potential $15 million liability to Bank of America on the Chandler Creek mortgage.

The IDI board convened on February 27, 2009 to consider the sale of Chandler Creek. At the board meeting, Weimert presented each offer to the board and recommended a sale to The Burke Group. He also told the board that his participation in the deal was necessary. The directors found this proposal unusual, to say the least. In light of the conflict of interest that everyone recognized, the board excused Weimert from the meeting while it discussed the conflict issue with outside counsel.

The attorney advised the board that Weimert's involvement was not illegal. He asked the board two questions: first, whether the transaction could be completed without Weimert's involvement; and second, whether the transaction was necessary and in the best interest of the company. The board members said they understood that Weimert "had to be involved or the Burkes were not going to be a purchaser," and that the deal was good for the company, especially with the need to raise cash to make the looming payment due to U.S. Bank at the end of March. The attorney advised the board to waive the conflict and go forward with the sale. On this advice, the board waived the conflict, accepted The Burke Group's purchase offer, and approved the four percent fee for Weimert in the amount of $311,000.

According to David Omanchinski, a member of the AnchorBank board of directors, Weimert had also told him at about the time of the IDI board meeting that "he did not believe the deal could get done without his participation in it," and that Weimert would not have received his fee or any additional compensation if it had not been tied to The Burke Group deal.

The final terms of the deal were rather different from the terms proposed in the letter of intent and approved by the IDI board. IDI's attorney worked on the revisions. There is no evidence that Weimert had anything further to do with IDI's side ***363** of the transaction. On behalf of IDI, the attorney actually removed Weimert's participation from the purchase agreement itself. He reasoned that Weimert's purchase was a matter between him and The Burke Group and was more appropriate for a side deal between them than as part of the primary transaction. The attorney also drafted the separate agreement for Weimert's ownership, requiring Weimert to commit that he would in fact make the promised investment. In exchange for the four and seven-eighths percent ownership interest, Weimert would contribute $100,000 to his partnership with The Burke Group.

On March 30, IDI and The Burke Group closed the deal, in the nick of time for IDI to send the cash from the sale

to the parent holding company, ABCW, which then used it to pay U.S. Bank on March 31. The Burke Group bought IDI's 50 percent stake of Chandler Creek for $7,792,000 and relieved IDI of its mortgage obligation. The purchase was financed with a $6,233,000 loan from AnchorBank. IDI also paid Kalka the agreed $75,000 break-up fee. And Weimert received his agreed fee and bought a share of Chandler Creek from The Burke Group.

E. *Weimert's SEC Testimony and the Prosecution*

At this point, one might think, all parties were satisfied with the deal. The Burke Group got a good deal and owned more than 95 percent of the Chandler Creek property. The bank had sold the property for nearly $2 million more than it was willing to accept. It had also managed to move millions of dollars upstream to ABCW so that it could make its payment to U.S. Bank. And Weimert was hundreds of thousands of dollars ahead, with cash and a fractional interest in Chandler Creek.

Then the Securities and Exchange Commission investigated AnchorBank and its affiliates' use of TARP funds. The investigation included the Chandler Creek deal, which could be viewed as an indirect mechanism to channel AnchorBank's TARP money through the loan to The Burke Group to IDI and then on to ABCW.

In April 2012, Weimert gave testimony before the SEC regarding the deal. He testified that the Burkes had not *insisted* on his involvement, but that instead he had told the Burkes he would "like to be part of the transaction." Weimert said he had felt he "was the broker in the transaction and deserved a piece of the transaction." Weimert further testified that he was "an earmark to the deal," a description he claims he used to alert the IDI board that he "wanted to make sure that they understood that I wasn't absolutely necessary for this deal." All IDI directors testified at Weimert's trial, though, that Weimert had not described his role as an "earmark" but had told them instead that his participation was required by the Burkes. [3]

In February 2014, a few weeks before the five-year statute of limitations would have run, a federal grand jury indicted Weimert on six counts of wire fraud. The indictment alleged a scheme to defraud IDI through materially false and fraudulent pretenses to obtain an ownership interest in IDI's share of Chandler Creek and to receive the four percent fee. Specific misrepresentations included Weimert's affirmative statements that the Burkes required his involvement and his ***364** deception about who first proposed that he have a piece of the deal. Weimert pled not guilty. At trial, the jury convicted Weimert on five of the six counts. The district court denied Weimert's Rule 29 motion for judgment of acquittal. The court sentenced Weimert to 18 months in prison, well below the advisory guideline range of 87–108 months, and also ordered three years of supervised release, a $25,000 fine, $322,515 in restitution, and the relinquishment of his interest in Chandler Creek. Weimert has appealed.

IV. *Analysis*

To reiterate, we review *de novo* the denial of a motion for judgment of acquittal, *United States v. Durham,* 766 F.3d 672, 678 (7th Cir.2014), citing *United States v. Claybrooks,* 729 F.3d 699, 704 (7th Cir.2013), construing the evidence in the light most favorable to the government, *Durham,* 766 F.3d at 678, quoting *United States v. Love,* 706 F.3d 832, 837 (7th Cir.2013).

Even under this deferential standard of review, Weimert is entitled to a judgment of acquittal. All terms of the transaction, including Weimert's participation as a buyer, were disclosed to all interested parties. The government's evidence of deception—all of it—addressed not material facts or promises but rather parties' negotiating positions, which are not material for purposes of mail and wire fraud. In Part A, below, we first explain the government's theory. In Part B, we conclude that Weimert did not commit a crime by anything he told the potential buyers. We address in Part C Weimert's deception of the IDI board and in Part D whether his role as a corporate officer can support the convictions. [4]

A. *The Government's Theory*

The government's theory is that Weimert obtained property (the fee and the share of Chandler Creek) by deceiving the IDI board and his ABCW/AnchorBank supervisors, as well as Petershack, Kalka, and the Burkes. The government's case relied on Weimert's direct communications with the IDI bank executives and directors, and on a third-party theory of fraud based on deceiving the buyers rather than IDI, from whom he actually obtained property. See *United States v. Seidling,* 737 F.3d 1155, 1160–61 (7th Cir.2013). The government argued that Weimert committed wire fraud by telling Peter-shack about the need for his participation and fee, by failing to disclose to Kalka that he was a stalking-horse bidder, by misrepresenting Kalka's involvement to the Burkes, and by repeatedly telling the IDI board and bank officials that he had

not originated the idea of participating as a buyer and that the buyers required that he participate in the deal.

B. *Deception of the Buyers*

We first address the government's theory that Weimert committed wire fraud by misleading Kalka about whether his bid, which was not successful, was a "stalking horse" bid. "Stalking horse" is not a legal term of art, and it was never defined precisely in the trial. The term is often used in bankruptcy proceedings to describe an initial bid for assets invited by the debtor to set a floor for competing bids. See, e.g., ***365** *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. ——, 132 S.Ct. 2065, 2069, 182 L.Ed.2d 967 (2012). In that context there is nothing even suspicious about the practice.

[10] In this case, however, the government seems to use the term to describe a bidder who does not actually mean to follow through on the bid, but whose bid is being used by the seller to trick another potential bidder to make or increase a bid. This theory of fraud fails on the evidence, so we need not evaluate its legal viability.

There is no evidence that Kalka's bid was anything other than a good-faith bid. Kalka and his partner offered a higher price. They hoped to win the purchase, and they had the assets to close the deal. Kalka knew Weimert was hoping to elicit another bid, or at least that his offer would have to be subject to The Burke Group's right of first refusal. That's why the $75,000 break-up fee made sense. But there simply is no evidence that there was anything fraudulent about Kalka's bid or role. We need not consider the legal question whether a complete bluff to the Burkes about the Kalka bid might support a wire fraud conviction, though bluffs in negotiations are not unusual.

The government also argued that Weimert misled the Burkes. First, the government pointed to the contradiction in Weimert telling the Burkes on one hand that Kalka would be a terrible partner for the Burkes—thus encouraging the Burkes to make their own offer—but telling them on the other hand that Kalka would be an attractive partner. This theory cannot support a conviction for wire fraud. In the negotiating dance, Weimert was trying to coax the Burkes to make a serious and prompt offer to buy IDI's share of Chandler Creek. The inconsistent opinions he expressed to reluctant bidders about how well they would like having Kalka and his investor as partners in the investment did not rise beyond puffery. They cannot reasonably be deemed material. See *United States v. Coffman,* 94 F.3d 330, 334 (7th Cir.1996) (noting in wire fraud case that nearly "all sellers engage in a certain amount of puffing; all buyers ... know this; it would not do to criminalize business conduct that is customary rather than exceptional").

Second, the government argued that Weimert misled the Burkes about whether Kalka was requiring Weimert to participate in the deal. That led the Burkes to include in their letter of intent a term having Weimert buy a minority stake in Chandler Creek. Although Kalka was in fact requiring Weimert's participation, any deception of the Burkes on that score would not have been material because it was deception of the opposing party in a transaction about the negotiating positions of third parties.

C. *Weimert's Deception of the IDI Board*

The government relies most heavily on the theory that Weimert deceived the IDI board and its affiliates about whether The Burke Group required his participation in the purchase. According to the government, Weimert crafted an elaborate scheme to obtain money and property by leading IDI to believe the buyers insisted on his participation and by leading the buyers to believe that IDI wanted him to participate. On this record, giving the benefit of conflicting evidence to the government, we must assume that he did so, and that he did so by deceiving the various parties about the negotiations with other parties. He told Kalka and Petershack that IDI supported his involvement in the deal and that Timmerman had approved. He told the Burkes that IDI and Kalka all wanted him in the deal. And he told the IDI board that the Burkes required his participation. The deception was especially ***366** plausible in early 2009, when many owners were trying to sell shaky real estate investments. A seller who was willing to keep some "skin in the game" had more credibility than a seller who was trying to walk away from the property entirely.

[11] To the extent the Chandler Creek deal is properly understood as an arms-length, three-party deal, with IDI selling most of its interest to The Burke Group and a fraction to Weimert, these deceptions do not support the criminal convictions. They misled parties who were negotiating a commercial deal only about the negotiating positions—the preferences, values, and priorities—of other parties.

IDI was not misled as to the nature of the asset it was selling or the consideration it received. Cf. *United States v. Sheneman,* 682 F.3d 623, 629 (7th Cir.2012) (lenders induced by falsified loan documents); *United States v. Morris,* 80

F.3d 1151, 1167–68 (7th Cir.1996) (investors induced by misleading sales tactics at pricing). And IDI was not misled as to Weimert's interest in seeing the deal done. Cf. *United States v. George,* 477 F.2d 508, 513–14 (7th Cir.1973) (employee received hidden kickbacks that caused employer to overpay for assets).

At bottom, even the centerpiece of the government's case—Weimert falsely told the IDI board and Omanchinski that the Burkes required his participation—amounted to no more and no less than a false prediction about how the Burkes would respond to a counteroffer to exclude Weimert's participation. In other words, it was deception about a party's negotiating position. Weimert's false story about who had first come up with the idea to have him participate would have been material only for what it signaled about how important his participation was to the parties. In other words, it was important only in predicting how various parties were likely to respond to a counteroffer proposing to reduce or eliminate his role. For the reasons explained above in Part II, such deceptions about parties' preferences and values, and thus their negotiating positions, are not material for purposes of wire fraud and cannot support Weimert's convictions.

D. *Weimert's Role as Fiduciary*

But is it correct to consider the Chandler Creek deal as an arms-length transaction among three separate parties? After all, Weimert was an officer of IDI. He owed the corporation fiduciary duties of loyalty and honesty. The government's strongest argument is that Weimert's actions amounted to a scheme to defraud IDI because, even if an outsider might be permitted to mislead it about negotiating positions, Weimert could not do so about his own role in the transaction. Based on the testimony of IDI directors, we must assume that they trusted Weimert on all aspects of the Chandler Creek deal, including what he told them about the buyer insisting that he participate in the deal.

In light of the disclosure of all terms of the sale, as well as our doubts that an officer or other fiduciary must disclose his negotiating position when dealing with the company about his own compensation, we think the better approach is to treat this as closer to an arms-length transaction, at least for purposes of criminal law.

[12] One cornerstone of civil corporation law is that corporate officers and directors owe fiduciary duties of loyalty and honesty to the corporation. E.g., *Nixon v. Blackwell,* 626 A.2d 1366, 1376 (Del.1993) (when directors are on both sides of transaction, they must demonstrate "their utmost good faith and the most scrupulous inherent fairness of the bargain"); ***367** *Racine v. Weisflog,* 165 Wis.2d 184, 477 N.W.2d 326, 329 (Wis.App.1991) (officers and directors are under fiduciary duty of individual loyalty, good faith, and fair dealings in corporate business). The questions here involve whether Weimert breached his fiduciary duty to IDI and how such a breach of a civil duty affects the analysis under the law of criminal wire fraud.

[13] Proof of a breach of fiduciary duty is neither necessary to nor sufficient proof of mail or wire fraud, but such a breach is often relevant. First, while the "existence of a [fiduciary] duty is relevant and an ingredient in some" wire fraud prosecutions, it is not essential to establish wire fraud. *United States v. Colton,* 231 F.3d 890, 900–01 (4th Cir.2000) (quotation marks omitted); see also *United States v. Keplinger,* 776 F.2d 678, 697–98 (7th Cir.1985) (citations omitted). Concealment is often accompanied by a violation of a fiduciary duty, but it need not be.

[14] More pertinent for this case, a breach of fiduciary duty combined with a mailing or wire communication is insufficient alone to establish mail or wire fraud. *United States v. Kwiat,* 817 F.2d 440, 444 (7th Cir.1987) (reversing mail fraud conviction of corporate officer through scheme for self-dealing: "Neither the language nor the legislative history of § 1341 hints that it is an all-purpose remedy for corporate mismanagement."); *Disher v. Information Resources, Inc.,* 691 F.Supp. 75, 86 (N.D.Ill.1988) ("Not every common law breach of fiduciary duty that involves mailings or use of the telephone constitutes a violation of the mail and wire fraud statutes."), *aff'd,* 873 F.2d 136 (7th Cir.1989). The government must still demonstrate a scheme to defraud, including "some sort of fraudulent misrepresentation or omissions calculated to deceive persons of ordinary prudence and comprehension." *Disher,* 691 F.Supp. at 86, quoting *United States v. Wellman,* 830 F.2d 1453, 1462 (7th Cir.1987); see also *United States v. Feldman,* 711 F.2d 758, 763 (7th Cir.1983) ("Yet not every breach of duty by an employee works as a criminal fraud.... Such activities must be accompanied by a scheme formed with the intent *to defraud.*") (emphasis in original) (citations omitted).

In some cases, such as "honest services" mail and wire fraud cases that rely on 18 U.S.C. § 1346, a breach of a fiduciary duty may lie at the core of the offense, such as when an officer or director receives a hidden kickback or bribe from a party transacting business with his company. That is clear from

Skilling v. United States, 561 U.S. 358, 405–09, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), where the Supreme Court held that an "honest services" fraud prosecution requires proof of a kickback or bribe. At the same time, the *Skilling* Court also rejected the government's argument that self-dealing alone, *even undisclosed self-dealing,* would violate fraud statutes without a kickback or bribe. *Id.* at 409–11, 130 S.Ct. 2896. Also important for our thinking in this case, the Court emphasized that uncertainty in criminal law weighed in favor of lenity. *Id.* at 410–11, 130 S.Ct. 2896. For other illustrations of the bribe-kickback point, see, e.g., *United States v. Nayak,* 769 F.3d 978, 980–81 (7th Cir.2014) (affirming mail fraud conviction of doctor who paid bribes and kickbacks to encourage other doctors to refer their patients); *United States v. Vrdolyak,* 593 F.3d 676, 678 (7th Cir.2010) (explaining guilty plea based on hidden kickback from buyer to seller's director).

There was no such hidden kickback or bribe here. Nor was there even undisclosed self-dealing. Weimert's interest in the Chandler Creek sale was fully disclosed to the IDI board. Everyone recognized the conflict of interest, and they took the appropriate steps to deal with it as a corporation should when an officer or director ***368** has a material, personal interest in a transaction with the corporation. See Del.Code Ann. tit. 8, § 144; *Benihana of Tokyo, Inc. v. Benihana, Inc.,* 906 A.2d 114, 120 (Del.2006). Weimert did not participate in the board's decision to approve the sale. The board received independent advice from counsel about the conflict and the transaction before approving it. And there is no evidence that Weimert played any role in the later negotiations needed to close the sale to The Burke Group on somewhat modified terms, for a lower price.

Since Weimert had such a substantial financial interest in the deal that was disclosed to the board, it is helpful to view the role of Weimert's fiduciary duty as if this were a transaction involving Weimert's own compensation. If Weimert's role as a corporate officer with fiduciary duties were to play a decisive role here, it would be because he would have owed a duty to the corporation to be completely honest regarding the Chandler Creek sale, including how his participation in the deal came about and what he knew about how the Burkes were likely to have responded to a counteroffer excluding Weimert. So, to the extent that fiduciary standards are relevant to this criminal case, the best guidance concerns the extent of a corporate officer's fiduciary duty toward the corporation in negotiating his own compensation.

When a corporate officer is negotiating his own compensation with the corporation, the scope of that fiduciary duty appears to be a matter of controversy and divided authority. Courts often use sweeping language to describe that duty. See, e.g., *Nixon,* 626 A.2d at 1376 (directors on both sides of transaction must demonstrate "their utmost good faith and the most scrupulous inherent fairness of the bargain"); see also *Maksym v. Loesch,* 937 F.2d 1237, 1242 (7th Cir.1991) (when attorney agrees with client to side-deal benefitting the attorney, "the burden of proof is upon the attorney to show the fairness of the agreement, the utmost good faith, complete disclosure on his part and a full understanding of all the facts and legal consequences on the part of the client").

Taken literally, such a broad fiduciary duty could require a corporate officer negotiating with the corporation about his own compensation to reveal the weaknesses in his own negotiating position as part of his duty of good faith. He might be required, for example, to disclose that he would be willing to take less compensation than he is asking for. And under that reasoning, Weimert would have been obliged to tell the directors that the Burkes probably would have been willing to go forward with the purchase even without his participation. That is not the law with corporate fiduciary duties or with other fiduciary duties, however, or at the very least it is not so clearly the law as to support a criminal conviction.

For example, Delaware courts teach that "an officer may negotiate his or her own employment agreement as long as the process involves negotiations performed in an adversarial and arms-length manner." *In re Walt Disney Co. Derivative Litigation,* 825 A.2d 275, 290 (Del.Ch.2003) (emphasis omitted) (denying motion to dismiss), *later judgment for defendants aff'd,* 906 A.2d 27 (Del.2006).

Similarly, a Texas court applying Delaware law has explained that when a corporate officer negotiates and renews his own employment terms, he "acts in his individual capacity, as it is evident that the company and the employee are adverse to each other in the context of negotiating that employee's compensation." *Pride International, Inc. v. Bragg,* 259 S.W.3d 839, 850 (Tex.App.2008), citing *In re Walt Disney,* ***369** 906 A.2d at 49–51. As another example of controversy on the civil side of the fiduciary duty issue, see *Fernandez v. City of Miami,* 147 So.3d 553 (Fla.App.2014), where a majority held that a city attorney breached his fiduciary duty in negotiating a generous severance term in his own employment contract with the city, while the dissenting judge argued that the relationship was not a fiduciary one when

negotiating compensation. *Id.* at 564–65 (Shepherd, C.J., dissenting), citing *Pride Int'l,* 259 S.W.3d at 850, and *In re Walt Disney,* 906 A.2d at 49–51.

In the related area of an attorney's fiduciary duties to clients, we have cautioned that the broader scope of fiduciary duty quoted above does not apply with full force when the attorney's compensation is the issue: "Fiduciary law does not send the dark cloud of presumptive impropriety over the contract that establishes the fiduciary relationship in the first place and fixes the terms of compensation for it." *Maksym,* 937 F.2d at 1242. We continued: "Most fiduciary relationships are established by contract and are not eleemosynary, yet the contracts establishing them are held valid without the court's imposing on the lawyer or other fiduciary the difficult burden of demonstrating that he made full disclosure of the terms of the contract and that those terms were 'fair,' whatever exactly that means." *Id.* Thus, while an attorney's fiduciary duty is broad, the law does not require an attorney negotiating with a client over a fee to disclose the lowest fee the attorney would be willing to accept. That remains a matter for negotiation without a duty of complete disclosure of the attorney's negotiating position.

Along these lines, it is also useful to recall a legal dispute in the appellate courts at the time of the events at issue in this case. The dispute concerned the fiduciary duty imposed by statute, § 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a–35(b), with respect to compensation advisors receive from mutual funds. In 2008, a panel of this court held that agreed-upon compensation was lawful, without subjecting the rates to judicial review for reasonableness. *Jones v. Harris Associates L.P.,* 527 F.3d 627, 632–33 (7th Cir.2008). By way of illustration, we explained that corporate officers' fiduciary duties did not "prevent them from demanding substantial compensation and bargaining hard to get it." *Id.* at 632. Bargaining "hard" can include bluffs about negotiating positions. Showing the room for controversy, rehearing en banc was denied by an equally divided court, 537 F.3d 728 (7th Cir.2008), and then, after the events in this case, the Supreme Court reversed, adopting a standard that allows for judicial review of the reasonableness of such fees charged by mutual fund fiduciaries. *Jones v. Harris Associates L.P.,* 559 U.S. 335, 130 S.Ct. 1418, 176 L.Ed.2d 265 (2010).

Our point here is not to resolve whether or not the government proved a civil breach of fiduciary duty by Weimert in the Chandler Creek sale. The concerns raised by our dissenting colleague about the duties, incentives, and sometimes conflicting interests of corporate officers and directors are important, have considerable force, and deserve further consideration as a part of the civil law governing those relationships. Our point is a narrower one: that at the time relevant in this case, civil corporate law standards of fiduciary duty did not provide a clear answer for a situation like this: a corporate officer negotiating with his employer in a three-sided deal in which he, his employer, and a third party took part, in which his personal financial interest was known, but in which he misled that employer about his and others' negotiating positions on the transaction. Perhaps IDI and AnchorBank ***370** would have had a viable civil case against Weimert, or perhaps not. But particularly in light of the rule of lenity invoked in *Skilling,* 561 U.S. at 410–11, 130 S.Ct. 2896, we do not believe the government has proven criminal wire fraud in the circumstances of this unusual, and seemingly unprecedented, prosecution. This is not a case where a party used a secret side-deal to induce a victim to part with an asset at a discount. The final contract terms were in plain view and were in fact discussed and negotiated by the interested parties. We leave the civil law issues and remedies for civil cases.

V. *Conclusion*

Federal mail and wire fraud statutes encompass a broad range of behavior. Their limits can be difficult to draw with certainty. But there are limits nonetheless, and they must be defined by more than just prosecutorial discretion. Deception and misdirection about a party's values, priorities, preferences, and reserve prices are common in negotiation. We must be wary of criminalizing these tactics, at least without much clearer direction from Congress. Weimert's dealings in selling Chandler Creek were sharp and self-interested, but they did not amount to wire fraud. By the time IDI signed the contract to sell, all terms of the deal were on the table. IDI might have been able to secure a better deal if it had known the underlying priorities of prospective buyers and Weimert, but that is for now, at least, a matter for the corporate boardroom and civil law, not a federal criminal trial.

Weimert's motion for a judgment of acquittal should have been granted. Accordingly, we need not reach the other issues Weimert raises on appeal. The judgment of the district court is REVERSED. We order Weimert released from Bureau of Prisons custody within 72 hours of issuance of this opinion, subject to the terms of supervised release of his sentence, pending issuance of our mandate. Pending issuance of our mandate, the district court shall have jurisdiction to modify and enforce those terms of supervised release as appropriate.

FLAUM, Circuit Judge, dissenting.

I respectfully disagree with the analysis and conclusion of the majority. At the outset, I do not believe that the scenario presented in this case can be viewed as an arms-length, three-party transaction. Weimert, as president of IDI, was acting on behalf of IDI in negotiating the deal. Unlike a situation involving three independent parties, in the transaction at hand, the IDI board had every reason to expect that Weimert would fairly and honestly represent its interests. The record does not reflect an expectation at the start of negotiations that Weimert would be entitled to equity or any sort of bonus arising out of the Chandler Creek deal. Thus, I cannot accept the majority's conclusion that this situation amounts to hard bargaining among disinterested parties, and that the IDI board received what it agreed to and expected in the Chandler Creek sale. In fact, IDI likely would have received a higher purchase price had Weimert not taken a bite out of the deal. IDI received roughly 96 percent, rather than 100 percent, of the purchase price due to Weimert's creation of equity for himself.

I also do not agree that this case is similar to a routine negotiation among buyers and sellers in which the parties benefit from deliberately false misrepresentations about their negotiating positions. Such situations, which the majority contends are customary and relatively harmless, entail actual arms-length transactions among independent parties. By ***371** contrast, Weimert, the president of IDI, was not at arms-length with the IDI board. Moreover, in the typical negotiation involving a buyer and seller, the parties are aware that they are solely bargaining with one another; in the case at hand, the IDI board had no reason to believe that it was also negotiating with Weimert, in addition to the potential buyers.

Although the final contract terms were disclosed when the IDI board considered and approved the deal, the evidence suggests that the IDI board only approved the deal because Weimert represented that it would not get done without his involvement. All of the board members later testified that they would not have voted to waive the conflict of interest and pay Weimert's fee if they had known that the Burkes did not require his involvement. This evidence undermines the notion that the IDI board simply agreed to the terms that were in plain view and received what it expected. Rather, the deal the board approved was based on misrepresentations by its own representative and the board would not have approved the deal if it had known the truth. Further, I find the majority's assertion that the final contract terms were "in fact discussed and negotiated by the interested parties" to be an incomplete portrayal of the facts, since the only parties to negotiate the letter of intent that the IDI board approved were Weimert, as IDI's representative, and the Burkes. Although the final contract terms were slightly different than those initially approved by the board, that letter of intent formed the basis for a transaction in which the parties assumed and ultimately mandated Weimert's participation.

If one focuses on Weimert's misrepresentations to the IDI board while he was supposedly acting on its behalf, the materiality inquiry is different than the majority proffers. Even if Weimert's statements to Kalka and the Burkes—parties at arms-length—were closer to puffery, Weimert's deception of the IDI board and his ABCW/AnchorBank supervisors was more insidious than mere bluffing. Furthermore, even assuming Weimert's participation was a non-core term of the deal, IDI was misled as to the amount it could receive for the property as well as Weimert's interest in seeing the deal completed. Weimert's misrepresentations induced the IDI board to approve the deal and were, therefore, material to the board's decision. *See Neder v. United States,* 527 U.S. 1, 16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Our case law also supports the conclusion that Weimert's misrepresentations to the Burkes were material to the IDI board's decision to approve the deal. *See United States v. Seidling,* 737 F.3d 1155, 1160 (7th Cir.2013) (noting that "[i]n general, a false statement is material if it has a natural tendency to influence or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed" (quoting *Neder,* 527 U.S. at 16, 119 S.Ct. 1827) (internal quotation marks omitted)). As mentioned previously, all of the board members testified that they would not have voted to waive the conflict of interest and pay Weimert's fee if they had known that the Burkes did not require his involvement. Weimert's statements were also material to his supervisors at AnchorBank, who testified that they would not have approved payment of his fee through bank payroll if it had not been their understanding that Weimert had to be involved in the deal.

In sum, I conclude that Weimert committed wire fraud by deceiving his own company and taking a portion of the deal for himself. I am not unsympathetic to the majority's commentary regarding the ***372** "expansive glosses" on the mail and wire fraud statutes that have led to their liberal use by federal prosecutors, but Weimert's deception of his own board

meets the Supreme Court's standard for materiality. *Neder,* 527 U.S. at 16, 119 S.Ct. 1827.

Additionally, even if one assumes that Weimert's misrepresentations to the Burkes and Kalka did not, standing alone, rise to the level of criminal wire fraud, they do constitute such when combined with his statements to the IDI board. In *United States v. Seidling,* we held that wire fraud does not require that the false statement be made directly to the victim of the scheme—here, the IDI board. 737 F.3d at 1160. *Seidling* involved a misrepresentation to a third party that furthered the scheme to defraud the victim. *Id.* As in *Seidling,* Weimert's misrepresentations to the Burkes and Kalka were integral to the success of his scheme to defraud IDI. Thus, no matter how insignificant these misrepresentations may have been to the Burkes and Kalka, I conclude that they still satisfy the requisite materiality element of wire fraud and support Weimert's conviction.

Beyond whether this is properly viewed as an arms-length, three-party transaction, I am further concerned with the majority's fiduciary duty analysis. The parties did not address the issue of fiduciary duty and, in any event, it is not central to the criminal wire fraud analysis. *See United States v. Kwiat,* 817 F.2d 440, 444 (7th Cir.1987). What is critical is Weimert's position of trust as IDI's president.

I also find questionable the majority's framing of Weimert's misrepresentations as a permissible employment compensation negotiating strategy. I do not view this as a situation in which Weimert, who had not been promised any sort of compensation arising out of the sale of Chandler Creek, was negotiating the terms of his employment at arms-length with the IDI board. Instead, Weimert was simultaneously representing and deceiving the IDI board for his own pecuniary gain.

For the foregoing reasons, I respectfully dissent and would affirm the judgment of conviction.

All Citations

819 F.3d 351

Footnotes

1 One might raise a practical objection to this simple example: it will usually be too difficult to prove that a negotiating position was deliberately deceptive in such a two-person negotiation over a car. But in much larger business deals involving negotiating teams, internal emails and discussions would routinely provide such evidence if one were to look.

2 Strictly speaking, neither letter of intent was a firm offer. Both were subject to various contingencies, and the letters were drafted to require further negotiations on details, even after execution, before either side would be bound to the terms of the proposed transaction. See, e.g., *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.,* 873 F.2d 155, 158 (7th Cir.1989) (holding that executed draft letter of intent imposed only a limited duty to negotiate in good faith).

3 Anchor BanCorp Wisconsin, Inc. filed for Chapter 11 bankruptcy protection on August 12, 2013. The approved bankruptcy reorganization plan allowed ABCW to escape almost all of its TARP loan obligations and to reduce its obligations to U.S. Bank. See *In re Anchor BanCorp Wisconsin Inc.,* No. 3:13–BK–14003 (Bankr.W.D.Wis.2013).

4 We reject the government's forfeiture argument. At the close of the government's case-in-chief, Weimert moved for judgment of acquittal, arguing that the government had failed to establish the element of materiality. The court reserved ruling. Weimert renewed the motion in writing at the end of the trial. The materiality issue was not forfeited.

976 F.Supp.2d 460
United States District Court,
S.D. New York.

In the Matter of Gregory N. FILOSA, Respondent.

No. M–2–238.
|
Feb. 5, **2013**.

Synopsis

Background: Attorney was charged by the Committee on Grievances for the United States District Court for the Southern District of New York with engaging in conduct violative of the New York Rules of Professional Conduct.

[Holding:] The District Court, Richard J. Sullivan, J., held that one-year suspension from the practice of law was warranted for engaging in conduct in violation of New York Rules of Professional Conduct by knowingly failing to disclose information to opposing party in order to extract a more favorable settlement of client's employment discrimination claim.

Suspension ordered.

See also, **976** F.Supp.2d 471, **2013** WL 433537.

West Headnotes (6)

[1] Federal Courts
Counsel

In interpreting New York Rules of Professional Conduct, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, district court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests.

[2] Attorney and Client
Deception of court or obstruction of administration of justice

Attorney violated New York Rules of Professional Conduct concerning fairness to opposing party and counsel by serving an expert report that he knew was misleading and subsequently referring to the report in the context of settlement negotiations; fact that attorney did not realize at the time that his actions were unethical did not insulate him from a finding that he violated the Rules. N.Y.Rules of Prof.Conduct, Rules 3.3(a)(3), 3.4(a)(4), 4.1.

1 Cases that cite this headnote

[3] Attorney and Client
Deception of court or obstruction of administration of justice

Attorney violated New York Rules of Professional Conduct concerning fairness to opposing party and counsel by failing to correct deposition testimony provided by his client that he knew was false. N.Y.Rules of Prof.Conduct, Rule 3.4(a)(1, 3).

[4] Attorney and Client
Deception of court or obstruction of administration of justice

Attorney violated New York Rules of Professional Conduct concerning fairness to opposing party and counsel by failing to timely produce documents that would have revealed client's job offers in order to extract a more favorable settlement of her employment discrimination claim. N.Y.Rules of Prof.Conduct, Rule 3.4(a)(1, 3).

1 Cases that cite this headnote

[5] Attorney and Client
Deception of court or obstruction of administration of justice

Attorney engaged in intentionally deceptive misconduct that interfered with the administration of justice and reflected adversely on his fitness as a lawyer in violation of New York Rules of Professional Conduct where he,

in order to obtain a more favorable settlement of client's employment discrimination claim, knowingly misled opposing party about client's employment prospects when he served the inaccurate expert report, failed to correct client's evasive deposition testimony, and failed to timely produce documents that would have revealed that client had accepted two job offers. N.Y.Rules of Prof.Conduct, Rule 8.4.

1 Cases that cite this headnote

[6] Attorney and Client

Definite Suspension

One-year suspension from the practice of law was warranted for engaging in conduct in violation of New York Rules of Professional Conduct by knowingly failing to disclose information to opposing party in order to extract a more favorable settlement of client's employment discrimination claim, given attorney's relative youth, his expressions of remorse, the absence of a prior disciplinary record, and that, at least in some instances, he was acting at the specific direction of a supervising lawyer. N.Y.Rules of Prof.Conduct, Rules 3.3(a)(3), 3.4(a), 8.4.

***461 OPINION AND ORDER**

RICHARD J. SULLIVAN, District Judge.

BEFORE THE COMMITTEE ON GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK [1]

This matter comes before the Committee on Grievances for the United States District Court for the Southern District of New York (the "Committee") to consider the imposition of discipline upon Respondent Gregory N. Filosa, a member of the bar of this Court, based on his conduct before the Honorable William H. Pauley, III, United States District Judge, in *Fryer v. Omnicom Media Group,* 09 Civ. 9514(WHP). In *Fryer,* Judge Pauley imposed a $15,000 sanction on the law firm Thompson Wigdor & Gilly and a $2,500 sanction on its client, plaintiff Violet Fryer, based on false testimony by Fryer at her deposition and efforts by Respondent and Scott B. Gilly to conceal Fryer's new employment and to leverage a false expert report in order to extract a favorable settlement.

For the reasons set forth below, the Committee finds that Respondent engaged in conduct that violates Rules 3.3 (conduct before a tribunal); 3.4 (fairness to opposing party and counsel); 4.1 (truthfulness in statements to others); and 8.4 (misconduct) of the New York Rules of Professional Conduct.

462 *BACKGROUND

In June of 2009, plaintiff Violet Fryer retained the law firm of Thompson Wigdor & Gilly ("TWG") to represent her in the prosecution of her employment discrimination claim against OMD (a subsidiary of Omnicom Media Group). Fryer alleged that, while she was employed at OMD, she was subjected to employment discrimination and retaliatory termination, in violation of the Family Medical Leave Act ("FMLA") and Title VII of the Civil Rights Act of 1964.

Respondent was assigned as the associate on the *Fryer* litigation in June of 2009, and remained the associate on the matter until the end of his employment with TWG. Respondent worked on the case under the supervision of partner Andrew Goodstadt until Goodstadt left the firm in August 2010. Thereafter, Respondent was supervised by partner Scott B. Gilly.

The Expert Report and Settlement Negotiations

In July of 2010, TWG retained an economist to prepare a calculation of Fryer's potential damages resulting from the termination of her employment, and provided him with the information necessary to make that calculation. Fryer had remained unemployed since her termination from OMD. The economist prepared an expert report that contained a damages analysis based, in part, on the assumption that Fryer would remain unemployed through the end of 2010 and also calculated future earnings for a period of one to six years into the future.

Prior to service of the expert report, however, Fryer received, and accepted, two job offers. On September 10, 2010, she received an offer of employment from Universal McCann ("UM"), which she initially accepted. She then withdrew her acceptance of the UM offer when she received and accepted a job offer from Kraft Foods ("Kraft") on September 17, 2010 at a salary greater than what she had been paid by OMD. Fryer was scheduled to begin her employment with Kraft on October 11, 2010. Fryer advised Respondent of the foregoing on the date she received each offer, September 10th and September 17th, respectively. On September 10th, Respondent and Gilly discussed the fact that Fryer had received a job offer at a higher salary than she had earned at OMD, and that it was likely she would accept the offer. Respondent and Gilly also discussed the desirability of settling the case as soon as possible. On September 17th, Respondent advised Gilly that Fryer had decided to accept a job offer and had authorized him to renew settlement discussions with OMD.

The expert report was provided to TWG on September 22, 2010. On September 24, 2010, Respondent forwarded the report to Gilly in an email, stating:

> I received the economic damages report in Fryer. A copy is attached. We have to provide to opposing counsel by next Wednesday, but I wanted to discuss with you how we could leverage this into trying to settle it before they know about her new job. I will come by Monday to discuss, but I wanted to give you a heads up.

Gilly responded, "[s]ounds good. I just read the report and have some ideas." Following further discussions with Gilly, Respondent served the expert report upon defendants' counsel on September 27, 2010.

On September 28, 2010, Respondent engaged in a settlement discussion with opposing counsel. Respondent renewed the settlement demand of $350,000 that had originally been made during the parties' Rule 26(f) conference. In this discussion and in subsequent correspondence, Respondent ***463** referenced the expert report to support the reasonableness of the settlement demand. Respondent had discussed this settlement strategy with Gilly. On September 29, 2010, Respondent sent opposing counsel a settlement demand letter, dated September 28, 2010, summarizing the previous settlement discussion, and noting that the renewed settlement offer of $350,000 was "at the bottom end of the range [of economic damages] provided in the expert report which we recently forwarded to you." Gilly reviewed and revised the September 28th letter before it was sent. There were no further settlement discussions until after the first day of Fryer's deposition.

Deposition and Continued Settlement Negotiations

On October 7, 2010, Fryer was deposed by OMD. Respondent represented Fryer at the deposition. Counsel for OMD asked Fryer about her efforts to retain new employment. Specifically, he asked Fryer whether she had worked since she left OMD, to which Fryer replied "no." (Fryer Oct. 7, 2010 Dep. Transcript at 249: 11–12.) Counsel for OMD then inquired what Fryer "had done in the past 60 days to find work." (*Id.* at 253:4–5.) Fryer responded that she had "been on interviews," had submitted her resume to various job boards as well as directly to specific companies' websites, and had "been working with several headhunters." (*Id.* at 253:6–9.) In response to further questioning from counsel for OMD, Fryer gave the names of two specific headhunters she had been communicating with, and lamented that the positions the headhunters presented to her always required "a different type of background than me, than I have, or it's again too senior or junior." (*Id.* at 253:15–255:11.) Counsel for OMD asked Fryer about how many interviews she had been on and with what companies. (*Id.* at 255:12–13, 15, 18.) Fryer stated that she "probably met with ten companies," specifically "MRI, MTV, Source Marketing, ... Mediacom, Universal McCann, Kraft," and the "CafeMom web site." (*Id.* at 255:16–17, 19–21.) When asked if she had second interviews with any companies, Fryer responded as follows: "With a few of them. And after I—I didn't—either I didn't hear back or I didn't get the job." (*Id.* at 256:18–20.) When asked about the "emotional impact" of the loss of her job, Fryer cited the "financial stress of everything, not knowing when is the next job going to come along," commenting that "[i]t's frustrating to keep trying and not getting anywhere." (*Id.* at 266:12–16.) Respondent was aware at the time of the deposition that Fryer had in fact accepted and then rejected a job offer from UM, and that she was scheduled to begin working at Kraft on October 11, 2010. Yet, at no time before, during or immediately following the October 7, 2010 deposition did Respondent disclose these facts to OMD or take any other steps to clarify the record.

Following the October 7, 2010 deposition, the parties engaged in several settlement discussions, but were unable to come to an agreement. Beginning on October 12, 2010, OMD had begun making offers to settle the case. Respondent reduced Fryer's settlement demand from $350,000 to $250,000. OMD eventually offered $125,000, to which Respondent replied that Fryer's final demand remained $250,000. Settlement discussions reached an impasse at this point.

Documents

On April 20, 2010, OMD requested production of, among other things, all documents concerning: (a) Fryer's efforts to mitigate her damages; (b) Fryer's efforts to secure employment following the termination of her employment with OMD; (c) ***464** each job that Fryer held since the termination of her employment with OMD; and (d) income that Fryer received from any such job. Fryer initially produced documents responsive to OMD's document requests, and Fryer **supplemented** her document production on September 7, 2010, October 5, 2010 and October 12, 2010. Yet, prior to November 11, 2010, Fryer had not produced any documents reflecting that she had received or accepted job offers from Kraft and/or UM. Among those documents that were not produced or logged on a privilege log is a series of e-mails between Fryer and Respondent, sent and received on September 17, 2010, and between Fryer and a representative of UM, forwarded to Respondent on September 20, 2010, that refer to Fryer's interviews and job offers from both UM and Kraft.

On October 4, 2010, Respondent consulted with Gilly regarding discovery strategy. More than two weeks later, on October 19, 2010, Respondent met with Gilly to discuss the impasse in settlement discussions and the status of discovery. Thus, Gilly was aware that Respondent had not yet **supplemented** Fryer's document production with correspondence concerning her job offer, and that he had not amended the expert report, despite the fact that Fryer had commenced employment with Kraft one week earlier.

OMD's Discovery of Fryer's New Job

On October 27, 2010, counsel for OMD contacted Respondent and notified him that he had learned that Fryer had in fact obtained a new job. Respondent confirmed that Fryer had obtained new employment. By letter dated November 16, 2010, counsel for OMD notified Respondent that OMD intended to seek dismissal and sanctions based on Fryer's misconduct, and asked Respondent to confirm that neither he nor anyone else at TWG was aware of Fryer's job offers, or her acceptance of the job with Kraft, prior to October 27, 2010 when counsel for OMD confronted Respondent. By letter dated November 24, 2010, Respondent denied OMD's allegations of misconduct and indicated that Fryer would seek sanctions if counsel for OMD pursued its "frivolous" motion for dismissal. On December 2, 2010, Respondent served OMD with a revised expert report, which capped Fryer's economic damages at $151,239 based, in part, on the fact that she had accepted the job with Kraft.

The Sanctions Hearing

By letter dated December 22, 2010, counsel for OMD advised Judge Pauley of Fryer's misconduct and requested a pre-motion conference on OMD's motion for dismissal and sanctions against Respondent, Gilly, TWG and Fryer. By letter dated December 30, 2010, Respondent denied any misconduct by either Fryer or her counsel and requested that Judge Pauley deny OMD's request for a pre-motion conference. The pre-motion conference was held on January 14, 2011. On March 11, 2011, counsel for OMD re-deposed Fryer. On April 6, 2011, counsel for OMD filed a motion for sanctions and dismissal. On May 20, 2011, Judge Pauley heard oral argument on OMD's motion. Though Gilly and founding partner Kenneth W. Thompson were present at the hearing, Respondent was not. At the conclusion of the oral argument, at which Thompson, Gilly, and counsel for OMD were heard, Judge Pauley issued an Order imposing a sanction of $2,500 against Fryer and $15,000 against TWG, but declined to dismiss Fryer's case.

DISCUSSION

[1] Rule 1.5(b)(5) of the Local Rules of the United States District Court for the Southern District of New York authorizes ***465** the Committee on Grievances to discipline an attorney if, after notice and opportunity to respond, it is found by clear and convincing evidence that, "[i]n connection with activities in this Court, any attorney is found to have engaged in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York. In interpreting

the Code, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, this Court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests."

I. Respondent violated Rules 3.3(a)(3), 3.4(a)(4) and 4.1 by serving an expert report that he knew was misleading and subsequently referring to the report in the context of settlement negotiations.

[2] The Committee finds that there is clear and convincing evidence that Respondent violated New York Rules of Professional Conduct ("Rules") 3.3(a)(3), 3.4(a)(4), and 4.1 when he served the expert report on OMD and then subsequently referenced the expert report to support the reasonableness of his client's settlement demand. Rules 3.3(a)(3) and 3.4(a)(4) provide that a lawyer shall not knowingly use false evidence. Rule 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." The New York State Bar Association ("NYBA") commentary to Rule 4.1 notes that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

The expert report, estimating Fryer's economic damages as between $350,000 and $1 million, "was based, in part, on the assumption that plaintiff Violet Fryer would remain unemployed through the end of the 2010 calendar year and also calculated future lost earnings for a period of one to six years into the future." Verified Answer of Gregory N. Filosa to Order to Show Cause by Committee on Grievances ("Answer to OTSC") at 6–7. It is undisputed that Respondent knew the report was inaccurate, because he was admittedly aware that Fryer had accepted a higher-paying position with Kraft on September 17, 2010 and that she was scheduled to begin her employment with Kraft on October 11, 2010. *Id.* at 7 and 19. Yet, Respondent failed to advise opposing counsel that one of the key assumptions in the expert report was no longer valid, or would become invalid in the near future. *Id.* at 3. Instead, Respondent reaffirmed the expert report's misrepresentations when he referenced the report to support the reasonableness of Fryer's settlement demand. Respondent admits that "he erred in sending the expert report to OMD's lawyers because it was based on an assumption which was no longer supportable," and that he "was mistaken in engaging in settlement negotiations based upon the expert report." *Id.* at 19.

While it is true that a certain amount of posturing or puffing is not unheard of in settlement negotiations, Respondent's misrepresentations were not limited to the context of settlement discussions. Moreover, Respondent's reliance on the expert report cannot fairly be characterized as mere puffery about the value of his client's case—the entire report of economic damages was based on an invalid assumption of facts.

***466** Respondent insists that he did not violate the Rules because he "relied on Mr. Gilly's reasonable resolution of arguable questions of their professional duties." *Id.* at 17–18. Respondent asserts that, shortly after he served the expert report, Gilly suggested that Respondent contact opposing counsel to attempt to discuss a possible settlement of the *Fryer* litigation. *Id.* at 8. Respondent admits that he "did not argue with Mr. Gilly, nor did he urge Mr. Gilly to disclose Ms. Fryer's new job at that time. In fact, Respondent's own email discussed 'how we could leverage [the expert report] into trying to settle it before they know about her new job.' " *Id.*

Under Rule 5.2(a), "[a] lawyer is bound by the[ ] Rules notwithstanding that the lawyer acted at the direction of another person." Rule 5.2(b) provides a narrow exception, recognizing that "[a] subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Rule 5.2(b) does not apply here. Even assuming that Respondent was just following orders handed down by Gilly, it cannot be said that Gilly's resolution of these questions—namely, whether to serve the misleading expert report, whether to inform opposing counsel of the invalid assumptions contained therein, and whether to rely on the expert report in the course of settlement negotiations—were even remotely reasonable. This is not an unsettled area of the law. Rules 3.3(a)(3), 3.4(a)(4), and 4.1 squarely address the question of whether a lawyer can use false evidence. Any question about the definition of "false" is quickly resolved by consulting the NYBA comments to Rule 4.1, which make clear that misleading statements or omissions fall within the purview of the Rule. Put simply, Gilly's chosen course of action with respect to the expert report was patently unreasonable, and there is no plausible reading of the Rules or any other controlling authority that could suggest otherwise. Respondent admits as much in his

Answer. *Id.* at 3–4 ("Mr. Filosa believed at that time (but no longer) that his supervisor had offered a reasonable resolution of an 'arguable question of professional duty,'...").

Furthermore, the NYBA commentary to Rule 5.2 states, "[t]o evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable law, it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any ..., or use other appropriate means." Respondent admits that he took no such steps to evaluate Gilly's proposed course of action with regards to the expert report. Answer to OTSC at 8–9. The fact that Respondent simply did not realize at the time that his actions were unethical does not insulate him from a finding that he violated the Rules. *See* Roy D. Simon, *Simon's Rules of Professional Conduct* 893 (2012) (discussing Rule 5.2(b): "This defense will not work if the actions of the subordinate attorney were plainly unethical ... but the subordinate simply did not realize it."). Accordingly, the Committee has little difficulty concluding that Respondent violated Rules 3.3(a)(3), 3.4(a)(4), and 4.1 by serving, and subsequently using, the misleading expert report.

II. Respondent violated Rules 3.3(a)(3) and 3.4(a)(4) by failing to correct deposition testimony provided by his client that Respondent knew was false.

[3] There is also clear and convincing evidence that Respondent violated Rules 3.3(a)(3) and 3.4(a)(4) when he failed to correct false testimony offered by Fryer at her October 7, 2010 deposition. Respondent ***467** now admits that Fryer's testimony was "evasive, if not outright false" and that it "misled opposing counsel regarding whether or not she had secured new employment." Answer to OTSC at 3; *see also, id.* at 26 (Respondent "recognizes that Ms. Fryer's testimony had the effect of misleading Mr. Cohen in his examination of Ms. Fryer during the first day of her deposition.") Though the Rules themselves are silent as to what remedial measures a lawyer should take to remedy false testimony by a client, Professor Simon, in *Simon's Rules of Professional Conduct,* suggests three steps: (i) "call upon the client to correct the false testimony;" (ii) "move to withdraw;" and (iii) make "some form of 'disclosure to the tribunal.' " *Id.* at 726–27. It is undisputed that Respondent "did not take any steps to immediately correct the record regarding Ms. Fryer's testimony." Respondent's Memorandum of Law in Response to the Committee on Grievances' **Supplemental** Order to Show Cause ("Answer to **Supp**. OTSC") at 3. Instead, he waited until almost three weeks after Fryer gave the false testimony and then asked Fryer to collect documents relating to her new job at Kraft, which Respondent claims he planned to produce to OMD at some unspecified time after Respondent commenced her employment. In the meantime, Respondent continued to engage in settlement negotiations with opposing counsel under obviously false pretenses. Answer to OTSC at 14. In fact, before Respondent ever produced a single document that would have revealed Fryer's new job, counsel for OMD revealed to Respondent that it had learned about Fryer's new job from an independent source.

The fact that Fryer might not have intentionally committed perjury—which is hard to square with the facts in this matter—does not relieve Respondent of his professional obligation to correct the record. According to Ethics Opinion 741 by the New York County Lawyers' Association Committee on Professional Ethics, issued on March 1, 2010 ("Ethics Opinion 741"), an attorney faced with a client who has offered false testimony "should explore whether the client may be mistaken. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct."[2] Although Fryer maintained that her testimony was accurate, she also claimed that she was confused and stressed during the deposition. Answer to OTSC at 26. There is no indication that Fryer was uncooperative in taking remedial action, or that she caused any delay in the process of remonstration. Under these circumstances, Respondent's failure to act quickly to clarify the record was clearly unreasonable.

Similarly, the document collection described by Respondent, though necessary to satisfy Fryer's ongoing obligation to **supplement** discovery under the Federal Rules of Civil Procedure, cannot fairly be characterized as a reasonable measure aimed at remedying Fryer's false testimony. For one thing, the documents—which Respondent describes as "documents relating to [Fryer's] new job" at Kraft—would not have corrected the false testimony regarding the UM offer. *Id.* at 13. Moreover, ***468** the documents provided after the first day of deposition would hardly have remedied the situation, since defendants would still have been deprived the opportunity to explore the details and timing of the job offers or Fryer's truthfulness given her initial responses. Respondent is quick to point out that at the end of the first day of Fryer's deposition, the defendants indicated that they had two more hours of questioning and they intended to continue the deposition on a second day, thus suggesting that defendants were not deprived the opportunity to explore these issues with

Fryer; however, following the conclusion of the first day of Fryer's deposition, Respondent repeatedly took the position with the defendants that he had no intention of permitting Fryer to testify again on topics that had been covered on day one. *See* **Supplemental** Declaration of Guy R. Cohen, attached to Respondent's Answer as Exhibit F, at ¶ 5.

As for the timeliness of his efforts, Respondent himself admits that he "could have taken action to more promptly correct any misunderstanding created by Ms. Fryer's testimony during her October 7 deposition. Further, he could have **supplemented** Ms. Fryer's discovery responses more expeditiously." Answer to OTSC at 19. According to Ethics Opinion 741, "[w]hile there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment." Here, Respondent was well aware that OMD would likely rely on Fryer's misleading testimony not only throughout the remainder of the first day of her deposition and in preparation for the second day, but also in the course of settlement negotiations. Indeed, Respondent's own negotiation strategy was premised on the need to "leverage" that apparent misperception. Therefore, it was unreasonable for Respondent to do nothing for several weeks.

Again, Respondent raises Rule 5.2 as a defense to the charge that he failed to correct Fryer's false deposition testimony, claiming that he was acting at all times under the supervision of Gilly. However, there is no evidence that Respondent consulted with Gilly about the problems with Fryer's testimony, or that Gilly was even aware of the misleading testimony. Moreover, as set forth above, Respondent's obligation to correct Fryer's deposition testimony was not arguable, nor was his lack of prompt remedial action reasonable. Accordingly, the Committee concludes that Respondent clearly violated Rules 3.3(a)(3) and 3.4(a)(4) by failing to promptly correct Fryer's misleading deposition testimony.

III. Respondent violated Rules 3.4(a)(1) and (3) by failing to timely produce documents that would have revealed Fryer's job offers.

[4] There also is clear and convincing evidence that Respondent violated Rules 3.4(a)(1) and (3) by not promptly **supplementing** Fryer's document production with documents related to Fryer's job offers from UM and Kraft. Rule 3.4(a)(1) states that "[a] lawyer shall not ... suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Similarly, under Rule 3.4(a)(3), "[a] lawyer shall not ... conceal or knowingly fail to disclose that which the lawyer is required by law to reveal." Rule 26(e) of the Federal Rules of Civil Procedure imposed an obligation on Respondent to **supplement** Fryer's document production. Rule 26(e) states, "[a] party who has ... responded to a request for production ... must **supplement** or correct its disclosure ... in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information ***469** had not otherwise been made known to the other parties during the discovery process or in writing...."

There is no dispute that the **supplemental** document production made by Fryer on November 11, 2010, more than 30 days after the first day of her deposition, was not made "in a timely manner." *See* Respondent Gregory N. Filosa's Response to the Committee on Grievances' Second **Supplemental** Order to Show Cause ("Answer to Second **Supp**. OTSC") at 9 ("Filosa does not dispute that this disclosure was belated."); *see also,* Answer to OTSC at 19 (Respondent admits that he "could have **supplemented** Ms. Fryer's discovery responses more expeditiously."). At the very least, Respondent should have produced the series of e-mails pertaining to the Kraft and UM job offers that were in Respondent's possession prior to the start of Fryer's deposition. Respondent insists that he acted in good faith, because he was waiting for Fryer to gather all of the documents relating to her employment before making a **supplemental** production. Yet, remarkably, Respondent did not take any action to obtain such documents from Fryer until October 26, 2010—19 days after the initial day of Fryer's deposition, and two weeks after she commenced employment with Kraft—even though Respondent had been aware of Fryer's job offers since mid-September.

Respondent also argues that he was not obligated to produce the aforementioned e-mails between Respondent and Fryer and between Fryer and the UM representative (which Fryer forwarded to Respondent) because they are exempt from discovery as falling within the attorney-client privilege. *See* Answer to Second **Supp**. OTSC at 8–9. Even assuming the attorney-client privilege applied to the documents, the proper time for Respondent to assert the attorney-client privilege was *during* the discovery phase of the *Fryer* litigation, when his adversary could have challenged the assertion of privilege. Respondent failed to do that, and cannot now make the belated argument that the documents were properly withheld.

In sum, Respondent knew that the defendants had a misimpression about Fryer's employment status based on

the inaccurate expert report, Fryer's misleading answers at her deposition, and Respondent's failure to **supplement** the responses to the defendants' discovery requests. This fact, along with Respondent's admitted strategy of trying to settle the case before the defendants found out about Fryer's new job, militate strongly against Respondent's present arguments that he had a good faith basis for withholding the documents.

IV. Respondent engaged in misconduct in violation of Rules 8.4(a), (c), (d) and (h).

[5] Clear and convincing evidence has established that Respondent engaged in intentionally deceptive misconduct that interfered with the administration of justice and reflects adversely on his fitness as a lawyer in violation of Rules 8.4(a), (c), (d) and (h).[3] There is no dispute that Respondent misled OMD about Fryer's employment prospects when he served the inaccurate expert report, failed to correct Fryer's evasive deposition testimony, and ***470** failed to timely produce documents that would have revealed that Fryer had received two job offers and had, in fact, accepted both. Respondent then tried to quickly settle the case before the defendants caught on to the truth.

Respondent himself acknowledges that he failed to live up to his professional obligations and duties to the Court. *See* Answer to OTSC at 2 (Respondent "exercised poor professional judgment and did not live up to the standards of the profession or of this honorable Court."); *id.* (Respondent "now regretfully recognizes that he failed to conduct himself in accordance with the professional standards of this Court, notwithstanding the supervision of his superior, while engaging in the conduct that Judge Pauley found to be sanctionable."); *id.* at 17 (Respondent "acknowledges that his conduct fell short of the standard expected of attorneys practicing in this Court."); *id.* at 18 (Respondent acknowledges that "he was a relatively young and inexperienced attorney who exercised poor professional judgment and allowed his zeal for his client to overtake his duty to the profession and to the court."); *id.* at 28 (Respondent "conced[es] at this time that his conduct did not comply with the standards of the profession" and that "he is responsible for a lapse in professional judgment for which he is sincerely remorseful.")

Respondent offers in mitigation the fact that the time period between the filing of the expert report and "full disclosure to adversary counsel of Fryer's new job" was only 31 days. *See* Answer at 3; 14; 21. Yet, over the course of those 31 days, the plaintiff served her key expert report, the parties were engaged in active settlement negotiations, and the plaintiff sat for the first day of her deposition. Indeed, Respondent admits that he had multiple opportunities over the course of those 31 days to set the record straight. *See* Answer to OTSC at 20 (Fryer's new job should have been disclosed "in the expert report, in settlement negotiations, by correspondence, by Ms. Fryer in her deposition testimony, or by Mr. Filosa promptly thereafter.")

Respondent insists that, at all relevant times, he believed that the defendants would soon discover the truth through deposition questions. He points out that he "did not equivocate or prevaricate" on October 27, 2010 when opposing counsel asked him point-blank about Fryer's job at Kraft. Answer at 14. However, Respondent's belated honesty in the face of an adversary who had already discovered the truth is hardly worthy of applause. If opposing counsel had not discovered Fryer's employment on their own, there is no telling how much longer Respondent would have continued to conceal the truth or whether the parties would have reached a settlement premised on the concealed information. In any event, the fact that Respondent may not have planned to perpetuate his deceit indefinitely does not lessen the seriousness of his misconduct.

CONCLUSION

[6] The Committee on Grievances, having carefully considered Respondent's various submissions in response to the three Orders to Show Cause that were issued in this matter, finds that Respondent has raised no issues requiring a hearing. *See* **S.D.N.Y**. Local Civil Rule 1.5(d)(4). On the basis of Respondent's own admissions, the Committee finds that he acted in violation of Rules 3.3(a)(3) (knowingly used false evidence before a tribunal); 3.4(a)(1) (suppressed evidence); 3.4(a)(3) (failed to disclose that which he had a legal obligation to disclose); 3.4(a)(4) (knowingly used false evidence); 4.1 (made a false statement to a third person); 8.4(a) (engaged ***471** in misconduct); 8.4(c) (engaged in conduct involving dishonesty, fraud, deceit or misrepresentation); 8.4(d) (engaged in conduct prejudicial to the administration of justice); and 8.4(h) (engaged in conduct that adversely reflects on his fitness as a lawyer). In determining the measure of discipline to be imposed upon Respondent, the Committee has taken into account, as mitigating circumstances, Respondent's relative youth, his expressions of remorse, the absence of a prior disciplinary

record, and that, at least in some instances, he was acting at the specific direction of a supervising lawyer. The Committee has also taken into account the fact that Respondent has taken steps to better educate himself on the New York Rules of Professional Conduct.

Taking into consideration all of the circumstances indicated by the record, it is the Committee's opinion that suspension from the practice of law in this Court for a period of one year would be an appropriate and suitable discipline to be imposed upon Respondent. Accordingly, pursuant to **S.D.N.Y**. Local Civil Rule 1.5(b)(5) and (c)(1), Respondent is hereby suspended from the practice of law in the Southern District of New York for a period of one year, effective immediately, with leave to apply for reinstatement at the expiration of that term. The Clerk of this Court is hereby directed to unseal the entire record of this matter.

SO ORDERED.

All Citations

976 F.Supp.2d 460

Footnotes

1 The members of the Committee are District Judge P. Kevin Castel, Chair; Chief Judge Loretta A. Preska; District Judges Vincent L. Briccetti, Katherine B. Forrest, Paul G. Gardephe, John F. Keenan, Colleen McMahon, Louis L. Stanton; and Richard J. Sullivan; and Magistrate Judge Frank Maas. Judge Castel is recused from this matter.

2 Respondent points out that Rule 3.3, which became effective on April 1, 2009, as well as Ethics Opinion 741, represented a significant change in the ethics requirements for New York lawyers, and he urges the Committee to take that into consideration when deciding the charges against Respondent. The changes to the law in this area are of little consequence here, however, since there is no indication in the record that Respondent gave *any* consideration to *any* authorities and ethics opinions, superseded or otherwise, when deciding on a course of conduct in this Action.

3 Rule 8.4 states: “A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; ... or (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.”

96 A.D.2d 267
Supreme Court, Appellate Division,
First Department, New York.

In the Matter of Christopher C. McGRATH, Jr., an attorney and counselor-at-law. Departmental Disciplinary Committee for the First Judicial Department, Petitioner, Christopher C. McGrath, Jr., Respondent.

Nov. 22, 1983.

Synopsis

In disciplinary proceedings, the Supreme Court, Appellate Division, held that negligently misrepresenting medical malpractice client's insurance coverage, failing to appear at scheduled pretrial conferences, and failing to cooperate in disciplinary committee investigations, after having received private admonishments and public censure in connection with other matters, warrants six-month suspension.

Suspension ordered.

West Headnotes (1)

[1] Attorney and Client
Definite Suspension

Negligently misrepresenting medical malpractice client's insurance coverage, failing to appear at scheduled pretrial conferences, and failing to cooperate in disciplinary committee investigations, after having received private admonishments and public censure in connection with other matters, warrants six-month suspension. Code of Prof.Resp., DR1–102(A)(5, 6), DR6–101(A)(3), McKinney's Judiciary Law App.

2 Cases that cite this headnote

Attorneys and Law Firms

****350** ***267** Claudio B. Bergamasco, New York City, of counsel (Michael A. Gentile, New York City, attorney), for petitioner.

Louis Biancone, New York City, of counsel (Saxe, Bacon & Bolan, P.C., New York City, attorneys), for respondent.

Before KUPFERMAN, J.P., and SANDLER, SILVERMAN, BLOOM and MILONAS, JJ.

Opinion

PER CURIAM:

Respondent was admitted to the Bar of this State on December 11, 1961 by the Appellate Division, First Department. From that date to and including 1977 he maintained an office for the practice of law in this Department.

On June 8, 1982 he was personally served with a Notice of Charges alleging five instances in which he violated the standards of professional conduct. Respondent filed an answer to the charges denying generally the charges that ***268** his actions constituted professional misconduct. The matter was referred for hearing by the Departmental Disciplinary Committee to a panel of its members. Prior to the commencement of the hearing one of the charges was withdrawn. At its conclusion, the Panel found that another of the charges had not been sustained. However, it did find the proof sufficient to sustain three of the charges.

The most serious charge involves the claim that respondent, in defending a malpractice action, misrepresented the amount of his client's insurance coverage, as a result of which plaintiff in that action settled the claim for a sum far less than ordinarily he would have done. The facts in that connection are as follows:

Charlotte Slotkin, a twenty-year old diabetic, entered Beth-El Hospital to give birth to a child. It was alleged that by reason of the failure of the two physicians who attended her to timely and properly administer an appropriate drug, she gave birth to a child seriously afflicted with cerebral palsy. The father of the child brought suit on behalf of the child against the hospital and the two physicians. The suit against the two physicians was settled for a total of $20,000. When the suit against the hospital was ready to proceed to trial, respondent was retained by the hospital's insurance carrier, Citizens' Casualty

Company, then in the process of rehabilitation, to try the case. The coverage afforded the hospital by Citizens' Casualty was $200,000. However, the hospital carried an excess policy with Lloyds of London in the sum of $1,000,000 and the file turned over to respondent by Citizens' Casualty contained one or more letters reflecting that fact. Additionally, Citizens' Casualty had reinsured $150,000 of its primary coverage with ten insurance companies.

Throughout the trial respondent represented that the total coverage carried by the hospital was $200,000. At the settlement negotiations which proceeded during the course of the trial plaintiff's counsel manifested his skepticism at the accuracy of the representation of the amount of coverage. As a result Mr. Ratner, a vice-president of Citizens' Casualty and Mr. Berkowitz, a trustee of the hospital, were brought into the negotiations which ultimately led to a settlement in the sum of $185,000.

Approximately ten days after the entry into the stipulation of settlement Ratner learned of the excess policy with ***269** Lloyds. He immediately contacted respondent, who was then on trial in another matter and informed him of the turn of events. Respondent immediately called plaintiff's attorney and the justice who had presided at the trial, and notified them of this fact. The trial judge, who had not yet signed the compromise order, called a conference of the parties at which Lloyds was present. An effort was made to increase the amount of the settlement by having Lloyds add to the total agreed to by Citizens' Casualty. ****351** Lloyds refused, although it did agree that if the trial court set aside the settlement and ordered a retrial, it would participate in the retrial up to the full amount of its coverage. However, plaintiff's counsel refused to agree to a setting aside of the stipulation of settlement noting the cost to plaintiff of a retrial and the difficulty of again bringing his experts together. Thereupon, the malpractice action was disposed of on the basis of the stipulation of settlement.

Subsequently, an action was commenced in the United States District Court for the Southern District of New York against Citizens' Casualty, its ten reinsurers, Ratner, Berkowitz, respondent and his partner, who had assisted him at the trial, bottomed upon the theory of fraud, misrepresentation and/or negligence. Prior to submission to the jury the case against the reinsurers was dismissed. The jury returned a verdict in the sum of $680,000 apportioning it $500,000 against Citizens' Casualty, $100,000 and $60,000 against Berkowitz and Ratner, respectively, and $20,000 against respondent. The case against respondent's partner was dismissed. On motion for judgment notwithstanding the verdict, the District Court held for defendants and dismissed the complaint. On appeal the Circuit Court reversed as against all defendants except Berkowitz, whom it found to be blameless since, in his participation in the settlement, he had relied on the representations of the others, and reinstated the verdicts (2 Cir., 1979, 614 F.2d 301). Its holding declared that the dismissal against the ten reinsurers and respondent's brother was improper and that the liability of all of the defendants, except Berkowitz, was joint and several. In light of the posture of the case it granted plaintiff the option of accepting the verdict with a remand for the purpose of determining apportionment or retrying the case against all defendants except Berkowitz. Plaintiff then settled the claims against Citizens' Casualty, Ratner and respondent and his partner. Although an effort was ***270** made to pursue the ten reinsurers, the District Court concluded that the acceptance of the settlement option precluded further litigation (see *Slotkin v. Citizens' Casualty Co.,* 530 F.Supp. 789).

The next charge dealt with respondent's handling of an action brought on behalf of Mr. Williams, who was suing the City of New York for assault and battery, false arrest, false imprisonment and defamation. After the case had been placed on the calendar, it was twice noticed for pre-trial conference. Respondent failed to appear on either occasion. The case was then marked “off calendar”. Although respondent continues to represent Mr. Williams he has never sought to restore the case to the calendar.

The final charge concerns respondent's failure to cooperate with the Disciplinary Committee in its investigation of the Williams' complaint. Initially, he failed to respond to two letters by the Committee. Thereafter he was served with a Committee subpoena pursuant to which he appeared. However, he requested an adjournment so that he could consult with counsel. The adjournment was granted as was a second adjournment. Respondent failed to appear on the second adjourned date and thereafter.

The evidence supports the conclusion that respondent, in his handling of the Slotkin malpractice case engaged in conduct which reflects adversely on his fitness to practice law, in violation of DR 1–102(A)(6) of the Disciplinary Rules. His conduct in the Williams case clearly warrants the holding that he has neglected a legal matter entrusted to him in violation of DR 6–101(A)(3). His failure to cooperate with the Disciplinary Committee in its investigation of the

Williams' complaint demonstrates conduct prejudicial to the administration of justice in violation of DR 1–102(A)(5).

There can be no question but that in the handling of the Sloktin malpractice suit respondent was guilty of negligence. At the time he made the representation there was information in his file that contradicted the representation made by him. Nevertheless, his conduct, once actual knowledge was brought to his attention, demonstrates that in acting as he did, he was not prompted by ****352** bad faith, or an intent to mislead. The two charges arising out of the Williams case are less easily disposed of. Nevertheless, ***271** were these three matters the sum total of respondent's derelictions, we might be inclined to dispose of this proceeding with a severe censure. However, on January 14, 1972, respondent was privately admonished for neglecting a matter entrusted to him and for endeavoring to effect a withdrawal of the complaint in return for the performance of services which he had agreed to perform six years earlier. On January 31, 1978 he was again privately admonished for failure to cooperate with the Disciplinary Committee in its investigation of a complaint made against him. On March 29, 1979 he was publicly censured by us (*Matter of McGrath,* 67 A.D.2d 109, 414 N.Y.S.2d 695) for neglecting a matter entrusted to him and for failing to maintain a complete record of all of his client's properties by losing his client's case file and for failing to respond to his client's requests and those of a fellow attorney whom the client desired to have substituted for respondent. In these circumstances, and considering respondent's entire record, we deem it appropriate that respondent be suspended for a period of six months.

Accordingly, the findings of the Disciplinary Committee are approved and respondent is suspended from practice of the law for a period of six months and until further order of this Court.

Respondent suspended from practice as an attorney and counselor-at-law in the State of New York for a period of six months effective December 1, 1983, and until the further order of this Court.

All concur.

All Citations

96 A.D.2d 267, 468 N.Y.S.2d 349

End of Document

Formal Opinion 06-439
April 12, 2006

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules [1] .

[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a). [2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

[2] Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in Formal and Informal Ethics Opinions 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client ...." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation. [3]

[3] The Restatement (Third) of The Law Governing Lawyers §98, cmt. c (2000) (hereinafter "Restatement") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client. [4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law. [5] Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards. [6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers. [7]

[4] *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

[5] *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

[6] *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

[7] *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370 [8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter, [9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

[8] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in Formal and Informal Ethics Opinions 1983-1998 at 160-61.

[9] The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

> [w]hile ... a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387, [10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397 [11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect. [12]

[10] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in Formal and Informal Ethics Opinions 1983-1998 at 253.

[11] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in Formal and Informal Ethics Opinions 1983-1988 at 362.

[12] *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. [13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage. [14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, [15] and the setting aside of settlement agreements, [16] as well as civil lawsuits against the lawyers themselves. [17]

[13] Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client

prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

[14] In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

[15] *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

[16] *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

[17] *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1. [18]

[18] Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person ...." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation. [19]

[19] This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004) (Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations. [20]

[20] *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation—particularly in a caucused mediation—precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes. [21]

[21] Mediators are "the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 35-43 (1986)).

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation. [22]

[22] There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

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ETHICS OPINION 772

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #772 - 11/14/2003	Topic: Threatening and presenting criminal, administrative and disciplinary charges to obtain an advantage in a civil matter.
	Digest: DR 7-105(A) prohibits the presentation and threatened presentation of criminal charges when the purpose is to effect a resolution of a civil dispute; the disciplinary rule does not embrace administrative or disciplinary charges that may be threatened or presented in connection with a civil dispute, regardless of purpose.
	Code: DR 1-102(A)(4), 1-102, 1-102(A) (3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21.

QUESTION

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's

intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

OPINION

When a client invests funds with a Broker who is an associated member of a self-regulatory body, such as the NYSE or the National Association of Securities Dealers, and the Broker then wrongfully takes a portion of those funds for his or her own benefit, the Broker's conduct can have a variety of legal consequences. Viewed as a conversion of the client's funds, the taking may become the subject of a civil liability claim asserted by the client, perhaps leading to the filing of a lawsuit or arbitration. Viewed as a theft, the taking may become the subject of a criminal complaint filed by the client with a Prosecutor, perhaps leading to a criminal prosecution. Viewed as a violation of the rules of the NYSE or any other self-regulatory body of which the Broker is associated, the taking may become the subject of a professional disciplinary proceeding to revoke the Broker's license to practice.

Consequently, when a client believes that a Broker has wrongfully taken funds, the lawyer is faced with various choices about how best to represent and promote the client's interests. Of course, it is the client who decides the objectives of the representation. *See*DR 7-101(A)(1); EC 7-7. If the client's primary objective is to obtain the return of such funds, the lawyer is likely to suggest first writing a letter to the Broker demanding the return of the funds. If the Broker does not return the funds within the specified time period, the client often will authorize the filing of a lawsuit or arbitration proceeding against the Broker for conversion. But if the client asks about alternative or additional ways of proceeding, a question of legal ethics is likely to arise: may the lawyer file or threaten to file a complaint or charge regarding the Broker's alleged wrongful conduct with either a Prosecutor or the NYSE?[1]

I. The Filing of a Complaint With a Prosecutor or the NYSE

A. THE GENERAL ETHICAL RULES REGARDING THE FILING OF ANY COMPLAINT

In deciding whether to file any complaint against the Broker -- whether a lawsuit or an arbitration or a letter of complaint with either a Prosecutor or the NYSE -- there are a number of applicable disciplinary rules. DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim . . . that is unwarranted under existing law, except that a lawyer may advance such claim . . . if it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 7-102(A)(I) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position . . . or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Thus, before filing any complaint against the Broker, the lawyer must determine that the client's claim is warranted in law and in fact and that the complaint is not being made merely to harass or injure the Broker.

Two other disciplinary rules are relevant in preparing such a complaint. DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law

or fact." Together, these two disciplinary rules impose additional ethical limits on what can be said in any such complaint.

Another disciplinary rule that deals specifically with the interplay of the system of civil liability and the criminal justice system, DR 7-105(A), states "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

EC 7-21 explains the purposes underlying DR 7-105(A):

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine -- that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system -- DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Does DR 7-105(A) apply to the lawyer's filing of a complaint about the Broker's conduct with either a Prosecutor or the NYSE?[2]

B. FILING A COMPLAINT WITH A PROSECUTOR

Whether the lawyer's filing of a complaint about the Broker's conduct with a Prosecutor violates DR 7-105(A) depends, in part, upon the meaning of the phrase "present criminal charges." If that phrase refers only to a Prosecutor's actions, then a lawyer's filing of a complaint would not qualify as either presentation of such charges, or participation in such presentation.

We have been unable to find any ethics opinions or court decisions interpreting DR 7-105(A) that address the definition of "present criminal charges." Perhaps this phrase was intended as a term of art, referring to the Fifth Amendment's requirement of a grand jury presentment or indictment for capital and infamous crimes. *See*1 Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999) ("The Constitution speaks also of a 'presentment' but this is a term with a distinct historical meaning now not well understood. Historically presentment was the process by which a grand jury initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."). Likewise, some criminal cases from the 1940s and 1950s refer to a prosecutor's presentation of criminal charges to the grand jury. *See, e.g., Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T. Monroe County 1957).

Despite this historical context, the fact remains that numerous ethics opinions and court decisions

concerning DR 7-105(A) assume that a lawyer's conduct in reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). *See, e.g., Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3.[3]

Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor.

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. *See*§II (B) below. As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

C. FILING A COMPLAINT WITH THE NYSE

In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to "administrative or disciplinary charges" in addition to criminal charges, *see*Maine Bar Rule 3.6(c), or just "disciplinary charges," *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning §7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney "from present[ing] criminal, administrative, or disciplinary charges to obtain an advantage in a civil action").

Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. *See, e.g.*, Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system -- to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges."[4] In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.*District of Columbia Opinion

263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

II. Sending a Demand Letter

DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges,"[5] and (ii) do so "solely to obtain an advantage in a civil matter."

A. THREATS

Some letters contain unambiguous threats to present criminal charges. In *In re Hyman*, 226 App. Div. 468 (1929), the First Department censured a lawyer who wrote a letter to the driver of an automobile that hurt his client, Miss Horn, stating:

Unless you show some substantial evidence of your willingness to compensate Miss Horn [the attorney's client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered.

226 App. Div. at 469. Four years after *In re Hyman*, the First Department censured another lawyer who sent a letter stating that unless money was paid immediately he "would present the matter to the district attorney upon a charge of larceny and embezzlement." *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933).[6] More recently, the Third Department censured a lawyer for sending a letter to a workman which stated that unless the workman returned a sum of money to his client the lawyer would "have a warrant issued for [the workman's] arrest;" "you will return the money or go to jail." *In re Glavin*, 107 A.D.2d 1006- 1007 (1985).

In each of these cases, the letter refers to future criminal prosecution, but provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision.[7]

Based on these cases, we conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds. In reaching this conclusion, we consider it immaterial under DR 7-105(A) whether the Broker actually owed the client the requested funds or whether the client had good grounds for believing the funds were owed. As stated below, DR 7-105(A) prohibits a letter that threatens to file a complaint with a Prosecutor solely to obtain a civil advantage, regardless of whether the threat is extortionate or

justifiable. *See* § II(C) below.

Other letters are more ambiguous in their intention to present criminal charges. Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See, e.g., In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cf.* District of Columbia Opinion 220 (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g., In re McCurdy*, 681 P.2d 131, 132 (Or. 1984).

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

B. THE "SOLELY" REQUIREMENT

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.

Consider, for example, the letter sent by the lawyer in *Decato's Case*, 379 A.2d 825 (N.H. 1977):

In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore (sic). Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of services. Unless you communicate directly with me and give me some proof that the damages sustained to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

379 A.2d at 826. The New Hampshire Supreme Court imposed no discipline based on that letter, holding that the purpose of the lawyer's letter was not to gain leverage in a civil action by the threat of filing criminal charges, because Decato made no demand or request for payment from the letter's recipient - he only asked for information about the recipient's legal position.

Similarly, ethics committees in several other jurisdictions have opined that a letter referring to the criminal sanctions imposed for stopping payment on a check was not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g.*, Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979). These opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action. *But see*New Mexico Opinion 1987-5 ("threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105[A]").

Thus, if the lawyer sent a letter to the Broker stating that the Broker's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and requesting an explanation or justification of the Broker's conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the Broker's conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific. However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously. *See*Connecticut Informal Opinion 98-19 ("Such an examination [of a lawyer's motivation] is very fact specific"); Florida Opinion 89-3 ("The motivation and intent of the attorney involved obviously will be a major factor in determining whether his or her actions are ethically improper. The Committee believes that such determinations necessarily must be made on a case-by-case basis").

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose - the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.[8]

C. DR 7-105(A)'S RELATION TO ILLEGAL CONDUCT

Under New York law, proof of a threat to present criminal charges unless a certain specified action is performed constitutes a *prima facie*case of criminal coercion in the second degree, *see*N.Y. Penal Law § 135.60(4) (Consol. 2003), and, if property is obtained, makes out a *prima facie*case of extortion, *see*N.Y. Penal Law §155.05(2)(e)(iv) (Consol. 2003). However, New York law provides that such conduct is not unlawful if the person making such a threat "reasonably believed the threatened [criminal] charges to be true and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law § 135.75 (Consol. 2003) (affirmative defense to criminal coercion). *Accord*N.Y. Penal Law § 155.15(2) (Consol. 2003) (affirmative defense to extortion).

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

CONCLUSION

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

(44-01)

[1] In focusing this opinion on questions regarding the lawyer's actual or threatened filing of a complaint on behalf of a client, we choose not to opine on any related questions regarding whether it would be permissible for a non-lawyer client, who is not bound by the constraints of the New York State Lawyer's Code of Professional Responsibility (the "Code"), to file such a complaint on his or her own behalf. In this opinion, we are concerned only with the lawyer's professional responsibilities regarding the lawyer's own conduct.

[2] We assume throughout this opinion that the lawyer's client has consented to the lawyer filing or threatening to file a complaint about the Broker's conduct. Such consent would be necessary under the Code if the disclosure of the Broker's conduct would be embarrassing or detrimental to the client or the client expressly asked the lawyer not to disclose the Broker's conduct, because the lawyer is prohibited from revealing to third parties the client's "secrets," *see*DR 4-101(B)(1), and, by definition, the Broker's conduct would be a "secret" under DR 4-101(A).

[3] These ethics opinions and court decisions contain no discussion and, therefore, provide no guidance as to whether the filing of such a complaint is construed as the presentation of criminal charges or participation in the presentation of criminal charges.

[4] We also reject the specific analysis underlying Nassau County 98-12 (1998). In that opinion, the Committee concluded that DR 7-105(A) prohibits an attorney from threatening to file a report with disciplinary authorities against another attorney. Citing *People v. Harper*, 75 N.Y.2d 313 (1990), the Committee stated: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." But *Harper*did not find that DR 7-105(A) covered threats of filing or the actual presentation of disciplinary charges. *Harper*was an appeal from a jury verdict that a witness had received a bribe. The *Harper*Court referred to DR 7-105 solely with reference to the People's argument that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." 75 N.Y.2d at 318. The *Harper*Court rendered no opinion about the actual or threatened reporting of disciplinary violations by lawyers.

[5] Because, for the reasons stated above, the filing of a complaint against the Broker with an administrative or disciplinary authority, such as the NYSE, is not within the scope of DR 7-105(A), the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds.

[6] This short decision does not make it clear whether the respondent lawyer was acting on behalf of a client or for himself in sending the threatening letter. In our view, however, that does not matter. We agree with the numerous decisions in other jurisdictions holding DR 7-105(A) or its counterparts applicable where the respondent lawyer is acting on his or her own behalf. *See, e.g., Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718-19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993).

[7] As stated below, in some circumstances such a threat in itself may violate New York's Penal Law because it constitutes criminal coercion or extortion. *See* § II(C) below. In those circumstances, the threat not only violates DR 7-105(A); it also violates DR 1-102(A)(3)'s prohibition against "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

[8] The Model Rules have no analogue to DR 7-105(A). The drafters of the Model Rules apparently believed that to the extent DR 7-105(A) serves legitimate purposes, the conduct it proscribes is prohibited by other ethical rules, such as Model Rule 8.4 (which is analogous to DR 1-102), Model Rule 4.1 (which is analogous to DR 1-102[A][4] and DR 7-102[A][5]), Model Rule 4.4 (which is analogous to DR 7-102(A)(1)), and Model Rule 3.1 (which is analogous to DR 7-102[A][2]). *See* ABA 92-363. To the extent that DR 7-105(A) prohibits conduct other than that prohibited by those Rules -- such as the actual or threatened presentation of criminal charges in a civil matter to gain relief for a client when the criminal charges are related to the civil matter, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the facts and the law, and the lawyer does not attempt to exert or suggest improper influence over the criminal process, *see* ABA 92-363, -- the drafters of the Model Rules appear to have believed that DR 7-105(A) was overbroad because it "excessively restrict[ed] a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system." *Id. See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering*, § 40.4, at 40-7 (3d ed. 2000) ("rules like DR 7-105[A] . . . are overbroad because they prohibit *legitimate* pressure tactics and negotiation strategies") (emphasis in original).

Related Files

Opinion 772(PDF File)

180 F.3d 55
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Autumn JACKSON, Boris Sabas, also known as Boris Shmulevich, and Jose Medina, also known as Yosi Medina, Defendants–Appellants.

Nos. 97–1711, 97–1721 and 98–1171.
|
Argued June 22, 1998.
|
Decided June 9, 1999.

Synopsis

Following denial of motion to dismiss indictment, 986 F.Supp. 829, defendants were convicted in the United States District Court for the Southern District of New York, Barbara S. Jones, J., of offenses related to the transmission of extortionate threats to injure another person's reputation, and they appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) within statute which proscribes extortionate threats to injure another person's reputation, the phrase "intent to extort" was meant to reach only demands that are wrongful; (2) not all threats to engage in speech that will have the effect of damaging another person's reputation are wrongful, even if a forbearance from speaking is conditioned on the payment of money; (3) a threat to reputation that has no nexus to a claim of right is inherently wrongful; (4) erroneous instruction on this element required new trial on all counts; (5) the evidence was sufficient; (6) admission of entire 42-minute tape recording was not required under the completeness doctrine; and (7) one defendant was not entitled to severance.

Vacated and remanded.

Attorneys and Law Firms

***58** Paul A. Engelmayer, Assistant U.S. Atty., New York, NY (Mary Jo White, U.S. Atty. for the Southern District of New York, Lewis J. Liman, Ira M. Feinberg, Asst. U.S. Attys., New York, NY, on the brief), for Appellee. Edward S. Zas, New York, NY (The Legal Aid Society, Federal Defender Div., Appeals Bureau, New York, NY, on the brief), for Defendant-Appellant Jackson.

Donald Etra, Los Angeles, CA, for Defendant-Appellant Sabas.

Neil B. Checkman, New York, New York (Beverly Vanness, on the brief), for Defendant-Appellant Medina.

Before: WINTER, Chief Judge, VAN GRAAFEILAND and KEARSE, Circuit Judges.

Opinion

KEARSE, Circuit Judge:

Defendants Autumn Jackson, Jose Medina, and Boris Sabas appeal from judgments of conviction entered in the United States District Court for the Southern District of New York following a jury trial before Barbara S. Jones, *Judge*. Jackson and Medina were convicted of threatening to injure another person's reputation with the intent to extort money, in violation of 18 U.S.C. §§ 875(d) and 2 (1994); all three defendants were convicted of traveling across state lines to promote extortion, in violation of the Travel Act, 18 U.S.C. §§ 1952(a)(3) and 2 (1994), and conspiring to commit extortion, in violation of 18 U.S.C. § 371 (1994). Sabas was found not guilty of making extortionate threats. Jackson, Medina, and Sabas were sentenced principally to 26, 63, and 3 months' ***59** imprisonment, respectively, with each defendant's term of imprisonment to be followed by a three-year period of supervised release. On appeal, defendants contend chiefly that the district court failed to give proper jury instructions as to the nature of extortion. For the reasons that follow, we agree, and we accordingly vacate the judgments and remand for a new trial.

I. BACKGROUND

The present prosecution arises out of defendants' attempts to obtain up to $40 million from William H. ("Bill") Cosby, Jr., a well-known actor and entertainer, by threatening to cause tabloid newspapers to publish Jackson's claim to be Cosby's daughter out-of-wedlock. The witnesses at trial included Cosby, Jackson's grandmother, persons who had conversations with Jackson in which she demanded money from Cosby and threatened to injure his reputation if he did not pay, and a cooperating witness who had attended meetings during which defendants formulated and executed parts of their plan. The government also introduced, *inter*

alia, recordings of messages left by Jackson, recordings of conversations in which Jackson demanded money from Cosby and threatened to injure his reputation if she were not paid, and documents found in the possession of Medina and Sabas. Taken in the light most favorable to the government, the evidence showed the following.

A. *Jackson's Relationship With Cosby*

In the early 1970s, Cosby had a brief extramarital affair with Jackson's mother, Shawn Thompson. After Jackson was born in 1974, Thompson told Cosby that he was the father. Cosby disputed that assertion, and according to Jackson's birth certificate, her father was one Gerald Jackson. Jackson's grandmother testified, however, that she and Thompson told Jackson, as Jackson was growing up, that Cosby was her biological father. The grandmother told Jackson that Cosby had said that, so long as they "didn't tell anyone about it, that he would take care of her mother and her, and take care of his responsibility." (Trial Transcript ("Tr."), 1459.)

For more than 20 years after Jackson's birth, Cosby provided Thompson with substantial sums of money, provided her with a car, and paid for her admission to substance-abuse treatment programs. Thompson repeatedly telephoned him saying that she needed money, and in the course of the conversations she would usually reiterate her claim that Cosby was Jackson's father and state that she did not want to embarrass Cosby's wife. Between 1974 and mid–1994, Cosby gave Thompson a total of more than $100,000, typically having traveler's checks or cashier's checks issued in the name of an employee rather than his own name. In 1994, Cosby established a trust fund for Thompson, which was administered by John P. Schmitt, a partner in the New York City law firm that represented Cosby. The trust fund provided Thompson with $750 a week for as long as Cosby chose to fund the trust. Thompson received approximately $100,000 in payments from this fund from mid–1994 until the fund was exhausted, and not replenished, in early 1997.

In addition, Cosby, who had funded college educations for some 300 persons outside of his own immediate family, and had spoken with Jackson by telephone at least once during her childhood, had offered to pay for the education of Jackson and of Thompson's other two children. In about 1990, after a telephone conversation with Jackson's grandmother, Cosby became concerned that Jackson's education was being hampered by conditions at her California home, and he arranged to have Jackson finish high school at a preparatory school in Florida associated with a Florida college. Cosby thereafter also created a trust to pay for Jackson's college tuition and for certain personal expenses such as food, rent, utilities, and medical costs while Jackson was attending college. This trust ***60** was administered by Schmitt's law partner Susan F. Bloom. Jackson subsequently enrolled in a community college in Florida. While Jackson was in school, Cosby spoke with her by telephone approximately 15 times to encourage her to pursue her education, telling her that although he was not her father, he "loved her very, very much" and would be a "father figure" for her. In these conversations, she addressed him as "Mr. Cosby."

In April 1995, Bloom learned that Jackson had dropped out of college, and Bloom therefore ceased making payments to Jackson from the college education trust. From the spring of 1995 until December 1996, Jackson had no contact with Cosby or any of his attorneys.

B. *The Events of December 1996 and early January 1997*

In the fall of 1996, Jackson and her then-fiancé Antonay Williams were living in California and working for a production company in Burbank, California, headed by Medina. Medina's company, which operated out of his hotel suite, was attempting to produce a children's television show. Jackson, Williams, and Sabas had acting roles in the show; along with cooperating witness Placido Macaraeg, they also had administrative positions. Jackson worked without pay, but she expected to receive a commission when the television show was sold.

In December 1996, Jackson reinitiated contact with Cosby. Within a four-day period, she telephoned him seven times and left urgent messages asking him to return her calls. In one instance, Jackson identified herself as "Autumn Cosby," a message that Cosby perceived as "some sort of threat." (Tr. 850.) When he returned Jackson's call, he reproached her for using his name. Jackson described the project on which she was working, told Cosby that she was homeless, and asked him to lend her $2100. Cosby initially refused and suggested that she instead get an advance from the person for whom she was working. After further reflection, Cosby called Jackson back and agreed to send her the $2100 she had requested, plus an additional $900; he urged her to return to school, and he renewed his offer to pay for her education. Cosby directed his attorneys to tell Jackson that he would pay for her education and related expenses if she returned to school, maintained a B average, and got a part-time job. Bloom sent Jackson a letter dated December 13, 1996, setting out the conditions and requesting, if Jackson agreed to the conditions, that Jackson

sign and return a copy of the letter to Bloom. Jackson did not comply.

On January 2 and 3, 1997, Jackson spoke with Bloom and Schmitt by telephone and asked that she be sent money for food, lodging, and tuition. Bloom responded that Jackson had not shown that she was enrolled in school. Bloom and Schmitt reiterated that Cosby would not pay for Jackson's support until she enrolled in school and secured employment for eight hours a week; they advised her that her unpaid work at Medina's production company did not satisfy the condition that she get a part-time job.

Following this rejection of her request for money, Jackson made a series of calls to business associates of Cosby, threatening to publicize her claim to be his daughter and thereby harm his reputation. For example, on January 6, she left a voice-mail message for an administrator at Eastman Kodak Company, whose products Cosby has endorsed. The administrator testified that the caller "said that she was Autumn Jackson, she was the daughter of Dr. William J. [*sic*] Cosby, Jr., that she knew that Mr. Cosby had a contract with Kodak, and that it was very important that I call her, she was calling in regards to their relationship and his actions or non-actions, and that she was prepared to go to [a] tabloid." (Tr. 121.)

Also on January 6, Jackson left a voice-mail message for Peter Lund, president ***61** and chief executive officer of CBS, whose television network currently carried Cosby's prime-time program. Stating that her name was Autumn Jackson, Jackson said:

> I am the daughter of Doctor William Cosby, Jr. I need to speak with you, um, regarding, regarding [*sic*] this relationship, um, that he and I have, and how this will affect CBS if I go to any tabloids.... This is of the ... utmost importance to CBS and his, uh, welfare, so I would, I would [*sic*], uh, guess that you would need to call me back as soon as possible.

(Government Exhibit 1R1T.) On January 7, Jackson called Lund's office at CBS again, leaving a second message identifying herself as Cosby's daughter and stating that if she were not called back promptly "she would go to the tabloids." (Tr. 93.)

Later on January 7, Jackson telephoned Schmitt and asked if there was any chance that Cosby "would send her money to live on." (Tr. 482.) When Schmitt responded in the negative, Jackson said that if she did not receive money from Cosby, she would have to go to the news media. Schmitt testified that he replied that if Jackson meant that "she was planning to go to the news media with what she believed was damaging information and would refrain from doing so only if Mr. Cosby paid her money, that that was extortion, that was both illegal and disgraceful." (*Id.*) He also told her that "extortion is a crime in every state." (Tr. 483.) Jackson stated that she had "checked [it] out and she knew what she was doing." (Tr. 482–83.)

During the week of January 6, Jackson and Medina discussed ways to intensify the pressure on Cosby and his corporate sponsors. These discussions took place at the evening meetings of Medina's production staff in the presence of Sabas, Williams, and Macaraeg. Macaraeg testified that the discussions resulted in, *inter alia,* the mailing on January 10 and 11 of company solicitation letters that, without mentioning Cosby by name, included a paragraph referring to Jackson as the daughter of a "CBS megastar" who was "CBS's most prized property," and stating that, contrary to the star's public image as an advocate of parenting, the star had left Jackson "cold, penniless, and homeless." (Tr. 968.) Letters containing this paragraph were sent to the President and Vice President of the United States, the Governor of California, the Mayor of New York City, CBS, Eastman Kodak, Philip Morris Company, which was another Cosby sponsor, two publishing companies that had published Cosby's books, and many other companies. Medina explained that the paragraph would affect Cosby's sponsors, "put pressure on Bill Cosby," and "help Autumn out." (Tr. 956.)

C. *The Events of January 15–18, 1997*

On January 15, 1997, after the telephone calls and letters of the week before had failed to produce the desired results, Medina and Jackson contacted Christopher Doherty, a reporter for *The Globe* tabloid newspaper. Medina and Jackson told Doherty that Cosby was Jackson's father and asked what her story would be worth. To support the story, Medina described for Doherty an affidavit in which Jackson had stated (falsely) that Cosby admitted his paternity. Medina faxed Doherty a copy of Bloom's December 13, 1996 letter to Jackson setting out the terms under which Cosby offered

to pay Jackson's tuition. After some negotiation of terms, Doherty agreed that *The Globe* would purchase the rights to Jackson's story of her relationship to Cosby for $25,000.

That evening, Doherty brought to Medina's hotel a "source agreement," for the signatures of both Jackson and Medina, setting forth the terms under which *The Globe* would buy the rights to Jackson's story. Doherty did not get to meet with Jackson or Medina but dealt instead with Williams, who relayed a number of requests for modifications of the contract. ***62** Doherty agreed to accommodate all of their requests, but Jackson and Medina refused to sign the source agreement, saying they would deal with it the next day.

The agreement with *The Globe* was never signed. Instead, on the following morning, January 16, Jackson faxed a copy of the agreement, after obliterating the $25,000 price, to Schmitt. In addition, Jackson faxed Schmitt a letter stating, "I need monies and I need monies now." Jackson's letter stated that it was "urgent" that Schmitt contact her and "make certain arrangements" and asked Schmitt to have Cosby call her that day. The letter concluded:

> If I don't hear from you by today for a discussion about my father and my affairs, then I will have to have someone else in CBS to contact my father for me. I want to talk to my father because I need money and I don't want to do anything to harm my father in any way, if at all possible to avoid.
>
> Enclosed you will find a copy of a contract that someone is offering monies for my story, which is the only property I have to sell in order to survive.

(Government Exhibit 33.) The fax cover letter directed Schmitt to "R.S.V.P." to Jackson in Medina's hotel suite.

Schmitt called Jackson later that morning. Medina, Jackson, Williams, Sabas, and Macaraeg were present when Schmitt called. With Medina mouthing words and passing notes to Jackson, Jackson and Schmitt had the following conversation, in which Jackson asked for $40 million:

> SCHMITT: I, I received your letter, Autumn.
>
> JACKSON: Okay.
>
> SCHMITT: [Clears throat] How, how much money are you asking for, Autumn?
>
> JACKSON: I'm wanting to settle, once and finally.
>
> SCHMITT: What, what are you asking for?
>
> JACKSON: I'm asking for 40 million, to settle it completely [pause].
>
> SCHMITT: And if our answer to that is no?
>
> JACKSON: Well, like I said, I have offers, and I will go through with those offers.
>
> SCHMITT: And those offers are to sell your story to the Globe? [Pause]. Autumn, are you there?
>
> JACKSON: Yes I am.
>
> SCHMITT: Is that what you're referring to, the contract that you sent me, that, for sale to the Globe of your story?
>
> JACKSON: Them, as well as any others. [Pause].
>
> SCHMITT: Well, I'm, I'm sure you know the answer to that is no, Autumn. Thank you very much.

(Government Exhibit 22E8T, at 1.) Jackson asked to have her "father" call her; Schmitt responded that Jackson's father was "Mr. Jackson," and that she should "not expect a call from Mr. Cosby." (*Id.* at 1–2.) Macaraeg testified that when the conversation ended, Jackson looked frustrated and told the group that Schmitt "doesn't understand the meaning of the term settlement," and Medina said, "if [Cosby] doesn't want this to get out, he's going to have to pay a lot of money." (Tr. 995.) Jackson nodded.

Some hours later, Jackson and Medina faxed a letter to CBS president Lund. They attached a copy of the unsigned source agreement with *The Globe,* again with the price redacted. In the letter, which was signed "Autumn J. Jackson–Cosby" and bore the heading "ATTENTION: PLEASE FORWARD THIS LETTER TO MY FATHER, WILLIAM H. COSBY, JR.," Jackson said that Cosby's failure to acknowledge her as his daughter had left her mentally anguished and financially impoverished. Jackson said that because of her "unconditional love ... for [her] father" she did not wish to harm Cosby, his sponsors or publishers, or CBS "[i]n any way, if at all possible to avoid." ***63** (Government Exhibit 4.) However, she made reference to the contract with *The Globe,* saying "if you and my father cannot help me, [it] may possibly be my only means of survival." (*Id.*) Jackson's letter to Lund concluded:

> I am willing to decline this offer and all others upon a fair settlement. If my father, CBS, and you are not interested in this settlement, then I am quite sure that NBC, ABC, and other networks will have an interest in hearing my story of desperation reaching out for my father's love.... [Cosby's] show and his private life just happens [*sic*] to be one of your best properties and this disclosure ... could undoubtedly effect [*sic*] your ratings negatively.

(*Id.*)

When Schmitt informed Cosby of Jackson's demand for $40 million dollars, Cosby responded that he would not pay, and he directed Schmitt to tell Thompson, Jackson's mother, of her daughter's conduct. The next morning, January 17, Schmitt telephoned Thompson and told her that Jackson "was attempting to extort money from Mr. Cosby, and she was threatening to go to the Globe with her story unless she were paid a lot of money." (Tr. 509.) Thompson then attempted to call Jackson at Medina's hotel suite, but reached only Medina. In a conversation tape-recorded by Medina, Thompson stated that Jackson was committing a crime by attempting to "blackmail" Cosby:

> Autumn for some reason has painted herself into a corner. Instead of doing what ... he asked her to do, which is go to school, enroll, ... [s]he has tried to blackmail him.... I think they used your fax machine.... Um, and said if they don't give her an exorbitant amount of money, that she's going to go to the tabloids with her story, and the talk shows.... [S]he's also told them that she has an unsigned ... contract with Globe magazine to tell her story. Now, that's extortion when you do it like that. If she was just going to tell her story, that's what she should have done. But by calling him, calling the attorneys, and talking with the attorney saying "if you don't give me this money, then I'm going to do that" it's called extortion, it's a federal offense.

(Government Exhibit 24E2R2.) That afternoon, Cosby instructed Schmitt to report Jackson's threats to the Federal Bureau of Investigation ("FBI").

At the direction of the FBI agents, Schmitt telephoned Jackson for the purpose of allowing the agents to hear and record her demands. In that conversation, Schmitt told Jackson that Cosby had changed his mind and now wanted to come to an arrangement with her. Schmitt asked Jackson how much money she needed, saying her $40 million demand was unreasonable. Schmitt and Jackson negotiated and eventually arrived at the figure of $24 million. Schmitt told Jackson that she and Medina would have to come to New York to pick up a check. Jackson said that Medina was to receive 25 percent of the money and asked Schmitt to make out one check for $18 million and the other for $6 million. Schmitt made flight arrangements for Jackson, Medina, and Williams to travel from Los Angeles to New York that night, and asked Jackson to meet him in his office the next morning to execute a written agreement and pick up the checks.

That evening, Sabas drove Jackson, Medina, and Williams to the airport. Only Jackson and Medina flew to New York; Williams remained in Los Angeles, and Sabas allowed him to use Sabas's credit card to pay for tickets for Jackson's and Medina's return flight to California.

On the morning of January 18, 1997, Jackson and Medina met Schmitt at the offices of his law firm in Manhattan. Jackson and Medina reviewed a draft agreement, prepared by Schmitt under the direction of the FBI, which provided that, in consideration for $24 million, Jackson and Medina would "refrain from providing ***64** any information whatsoever about Mr. Cosby to any third party," would "terminate any and all discussion with ... *The Globe,*" and would "not initiate any further discussions with *The Globe* or any other media outlet, with respect to Ms. Jackson's story that she is the daughter of Mr. Cosby." (Government Exhibit 37A.) When Jackson and Medina had signed, Schmitt left the room on the pretense of getting the checks, and FBI agents entered and arrested Jackson and Medina.

D. *Evidence Seized in Postarrest Searches*

After the arrests, FBI agents searched Medina's hotel suite and safe deposit box in California. In the safe deposit box, they found cassette tapes with recordings of many of defendants' telephone calls. In the hotel suite, they found drafts of Jackson's letters to Schmitt and Lund, notes of research into Cosby's sponsors and publishers, and lists of "talking points" for a proposed conversation to be held with Lund, all in Jackson's handwriting. The agents also found a hand-written plan detailing the steps defendants intended to take to exploit *The Globe* source agreement and obtain money from

Cosby or his sponsors, including such steps such as "Make Copy of Contract[,] White–Out Prices" and "Fax Letters to Jack Schmidt [*sic*] and Peter Lund." (Government Exhibit 69A3.) The agents also found a note that Jackson had drafted, apparently for Cosby, but never sent. It read in part: "Now, here is my deal. Either I go to the tabloids and/or CBS or we can settle now. That's what I am willing to do." (Tr. 1254.)

Thereafter, agents obtained additional tapes and documents that were in the possession of Sabas. They included the original *Globe* source agreement with the price whited out, letters faxed to Lund and Schmitt, and a tape of the January 16 conversation with Schmitt in which Jackson had demanded the payment of $40 million.

E. *The Present Prosecution*

The present prosecution was commenced in February 1997. The superseding indictment alleged three counts against each defendant: (1) conspiracy to violate 18 U.S.C. § 875(d) and the Travel Act, 18 U.S.C. § 1952(a)(3), in violation of 18 U.S.C. § 371; (2) interstate transmission of threats to injure another person's reputation with the intent to extort money, in violation of 18 U.S.C. §§ 875(d) and 2; and (3) interstate travel in order to promote extortion, as prohibited by § 875(d) and the New York State extortion statute, N.Y. Penal Law § 155.05(2)(e)(v) (McKinney 1988), in violation of the Travel Act, 18 U.S.C. §§ 1952(a)(3) and 2. Following a jury trial, Jackson and Medina were convicted on all three counts. Sabas was convicted of conspiracy and violating the Travel Act but was acquitted on the § 875(d) extortion count.

In a posttrial motion defendants moved for dismissal of their convictions on the ground that § 875(d) and the New York State extortion statute, as interpreted in the district court's jury instructions, see Part II.A. below, are unconstitutionally overbroad or vague. In an opinion published at 986 F.Supp. 829 (S.D.N.Y.1997), the district court denied the motion, ruling that the statutes are not overbroad because they target only extortionate threats, not expressions of ideas or advocacy that typically implicate First Amendment protections, *see* 986 F.Supp. at 833–35, and because they proscribe only unequivocal and specific "true threats," *see id.* at 832–33. The court also found that the statutes in question are not impermissibly vague. *See id.* at 835–37. Judgments of conviction were entered, defendants were sentenced as indicated above, and these appeals followed.

II. DISCUSSION

On appeal, Jackson and Medina contend principally that the district court gave an erroneous jury charge on the elements of ***65** extortion as prohibited by § 875(d) because it omitted any instruction that, in order to convict, the jury must find that the threat to injure Cosby's reputation was "wrongful." Alternatively, they argue that if that section does not include an element of wrongfulness, it is unconstitutionally overbroad and vague. In addition, Medina contends that the district court improperly excluded from evidence portions of the tape recording of his January 17, 1997 conversation with Jackson's mother; and Sabas contends that the evidence was insufficient to support his conspiracy conviction and that he should have been tried separately from his codefendants. Finding merit in the challenge to the district court's instructions, we vacate and remand for a new trial.

A. *Extortion in Violation of 18 U.S.C. § 875(d)*

Section 875(d), the extortion statute under which Jackson and Medina were convicted, provides as follows:

> (d) Whoever, with intent to extort from any person ... any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another ... shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 875(d). This statute does not define the terms "extort" or "intent to extort." At trial, Jackson asked the court to instruct the jury that

> [t]o act with intent to "extort" means to act with the intent to obtain money or something of value from someone else, with that person's consent, but caused or induced by the wrongful use of fear,

and to explain that

> [t]he term "wrongful" in this regard means that the government must prove beyond a reasonable doubt, *first,* that the defendant had no lawful claim or right to the money or property he or she sought or attempted to obtain, and, *second,* that the defendant knew that he or she had no lawful claim or right to the money or property he or she sought or attempted to obtain.
>
> If you have a reasonable doubt as to whether a defendant's object or purpose was to obtain money or other thing of value to which he or she was lawfully entitled, or believed he or she was lawfully entitled, then the defendant would not be acting in a "wrongful" manner and you must find him or her not guilty.

(Jackson's Requests To Charge Nos. 18, 19 (emphasis in original)).

The court informed the parties that it would not give these requested instructions, stating its view that "threatening someone's reputation for money or a thing of value is inherently wrongful." (Tr. 1481.) Consistent with that view, after instructing the jury that a § 875(d) offense has four elements, to wit, (1) an interstate communication, (2) containing a threat to reputation, (3) with intent to communicate such a threat, (4) with intent to extort, the court described the "intent to extort" element as follows, without mentioning any ingredient of wrongfulness:

> The fourth element, intent to extort. The final element that the government must prove beyond a reasonable doubt is that the defendant you are considering acted with the intent to extort money or a thing of value from Bill Cosby. You should use your common sense to determine whether the defendant you are considering had the requisite intent to extort. In this connection, *to extort means to obtain money or a thing of value from another by use of threats to reputation.*
>
> ....
>
> ... [I]t is not a defense that the alleged threats to another's reputation are based on true facts. In other words, it is irrelevant whether Bill Cosby in fact is the father of Autumn Jackson. Rather, you must determine whether the defendant you are considering communicated ***66** a threat to injure Bill Cosby's reputation, and whether that defendant did so with intent to extort money from Bill Cosby.
>
> In addition, if you find that the government has proved beyond a reasonable doubt a particular defendant threatened to injure Bill Cosby's reputation in order to obtain money from him, *it makes no difference whether the defendant was actually owed any money by Bill Cosby or thought he or she was.* That is because *the law does not permit someone to obtain money or a thing of value by threatening to injure another person's reputation.*

(Tr. 1778–80 (emphases added).)

Although in connection with the counts charging conspiracy and violations of the Travel Act the court instructed the jury that the government was required to proved that the defendant acted with the intent to engage in "unlawful" activity, *see* Part II.B. below, the court did not use the words "unlawful" or "wrongful" or any equivalent term in its instructions as to the scope of § 875(d).

The government contends that § 875(d) contains no "wrongfulness" requirement, and that even if such a requirement is inferred, threats to injure another person's reputation are inherently wrongful. These arguments are not without some support. The subsection itself contains no explicit wrongfulness requirement, and it parallels a subsection that prohibits, with intent to extort, a "threat to kidnap" a person, 18 U.S.C. § 875(b), and a "threat to injure the person of another," *id.* Given the inherent wrongfulness of kidnaping and assault, the parallelism of subsection (b)'s prohibitions with § 875(d)'s prohibition against threats to injure reputation or property may support an inference that Congress considered threats to injure reputation to be inherently wrongful methods of obtaining money. Such an inference would be consistent with the established principle that, when a threat is made to injure the reputation of another, the truth of the damaging allegations underlying the threat is not a defense to a charge of extortion under § 875(d). *See, e.g., United States v. Von der Linden,* 561 F.2d 1340, 1341 (9th Cir.1977) (per curiam), *cert. denied,* 435 U.S. 974, 98 S.Ct. 1621, 56 L.Ed.2d 68 (1978); *Keys v. United States,* 126 F.2d 181, 185 (8th Cir.), *cert. denied,* 316 U.S. 694, 62 S.Ct. 1296, 86 L.Ed. 1764 (1942); *cf. United States v. Pascucci,* 943 F.2d 1032, 1033–34, 1036–37 (9th Cir.1991) (§ 875(d) conviction upheld where defendant threatened to send genuine tape of extramarital sexual encounter to victim's employer).

Further, the government's suggested interpretation of § 875(d) finds support in *United States v. Pignatelli,* 125 F.2d 643, 646 (2d Cir.), *cert. denied,* 316 U.S. 680, 62 S.Ct. 1269,

86 L.Ed. 1754 (1942), in which we interpreted a section paralleling a predecessor of § 875(d), which prohibited a person, "with intent to extort from any person any money or other thing of value," from mailing a "communication ... containing any threat to injure the property or reputation of the addressee or of another," 18 U.S.C. § 338a(c) (1940). Pignatelli, who had threatened by mail that unless he were paid $500,000 he would state in a book that a relative was falsely using the title of "Prince," contended on appeal that the trial court improperly excluded evidence showing that Pignatelli himself "had sole right to the title of Prince." 125 F.2d at 646. He argued that that evidence was relevant because it tended to show that his demands for money were made "in good faith and only in order to adjust pending disputes." *Id.* We rejected Pignatelli's claim, stating as follows:

> The book describing the victims as ... swindlers ... was a threat to injure their reputation, pure and simple. It is true that [Pignatelli] was free to publish the facts at the risk of liability in a libel suit, but he was not free to threaten to injure their reputations and to use the mails for that purpose in order to settle his claim. *Threats to damage another's* ***67** *reputation are no proper means for determining a controversy.* It may be adjusted either by suit or by compromise but settlement must not be effected by using defamation as a club. The threat to publish the book for such a purpose was unlawful and it made no difference whether [Pignatelli] had the sole right to be called Prince or not.

Id. (emphasis added).

Despite the categorical language of *Pignatelli,* and despite Congress's failure either to provide a definition of "extort" for purposes of § 875(d) or to include in § 875(d) the word "wrongful," we are troubled that § 875(d) should be interpreted to contain no element of wrongfulness, for plainly not all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful. For example, the purchaser of an allegedly defective product may threaten to complain to a consumer protection agency or to bring suit in a public forum if the manufacturer does not make good on its warranty. Or she may threaten to enlist the aid of a television "on-the-side-of-the-consumer" program. Or a private club may threaten to post a list of the club members who have not yet paid their dues. We doubt that Congress intended § 875(d) to criminalize acts such as these.

Further, we cannot view the absence of an extortion definition in § 875, or the absence of the word "wrongful," as particularly meaningful, for an overview of the Criminal Code reveals that, in enacting provisions dealing with extortion, Congress has simply been inconsistent as to the inclusion of such a word and as to the inclusion of an extortion definition. The inconsistency in format does not appear to bespeak different legislative intentions as to the meaning of extortion, for where a definition has been included, the concept of wrongfulness is made explicit; and in most sections where there is no definition and no use of adjectives such as "wrongful" or "unlawful," such a concept seems nonetheless implicit. For example, in Chapter 42 of the Code, which encompasses 18 U.S.C. §§ 891–896 and is entitled "Extortionate Credit Transactions," the use of any "extortionate means" to collect an extension of credit is forbidden, *see, e.g., id.* § 894(a), and "extortionate means" is defined: It encompasses "any means which involves the use, or an express or implicit threat of use, of *violence or other criminal means* to cause harm to the person, reputation, or property of any person," *id.* § 891(7) (emphasis added). Section 875, on the other hand, is in Chapter 41 of the Code, which encompasses 18 U.S.C. §§ 871–880 and is entitled "Extortion and Threats." In Chapter 41, the words "extort," "extortion," and "extortionate" are used in several sections, but all are undefined. Nonetheless, most of the acts prohibited in those sections must have been viewed as inherently wrongful. For example, §§ 875(a), (b), and (c) and the first three paragraphs of § 876 deal with extortionate threats to kidnap or to injure a person, conduct that plainly is inherently wrongful. In § 872, the conduct that is prohibited is simply the commission or attempted commission, by, *inter alios,* a federal employee, of "an act of extortion." 18 U.S.C. § 872. Since § 872 contains no pertinent qualifying language, it seems plain that Congress views "extortion" as wrongful.

A similar juxtaposition of the presence and absence of definitions of extortion can be seen in the Hobbs Act, 18 U.S.C. § 1951, and the Travel Act, 18 U.S.C. § 1952. The Hobbs Act prohibits, *inter alia,* obstructing, delaying, or

affecting commerce "by robbery or extortion," *id.* § 1951(a), and it defines extortion as follows:

> The term "extortion" means the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened force, violence, or fear, or under color of official right,

id. § 1951(b)(2) (emphasis added). The Travel Act refers to "extortion" without ***68** defining it. That Act has nonetheless been interpreted as using the term in its "generic" sense, a sense that inherently signifies wrongfulness. Thus, in determining whether the term "extortion" as used in § 1952 was meant to encompass acts that at common law were classified as blackmail but not as extortion (because not committed by a public official), the Supreme Court accepted the

> Government['s] ... suggest[ion] that Congress intended that extortion should refer to those acts prohibited by state law which would be *generically* classified as extortionate, i.e., obtaining something of value from another with his consent induced by the *wrongful* use of force, fear, or threats.

United States v. Nardello, 393 U.S. 286, 290, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969) (emphasis added).

In sum, in sections of the Criminal Code other than § 875(d), the words "extort," "extortionate," and "extortion" either are defined to have a wrongfulness component or implicitly contain such a component. If Congress had meant the word "extort" in § 875(d) to have a different connotation, we doubt that it would have chosen to convey that intention by means of silence. Given its silence and given the plain connotation of extortion in other sections, we decline to infer that "extort" as used in § 875(d) lacks a component of wrongfulness.

The legislative history of § 875(d) also supports our view that the phrase "intent to extort" was meant to reach only demands that are wrongful, for the predecessor to that section was enacted contemporaneously with the Anti–Racketeering Act of 1934, 18 U.S.C. § 420a–420e (1934) ("1934 Act"), which is the predecessor to the Hobbs Act, 18 U.S.C. § 1951. The Hobbs Act's definition of extortion ("the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right") dates back to the 1934 Act, which provided penalties for any person who

> (b) Obtains property of another, with his consent, induced by wrongful use of force or fear, or under color of official right,

or who

> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsection[ ] ... (b).

18 U.S.C. § 420a(b) and (c) (1934). Although the structure of the 1934 Act differs from that of Hobbs Act, the substance of their prohibitions is the same. *Accord Bianchi v. United States,* 219 F.2d 182, 188–89 (8th Cir.) (prohibition of extortion in the Hobbs Act is substantially the same as in the 1934 Act, both of which contain wrongfulness element), *cert. denied,* 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249 (1955). And although the word "extortion" itself is not used in the 1934 Act, it is quite clear that Congress meant the statutory language to describe what it viewed as the essence of extortion, for the report of the Senate Judiciary Committee discussing the bill that would become the 1934 Act stated that the bill was aimed at "persons who commit acts of violence, intimidation and extortion." S.Rep. No. 73–532, at 1 (1934); *see id.* ("The proposed statute ... makes it a felony to do any act 'affecting' or 'burdening' ... commerce if accompanied by extortion....").

The 1945 debates on the bill that was eventually to become the Hobbs Act, *see* 91 Cong. Rec. 11,839–48, 11,899–922 (1945), showed both that the legislators believed that the 1934 Congress viewed extortion as having an element of wrongfulness, and that the Hobbs Act Congress—which

retained the substance of the 1934 Act's prohibition—held the same view. *See id.* at 11,901–02, 11,906, 11,908, 11,920. The discussion leading to the express use of the word "extortion" in the Hobbs Act, and of the definition of that term, centered on the generally accepted ***69** meaning of the term, which traditionally included a component of wrongfulness. The Hobbs Act proponents pointed out that the 1934 Act was fashioned in no small measure after the then-current definition of extortion used in the New York Penal Code. *See, e.g.,* 91 Cong. Rec. 11,843, 11,900, 11,906; *see also United States v. Zappola,* 677 F.2d 264, 268 (2d Cir.), *cert. denied,* 459 U.S. 866, 103 S.Ct. 145, 74 L.Ed.2d 122 (1982); *United States v. Nedley,* 255 F.2d 350, 355 (3rd Cir.1958). That definition expressly included a "wrongfulness" element, *see* N.Y. Penal Law § 850 (Consol.1930) (extortion is the "obtaining of property from another ... with [his] consent, induced by a *wrongful* use of force or fear, or under color of official right" (emphasis added)), and the Hobbs Act proponents viewed that definition as representative of the extortion laws of every state, *see* 91 Cong. Rec. at 11,906. Thus, the definition of extortion included in the Hobbs Act reflected what its proponents believed to be the generally accepted definition. *See id.* at 11,900, 11,906, 11,910, 11,914; *see generally Black's Law Dictionary* 696 (4th ed.1957) ("extort": "To gain by wrongful methods, to obtain in an unlawful manner, to compel payments by means of threats of injury to person, property, or reputation .... to exact something unlawfully by threats or putting in fear."). Accordingly, Representative Hobbs stated that the terms extortion and robbery "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11,912.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952). In enacting the Hobbs Act, Congress made express what we would ordinarily presume with respect to the meaning of extortion.

At the same time that Congress was fashioning the 1934 Act to prohibit extortion it was considering the bill that would become 18 U.S.C. § 408d (1934), the predecessor of § 875. In terms virtually identical to those of § 875(d), the first numbered clause of § 408d prohibited

> with intent to extort from any person ... any money or thing of value, [the] transmi[ssion] in interstate commerce by any means whatsoever, [of] any threat (1) to injure the person, property, or reputation of any person.

18 U.S.C. § 408d (1934). Although the passage of § 408d preceded the passage of the 1934 Act by a month, it is plain that the two statutes were considered by Congress contemporaneously. The Senate Report on the bill that would become the 1934 Act, emphasizing that that bill targeted "extortion," S.Rep. No. 73–532, at 1 (1934), was issued in March 1934; the 1934 Act was passed in June, prohibiting what Congress viewed as extortionate conduct; and during the period between the issuance of the Report and the passage of the 1934 Act, Congress passed § 408d, prohibiting threats to injure reputation "with intent to extort." The simultaneous consideration of the two enactments focusing on extortion gives rise to a strong inference that Congress intended to give the same meaning to extortion in both statutes.

Under the Hobbs Act definition of extortion, which includes obtaining property from another through a wrongful threat of force or fear, the use of a threat can be wrongful because it causes the victim to fear a harm that is itself wrongful, such as physical injury, or because the means is wrongful, such as violence. *See, e.g., United States v. Zappola,* 677 F.2d at 269. However, the Hobbs Act may also be violated by a threat that causes the victim to ***70** fear only an economic loss. *See, e.g., United States v. Margiotta,* 688 F.2d 108, 134 (2d Cir.1982), *cert. denied,* 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). Yet as we discussed in *United States v. Clemente,* 640 F.2d 1069, 1077 (2d Cir.), *cert. denied,* 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981), a threat to

cause economic loss is not inherently wrongful; it becomes wrongful only when it is used to obtain property to which the threatener is not entitled.

In *Clemente,* we considered challenges to Hobbs Act convictions on the ground that the trial court's instructions permitted the jury to "convict [Clemente] solely upon finding that he used fear of economic loss to obtain money," and that as a matter of law "the use of fear of economic loss is not inherently wrongful." 640 F.2d at 1077. We rejected the challenge because Clemente's factual premise was erroneous. The trial court had in fact informed the jury, *inter alia,* that "extortion" means obtaining property from another, with his consent, induced by the "wrongful" use of actual or threatened force or fear, *id.* at 1076 (internal quotation marks omitted), and had instructed that "[w]rongful" meant that the defendant in question had instilled in his victim the fear of economic loss of property to which the defendant "had no lawful right," *id.* at 1077 (internal quotation marks omitted). In upholding the convictions, we stated as follows:

> We are satisfied that the charge correctly instructed the jury on the wrongfulness element of the crime of extortion. The thrust of the district court's charge when read as a whole, *see Cupp v. Naughten,* 414 U.S. 141, 146–47, 94 S.Ct. 396, 38 L.Ed.2d 368 ... (1973), was that the use of fear of economic loss to obtain property to which one is not entitled is wrongful. *It is obvious that the use of fear of financial injury is not inherently wrongful. And precisely because of this fact, the "objective" of the party employing fear of economic loss will have a bearing on the lawfulness of its use.* In this regard, Judge Sand instructed the jury that the wrongfulness element of the crime would be satisfied upon finding that fear of economic loss was employed by the defendants to obtain money to which they were not lawfully entitled.

Id. at 1077 (emphasis added).

We are persuaded that a similar interpretation of § 875(d) is appropriate. Given Congress's contemporaneous consideration of the predecessors of § 875(d) and the Hobbs Act, both of which focused on extortion, we infer that Congress's concept of extortion was the same with respect to both statutes. The congressional discussions make clear that Congress meant to adopt the traditional concept of extortion, which includes an element of wrongfulness. And since, like threats of economic harm, not every threat to make a disclosure that would harm another person's reputation is wrongful, we adopt an interpretation of § 875(d) similar to *Clemente* 's interpretation of the Hobbs Act. We conclude that not all threats to reputation are within the scope of § 875(d), that the objective of the party employing fear of economic loss or damage to reputation will have a bearing on the lawfulness of its use, and that it is material whether the defendant had a claim of right to the money demanded.

We do, however, view as inherently wrongful the type of threat to reputation that has no nexus to a claim of right. There are significant differences between, on the one hand, threatened disclosures of such matters as consumer complaints and nonpayment of dues, as to which the threatener has a plausible claim of right, and, on the other hand, threatened disclosures of such matters as sexual indiscretions that have no nexus with any plausible claim of right. In the former category of threats, the disclosures themselves—not only the threats—have the potential for causing payment of the money demanded; in the latter category, it is only the threat that has that potential, and actual disclosure would frustrate the prospect of payment. ***71** Thus, if the club posts a list of members with unpaid dues and its list is accurate, the dues generally will be paid; if the consumer lodges her complaint and is right, she is likely to receive her refund; and both matters are thereby concluded. In contrast, if a threatener having no claim of right discloses the victim's secret, regardless of whether her information is correct she normally gets nothing from the target of her threats. And if the victim makes the demanded payment, thereby avoiding disclosure, there is nothing to prevent the threatener from repeatedly demanding money even after prior demands have been fully met.

Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure, we regard a threat to reputation as

inherently wrongful. We conclude that where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by § 875(d).

Within this framework, we conclude that the district court's instruction to the jury on the meaning of "extort" as that term is used in § 875(d) was erroneous. The court instructed simply that "to extort means to obtain money or a thing of value from another by use of threats to reputation." The court gave no other explanation of the term "extort" and did not limit the scope of that term to the obtaining of property to which the defendant had no actual, or reasonable belief of, entitlement. Rather, the court added that "it makes no difference whether the defendant was actually owed any money by" the victim of the threats. While it would have been correct to instruct that it makes no difference whether the defendant was actually owed money by the threat victim if the threat has no nexus to the defendant's claim, the instruction as given lacked this essential component. Issues of whether a defendant has a plausible claim of right and whether there is a nexus between the threat and the defendant's claim are questions of fact for the factfinder, and we conclude that the jury was not properly instructed as to the elements of a § 875(d) offense.

The evidence at trial was plainly sufficient to support verdicts of guilty had the jury been properly instructed. Even if Jackson were Cosby's child, a rational jury could find that her demand, given her age (22) and the amount ($40 million), did not reflect a plausible claim for support. The evidence supported an inference that Jackson had no right to demand money from Cosby pursuant to a contract or promise and no right to insist that she be included in his will. The jury thus could have found that her threat to disclose was the only leverage she had to extract money from him; that if she sold her story to *The Globe,* she would lose that leverage; and that if Cosby had capitulated and paid her in order to prevent disclosure, there was no logical guarantee that there would not be a similar threat and demand in the future. Thus, had the jury been instructed that the "with intent to extort" element meant that defendants could be found guilty of violating § 875(d) only if Jackson's threat to disclose was issued in connection with a claim for money to which she was not entitled or which had no nexus to a plausible claim of right, the jury could permissibly have returned verdicts of guilty on that count.

We conclude, however, that the court's failure to inform the jury of the proper scope of the intent-to-extort element of § 875(d) erroneously allowed the jury to find defendants guilty of violating that section on the premise that any and every threat to reputation in order to obtain ***72** money is inherently wrongful. Accordingly, Jackson and Medina are entitled to a new trial on the § 875(d) count.

B. *The Conspiracy and Travel Act Counts*

We conclude that defendants' convictions of conspiracy and Travel Act violations must also be set aside. In its instructions on the conspiracy count, the district court made clear that a defendant could not be found guilty on that count unless he or she was aware of the unlawful nature of the agreement. Thus, it informed the jury, *inter alia,* that in order to convict a given defendant on that count, it must find that that defendant entered into the alleged conspiracy with criminal intent, *i.e.,* with "aware[ness] of the generally unlawful nature of his or her acts" (Tr. 1769), *i.e.,* that the defendants acted "with an understanding of the unlawful character of the conspiracy, intentionally engaged, advised, or assisted in it for the purpose of furthering one or both of its unlawful objects" (Tr. 1771). However, in elaborating on the allegedly unlawful acts and objects of the conspiracy, the court stated:

> The indictment charges two distinct unlawful objects or goals. The first charges that it was an object of the conspiracy that the defendants, with the intent to extort money and things of value from Bill Cosby, would and did transmit in interstate commerce communications containing threats to injure the reputation of Bill Cosby, in violation of Section 875(d) and, as I have told you, in addition the indictment alleges a second object of this conspiracy, to violate Section 1952(a)(3) of Title 18 of the United States Code, which makes it unlawful to cross state lines or use interstate facilities to facilitate extortion.
>
> ... [I]t is not necessary for the government to prove the success of the conspiracy. It is also not necessary for you to find that the conspiracy embodied both of these unlawful objectives. It is sufficient if you find beyond a reasonable doubt the conspirators agreed, implicitly or impliedly [*sic*], on either of these two objectives. When a conspiracy has more than one objective, the government need prove only that the defendant you are considering agreed to accomplish at least one of the criminal objectives.

(Tr. 1767–68.) Thus, the instruction on conspiracy incorporated the error in the court's instruction on § 875(d),

thereby erroneously allowing the jury to find defendants guilty of a conspiracy to engage in conduct that, under the court's definition, could have been lawful. Defendants are entitled to a new trial on the conspiracy count with the jury properly instructed as to the nature of the conduct prohibited by § 875(d).

The court's instructions on the Travel Act count likewise incorporated the erroneous instruction on the § 875(d) count. As to the objectives of the interstate travel, the court stated as follows:

> The indictment alleges that the defendant traveled or caused someone else to travel interstate and used or caused someone else to use interstate facilities to facilitate two forms of unlawful activity, extortion in violation of 875(d), and extortion in violation of Section 155 of the New York Penal Law. The government must prove to you beyond a reasonable doubt that the activities the defendant intended to facilitate were in fact unlawful under either federal law or New York State law.
>
> It is sufficient if you find beyond a reasonable doubt that the conduct was unlawful under either of these statutes. Of course, to conclude that the government has met its burden of proof in this case, you must unanimously agree on whichever statute you may find that the conduct violated.
>
> ....
>
> I have already instructed you on elements of extortion under the federal law under 875(d) in connection with my ***73** charge to you on Count 2. Those instructions apply here as well.

(Tr. 1785–86.) Accordingly, defendants are entitled to a new trial on the Travel Act count as well.

C. *Other Contentions*

Medina and Sabas advance additional contentions that we discuss briefly in light of our order for a remand.

1. *Admission of the Medina–Thompson Conversation Excerpt*

Medina contends that the district court erred in refusing to allow him to introduce parts of the tape of his January 16, 1997 conversation with Thompson. The conversation was roughly 42 minutes long; the government offered in evidence only a 90–second portion of the tape near the beginning of the conversation, in which Thompson warned that the scheme in which Jackson was engaged constituted the federal crime of extortion. The excerpt was admitted as evidence of Medina's awareness of the unlawfulness of the extortion scheme. The court denied Medina's request that the remainder of the tape be admitted pursuant to the "rule of completeness." We see no error in that denial.

Rule 106 of the Federal Rules of Evidence provides that

> [w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed.R.Evid. 106. Under this principle, an "omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." *United States v. Castro,* 813 F.2d 571, 575–76 (2d Cir.), *cert. denied,* 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987); *see, e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172–73, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); *Phoenix Associates III v. Stone,* 60 F.3d 95, 102 (2d Cir.1995). The completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages. *See United States v. Marin,* 669 F.2d 73, 84 (2d Cir.1982). The trial court's application of the rule of completeness is reviewed only for abuse of discretion. *See, e.g., United States v. Castro,* 813 F.2d at 576.

Medina argues that a jury hearing the tone and substance of Thompson's statements in later portions of the conversation would perceive Thompson to be exaggerating, overly emotional, or "out of control," and would conclude that Medina had reason to discount her warning that Jackson's conduct was unlawful. The trial court, after listening to the tape, saw little probative value in the parts of the tape proffered by Medina, noting, *inter alia,* that the substance of Thompson's remarks in the remainder of the conversation was neither incredible nor bizarre, and that Thompson's "tone was pretty calm and reasoned." (Tr. 1342–43.) The court also noted that the portions of the tape proffered by Medina

consisted largely of Medina's own self-serving statements, which, as offered by him, are inadmissible hearsay. We see no abuse of discretion in the exclusion of the tape.

2. *Sabas's Sufficiency Challenges*

Focusing principally on the conspiracy count, Sabas contends that he is entitled to reversal on the ground that the evidence was insufficient to support his conviction. If this contention had merit, Sabas would be entitled to dismissal of the conspiracy count, rather than being retried on that count. *See, e.g., Burks v. United States,* 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). We conclude that his contention is without merit.

***74** In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden, for the reviewing court must view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility. *See, e.g., United States v. Allah,* 130 F.3d 33, 45 (2d Cir.1997), *cert. denied,* 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 718 (1998); *United States v. Giraldo,* 80 F.3d 667, 673 (2d Cir.), *cert. denied,* 519 U.S. 847, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996). We must affirm the conviction so long as any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See, e.g., Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Amato,* 15 F.3d 230, 235 (2d Cir.1994).

In order to prove a conspiracy, the government must present evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme and knowingly joined and participated in it. *See, e.g., United States v. Giraldo,* 80 F.3d at 673; *United States v. Sanchez Solis,* 882 F.2d 693, 696 (2d Cir.1989). Mere presence at the scene or association with conspirators does not constitute participation in the conspiracy, even if the defendant has knowledge of the conspiracy. *See, e.g., United States v. Jones,* 30 F.3d 276, 282 (2d Cir.), *cert. denied,* 513 U.S. 1028, 115 S.Ct. 602, 130 L.Ed.2d 513 (1994); *United States v. Scarpa,* 913 F.2d 993, 1005 (2d Cir.1990); *United States v. Torres,* 901 F.2d 205, 220 (2d Cir.), *cert. denied,* 498 U.S. 906, 111 S.Ct. 273, 112 L.Ed.2d 229 (1990). However, "[o]nce a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Amato,* 15 F.3d at 235 (internal quotation marks omitted); *see, e.g., United States v. Rivera,* 971 F.2d 876, 891 (2d Cir.1992); *United States v. Scarpa,* 913 F.2d at 1005. The elements of conspiracy, like the elements of substantive offenses, may be established through circumstantial evidence. *See, e.g., United States v. Amato,* 15 F.3d at 235; *United States v. Rivera,* 971 F.2d at 890.

The evidence in the present case was sufficient under these standards. First, there was ample evidence that Sabas was present for many of the key conspiratorial conversations, which could have left no doubt in his mind as to the nature of the discussions. For example, Macaraeg testified that Sabas was present at the discussions during the week of January 6, in which Jackson and Medina discussed ways to threaten Cosby's reputation and pressure sponsors in order to force Cosby to give Jackson money; Sabas was present when Medina and Jackson were formulating a draft press release designed to increase that pressure; Sabas was present when Medina announced that Cosby would "have to pay a lot of money" if he did not want Jackson's story to come out; and Sabas was present on January 16 when Jackson spoke with Schmitt by telephone and stated that she would sell her story to a tabloid unless she received $40 million.

Second, there was evidence that Sabas acted to further the objectives of the conspiracy. After the January 17 negotiations between Jackson and Schmitt culminated in an agreed figure of $24 million, which Jackson and Medina were to collect in New York, Sabas drove Jackson and Medina to the airport. At Medina's instruction, Sabas provided Williams with a place to stay that night. In addition, Sabas allowed the use of his credit card for the purchase of return tickets for Jackson and Medina.

Finally, while Jackson and Medina were in New York, Sabas had possession of several documents and tapes that were integral to the scheme, including the source agreement with *The Globe,* the letters faxed to Lund and Schmitt in which Jackson threatened to take her story to the media, and a tape of the conversation in which Jackson demanded $40 million. Sabas concealed some of these materials in ***75** his parents' house rather than his own. When asked for these items by FBI agents after Jackson and Medina were arrested, he sought to conceal them. He first responded that they were at the house of a friend, whom he refused to identify; he told the agents he would lead them to the friend's house, but he then engaged in evasive driving, and the agents lost track of him. The agents were unable to find Sabas at his home again for two days. When they did find him and served him with a subpoena, he gave them only some of the materials they requested, stating that he was giving them everything. It was only after

a third visit by the agents, along with a threatened charge of obstruction of justice, that Sabas took the agents to his parents' home and produced all of the remaining evidence.

In sum, the evidence as to Sabas's awareness and involvement was sufficient to permit a rational juror to find beyond a reasonable doubt that Sabas knew of the conspiracy, intended to join it, and did participate in it.

To the extent that Sabas also contends that the evidence was insufficient to support his conviction of interstate travel to promote extortion, that contention too lacks merit. The evidence that Sabas, with knowledge of the scheme, drove Jackson and Medina to the airport for their trip from California to New York and provided them with tickets for their intended return, was ample to permit his conviction of a Travel Act violation on an aiding and abetting theory. *See, e.g., United States v. Gordon,* 987 F.2d 902, 907 (2d Cir.1993) ("[a] defendant may be found guilty of a substantive crime on an aiding and abetting theory if he joined the criminal venture, shared in it, and contributed to its success").

3. *Severance*

Sabas also contends that he should have been tried separately from Jackson and Medina because the evidence was so much stronger against them than against him and because his defense was "diametrically opposite from [theirs]." (Sabas brief on appeal at 9). We conclude that his motions for severance were properly denied.

In the federal system, multiple defendants may be charged in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions," Fed.R.Crim.P. 8(b), and there is a clear preference that defendants who are indicted together be tried jointly, *see, e.g., Zafiro v. United States,* 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993); *United States v. Miller,* 116 F.3d 641, 679 (2d Cir.1997), *cert. denied,* 524 U.S. 905, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998). If defendants have been properly joined under Rule 8(b), a severance motion should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States,* 506 U.S. at 539, 113 S.Ct. 933; *see, e.g., United States v. Aulicino,* 44 F.3d 1102, 1116 (2d Cir.1995).

The denial of a motion for severance will not be overturned absent an abuse of discretion of the district court, *see, e.g., United States v. Rosa,* 11 F.3d 315, 341 (2d Cir.1993), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994); *United States v. Benitez,* 920 F.2d 1080, 1085 (2d Cir.1990), resulting in prejudice so severe that the defendant's conviction constituted "a miscarriage of justice," *United States v. Aulicino,* 44 F.3d at 1117; *United States v. Rosa,* 11 F.3d at 341. A jury's acquittal of a defendant on one or more counts is persuasive evidence that joinder did not result in prejudice. *See, e.g., United States v. Aulicino,* 44 F.3d at 1117.

We see no abuse of discretion or unfair prejudice in requiring that Sabas, Jackson, and Medina be tried together. First, we see no inconsistency in the defendants' ***76** respective defenses. Sabas's defense was that he lacked knowledge of any conspiracy; the defense of Jackson and Medina was that they lacked the necessary criminal intent because they believed they had certain legal rights to money from Cosby. The two stances are not necessarily inconsistent. Second, since Sabas is charged with participating in a conspiracy with Jackson and Medina, nearly all of the evidence admitted at a trial of Jackson and Medina would also be admissible in a separate trial of Sabas. Third, as discussed above, there is ample evidence to support Sabas's convictions of conspiracy to commit extortion and of aiding and abetting violation of the Travel Act. Finally, we have little doubt that a jury is capable of discerningly assessing the weight of the evidence in order to differentiate among these three defendants. The original jury did precisely that, finding Jackson and Medina guilty on the § 875(d) count while acquitting Sabas on that count.

Accordingly, on remand, all three defendants may be retried together.

CONCLUSION

For the foregoing reasons, we vacate the convictions and remand for a new trial.

All Citations

180 F.3d 55, 52 Fed. R. Evid. Serv. 639

Approved: _____
MATTHEW PODOLSKY/ROBERT L. BOONE/ROBERT B. SOBELMAN
Assistant United States Attorneys

Before: THE HONORABLE STEWART D. AARON
United States Magistrate Judge
Southern District of New York

19MAG2927

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA	:	**SEALED COMPLAINT**
	:	
- v. -	:	Violations of 18 U.S.C.
	:	§§ 371, 875(d), 1951, and 2
MICHAEL AVENATTI,	:	
	:	COUNTY OF OFFENSE:
Defendant.	:	NEW YORK

- - - - - - - - - - - - - - - - - - X

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHRISTOPHER HARPER, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI"), and charges as follows:

COUNT ONE
(Conspiracy to Transmit Interstate Communications with Intent to Extort)

1. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, knowingly, and willfully, did combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, transmission of an interstate communication with intent to extort, in violation of Title 18, United States Code, Section 875(d).

2. It was a part and an object of the conspiracy that MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully, willfully, and knowingly, and with intent to extort from a corporation any money and other thing of value, would and did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, in violation of Title 18, United States Code, Section 875(d), to wit, AVENATTI and a co-conspirator not named as a defendant herein ("CC-1") devised a scheme to extort a company by means of an

interstate communication by threatening to damage the company's reputation if the company did not agree to make multi-million dollar payments to AVENATTI and CC-1, and further agree to pay an additional $1.5 million to a client of AVENATTI's.

OVERT ACTS

3. In furtherance of the conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about March 19, 2019, in Manhattan, MICHAEL AVENATTI, the defendant, and CC-1 met with attorneys for NIKE, Inc. ("Nike") and threatened to release damaging information regarding Nike if Nike did not agree to make multi-million dollar payments to AVENATTI and CC-1 and make an additional $1.5 million payment to an individual AVENATTI claimed to represent ("Client-1").

b. On or about March 20, 2019, AVENATTI and CC-1 spoke by telephone with attorneys for Nike, during which AVENATTI stated, with respect to his demands for payment of millions of dollars, that if those demands were not met "I'll go take ten billion dollars off your client's market cap . . . I'm not fucking around."

(Title 18, United States Code, Section 371.)

COUNT TWO
(Conspiracy to Commit Extortion)

4. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, on an interstate telephone call, AVENATTI and CC-1 used threats of economic harm in order to obtain multi-million dollar payments from Nike to AVENATTI and CC-1, and further to obtain an additional $1.5 million for Client-1.

(Title 18, United States Code, Section 1951.)

COUNT THREE
(Transmission of Interstate
Communications with Intent to Extort)

5. On or about March 20, 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, unlawfully, knowingly, and willfully, and with intent to extort from a corporation any money and other thing of value, did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, and did aid and abet the same, to wit, AVENATTI, during an interstate telephone call, threatened to cause substantial financial harm to Nike and its reputation if Nike did not agree to make multi-million dollar payments to AVENATTI, and further agree to pay an additional $1.5 million to Client-1.

(Title 18, United States Code, Sections 875(d) and 2.)

COUNT FOUR
(Extortion)

6. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, willfully and knowingly, did attempt to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, AVENATTI used threats of economic harm in an attempt to obtain multi-million dollar payments from Nike, and further to obtain an additional $1.5 million for Client-1.

(Title 18, United States Code, Sections 1951 and 2.)

BACKGROUND TO THE EXTORTION SCHEME

The bases for my knowledge and for the foregoing charges are, in part, as follows:

7. I am a Special Agent with the FBI and I have been personally involved in the investigation of this matter, which has been handled jointly by Special Agents of the FBI and of the United States Attorney's Office. This affidavit is based upon my personal participation in the investigation of this matter, my conversations with other law enforcement agents, witnesses,

and others, as well as my examination of reports and records. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

8. Based on my involvement in this investigation, and set forth in greater detail below, I have become aware of a multi-million extortion scheme in which MICHAEL AVENATTI, the defendant, and CC-1 used threats of economic and reputational harm to extort Nike, a multinational corporation engaged in, among other things, the marketing and sale of athletic apparel, footwear, and equipment. Specifically, AVENATTI threatened to hold a press conference on the eve of Nike's quarterly earnings call and the start of the annual National Collegiate Athletic Association ("NCAA") tournament at which he would announce allegations of misconduct by employees of Nike. AVENATTI stated that he would refrain from holding the press conference and harming Nike only if Nike made a payment of $1.5 million to a client of AVENATTI's in possession of information damaging to Nike, *i.e.*, Client-1, and agreed to "retain" AVENATTI and CC-1 to conduct an "internal investigation" - an investigation that Nike did not request - for which AVENATTI and CC-1 demanded to be paid, at a minimum, between $15 and $25 million. Alternatively, and in lieu of such a retainer agreement, AVENATTI and CC-1 demanded a total payment of $22.5 million from Nike to resolve any claims Client-1 might have and additionally to buy AVENATTI's silence.

RELEVANT ENTITIES AND INDIVIDUALS

9. As set forth further below, and based on my involvement with the investigation to date, I am aware of the following:

a. MICHAEL AVENATTI, the defendant, is an attorney licensed to practice in the state of California, with a large public following due to, among other things, his representation of celebrity and public figure clients, as well as frequent media appearances and use of social media.

b. CC-1 is also an attorney licensed to practice in the state of California, and similarly known for representation of celebrity and public figure clients.

c. Nike is a multinational, publicly-held corporation headquartered in Beaverton, Oregon. Nike produces and markets athletic apparel, footwear, and equipment, and also sponsors athletic teams in many sports, including basketball, at various levels, including the high school, amateur, collegiate, and professional levels.

d. "Client-1" is a coach of an amateur athletic union ("AAU") men's basketball program based in California. For a number of years, the AAU program coached by Client-1 had a sponsorship agreement with Nike pursuant to which Nike paid the AAU program approximately $72,000 annually.

e. "Attorney-1" and "Attorney-2" work at a law firm based in New York and represent Nike.

f. The "In-House Attorney" is an attorney who works for Nike.

THE MARCH 19 MEETING WITH AVENATTI

10. Based on my conversations with other law enforcement officers, review of notes, text messages, and emails, and discussions with Attorney-1 who, as noted above, represents Nike, I have learned the following information, in substance and in part:

a. On or about March 13, 2019, Attorney-1 learned from a representative of Nike that CC-1 had contacted Nike and stated, in substance and in part, that he wished to speak to representatives of Nike. CC-1 had further stated, in substance and in part, that the discussion should occur in person, not over the phone, as it pertained to a sensitive matter.

b. On or about March 15, 2019, Attorney-1 spoke by phone with CC-1, and CC-1 stated, in substance and in part, that he was trying to be discreet on the phone, but that he and MICHAEL AVENATTI, the defendant, wished to speak with representatives of Nike in person.

c. On or about March 19, 2019, at approximately 12:00 p.m., Attorney-1, Attorney-2, and the In-House Attorney met with AVENATTI and CC-1 at CC-1's office in New York, New York, during which the following occurred, among other things:

i. AVENATTI stated, in substance and in part, that he represented Client-1, an AAU coach, whose team had previously had a contractual relationship with Nike, but whose

contract Nike had recently decided not to renew. According to AVENATTI, Client-1 had evidence that one or more Nike employees had authorized and funded payments to the families of top high school basketball players and/or their families and attempted to conceal those payments, similar to conduct involving a rival company that had recently been the subject of a criminal prosecution in this District. AVENATTI identified three former high school players in particular, and indicated that his client was aware of payments to others as well.

ii. AVENATTI further stated, in substance and in part, that he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value. In particular, AVENATTI stated, in substance and in part, that he had approached Nike now because he knew that the annual NCAA tournament - an event of significance to Nike and its brand - was about to begin and further because he was aware that Nike's quarterly earnings call was scheduled for March 21, 2019, thus maximizing the potential financial and reputational damage his press conference could cause to Nike.

iii. AVENATTI further stated, in substance and in part, that he would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the team coached by Client-1; and (2) Nike must hire AVENATTI and CC-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct such an internal investigation, Nike would still be required to pay AVENATTI and CC-1 at least twice the fees of any other firm hired.

iv. At the end of the meeting, AVENATTI and CC-1 indicated that Attorney-1 and Nike would have to agree to accept those demands immediately or AVENATTI would hold his press conference. In particular, CC-1 indicated that he and AVENATTI would contact Attorney-1, Attorney-2, and the In-House Attorney later that afternoon to discuss Nike's response.

d. Later that day, Attorney-1 left a voicemail for CC-1 indicating that Nike needed time. CC-1 subsequently returned Attorney-1's call and stated, in substance and in part, that AVENATTI had agreed to give Nike until Thursday (i.e. two days) to consider the demands before holding the threatened press conference.

e. After the conclusion of the meeting described above, representatives of Nike contacted representatives of the United States Attorney's Office for the Southern District of New York regarding AVENATTI's threats and extortionate demands.

THE MARCH 20 CALL WITH AVENATTI

11. Based on my conversations with other law enforcement officers and Attorney-1, my own observations, and my review of notes, text messages, audio recordings and draft transcriptions of those conversations, I have learned the following information, in substance and in part:

a. On or about March 20, 2019, at the direction of law enforcement, Attorney-1 sent CC-1 a text message to schedule a telephone call for later that day.

b. On or about March 20, 2019, at approximately 4:00 p.m., Attorney-1 and Attorney-2, who were in their offices in New York, New York, spoke to CC-1 on a telephone call that was consensually recorded and monitored by law enforcement. During the call, and at the direction of law enforcement, Attorney-1 asked CC-1 for more time to consider the demands made by MICHAEL AVENATTI, the defendant, and CC-1 the day before and/or another in-person meeting to discuss those demands. CC-1, who stated, in substance and in part, that he was in Miami, Florida, at the time, said that he would speak to AVENATTI to discuss the possibility of delaying the deadline for Nike's response and would further discuss with AVENATTI the possibility of setting up another in-person meeting.

c. Less than an hour later, at approximately 4:50 p.m., Attorney-1 and Attorney-2 again spoke to CC-1 on a telephone call that was consensually recorded and monitored by law enforcement. During the call, CC-1 indicated that he had spoken to AVENATTI, who was yelling and angry because he did not believe that Nike needed more time to respond to the demands for payment. CC-1 stated, in substance and in part, that Attorney-1 and Attorney-2 would need to provide some justification for delaying the deadline and that CC-1 would attempt to set up another call with AVENATTI so that Attorney-1 could discuss the request for an extension with AVENATTI directly.

d. Shortly thereafter, at approximately 5:10 p.m., Attorney-1 and Attorney-2 engaged in a three-way phone conversation with AVENATTI and CC-1 that was consensually recorded and monitored by law enforcement. During that call, the following, among other things, occurred:

i. AVENATTI reiterated that he expected to "get a million five for our guy" (i.e., Client-1) and be "hired to handle the internal investigation" adding that and "if you don't wanna do that, we're done here."[1]

ii. AVENATTI also reiterated threats made during the previous in-person meeting along with his demand for a multi-million dollar retainer to do an internal investigation. With respect to the internal investigation, AVENATTI made clear that his demand was not simply to be retained by Nike but to be paid at least $10 million dollars or more by Nike in return for not holding a press conference.

iii. In particular, AVENATTI stated, in part: "I'm not fucking around with this, and I'm not continuing to play games. . . . You guys know enough now to know you've got a serious problem. And it's worth more in exposure to me to just blow the lid on this thing. A few million dollars doesn't move the needle for me. I'm just being really frank with you. So if that's what, if that's what's being contemplated, then let's just say it was good to meet you, and we're done. And I'll proceed with my press conference tomorrow . . . . I'm not fucking around with this thing anymore. So if you guys think that you know, we're gonna negotiate a million five, and you're gonna hire us to do an internal investigation, but it's gonna be capped at 3 or 5 or 7 million dollars, like let's just be done. . . . And I'll go and I'll go take ten billion dollars off your client's market cap. But I'm not fucking around."

iv. AVENATTI and CC-1 continued to discuss how much AVENATTI expected to be paid by Nike for doing an "internal investigation." AVENATTI made clear his view that an internal investigation of conduct at a company like Nike could be valued at "tens of millions of dollars, if not hundreds," stating, in part, "let's not bullshit each other. We all know what the reality of this is," adding later in the conversation that while he did not expect to be paid $100 million, he did expect to be paid more than $9 million.

v. Finally, AVENATTI stated, in substance and in part, that he would agree to meet with Attorney-1 in person the following day, Thursday, March 21, the date of Nike's scheduled quarterly earnings call and the beginning of the NCAA tournament, to present the exact amount he demanded from Nike

[1] The quotations set forth in this Complaint are based on draft transcriptions of the recorded conversations, and are in preliminary form only and subject to change upon further review.

and under what terms it would have to be paid. AVENATTI further stated, in substance and in part, that Nike would be required to provide an answer the following Monday or he would hold his press conference.

THE MARCH 21 MEETING WITH AVENATTI

12. Consistent with the phone call described above, and based on my conversations with other law enforcement officers and Attorney-1, my own observations, and my review of a video recording and draft transcription of that video recording, I know that, on or about March 21, 2019, MICHAEL AVENATTI, the defendant, CC-1, Attorney-1, and Attorney-2 met at CC-1's office in New York. That meeting was consensually video- and audio-recorded by Attorney-1 and Attorney-2. During that meeting, the following, among other things, occurred:

a. At the beginning of the meeting, and at the direction of law enforcement, Attorney-1 stated that he did not believe that a payment to AVENATTI's client would be the "sticking point" but that Attorney-1 needed to know more about the proposed "internal investigation." AVENATTI stated, in substance and in part, that he and CC-1 would require a $12 million retainer to be paid immediately and to be "deemed earned when paid," with a minimum guarantee of $15 million in billings and a maximum of $25 million, "unless the scope changes." During the meeting, AVENATTI and CC-1 also stated, in substance and in part, that an "internal investigation" could benefit Nike, by, among other things, allowing Nike to "self-report" any misconduct, and that it would be Nike's choice whether to do so.

b. Attorney-1 noted that Attorney-1 had never received a $12 million retainer from Nike and had never done an investigation for Nike "that breaks $10 million." AVENATTI responded, in substance and in part, by asking whether Attorney-1 has ever "held the balls of the client in your hand where you could take five to six billion dollars market cap off of them?"

c. Attorney-1 also reiterated, at the direction of law enforcement, that Attorney-1 did not think paying AVENATTI's client $1.5 million would be a "stumbling block," but asked whether there would be any way to avoid AVENATTI carrying out the threatened press conference without Nike retaining AVENATTI and CC-1. In particular, Attorney-1 asked, in substance and in part, whether Nike could resolve the demands just by paying Client-1, rather than retaining AVENATTI and CC-1. CC-1 indicated that CC-1 understood that Nike might like to get rid of the problem in "one fell swoop," rather than have it "hanging

over their head." AVENATTI noted that he did not think it made sense for Nike to pay Client-1 an "exorbitant sum of money . . . in light of his role in this." AVENATTI and CC-1 then left the room to confer privately.

d. After returning, AVENATTI stated, in part, "If [Nike] wants to have one confidential settlement and we're done, they can buy that for twenty-two and half million dollars and we're done. . . . Full confidentiality, we ride off into the sunset. . . ."

e. AVENATTI then added that "I just wanna share with you what's gonna happen, if we don't reach a resolution." AVENATTI then laid out again his threat of harm to Nike, adding that, "as soon as this becomes public, I am going to receive calls from all over the country from parents and coaches and friends and all kinds of people - this is always what happens - and they are all going to say I've got an email or a text message or - now, 90% of that is going to be bullshit because it's always bullshit 90% of the time, always, whether it's R. Kelly or Trump, the list goes on and on - but 10% of it is actually going to be true, and then what's going to happen is that this is going to snowball . . . and every time we got more information, that's going to be the Washington Post, the New York Times, ESPN, a press conference, and the company will die - not die, but they are going to incur cut after cut after cut after cut, and that's what's going to happen as soon as this thing becomes public."

f. Finally, AVENATTI and CC-1 agreed to meet at Attorney-1's office on Monday, March 25, 2019. AVENATTI made clear that Nike would have to accede to his demands at that meeting or he would hold his press conference, stating in part, "If this is not papered on Monday, we are done. I don't want to hear about somebody on a bike trip. I don't want to hear that somebody has, that somebody's grandmother passed away or . . . the dog ate my homework, I don't want to hear - none of it is going to go anywhere unless somebody was killed in a plane crash, it's going to go zero, no place with me."

13. Based on my review of a Twitter account publicly associated with MICHAEL AVENATTI, the defendant, I have learned that, consistent with the threats communicated by AVENATTI, as described above, and within approximately two hours after the conclusion of the video-recorded meeting described above, AVENATTI posted the following message on Twitter:

Based on my participation in the investigation, and my review of the article referred to in the tweet described above, I am aware that the article refers to the prior prosecution involving employees of a rival company referred to by AVENATTI in his initial March 19 meeting with attorneys for Nike.

WHEREFORE, deponent respectfully requests that a warrant be issued for the arrest of MICHAEL AVENATTI, the defendant, and that he be arrested and imprisoned or bailed, as the case may be.

SPECIAL AGENT CHRISTOPHER HARPER
FEDERAL BUREAU OF INVESTIGATION

Sworn to before me this
24th day of March, 2019

THE HONORABLE STEWART D. AARON
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MICHAEL AVENATTI,

Defendant.

MEMORANDUM
OPINION & ORDER

(S1) 19 Cr. 373 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Indictment (S1) 19 Cr. 373 charges Defendant Michael Avenatti with transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One); Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Two); and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Count Three). The Government charges that Avenatti – who is licensed to practice law in California – transmitted in interstate commerce threats "to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to Avenatti"; "used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike"; and used interstate communications to "engage[] in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 for the purpose of furthering AVENATTI's representation of Client-1, without Client-1's knowledge or approval," thereby depriving Client-1 of the "duty of honest services" he was owed. ((S1) Indictment (Dkt. No. 72) ¶¶ 20, 22, 24)

Avenatti has moved to dismiss Counts One and Two on the grounds that (1) they fail to allege "wrongful" conduct; and (2) the extortion statutes are vague as applied. (Def. Mot.

(Dkt. No. 34; see also Nov. 13, 2019 Def. Ltr. (Dkt. No. 71)) For the reasons stated below, Avenatti's motion to dismiss will be denied.

BACKGROUND

I. THE (S1) INDICTMENT'S FACTUAL ALLEGATIONS AND CHARGES

The (S1) Indictment alleges that Client-1 is the director and head coach of an amateur youth basketball program (the "Basketball Program") based in California. "For a number of years, the Basketball Program . . . had a sponsorship program with Nike[,] pursuant to which Nike paid the program approximately $72,000 annually." ((S1) Indictment (Dkt. No. 72) ¶ 5) In March 2019, Client-1 contacted Avenatti seeking "legal assistance after [Nike informed] the Basketball Program . . . that its annual contractual sponsorship would not be renewed." (Id. ¶ 8)

Avenatti and Client-1 met on March 5, 2019. "During that meeting and in subsequent meetings and communications, Client-1 informed AVENATTI . . . that [he] wanted Nike to reinstate its $72,000 annual contractual sponsorship of the Basketball Program." "During the [March 5, 2019] meeting, Client-1 provided AVENATTI with information regarding what Client-1 believed to be misconduct by certain employees of Nike involving the alleged funneling of illicit payments from Nike to the families of certain highly ranked high school basketball prospects." (Id. ¶ 9)

At the March 5, 2019 meeting, Avenatti "told Client-1 that [he] believed that he would be able to obtain a $1 million settlement for Client-1 from Nike. . . ." However,

> at no time during the March 5, 2019 meeting or otherwise did AVENATTI inform Client-1 that AVENATTI also would and did seek or demand payments from Nike for himself in exchange for resolving any potential claims made by Client-1 and not causing financial and reputational harm to Nike, or that AVENATTI would and did seek to make any agreement with Nike contingent upon Nike making payments to AVENATTI himself. Furthermore, at no time did AVENATTI inform Client-1 that AVENATTI intended to

> threaten to publicize the confidential information that Client-1 had provided to AVENATTI, nor did AVENATTI obtain Client-1's permission to publicize any such information.

(Id. ¶ 10)

The Indictment goes on to allege that during a March 19, 2019 meeting with Nike's lawyers, Avenatti told Nike that

> he represented Client-1, "a youth basketball coach, whose team had previously had a contractual relationship with Nike, but whose contract Nike had recently decided not to renew";
>
> Client-1 "had evidence that one or more Nike employees had authorized and funded payments to the families of top high school basketball players and attempted to conceal those payments";
>
> "he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value"; and
>
> he "would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the Basketball Program; and (2) Nike must hire AVENATTI and Attorney-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct such an internal investigation, Nike would still be required to pay AVENATTI and Attorney-1 at least twice the fees of any other firm hired."

(Id. ¶ 11)

In a March 20, 2019 telephone call with Nike's counsel, Avenatti reiterated that he expected to "get a million five for [Client-1]" and to be "hired to handle the internal investigation," for which he demanded a "multimillion dollar retainer" in exchange for not holding a press conference. (Id. ¶ 13(a)-(b)) According to Avenatti, "3 or 5 or 7 million dollars" would not be sufficient for his retainer. Unless Nike agreed to a larger retainer, Avenatti would hold a press conference that would "take ten billion dollars off [Nike's] market cap" (Id. ¶ 13(c))

Avenatti also stated that "he expected to be paid more than $9 million." (Id. ¶ 13(d)) At the end of the call, Avenatti agreed to meet with Nike's lawyers the next day. (Id. ¶ 13(e)

On March 21, 2019, Avenatti met with Nike's lawyers in Manhattan. (Id. ¶ 14) At that meeting, Avenatti demanded "a $12 million retainer to be paid immediately and to be 'deemed earned when paid,' with a minimum guarantee of $15 million in billings and a maximum of $25 million, 'unless the scope changes.'" (Id. ¶ 14(a)) Nike's counsel asked Avenatti whether Nike could simply pay Client-1, "rather than retaining AVENATTI. AVENATTI responded that he did not think it made sense for Nike to pay Client-1 an 'exorbitant sum of money . . . in light of his role in this.'" (Id. ¶ 14(b)) Avenatti agreed to meet with Nike's counsel "on March 25, 2019, to hear whether Nike was willing to make the demanded payments. AVENATTI stated that Nike would have to agree to his demands at that meeting or he would hold his threatened press conference." (Id. ¶ 14(f))

According to the Indictment, Avenatti did not "inform Client-1 that Nike had offered to resolve Client-l's claims without paying AVENATTI. Nor did AVENATTI inform Client-1 that AVENATTI had continued to threaten to publicize confidential information provided to AVENATTI by Client-1, or that AVENATTI had continued to use that information to demand a multimillion dollar payment for himself." (Id. ¶ 14(g))

About two hours after the March 21, 2019 meeting, and without consulting Client-1, Avenatti posted the following message on Twitter:

(Id. ¶ 15; see also @MichaelAvenatti, Twitter (Mar. 21, 2019, 3:52 p.m.), https://twitter.com/MichaelAvenatti/status/1108818722767163392)

The article linked in the March 21, 2019 tweet refers to a prosecution brought by the Government against employees of Adidas – a competitor of Nike. (Id. ¶ 16)

On March 25, 2019, after Avenatti learned that law enforcement had approached Client-1, but shortly before he was arrested, Avenatti posted the following message to Twitter:

(Id. ¶ 18; see also @MichaelAvenatti, Twitter (Mar. 25, 2019, 12:16 p.m.), https://twitter.com/MichaelAvenatti/status/1110213957170749440)

Later that day, Avenatti was arrested as he approached Nike's counsel's office complex in Manhattan for the scheduled March 25, 2019 meeting. (Id. ¶ 17)

The (S1) Indictment charges Avenatti with: (1) transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d), in that "AVENATTI, during an interstate telephone call, threatened to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to AVENATTI"; (2) attempted extortion, in violation of 18 U.S.C. §§ 1951, in that "AVENATTI used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike, a multinational public corporation"; and (3) committing honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, in that he "engaged in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 . . . without Client-1's knowledge or approval, and used and caused the use of interstate communications to effect the scheme." (Id. ¶¶ 20, 22, 24)

DISCUSSION

I. DEFENDANT'S MOTION TO DISMISS

Avenatti argues that Counts One and Two – which charge him with extorting Nike through threats of economic and reputational harm in violation of 18 U.S.C. §§ 875(d) and 1951 – must be dismissed, because they fail to allege "wrongful" conduct and are vague as applied. (Def. Br. (Dkt. No. 35) at 6)

The Government argues that these counts are legally sufficient, in that they plead the elements of the offenses "and describe[] in detail the time, place, and circumstances of the

offenses. . . . Nothing more is required." (Govt. Opp. (Dkt. No. 57) at 12 (citing United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998)) The Government further contends that Avenatti's argument that his conduct was not "wrongful" as a matter of law is both premature and incorrect. (Id. at 12-13) Similarly, as to Avenatti's vague-as-applied challenge, the Government contends that such challenges "must wait until the facts have been established at trial. . . . On this basis alone, the defendant's claim must be rejected." (Id. at 19)

II. WHETHER THE INDICTMENT IS LEGALLY SUFFICIENT

A. Whether the Indictment Pleads the Statutory Elements

Fed. R. Crim. P. 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . ." "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974) (citation omitted); see also United States v. Frias, 521 F.3d 229, 235 (2d Cir. 2008) ("Typically, to state an offense, an indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms." (internal quotation marks and citation omitted)).

"The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (citing United States v. Nai Fook Li, 206 F.3d 56, 62 (1st Cir. 2000) (en banc) Indeed, dismissal of charges is an "extreme sanction," United States v. Fields, 592 F.2d 638, 647 (2d Cir. 1978), that has been upheld "only in very limited and extreme circumstances," and should be "reserved for the truly extreme cases," "especially where serious

criminal conduct is involved." United States v. Broward, 594 F.2d 345, 351 (2d Cir. 1979). In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true. Boyce Motor Lines v. United States, 342 U.S. 337, 343 n. 16 (1952); New York v. Tanella, 374 F.3d 141, 148 (2d Cir. 2004).

Title 18, United States Code, Section 875(d) provides that

> [w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 875(d).

Title 18, United States Code, Section 1951 provides that

> [w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). As used in Section 1951, "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

Here, Count One tracks the language of 18 U.S.C. § 875(d), and Count Two tracks the language of 18 U.S.C. § 1951(a).

Count One charges, in part:

> On or about March 20, 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, with intent to extort from a corporation money and a thing of value, transmitted in interstate commerce a communication containing a threat to injure the property and reputation of the corporation, to wit, AVENATTI, during

> an interstate telephone call, threatened to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to AVENATTI.

((S1) Indictment (Dkt. No. 72) at ¶ 20)

Count Two charges, in part:

> In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, attempted to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, AVENATTI used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike, a multinational public corporation.

(Id. at ¶ 22)

Because these counts track the language of the respective statutes, apprise Avenatti of the nature of the accusations against him, and provide notice generally of where and when the crimes occurred, they are legally sufficient. See Frias, 521 F.3d at 235.

B. Whether the Indictment Pleads Facts Demonstrating Wrongful Conduct

Avenatti argues, however, that "'extortion' is defined in §1951(b)(2) as 'the obtaining of property from another, with his consent, induced by **wrongful** use of actual or threatened force, violence, or fear. . . .'" (Def. Br. (Dkt. No. 35) at 8) (emphasis in Def. Br.), and that the Indictment's factual "allegations, even [if] accepted as true, do not describe 'wrongful conduct' under the law." (Id. at 9) According to Avenatti, his "conduct, as alleged [in the Indictment], does not fit within the 'contours' of what constitutes extortion," and "the law did not provide fair notice to Mr. Avenatti that he could go to prison for allegedly threatening to reveal truthful information related to a client's claim against Nike." (Def. Reply (Dkt. No. 64) at 8)

The leading case in this area is, of course, United States v. Jackson, 180 F.3d 55 (2d Cir. 1999) ("Jackson I"), on reh'g, 196 F.3d 383 (2d Cir. 1999) ("Jackson II"))). Given that

Jackson has application here, the Court will discuss the facts of that case and what it teaches in some detail.

1. *United States v. Jackson*

In United States v. Jackson, the defendant – Autumn Jackson – threatened to harm the alleged victim, Bill Cosby, through public disclosure that she was his out-of-wedlock daughter. Cosby had had an extramarital affair with Jackson's mother, Shawn Thompson, and after Jackson was born in 1974, Thompson told Cosby that he was the father. Although Cosby disputed that assertion, for more than 20 years after Jackson's birth, he made payments to Thompson that totaled more than $100,000, using cashier's checks and traveler's checks that would not reveal his identity. Cosby ultimately established a trust fund for Thompson, and a trust to pay for Jackson's college tuition. While Jackson was in college, Cosby spoke with her about fifteen times by telephone, telling her that he "'loved her very, very much.'" Jackson, 180 F.3d at 59-60.

In December 1996, Jackson reinitiated contact with Cosby, and demanded money. Cosby sent her $3,000. In January 1997, Jackson began calling Cosby's business associates – including companies whose products Cosby endorsed and the network that carried Cosby's prime-time television program – threatening to publicize her claim to be Cosby's daughter. She also contacted Cosby's lawyer, demanding that Cosby "'send her money to live on.'" Cosby's lawyer refused. Jackson then sent letters to political figures, to the network carrying Cosby's television show, to the companies whose products he endorsed, and to others, stating that she was Cosby's daughter and that he had left her "'cold, penniless, and homeless.'" When these efforts to extract additional money from Cosby proved ineffective, Jackson sent Cosby's lawyer a copy of an agreement that she was about to enter into with The Globe, a tabloid newspaper.

With the draft contract Jackson enclosed a letter saying, "'I need monies and I need monies now.'" Cosby's lawyer then spoke by telephone with Jackson, who stated that she wanted $40 million in exchange for not selling her story to the tabloids. Cosby told his lawyer that he would not pay, and instructed the lawyer to report Jackson's threats to the Federal Bureau of Investigation ("FBI"). Id. at 60-63.

In subsequent conversations that were monitored by the FBI, Cosby's lawyer and Jackson negotiated her fee for agreeing not to share her story with the tabloids. Ultimately, the two arrived at a figure of $24 million. Jackson was arrested after a meeting at the lawyer's Manhattan office, at which she had signed a contract in which she agreed – in exchange for $24 million – not to discuss with The Globe or any other media outlet her claim that she was Cosby's daughter. Id. at 63-64.

Jackson was charged with interstate transmission of threats to injure another's reputation with the intent to extort money, in violation of 18 U.S.C. § 875(d); conspiracy to do the same, in violation of 18 U.S.C. § 371; and interstate travel in order to promote extortion, in violation of 18 U.S.C. §1952(a)(3).

At trial, Jackson asked the district judge to charge the jury that

> [t]o act with intent to "extort" means to act with the intent to obtain money or something of value from someone else, with that person's consent, but caused or induced by the wrongful use of fear,

and to explain that

> [t]he term "wrongful" in this regard means that the government must prove beyond a reasonable doubt, first, that the defendant had no lawful claim or right to the money or property he or she sought or attempted to obtain, and second, that the defendant knew that he or she had no lawful claim or right to the money or property he or she sought or attempted to obtain.
>
> If you have a reasonable doubt as to whether a defendant's object or purpose was to obtain money or other thing of value to which he or she was lawfully entitled, or believed

> he or she was lawfully entitled, then the defendant would not be acting in a "wrongful" manner and you must find him or her not guilty.

Id. at 65.

The trial judge rejected the proposed jury instruction, finding that "threatening someone's reputation for money or a thing of value is inherently wrongful." Id. (internal quotation marks and citation omitted). Consistent with this ruling, the court's recitation of the elements of the Section 875(d) offense in the jury charge did not reference wrongfulness. Indeed, the trial judge instructed the jury, in essence, that wrongfulness was irrelevant: "it makes no difference whether the defendant was actually owed any money by Bill Cosby or thought he or she was. That is because the law does not permit someone to obtain money or a thing of value by threatening to injure another person's reputation." Id. at 66 (emphasis in Jackson I) (internal quotation marks and citation omitted).

The jury convicted Jackson on all three counts, and she was sentenced to twenty-six months' imprisonment. Id. at 58-59, 64.

On appeal, Jackson argued that the district judge's jury instructions were erroneous, because she had not included – despite defense counsel's request – "any instruction that, in order to convict, the jury must find that the threat to injure Cosby's reputation was 'wrongful.'" Jackson argued, in the alternative, that if 18 U.S.C. § 875(d) "does not include an element of wrongfulness, it is unconstitutionally overbroad and vague." Id. at 64-65.

The Second Circuit concluded that the phrase "intent to extort" – as used in Section 875(d) – "was meant to reach only demands that are wrongful." Id. at 68; see also id. at 70-71. The court also cited United States v. Clemente, 640 F.2d 1069 (2d Cir. 1981) for the proposition that "a threat to cause economic loss is not inherently wrongful; it becomes wrongful

only when it is used to obtain property to which the threatener is not entitled." Id. at 70 (citing Clemente, 640 F.2d at 1077).

The court expanded on this thought as follows:

> We conclude that not all threats to reputation are within the scope of § 875(d), that the objective of the party employing fear of economic loss or damage to reputation will have a bearing on the lawfulness of its use, and that it is material whether the defendant had a claim of right to the money demanded.
>
> We do, however, view as inherently wrongful the type of threat to reputation that has no nexus to a claim of right. . . .
>
> Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure, we regard a threat to reputation as inherently wrongful. We conclude that where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by § 875(d).

Id. at 70-71.

The Second Circuit went on to conclude that the district judge's jury charge was erroneous, because it "did not limit the scope of [the term 'extortion'] to the obtaining of property to which the defendant had no actual, or reasonable belief of, entitlement," and granted Jackson a new trial on all three counts. Id. at 71-72. The court reached this result despite finding that

> [t]he evidence at trial was plainly sufficient to support verdicts of guilty had the jury been properly instructed. Even if Jackson were Cosby's child, a rational jury could find that her demand, given her age (22) and the amount ($40 million), did not reflect a plausible claim for support. The evidence supported an inference that Jackson had no right to demand money from Cosby pursuant to a contract or promise and no right to insist that she be included in his will. The jury thus could have found that her threat to disclose was the only leverage she had to extract money from him; that if she sold her story to The Globe, she would lose that leverage; and that if Cosby had capitulated and paid her in order to prevent disclosure, there was no logical guarantee that there would not be a similar threat and demand in the future. Thus, had the jury been instructed that the "with

> intent to extort" element meant that defendants could be found guilty of violating § 875(d) only if Jackson's threat to disclose was issued in connection with a claim for money to which she was not entitled or which had no nexus to a plausible claim of right, the jury could permissibly have returned verdicts of guilty on that count.
>
> We conclude, however, that the court's failure to inform the jury of the proper scope of the intent-to-extort element of § 875(d) erroneously allowed the jury to find defendants guilty of violating that section on the premise that any and every threat to reputation in order to obtain money is inherently wrongful.

Id. at 71-72.

The Second Circuit later reinstated Jackson's convictions in the wake of Neder v. United States, 527 U.S. 1 (1999), in which the Supreme Court announced that harmless error analysis applies to a trial court's failure to instruct on an element of the offense. The Second Circuit found that "a properly instructed jury would . . . have found [Jackson] guilty, rejecting the proposition that she had any plausible claim of right to $40 million." Jackson II, 196 F.3d 383, 388 (2d Cir. 1999).

2. Application of *Jackson*

Avenatti contends that the extortion counts must be dismissed because, as a matter of law, the conduct the Indictment alleges he committed is not "wrongful." (Def. Br. (Dkt. No. 35) at 9) Noting that "the use of economic fear or a threat to injure the reputation of another is not inherently wrongful," id. at 10 (citing Clemente, 640 F.2d at 1077; Jackson I, 180 F.3d at 70) (emphasis omitted), Avenatti asserts that the conduct he is alleged to have committed is not "wrongful," because he

> had the right to publicly expose truthful information about Nike's misconduct. He had the right to demand from Nike a settlement of his client's claims. . . . He had the right to demand a settlement on terms that may seem extraordinary to some. . . . He had the right

> to demand attorney's fees for himself as part of the overall settlement of his client's claims.

(Id. at 11)

Avenatti's argument ignores both the factual allegations in the Indictment and critical language in Jackson I and Clemente. While the Jackson I court states that "a threat to cause economic loss [or reputational harm] is not inherently wrongful," the court goes on to hold that such a threat "becomes wrongful . . . when it is used to obtain property to which the threatener is not entitled." Jackson I, 180 F.3d at 70 (emphasis added); see also Clemente, 640 F.2d at 1077 ("the use of fear of economic loss to obtain property to which one is not entitled is wrongful"); see also Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 579 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016) ("[t]he element of wrongfulness may be supplied by (1) the lack of a plausible claim of entitlement to the property demanded, or (2) the lack of a good faith belief of entitlement, or (3) the lack of a nexus between the threat and the claim of right. It may be supplied also, in this Court's view, by inherently wrongful conduct." (emphases in original)).

The core of the Indictment's factual allegations is that Avenatti used threats of economic and reputational harm to demand millions of dollars from Nike, for himself, to which he had no plausible claim of right. Even if Avenatti "had the right to" (1) "publicly expose truthful information about Nike's misconduct"; (2) "demand from Nike a settlement of his client's claims"; (3) "demand a settlement on terms that may seem extraordinary to some"; and (4) "demand attorney's fees for himself as part of the overall settlement of his client's claims," as he asserts in his brief (see Def. Br. (Dkt. No. 35) at 11), the charges against Avenatti are not premised on such conduct. The Government instead alleges that Avenatti – using confidential information supplied by his client – demanded $15 to $25 million from Nike for himself, without

his client's knowledge, and to his client's detriment. ((S1) Indictment (Dkt. No. 72) at ¶¶ 1, 9-10, 11(c), 11(f), 14(b), 14(g)) Indeed, the Indictment alleges that when Nike's counsel asked whether Nike could resolve Avenatti's demands simply by paying his client – rather than by retaining Avenatti – Avenatti rejected that proposal, stating that it would not make sense for Nike to pay his client "'an exorbitant sum of money . . . in light of his role in this.'" (Id. at ¶ 14(b))[1]

Assuming arguendo that a speaking indictment alleging extortion must plead facts demonstrating that a defendant engaged in "wrongful" conduct, the (S1) Indictment meets that standard. The Indictment adequately alleges that Avenatti engaged in "wrongful" conduct, because it pleads facts demonstrating that Avenatti used threats of economic and reputational harm to demand millions of dollars from Nike, for himself, to which he had no plausible claim of right. While Avenatti's client may have been in a position to make demands on Nike, Avenatti had no right – independent of his client – to demand millions of dollars from Nike (1) based on confidential information supplied by his client; (2) without his client's knowledge; and (3) to his client's detriment.[2] Whether or not Avenatti engaged in such conduct is, of course, a question for the jury. Similarly, whether or not Avenatti had "a plausible claim of right," and whether or

[1] Avenatti argues that "[c]ourts have largely exempted [litigation-related] threats from the extortion statutes as a matter of law because, by its very nature, litigation is inherently threatening and poses a risk of economic loss to all parties." (Def. Br. (Dkt. No. 35) at 13) But the unusual feature of this case is that the Government alleges that Avenatti – using his client's confidential information – demanded millions of dollars for himself, without his client's knowledge, and to his client's detriment. ((S1) Indictment (Dkt. No. 72) at ¶¶ 11(c), 13(a), 14(a), 14(b), 14(d)) These factual allegations take this case outside the usual parameters of civil litigation, constitute "wrongful" conduct, and raise the specter of extortion.

[2] Indeed, the Indictment alleges that the millions of dollars Avenatti sought for himself were completely divorced from his client's claim. For example, the Indictment alleges that Avenatti told Nike that if it chose to hire another law firm to conduct an internal investigation, Nike would be required to pay Avenatti "at least twice the fees of any other firm [that was] hired." ((S1) Indictment (Dkt. No. 72) at ¶ 11(c))

not "there is a nexus between [his alleged] threat[s]" and that "plausible claim of right," are questions for the jury. Jackson I, 180 F.3d at 71.

III. WHETHER THE EXTORTION STATUTES ARE VAGUE AS APPLIED

Avenatti contends that extortion jurisprudence on "wrongfulness" "at best provide[s] insufficient guidance and leave[s] a vacuum filled by vagueness," and that "[t]he 'wrongfulness' element of the extortion statute is vague as applied to [] Avenatti's alleged conduct. . . ." (Def. Br. (Dkt. No. 35) at 22)

"'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" United States v. Halloran, 821 F.3d 321, 337 (2d Cir. 2016) (quoting United States v. Rosen, 716 F.3d 691, 699 (2d Cir. 2013). "'The doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.'" Id. (quoting Rosen, 716 F.3d at 699). Under the "'fair notice' prong, a court must determine 'whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" Id. (quoting Rosen, 716 F.3d at 699). As Avenatti recognizes (see Def. Br. (Dkt. No. 35) at 21), "resolution of a defendant's void for vagueness challenge ordinarily requires 'a more expansive factual record to be developed at trial.'" (Id. (quoting United States v. Hoskins, 73 F. Supp. 3d 154, 166 (D. Conn. 2014)).

Avenatti's motion to dismiss on vagueness grounds will be denied as premature. See id. It is worth noting, however, that similar vagueness challenges to the extortion statutes

have been rejected. See, e.g., United States v. Jackson, 986 F. Supp. 829, 835-37 (S.D.N.Y. 1997); see also United States v. Coss, 677 F.3d 278, 289-90 (6th Cir. 2012)

CONCLUSION

For the reasons stated above, Avenatti's motion to dismiss Count One and Count Two on grounds of insufficiency and vagueness (Def. Mot. (Dkt. No. 34)) is denied.

Dated: New York, New York
January 6, 2020

SO ORDERED.

Paul G. Gardephe
United States District Judge

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

United States of America
v.

Timothy Litzenburg

Defendant(s)

Case No. 3:19-mj-00069

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of October 2019 - November 2019 in the county of Albemarle in the Western District District of Virginia, the defendant(s) violated:

Code Section	*Offense Description*
18 U.S.C. § 875(d)	Transmission of interstate communications with intent to extort
18 U.S.C. § 371	Conspiracy
18 U.S.C. § 1951	Attempted Extortion

This criminal complaint is based on these facts:

See attached affidavit

☑ Continued on the attached sheet.

Complainant's signature

Kevin Towers, Postal Inspector (USPIS)

Printed name and title

Sworn to before me and signed in my presence.

Date: 12/16/19

Judge's signature

City and state: Charlottesville, VA

Honorable Joel C. Hoppe, U.S. Magistrate Judge

Printed name and title

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	)	**UNDER SEAL**
v.	)	Criminal No. 3:19-mj-00069
TIMOTHY LITZENBURG,	)	
Defendant.	)	

AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

I, Kevin Towers, being duly sworn, hereby depose and state as follows:

Introduction

1. I am a Postal Inspector employed by the United States Postal Inspection Service ("USPIS") and have been so employed for over fourteen years. As a Postal Inspector, I received training in investigating violations of federal statutes, including those regarding conspiracy, wire fraud, money laundering, and other financial crimes. More specifically, I have conducted physical surveillance, electronic surveillance, executed search warrants, analyzed phone and text records, and obtained and reviewed financial documents and records of fraudulent activity. I have also spoken to suspects, defendants, witnesses, and other experienced investigators concerning the methods and practices of criminal enterprise groups, especially those involved in financial crimes.

2. This affidavit is made in support of a criminal complaint charging Timothy Litzenburg with transmission of interstate communications with intent to extort (in violation of 18 U.S.C. § 875(d)), conspiracy to commit transmission of interstate communications with intent to extort (in violation of 18 U.S.C. § 371), and attempted extortion, as well as conspiracy to commit extortion (in violation of 18 U.S.C. § 1951).

3. This affidavit is based on my personal investigation and the investigation of others, including federal law enforcement officials whom I know to be reliable. The facts and information contained in this affidavit are based upon information provided by witnesses and my review of records, documents, and other physical evidence obtained during this investigation.

4. This affidavit does not include each and every fact known to the government, but only those facts necessary to support a finding of probable cause to support the requested arrest warrant.

Probable Cause

I. Litzenburg's Initial Contact with Company 1

5. According to public records from the Virginia State Bar, Timothy Litzenburg is an active member of the bar whose office is located on Westminster Road in Charlottesville, Virginia. Litzenburg lists his employer as "Roundup Cancer Firm plc." According to public records from the Commonwealth of Virginia State Corporation Commission, Roundup Cancer Firm, LLC was formally registered as a Virginia corporation on or about September 24, 2018. Litzenburg is listed as the registered agent for the Roundup Cancer Firm.

6. According to public sources, Litzenburg has been involved in litigation against Monsanto, a chemical company that manufactured, among other things, a weed-killer sold under the brand name Roundup. Roundup's active ingredients include glyphosate, a chemical allegedly linked to non-Hodgkin's lymphoma.[1]

[1] According to a 2018 civil complaint, Litzenburg was previously employed at a Virginia law firm that focuses on representing plaintiffs in personal injury matters. *Miller Law Firm v. Litzenburg*, No. CL 18001118 (Orange Cty. Cir. Ct.). The civil complaint alleges, in or around June 2018, Litzenburg "actively began to surreptitiously steal The Miller's Law Firm's confidential information and trade secrets." The civil complaint sues Litzenburg for breach of fiduciary duty; tortious interference, statutory business conspiracy; common law civil conspiracy; misappropriation of trade secrets; and violation of the Virginia Computer Crimes Act.

7. Company 1 is a privately owned chemical manufacturer, with facilities located all over the world. In or around 2018, Company 1 was acquired by Company 2, a publicly traded U.S. corporation listed on the NASDAQ exchange.

8. In or around early September 2019, Litzenburg transmitted to Company 1 a draft complaint ("Draft Complaint") on behalf of Person 1, whom Litzenburg claimed to represent. The Draft Complaint alleged that Company 1 and other related companies created several chemical compounds used by Monsanto to create Roundup, some of which the Draft Complaint alleged to be carcinogenic. Among other things, the Draft Complaint alleged that Company 1 knew of the carcinogenic properties of these chemicals but failed to warn Roundup users and others exposed to Roundup about those risks.

9. After receiving the Draft Complaint, Company 1 retained outside counsel to communicate with Litzenburg. On or about September 11, 2019, an attorney representing Company 1 ("Attorney 1") spoke with Litzenburg by telephone.[2]

a. According to Attorney 1, on the September 11, 2019 call, Litzenburg described himself as being involved in mass torts litigation since approximately 2012. Litzenburg also stated that he was working with a Chicago-based attorney ("Associate 1") and another Virginia-based attorney ("Associate 2") on potential other Roundup-related litigation.[3]

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[2] During telephone calls involving Litzenburg and Attorney 1, one or more other members of Attorney 1's law firm listened to the conversations but did not participate. These associates were generally not introduced on the telephone line, such that Litzenburg may not have been aware they were on the line.

[3] During communications with Company 1 and their outside counsel, Litzenburg repeatedly has claimed to be working with Associate 1. Neither Company 1 nor Law Firm 2 (the law firm retained by Company 1) has ever been contacted by or had communications with Associate 1 or associates from his Chicago-based law firm.

b. According to Attorney 1, Litzenburg said that he was considering filing the Draft Complaint involving Person 1 unless he was granted an in-person meeting with representatives of Company 1. Litzenburg said he would postpone filing the Draft Complaint for two weeks in order to accommodate an in-person meeting.

10. Following the September 11, 2019 telephone call, Litzenburg and Attorney 1 continued to exchange emails and telephone calls about possible further meetings. During the course of communications, Litzenburg pressed for an in-person meeting in Charlottesville, Virginia. In an email to Attorney 1 on October 15, 2019, Litzenburg wrote that he "had no intention of holding [the Draft Complaint] until November . . . . However, as one more gesture of good faith . . . I would be willing to hold off a couple of weeks under the following terms," which included scheduling a meeting on "Halloween" in "Charlottesville, where I generally conduct most significant and discreet business."

II. Litzenburg's First Demand for a $200 Million "Consulting Agreement" from Company 1 or Company 2, in Exchange for Not Advising Clients to Sue Company 1

11. On or about October 16, 2019, Litzenburg and Attorney 1 had another telephone call. Associate 2 also participated on the telephone call. During the telephone call, Attorney 1 was outside the Commonwealth of Virginia at the time the communication occurred.

a. According to Attorney 1, Litzenburg stated during the call that he still intended to file the Draft Complaint, unless a resolution could be found. Litzenburg indicated that if he did file a public lawsuit, other lawsuits would likely follow as the public became aware of Company 1's role.

b. According to Attorney 1, Litzenburg and Associate 2 indicated that they represented 800 clients in Roundup-related litigation against Monsanto. Litzenburg indicated that, to date, he had not informed any Monsanto client about Company 1

or the possibility of bringing a Roundup-related lawsuit against Company 1.

c. According to Attorney 1, after describing the possibility of the lawsuits against Company 1, Litzenburg proposed that he and Associate 2 could enter into a "consulting arrangement" with Company 1. Doing so, Litzenburg stated, would create a purported conflict-of-interest that would effectively stop him from representing plaintiffs in litigation against Company 1.

12. On or about October 18, 2019, Litzenburg and Attorney 1 had another telephone call in which Litzenburg again raised the issue of entering a "consulting agreement" with Company 1. During the telephone call, Attorney 1 was outside the Commonwealth of Virginia.

a. According to Attorney 1, Litzenburg stated that as a first step, he wished to settle the case between Person 1 and Company 1 for $5 million.

b. According to Attorney 1, separate from the $5 million settlement for Person 1, Litzenburg indicated that he separately wanted "consulting arrangements" for himself and Associate 1 worth a total of $200 million. Litzenburg described the $200 million as the "bottom line." According to Attorney 1, Litzenburg also indicated that, instead of the "consulting agreement" being with Company 1, he would also accept a "consulting agreement" with Company 2 (of which Company 1 was a subsidiary).

c. According to Attorney 1, Litzenburg also clarified that the $200 million would not be used to resolve any of the potential lawsuits that could be brought by Litzenburg's other clients. Litzenburg stated that the $200 million in "consulting" fees would not result in additional releases from litigation by those plaintiffs.

III. Litzenburg's Written "Demand" for a $200 Million "Consulting Agreement" from Either Company 1 or Company 2

13. On or about October 24, 2019, Litzenburg emailed Attorney 1 (who was outside the Commonwealth of Virginia at the time): "Please accept this email as a written demand in follow up to our discussion about the same." In the email, Litzenburg reiterated his demand for a $5 million settlement for Person 1 and a separate $200 million "consulting agreement" for himself and his associates.

14. Litzenburg described resolving Person 1's case as "only a first step." Litzenburg then said if Person 1's case is resolved, "We would simply advertise and sign up more users of Roundup home products that contain [Company 1 chemicals]. In fact, that is precisely our plan, absent some agreement to the contrary."

15. Litzenburg continued, "The [Company 1] non-Hodgkin lymphoma litigation that we are planning will be 'Roundup Two,' and I'm excited to lead the charge again. This time, to my great financial benefit."[4] Litzenburg stated that if he filed suit against Company 1, "[t]here would quickly be a docket of thousands of cases against [Company 1]."

16. If litigation commenced, Litzenburg warned, "[t]his become [*sic*] an ongoing and exponentially growing problem for [Company 1], particularly when the media inevitably takes notice. The defense costs and cost to ultimately resolve the thousands or tens of thousands of cases would be well into the billions, setting aside the associated drop in stock price and reputation damage."

17. Instead of the supposed consequences of litigation, Litzenburg suggested "a potential

[4] Litzenburg claimed in his email to have been instrumental in prior Roundup litigation, stating in part, "I filed the first Roundup case against Monsanto, retained the first experts, took the first depositions, and likewise maneuvered the first case to trial and a $289.2 million verdict for my client . . . ."

solution" that would avoid the costs associated with litigation, reputational damage, and a drop in stock price. Specifically, Litzenburg proposed that Company 1 and Litzenburg "enter into a consulting arrangement with [Company 1] or a related entity, or somw otjer wuch relationship [*sic*]," that would "prevent my firm . . . from suing [Company 1]." Litzenburg claimed that with such a "consulting arrangement," "[Company 1] would weather the storm and avoid the parade of horribles I outlined in short form above."

18. Litzenburg continued, "Our demand/proposal related to a consulting agreement with my firm and [Associate 1] is two hundred million ($200,000,000) to be shared by our firms. As I previously mentioned, please do not misconstrue this demand as indication that we would accept half that or less." Litzenburg later described the $200 million "demand" as "a very reasonable price" compared to the "significant financial consequences to [Company 1] of a protracted and public 'Roundup Two.'"

19. Litzenburg concluded by reiterating his request for an in-person meeting on "Halloween" (October 31, 2019) in Charlottesville, Virginia and stating, "I hope the [Company 1] Board and any other decisionmakers have a chance to consider these demands/proposals...Just to set expectations, this is something we would like to resolve in 2019 or have litigation well underway by January 1, 2020."

IV. Litzenburg Discusses His Demand for $200 Million "Consulting Agreement " During a Consensually Recorded Call and Offers to "Take a Dive" During a Deposition

20. On or about October 29, 2019, Company 1's outside counsel contacted prosecutors from the U.S. Department of Justice ("DOJ") regarding Litzenburg's actions. On or about October 30, 2019, DOJ prosecutors and I spoke telephonically with Company's 1 outside counsel. During that call, Attorney 1 summarized her prior contacts with Litzenburg. Attorney 1 also reported that she and another attorney, Attorney 2, expected to speak telephonically with Litzenburg on or about

October 30, 2019. Attorney 1 and Attorney 2 agreed to allow USPIS to record this telephone call.

21. On or about October 30, 2019, Attorney 1 and Attorney 2 spoke telephonically with Litzenburg, who they understood was in Charlottesville at the time. During the call, Attorney 2 asked how Litzenburg came arrived at the $200 million figure he had asked for in "consulting" fees. Litzenburg responded, "It's opportunity loss," later adding, "I think it's lower than the extraordinarily low end estimate of what [Associate 1] and I would make off this litigation."[5] Litzenburg also added,

> [T]he way that I guess you guys will think about it and we've thought about it too is savings for your side. I don't think if this gets filed and turns into mass tort, even if you guys win cases and drive value down . . . I don't think there's any way you get out of it for less than a billion dollars. And so, you know, to me, uh, this is a fire sale price that you guys should consider, uh, you know, for a limited time.

22. Attorney 2 then asked about where the $200 million from Company 1 would be sent, asking "the money is not going into a[n] . . . individual plaintiff's compensation fund or anything like that. This is money that's going straight to you and your partners, correct?" Litzenburg responded,

> [I]t is our analysis [*inaudible*] retainer Virginia Law and actually American Bar sort of standard law that we have no obligation at this time to, um, recommend to our clients to, uh, add [Company 1] into a suit, uh, because of manufacturers I've laid out for you before. That doesn't mean we're prohibited from doing it, but we think very strongly that we have no obligation to do so whatsoever.[6]

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[5] The language quoted from consensually recorded calls and meetings in this affidavit are draft transcripts. The government continues to review the transcripts for accuracy. Certain verbal tics and non-substantive sounds have been omitted for ease of reading.

[6] Litzenburg also said, "We have to carefully research everything. But we have already been doing so with some of the top ethics lawyers and big firms already, asking some general questions about this." Litzenburg never identified those purported "ethics lawyers" or their analysis to Company 1 or the lawyers representing them.

23. Attorney 1 asked how the "consulting arrangement" with Company 1 would prevent lawsuits from getting filed. Litzenburg responded in part, "I think we can talk to people we knew, if they were thinking of going that route [i.e., thinking about suing Company 1]. I think [Associate 1] is gonna be a real asset there. Anybody thinking of filing a mass tort [lawsuit] in Chicago is gonna come to [Associate 1]. And if he says, "We thought about that. We thought it was a terrible idea. Move on." Litzenburg clarified, "Of course I've explained to you guys what I think I win with juries is on causation, but nobody else is going to figure that stuff out. Um, and I think the likelihood people come to me or [Associate 1] first, uh, before even going down that road is pretty . . . is pretty high."

24. Later in the telephone call, Litzenburg told Attorney 2: "You could forward your own toxicology experts or something at a pre, uh, trial, um, deposition. I mean, a pre-suit deposition as part of some sort of, you know, negotiation with a pre-suit. And we ask the wrong questions." Litzenburg explained that, as a result, "you would have a deposition transcript where I basically got whacked, um, but did nothing. . . . And that could sort of be something that you kept in a vault somewhere to pull out if you ever got bothered by someone that didn't know me or whatever." Litzenburg later described this tactic as one where he would "almost sort of take a dive as long as it's legal, and ethical, and best for our one client."[7]

25. At another point of the conversation, Litzenburg suggested that, as part of the deposition exercise in which he would "take a dive," Company 1 and Person 1 could purport to

[7] During his communications with Company 1, Litzenburg has repeated variations of the phrase "legal and ethical" dozens of times. Litzenburg never elaborated on that statement beyond repeating it frequently, nor has ever identified an action he would *not* take due to ethical or legal considerations.

execute a "high-low agreement,"[8] with the minimum amount set at the actual amount demanded by Litzenburg. Litzenburg explained that they would settle for the "minimum" in the purported high-low agreement after the deposition, making it appear that Person 1's lawsuit had not been successful in the deposition stage of the proceeding.

26. During the recorded telephone call, Litzenburg repeatedly said that he represented hundreds of clients in pending Roundup-related litigation against Monsanto; Litzenburg also stated that he would continue representing them in the Monsanto litigation. At one point, Attorney 1 asked what would prevent the clients from "switch[ing] law firms and then up bringing another claim against [Company 1]." Litzenburg responded:

> Well, I have no idea what would prompt that, I guess, is my first question. Um, I have no idea what would cause that. None of them have ever heard of [Company 1]. Uh, none of them have ever heard of [name of company affiliated with Company 1]. Um, and, uh, again, our analysis is with a settlement right around the corner, some of them waiting some years, um, we're not going to suggest that they wait another five years to get a Chicago trial date when they have probably a…a bird in the hand right around the corner.

27. Talking about other clients he purported to represent in the Roundup litigation against Monsanto, Litzenburg stated that he was "[a]bsolutely not" obligated to recommend to clients the possible litigation against Company 1. Litzenburg claimed that "our retainer gives us, uh, the…the full discretion to decide what entities are…are most worth going after for you to get the most in the…the least amount of time essentially." Litzenburg implied that he could therefore steer away those existing clients away from Company 1 if the parties reached a "consulting agreement."

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[8] In mass torts, a "high-low agreement" is an agreement between the parties that caps the minimum and maximum amounts of recovery, thereby giving the parties some assured level of recovery while limiting the highest possible recovery.

V. Litzenburg Demands a Consulting Agreement to "Avoid the Parade of Horribles" of Having Him Sign Up "Thousands of Future Plaintiffs" Against Company 1

28. On or about November 6, 2019, Litzenburg continued to seek a consulting agreement in an email to Attorney 1 and Attorney 2.

a. Litzenburg began by claiming to have "a simply list of 1000ish Roundup clients who hired me to sue Monsanto and that number is growing every day." However, Litzenburg said that Person 1 "is the only client with whom we have had discussions about a claim against [Company 1]." However, Litzenburg said that without a consulting agreement, he predicted he would have "thousands of future plaintiffs against [Company 1]," which he could find through "our extensive network of referral lawyers, lead generators, and advertising machinery that you know well could produce . . . thousands of new claimants/clients for me and [Associate 1] by the new year."

b. Litzenburg continued, "While I cannot guarantee and warrant complete finality . . . [Company 1] will be exceedingly well-positioned to weather this storm if it settles my single case . . . and if we subsequently agree to offer consulting . . . ." Entering a "consulting agreement," Litzenburg claimed, "will mean that [Company 1] avoids the parade of horribles that has been the Roundup litigation for Bayer/Monsanto."

c. Litzenburg concluded, "That is another thing I can guarantee and warrant: in the absence of a so-called 'global' or final deal with me, this will certainly balloon into an existential threat to [Company 1]."

VI. Litzenburg Says He Is Company 1's "Biggest Problem" and Warns of a "40% Stock Loss" Unless They Enter a $200 Million "Consulting Agreement"

29. Litzenburg had repeatedly requested an in-person meeting with the attorneys

representing Company 1. On or about November 12, 2019, attorneys representing Company 1 met Litzenburg at a conference center in Charlottesville, Virginia. Associate 2 was also in attendance. Attorneys representing Company 1 consented to the USPIS recording the interview, and the meeting was held in a room USPIS personnel had wired for audio and visual recordings.

30. At the beginning of the meeting, Litzenburg made the following introductory comments:

> I assume that a company as smart as [Company 1] and [Company 2] has had reserves in this, whether you guys were involved or something from the . . . it's been a concern I am sure. You don't have to try to convince me otherwise.
>
> Um, and I'm sure if they've been watching the litigation, those reserves are multiples of what we're talking about here. Um, and they've been biting their nails for years over this, um, waiting to see, you know, if this problem is gonna come to a head. And we have brought the problem to a head, but only among the people in this room.
>
> And so there is now a problem to solve that I think brings certainty. Um, you know, all I'm certain of is, um, we're gonna be the leading edge of the next mass torts. . . . You know, I took a hard left at pharmaceuticals. I may take a hard left at chemicals and pesticides. We'll see. I mean, that...that remains to be seen and...and decided largely by, you know, your client.
>
> Um, but I'm sure that we'll be, um, leading that and...and...and...both formally and informally. Um, what's...what's certain, uh, is that if we walk out of here today without a deal, and we, uh, you know, the [Person 1] case gets filed and gets served. And we've talked about the consequences.

31. Early on in the meeting, Litzenburg stated that if litigation commenced, there was no way Company 1 "gets out of it for less" than "[a] billion. Yeah. No, I mean, nuisance value, uh, defense lawyer fees, a hit in the stock when this gets filed and served, maybe the press conference, whatever." Litzenburg then continued,

> [W]e can be, um, your biggest problem. Right now we're your only problem or potential problem. Uh, we have one identified certain conflict that…that we can discuss, and we can discuss other…discuss some other creative ideas. Uh, or we can be an asset. You know? And I've…I've talked about creative ways to not only make the problem go away but, um, try to help [Company 1] and perhaps its sister companies avoid this problem and other problems in the future.

32. Later on, Litzenburg again stated the litigation he contemplated would have adverse effects on stock price.[9]

> We walk out of here today, and you're telling them, you know, "You are absolutely, absolutely making a quarter of a million, 500 million, billion plus dollar investment in a public relations nightmare." You know, [*inaudible*] in a 40% stock loss coming off the top. And that…that's what they're deciding between is whether to avoid that, uh, or to buckle down for that. Uh, you know, there is no… I mean, I know you're gonna have to call and tell your client. The client is gonna be understanding probably 'cause they're gonna be saying, "We don't have to deal with this." They've got a way bigger than a quarter million dollar investment in a…in a nightmare.

33. During the meeting, attorneys representing Company 1 inquired about the "deposition" that Litzenburg proposed doing before. Litzenburg responded:

> Um, I mean, it depends on what we're asking for. But yeah, [*inaudible*] prevents exposure for y'all and erase the trail, like we've talked about. . . . [I]t borders into misrepresentation and taking a dive sort of thing. I think it's okay as far as we've looked at. But for . . . for reasons that . . . It would [*inaudible*] for us in reasons I'm sure you can figure out, um, to do on a first case before we have . . . We can't do it under a consultancy with you before we, um, settle this case. I don't think it's an in either of our best interest. But, um, you know, I tossed it out there. If there is some way that you guys can ensure that that, uh, you know, happens legally and ethically, and then there is a surety on our part that's followed by this consultancy.

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[9] While Company 1 was privately held, its parent company, Company 2, was publicly traded on a U.S. exchange. Litzenburg repeatedly referred to Company 2 during calls and meetings with Company 1's counsel, indicating he was aware of the relationship.

At another point, Litzenburg was asked who would be deposed. Litzenburg responded, "I was suggesting your toxicologist. Um, I think that would be better than trying to set up something where, like, our tox[icologist] takes a dive."

34. During the meeting, attorneys representing Company 1 asked what entity would serve as the entity to which the $200 million would be paid. In Litzenburg's presence, Associate 2 stated the money would be paid to "Golden Ratio LLC," and confirmed that Associate 2 and Litzenburg were the beneficial owners of Golden Ratio, which is a Virginia entity.

a. According to public records from the Commonwealth of Virginia State Corporation Commission, "Golden Ratio, LLC" is an active Virginia corporation registered on or about October 21, 2019 (after Litzenburg first made the "demand" that Company 1 enter a consultancy with him).

b. Associate 2 is listed as the registered agent of Golden Ratio, LLC.

35. During the in-person meeting, Litzenburg was asked what would prevent his current client, Person 1, from telling other people about her settlement with Company 1, were it to happen. Litzenburg clarified that Person 1 had not seen the draft complaint sent to Company 1 in her name, and he did not believe he had ever mentioned the name of Company 1 to Person 1.

VII. Litzenburg Outlines Details of His Demand for $200 Million in "Consulting Agreements" with Company 1 and Company 2

36. On or about November 14, 2019, Litzenburg sent Attorney 1 and Attorney 2 an email with the subject "Consult," in which he discussed details regarding "a potential consulting relationship with [Company 2] if and when I have no conflicts."

a. Litzenburg began by describing two "consulting arrangements": one for himself and Associate 2, and separate agreement for Associate 1. Associate 1's "consulting" arrangement, Litzenburg explained, would be with Company 1.

Litzenburg, in turn, proposed that he and Associate 2 would "consult for an entity other than that which owns [Company 1]," and then suggested a subsidiary of Company 2 that he said did not directly own Company 1.

b. Litzenburg wrote, "The price has been discussed. The relationship would begin on execution of agreement . . . with full payment contemplated on Jan 2, 2020." Litzenburg then directed that the payment should be made "to our business Golden Ratio LLC."

c. Litzenburg also stated that he would not work any substantial work for Company 2. "While I would engage fully and seriously with [Company 2], etc., when needed, I would expect the total active consulting to not to amount to more than a few weeks per year."

37. On or about November 14, 2019, Litzenburg sent Attorney 1 and Attorney 2 a second email with the subject "expert." As discussed above, Litzenburg at one point proposed that he could assist Company 1 by "tak[ing] a dive" during a deposition of a toxicology expert, in order to undermine the merits of any subsequent litigation against Company 1. In furtherance of his proposed "dive," Litzenburg's second email included written questions that he would "expect [to be] the substance of a probably two-hour bellwether tox[icology] expert depo[sition] to be, such as we discussed." Litzenburg then included approximately thirty-seven topics and questions dealing with toxicological subjects connected to the carcinogenic effects of chemicals produced by Company 1 and related topics.

38. On or about November 15, 2019, Litzenburg and Attorney 2 spoke by telephone. Prior to the call, Attorney 2 consented to having USPIS record the telephone conversation.

a. On the call, Litzenburg developed more particular demands for the "consulting

arrangement." Specifically, Litzenburg stated that Associate 1 (the Chicago-based attorney Litzenburg claimed to work with) would "consult" for Company 1, while Litzenburg in turn would "consult" for Company 2 (the publicly traded company that owned Company 1). Litzenburg stated that he had spoken with Associate 1, and that "we've decided all he [Associate 1] wants to know is that he is consulting for [Company 1]." Litzenburg then stated, of the $200 million "consulting fees" he had demanded, $50 million would go to an entity controlled by Associate 1, and the remaining $150 million would go to Golden Ratio, LLC.

b. Litzenburg also indicated that, through this arrangement, he would divert cases involving Company 2 or its subsidiaries to Associate 1. Litzenburg stated, "[I]f I have a problem in the future that I need to get it taken care of, and I refer to [Associate 1] a single products [liability] case, he will understand that that is sort of a wink to go to the manufacturer of the product and do a private one off settlement."

VIII. Litzenburg Emails a Draft "Consulting Agreement" for Associate 1 and a List of Purported Clients He Would Not Tell About Company 1 in Exchange for a "Consulting Agreement"

39. On or about November 24, 2019, Litzenburg emailed Attorney 1 and Attorney 2 with the subject "Deliverables." Litzenburg attached two PDF documents to the email.

40. Litzenburg identified the first attachment as a "client list" of clients that he was representing in the Monsanto-Roundup litigation. The document contained approximately 1,001 entries, each purporting to have the initials of the litigant, the date they were engaged by Litzenburg, the plaintiff's purported state of residence, and the plaintiff's purported zip code.

41. Litzenburg identified the second attachment as the "[s]ubstance of [Associate 1]'s

agreement." The attachment was a one-page "confidential agreement" between Associate 1 and Company 1, in which "[t]he parties agree that [Company 1], as of the date of execution, will retain [Associate 1] as an 'Ad Hoc' consultant."

a. The document also provided, "This agreement is of strict confidentiality; its existence, nature, content or details shall not be disclosed to third parties (with exception of Timothy Litzenburg) absent express written agreement of the parties or a valid court order."

b. As to length of service, the document said that "[t]he duration of this consulting relationship shall be 99 years beginning on the date of execution."

c. Finally, the document provided: "The consideration for said consultancy shall be a one-time payment from [Company 1] to [Associate 1] of FIFTY MILLION DOLLARS ($50,000,000), on January 2, 2020." (Capitalization in Original).

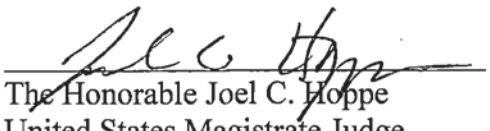
Conclusion

42. Based on my training and experience, and the information provided in this affidavit, I respectfully submit that there is probable cause to believe that beginning on a date unknown, but from at least in or around September 2019 to November 2019, within the Western District of Virginia, Timothy Litzenburg committed transmission of interstate communications with intent to extort (in violation of 18 U.S.C. § 875(d)), conspiracy to commit transmission of interstate communications with intent to extort (in violation of 18 U.S.C. § 371), and attempted extortion, as well as conspiracy to commit extortion (in violation of 18 U.S.C. § 1951).

I declare under penalty of perjury that the statements above are true and correct to the best of my knowledge and belief.

Inspector Kevin Towers
United States Postal Inspection Service

Sworn to and subscribed before me this 16th day of December, 2019.



The Honorable Joel C. Hoppe
United States Magistrate Judge