

SUPREME COURT
CRIMINAL TERM

NEW YORK COUNTY
PART 59

THE PEOPLE OF THE STATE OF NEW YORK

INDICTMENT #
71543/2023

-against

Falsifying Business
Records First Degree

DONALD J. TRUMP,

Defendant.

-----:

100 Centre Street
New York, New York 10013
May 21, 2024

B E F O R E: HONORABLE JUAN M. MERCHAN,
JUSTICE OF THE SUPREME COURT

A P P E A R A N C E S:

FOR THE PEOPLE:

ALVIN L. BRAGG, JR., ESQ.
New York County District Attorney
BY: JOSHUA STEINGLASS, ESQ.,
MATTHEW COLANGELO, ESQ.,
SUSAN HOFFINGER, ESQ.,
CHRISTOPHER CONROY, ESQ.,
REBECCA MANGOLD, ESQ.,
KATHERINE ELLIS, ESQ.,
Assistant District Attorneys

FOR THE DEFENDANT:

BLANCHE LAW
BY: TODD BLANCHE, ESQ.
EMIL BOVE, ESQ.
KENDRA WHARTON, ESQ.

NECHELES LAW, LLP
BY: SUSAN NECHELES, ESQ.
GEDALIA STERN, ESQ.

SUSAN PEARCE-BATES
Principal Court Reporter
LAURIE EISENBERG, RPR, CSR
LISA KRAMSKY
THERESA MAGNICCARI
Senior Court Reporters

1 THE CLERK: Calling People of the State of New York
2 versus Donald J. Trump, Indictment Number 71543 of 2023.

3 Appearances, starting with the People.

4 MR. STEINGLASS: For the People, Assistant District
5 Attorneys Joshua Steinglass, Susan Hoffinger, Matthew
6 Colangelo, Becky Mangold, Christopher Conroy and Katherine
7 Ellis.

8 Good morning, everyone.

9 THE COURT: Good morning, People.

10 MR. BOVE: Good morning, your Honor.

11 Emil Bove for President Trump, who is seated to my
12 left.

13 I'm joined by Todd Blanche, Susan Necheles and
14 Kendra Wharton.

15 THE COURT: Good morning, counsel.

16 Good morning, Mr. Trump.

17 All right.

18 We have a witness on the stand.

19 Is there anything that we need to discuss before we
20 bring the witness in?

21 MR. STEINGLASS: I don't think so.

22 THE COURT: By the way, I did receive your
23 submission.

24 Thank you very much. It is helpful.

25 And I was going to ask, if you plan or if you

1 could, perhaps, do the same for the other submissions of the
2 charges; I do find it helpful.

3 The sooner you can get that to me, the better,
4 okay.

5 Let's get the witness, please.

6 (Pause.)

7 THE LIEUTENANT: Ready for the witness, your Honor?

8 THE COURT: Yes, please.

9 THE LIEUTENANT: Witness entering.

10 (The witness, Robert Costello, enters the courtroom
11 and resumed the witness stand.)

12 THE COURT OFFICER: Step up to the officer, and
13 please take the witness stand.

14 THE COURT: Good morning, Mr. Costello. Welcome
15 back.

16 I remind you that you are still under oath.

17 THE WITNESS: Yes.

18 THE COURT: All right.

19 Let's get the jury, please.

20 THE WITNESS: Can you speak up? My hearing is bad.

21 THE COURT: Okay.

22 (Pause.)

23 MR. STEINGLASS: Your Honor, while we are waiting
24 for the jury.

25 THE COURT: Yes.

1 MR. STEINGLASS: Did you want to ask about their
2 availability for next Wednesday before we send them home
3 today?

4 THE COURT: Yes, I will.

5 THE SERGEANT: All rise. Jury entering.

6 (Jury enters.)

7 *****

8 THE COURT: Please be seated.

9 THE CLERK: Do both parties stipulate that all
10 jurors are present and properly seated?

11 MR. STEINGLASS: Yes.

12 MR. BOVE: Yes.

13 THE CLERK: Thank you.

14 THE COURT: Good morning, Jurors.

15 Ms. Hoffinger.

16 MS. HOFFINGER: Thank you, your Honor.

17 *****

18 CONTINUED CROSS-EXAMINATION

19 BY MS. HOFFINGER:

20 Q Good morning, Mr. Costello.

21 A Good morning.

22 Q Now, when we left off yesterday, do you recall that we
23 were discussing that, ultimately, Michael Cohen hired another
24 lawyer to represent him in connection with the Southern District
25 investigation instead of you and your firm; correct?

1 A That's correct.

2 MS. HOFFINGER: Can we show the witness, please,
3 and to counsel and to the Court, People's Exhibit 512Q for
4 identification.

5 (Displayed to the aforementioned parties.)

6 Q Mr. Costello, do you recognize this email to you, did
7 you receive this email -- you along with your partner Jeffrey
8 Citron -- subject line "Statement of Account?"

9 A I do.

10 Q And the email is dated August 8th, 2018?

11 A That's correct.

12 Q And is that an email that you provided to our
13 Office?

14 A I did.

15 I provided a lot of emails to your Office.

16 Q Thank you, sir.

17 MS. HOFFINGER: I now offer People's Exhibit 512Q.

18 MR. BOVE: No objection.

19 THE COURT: People's 512Q is accepted into
20 evidence.

21 (So marked in evidence.)

22 *****

23 Q I'm just going to read the email for the jury.

24 "Gentlemen, please cease contacting me, as you do not and
25 have never represented me in this or any other matter. Your

1 interest and offers to become a part of "the team" and to serve
2 as a contact was subject to existing counsel, Guy Petrillo's
3 cc'd approval, which was denied.

4 Now, the subject line says "Statement of Account;" correct,
5 Mr. Costello?

6 A That's correct.

7 Q And that means you were sending him bills; right?

8 A Not with this email.

9 I think he had been provided a bill by the Billing
10 Department.

11 Q And, in reply, he was replying to a statement of
12 account that you had sent him?

13 A That's what it appears to be, yes.

14 Q And you were upset that he had not paid you; right?

15 A I did -- I was. We also replied to this --

16 Q Okay. Thank you.

17 A -- which you have.

18 Q Now, let's go back to your first meeting with Mr. Cohen
19 at the Regency Hotel on April 17th, 2018; okay?

20 A Right.

21 Q You discussed with him, at that very first meeting, how
22 connected you were to Rudy Giuliani; correct?

23 A That's not true.

24 Q Well, didn't you tell him at the first meeting that
25 your relationship with Rudy Giuliani would be useful to him?

1 A No. That was not the first meeting.

2 You are quoting from a different email that is --

3 Q I'm just asking you a question?

4 A That is much later.

5 Q I'm not quoting from an email yet.

6 And I'm just asking you a question and you said, "No;" is
7 that correct?

8 A I said "No," that's correct.

9 Q And you are very close to Rudy Giuliani; correct?

10 A Yes.

11 Q And you've known him for 50 years?

12 A I have.

13 Q And he has been to your wedding?

14 A Yes, he was.

15 Q Okay. Now, didn't you confirm to Michael Cohen in an
16 email two days later that you had, in fact, told him that your
17 relationship with Rudy could be very useful to him?

18 A Yes.

19 Q Okay.

20 MS. HOFFINGER: So let's take a look at People's
21 203 in evidence, please.

22 If you could put that up.

23 (Displayed.)

24 A Yes.

25 Q You sent this email; correct?

1 A Correct. I did.

2 Q To Mr. Cohen?

3 A That's correct.

4 Q Two days after meeting him?

5 A That's correct, yes.

6 Q I'm going to read it for the jury.

7 I'm sure you saw the news that Rudy is joining the Trump
8 legal team.

9 I told you my relationship with Rudy, which could be very,
10 very useful for you.

11 Robert Costello.

12 You sent that email to him; correct?

13 A Yes.

14 Q Okay. Now, when you said, "I told you my relationship
15 with Rudy," didn't you mean that you had told him that at that
16 first meeting --

17 A No.

18 Q -- on August 17th?

19 A No.

20 Q Okay. Let's take a look.

21 MS. HOFFINGER: Let's put up just for the witness
22 and for the counsel and for the Court, People's Exhibit 512E
23 for identification, please.

24 (Displayed for the aforementioned parties only.)

25 Q Mr. Costello, do you recognize this email that you sent

1 to your partner, Jeff Citron, the same day, on April 19th,
2 subject line, "Rudy Giuliani to join Trump's legal team?"

3 A Yes, I do.

4 Q And you provided that email to our Office; correct?

5 A Absolutely, correct. More than a year ago.

6 MS. HOFFINGER: I offer in evidence now People's
7 512E.

8 MR. BOVE: No objection.

9 THE COURT: People's 512E is accepted and received
10 into evidence.

11 (So marked in evidence.)

12 *****

13 Q And so, this is your -- I'm going to read to you --
14 read to the jury from your email to Jeffrey Citron, April 19th,
15 2018.

16 You sent a link from Fox News that said "Rudy Giuliani to
17 join Trump team."

18 Here is your email to your partner, Jeffrey Citron:

19 All the more reason for Cohen to hire me because of my
20 connection to Giuliani, which I mentioned to him in our meeting.

21 That was your email; correct?

22 A Correct.

23 Q Now, you continued to tell Mr. Cohen, did you not, that
24 your relationship with Rudy Giuliani would provide him with a
25 back channel of communications to President Trump; isn't that

1 correct?

2 A No, that's not correct.

3 MS. HOFFINGER: Let's show People's Exhibit 204 in
4 evidence, please.

5 (Displayed.)

6 Q Do you remember sending this email to Mr. Cohen on
7 April 21st of 2018?

8 A Yes, I do.

9 Q I will read to the jury from the email:
10 Michael, I just spoke to Rudy Giuliani and told him I was on
11 your team.

12 Rudy was thrilled and said this could not be a better
13 situation for the President or you.

14 He asked me if it was okay to call the President and Jay
15 Sekulow and I said, fine.

16 We discussed the facts, Jay Goldberg's stupid remarks, et
17 cetera. He said I can't tell you how pleased I am that I can
18 work with someone I know and trust.

19 He asked me to tell you that he knows how tough this is
20 on you and your family and he will make sure to tell the
21 President.

22 He said thank you for opening this back channel of
23 communication and asked me to keep in touch.

24 I told him I would after speaking to you further.

25 Bob.

1 That was your email, correct, to Michael Cohen?

2 A Yes.

3 Q And the email speaks for itself; right, sir?

4 A I'm sorry?

5 Q The email speaks for itself; right, sir?

6 A No, not quite, because there are surrounding
7 circumstances --

8 Q Uh-huh.

9 A -- about that email, which I will be delighted to tell
10 you about.

11 Q That's all right.

12 MS. HOFFINGER: Let's move on to the next one.

13 Can we put up People's 205 now, in evidence.

14 (Displayed.)

15 Q You sent this email to Michael Cohen on April 21st of
16 2018; right?

17 A Yes, I did.

18 Q And you provided that email to our Office as well;
19 correct?

20 A Absolutely.

21 Q I will read to the jury from it.

22 From Robert Costello to Michael Cohen. Subject line
23 "Giuliani."

24 I spoke with Rudy. Very, very positive. You are loved. If
25 you want to call me, I will give you the details.

1 I told him everything you asked me to and he said they knew
2 that.

3 There was never a doubt that they are in our corner.

4 Rudy said this communication channel must be maintained.

5 He called it crucial and noted how reassured they were that
6 they had someone like me whom Rudy has known for so many years
7 in this role.

8 Sleep well tonight. You have friends in high places.

9 Bob.

10 P.S., some very positive comments about you from the White
11 House.

12 Rudy noted how that followed my chat with him last night.

13 Now, you were sending him this message of reassurance that
14 he was loved by President Trump, that's what "friends in high
15 places" means; doesn't it?

16 A "Friends in high places" definitely refers to President
17 Trump, yes.

18 Q And didn't you say, "P.S. some very positive comments
19 about you from the White House?"

20 A I did. That's in the P.S., yes.

21 Q And just in case there is any doubt, you were talking
22 about President Trump there; right?

23 A I'm not sure, because I don't know what I was referring
24 to, but I think that's reasonable to conclude.

25 MS. HOFFINGER: Can we now show just to the

1 witness, the Court and the parties, People's Exhibit 512G
2 for identification.

3 (Displayed to the aforementioned parties only.)

4 Q Do you recognize this email that you sent to your
5 partner Jeffrey Citron on May 15th of 2018; subject: "Call to
6 Cohen?"

7 A Yes.

8 Q And you provided this email to our Office as well; did
9 you not?

10 A I did, yeah.

11 MS. HOFFINGER: I will offer in evidence People's
12 People's Exhibit 512 G.

13 MR. BOVE: No objection.

14 THE COURT: Accepted into evidence.

15 MS. HOFFINGER: Can you blow up the first
16 paragraph, thank you.

17 Can you make the first paragraph larger for the
18 jury to see.

19 Thank you.

20 (Displayed.)

21 Q I'm going to read this to the jury.

22 Robert Costello. Tuesday, May 15th, 2018. To Jeffrey
23 Citron. Subject: "Call to Cohen."

24 Jeff, it's time for you to call Michael Cohen, as he has
25 failed to respond to my emails and text messages.

1 I spoke with Giuliani yesterday and he told me the
2 following:

3 He said he spoke with Stephen Ryan of McDermott Will &
4 Emery, Mike's current attorney, and he and Jay Sekulow will be
5 meeting with Ryan in Washington on Wednesday or Thursday of this
6 week.

7 He indicated that the President was paying for McDermott
8 Will & Emery to review the documentation for the attorney-client
9 privilege issues.

10 He may have meant Trump Enterprises, but he did say that the
11 President -- he also said the President was satisfied with Ryan
12 and MWE was the right group to go through all of the documents,
13 but after that he wanted more aggressive lawyers representing
14 Cohen, us.

15 He said the President was being charged \$200,000 by MWE for
16 the document review and that Jay Sekulow told Trump that was an
17 outrageously large fee.

18 I spoke with Giuliani about the text message that I had sent
19 him the previous Friday, in which I outlined the argument that
20 Mueller had already found that there was no Russian collusion
21 with Michael Cohen because after doing all of this
22 investigation, last November, he transferred the case to the
23 Southern District.

24 I said that it was important to reverse the Avenatti-created
25 Russian spin to the Cohen investigation, and the best way to do

1 that was to use Mueller's investigation to our own advantage.

2 He loved the idea and thought it was very important to get
3 that message out there.

4 But he thought he should not do that because it would look
5 like he is defending Michael Cohen.

6 He said Ryan wouldn't do that and, in any event, Ryan was
7 the wrong guy for that, but I was the right guy for that.

8 He said the President is tired of Ryan and will no longer
9 fund Ryan once the document review is completed.

10 MS. HOFFINGER: Can you please blow up the last
11 paragraph, please, in yellow.

12 (Displayed.)

13 Q Our issue is to get Cohen on the right page without
14 giving him the appearance that we are following instructions
15 from Giuliani or the President.

16 In my opinion, this is the clear correct strategy.

17 We must reverse the Avenatti effect and restore this to a
18 far more simple investigation of things, that while they might
19 not look good politically and nevertheless legal.

20 Bob.

21 Now, you sent this email to your partner, about your goal of
22 getting Cohen to follow instructions from Rudy Giuliani and the
23 President without it appearing so; correct?

24 A No, not to follow instructions, but to get everybody on
25 the same page, because Michael Cohen had been complaining,

1 incessantly, frankly, that Rudy Giuliani was making statements
2 in the press that Michael Cohen didn't approve of --

3 Q Thank you.

4 A -- and that's why I said to him, if you really feel
5 that way, make it known and tell me, and I will tell them.

6 Q Thank you for that response.

7 And, as you said yesterday, the email speaks for itself;
8 correct?

9 A Sometimes.

10 Q Okay. Let me direct your attention now to People's 207
11 in evidence.

12 (Displayed.)

13 Q This is another email from you to Michael Cohen dated
14 June 13th of 2018; right?

15 A Yes, but it says it's a draft.

16 Q It says "Update draft."

17 A Right.

18 Q Correct?

19 A Right.

20 Q So this is an email that you sent; is that correct?

21 A Yes.

22 Q Okay. Let's take a look at the first paragraph,
23 please.

24 MS. HOFFINGER: Let's take a look at the first
25 paragraph, please.

1 (Displayed.)

2 Q This is from Robert Costello, Wednesday, June 13th,
3 2018, to Michael Cohen.

4 Michael, since you jumped off the phone rather abruptly,
5 I did not get a chance to tell you that my friend has
6 communicated to me that he is meeting with his client this
7 evening.

8 And he added that if there was anything that you wanted to
9 convey, you should tell me, and my friend will bring it up for
10 discussion this evening.

11 Weren't you encouraging Michael Cohen there to send any
12 message he wanted to the President through Rudy Giuliani; isn't
13 that right?

14 A I was encouraging Michael Cohen, as I just explained to
15 you in my previous answer, to express any of his complaints --
16 and he had several -- so that I could bring them to Giuliani and
17 get them worked out, whatever they were.

18 Q Okay.

19 MS. HOFFINGER: Let's take a look at the last
20 paragraph, please.

21 (Displayed.)

22 Q Please remember that if you want or need to
23 communicate something, please let me know and I will see that it
24 gets done.

25 I hope I am wrong but it seems to both Jeff and I that

1 perhaps we have been played here.

2 Let me know what you want to do.

3 You sent that email; correct?

4 A Yes, I did.

5 Q You felt that you had been played by Michael Cohen;
6 correct?

7 A Yes.

8 Do you want me to explain it?

9 Q No, sir.

10 Because you had not been paid; is that right?

11 A No.

12 Q Okay. Isn't that what you meant by "being played?"

13 A No. Now you do want me to explain it?

14 Q No, sir.

15 A When I said "being played" --

16 Q Excuse me, sir.

17 MR. BOVE: Judge, let him finish answering. There
18 is a pending question.

19 THE COURT: There is no pending question.

20 MS. HOFFINGER: Let's take a look at People's 208,
21 please, in evidence.

22 (Displayed.)

23 Q This is another email that you sent to Michael Cohen on
24 June 14th of 2018; correct?

25 A That is correct.

1 Q And in this email, aren't you encouraging him not to
2 cooperate?

3 Yes or no?

4 A Let me read it.

5 Q Sure.

6 (Witness reading document.)

7 A Okay.

8 Your question is?

9 Q In this email, aren't you encouraging him not to
10 cooperate, yes or no?

11 A No.

12 Q Okay.

13 MS. HOFFINGER: Let's take a look at the first
14 paragraph.

15 Put that up for the jury, please.

16 (Displayed.)

17 Q From Robert Costello to Michael Cohen.

18 Subject line: "Giuliani on the possibility of Cohen
19 cooperating. Mueller Probe."

20 The answer to your question will be found in watching the
21 video.

22 It seems clear to me that you are under the impression that
23 Trump and Giuliani are trying to discredit you and "throw you
24 under the bus," to use your phrase.

25 I think you are wrong because you are believing the

1 narrative promoted by the left wing media.

2 They want you to believe what they are writing.

3 Many of them are already writing that you are cooperating.

4 This strategy has been consistent from the start to put
5 pressure on you into believing that you are alone, that everyone
6 you knew before is distancing themselves from you and you are
7 being "thrown under the bus."

8 The whole objective of this exercise by the Southern
9 District of New York is to drain you, emotionally and
10 financially, until you reach a point that you see them as your
11 only means to salvation.

12 I told you that on the very first day I met you.

13 That's your email; correct?

14 A That's correct.

15 MS. HOFFINGER: Let's take a look at the third
16 paragraph, please.

17 If you could just blow up the third paragraph.

18 Thank you so much.

19 (Displayed.)

20 Q You are making a very big mistake if you believe
21 the stories that these, quote, "journalists" are writing about
22 you.

23 They want you to cave.

24 They want you to fail.

25 They do not want you to persevere and succeed.

1 If you really believe you are not being supported properly
2 by your former boss, then you should make your position known.

3 If you really want certain things to happen, you should make
4 that known.

5 If you really want other lawyers to refrain from saying this
6 or that, you should make it known.

7 You have the ability to make that communication when you
8 want to.

9 Whether you exercise that ability is totally up to you.

10 You wrote that to him; right?

11 A I did.

12 Q In June of 2018, you were really angry, were you not,
13 about Michael Cohen playing you?

14 A Angry? No.

15 Q You were upset that he was playing you; weren't you?

16 A No. That's not correct. That's the wrong word.

17 Q Okay.

18 A I was informed --

19 Q Weren't you --

20 A And I informed Jeff Citron of that.

21 Q Didn't you believe that he was also playing President
22 Trump; correct?

23 A I don't think that's correct.

24 Q Okay.

25 Yesterday, you were asked a question by defense counsel:

1 "Whose interest did you have in mind during the course of that
2 relationship?"

3 And you answered: "Exclusively Michael Cohen's."

4 Do you remember that?

5 A Yes. And that's right. That's correct.

6 Q And you also were asked by Mr. Bove: "Did you care
7 about President Trump's interests while you were dealing with
8 Michael Cohen?"

9 And your answer was: "No. My obligation was to Michael
10 Cohen."

11 Do you remember testifying to that yesterday?

12 A Yes, I do, uh-huh.

13 Q Okay.

14 MS. HOFFINGER: Let's show to just the witness
15 now, and to counsel and to the Court, People's Exhibit 512H
16 for identification.

17 (Displayed.)

18 Q Do you recognize this email that you sent to your
19 partner, Citron, on June 22nd, 2018, subject line: "Michael
20 Cohen?"

21 A Yes, I do.

22 Q And you provided this email to our office as well; did
23 you not?

24 A Yes, as I provided you with all of my emails --

25 Q Okay.

1 A -- as well as this one..

2 MS. HOFFINGER: I now offer in evidence People's
3 512H.

4 MR. BOVE: No objection.

5 THE COURT: 512H is accepted.

6 (So marked in evidence.)

7 *****

8 MS. HOFFINGER: Can you put it up for the jury to
9 see.

10 (Displayed.)

11 Q Now, at the bottom here was a text from Michael Cohen;
12 correct?

13 A That is correct.

14 Q Finished document review and then met with counsel.
15 Arrived home at 8:30 and just took wife to get dinner. Let's
16 speak tomorrow.

17 And you forwarded that text to your partner, Jeffrey Citron;
18 correct?

19 A Yes, I did.

20 MS. HOFFINGER: Can we blow up the top email now,
21 please, for the jury.

22 (Displayed.)

23 Q Jeff, this is the response I received from Michael
24 after sending him a detailed text followed by a voicemail one
25 hour later at 4:00 p.m.

1 Tune in to CNN and see how they are playing this up.
2 Cohen has to know this, yet he continues to slow play us and the
3 President. Is he totally nuts???

4 I'm in a golf tournament tomorrow early and again on Sunday.

5 What should I say to this asshole?

6 He is playing with the most powerful man on the planet.

7 Now, that email certainly speaks for itself; does it not,
8 Mr. Costello?

9 A Yes, it does.

10 Q You still -- withdrawn.

11 You had lost control of Michael Cohen for President Trump;
12 didn't you?

13 A Can you repeat that?

14 Q You lost control of Michael Cohen for the President;
15 did you not?

16 A Absolutely not.

17 Q Well, when he hired Guy Petrillo instead of you, you
18 could no longer control him; correct?

19 A Ummm, no.

20 In fact, if you look at the email --

21 Q Yes or no, sir?

22 Yes or no?

23 A Okay.

24 Q Is your answer no?

25 A I did --

1 Q Did you not lose control of him?

2 A I did --

3 Q You did lose control of him?

4 A No. I answered no.

5 Q Okay.

6 And you didn't lose control of him when he pled guilty on
7 August 21st, 2018?

8 A What do you mean by that?

9 Q You are stating under oath that he had violated two
10 separate campaign finance violations in coordination with and in
11 the direction of Donald Trump --

12 MR. BOVE: Objection.

13 THE COURT: Overruled.

14 Q -- for the initial purpose of influencing the election;
15 yes or no?

16 A You are asking me if I lost control when he pled
17 guilty?

18 Q Correct.

19 A I certainly didn't have any control when he pled
20 guilty.

21 Q Understood.

22 And you still have a lot of animosity against Michael Cohen;
23 don't you?

24 A I don't have any animosity. I just don't think Michael
25 Cohen is telling the truth --

1 Q Yes or no? Yes or no? Do you have animosity against
2 Michael Cohen?

3 A No.

4 Q Well, last week, on May 15th, didn't you go to Congress
5 to testify about this case and testify all about Michael Cohen;
6 didn't you go to the House of Representatives to do that?

7 A Yes. I was requested to go by the House of
8 Representatives, and I went.

9 Q And you went there to publicly vilify Michael Cohen
10 while he was in the middle of his testimony; isn't that
11 correct?

12 A I went there to testify.

13 Q And you knew your comments would be reported in the
14 press; correct?

15 A I didn't know, although it's certainly possible.

16 Q And it was an effort by you, wasn't it, to try to
17 intimidate Michael Cohen while he was testifying here; isn't
18 that correct?

19 A I was intimidating him?

20 Q Yes, that's my question.

21 A That's ridiculous. No.

22 MS. HOFFINGER: Nothing further.

23 THE COURT: Any redirect?

24 MR. BOVE: Yes, Judge, thank you.

25 May I inquire, Judge?

1 THE COURT: Please.

2 MR. BOVE: Thank you.

3 *****

4 REDIRECT EXAMINATION

5 BY MR. BOVE:

6 MR. BOVE: Mr. Bernik, can we please take a look at
7 Government Exhibit 512Q in evidence.

8 I'm sorry, if I could ask the Government to help me
9 out with that one.

10 Thank you.

11 MS. HOFFINGER: That's a People's Exhibit?

12 MR. BOVE: Yes.

13 Thank you.

14 MS. HOFFINGER: You're welcome.

15 (Displayed.)

16 MR. BOVE: And if we could zoom in on the email,
17 please.

18 (Displayed.)

19 Q And, so, Mr. Costello, this is an email that Michael
20 Cohen sent to you and some others on August 8th; correct?

21 A That is correct.

22 Q And do you see where he wrote in the first sentence:
23 "Please cease contacting me as you do not and have never
24 represented me in this or any other matter."

25 Do you see that?

1 A I do.

2 Q And I want to focus on the part of that sentence that
3 reads: "Have never represented me."

4 Do you see that?

5 A I do.

6 Q From your perspective, was that true or false at the
7 time that Cohen said it?

8 A False.

9 MR. BOVE: Now, I would like to next look at
10 Government Exhibit 504AT in evidence.

11 I think we have this one.

12 And I just want to look at the carry-over sentence
13 on Page 1 and 2.

14 (Displayed.)

15 Q Now, this is a Waiver signed by Michael Cohen, and I'm
16 focused on the sentence that begins, "Although."

17 Do you see that?

18 A Yes.

19 Q Do you see where it says: "At no time did I sign a
20 retainer or otherwise agree to retain Costello."

21 Do you see that on Page 2?

22 A I do.

23 Q And do you see where it says: "Otherwise agreed or
24 retained Costello?"

25 A I do.

1 Q So if Michael Cohen signed this document, that's a
2 false statement; right?

3 A That is a false statement.

4 MS. HOFFINGER: Objection, your Honor.

5 THE COURT: Overruled.

6 MR. BOVE: Well, let's look at Government
7 Exhibit 512M.

8 This is something that Ms. Hoffinger put in
9 yesterday.

10 (Displayed.)

11 Q This is an email that -- it's an exchange between you
12 and your son; right?

13 A That is correct.

14 Q On April 20th of 2018?

15 A Correct.

16 MR. BOVE: And can we zoom in on the bottom email,
17 please.

18 A Yes.

19 (Displayed.)

20 Q Do you see where you said, you wrote to your son, "I
21 will be on the team," and then in quotes, "'It would be an honor
22 to have you as part of my team. I will be eternally grateful
23 for the help and guidance that you have already given me.'"

24 Do you see that quote?

25 A Yes.

1 Q And then there is a dash, it says, "Michael Cohen,
2 Personal Attorney for President Donald J. Trump?"

3 A Yes. It's a quote from Michael Cohen.

4 Q So that's something that Michael Cohen said to you,
5 specifically, on April 20th of 2018?

6 A Yes.

7 Q And that's why you put it in quotation marks to your
8 son?

9 A Exactly.

10 Q And then you wrote Michael Cohen's title after that;
11 right?

12 A That's the way -- yeah.

13 Q Because you were trying to explain to your son --

14 A Who he was.

15 Q -- what Cohen's role was; right?

16 A Correct.

17 MR. BOVE: And let's take a look at Defense
18 Exhibit B1018.

19 Zoom in on rows 6 through 8.

20 (Displayed.)

21 Q So, this is that phone chart that we worked with a
22 little bit yesterday?

23 A Right.

24 Q And you see that this reflects calls on April 20th,
25 2018?

1 A That's correct.

2 Q So, on the same date that you sent that email with the
3 quote from Michael Cohen to your son, you see the 30-minute call
4 from Michael Cohen to you?

5 A Right.

6 MR. BOVE: Now, I would like to take a look at
7 Government Exhibit 207 next.

8 (Displayed.)

9 Q And I want you to take a look at Page 2.

10 MR. BOVE: And if we can zoom in on the last
11 paragraph.

12 (Displayed.)

13 Q And you talked about this email with Ms. Hoffinger.

14 Do you see the reference on the last line to "being played
15 here?"

16 A Right.

17 Q And when you wrote that, were you concerned about the
18 types of things that Michael Cohen --

19 MS. HOFFINGER: Objection.

20 THE COURT: Overruled.

21 Q When you wrote that, were you concerned about the
22 things that Michael Cohen later wrote to you in that August 2018
23 email that we just looked at where he said you never had legal
24 representation?

25 A No, not at all.

1 Q What did you mean when you expressed concern that "we
2 had been played here?"

3 A He constantly referred to the fact -- Jeff Citron gave
4 him a Retainer Agreement, I think it was about two weeks after
5 the initial meeting on April 17th, 2018.

6 He stuck it in his briefcase that day and said to us, "I
7 will look at it later."

8 Every time Jeff asked him about the retainer, "Michael, did
9 you sign the retainer yet," he gave an excuse.

10 He would claim -- he tried to let us believe that he was
11 paying McDermott Will & Emery, which was conducting the
12 examination on all of the documents that had been seized
13 pursuant to the search warrants.

14 In fact, I found out from Giuliani that he wasn't even
15 paying --

16 MS. HOFFINGER: Objection.

17 A -- McDermott Will & Emery.

18 THE COURT: Sustained.

19 Q Were you concerned that you were representing Michael
20 Cohen, but he wasn't signing the Retainer Agreement?

21 A Yeah, sure.

22 MR. BOVE: Now, I want to take a look at
23 Government Exhibit 2035 next, please.

24 And if we could zoom in on the email.

25 Q So this one is dated April 21st; do you see that?

1 A Correct. I do.

2 Q And this is an email that you sent to Michael Cohen
3 that day; correct?

4 A That's right.

5 Q And this is the day after that email you sent to your
6 son with the quote from Michael Cohen?

7 A Right.

8 Q Correct?

9 A That's correct.

10 Q And do you see at the top where you wrote:
11 "Attorney-client communication privileged?"

12 A Yes.

13 Q Why did you write that?

14 A Because it was an attorney-client communication and,
15 therefore, privileged. That's why I wrote it.

16 Q That's your perspective; right?

17 A Yes.

18 Q Did Michael Cohen write back to you and say: Hey, wait
19 a second, you are not my lawyer?

20 A No.

21 Q And did you write back and say: Hey, wait a minute,
22 you didn't even send me a Retainer Agreement?

23 A No.

24 Q And did he actually write back and say: Hey, I'm
25 talking to a bunch of lawyers right now and I haven't made a

1 decision?

2 A No, he didn't.

3 Q And did he, in fact, continue to give you instructions
4 in order to continue to review things with Rudy Giuliani?

5 A Yes.

6 Q Now, let's talk about some of those instructions,
7 like --

8 MR. BOVE: Let's look at Government Exhibit 204,
9 please.

10 (Displayed.)

11 MR. BOVE: And if you could zoom in a bit.

12 (Displayed.)

13 Q I want to focus on the last two sentences, and there is
14 a reference to "back channel."

15 Do you see that?

16 A I do.

17 Q And so, this is the same day as the last email that we
18 looked at, April 21st, 2018; right?

19 A Correct.

20 Q And it's another email that you put that legend at the
21 top, "Privileged and confidential;" correct?

22 A That is correct.

23 Q And you are updating Cohen on what you had written,
24 what you had said to Giuliani; right?

25 A That is correct.

1 Q So, Cohen is in no position to be surprised that you
2 are communicating to Giuliani on his behalf; is he?

3 A He asked me to.

4 Q And, now, let's focus on the words "back channel."
5 Between Michael Cohen, you, and Rudy Giuliani, who first
6 used the word "back channel?"

7 A Rudy Giuliani, in response to my telling him we
8 couldn't make this public, because that's what Michael Cohen had
9 said to me: You can tell Rudy Giuliani and the President's team
10 that you want -- quote, that you were, quote, on the team, but
11 we don't want to go public with this; and he gave an excuse, it
12 would cause a press uproar.

13 Q And this is April 21st, the day after the email that
14 you sent to your son and the half-an-hour call with Cohen;
15 right?

16 A That's right.

17 Q And Giuliani used the word "back channel," you said?

18 A Yes.

19 Q And that is after you described to him the instructions
20 that Michael Cohen provided to you; right?

21 A Yes. That is right.

22 MS. HOFFINGER: Objection.

23 THE COURT: Sustained.

24 Q Now, let's take a look at Defense Exhibit E1008,
25 please.

1 And look at the bottom email, May 16th, 2018.

2 In the last line, do you see where you said: "I will not
3 pester you. If you want to talk, you know how to reach Jeff and
4 myself."

5 A Right.

6 Q What did you mean by that?

7 MS. HOFFINGER: Judge, beyond the scope.

8 THE COURT: Sustained.

9 MR. BOVE: This was inquired about on
10 cross-examination.

11 THE COURT: Sustained.

12 MS. HOFFINGER: No, it was not.

13 Q Let's take a look at who initiated communication next,
14 following that May 16th email --

15 MS. HOFFINGER: Objection, your Honor. Beyond the
16 scope.

17 THE COURT: I'm sorry. Can you repeat that
18 question?

19 MR. BOVE: I would like to look at the evidence of
20 who initiated communication following that email.

21 THE COURT: Please approach.

22 MR. BOVE: Yes, your Honor.

23 (At Sidebar.)

24 *****

25 MS. HOFFINGER: Judge, we have been over all of

1 this on direct, and I did not inquire into any of it on
2 cross.

3 THE COURT: Yes, you covered all of this on your
4 direct.

5 MR. BOVE: But then he was impeached about things
6 that happened in June, to make the suggestion that he did
7 actually pester Michael Cohen.

8 I'm just quoting from the email that's on the
9 screen, and that's why I'm trying to reinforce the point
10 that's --

11 THE COURT: You can't use --

12 MR. BOVE: -- in response to the impeachment.

13 THE COURT: You can't use what was not questioned
14 about or asked about on cross; and her cross was based on
15 your direct.

16 MR. BOVE: It's in response to the cross that I am
17 now asking on my redirect --

18 THE COURT: You went through questions on direct,
19 Ms. Hoffinger had the opportunity to cross-examine the
20 witness in response to what you asked on direct. You now
21 cannot hammer home what you asked on direct if she did not
22 cover it. That's not the way it works.

23 MR. BOVE: Yes, Judge. Understood.

24 (Sidebar concluded.)

25 THE COURT: The objection is sustained.

CONTINUED REDIRECT EXAMINATION

BY MR. BOVE:

MR. BOVE: If we could take a look at Government Exhibit 208, please.

(Displayed.)

Q And this is an email that Ms. Hoffinger just asked you about; right?

Do you recall questions about whether this email involved you putting pressure on Michael Cohen to cooperate?

A Yes.

MR. BOVE: And I would like to look at Page 2, please.

Q And focus in on the carry-over paragraph on the top of the page.

Do you see where you say, "You have the ability to make that communication when you want to. Whether you exercise that ability is totally up to you."

Do you see that?

A I do.

Q Was that you trying to pressure Michael Cohen to do anything?

A No, not at all.

Q Was that just you giving him options and waiting for his instructions?

1 A Exactly.

2 Q Did you ever pressure Michael Cohen to do anything?

3 A I did not.

4 Q Did you ever have control over Michael Cohen?

5 A Clearly not.

6 Q Does a lawyer ever control his client?

7 MS. HOFFINGER: Objection, your Honor.

8 THE COURT: Sustained as to form.

9 Q I just want to ask you a question right now.

10 You are experienced in how you practice law?

11 MS. HOFFINGER: Objection.

12 THE COURT: Sustained.

13 Q Did you have control over Michael Cohen, sir?

14 A No, I did not.

15 Q In every single document that we've looked at during
16 your testimony, you provided them to these guys a year ago;
17 correct?

18 A I did.

19 Q Including the email you sent to your son where you
20 quoted Michael Cohen and indicated that he had told you that you
21 were his lawyer; right?

22 A That is true.

23 Q And that's an email that he sent to you after that
24 meeting at the Regency Hotel; correct?

25 A Yes.

1 Q And it was in the April 17th meeting where he said that
2 President Trump did not know about the payment to Stormy
3 Daniels; correct?

4 A That is correct.

5 MS. HOFFINGER: Objection.

6 A That is correct. Many times.

7 MS. HOFFINGER: Objection.

8 THE COURT: Sustained.

9 MS. HOFFINGER: Move to strike.

10 THE COURT: It is stricken.

11 Q And the next in-person meeting you had was May 3rd?

12 MS. HOFFINGER: Objection. Beyond the scope.

13 THE COURT: Sustained.

14 A Correct.

15 Q April 17th wasn't your only meeting; correct?

16 A Correct.

17 Q You met with Mr. Cohen to understand his concerns and
18 how that affected the way that you wanted to represent him?

19 MS. HOFFINGER: Objection.

20 THE COURT: Sustained as to the leading.

21 Q What was your purpose in subsequent meetings with
22 Mr. Cohen?

23 A To continue to discuss his legal problems and how he
24 was going to deal with them.

25 Q Did you -- did someone propose a Retainer Agreement to

1 Michael Cohen in the subsequent meetings, after the meeting at
2 the Regency?

3 A My recollection -- yes, it was May 3rd, at our office.

4 Q And you told the Government all of this a year ago;
5 right?

6 A I did.

7 Q And you told the Government about the attorney-client
8 relationship that you had with Michael Cohen; right?

9 A Correct.

10 MS. HOFFINGER: Objection.

11 THE COURT: Sustained.

12 Q These things that you said at this trial have been
13 known to these people; correct?

14 (Indicating the People's table.)

15 MS. HOFFINGER: Objection.

16 A Yes.

17 THE COURT: Sustained.

18 MR. BOVE: I have nothing further, Judge.

19 THE COURT: Any recross?

20 MS. HOFFINGER: Just two questions, your Honor.

21 *****

22 RECROSS-EXAMINATION

23 BY MS. HOFFINGER:

24 Q Mr. Costello, you said that you gave Mr. Cohen a
25 Retainer Agreement weeks later, after meeting with him on

1 May 3rd; did you say?

2 A Actually, it was Jeff Citron who gave it to him, but we
3 were in the room.

4 Q On May 3rd?

5 A Yes.

6 MS. HOFFINGER: Can we just show to the witness,
7 please, People's 504BE, just for counsel, the witness and
8 the Court.

9 Q Do you recognize that Retainer Agreement in front of
10 you, sir?

11 A This looks like it, yeah.

12 Q Do you see the date of April 20th, 2018?

13 A It says "As of."

14 Q "As of April 20th, 2018?"

15 A Right. Correct. That's the day that he said: "You are
16 on the team."

17 Q And Michael Cohen never signed that Retainer Agreement;
18 correct?

19 A That is correct.

20 Q And he never paid you; correct?

21 A That is correct.

22 MS. HOFFINGER: Thank you.

23 THE COURT: Anything else?

24 MR. BOVE: No, Judge.

25 Thank you.

1 THE COURT: Thank you, sir.

2 You can step down.

3 (Witness excused.)

4 *****

5 THE COURT: Counsel?

6 MR. BLANCHE: Your Honor, the Defense rests.

7 THE COURT: People?

8 MR. STEINGLASS: Nothing further, Judge.

9 THE COURT: Okay.

10 Jurors, as you've just heard, the People rested
11 yesterday.

12 The Defense just rested today.

13 So, what normally happens at this point is that you
14 will hear the summations of the attorneys; the summations
15 are then followed by my instructions to you on the law; and
16 then you will begin your deliberations.

17 In a case like this, which is a rather long case,
18 summations will not be quick.

19 I expect that the summations will take, for both
20 attorneys, they will take at least a day.

21 I expect that my instructions will take at least an
22 hour.

23 My belief is that it's always ideal or best not to
24 break up summations. I prefer that the jury hear both
25 summations at the same time, if at all possible.

1 It's not always possible.

2 Also, ideally, I then would like to give the jury
3 the jury charge; and then immediately after the jury charge,
4 I would like for the jury to begin your deliberations.

5 As you know, this week we are only meeting today
6 and Thursday; therefore, there is no way that we could
7 possibly do what needs to be done in any kind of a cohesive
8 manner; it would just be broken up.

9 I considered all of the permutations, the different
10 scheduling options, and at the end of the day, I think that
11 the best thing that we can do is to adjourn now until next
12 Tuesday.

13 At that time, you will hear the summations of the
14 attorneys, and that will probably continue the next day, on
15 Wednesday -- and I am asking you to come in on Wednesday --
16 and that next day, Wednesday, you will hear my jury charge,
17 and then I will expect that you will begin your
18 deliberations, hopefully, at some point on Wednesday.

19 So, you are familiar with all of the instructions
20 that I have given to you up to this point. You've heard them
21 many times.

22 It might be tempting to think that, you know, now
23 that both sides have rested, you can kind of let up a little
24 bit.

25 But, in fact, these instructions now take on even

1 greater significance.

2 So, I remind you to, please, not to talk either
3 among yourselves or anyone else on anything related to the
4 case.

5 Please continue to keep an open mind.

6 Do not form or express an opinion about the
7 defendant's guilt or innocence until all of the evidence is
8 in, and I have given you my final instructions on the law,
9 and I have directed you to begin your deliberations.

10 Do not request, accept, agree to accept or discuss
11 with any person the receipt or acceptance of any payment or
12 benefit in return for supplying any information concerning
13 the trial.

14 Report directly to me any incident within your
15 knowledge involving an attempt by any person improperly to
16 influence you or any members of the jury.

17 Do not visit or view any of the locations discussed
18 in the testimony.

19 And do not use any program or electronic device
20 to search for and view any location discussed in the
21 testimony.

22 Please do not read, view or listen to any accounts
23 or discussions of the case, that includes the reading or the
24 listening to the reading of any transcripts of the trial, or
25 the reading of any posts on any court sites.

1 Do not attempt to research any fact, issue or law
2 related to the case.

3 Please do not communicate with anyone about the
4 case by any means, including by telephone, text messages,
5 email or the internet.

6 And do not Google or otherwise search for any
7 information about the case, or the law which applies to the
8 case, or the people involved in the case.

9 Just speaking ahead to next Tuesday, I'm not a
10 hundred percent sure that we're going to get both summations
11 done by 4:30.

12 So, what I would ask you to do between now and then
13 is to give some thought, if necessary, if you could work
14 late on Tuesday.

15 If you are unable to do so, that's fine; we will
16 just continue on Wednesday.

17 All right. Thank you.

18 I will see you in a week.

19 THE COURT OFFICER: All rise.

20 (Jury exits.)

21 *****

22 THE COURT: Thank you.

23 Please be seated.

24 So, as we discussed and agreed to yesterday, the
25 plan is for us to take some time now and continue working on

1 the proposed jury charges and then come back and meet here
2 at 2:15.

3 I repeat my request. If possible, if the two of
4 you could put together some additional questions of the
5 proposed jury charges and submit them exactly like you did
6 earlier today, based on if there is an objection from one
7 side or the other, but I think that that would go a long way
8 to help us getting through the charge conference this
9 afternoon.

10 Is there anything else that we need to cover?

11 MR. STEINGLASS: No.

12 Thank you, Judge.

13 MR. BOVE: Just a procedural question, Judge.

14 Do we have the Court's permission to file the
15 request documents publicly?

16 THE COURT: And what's the reason for that?

17 MR. BOVE: I'm just asking, Judge. I'm just
18 asking.

19 THE COURT: Okay. Because it's not a final
20 document.

21 What we can do is mark it as a Court Exhibit. We
22 can do that.

23 So, we can take what you submitted earlier and mark
24 that as a Court Exhibit.

25 MR. BOVE: That's the document I was requesting, our

1 submissions to your Honor.

2 THE COURT: That could be a Court Exhibit. That's
3 fine.

4 We will have the in-court filing for the Court's
5 purposes, if necessary.

6 All right. I will see you at 2:15.

7 MR. STEINGLASS: Thank you.

8 (Matter adjourned to 2:15 p.m., at which time
9 Senior Court Reporter Laurie Eisenberg will relieve Senior
10 Court Reporter Lisa Kramsky as the official court reporter.)

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1 (Whereupon, the case is recalled at 2:15 PM.)

2 THE COURT: Good afternoon.

3 Please be seated.

4 I want to thank you again for getting those joint
5 submissions in to me. I appreciate it. It was helpful.

6 You should also both feel free to provide a copy
7 of your submissions to the clerk. We'll make it part of
8 the court file.

9 You may both want to just initial whatever you
10 give her to make sure that it's accurate.

11 First, I would like to go over what it is that I
12 received from you, just to make sure that I have
13 everything.

14 I received an email from Mr. Colangelo, dated May
15 13th, at 8:34 AM, with the proposed attachments.

16 I received an email with attachments from
17 Mr. Bove May 14th, at 9:09 AM.

18 I then received another email from Mr. Colangelo
19 on May 15th, at 5:37 PM. That was regarding the proposal
20 structure as to the remaining counts.

21 I received an email from Mr. Colangelo on May
22 17th, at 10:22 AM. That was the People's response to the
23 Defense proposal.

24 Those were the substantive emails that I
25 received.

1 Today, I also received four joint submissions.

2 I'm not sure what time the first two came in.

3 But, one of them, the first one, had to do with
4 -- the first one had to do with the proposal structure on
5 FECA.

6 The second one had to do with the proposal on
7 accomplice as a matter of law.

8 The third one was a joint submission regarding
9 falsifying business records in the first degree and
10 several other charges.

11 Then, the last one was a joint submission
12 regarding Election Law Section 17-152 predicate.

13 Is there anything that you believe that you
14 submitted that I have not acknowledged?

15 MR. COLANGELO: No, your Honor.

16 Just to clarify that in those four transmittals
17 -- and I think the Court may have just mentioned this --
18 we submitted six different joint proposed submissions on
19 the applicable parties. So, that was four transmittals
20 with six documents.

21 THE COURT: Okay.

22 I think that we've made some progress with the
23 joint submissions.

24 There are, obviously, a few issues that remain.

25 I would like to start by going through the

1 submissions I received today, so I can hear you further on
2 your respected positions.

3 Let's start with the proposal instructions on
4 FECA.

5 On the first paragraph, I see that the Defense
6 requested the word "willfully" be added twice.

7 Can I hear from you on that?

8 MR. BOVE: Yes, your Honor.

9 Our position on FECA, here, because of the way
10 its positioned in the Government's theory of the case,
11 meaning no longer a predicate on the business records
12 count but now an unlawful activity as an object of the New
13 York Election Law conspiracy, that the FECA predicate in
14 that position, it has to be a criminal FECA violation.
15 Because a conspiracy to violate New York Election Law,
16 it's only a crime if it has a criminal object.

17 If it's a non-criminal violation, you're talking,
18 I submit, about a civil conspiracy, at most.

19 This is an issue, both, at the FECA level and
20 then when we talk about that one predicate charge that's
21 very, very important to us, which is New York Business Law
22 175.10 requires intent to either commit or conceal another
23 crime.

24 That other crime, now we know, is New York
25 Election Law.

1 But, there's no illegal conspiracy.

2 That's the key. It's got to be an illegal
3 conspiracy, unless the conspiracy's object, one of them,
4 is criminal.

5 So, it's not enough for the Government to
6 establish a civil violation of FECA or to suggest to the
7 jury that -- I understand that they don't have to prove a
8 substantive violation of FECA -- but to suggest that the
9 object conspiracy was a civil violation of FECA. Because
10 what we're talking about is a civil conspiracy, which
11 can't serve as a predicate for the business records
12 charges.

13 If I can cite some cases on the conspiracy to the
14 crime has to have a criminal object:

15 People v. Wisan, W-I-S-A-N. This is a Richmond
16 County case. It's a little vague in 1986. But, what it
17 says is that the United States Supreme Court has held,
18 time and again, that to be a criminal conspiracy, there
19 must be a criminal object.

20 And one of the Supreme Court cases cited in Wisan
21 is Grunewald v. United States, 353 U.S. 391 at 404, 405.

22 What that means to us, Judge, and why we're
23 asking for the "willfully" instruction when you talk about
24 FECA is that, otherwise, it would allow the jury to think
25 about the predicate offense and the objects of this

1 predicate offense in civil terms, and put President Trump
2 in a position where this jury could convict him based on a
3 flawed finding of some kind of intent to conceal a civil
4 conspiracy can elevate a civil misdemeanor charge up to a
5 felony.

6 That's a very serious concern for us.

7 That's why, starting with the FECA charge, we
8 requested your Honor instruct the jury in terms of
9 criminal offenses.

10 And, here, the FECA offense requires a "willful"
11 mens rea.

12 That's consistent, Judge -- last one -- with the
13 way that the Government has requested instructions on the
14 Federal tax predicate that they're seeking instructions
15 on.

16 If you look at Page 6 of the Government's
17 request, they ask for a "willfully" instruction with
18 respect to that charge.

19 So, I think it's also consistent with their
20 request.

21 But, even if they hadn't made that request, it's
22 critical for -- to make sure that the jury knows and is
23 required to find that the predicate of the 175.10 charge
24 is a criminal offense, and if the object isn't criminal,
25 then we're stuck with a civil conspiracy.

1 MR. COLANGELO: We heard that the disagreement
2 here is that for a violation of the criminal law of FECA,
3 it must be willful, but the willfulness standard is not
4 required for other violations of FECA.

5 We oppose including that additional language
6 here, because the Election Law 17-152 violation occurs:
7 "When two or more people conspired to promote someone's
8 election to a public office by unlawful means." Those are
9 the terms of the Election Law 17-152 statute. And by its
10 plain meaning, "unlawful" doesn't mean criminal. It means
11 violation of law.

12 There are cases holding as much, including People
13 v. Ivybrooke Equity Enterprises, 175 A.D.3d 1000.

14 And the Court of Appeals has long held that when
15 the legislature intends to make -- intends to refer to a
16 crime, it knows how to do so.

17 (Whereupon, Mr. Steinglass whispers to Mr.
18 Colangelo.)

19 MR. COLANGELO: Ivybrooke. I-V-Y-B-R-O-O-K-E.

20 So, the legislature could have enacted the
21 statute that referred to a conspiracy to promote or
22 prevent election by criminal means, but, instead, it chose
23 the word "unlawful".

24 Mr. Bove mentioned the case People v. Wisan.

25 Unless we missed it, I'm not sure it was briefed

1 in the earlier submission.

2 I have not briefed that case.

3 If your Honor needs further analysis, we can take
4 a look.

5 But, the plain text of the statute provides that
6 Election Law conspiracy occurs when its intended results
7 are executed through unlawful means.

8 Because it doesn't need to be "criminal unlawful
9 means", there's no need to add the word "willful" into the
10 FECA charge.

11 MR. BOVE: Can I briefly respond to this one,
12 Judge?

13 THE COURT: Sure.

14 MR. BOVE: The Government's main case for this,
15 Ivybrooke, as your Honor sees in the briefing, it's a
16 civil case about Executive Law 63(12). That case does not
17 suggest -- provide any support for the Government's
18 position here, which is that a criminal conspiracy charge
19 can be supported by a civil object.

20 And that's what they're seeking to do.

21 That's at the core here with respect to
22 "willfully" down at the FECA predicate.

23 But, again, when we start talking about New York
24 Election Law, that's extremely problematic.

25 And another reason that it is -- both sides have

1 relied on the CJI instructions, the conspiracy in the
2 sixth degree instruction that we relied upon, I think, is
3 pretty clear that: "The Defendant must intend" -- I'm
4 quoting -- "conduct constituting a crime be performed."

5 So, I think the Supreme Court has been clear that
6 for a conspiracy to be criminal, it must have a criminal
7 object, and I think the New York Pattern Instructions
8 recognize that.

9 So, we think "willfully" is important here, and
10 that will sort of ride up the instructions as we talk
11 about this this afternoon.

12 THE COURT: On the heels of this -- I know we've
13 gone over this before.

14 Just looking at the Penal Law charge, falsifying
15 records in the first degree requires there be an intent to
16 defraud with intent to commit another crime.

17 How do you respond to that?

18 MR. COLANGELO: Your Honor, the other crime here
19 is the Election Law violation, which becomes a criminal
20 violation when any two or more persons conspire to promote
21 someone's election by unlawful means.

22 So, the crime is established through the
23 formation of a conspiracy and its execution through
24 unlawful means.

25 The legislature could have said "through criminal

1 means" and didn't.

2 There's two other points I would make in quick
3 response. One -- to what Mr. Bove just said.

4 One is that, more broadly, your Honor, and as you
5 previewed yesterday, and as you may have seen from our
6 proposed FECA charge, we think there's value, as you
7 indicated, in tailoring the "unlawful means" instructions
8 more narrowly and more concisely than in our original
9 proposal.

10 One of the reasons for that, as the Court held in
11 denying the Defendant's Omnibus Motions to dismiss, the
12 falsifying business records offense is committed when the
13 Defendant has the intent to defraud, that includes the
14 intent to commit or aid or conceal in the commission of
15 another crime.

16 But, the object crime doesn't need to be
17 completed, and there are cases the Court has cited where
18 the Defendant was acquitted of the object crime.

19 So, because we're now talking about -- and one
20 element of the predicate of the charged offense -- we
21 think it makes more sense for the Court not to burden the
22 jury with excessive verbiage we don't think is necessary
23 for the jury to accept what's necessary here.

24 MR. BOVE: This is a big one for us.

25 THE COURT: Sure.

1 MR. BOVE: The problem for us, Judge, is that the
2 mens rea for the predicate, the 17-152 charge, the
3 conspiracy charge has to match the highest mens rea of the
4 objects. I think that's Black-letter law.

5 And so, all the points I've already made, I
6 think, stand on for this to be a criminal conspiracy,
7 there has to be a criminal object. But, in addition, that
8 "willfully" mens rea has to come up to the level of the
9 predicate; or, otherwise, again, we just have a civil
10 conspiracy, that it can't be used to elevate this to a
11 felony.

12 THE COURT: Thank you.

13 Let's go down to the next disputed area, which is
14 the last sentence in the first paragraph.

15 The Defense is requesting language that in 2015
16 and 2016, there was no limit on a candidate's ability to
17 contribute personal funds to his or her campaign.

18 Why do you need that instruction?

19 MR. BOVE: Judge, we're quoting the regulation,
20 and we're seeking that instruction because we want the
21 jury to have a full picture of what constitutes
22 "contributions" and "expenditures", and the third party
23 issue is significant in this case, but President Trump's
24 mental state and the Government's burden of proof on his
25 mental state also matters.

1 So, here, what we want the jury to understand is
2 that as someone in President Trump's situation is
3 evaluating potentially or allegedly proposed payments by
4 third parties, part of his understanding is somebody --
5 and there is testimony in the record about the campaign
6 having counsel -- would understand that he could have paid
7 this out of his personal expenses, without issue.

8 MR. COLANGELO: Your Honor, we oppose including
9 that sentence for the reason that the Court may have been
10 suggesting, which is that it's extraneous and totally
11 irrelevant to the facts of the case.

12 This case is not about a candidate's use of his
13 own personal expenses for his campaign or other purposes.

14 So, it has nothing to do with the case, is
15 extraneous, and will probably be confusing to the jury.

16 If the Court is inclined to include something
17 like this, which we think shouldn't be included, this
18 language is not a quote from the Regulations Act, is
19 misleading, including the reference to "no limit on
20 someone's ability".

21 There's plenty of regulations on someone's
22 ability. The Regulations Act maintains candidates can make
23 contributions from personal funds.

24 It is worded inaccurately.

25 In any event, this is extraneous and confusing.

1 THE COURT: Just to be clear, I'm reserving
2 decision on the "willfully" issue.

3 On the issue -- we're speaking about, now, the
4 2015 and 2016 limits -- I don't think that's necessary. I
5 don't think there's really a reasonable view of the
6 evidence here that requires that instruction.

7 You're certainly free to argue on summation that
8 if your client has certain wealth, he could have certainly
9 paid for this himself.

10 But, I don't think that that needs to come from
11 the bench, so I'm going to strike that.

12 Going down to the next paragraph, this is also a
13 Defense-disputed request.

14 The phrase, quote, "the purpose of influencing an
15 election," closed quote, requires proof that the activity
16 clearly and unambiguously related to President Trump's
17 2016 campaign.

18 MR. BOVE: Yes, Judge.

19 So, you have the authorities we've cited in
20 support of that: the Leake case, L-E-A-K-E, Orloski, and
21 Wisconsin Right to Life.

22 Our position here is that this type of
23 instruction is necessary to make clear to the jury that
24 there is a zone of First-Amendment-protected activity
25 involved in this analysis, and what the Supreme Court has

1 done to carve out First Amendment-protected activity from
2 prohibited contributions is use language exactly like
3 this.

4 So, we think it's necessary for the jury to
5 understand that point, so that we can make arguments
6 around the fact of people's mental state as they were
7 thinking about these things in 2016, they would have
8 understood this type of restriction and that it was
9 required that the things they were doing be in clear
10 violation of the FECA Regulations and Provisions we're
11 talking about.

12 This is an accurate statement of the law. It's
13 describing a phrase that I think Buckley in the Supreme
14 Court said is ambiguous.

15 This is the kind of thing that we would have done
16 through Mr. Smith.

17 We understand the Court's ruling.

18 But, this is the type of content we were seeking
19 to provide to the jury about what these phrases mean.

20 So, we're asking your Honor do it in your
21 province of instructing the jury on the law.

22 MR. COLANGELO: We think this is not an accurate
23 statement of the law and is, in any event, both irrelevant
24 and superseded by other instructions we think the Court
25 will give.

1 So, this "clearly and unambiguously related to"
2 test, as I think Mr. Bove acknowledged, only has arisen in
3 a separate context of regulations in expressive advocacy.
4 So, it's the proposed importation of a different test from
5 an entirely different context.

6 Even the case he cited, the Fourth Circuit case,
7 North Carolina Right to Life v. Leake, L-E-A-K-E, we
8 believe has been either overruled or substantially
9 aggregated by a subsequent Fourth Circuit decision, Real
10 Truth Against Abortion, 681 F.3d 544.

11 It's not even clear at all this is a viable test
12 in the limited context in the Regulations on expressive
13 advocacy.

14 In any event, your Honor, it's not necessary to
15 define this term for a couple of other reasons.

16 One. As we discussed, we think the jury needs
17 less, not more, on FECA instructions; and we think the
18 term "for the purpose of influencing any election" is a
19 pretty straight-forward term that jurors can understand.

20 Second. We think to the extent the Court defines
21 the "irrespective of the candidacy" test, which we're
22 going to talk about, that test is going to be the test for
23 determining whether an individual third-party's payments
24 of a candidate's personal expenses, whether that's a
25 contribution or not.

1 So, we don't need an additional gloss on some
2 other language that is, otherwise, already clear on that
3 space.

4 THE COURT: So, what you're suggesting is that
5 paragraph simply read: The terms "contribution" and
6 "expenditure" include anything of value, including any
7 purchase, payment, loan, or advance made by any person for
8 the purpose of influencing any election for Federal
9 office; period?

10 MR. COLANGELO: Correct, your Honor. That's the
11 People's request.

12 THE COURT: I agree.

13 I think that the concerns that you have, that
14 you're expressing, will be expressed in other areas of the
15 charge.

16 I think that here it becomes confusing.

17 Some of the issues are confusing enough, I think.

18 We want to make it as easy as possible for the
19 jury.

20 Let's go down to the next paragraph.

21 Here, the People made a request. It says that: A
22 candidate for Federal Office does not have to be the sole
23 or only motivation for the third-party's payment, so long
24 as the payment would not have been made but for the
25 candidate's status as a candidate for Federal Office.

1 MR. COLANGELO: Thank you, your Honor.

2 So, the preceding sentence in that paragraph
3 identifies -- which the parties have agreed on, identifies
4 the regulatory definition for when a third-party's payment
5 of a candidate's special expenses counts as a
6 contribution. That's when it would not have been made
7 irrespective of the candidacy.

8 Our purpose in adding this additional language
9 was twofold.

10 First, the "irrespective of the candidacy" and
11 the way the language appears in the Regulation is not, on
12 its face, the most artful turn of phrase, and we thought
13 it might be a useful explanation for the jury, to help
14 them understand: What does it mean for a third-party's
15 payment of a personal candidate's personal expenses to be
16 done irrespective of the candidacy?

17 And this gloss that we've identified in this
18 additional sentence is language directly from an FEC
19 advisory opinion, which is a binding and definitive
20 interpretation of FECA issued by the Commission and that
21 the Commission has looked to define when something is
22 "irrespective of a candidate".

23 That's the first reason.

24 The second reason is that there's been factual
25 testimony -- and we anticipate this will be a contested

1 point on summations -- regarding what the different
2 motivations were for executing the Karen McDougal payment
3 and the Stormy Daniels payment.

4 So, we thought this is an important point, that
5 there's some additional explanation for the jury regarding
6 what it means to pay someone's personal expenses and
7 whether he would have done it irrespective of the
8 candidacy or not.

9 THE COURT: What's your concern with that phrase?

10 MR. BOVE: The concern, Judge, is that the Harvey
11 advisory opinion that's being relied upon doesn't actually
12 involve an inquiry into the subjective intent of the
13 person making the payment, because in the Harvey advisory
14 opinion, that person wrote in and said: This is what I'm
15 going to do, this is my intention.

16 So, before the Commission on those circumstances,
17 there was objective, clear evidence of what the motivation
18 for the payment was.

19 So, this -- whatever the language is in this
20 opinion -- in the Harvey opinion, it doesn't support
21 inviting the jury to try to make an analysis of a mixed
22 motive behind these payments.

23 We think -- we are in agreement, as reflected
24 here, on the first sentence about the "irrespective rule".

25 Then we've endeavored in the ones we're going to

1 talk about next, to quote from other authorities that
2 provide the jury with some guidance about the types of
3 situations where this "irrespective" test is met and not
4 met.

5 THE COURT: So, you're in agreement on the first
6 sentence regarding the "irrespective rule"?

7 The People submit that the sentence that they're
8 adding helps define what that means.

9 Your position is that in this context, it's
10 actually a bit confusing, but you propose additional
11 language that follows?

12 MR. BOVE: We propose examples to give the jury a
13 sense as to how the FEC has applied it.

14 Our concern with the yellow highlighting that is
15 at issue right now is that this is not an authoritative
16 determination by the FEC. What it is is an advisory
17 opinion on a set of facts that included objective evidence
18 of the person's intent.

19 So, this -- the language that's proposed
20 extrapolates from that advisory opinion to invite the jury
21 to make some mixed motive determinations about subjective
22 considerations.

23 We don't think that's supported.

24 THE COURT: You obtained the examples that you
25 proposed from where?

1 MR. BOVE: The next sentence, Judge, begins,
2 "There are a new number of issues," is a verbatim quote
3 from MUR 4944, which is an analyst by the FEC relating to
4 loans to the Clinton family that I think both sides have
5 cited. It's in the footnotes.

6 But, these are -- we're quoting nearly verbatim
7 from those authorities.

8 THE COURT: Let me read it into the record.

9 There are a number of issues arising with a
10 candidate's personal situation that may become campaign
11 issues, that expenses arising from such controversies are
12 not necessarily campaign expenses.

13 The political impact of legal issues on a
14 campaign would not, by itself, justify the treatment of
15 any legal expenses as campaign related. Legal expenses are
16 not campaign related unless the underlying activities have
17 some impact on the campaign.

18 If the payment had been made in the absence of
19 the candidacy, the payment should not be treated as a
20 contribution.

21 It seems to me that that very last sentence that
22 you're proposing is very similar to the sentence that the
23 People are proposing above.

24 And the examples that you're providing in the
25 middle I find somewhat confusing.

1 Why don't we just leave in that very last
2 sentence, which sums it up? I think it sums it up very
3 well.

4 If the payment would have been made, even in the
5 absence of the candidacy, the payment should not be
6 treated as a contribution.

7 MR. BOVE: I think that that is an accurate
8 restatement or summary of the "irrespective rule"; and I
9 think the way it is different there, the Government's
10 proposal is that it -- in yellow, is that it does not
11 invite a mixed motive analysis; and that's why the last
12 one is accurate, the one we put forward.

13 We do think, as your Honor noted, this is an area
14 that is technical and somewhat confusing.

15 This is something that -- we understand the
16 Court's ruling -- that we would have sought to do through
17 the expert.

18 We are asking your Honor to provide examples so
19 the jury has a picture -- again, we're not asking to you
20 make up examples.

21 We didn't make up examples.

22 We're really trying to, quote, carefully -- and
23 if we missed a word or two, let's fix it -- but get this
24 very carefully from things the FEC said before.

25 MR. COLANGELO: A couple of things.

1 We agree with the Court that the first three
2 sentences in blue are, both, confusing and extraneous.
3 They describe circumstances that aren't present in this
4 case. We're not talking about campaign expenses paid for
5 by a campaign, so we think they're confusing and
6 extraneous.

7 Mr. Bove has opposed the sentence highlighted in
8 yellow in that it suggests a subjective test.

9 That is a motion we briefed at the Motion in
10 Limine stage, and we gave the Court two pages of authority
11 for looking at whether a payment would have been made
12 irrespective of a candidacy is a subjective test. That's
13 how you determine whether a payment would be made
14 irrespective of the candidacy or not. You have to look at
15 the reasons.

16 And these authorities are cited in our Opposition
17 to the Defendant's Motions in Limine at Page 13 to 14.
18 That's a document we filed on February 29th.

19 We think the "it's subjective" evaluation is the
20 way that Regulation is applied.

21 So, for that reason, we think the sentence that
22 the People proposed is the better explanation of the
23 "irrespective" test than the final sentence in that
24 paragraph that the Defense proposed.

25 If the Court is inclined to go with the final

1 sentence in the Defense paragraph, we do think it would
2 need to refer to a third-party's payment, because those
3 are the circumstances we're talking about here; and that
4 sentence does not, right now, refer to if a third party
5 would have made the payment.

6 THE COURT: So, I'm going to reserve decision on
7 this.

8 But, right now, my inclination is that I'm
9 actually going to insert the People's sentence and your
10 last sentence. I think that they both work together.

11 And I'm going to remove the examples that you
12 provided in the middle.

13 Again, I'm reserving decision on that.

14 That's my inclination right now.

15 Let's go down to the very last disputed exception
16 here regarding the press exemption.

17 Mr. Bove, you request that the following be
18 added: This is called a press exemption, given that the
19 press function is a broad concept -- for example, the term
20 "legitimate press function" includes solicitation letters,
21 seeking news subscribers to the publication.

22 I don't have a major problem with that.

23 Why can't we just strike the phrase "legitimate
24 press function is a broad concept", and I can keep what
25 you have before that and what you have after that?

1 MR. BOVE: That would be fine with us.

2 Thank you.

3 MR. COLANGELO: So, your Honor, we definitely
4 agree with striking the argumentative sentence regarding
5 the "broad concept".

6 We think the other language that the Court just
7 read into the record and that we highlighted in blue is
8 unnecessary for a couple of reasons.

9 First, we think, again, "normal and legitimate
10 press function", especially against the facts that have
11 already been elicited during this trial, is a concept that
12 the jury will be likely to understand without unnecessary
13 additional instruction and that the parties can argue on
14 summations. We're not sure any further explanation of that
15 term is necessary.

16 If it is, the problem with the last sentence here
17 -- which we acknowledge is drawn from the fact-pattern in
18 one of the cases cited in the footnote. The problem with
19 that last sentence is a little bit confusing because it
20 has nothing to do with the circumstances of this case.

21 "Sending solicitation letters", "seeking new
22 subscribers", it's hard to see how that explains to the
23 jury what a normal, legitimate press function is.

24 If we're going to be giving examples, it seems
25 odd to select that one over other ones, including, for

1 example, the FEC's exception when it came to the FEC
2 involvement in the facts of this case.

3 FEC involvement was not a function of its limited
4 activity, but, instead, fell outside that for four
5 reasons. We outlined those four factors in the proposal we
6 sent to the Court last week. We stripped it out, following
7 the Court's guidance yesterday, to be a little more
8 concise.

9 If the Court is inclined to include an exception,
10 we think it should be something closer to the facts of the
11 case that the jury is likely to understand and not a
12 confusing and attenuated example about solicitation
13 records that were referenced in a District Court case from
14 1981.

15 MR. BOVE: So, the issue for us, Judge, is that
16 this concept, "normal, legitimate press function" -- I'm
17 quoting from the preceding sentence -- it is actually an
18 extremely broad concept as interpreted by the FEC.

19 We proposed an attenuated example to stay away
20 from the facts of this case, so the jury can have a sense
21 of, in our view, why this is very broad and, at the same
22 time, not get a legal instruction that as a metaphor of
23 law goes one way or another on AMI's facts.

24 In terms of AMI's Conciliatory Agreement, we
25 don't think that represents a "legitimate press function"

1 for this case, that the press exception didn't apply.

2 There's evidence in the record that AMI wanted to
3 resolve these things and move on.

4 You remember Mr. Pecker's testimony.

5 There was a large transaction in escrow. They
6 wanted to resolve their business and close, so they could
7 move forward.

8 It applied on the Non-Prosecution Agreement for
9 fact-findings to support what it was doing in that case.

10 Neither of these Agreements addressed or grappled
11 with the fact that AMI did publish articles and do things
12 for Karen McDougal pursuant to that Agreement that were
13 within -- I think it would be hard to dispute -- within a
14 normal, legitimate press function.

15 Those are not facts that the FEC --

16 THE COURT: I think we're better off staying away
17 from any facts too close to parallel the facts of this
18 case.

19 I don't see any prejudice to the People in any
20 way by saying: Listen, sending out solicitation letters,
21 seeking new subscribers would be a legitimate press
22 function.

23 I don't see any harm to the People in including
24 that.

25 And you don't object to striking the "legitimate

1 press function is a broad concept"; right?

2 MR. BOVE: No, your Honor.

3 THE COURT: All right.

4 That's how we're going to go with that one.

5 Turning to the submission regarding "accomplice
6 as a matter of law", it really comes down to the same
7 thing, three times over again, of the Defense is
8 requesting that the phrase "participated in the crime" be
9 used and that the name "Cohen" be used.

10 The People are requesting that the term
11 "participated in" and "was convicted of two crimes" be
12 used and, also, the phrase "the accomplice".

13 Why do you think we need to add "and convicted of
14 two crimes"?

15 MR. STEINGLASS: That language is straight out of
16 the CJI. It's bracketed language. Not the "two crimes".
17 It says "convicted of a crime".

18 In this case, it's two crimes.

19 If you want to make it single, that's fine.

20 I thought it was misleading to make it only one.

21 That's bracketed language, and the way I read the
22 bracketed language in the CJI is it's to be given if it's
23 applicable.

24 THE COURT: Okay.

25 Why don't we just give "participated in"?

1 That's applicable also.

2 MR. STEINGLASS: Actually, if you look at the
3 CJI, it says "participated in", and then, in brackets,
4 "and was convicted of".

5 So, what I'm suggesting is the bracketed language
6 is to be given if it's applicable to the facts of this
7 case.

8 I think that that's consistent in the way the CJI
9 brackets information on every charge, to be given if it's
10 applicable in this case.

11 And it certainly is applicable in this case.

12 THE COURT: The danger is that then we get into
13 the concern that the Defense had regarding Mr. Cohen's
14 convictions being used as an inference that because he was
15 convicted or because he pled guilty, then, therefore,
16 Mr. Trump would also be guilty.

17 I'm sure you recall that we gave a number of
18 limiting instructions to ensure that there was no
19 prejudice to the Defendant as a result of that.

20 It seems to me like right now we're really
21 playing with fire or getting very close to that.

22 Wouldn't it be safer to just have "participated
23 in"?

24 MR. STEINGLASS: Well, that argument that you're
25 suggesting would apply every single time there was --

1 somebody had been convicted -- an accomplice had been
2 convicted of a crime, which would render the language
3 completely superfluous.

4 THE COURT: Let's talk about this case.

5 MR. STEINGLASS: As your Honor pointed out, you
6 have instructed the jury several times about the proper
7 use of that guilty plea and improper use of that guilty
8 plea.

9 We have no objection to you doing that again as
10 part of the charge, to re-reading that limiting
11 instruction.

12 But, I think the evidence is more in this case
13 than just "participated in". It's "participated in and
14 convicted of". And I think that's what the CJI
15 contemplates.

16 (Whereupon, Senior Court Reporter Theresa
17 Magniccari relieves Senior Court Reporter Laurie
18 Eisenberg, and the transcript continues on the following
19 page.)
20
21
22
23
24
25

1 (Whereupon, the proceedings were continued from
2 previous page:)

3 ***

4 THE COURT: I think what we can do is, strike the
5 convicted of language. Leave participated in.

6 If the defendant in any way tries to take
7 advantage of that ruling by arguing on summation that he
8 was convicted of these two other crimes, and not convicted
9 of this other one, then you can certainly argue that the
10 door has been opened. You could then -- or I could add
11 this language to my instructions.

12 MR. BOVE: I think as you flagged, this issue is
13 also extremely important to us that the limiting
14 instruction that you have given in making sure that in
15 summation we don't open the door to changing that limiting
16 instruction, and also policing the line that the Government
17 is not arguing anything is traversing it.

18 Here, I think the correct thing to do would be to
19 just make our crime -- where we have singular -- make it
20 plural.

21 And part of the reason is it's not the two FECA
22 violations.

23 It's the Government's theory that Mr. Cohen
24 participated in the 34 charged crimes, and so, crimes
25 plural is accurate and wouldn't draw undue attention to the

1 issues that you're flagging, and I think it's the
2 appropriate way to go and the right balance.

3 THE COURT: That's fine. We can make crimes
4 plural. But my caution still applies, that if you try to
5 bring up the convictions to the guilty pleas and make it
6 appear as if those were the only crimes that he pled guilty
7 to or the only violations that he pled guilty to, that
8 could open the door to the People making further argument.

9 They still can't go so far as to say that because
10 Mr. Cohen was found guilty or pled guilty to a particular
11 crime, therefore it's more likely than not that Mr. Trump
12 is guilty of that. They can't go there. But it will open
13 the door to them being able to bring up what the
14 convictions were.

15 MR. BOVE: We understand and reviewed this
16 guidance and will follow it as closely as we can.

17 THE COURT: We're going to change the wording to
18 crimes plural.

19 All right.

20 MR. STEINGLASS: There is also the matter of the
21 accomplice versus Cohen.

22 THE COURT: Yes.

23 STEINGLASS: I don't think this is a highly
24 critical issue, but this has changed. This changed. The
25 CJI says, accomplice, except in the first paragraph where

1 it names the accomplice. So I will just take the CJI and
2 refer to him thereafter as accomplice.

3 THE COURT: You should know going forward for the
4 rest of this conference and beyond, where there is standard
5 pattern jury instructions, I don't deviate. If there is
6 really a good reason, I will, but I won't just for the sake
7 of it. A lot of really smart people put a lot of hard work
8 into coming up with those instructions. There is no reason
9 to mess with it.

10 So if here the language is accomplice, that's what
11 we'll go with.

12 Okay. All right.

13 Let's look at the joint submission that came in at
14 is 11:26.

15 Let's begin with the most challenging submission
16 facing all of us, which is how you pronounce this word,
17 "eleemosynary." I've said it one hundred times and I still
18 can't get it right.

19 MR. STEINGLASS: You won't get any help from us.

20 THE COURT: My suggestion would be, why do we even
21 have it. I don't think we need it. It's not relevant to
22 the facts of this case.

23 Can we just delete it?

24 MR. STEINGLASS: No objection.

25 COURT REPORTER: Can you spell that, please.

1 THE COURT: E-L-E-E-M-O-S-Y-N-A-R-Y. Which means
2 charity. But we'll move to strike it.

3 Let's go down to the next one.

4 For the definition of intent, the People propose
5 to add, "Thus, a person acts with intent to defraud, when
6 his or her conscious objective or purpose is to do so."

7 The defense suggests, "Thus, a person acts with
8 intent to defraud, when his or her conscious objective or
9 purpose is to lead another into error or to disadvantage."

10 MR. COLANGELO: Thank you, your Honor.

11 So, the first sentence your Honor just read is not
12 the People's proposal. That is verbatim from the CJI
13 charge.

14 As the Court just said, that's the pattern charge
15 for a reason. We think there is absolutely no basis for
16 deviating from it in this case.

17 The second sentence the Court read, the defense
18 proposal, is a citation from the language from the Practice
19 Commentary, but even that Practice Commentary citation
20 refers to a concurring opinion in a court case that talks
21 about what intent to defraud has been suggested to be
22 defined as.

23 And, so, we just think there is really no reason
24 at all to alter the standard practice. We think the Court
25 should stick with the standard charge for the definition of

1 intent.

2 THE COURT: Mr. Bove, this seems like one of those
3 situations where clearly it does deviate from the standard
4 charge, and I don't see a reason to do that.

5 MR. BOVE: The reason that we propose it, Judge,
6 and, obviously, both sides propose some expansion on the
7 intent to defraud element, we proposed it here based on
8 Judge Donnino's Commentaries for this reason: The way this
9 case is now structured, you have the business record
10 charge, and the Government's argument will be, at least in
11 part, that President Trump sought to conceal a conspiracy.

12 So, in that context, that's a very complicated
13 legal concept.

14 Our position is, a criminal conspiracy, this is
15 17-152, Election Law Conspiracy between parties, that the
16 Government will make arguments about, it was a private
17 secret agreement. And then President Trump tried to
18 conceal a private secret agreement of others.

19 We think in that context, where the Government's
20 burden requires proof that the President sought to conceal
21 a conspiracy, an in coed agreement, not a substantive
22 crime, that more emphasis on these intent elements is
23 required.

24 So, what we did was pull from the statutory
25 commentary to try and emphasize this point about what

1 intent to defraud should mean here under these
2 circumstances.

3 THE COURT: I appreciate your argument. I'm
4 going to stick with the standard language.

5 It continues on the next page.

6 Turning then to the expanded charge on intent.
7 Why do you oppose that?

8 MR. BOVE: If I could, Judge. The carry-over
9 language on Page 2, "A person causes a false entry when,"
10 I'm not sure that is from the CJI.

11 THE COURT: You're right.

12 Let me hear from you.

13 MR. BOVE: The issue here, Judge, is -- this would
14 put the jury in a situation where they could convict based
15 on someone else causing a false entry and accessorial
16 liability. It basically puts someone causing the causer --
17 it is a situation where Allen Weisselberg caused someone to
18 do something and President Trump causes Allen Weisselberg.

19 It doubles up on the concept of accessorial
20 liability. It should be struck and we should go with the
21 accessorial liability.

22 THE COURT: I am in agreement with it. I don't
23 like the foreseeable consequence on that. I am going to
24 strike that portion.

25 MR. COLANGELO: If I could be heard, a few

1 sentences on that.

2 We think this is an extremely important concept
3 for the Court to charge the jury on. In part, because of
4 how the defense presented the case in opening statement.
5 The defense made extensive arguments in opening -- this is
6 at the transcript Page 893 to 895. Sort of a lengthy
7 discussion of the fact that the defendant did not himself
8 enter the accounting records directly.

9 The Court's authority under CPL 300.10 (2) to
10 charge the jury, includes instructing the jury on material
11 legal principles that are important to the case.

12 We think the concept of made or caused,
13 particularly because of how the defense says it, both
14 presented the case in opening and indicating that they
15 intend to argue it in summation, we think that's a critical
16 concept. And the reasonably foreseeable language that we
17 included here is drawn directly from the case law,
18 including the four cases that we cited in footnote that the
19 Court referenced in our proposal.

20 There is no disagreement, we don't understand
21 there to be, that causing false entries occurs when the
22 falsification of those entries is the reasonably
23 foreseeable consequence in this action.

24 So, we think it does not, in fact, merge the
25 accomplice problem, which is a critical instruction to the

1 jury, to approach and understand the facts of this case.

2 MR. BOVE: Each of the cases cited by the
3 Government for this proposition are not -- they don't
4 support -- they're not jury instruction cases at all. One
5 of them, Murray, is an accessorial liability case.

6 Legally, there are two reasons this would be
7 error.

8 Number one, this concept that I've already
9 articulated, it would put the jury in the position of
10 finding the President guilty of causing the causer two
11 steps of accessorial liability. That's number one.

12 Problem number two is made clear by the CJI charge
13 on accessorial liability. There has to be corresponding
14 intent. To tell the jury at this point in the instruction,
15 you can find causation based on reasonable foreseeability,
16 but de-couple that from the intent requirement, would make
17 this completely wrong as a matter of law.

18 MR. COLANGELO: Just two quick points.

19 First, the defendant could act in concert with
20 Mr. Weisselberg to make or cause Jeffrey McConney or
21 Deborah Tarasoff to make false entries.

22 But, second, the cases directly support the legal
23 instruction that we propose.

24 The People versus Miles case, for example, is the
25 affirmative conviction of a defendant who was convicted of

1 falsifying business records by attaching jumper cables to
2 the electrical box outside his home, and in doing so,
3 making or causing false entries in the records of the power
4 plant.

5 Nobody said he went into the power company's power
6 accumulation system and altered how the billing records
7 were going to coming out, but applying jumper cables
8 supported the conviction.

9 So, on facts like the ones we have here, and given
10 the way the parties have had to argue the case, we think
11 this is a very straightforward explanation of the law that
12 is important for the jury to understand.

13 THE COURT: My only question: Isn't this already
14 covered in the definition of accomplice liability?

15 If you look at the second page, the entire
16 definition, the second page, the second full paragraph
17 says, "The People have the burden of proving beyond a
18 reasonable doubt that the defendant acted with state of
19 mind required for the commission of the crime, and either
20 personally, or by acting in concert with another person,
21 committed each of the remaining elements of the crime."

22 And it goes on to say, "It doesn't matter what the
23 relative contribution was to the crime of each of the
24 defendants.

25 Why is this basically not duplicative of that?

1 MR. COLANGELO: I don't think it's duplicative of
2 that, irrespective of the accessorial concept. There is a
3 threshold definitional question about what it means to
4 cause a false entry.

5 So, we think acting in concert does not, in fact,
6 capture this issue. The defendant causes false entries
7 when he sets this scheme in motion and that's a reasonably
8 foreseeable consequence of that action.

9 MR. BOVE: Judge, the Miles case that we're
10 talking about is a sufficiency analysis after the fact.
11 It doesn't support providing instruction. That, as your
12 Honor said, would be duplicative.

13 I think really the central issue is, you cannot
14 de-couple the accessorial liability mens rea and just give
15 this instruction here without that.

16 This whole thing is required. That is what the
17 jury needs to find to return a verdict.

18 THE COURT: I will reserve decision on that.

19 Right now my inclination is to strike that
20 language from the charges.

21 Looking at the expanded charge of intent, why does
22 the defense oppose the entire charge?

23 MR. BOVE: We are just following your Honor's less
24 is more guidance on this one.

25 THE COURT: So, we'll leave it. I think it's an

1 appropriate charge.

2 You also oppose intent to defraud. Tell me why.

3 MR. BOVE: I think very much for at least similar,
4 if not, the same reasons that our proposal was stricken.
5 This elaborates in ways that are favorable to the
6 Government and not entirely accurate as matter of law on a
7 definition that your Honor seems inclined to let stand on
8 its own based on the CJI charge.

9 There is also, I think, a very significant issue
10 with suggesting -- with instructing the jury that intent to
11 defraud could include defrauding a Government in the voting
12 public based on the facts of this case. We raised it in a
13 footnote to our request.

14 The issue is under Tavares, a Court of Appeals
15 case the Government cites, we're dealing with enhanced
16 intent element to elevate this to a felony, and if the jury
17 is permitted to find that intent to defraud includes intent
18 to defraud the Government, it really leaves nothing for the
19 part of the concealment mens rea because the Government's
20 theory is that involved a conspiracy to defraud the
21 Government in the voting public.

22 So, we think to use this language, you know, we
23 know everybody is trying to put themselves in the best
24 position. We understand what we're doing here, but this is
25 just that. It's their argument. We're not going to be

1 making arguments along these lines. But this instruction
2 would, at a minimum, be confusing, we submit legal error,
3 because it will permit the jury to return a guilty verdict
4 by merging intent to defraud and the other part of the
5 enhancement element.

6 MR. COLANGELO: This is not argument. Every
7 sentence we cited here is anchored in the Court's ruling,
8 in the Court's decision on Omnibus Motion. So, there was
9 argument. We had argument last Fall. We briefed it
10 extensively to the Court. The Court ruled.

11 In your Honor's own words, and acknowledging
12 controlling case law, defined "intent to defraud," and in
13 the next section "intent to commit or conceal another
14 crime."

15 So, these two sections, both intent to defraud and
16 intent to commit or conceal another crime, are drawn
17 directly from this Court's existing analysis of those two
18 elements of the offense.

19 And we think under CPL 300.10, this is a perfect
20 example of an instance where the charging obligations
21 should include explaining to the jury how the facts of the
22 case apply to the law, particularly because the
23 circumstances like intent to defraud the Government, or
24 intent to defraud the voting public are germane here.

25 One other point here, your Honor, unlike in the

1 FECA charge, for example, where we agree that it makes a
2 lot of sense for the Court to take a less is more approach
3 because there the Court was considering charging language
4 on an unlawful means element of a predicate offense, these
5 are actual definitional terms in the charged crime.

6 So if there is anywhere that it makes sense to
7 give the jury more guidance, it's in defining terms like
8 intent to defraud and intent to conceal or commit another
9 crime.

10 The Court took a similar approach in the Trump
11 Corporation tax fraud case by defining when the defendants
12 wrongfully took, obtained or withheld money from their
13 owner in order to support larceny charges. And the Court
14 referred to the owner as the U.S. Internal Revenue Service.

15 And so, this is an approach the Court adopted in
16 other cases, and we think the additional language here is
17 warranted.

18 THE COURT: I will reserve on that. I don't have
19 a problem with the very last sentence. It's a full
20 paragraph. Intent to defraud is not constricted to an
21 intent to deprive another of property or money. In fact,
22 intent to defraud can extend beyond economic concerns.

23 I don't think that is in dispute. That is what I
24 ruled earlier, and it is the law.

25 MR. BOVE: I agree, that it's not something we're

1 arguing. It's what your Honor ruled. It is in dispute for
2 the record. We understand the Court's ruling.

3 Our position is, that unless we open the door to
4 that type of instruction, it would be a mistake here under
5 the circumstances of this case to be instructing the jury
6 how to negate about what they do not have to find.

7 The Government has a serious burden of proof here
8 and unless we've opened the door to arguments like this,
9 these instructions, and there is a couple of more in the
10 next section about what the Government doesn't have to do,
11 they're really not appropriate.

12 THE COURT: I think the Government would still
13 have to prove that there was an intent to deprive another.
14 What they don't have to prove is that it was property or
15 money. They have to prove that it was something.

16 Right?

17 MR. BOVE: I agree with that, Judge, and I submit
18 that we capture that accurately by quoting Judge Donnino.

19 And the issue now that we're going back and forth
20 on, does the Court need to take one step further in a
21 situation where we're not taking this argument. We
22 understand the Court's ruling; I don't think we opened the
23 door to it, and we will not open the door to it in
24 closing.

25 So, should the jury be instructed about what they

1 don't have to find with respect to the Government's
2 burden?

3 And we think that things like that sort of
4 diminish things in the case and what the Government has to
5 do here.

6 THE COURT: I don't think this turns on whether
7 you opened the door or not. The People have a burden of
8 proof. It is a very high burden of proof. They have to
9 prove every element of the offenses beyond a reasonable
10 doubt. I don't think they have to raise a particular
11 element or a particular facet of an element that they
12 directly attack, before they make an attempt to prove
13 element.

14 But I will hear from you.

15 MR. COLANGELO: I am not sure I have anything to
16 add to what the Court just said.

17 We think, as your Honor has acknowledged, this
18 is -- and as the Court already held, this is the
19 controlling definition of intent to defraud. We think
20 given the facts of this case, it is perfectly appropriate
21 that the jury be instructed on this.

22 THE COURT: Yes.

23 MR. BOVE: We understand the way your Honor is
24 inclined. But, if that is the case, if we're going to tell
25 the jury what they're not required to prove, why would we

1 not also tell them -- give them some greater concept of
2 what the Government is required to prove. And I am
3 referring back to the sentence that we proposed, with a
4 pretty authoritative commentary about what the statute
5 means, from somebody who looked at the issue very closely,
6 but maybe it compromises to do both, to give what we
7 propose --

8 THE COURT: What are you referring to?

9 MR. BOVE: The blue language on Page 1 associated
10 with Footnote 6.

11 THE COURT: But, that's a different heading.
12 That's a different subject.

13 MR. BOVE: It's not. We worked very hard to get
14 these documents together for the Court. There are two
15 sentences here that both relate to intent to defraud.

16 My point is this: If there is going to be sort of
17 an expanded instruction on intent to defraud, we would ask
18 that your Honor carefully consider giving the language we
19 proposed, "A person acts with intent to defraud, when his
20 or her conscious objective or purpose is to lead another
21 into error or disadvantage."

22 And, then, I'm reading some tea leaves here, your
23 Honor, is inclined to give the jury sort of a constraining
24 instruction on that term, and say it doesn't have to be an
25 economic disadvantage. We understand that, but we think

1 that is the balanced way to go forward.

2 MR. COLANGELO: The problem with revisiting that
3 sentence, your Honor, is that it's not an accurate
4 characterization of the law, notwithstanding that it comes
5 from the Practice Commentaries.

6 I mention, again, that it refers only to a
7 suggestion and concurring opinion. But, as your Honor
8 already held in the Court's Omnibus Opinion, that intent to
9 defraud does not need to be directed at any person or a
10 specific person. So the reference to leading another into
11 error just does -- is not a statement of the law as the
12 Court has acknowledged already.

13 THE COURT: Let's move on to intent to commit or
14 conceal another crime. Tell me why you are opposing that?

15 MR. BOVE: It's a very similar issue, so I don't
16 need to belabor it. These are further instructions
17 extrapolated from case law and from your Honor's pretrial
18 rulings. We understand and have adhered to it, both the
19 effect of giving an instruction like this is to, again,
20 calling the jury's attention to things that the Government
21 does not have to prove, which we are not suggesting that
22 they have to prove.

23 So, there is a lot of yellow on this page and the
24 preceding page. What we perceived here is a risk of burden
25 shifting and diminishing the burden that your Honor talked

1 about that is very significant for the People here.

2 And so, to say things about what they do not have
3 to prove, where we haven't argued otherwise, we don't think
4 this is an issue for the jury to be instructed on.

5 MR. COLANGELO: We don't think there is any burden
6 shifting risk here. Although, this language isn't in the
7 pattern charge, similar language does exist in other
8 pattern charges.

9 So, for example, the standard jury instruction on
10 accessorial liability reads, "In order to find the
11 defendant guilty, however, you need not be unanimous on
12 whether the defendant committed the crime personally or by
13 acting in concert with another, or both."

14 So the CJI standard charges do include this kind
15 of language regarding what the Government need not prove
16 in circumstances where it would otherwise be confusing for
17 the jury not to get an instruction like that.

18 The reasonable doubt charges also says what the
19 People don't have to prove.

20 And then, your Honor, again, particularly where we
21 are going to be going into some detail regarding the
22 contours of the object crime, the intended crime, the
23 predicate, we think it would be particularly confusing for
24 the jury not to be told what they are to make of the
25 instruction they are about to get regarding the Election

1 Law Violation and then regarding the unlawful means to
2 support the Election Law Violation.

3 We think there is a significant risk that would
4 retire into the deliberation room and wonder, do we have to
5 believe that all of these other crimes were committed. We
6 think this is a central part or important part of the
7 Court's charge to the jury.

8 THE COURT: Let's jump ahead to the final one on
9 this submission list I am concerned about. I am concerned
10 about all of them, but I am particularly concerned about
11 this one on Page 4, which reads, "That the defendant did so
12 with intent to defraud, that included an intent to commit
13 another crime, or to aid or conceal the commission
14 thereof."

15 The defense then proposes adding the language,
16 "Thus, for the second element, the People must establish
17 beyond a reasonable doubt two separate intents, the intent
18 to defraud, and the intent to aid or conceal the commission
19 of another crime, which I will define for you shortly."

20 MR. BOVE: We're quoting there, again, from the
21 Practice Commentaries, recognizing that it's not the CJI.

22 It's an important point here because, again, the
23 way that the Government's charges are not structured, this
24 idea that there needs to be, from our perspective, intent
25 to defraud, but some kind of intent with respect to in coed

1 conspiracy. That is the New York Election Law 17-152
2 predicate.

3 So, under those circumstances where the jury is
4 being asked to evaluate, not only intent to defraud, but
5 the present intent with respect to in coed promise, that
6 this bears emphasis in the same way that your Honor seems
7 inclined to place some emphasis on the other parts of the
8 175.10 instruction that we just went through. This is an
9 issue we feel was appropriate.

10 MR. COLANGELO: This proposed language is
11 inconsistent with the text of the statute, which says,
12 "That a person is guilty of falsifying business records in
13 the first degree, when he commits the crime of falsifying
14 business records in the second degree, and when his intent
15 to defraud includes an intent to commit another crime or to
16 aid or conceal the commission thereof."

17 There is nothing in the statute about two separate
18 intents. The Donnino Commentary doesn't cite any cases
19 regarding charging language of how the jury is supposed to
20 understand the statute, and the text of this statute alone,
21 contemplating the notion that the same set of facts could
22 satisfy both intents.

23 Obviously, we agree that the People have to
24 establish two elements, an intent to defraud and that the
25 intent to defraud includes an intent to commit or conceal

1 or aid another crime.

2 But the fact that there is a separate element for
3 the first degree felony offense doesn't mean they're
4 separate intents. It would rewrite the statute to give
5 this instruction.

6 THE COURT: The first question appears to be
7 semantics, but it's not. It's a material change in the
8 statute.

9 The second, mens rea.

10 I understand what the Commentary is referring to.
11 I understand what Judge Donnino is referring to, but that
12 second level of intent, for lack of a better term, is
13 incorporated by reference into the first.

14 So, it reads: That the defendant did so with
15 intent to defraud. That's the intent. That included an
16 intent to commit another crime. It's not a separate set of
17 mens rea, separate requirement of intent. It's a
18 requirement that that be a part of the intent.

19 So I'm not going to change the statute. I am
20 going to read it exactly as it is.

21 You also submitted some standard jury charges,
22 which I don't think -- I don't think we need to go over
23 unless under the section of inconsistent statements, there
24 is an objection to inserting the language, "That you may
25 consider whether a witness testified to a fact here at

1 trial that the witness omitted to state at a prior time."

2 MR. STEINGLASS: I think that was an inadvertent
3 submission on our part. I think we both agreed on that.

4 There is one part of the credibility charge I
5 think we have just agreed that we're also in agreement
6 about, the second disputed paragraph, which is one about
7 the witness testifying falsely. I think defense has
8 withdrawn that language, that requested language as well.

9 MR. BOVE: We're withdrawing it because we were
10 not permitted to and did not elicit from Mr. Cohen Judge
11 Pauley's findings, so we understand.

12 THE COURT: Looking at the submission that I
13 received today at 1:05, beginning with the Election Law
14 Section 17-152 predicate, the People are proposing language
15 that reads, "Thus, a person acts with the intent that
16 conduct be performed, that will promote or prevent the
17 person from public office by unlawful means, when his or
18 her conscious objective or purpose is that such conduct be
19 performed."

20 The defense is suggesting language that reads,
21 "Thus, a person acts with intent of conduct constituting a
22 crime be performed, when the person acts willfully that a
23 conscious objective or purpose that such conduct be
24 performed."

25 Continuing on the next page. "Evidence that

1 President Trump was present when others agreed to engage in
2 performance of a crime, does not by itself show that
3 President Trump personally agreed to engage in the
4 conspiracy. Proof of separate or independent conspiracy is
5 not sufficient. In determining whether or not any single
6 conspiracy has been shown by the evidence in the case, you
7 must decide whether common goals or objectives existed and
8 served as the focal points in the efforts and actions of
9 the members of the agreement."

10 "In arriving at this decision, you may consider
11 the length of time that the alleged conspiracy existed and
12 mutual independence or existence between various persons
13 alleged to have been its members and the complexity of the
14 goal or objective."

15 So, let's begin with that one sentence the People
16 want to add.

17 MR. COLANGELO: So, your Honor, this is drawn from
18 and tracked as closely as possible with the CJI charge for
19 conspiracy in the sixth degree, Penal Law 105.00. We
20 simply substituted in language referencing that the conduct
21 that would be performed is the conduct to promote or
22 prevent the election of a person to public office by
23 unlawful means.

24 We have taken the CJI charge for Conspiracy 6 and
25 adapted it for this circumstance.

1 We think, as the Court said a moment ago, tracking
2 as closely as possible where there is standard CJI
3 language is appropriate and useful.

4 Here there is standard CJI language on conspiracy.

5 THE COURT: You have your added language to that
6 paragraph. You go on to add two more paragraphs.

7 MR. BOVE: So the yellow and blue on Page 1, I
8 think are competing proposals.

9 THE COURT: I understand.

10 MR. BOVE: I think the real dispute between the
11 parties is the wilfully language, from our perspective.

12 From our perspective, for the 17-152 conspiracy
13 to be a criminal conspiracy, there has to be intent that
14 reflects the highest level of intent of the objects of the
15 conspiracy.

16 Here we've had the argument at the beginning about
17 FECA, and our position is that, for this to be a criminal
18 conspiracy at all, it has to be a criminal violation of
19 FECA. Criminal conspiracy has to have a criminal object.

20 But, in addition to that, the Federal tax unlawful
21 means that the Government has proposed, they concede in
22 their request, that that is a statute that requires
23 wilfulness.

24 So, there are two unlawful means proposed by the
25 Government, two categories, at least, FECA and tax crimes,

1 that both have that wilfulness mens rea.

2 And so, our position is that that needs to be
3 imported up into the 17-152 mens rea. That is, the mental
4 state required to join the conspiracy.

5 Our cite, this is in Footnote 25 of our request to
6 charge, People versus Caban, C-A-B-A-N, New York Court of
7 Appeals, 2005. This is an individual who is prosecuted for
8 conspiracy and necessarily is an individual that must have
9 the prescribed mens rea, the requisite intent to join
10 others and commit a substantive crime.

11 So that second sentence from Caban, we submit, is
12 controlling here.

13 So, because the object of the unlawful activity
14 under 17-152 must be criminal -- and we're going to have
15 this argument in a little bit, we don't think that the tax
16 predicate should go to the jury.

17 But, if it does, it will have this wilfully
18 requirement, same with respect to FECA. So, we think when
19 you are describing this Election Law Conspiracy, for you to
20 be describing a crime, a potentially valid predicate to
21 elevate the charges to a felony, it has to have this wilful
22 language.

23

24 (Whereupon, Theresa Magniccari, Senior Court Reporter, is
25 relieved by Laurie Eisenberg, as Senior Court Reporter.

1 (Continued from the previous page.)

2 MR. COLANGELO: So, your Honor, the reference to
3 the statutory language in the Federal Tax Provision is not
4 a concession. It's a -- it is a description of the
5 statutory provisions that the fact pattern in this case
6 meets and that make the grossing up agreement and the
7 intent to conceal the reimbursement as illegal income
8 under the Internal Revenue Code. It violates those or
9 would violate those Criminal Provisions of 26 U.S.C.

10 So, that's not a concession in some cases
11 "willfulness" is required. It's not.

12 The underlying criminal conduct violates the
13 criminal prohibitions of FECA anyway, but clearly meets
14 the standard of "willfulness".

15 That's not a concession.

16 Mr. Bove's point about the elements required to
17 establish conspiracy, our position is we think the CJI got
18 it right.

19 And if we track the CJI language, that's the most
20 constructive way to instruct the jury in this context.

21 THE COURT: I understand the dispute there,
22 Mr. Bove.

23 Tell me about the final two paragraphs.

24 MR. BOVE: The -- on paragraph -- excuse me. On

25 Page 2 --

1 THE COURT: Page 2. That sounds right.

2 MR. BOVE: The first paragraph: "Evidence that
3 President Trump was present", that's a standard "mere
4 presence" charge.

5 I think, based on the conversations and reviewing
6 the Government's papers, what I would propose -- it's a
7 standard charge out of the CJI.

8 What I propose is, say, "Remove President Trump
9 from the equation," because we're mindful of the fact that
10 the Government doesn't have to establish this crime in its
11 entirety.

12 But, the concept of "mere presence" is important
13 because of the way the evidence came in about President
14 Trump being in certain places at certain times, and the
15 same with Pecker, Weisselberg, throughout.

16 We think this is an accurate statement in the law
17 about the conspiracy crime that is extraordinarily
18 important to the jury's deliberations if it gets to the
19 question of whether or not there's a felony.

20 THE COURT: Isn't that concern addressed in other
21 parts of the charge?

22 MR. BOVE: I'm not sure what you mean.

23 THE COURT: Such as the accomplice liability
24 section, that mere presence at the scene of a crime,
25 without more, by itself, does not constitute guilt?

1 MR. BOVE: I don't think it accomplishes it for
2 purposes of a conspiracy, Judge.

3 They are similar concepts, "mere presence".

4 But, I think to protect our rights, they bear
5 repeating, what we're introducing is a distinct concept:
6 There's the criminal conspiracy predicate here. There's
7 the same from the accessorial criminal liability that
8 could give a conviction in 175.10.

9 THE COURT: What's the harm of including that?

10 We're including accessorial liability. This
11 section includes conspiracy. Why not include it there?

12 MR. COLANGELO: It would mislead the jury for two
13 reasons.

14 The first, as we addressed in the briefing and
15 the Court's decision, for months, the Defendant himself
16 doesn't need to have committed this crime to have
17 culpability under the FBR charge. It's if he concealed the
18 admission of someone else's crime.

19 It's confusing to instruct the jury of the
20 import of his mere presence when, if the facts show
21 after-the-fact he decided to conceal it, it would also be
22 an FBR violation.

23 The second reason is the trial record doesn't
24 support an argument of mere presence.

25 The extensive argument regarding the evidence of

1 the Trump Tower meeting of August of '15 is evidence of
2 participation, not mere presence.

3 This would be confusing and lead the jury in a
4 skewed understanding of the facts the trial record does
5 not support.

6 THE COURT: That's a different argument.

7 Is there a reasonable view of the evidence to
8 support that claim?

9 MR. BOVE: We certainly think so.

10 I think the August 2015 meeting was a good
11 example. From our perspective, what was discussed in that
12 meeting, if you credit the People's witnesses, is a series
13 of pretty standard campaign activity that were not
14 criminal and being practiced by candidates around the
15 country for decades. Mr. Pecker described some of that.

16 And the jury can certainly reach that finding.

17 So, I was actually -- before Mr. Colangelo said
18 that, I was going to raise that as my example as mere
19 presence can be very much a part of the defense here,
20 because sitting in that room, hearing people talk about
21 trying to get positive press coverage, avoid negative
22 press coverage, not have negative stories come out about
23 someone, the Defense's position is there's nothing
24 criminal at all about that.

25 So, that's why I think "mere presence" is

1 important here.

2 We're going to get to the next part.

3 This part we're pulling from CJI.

4 THE COURT: So, if there's nothing criminal about
5 it, what difference does it make whether he's present or
6 not?

7 MR. BOVE: In the same way that we are being
8 clear with the jury on other issues in 175.10, such as
9 what the Government is not required to prove with respect
10 to intent to defraud, this is an issue where we're
11 requesting clarity on our side about what does not
12 constitute a willful joinder of a felony -- of a
13 misdemeanor 17-152 conspiracy that could have very serious
14 consequences in the jury's deliberations.

15 THE COURT: Tell me about the last paragraph
16 where you talk about "multiple conspiracies".

17 MR. BOVE: We are requesting instructions on
18 "multiple conspiracies" because we think there is a view
19 of the evidence where the jury can look at the August 2015
20 meeting and find an agreement to -- I think as the statute
21 puts it -- 17-152 puts it: Promote a candidate, but
22 without willful means.

23 But then look at the testimony from Cohen about
24 what happened in January of 2017, and look at a different
25 conspiracy that didn't involve Mr. Pecker and didn't

1 involve the same players. Maybe one person overlapped.
2 One civil conspiratorial agreement in August of 2015 and
3 one -- in crediting the best view for their side of the
4 evidence -- potentially criminal conspiracy in
5 January 2017.

6 And we need to be clear with the jury that they
7 need to find -- when they're looking at this issue,
8 evidence of President Trump having intent to commit or
9 conceal a criminal conspiracy. And that's what we're
10 trying to capture here in the "multiple conspiracies"
11 instruction.

12 MR. COLANGELO: Language like this is necessary
13 only when the Defendant is actually charged with a
14 conspiracy, which he isn't in this case.

15 And the jury doesn't have to decide whether he's
16 guilty of a single conspiracy or whether there were,
17 instead, multiple conspiracies.

18 It's irrelevant whether there was a single
19 conspiracy or multiple ones, as long as he had some intent
20 to conceal the conspiracy, whether he, himself, even
21 participated in it.

22 So, we think it's extraneous and shouldn't be
23 included, at risk of confusing the jury.

24 One point, going back to the comment Mr. Bove
25 made on the trial record regarding the Trump Tower

1 meeting.

2 There just is no reasonable view of the evidence
3 that that was a perfectly benign discussion or a
4 high-minded conversation about democracy.

5 We know that because Mr. Pecker left that
6 meeting, immediately told a small handful of trusted
7 lieutenants, directed them to keep it secret, and then
8 proceeded to do all the other steps in the conspiracy
9 which we allege are unlawful, including things he had
10 never ever done before and were not part of his typical
11 practice.

12 The trial doesn't support the first paragraph,
13 either.

14 THE COURT: Let's turn to "unlawful means".
15 Start with the People.

16 MR. COLANGELO: Thank you, your Honor.

17 Here, I think the two paragraphs that we propose
18 that are bracketed in yellow are intended to give the jury
19 some guidance on what "unlawful" means.

20 The most critical point here is that the jury
21 does not need to conclude unanimously what the specific
22 unlawful means are. That's the key point here.

23 We understand the Defense opposes that, but
24 there's sort of well-established New York Law, that a jury
25 does not have to be unanimous about unlawful means about

1 accomplishing a single offense.

2 So, I think the key point here for this
3 instruction is to advise the jury that, yes, there has to
4 be some unlawful means, and to alert them as to what those
5 unlawful means are, but also advise them that they don't
6 have to unanimously agree on each of the unlawful means.

7 MR. BOVE: That is the heart of the dispute in
8 these two competing proposals, is whether the jury should
9 be required to find unanimously which of the 17-152
10 unlawful means are at issue.

11 We understand the law that's been cited here.

12 We think your Honor has some discretion.

13 This is, obviously, an extraordinarily important
14 case.

15 We do have a motion pending from yesterday,
16 still.

17 Assuming this is going to go to the jury, in the
18 way that these statutes are being used in this case --
19 which there's not much, if any, precedent for -- we submit
20 that the jury should be required to make very specific
21 findings, as specific as Your Honor's discretion would
22 permit, so it's very clear what happened at this trial.

23 THE COURT: Do you agree, that's not ordinarily
24 required?

25 MR. BOVE: Certainly.

1 We think it's important under the circumstances
2 of this case and think it's in your Honor's discretion to
3 make clear the record here.

4 MR. COLANGELO: The importance of the law is not
5 deviating from the law; it's to apply the law as
6 consistently as possible, as the Court would do in every
7 other case.

8 That is, there's no reason to rewrite the law for
9 this case.

10 THE COURT: I agree.

11 I think I understand what you're saying, what you
12 mean when you're saying it's an important case.

13 What you're asking me to do is change the law,
14 and I'm not going to do that.

15 Looking at Paragraphs 2 and 3, those seem very
16 similar to me.

17 What's the difference between those two
18 paragraphs?

19 MR. COLANGELO: So, your Honor, we have a couple
20 of concerns with Defense proposal.

21 The first is that it refers to a requirement that
22 there be proof that the goal of the conspiracy was to
23 promote the election of a person by unlawful means.

24 And, as we've discussed, the -- the actual
25 commission of the predicate crime does not need to be

1 established beyond a reasonable doubt, so we think it's
2 confusing and inaccurate to refer to a requirement of
3 proof.

4 Again, the only proof obligation the People have,
5 which is a high one, is to establish that this Defendant
6 had made or caused false entries in the business records
7 of his enterprises, with an intent to defraud and the
8 intent to conceal the commission of another crime. But,
9 there's no proof requirement as to the object crime.

10 So, we oppose the use of the word "proof".

11 I think the second key disagreement here is we
12 believe the Court should advise the jury that there are
13 three different unlawful means that the co-conspirators
14 intended to execute in order to promote the Defendant's
15 election unlawfully: violations of the Federal Election
16 Campaign Act, falsification of other business records, and
17 the violation of Tax Laws.

18 And we understand -- and I believe this is a
19 sufficiency argument.

20 We understand that the Defense opposes that third
21 category, the violation of Tax Laws.

22 MR. BOVE: Judge, we think that the Government
23 does have to put forward some proof of the objects of the
24 17-152 conspiracy. Because if they don't prove up
25 criminal objects, then there is no criminal conspiracy.

1 In that event, there is no predicate to elevate the 175.10
2 charges up to a felony.

3 So, under these circumstances, the way the
4 Government chose to put this theory of this case to this
5 jury, there does need to be proof. Because, otherwise, the
6 jury could find that there was a conspiracy to promote
7 President Trump's election without unlawful means, in
8 which case, that would not support what the Government is
9 going to ask this jury to do.

10 So, we think that our language is an accurate
11 statement of the law, and proof is required that there
12 were criminal objects of this conspiracy. Because,
13 otherwise, there's no unlawful means. In that event,
14 there's no 17-152 conspiracy, and there's no basis to
15 elevate this up to a felony.

16 THE COURT: Yes.

17 MR. COLANGELO: Under People v. Mackey, the
18 People weren't even required to identify any object crime.

19 As the Court knows, in The Trump Corporation
20 trial, the jury instructions did not identify an object
21 crime.

22 In nearly all burglary cases, the Court doesn't
23 identify an object crime.

24 We attempted to do so to make the evidence as
25 clear as possible for the jury and to help them understand

1 the facts of the case.

2 But, where there's no obligation to identify even
3 the object crime, there is no reason to be held to the
4 proof standard of the object crime.

5 What we have to prove is the Defendant's intent
6 and the intent to aid or conceal.

7 MR. BOVE: Mackey had to come up at least once at
8 this conference.

9 Look. There's a very significant difference
10 between the facts in Mackey and a burglary charge, where
11 the Court of Appeals said there can be evidence of
12 criminal intent of the fact of the entry, the manner in
13 which the burglary happened.

14 This is not that case.

15 And your Honor has discretion here.

16 The really important issue is: The predicate that
17 the Government is moving forward on requires proof of
18 unlawful means.

19 The jury cannot infer that the predicate is
20 established just by the fact that there was an agreement
21 to promote President Trump's election in 2016.

22 Of course there was. He won.

23 They have to establish some kind of unlawful
24 means to make that a crime.

25 That makes this very different from Mackey.

1 That's why we structured these proposals in the
2 way that we did.

3 THE COURT: Looking at violation of Tax Laws on
4 Page 3, Section 3.

5 People.

6 MR. COLANGELO: Thank you, your Honor.

7 As we understand it, the Defense objection to
8 including this charge at all is that I believe the Defense
9 is arguing that the evidence is insufficient to establish
10 Tax Law violations.

11 We just think the trial record refutes any
12 argument along those lines.

13 The record shows, both through witness testimony
14 and the documentary evidence, including Weisselberg's
15 handwritten notes on the Essential Consultants' bank
16 statement at People's Exhibit 35, Jeff McConney's
17 contemporaneous handwritten notes, People's 36, the record
18 shows that part of the intended concealment here was to
19 camouflage the reimbursement as income so it wouldn't be
20 noticed. And in order to camouflage it as income or as a
21 consequence of camouflaging it as income, they doubled it,
22 they grossed it up for tax purposes.

23 Weisselberg and McConney even wrote down "grossed
24 up" on People's 35, "times two for taxes" on People's 36.
25 So, falsely identifying corporate payment as

1 reimbursement -- as income rather than reimbursement.

2 And then, as the Court also saw through the 1099s
3 that were submitted to the IRS, carrying forward that
4 deception through documents that not only were intended to
5 be, but ultimately were, submitted to Government agencies,
6 all is evidence of false -- submission of false
7 information to Tax Authorities; and those elements, alone,
8 establish the City, State and Federal Tax violations that
9 we identified.

10 MR. BOVE: The problem with this theory, Judge,
11 and the reason that it shouldn't go to the jury is that
12 Michael Cohen testified that he didn't know anything about
13 it.

14 And I'm referring to the transcript at 3490,
15 Lines 6 through 9.

16 He was asked: "What, if any, understanding do you
17 have about why he" -- why Allen Weisselberg -- "grossed
18 that reimbursement up to \$360,000?"

19 "Answer: I don't know. And, to be honest, I
20 didn't even really think about it. I just wanted to get my
21 money back."

22 That testimony is the reason that the tax
23 predicate should not go to this jury, because what the
24 Government's theory is, is that they're talking about tax
25 filings by Mr. Cohen.

1 He didn't agree to do anything.

2 There's that 1099 Miscellaneous Form which just
3 only reflects and it confirms in an open way that payments
4 were made to Mr. Cohen. The Trump Organization was
5 transparent about this.

6 That's not evidence of some kind of agreement to
7 make false tax filings by Mr. Cohen.

8 And Mr. Cohen testified that he didn't know
9 anything about it.

10 So, that's the factual basis for this argument.

11 MR. COLANGELO: I don't think that testimony can
12 fairly be characterized as indicating Mr. Cohen didn't
13 know anything about it.

14 He separately testified that it was grossed up
15 because he was going to take it as income.

16 He knew full well it was not income. He knew it
17 was a reimbursement.

18 The trial record supports it was a reimbursement
19 because it tracks directly the \$100,000 to Keith Davidson.

20 Arguably, there's competing evidence the parties
21 can present to the jury.

22 We don't remotely think it's income for work.

23 We think the transcript shows he knew he was
24 getting income for reimbursement that they were calling
25 "income" when it's not.

1 He also said over and over again that the checks
2 were reimbursement, they were not payment for a retainer
3 for services rendered.

4 So, all of that supports the view that he knew he
5 was getting money called "income" when it wasn't.

6 That, alone, supports the tax violation, Judge.

7 (Whereupon, Senior Court Reporter Lisa Kramsky
8 relieves Senior Court Reporter Laurie Eisenberg, and the
9 transcript continues on the following page.)

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1 (The following proceedings are continued from
2 the previous page.)

3 MR. BOVE: Separate from the factual issue here,
4 Judge, we do have our additional position, which is that
5 these -- this back and forth that we are talking about, and
6 we don't think that the inferences that were just described
7 are supported by the trial record.

8 But even if they were, an agreement after the
9 election to do these things is not an agreement to promote
10 President Trump's candidacy in the 2016 election.

11 A conspiracy doesn't automatically continue past
12 the accomplishment of its objectives.

13 And so, the issue here is that on the
14 Government's theory, when President Trump won, the
15 conspiracy -- this is 17-152 -- the conspiracy was
16 accomplished.

17 And so, for that additional reason, as a matter of
18 law, the tax predicates should not go to the jury on this
19 theory because they could not have possibly have promoted
20 President Trump's election, because it had already happened.

21 THE COURT: Yes?

22 MR. COLANGELO: I think the Court rejected that
23 argument, as a matter of law, in your Honor's decision on
24 Omnibus Motions in February.

25 And, in any event, the trial record clearly

1 supports, and a rational juror could conclude, that where
2 one of the purposes of the conspiracy was to hide damaging
3 information and where there was an agreement made in advance
4 to conceal the nature of the transactions, that the ultimate
5 consummation through the repayment agreements is part of a
6 continuous course of conduct.

7 And it doesn't matter that it happened a few months
8 after the election, rather than before.

9 MR. BOVE: But those are factual arguments, Judge.

10 What the statute that we're talking about prohibits
11 is promoting a candidate in an election. The election was
12 over at this point.

13 These alleged tax crimes that we weren't even
14 allowed to ask Mr. Cohen about are not -- they didn't --
15 they are not unlawful means on the Government's theory of an
16 election that has already happened.

17 There is also no evidence that The Trump
18 Organization took a deduction on this or that President
19 Trump took a deduction on this.

20 There is no evidence of any tax filing on the
21 company's side either.

22 And so, there is just not enough evidence for these
23 things to go to the jury.

24 MR. COLANGELO: I think the Court addressed that
25 argument as well, in granting the People's motions to quash

1 the subpoenas to Mr. Cohen who could -- where your Honor
2 held that evidence regarding his ultimate tax treatment of
3 the payments is irrelevant to the question of whether, when
4 they decided in January 2017 to gross it up, and to do so in
5 order to conceal the reimbursement as income, whether that,
6 at that moment, included an intent to commit tax law
7 violations, which we believe it did.

8 THE COURT: All right. I have one more question,
9 then I want to take a short break.

10 The People have submitted proposed language for
11 Counts 32 through 34.

12 Have you had a chance to look at them?

13 MR. BOVE: We have, Judge.

14 And our concern with the proposal is that to try
15 and summarize the elements at the end, as well as the
16 description of which document is attached to which count,
17 would be to sort of limit the jury's consideration or at
18 least there would be a risk of them confusing their
19 consideration of all of the things that you told them about
20 each of the counts.

21 So, we think the better course would be at the
22 beginning of the counts to then give them the substance of
23 -- the real substance of what's at issue here, such as:

24 Ladies and gentlemen, what I'm about to say applies
25 to Counts 1 through 34.

1 At the end I will be clear with you about what
2 documents applies to each count so that they understand
3 beforehand what applies to each count; and this is so that
4 they can understand -- it's very abundantly in an excess of
5 caution, so that they understand that everything you're
6 saying applies to each count.

7 MR. COLANGELO: Your Honor, our proposal was drawn
8 from charges that this Court has given in other cases and
9 was based on our understanding of the Court's typical
10 practice of reciting the elements of the offense at the end
11 of a recitation of multiple counts where there are many
12 consecutive counts.

13 I'm not sure we have a strong view one way or the
14 other.

15 If the Court thinks that there is a more artful way
16 to do it, we obviously would not object.

17 THE COURT: I -- I think the proposal that we have
18 right now would lay out the elements right at the beginning
19 before count 1, and then right at the end, after count 34.

20 I have no problem giving the instruction you are
21 requesting as well.

22 That's fine.

23 Okay. Let's take ten minutes.

24 (Recess taken.)

25 *****

1 THE SERGEANT: Remain seated. Part 59 is back in
2 session.

3 THE COURT: All right. That was pretty much what I
4 had.

5 I would like to hear if you have any issues or
6 arguments that you would like to bring to my attention now.

7 MR. BOVE: Yes, your Honor, thank you.

8 There are some instructions that we requested in
9 the defendant's request submission that you referenced.

10 THE COURT: Yes.

11 MR. BOVE: I think that we don't have controversial
12 arguments about too many of them, but there are a couple of
13 them that are worth discussing.

14 We proposed a limiting instruction with respect to
15 bias that is specific to President Trump.

16 It is one that we modified from the instruction
17 that your Honor gave at the Trump Org trial that we think is
18 appropriate here.

19 There are sort of parallel competing proposals to
20 some extent, but I don't know that the differences are
21 material.

22 THE COURT: Can you direct me to the page in your
23 submission that you are referring to?

24 MR. BOVE: Yes, Judge, one second.

25 (Pause.)

1 THE COURT: Here it is. Page 5.

2 MR. BOVE: Right.

3 We've also requested an instruction.

4 THE COURT: Do you want to talk any more about that
5 one?

6 MR. BOVE: No, your Honor.

7 THE COURT: All right. I would like to hear from
8 the People.

9 MR. STEINGLASS: We would like to talk -- we would
10 like to be heard on it.

11 First of all, we don't think that this is
12 necessary, this charge.

13 I think the voir dire has satisfied this problem.
14 I think this charge was more appropriate -- and Mr. Bove
15 cites the Trump Corporation trial, it was more appropriate
16 there where the defendant was not -- well, this defendant
17 was not a defendant in that case.

18 And your Honor, I believe, the point of that
19 instruction was trying to remind the jury to keep Mr. Trump
20 out of the last trial because it wasn't -- he was not a
21 named defendant.

22 I don't think that instructing a jury that they
23 shouldn't hold bias against the defendant is necessary;
24 however, I think -- I mean, and I think that your Honor's
25 standard charge talks about excluding sympathy and bias.

1 So, I think it's covered by the standard CJI
2 charge.

3 If -- and I think Mr. Bove inadvertently stated
4 this incorrectly, it's not that we have competing proposals,
5 we don't think that this charge is necessary at all, but if
6 you are going to give it or a charge like it, we would
7 propose the more neutral language on Page 17 and 18 of our
8 response.

9 THE COURT: Well, as you know, Mr. Bove, that's not
10 an instruction that's normally given.

11 There are several times in the Court's instructions
12 that I refer to bias, fairness, implicit bias.

13 And in this case, I believe the questionnaire had
14 about 42 or 43 questions and then, of course, the voir dire
15 was pretty extensive.

16 Because the People are going along with a modified
17 version of what you're suggesting, I will go ahead and
18 include it, even though it's not something that I normally
19 do.

20 So, I will include the People's version on Pages 17
21 and 18 of their submission.

22 MR. BOVE: Thank you, Judge. The next request is
23 on Page 6.

24 It's just turning the page over, relating to a
25 curative or a limiting instruction that these so-called hush

1 money payments are not inherently illegal.

2 I think that the logic of this type of instruction
3 is similar to the limiting instruction that we discussed
4 earlier about what intent to defraud does not mean.

5 This is, I think, something that is
6 straightforward, and should be clarified to the jury so that
7 they're not misled by the use of certain terms that both
8 sides are going to use in their arguments and fairly so.

9 We think it should be clear to the jury that hush
10 money alone is not illegal.

11 MR. STEINGLASS: What the Defense is asking is
12 for you to make their arguments for them within the jury
13 charge.

14 They can argue whatever they want, as long as it's
15 a reasonable view of the evidence.

16 They can certainly say this to the jury, if they
17 want, but it's totally inappropriate for the Court to
18 marshal the evidence in a way that just makes the
19 defendant's argument for him.

20 THE COURT: I think this came up numerous times
21 during the course of the trial.

22 I think several witnesses were asked that question
23 several times.

24 The answer was always: It's not illegal. It's not
25 a crime.

1 And I expect that in your summation you are going
2 to argue the same.

3 And I don't think the People are going to dispute
4 that, because they can't.

5 So, but I think to take it to the next level and
6 actually give an instruction from the bench is taking it too
7 far, and I don't think it's necessary.

8 MR. BOVE: Understood.

9 So now we're moving to Page 7, Judge.

10 And it's an instruction about evidence that was not
11 offered for its truth.

12 And so, we broke this out in terms of documents
13 that came in in that fashion on witness testimony.

14 I think that with respect to the documents, we are
15 largely in agreement.

16 And there is a dispute about the witnesses,
17 meaning there was testimony from Hope Hicks and from
18 Mr. Cohen about public reactions and responses to the Access
19 Hollywood tape.

20 Our position is that the only basis for that
21 testimony to come in was not for its truth, but rather for
22 its impact on the listener.

23 Here, I assume the Government's theory is that
24 President Trump necessarily was one of the listeners, and
25 they're going to make arguments about how he reacted to

1 these statements that they've elicited.

2 What we are seeking is an instruction that
3 clarifies and confirms that factual assertions in those
4 reactions were not offered for their truth.

5 Things about, for example, the RNC's reaction to
6 the tape and how that might impact their association with
7 President Trump in his campaign at the time.

8 The Government disputes how this evidence came in
9 with respect to Ms. Hicks.

10 And I think we would like to clarify here.

11 Your Honor will recall that there were -- there was
12 a series of questions during Ms. Hick's direct examination
13 about reactions, and at some point -- and we did not object
14 to those, not because we believed they were coming in for
15 the truth, but because sitting here I understood why they
16 were coming in for their impact on the listener.

17 At some point, the questioning, from our
18 perspective, became cumulative in that, as we've said
19 before, in our view there is sort of a tipping point for
20 evidence that's not coming in for its truth becomes unduly
21 prejudicial.

22 When we reached that point, I asked for a sidebar.
23 At sidebar I referenced the hearsay issue.

24 I said I understood that there is a time and place
25 for this type of evidence, and I think we've gone over the

1 threshold.

2 So, I think it's clear on the record that we
3 understood why the evidence was coming in and the
4 instruction that we are asking for on Page 78 just makes
5 that clear to the jury.

6 And we think that's important and we don't think it
7 should be very controversial because there is no other basis
8 for the communications and the testimony that we are
9 referencing this instruction.

10 THE COURT: People.

11 MR. STEINGLASS: Okay. So, if we're just talking
12 about the Access Hollywood tape and the reaction to it, I
13 don't think that that -- I don't think that such a
14 limiting -- that the evidence was limited in that way.

15 And I don't think that the Court gave a limiting
16 instruction then, and I don't think the Court should give a
17 limiting instruction now.

18 The nature of the reaction by the Republican Party,
19 by other prominent Republican senators, by other members of
20 the public, the fact that that was the reaction had an
21 impact on the listener, being the defendant.

22 And so, I don't even think it matters whether it's
23 true that John McCain, for example, withdrew his
24 endorsement.

25 I think the point is that John McCain withdrew his

1 endorsement and what impact that had on the defendant so I
2 think that this charge is confusing.

3 I think it's unnecessary.

4 I think it retroactively limits the evidence. And,
5 you know, I'm not even quite sure what prejudice the
6 defendant is seeking to cure here.

7 MR. BOVE: We are seeking to be precise with the
8 jury about the admissible bases for which evidence came in
9 at the trial.

10 And I didn't object when Ms. Hicks was testifying.
11 I explained why I didn't object.

12 There was one permissible basis for this testimony,
13 and I think Mr. Steinglass just described it.

14 Except he also described a factual assertion by
15 Senator McCain, and that factual assertion doesn't come in
16 for its truth, the fact that he was withdrawing his support.
17 That's my point.

18 This should not be controversial. It comes in for
19 its impact on President Trump; and that's what this says.

20 MR. STEINGLASS: I'm not quite sure that that's
21 what the instruction that they are suggesting says, but
22 we can all agree that the evidence of the reaction of
23 others is coming in for its impact on the defendant, and his
24 state of mind and the impetus to lock up the Stormy Daniels
25 story.

1 THE COURT: I agree, but what I can do is go back
2 and read those portions of the transcript.

3 So, if you can email me directly those pages that
4 you are referring to.

5 I'm happy to go back and look at it again, but
6 right now I'm in agreement with the People.

7 MR. BOVE: We will take a look, Judge.

8 But I actually think that we've cited in our
9 submission the transcript excerpts that we are concerned
10 about.

11 And --

12 THE COURT: I'm sorry, you are referring to Page 7?

13 MR. BOVE: Yes, your Honor.

14 The transcript --

15 THE COURT: What pages?

16 MR. BOVE: It carries over.

17 THE COURT: I'm just looking for the pages of the
18 transcript that you are referring to.

19 MR. BOVE: It's in the footnotes.

20 THE COURT: I see.

21 MR. BOVE: 23 and 24, I'm sorry.

22 THE COURT: Yes.

23 Thank you.

24 MR. BOVE: We are just seeking to be clear and
25 precise with the jury about the purpose for which they can

1 consider that evidence.

2 There were times where news articles came in
3 where we sought to do that affirmatively during the course
4 of the trial, there were other times that we elected to wait
5 until this point.

6 That wasn't a waiver, Judge.

7 Those -- that's for Ms. Hicks who testified or
8 Mr. Cohen to testify about what out-of-court declarant said
9 to be offered for its truth was obviously inadmissible, it
10 could only come in for the basis that Mr. Steinglass
11 described.

12 And we will ask that you clarify it for the jury
13 and to be clear with respect to the evidence that was
14 entered into the record.

15 THE COURT: I will go back over the evidence, and I
16 will consider it.

17 MR. STEINGLASS: Now, that last clause of
18 Mr. Bove's statement seems to say that it's not just the
19 Access Hollywood tape, that we're talking about other
20 exhibits that came in.

21 So, rather than get into a back and forth about
22 this, unless your Honor wants me to, I will just point your
23 Honor to our response to the defendant's request to charge,
24 in which we basically say that it's really not necessary for
25 you to give further instruction on documents that came in

1 subject to certain limitations because you've already done
2 that.

3 And even if you are inclined to do that, they've
4 asked for limitations on documents that came in without
5 limitations.

6 In other words, kind of retroactively.

7 THE COURT: Right.

8 MR. STEINGLASS: Changing the purpose for which
9 these documents were received. And we certainly oppose
10 that.

11 THE COURT: All right.

12 MR. BOVE: The next request, Judge, is on Page 9.

13 And this is -- what we are seeking is just for your
14 Honor to reiterate to the jury the limiting instruction
15 around Mr. Cohen's FECA pleas, and the AMI Non-Prosecution
16 Agreement as well as the Conciliation Agreement.

17 We have proposed some language.

18 The Government has sought some modifications and
19 your Honor will use in your discretion.

20 THE COURT: I think limiting instructions are
21 appropriate.

22 I will take a look at the language and see what's
23 being proposed.

24 But I gave limiting instructions during the course
25 of the trial, I think it's appropriate to give the jury the

1 charge.

2 MR. STEINGLASS: And just to clarify, we are fine
3 with the limiting instruction that you gave during the
4 trial.

5 The language that the Defense is proposing in their
6 submission is outrageous.

7 Such as: AMI did not admit to any violations of
8 the law in those agreements.

9 This is not the limiting instruction that you gave;
10 this is an argument.

11 THE COURT: I'm not commenting on the language that
12 the defense has suggested.

13 MR. STEINGLASS: Okay.

14 MR. BOVE: I wasn't trying to be outrageous.

15 The reason that we put that in the proposal, Judge,
16 and it was queued up in the Government's response, is that
17 there was a comment at sidebar about whether or not the
18 non-pros is evidence of a violation of FECA by AMI.

19 Our concern gets back to the purpose of the
20 limiting instruction in the first place.

21 There is a suggestion in the Government's reply to
22 our request, that there is some kind of dispute that the
23 jury needs to evaluate about whether -- what that non-pros
24 reflects and whether it reflects a violation.

25 We think that type of argument would be wholly

1 inappropriate in front of the jury, unless somebody opens
2 the door to it.

3 I have been clear about our intentions with respect
4 to the door.

5 So there really shouldn't be any argument from the
6 Government in summations about what that non-pros reflects
7 on behalf of AMI, because that would be making arguments
8 about the non-pros as substantive evidence of President
9 Trump's guilt.

10 The only reason -- like the FECA pleas, the only
11 reason that the non-pros is in evidence is with respect to
12 Mr. Pecker's credibility.

13 It's not in evidence as substantive proof of
14 anything.

15 And so, to be arguing to the jury about whether
16 and to what extent it reflects a violation to be
17 inappropriate --

18 MR. STEINGLASS: Judge, you gave a limiting
19 instruction.

20 The limiting instruction was not just limited to
21 Mr. Pecker's credibility; it was the surrounding
22 circumstances.

23 There are arguments that can be made.

24 And I agree that there are arguments that cannot be
25 made.

1 We do not intend to suggest that Michael Cohen's
2 guilty plea or that AMI's Non-Pros Agreement is evidence of
3 the defendant's guilt, but it is relevant to more than
4 credibility.

5 That's what your Honor's limiting instruction that,
6 I believe the Defense drafted, said.

7 And we think that you should give that same
8 instruction and that we should be able to make the arguments
9 that you have allowed us to make and not make the arguments
10 that you have not allowed us to make.

11 And we do not intend to make the arguments that you
12 have not allowed us to make.

13 THE COURT: My intention right now is to give
14 substantially the same instruction that I gave during the
15 trial.

16 MR. BOVE: Understood. We are concerned about what
17 was just said.

18 In terms of the potential for arguments that go
19 beyond just the extent to which these agreements and
20 documents bear on Pecker's credibility and Cohen's
21 credibility.

22 Anything that gets near this line, Judge, with the
23 jury in summations would be extraordinarily prejudicial and
24 so we would hope that the People will be extremely
25 conservative in their approach on this.

1 And if they feel that they are close to the line,
2 we should talk about it outside of the presence of the jury.

3 This is a critical issue.

4 THE COURT: We don't need to keep going back and
5 forth with this.

6 I will just reiterate again, I have it right here.
7 I will read it again.

8 This is regarding AMI:

9 "You have just heard testimony that while David
10 Pecker was an executive at AMI, AMI entered into a
11 Non-Prosecution Agreement with Federal Prosecutors as well
12 as a Conciliation Agreement with the Federal Election
13 Commission, that evidence was permitted to assist you, the
14 jury, in assessing David Pecker's credibility and to help
15 provide context for some of the surrounding events. You may
16 consider that testimony for those purposes only. Neither
17 the Non-Prosecution Agreement nor the Conciliation Agreement
18 was evidence of the defendant's guilt, and you may not
19 consider them in determining whether the defendant is guilty
20 or not guilty of the charged crimes."

21 I don't think we need to go back and forth with
22 this.

23 MR. STEINGLASS: Agreed.

24 THE COURT: What else?

25 MR. BOVE: Next on my list is our proposed

1 instruction about involvement of counsel, Judge.

2 And I'm just trying to grab the page number. I
3 believe it's Page 12.

4 We think that the door was opened by the Government
5 on direct examination of Mr. Cohen and Mr. Pecker by --
6 through a series of questions about a conversation that
7 Mr. Pecker had with Mr. Cohen relating to the Agreements
8 involved -- that concern Ms. McDougal.

9 And we flagged this issue in advance of the trial,
10 that in the records that were disclosed to us, there was
11 this comment about the agreement being "bulletproof."

12 It is a fair inference from that, the use of that
13 word by Mr. Pecker, that what he meant was that it had been
14 vetted by counsel.

15 He actually testified, I believe on direct, that it
16 had been vetted by counsel.

17 What happened then, Judge, is that Mr. Cohen -- and
18 this was to some extent from us unexpected -- Mr. Cohen
19 confirmed that he communicated that word to President Trump.
20 That was an evidentiary link we hadn't necessarily
21 anticipated at this trial, absent President Trump taking the
22 stand.

23 Once that evidentiary link was made, there is a
24 fair inference that he -- he understood that to mean that it
25 had been vetted by counsel, that the Agreement was legal.

1 Why does that matter at this trial?

2 We haven't put on a formal advice of counsel
3 defense.

4 I'm not seeking to retread that.

5 What we are seeking to do, though, Judge, is to
6 argue that this is extremely probative of President Trump's
7 intent and, in particular, whether or not the Government can
8 meet their burden of establishing intent to defraud, and the
9 other types of intent that we talked about today,
10 willfulness as to FECA, et cetera.

11 And so, the fair inference from this conversation
12 that's in evidence, supports us, and supports this
13 instruction, and at a minimum, even if the Court is not
14 going to give the instruction, this is an argument that we
15 wanted to raise at this conference and flag because we do
16 think it's appropriate, both with respect to the bulletproof
17 comment and the inferences that President Trump drew from
18 it, and from the general fact that this entire trial is
19 entirely predicated on the testimony of an attorney who
20 worked for President Trump and that he was entitled to draw
21 some inferences from that fact.

22 The Government seeks competing inferences. They
23 seek to prove them beyond a reasonable doubt. We understand
24 that.

25 But our position is that this is an exceedingly

1 fair argument for the Defense to make when we challenge the
2 Government's burden, even if the Court is not going to give
3 the instruction we have requested.

4 MR. COLANGELO: Your Honor, this is a retread.

5 Your Honor rejected this argument on March 18th in
6 your Order granting the People's motion in limine to exclude
7 any argument regarding reliance on advice of counsel.

8 To the extent that Mr. Bove is making an
9 opening-the-door argument, this defense and any argument
10 based on this defense is both legally and factually
11 unavailable for a number of reasons.

12 The first is that under New York Law, a
13 prerequisite for making any argument like this is that the
14 defendant himself testifies in order to establish a prima
15 facie case of his state of mind.

16 The defendant exercised his constitutional right
17 not to testify and subject himself to cross-examination.
18 But having done so, having done so, he can't then seek to
19 introduce argument or present argument to the jury regarding
20 his intent.

21 And the New York Law that I'm referring to, there
22 is a case called People versus Lurie, L-U-R-I-E, 249 AD 2d
23 119.

24 That's a First Department case.

25 So, legally unavailable because the defendant

1 didn't establish the basis for this claim himself anyway.

2 The second, as the Court already recognized, and
3 again as a legal matter, the presence of counsel concept,
4 particularly when it's based on some claim of reliance
5 regarding what a third party's lawyer may have said, is also
6 legally unavailable.

7 And we cited a case here in Court called Lek
8 Securities Corporation 2019 West Law 573944.

9 That's a Southern District of New York case from
10 2019.

11 That case held that a defendant can't assert a
12 reasonable or good faith reliance based on a third party's
13 representation of advice to third party received through
14 consultations with counsel to which the defendant himself
15 did not have access.

16 And then, there is a factual reason why that
17 particular analysis applies with strong force in this case,
18 which is that the testimony also shows that Mr. Pecker
19 didn't give even remotely close to a full presentation of
20 the facts to the lawyer that he consulted.

21 He, in fact, testified that he specifically
22 authorized his General Counsel to give to the outside lawyer
23 simply the McDougal contract and didn't advise the lawyer of
24 any of the underlying facts that would be necessary to
25 determine whether the contract did or didn't evidence of

1 violation of Campaign Finance Law.

2 He didn't tell him about the agreement in Trump
3 Tower.

4 He didn't tell him that his real purpose was to
5 influence the election.

6 He didn't tell him that he didn't value the
7 services that McDougal was going to provide at 150 grand.

8 He only valued it at 25 grand.

9 He didn't give him -- he didn't tell him about the
10 intended assignment of the life rights back to Mr. Trump
11 after the fact.

12 So, none of the facts that an attorney would have
13 needed to rely on in order to make an informed judgment
14 about the lawfulness of that contract were even presented
15 to the attorney, which is why a defendant can't rely on
16 third party advice for this kind of defense in the first
17 place.

18 THE COURT: Mr. Bove, I don't think it's
19 necessary --

20 MR. BOVE: Well, Judge, with respect to --

21 THE COURT: I really don't think it's necessary to
22 respond.

23 MR. BOVE: Judge, Judge, this is an issue about the
24 Government's burden on a state of mind.

25 THE COURT: I understand, I understand the issue.

1 If you want to go ahead and say something else, go
2 ahead.

3 MR. BOVE: I would, Judge.

4 Everything that was just said about Mr. Pecker's
5 intent and what he communicated to his attorney doesn't bear
6 on the argument that we want to make at all.

7 We are not suggesting that we -- our argument does
8 not rely on whether or not what Mr. Pecker said was
9 accurate.

10 Our argument relies on the fact that Mr. Pecker
11 said to Michael Cohen: "This is bulletproof."

12 That the fair inference from the "bulletproof"
13 comment is that it was legally vetted.

14 Whether and to what extent and how Mr. Pecker did
15 that doesn't bear on what was said to President Trump.
16 Mr. Cohen said to President Trump: I have been told that
17 the agreement was "bulletproof."

18 President Trump was entitled to draw an inference
19 from that when his own attorney is communicating it to him
20 that it had been property vetted.

21 It doesn't -- that argument doesn't depend on
22 Mr. Pecker being truthful with his attorneys.

23 THE COURT: All right. Look --

24 MR. COLANGELO: Your Honor, can I make an
25 additional argument?

1 THE COURT: Look, Mr. Bove, this is an issue that
2 has been going on for a very, very long time.

3 Going back to, I think it was December of 2023, I'm
4 not sure of the date, the People filed a motion asking this
5 Court to require the Defense to once and for all decide and
6 give notice whether the Defense was going to rely on the
7 defense of advice of counsel.

8 I wrote a decision on this. My decision is dated
9 February 7th.

10 In that decision, I directed the Defense to provide
11 Notice of Disclosure of your intent to rely on the defense
12 of advice of counsel by March 11th, 2024, and to produce all
13 discoverable statements and communications within his
14 possession or control by the same date.

15 Subsequently, in response -- and the answer was
16 we're not relying on advice of counsel, therefore, there is
17 no waiver; there is no need to submit any documents.

18 Later on, the defense of advice of counsel morphed
19 into something called the presence of counsel, which I had
20 never heard of and I was not familiar with, but I addressed
21 it in the motions in limine.

22 And at that time, I indicated that you are
23 precluded from arguing this legal claim of presence of
24 counsel.

25 There was no such thing. It's just a way to get

1 around having to turn over documents related to the advice
2 of counsel.

3 Now, this term, "presence of counsel," has morphed
4 yet again into something called involvement of counsel.

5 THE COURT: I understand why you want it, this
6 instruction from the Court.

7 And I understand why you want to be able to make
8 the argument.

9 My answer hasn't changed and, honestly, I find it
10 disingenuous for you to make the argument at this point.

11 Please don't get up.

12 I let you speak; right.

13 I let you speak.

14 Let me speak.

15 MR. BOVE: All right.

16 Yes, your Honor.

17 THE COURT: It was -- it was concerning when notice
18 was not given initially in response to my Order of
19 February 7th.

20 It was concerning when the term was changed to
21 presence of counsel.

22 I couldn't believe when I saw it again in your
23 submission now calling it involvement of counsel.

24 And I understand the argument that you are making.
25 I'm telling you, my ruling is, the jury will not hear that

1 instruction from the bench, nor are you permitted to make
2 that argument. Period.

3 MR. BOVE: I understand. I just want to complete
4 the record.

5 THE COURT: Go ahead.

6 MR. BOVE: I'm not being disingenuous with your
7 Honor.

8 I didn't -- this involvement of counsel wasn't
9 intended.

10 And I don't think it did change in any way the
11 substance of the argument that we want to make.

12 Our argument is based on testimony that happened
13 after the rulings that you just described at this trial,
14 when Michael Cohen testified that he told President Trump --

15 THE COURT: You said that already, Mr. Bove.

16 MR. BOVE: But then you called me "disingenuous,"
17 and I'm trying to explain myself.

18 THE COURT: But I heard it the first time, and I
19 heard it the second time.

20 MR. BOVE: In addition, nothing we are trying to
21 argue would require a waiver by President Trump.

22 He doesn't control Mr. Pecker's privilege. That's
23 clear.

24 And the attorney -- the other attorney I'm talking
25 about, Michael Cohen, testified at the trial.

1 THE COURT: And I'm not suggesting that you
2 required a waiver.

3 What I'm saying is that this is an argument that
4 you have been advancing for many, many months.

5 This is something that you have been trying to get
6 through to the jury for many, many months.

7 It's denied.

8 It's not going to happen.

9 Please don't raise it.

10 What else?

11 MR. BOVE: I think the last thing on this is,
12 Judge, is the proposed exfoliation instruction.

13 It's on Page 13.

14 We think that the factual basis -- this is an
15 exfoliation instruction relating to the destruction of
16 evidence of Michael Cohen and the phones.

17 The factual basis for this instruction comes from
18 the testimony of Mr. Daus, who analyzed the phones and he
19 talked about the factory reset of the phones, which he also
20 described as wiping, which result in the deletion of data
21 from those phones.

22 The Government's response is that there was some
23 testimony that there was a subsequent backup or syncing of
24 the phones.

25 But there is testimony -- Mr. Daus was unable to

1 testify and could not testify, because he wasn't able to do
2 the analysis about what that -- what was actually loaded
3 back onto the phone.

4 So, we think for that reason, the exfoliation
5 instruction is appropriate.

6 In addition, there was testimony from Mr. Daus
7 about the use of the apps like Signal and Dust and Telegram
8 that sent messages to quote, "explode" or "self-delete."

9 I'm referring to the transcript at Page 2058.

10 And so, we think for both of those things an
11 exfoliation instruction is appropriate.

12 MR. STEINGLASS: So far as, I've never seen an
13 instruction like this.

14 It's certainly not in the CJI, and it's also just
15 flat out wrong in terms of Mr. Bove's characterization of
16 the testimony.

17 The testimony was that there was a factory reset on
18 one of Michael Cohen's phones, followed by, as defendant
19 fails to note, the restoration of the entire backup file
20 onto that phone, which was then forensically downloaded and
21 analyzed by Mr. Daus, the entirety of which was given to the
22 Defense.

23 So there is absolutely no basis for a charge like
24 this.

25 Once again, the Defense is asking your Honor to

1 charge the jury as though their arguments are both factual
2 and legal ones.

3 They can make whatever arguments they want,
4 although, I would suggest that they -- those arguments be
5 based in the actual record and not the imaginary record.

6 MR. BOVE: I think, if your Honor reviews the
7 testimony of Mr. Daus, what you will see is that there
8 was -- there was a factory reset, I believe it was in the
9 Fall of 2016 in a very relevant time frame.

10 That there was testimony that there was a sync.
11 That the sync came from a laptop with a user name from
12 Michael Cohen, and that he was unable to verify in any way
13 what was loaded back onto the phone because he never had
14 access to the laptop.

15 Not at all what Mr. Steinglass just said about a
16 complete backup.

17 And our argument is not that the evidence was
18 deleted for the purposes of this instruction, the factual
19 basis is not that evidence was deleted in 2020 when he reset
20 it again or in 2023 when it was mishandled, the inference is
21 in 2016 when he did the reset, and he loaded something else
22 that we don't know about onto the phone.

23 In addition, the use of the apps that involve
24 self-exploding messages and the deletion of messages that he
25 concededly sent in 2016 also supports the instruction.

1 THE COURT: You did a very effective job of
2 cross-examining that witness.

3 I think you laid an excellent foundation for your
4 summation, on your arguments on summation.

5 I think that there is a good basis for that.

6 And you are free to do that, but I'm not going to
7 give an instruction on exfoliation to the jury in my
8 charge.

9 MR. STEINGLASS: Are you done?

10 MR. BOVE: Yes.

11 MR. STEINGLASS: So I have a few more issues to
12 raise.

13 One of which is very easy.

14 It should be very easy.

15 Your Honor gave an instruction on redactions in the
16 exhibits.

17 I would just ask you to give it again.

18 Does anybody need a copy of it?

19 Mr. Bove?

20 MR. BOVE: No.

21 MR. STEINGLASS: Can I hand it up?

22 (Handed.)

23 MR. STEINGLASS: So, that one is easy.

24 There are two more.

25 One, I think we didn't discuss the accessorial

1 liability charge that we sent around.

2 And I believe it was a joint submission this
3 afternoon.

4 I wanted to point out two quick things about it.
5 First of all, it's maybe a little bit difficult to
6 understand the way this was done.

7 But, for example, if your Honor looks on Page 1
8 and 2.

9 Do you have a copy of it with you or I have an
10 extra copy?

11 THE COURT: Direct me to what time that came
12 through?

13 MR. STEINGLASS: I have no idea.

14 THE COURT: I think it was this afternoon?

15 MR. STEINGLASS: It was this afternoon. I will
16 just hand up a copy.

17 (Handed.)

18 MR. STEINGLASS: So, I just want to make it clear,
19 we crossed out the note, as appropriate.

20 That's because we both agree that that language
21 should be given.

22 That's on Page 1 and Page 2, where the optional
23 language is there, that we both agree that it should be
24 given.

25 That's what crossing out the note means.

1 There is only one word that we disagree with in
2 this entire charge and that is the mens rea requirement.

3 So accessorial liability accomplice, of course, to
4 the FBR charge -- and you know we very much disagree with,
5 but understand Mr. Bove's argument about willfully as it
6 applies to the FECA.

7 We oppose that, and your Honor has held that in
8 abeyance, but under no circumstances should the accessorial
9 liability charge be read with the mens rea of willfully
10 because it applies to the FBR charge.

11 And the only mens rea in the FBR charge is
12 intentionally.

13 So, the correct mens rea for that charge should be
14 intentionally not willfully.

15 MR. BOVE: The CJI charge, the model charge that
16 we're talking about lists as examples intentionally,
17 recklessly, with criminal negligence.

18 I don't believe that to be an exhaustive list of
19 the options we've talked a lot about the willfully mens rea
20 today.

21 You have our position.

22 THE COURT: Thank you.

23 MR. STEINGLASS: And, lastly, Judge, there was --
24 and I'm not casting any aspersions here.

25 And I will hand a copy up to the Court, and I have

1 given a copy to the Defense.

2 There is a curative instruction that we are
3 requesting on Retainer Agreements.

4 Through their cross-examination of three separate
5 witnesses, the Defense erroneously suggested that Retainer
6 Agreements in New York State don't have to be in writing.
7 They did that on cross of McConney.

8 I'm directing your Honor to the transcript Page
9 2401:

10 "QUESTION: Retainer Agreements can be verbal;
11 correct?"

12 "ANSWER: To my knowledge, yes."

13 That's incorrect.

14 They cannot be verbal.

15 I direct your Honor, if you don't mind, let me just
16 find this, please.

17 It's at 22 NYC CC 1215.1.

18 I can hand up copies, if your Honor wants.

19 I have already sent them to Mr. Bove.

20 Do you want a copy?

21 THE COURT: Sure.

22 MR. STEINGLASS: Okay.

23 Just a minute.

24 (Handed.)

25 MR. STEINGLASS: Give me a minute to find it, but I

1 will just make my argument.

2 THE COURT: I can find it.

3 That's fine.

4 MR. STEINGLASS: Thank you. So back to the
5 transcript.

6 It's the cross-examination of Mr. Cohen, after a
7 long conversation about Retainer Agreements.

8 Mr. Bove asks -- and I'm directing the Court to
9 Pages 3957 through 3961 of the transcript.

10 THE COURT: 3957.

11 MR. STEINGLASS: 3957 to 3961.

12 After a long conversation about not having a
13 Retainer Agreements and, by the way, there's nothing wrong
14 with that.

15 There is a long colloquy back and forth about how
16 there was no Retainer Agreement even after Mr. Cohen left
17 The Trump Organization and became the Personal Attorney to
18 the President.

19 And culminating with the following question:

20 "QUESTION: Because you know under New York Ethics
21 Rules, you don't need a Retainer Agreement to do work for a
22 client; do you?"

23 And the answer to that was elicited erroneously
24 was, "No."

25 This was also done with Mr. Davidson on

1 cross-examination, on Pages 1896 through 1897 in the
2 transcript.

3 "QUESTION: And that engagement, that
4 attorney-client engagement was not committed to writing; was
5 it?"

6 "ANSWER: It was not."

7 "QUESTION: And there is nothing wrong with that;
8 is there?"

9 "ANSWER: There is not."

10 "QUESTION: That's an ethical practice to have an
11 attorney-client relationship without an engagement letter;
12 right?"

13 "ANSWER: Yes."

14 So, as I said, I'm not ascribing any bad motives to
15 the Defense team, but those are just misstatements of the
16 law.

17 And I think that it is incumbent upon your Honor to
18 cure those misperceptions of the law.

19 And I do have a copy.

20 It's somewhere in here.

21 THE COURT: Thank you.

22 MR. STEINGLASS: Of both of the New York City Rules
23 and Regulations as well as some case law that interprets
24 them.

25 (Handed.)

1 MR. STEINGLASS: And I will just cite those cases
2 for the record.

3 Give me one moment.

4 People -- well, the first and foremost case is
5 Seth Rubinstein PC versus Ganea, 41 AD 3d 54 Second
6 Department 2007.

7 There is also a matter of Brown 133 AD 3d 7 First
8 Department from 2015.

9 And Barry Mallin and Associates PC versus Nash
10 Metalware Co., Inc., 18 Misc. 3D 890.

11 That's a Civil Court of New York County case from
12 2008.

13 So, we believe that this instruction is necessary
14 to cure the erroneous impression left that there is nothing
15 improper about not having a written Retainer Agreement.

16 It is, in fact, the law.

17 MR. BOVE: We don't think that's right, Judge.
18 First of all, the rule that was just cited, 1215.1, is
19 followed by 1215.2, which sets forth a series of exceptions,
20 including at subparagraph B, a situation where
21 representation with the attorneys' services are the same
22 kind as previously rendered and --

23 THE COURT: Do you have a copy of that?

24 MR. BOVE: Yes, Judge, I do.

25 (Handed.)

THE COURT: All right.

MR. BOVE: And so, I was referring to subparagraph B as an exception, which is certainly consistent with the testimony, and we are talking about, of course, the testimony of the Government's witnesses at this trial.

You know, the Government cited the Rubinstein case. I have a copy of that here as well.

I think when your Honor reads that case, what you will see is that what it's really about is whether and to what extent a retainer letter is necessary to permit an attorney to recover fees from the client.

It's not about whether, as a matter of ethics rules and attorney's ethical obligations, the Retainer Agreement is necessary.

I have some cases as well that we hope your Honor will look at before you rule on this.

One is Moran. And I'm going to hand this one to Mr. Steinglass.

MR. STEINGLASS: Thank you.

(Handed.)

MR. BOVE: This is a Second Department case.

And the language that I'm looking at is at Page 9111.

Since an attorney-client relationship does not

1 depend on the existence of a formal Retainer Agreement or
2 upon payment of a fee.

3 That's one case that I will hand up with the
4 highlighted portion.

5 I have also got Edelman. I just handed that to
6 Mr. Steinglass.

7 This is also a Second Department case. An
8 attorney-client relationship may arise even in the absence
9 of a written Retainer Agreement. That's at Page 997.

10 I will hand that up.

11 (Handed.)

12 THE COURT: Thank you.

13 MR. BOVE: Lastly, Pellegrino, First Department,
14 your Honor.

15 While the existence of the relationship is not
16 dependent upon the payment of a fee or an explicit
17 Agreement.

18 And I am reading there from Page 99.

19 And I will hand that up as well.

20 So, what we're really getting at here is that we
21 think that the Government's witnesses testified in a manner
22 that was consistent with the law that I have just cited.

23 So, there is certainly no curative instruction
24 necessary.

25 Though I appreciate the concession that we weren't

1 trying to do anything inappropriate.

2 In fact, the Government's witnesses were testifying
3 correctly.

4 And this is also a situation, Judge, there has been
5 several times today where we've said we are not going to
6 have instructions that sort of credit or put weight on other
7 arguments.

8 This is the Government seeking to have weight put
9 on their argument about whether a Retainer Agreement is
10 required.

11 Those authorities establish that that's not the
12 case.

13 But, in any event, this is a matter that their own
14 witnesses testified about, and it's for the jury.

15 MR. STEINGLASS: I think Mr. Bove is missing the
16 point of what I was handing up those cases for.

17 I agree that those cases are in the context of
18 whether fees can be collected.

19 But they cite to the New York City Code of Rules
20 and Regulations, and they acknowledge the existence of the
21 rule that requires them.

22 This is not about whether or not there is a dispute
23 over legal fees between the parties.

24 This is about whether it was correct for the
25 Defense to ask questions of the witnesses to imply -- not to

1 imply, to outright state, that there is no requirement for a
2 written Retainer Agreement.

3 And there is.

4 And the theoretical exception that Mr. Bove points
5 to in 1215.2 sub B is not applicable here because even
6 Mr. Cohen testified that he did maybe ten hours of legal
7 work for Mr. Trump and his family in the entire year of
8 2017.

9 So, to say that 1215.2 sub B, which is an exception
10 to the rule requiring a Retainer Agreement when the attorney
11 services are of the same general described as previously
12 rendered to and paid for by the client as though that
13 somehow covers what Mr. Cohen was doing for the Trump
14 Organization for the ten years before when he was on salary,
15 is, I think, I don't want to say disingenuous because that's
16 a pejorative, but not appropriate and does not cure the fact
17 that they have misled the jury.

18 THE COURT: All right. I will read the rules.

19 I will read the decisions and I will get back to
20 you on that.

21 Anything else?

22 MR. STEINGLASS: That's it for us, Judge.

23 MR. BOVE: Nothing else. Thank you.

24 THE COURT: If after reading the rules and the
25 decisions I determine that there is a requirement that there

1 be a retainer, we are going to have to have a follow up as
2 to how to deal with this.

3 But until I get to that point, there is no need to
4 argue it.

5 We are going to make every effort to get our jury
6 charges to you by the end of the day Thursday so you can
7 have the full four-day weekend to work on your summations.

8 If anything comes up, please do not wait until
9 Tuesday to let me know; send us an email; give us a call and
10 let us know what's going on.

11 Thank you.

12 MR. STEINGLASS: Thank you.

13 MR. BOVE: Thank you, your Honor.

14 (Matter adjourned to Tuesday, May 28th, 2024 at
15 9:30 a.m.)

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