UNITED STATES DISTRICT COURT
DISTRICT COURT OF NEW JERSEY

UNITED STATES OF AMERICA

-v-

ELIYAHU WEINSTEIN, and
VLADAMIR SIFOROV,

Defendants.

Docket No. 11-CR-701 (JAP)

MEMORANDUM OF LAW IN SUPPORT OF ELIYAHU WEINSTEIN'S MOTION TO WITHDRAW HIS GUILTY PLEA

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Preliminary Statement

This memorandum of law is submitted on behalf of defendant Eliyahu Weinstein in support of his motion to withdraw his guilty plea, pursuant to Rules 11(d)(2)(B), F.R.Cr..P., 28 U.S.C. §2255 and the Sixth and Fifth Amendments to the United States Constitution, because Weinstein was represented at his guilty plea by counsel (Messrs. Cleary and Harris of the Proskauer firm) burdened with a conflict of interest that was probably unwaivable but in any event was not waived because the government failed to bring the conflict to the Court's attention and therefore the Court could not and did not make the required inquiry.

I. Introduction

This Court and the cause of judicial efficiency have been ill-served by the government. There is a long and unbroken line of cases reminding the government of its duty to bring to the Court's attention at the earliest possible juncture its knowledge of facts raising even the possibility of defense counsel's conflict of interest.[1] Despite the

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1. When the government is aware of even a *potential* conflict, government counsel has an obligation to bring the conflict to the court's attention so that the court may elicit the defendant's knowing waiver of his right to conflict-free counsel pursuant to the procedures set forth in cases like *United States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982), or take other appropriate steps, including disqualifying conflicted counsel. The government's failure to bring actual or potential conflicts to the court's attention has been a frequent source of irritation and admonition in the Circuits:

> The central issue in this appeal could thus have been easily disposed of prior to trial had the government brought this fact [i.e., the conflict] to Judge Glasser's attention . . . Convictions are placed in jeopardy and scarce judicial resources are wasted when possible conflicts are not addressed as early as possible. *We therefore reiterate our admonition to the government in earlier cases to bring potential conflicts to the*

(continued...)

government's indisputable obligation, it ignored its duty to the Court in this case. Instead, in the face of the blatant and serious conflicts under which at least Harris labored, the government remained surprisingly silent, depriving the Court of critical information it needed to assess the situation, make inquiry and ultimately determine whether Harris, Cleary and the Proskauer firm should be disqualified. The motive for the government's silence in the face of Proskauer's obvious and serious conflict is ultimately irrelevant.[2] What matters is that Weinstein was deprived of his Sixth Amendment right to conflict-free counsel at a critical juncture in the case, all because the government failed to honor its well-recognized obligation to inform the Court of the conflict. In short, the Court was let down by the government, resulting not only in the violation of Weinstein's Sixth

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1. (...continued)

> *attention of trial judges.*

United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996) (emphasis added, footnote omitted). *See also United States v. McKeighan,* 685 F.3d 956, 966 (10th Cir. 2012) ("[W]hen the government is aware of a conflict of interest, it has a duty to bring it to the court's attention and, if warranted, move for disqualification"); *United States v. Ciak*, 59 F.3d 296, 306 fn 8 (2d Cir. 1995) ("This case is an example of . . . why it is always in the government's interest to 'protect the record'"); *United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991) ("[W]hen a conflict situation becomes apparent to the government, the government has a duty to bring the issue to the court's attention and, if necessary, move for disqualification of counsel"); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986) ("We add a final note. The reversal here is the direct result of the prosecution's using defense counsel's conflict of interest . . . We trust that this decision [reversing the conviction] will ensure that a pretrial disposition of such issues will occur in the future").

2. The record suggests that the government was more concerned about pleasing Mr. Cleary than it was about satisfying the Court's interests. Transcript of Proceedings (Jan. 17, 2012) at 23 (Addressing Cleary's earlier inquiry of the government concerning $500,000 Proskauer was holding in escrow, the Court asked the government, What does Mr. Cleary have to do with this [case]?" The government responded: "In some sense, Your Honor, you got us. . . . You know, when you get a call from Bob Cleary, you answer the phone obviously, and hear what he has to say"). Thus, it is understandable that the government would be hesitant to accuse Cleary, the former United States Attorney for the District and a lawyer with an enviable reputation, of a conflict of interest. Ironically, in abdicating its obligation to the Court, the government did Cleary no favor.

Amendment right to conflict-free counsel, but in a terrible waste of the Court's time and resources. Weinstein should be permitted to withdraw his guilty plea not only to vindicate his constitutional rights, but to ensure that the government's abandonment of its duty to the Court does not happen again in this district.

For his part, Harris appeared equally oblivious to his ethical obligations. In the process, Harris can be easily viewed as having facilitated Weinstein's charged fraud by encouraging an alleged "victim" to invest in the scheme, arguably making Harris a coconspirator under the government's view of the facts. In fact, the investment transaction on which, according to the government's witness, Harris opined was totally legitimate, and Harris's role, like Weinstein's, was no doubt completely innocent. Yet, for purposes of conflict law, the fact that Harris (and possibly other Proskauer lawyers) could have been (and still can be) charged with or professionally disciplined for the subject insurance transaction constitutes an actual conflict which required their withdrawal or disqualification. *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984) (reversing conviction on conflict grounds).[3] At the very least, Harris and the government were aware that Harris was a likely witness at a trial on the insurance transaction charge, a transaction which the purported victim insisted Harris had certified as "kosher" and characterized Weinstein's role as merely a "consultant," leading the

3. "In circumstances such as these, when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest. We agree with Zepp's contention that from these facts alone there was an actual conflict of interest which required withdrawal by trial counsel or disqualification by the court." *Id.* at 136.

"victim" to invest in that transaction. Thus, Harris (and possibly other Proskauer lawyers who were present at the meeting with the "victim") was saddled with another ethical conflict, i.e., the so-called witness-advocate rule, since Harris possessed highly relevant evidence, including the fact that he advised the alleged "victim" that the transaction pitched by Weinstein was proper and innocent, and that the alleged "victim" told Harris he did not consider himself a victim in any prior dealings with Weinstein, including the charged insurance transaction scheme.

In short, Harris showed questionable judgment, as well as ethical myopia, in meeting with and advising someone he suspected the government considered a victim of Weinstein's charged scheming (why else ask Rotenstein whether he considered himself victimized by Weinstein?), and then agreed to represent Weinstein even after learning that the indict alleged Rotenstein as one of Weinstein's victims. Under these circumstances, Weinstein did not receive constitutionally adequate representation at the hands of Harris and Proskauer before and at his guilty plea, and is therefore entitled to withdraw his guilty plea. *United States v. Berberena*, 642 F. Supp. 2d 445 (E. D. Pa. 2007) ("Although Berberena acknowledged his guilt of the crimes . . . by pleading guilty, [counsel's] conflict of interest requires the Court to vacate Berberena's guilty plea rather than simply resentence him"). The Court has the government to thank for being saddled with this problem because the government failed to bring the Proskauer conflicts to the Court's attention despite the government's certain knowledge of their existence.

II. The Facts

A. The Indictment. On October 27, 2011, a grand jury in the District of New Jersey returned a 45-count indictment charging Weinstein with conspiracy to commit wire fraud (Count One), substantive counts of wire fraud (Counts 2-30), the commission of wire fraud while on release (Counts 31-32), bank fraud (Count 33), and conducting transactions with criminally-derived proceeds (Counts 34-45). Morris Rotenstein ("MR" in the indictment) figured prominently in the indictment as an alleged victim, including in the conspiracy charged in Count One, and as the only alleged "victim" of the wire fraud committed while on release charged in Counts 31 and 32. Additionally, a wire transfer to Rotenstein by one of Weinstein's entities was alleged to be criminally derived proceeds. Count 42. Rotenstein's role was described most fully in the conspiracy count, and was labeled "The M.R. Fraud":

> 64. Victim investor M.R. was a member of the Orthodox Jewish community and an accountant residing in and around Staten Island, New York. From in or about July 2008 through in or about August 2010, defendant WEINSTEIN defrauded M.R., and a number of investors M.R. introduced to defendant WEINSTEIN (collectively, the "M.R. Investors"), of more than $2 million, pursuant to the scheme to defraud described above.
>
> 65. As a result of these losses, M.R. sought to recover money for himself and the M.R. Investors. Defendant WEINSTEIN represented to M.R. that he had new deals which would allow M.R. to recover all of M.R.'s losses, as well as the losses of the M.R. Investors. But these new deals, too, were fraudulent. For example, beginning in or about February 2011 and continuing through in or about May 2011, defendant

WEINSTEIN defrauded M.R. of over $100,000 in connection with, among other things, an "insurance deal." Defendant WEINSTEIN induced M.R. to invest in the insurance deal by making the following misrepresentations, among others:

a. M.R. could, for an "investment" of approximately $135,000, become the substitute beneficiary of a life insurance policy held by an elderly woman who was terminally ill, and thereby receive up to $5 million when the woman died;

b. defendant WEINSTEIN was bringing this deal to M.R. because M.R. and the M.R. Investors lost money with defendant WEINSTEIN, and defendant WEINSTEIN wished to make them whole; and

c. defendant WEINSTEIN had no stake in this deal.

66. In reliance on the above misrepresentations, among others, on or about February 16, 2011, M.R. caused approximately $101,700 to be wired from a bank account located in New York to a bank account in New Jersey held in the name of Portfolio Realty (the "Portfolio Realty Bank Account"). Unbeknownst to M.R., the Portfolio Realty Bank Account had been opened by an individual with the initials "D.T.," but was controlled by defendant WEINSTEIN, who had separately arranged with D.T. for defendant WEINSTEIN to assume control over the account for a fee. As part of this arrangement, defendant WEINSTEIN convinced D.T. to provide defendant WEINSTEIN with blank checks, drawn on the Portfolio Realty Bank Account and signed by D.T.

67. Contrary to his representations, however, defendant WEINSTEIN did not use M.R.'s money to "invest" in any life insurance policy. Rather, defendant WE!NSTEIN used the bulk of M.R.'s "investment" for his personal use, including the following payments:

a. thousands of dollars to lawyers associated with or directly retained by defendant WEINSTEIN;

b. thousands of dollars to prior victims of defendant WEINSTEIN; and

c. thousands of dollars to the private school attended by at least one of defendant WEINSTEIN's children.

B. Proskauer's Involvement in the M.R. Insurance Transaction. Of course the indictment's account of the Rotenstein insurance transaction omitted a highly relevant fact, known to the government, i.e., Rotenstein only invested in the insurance transaction because, according to Rotenstein, he had received assurances from one of Weinstein's lawyers at Proskauer, Mark Harris, who opined, according to Rotenstein, that the investment was "100% kosher" (Exhibit A), and that "everything was legal and above board, and can't be turned against Rotenstein because Weinstein is just a consultant in the matter." Exhibit B.[4]

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4. Rotenstein's statements to the government are reflected in a 302 prepared by Agent Ubellacker (Exhibit B) and a handwritten memo prepared by Rotenstein himself, which he gave to the government. Exhibit A. Rotenstein's handwritten memo reads as follows:

> <u>Memo</u>
> Re: <u>Meeting with Mark Harris</u>
> I do not remember the date of meeting. I think that if I transferred the first money on 2/16/11 it could be that I met Mark on 2/15/11 at 6:30 in his office (across Port Authority bus terminal). I passed security and went to his office at the law firm. Present at the meeting were: Eli Weinstein, myself, Mark Harris and his legal assistant (I think her name was Emily). Mark is E.W. criminal lawyer and I wanted to be 100% sure that buying the insurance policy via E.W. is 100% legal and allowed. *He and "Emily" assured me it is 100% "Kosher." (Mark had his yarmulka on).* After the meeting I spoke with Mark about a position for my son in his firm. He said he will check and after

(continued...)

Based on the version offered by Rotenstein, whose credibility the government apparently accepted and vouched for since the indictment alleged that Rotenstein was the "victim" of the insurance transaction scheme, Harris could be viewed as a co-conspirator and accomplice of Weinstein since Harris aided and abetted the charged insurance transaction scheme; as Rotenstein put it, "based on his [Harris's] opinion I invested the money." Exhibit A.[5] Indeed, the indictment elsewhere alleges that at least some of Weinstein's lawyers occasionally helped him to carry out his schemes in the way that Rotenstein insists that Harris did. *See* Indictment ¶1(e).[6]

Of course it is virtually inconceivable that a highly reputable attorney like Harris, a partner in a highly reputable firm like Proskauer, would knowingly engage in a criminal

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4. (...continued)

> a few days he sent me an email saying he is sorry but no position is available. No papers were signed at meeting. *But based on his opinion I invested the money*.

Exhibit A (emphasis added).

5. In counsel's recent conversation with the government, the government attempted to minimize the conflict by claiming that Harris's statement to Rotenstein that the deal was "100% Kosher" was only designed to assure Rotenstein that as a general proposition investing in life insurance policies like the one in the Rotenstein transaction was a legitimate investment vehicle. According to the government, Weinstein's alleged fraud in the charged insurance transaction scheme derived from Weinstein's use of Rotenstein's investment for an entirely different purpose, i.e., payment of Weinstein's personal expenses. But the government's contention ignores, *inter alia*, the plain language and meaning of Rotenstein's own written statement which explicitly states that Harris reassured Rotenstein not simply that such an investment was "100% kosher," but that "buying the insurance policy via EW [Weinstein] was 100% legal and allowed." Exhibit A. Rotenstein also told the government, which reflected his statements in a 302, that Harris had reassured him that Weinstein was nothing more than "a consultant" in the deal, a claim that the indictment alleges was false.

6. Indeed, at least one of Weinstein's lawyers was forced to resign from the New York Bar as a result of his complicity in one of Weinstein's schemes. *Matter of Hager,* 941 N.Y.S.2d 53 (1st Dep't 2012); *See also United States v. Weinstein,* Mag. No. 13-8148 (May 13, 2013) ("2013 Complaint"). The Complaint identified another attorney as an uncharged Weinstein co-coconspirator . 2013 Complaint at ¶1(d).

scheme. But that is beside the point. Harris and the government should have been concerned about the consequences of and appearance created by blessing a transaction for which the government later indicted Weinstein, and that reasonable concern is precisely what created an actual conflict of interest for Harris. *See* Section C, *infra*.

Even if Harris need not have and did not reasonably fear criminal or disciplinary proceedings as a result of his role in the Rotenstein transaction, he knew that he (and probably other Proskauer lawyers, e.g. "Emily") was likely to be called as a witness at trial by one side or the other. Under the government's theory, Weinstein used Harris to bamboozle Rotenstein into making an investment in what Rotenstein understood was the purchase of an interest in a life insurance policy when, according to the government, Weinstein intended to use Rotenstein's money for his own purposes. It is hard to imagine the government making that case without calling Harris as a witness. Certainly defense counsel had made it clear to the government that they intended to call Harris as a defense witness on the Rotenstein transaction. Doc. #52-1 (Defendant's Pretrial Motion at 27; "the government well knows that every step of all meetings and discussions with M.R. in any way related to Mr. Weinstein in this matter were fully attended and monitored by counsel, including lawyers from the firm Proskauer Rose"); Transcript of Argument on Pretrial Motions (Dec. 3, 2012) at 22; "We intend to have lawyer witnesses all day long on [the M.R. insurance transaction charges]"); Transcript of Proceedings (Jan. 17, 2012) at 15 (defense counsel: "Every step of the way, involving this person referred to as M.R. was monitored by a lawyer, Bob Cleary and Bob Cleary's partner [Mark Harris] were

approached . . . [and] Mark Harris met with M.R., [and] every step of the way on this transaction was approved by a lawyer").[7]

C. Proskauer Formally Appears Two Weeks Before Weinstein's Scheduled trial, Exacts From Weinstein A $1 Million Fee To Try The Case, Reviews the 3500 Material, And Promptly Convinces Weinstein to Plead Guilty

On December 31, 2012, little more than a week after the Court permitted David Schoen to withdraw (Doc. #65), Proskauer's Cleary filed a notice of appearance after exacting a $1 million fee from Weinstein to represent him at trial, scheduled to begin on January 14, after which the Proskauer lawyers continued their intense trial preparation, including meeting with Weinstein. 2013 Complaint at ¶¶41-43; Creizman Declaration at ¶9. Indeed, upon filing their notices of appearance, the Proskauer lawyers moved to modify Weinstein's bail conditions to permit him to meet with them at their offices later than the 8:00 pm curfew previously specified since the curfew, according to new defense counsel, "is interfering with his lawyers' ability to prepare for trial." Doc #70. Also on December 31, the government produced to Cleary the government's Jencks Act material,

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7. In October 2011 Harris was informed by Weinstein's then counsel (David Schoen) that Harris and other Proskauer lawyers would be called as defense witnesses on the Rotenstein transaction:

> Mark and Emily, I believe you will be needed as witnesses later in the case, since [the government] said they plan to indict on the MR matter. They said this in chambers the other day; they have not repeated it. , , , [I]f they do, this should be a centerpiece for the defense and we want to be very strong on covering every angle to demonstrate fully legitimate and reviewed, counseled deal for all aspects, by a defendant who approached it with the greatest of care. So please save notes, memories, etc.

Creizman Decl. at ¶8.

including Rotenstein's handwritten statement and the government's 302 reflecting Rotenstein's statement. Creizman Declaration at ¶ 6.[8] Immediately upon their review of the 3500 material, which included the Rotenstein handwritten memo and the government's 302 reflecting the government's interview of Rotenstein about his meeting with Harris, the Proskauer lawyers began plea negotiations with the government. Moreover, in their attempt to convince Weinstein to plead guilty when he had previously expected to proceed to trial, the Proskauer lawyers represented to Weinstein that they had been informed by the Court that if Weinstein pleaded guilty the Court "would consider" the government's prior offer to Weinstein of a prison term of 5 to 10 years, and reassured the Proskauer lawyers that "all doors will be open" to Weinstein if he pleaded guilty, but if he went to trial and was convicted on even one count "all doors would be closed." Creizman Decl. at ¶¶3-4.[9] After consulting his rabbinic advisor, who had also been informed by the Proskauer lawyers that they had spoken with the Court and had been assured that the Court would give Weinstein favorable consideration if he pleaded guilty and made restitution (Goldman Decl. at ¶ 3), Weinstein agreed to plead guilty.

On January 3, 2013, Weinstein, represented by Messrs. Cleary and Harris

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8. Prior to Proskauer's entry, Weinstein had been represented by Henry Klingeman, Esq., co-counsel with Schoen. At the time Proskauer entered an appearance and received the 3500 material, Klingeman was out of town on vacation, and did not receive his copy of the 3500 materials until January 2, 2013, the day before Weinstein entered his guilty plea. Creizman Declaration at ¶ 10.

9. The Court knows that the Proskauer lawyers misrepresented the Court's position to Weinstein because the Court has declared on the record that it had no such conversations with the Proskauer lawyers. Transcript of Proceedings (Nov. 25, 2013) at 15

(Klingeman attended but said nothing), entered his guilty plea. Transcript of Proceedings (Jan. 3, 2013).[10] When asked by the Court who had filled out the Court's lengthy Rule 11 questionnaire, Weinstein informed the Court that Harris had done so. *Id.* at 8-9. Cleary was the lawyer who actively represented Weinstein at his guilty plea. *See, e.g., id.* at 18-20.

Never once during Weinstein's plea proceedings, or during any other proceeding or communication, did the government mention or in any way bring to the Court's attention the fact that the Proskauer lawyers were burdened with conflicts of interest, and suggest that the Court at least make inquiry. Indeed, the government kept quiet even when the Court stated that it recognized or remembered the names of Cleary, Harris and Proskauer "in some documents in connection with this [case]." *Id.* at 6-7. The Court was no doubt referring to the pre-trial motions argued just a month earlier in which Weinstein's counsel [Schoen] argued that the Rotenstein transaction was "fully attended and monitored by counsel, including lawyers from the firm Proskauer Rose." Doc. #52-1 at 27.

The first time the government ever brought the Proskauer lawyers' conflict arising from the Rotenstein transaction to the Court's attention was during a telephone conference with the Court and new defense counsel on the morning of December 24,

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10. Even when the Court directed a question to Klingeman ("Mr. Harris, Mr. Cleary, Mr. Klingeman, you represent that Mr. Weinstein gave all of the answers that appear on the Rule 11 Form and that he signed it voluntarily"), only Cleary and Harris responded. *Id.* at 9.

2013, and the government did so then only because new defense counsel had warned the government the day before (December 23, 2013) that they themselves would imminently reveal Proskauer's conflicts to the Court via a motion before Weinstein's scheduled sentencing on January 8, 2014, to vacate Weinstein's guilty plea. After apprising the Court of the conflicts during the December 24 telephone conference, the Court gave the defense two days, until noon on December 26, 2013, to file this motions, even though Christmas Eve and Christmas consumed most of those two days.

III. Conflict Law And Its Application Here

The Sixth Amendment right to the effective assistance of counsel not only includes the right to competent representation, but the right to counsel's undivided loyalty. *Zepp*, 748 F.2d at 131 (*citing Wood v. Georgia*, 450 U.S. 261, 271 (1981)). A defendant's claim of conflicted representation is "of an even more fundamental nature than that of traditional lawyer competence." *Id.* at 132. Indeed, a defendant need not demonstrate prejudice as a result of his lawyer's conflict of interest; "prejudice is presumed when counsel is burdened by an actual conflict of interest" since "[i]n those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.* at 132 (*citing Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). A criminal defendant is entitled to relief when his lawyer's actual conflict "adversely affected counsel's performance but [the defendant] need not demonstrate actual prejudice." *Zepp*, 748 F.2d at 134.

Zepp is a leading Third Circuit conflict case which fully supports, — indeed, in our view compels — the relief Weinstein seeks on this motion. The conflict in *Zepp*, as here, was two-fold: 1) defense counsel was present when narcotics evidence was being destroyed by someone in the defendant's house, and 2) in order to avoid testifying at the defendant's trial, defense counsel entered into a written stipulation that he did not flush any toilets in defendant's bathrooms, sounds that the officers heard from outside the house. The Third Circuit reversed the defendant's conviction because her lawyer was burdened with the two above-described conflicts, either one of which required reversal. As to defense counsel's possible complicity in the destruction of evidence, *Zepp* concluded that counsel suffered from an actual conflict of interest since he faced potential criminal liability, even if he was wholly innocent:

> While there is no direct evidence of wrongdoing by trial counsel, it is not necessary to assume wrongdoing to conclude that he had an actual conflict of interest – trial counsel had equal access and opportunity while alone in the house with Zepp to flush cocaine down the toilet. It is clear that he was potentially liable for aiding and abetting or encouraging the destruction of evidence.
>
> Even if not criminally charged for such events, trial counsel could have faced severe disciplinary consequences if it were ever known that he was involved in the destruction of evidence. Trial counsel neither avoided professional impropriety nor the appearance of impropriety.
>
> Therefore, it is unrealistic for this court to assume Zepp's attorney vigorously pursued his client's best interests entirely free from the influence of his concern to avoid his own incrimination. In circumstances such as these, when defense counsel has independent personal information regarding the

> facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest.
>
> We agree with Zepp's contention that from these facts alone there was an actual conflict of interest which required withdrawal by trial counsel or disqualification by the court.

748 F.2d at 136 (citations omitted). *Zepp* restates the well-established rule that an attorney who faces even the possibility of criminal or disciplinary consequences for the same or similar conduct for which his client is being prosecuted has an actual conflict of interest; he cannot be expected to represent his client zealously because of his fear for his own safety. *See, e.g., United States v. Lacerda*, 929 F. Supp.2d 349, 358 & n.9 (D. N.J. Mar. 7, 2013) (disqualifying defense counsel based on actual conflict due to the "mere possibility that [defense counsel] may face criminal or professional misconduct charges" because he erroneously told defendant's employees that a telemarketing script was lawful, even though the government represented that it did not intend to charge the lawyer); *United States v. Kolodesh*, 2012 WL 1156334 (E.D. Pa. Apr. 5, 2012) (disqualifying defense counsel based on actual conflict in 2 out of 35 counts where counsel "reassure[d]" a witness concerning the legitimacy of a report the government claimed was fraudulent; "The government does not need to provide direct evidence tying [counsel] to [criminal] impropriety as long as it provides evidence from which a factfinder could reasonably infer that [counsel] was involved in or had intimate knowledge of [defendant's criminal conduct]").

Here, as in *Zepp*, the government's own "victim"-witness, Rotenstein, accused

Harris of reassuring Rotenstein that the insurance transaction pitched by Weinstein was "100% kosher," and that Weinstein was only a "consultant" in the transaction, Rotenstein was apparently particularly impressed by the fact that Harris put on a "yarmulka" (skull cap) when he blessed the transaction, a touch that apparently reassured Rotenstein of Harris's and Weinstein's *bona fides*.

The fact that Harris may be completely innocent of any wrongdoing, and in any event may never be charged with any wrongdoing in this transaction, are beside the point. The cited cases, and many others, stand for the proposition that all that is required to make out an actual conflict is the "plausibil[ity]" that defense counsel is concerned with his own "self preservation rather than focusing on his client's defense and serving as a zealous advocate" *Lacerda*, 929 F. Supp. 2d at 358.

The second form of actual conflict in *Zepp* was counsel's violation of the advocate-witness rule prohibiting a lawyer from acting simultaneously as both advocate and witness, thereby putting his credibility in issue. In *Zepp*, the court found that in effect defense counsel acted as a prosecution witness by agreeing to provide the jury with testimonial evidence via stipulation: "counsel's testimony deprived [defendant] of effective assistance of counsel [since] the roles of an advocate and of a witness are inherently inconsistent." 748 F.2d at 138. The Court concluded that the stipulation was coerced from Zepp's counsel since he was presented with the choice of stipulating or subjecting himself to cross-examination as a witness and possible implication as a coconspirator:

> Trial counsel's interest in testifying on his own behalf impaired the exercise of independent professional judgment on behalf of his client. From our view, the admission of such testimony is so egregious that it constitutes a total abandonment of loyalty which counsel owes his client. Thus, we also agree with Jo Ann Zepp's contention that trial counsel was required to withdraw *regardless of whether his testimony would be exculpatory or inculpatory. Such a statement given under these circumstances violates her fifth and sixth amendment due process rights to a fair trial.*

*Id (*emphasis added). Thus, the Court found that defense counsel had an actual conflict of interest whether he testified for the government or the defense.

Here, as in *Zepp*, it was made abundantly clear to the Proskauer lawyers who attended the meeting with Rotenstein that they would be called as defense witnesses, and of course under the government's view of the conduct, the Proskauer lawyers could just as easily been called to testify for the government. Indeed, it may well have been because of the strong possibility they would have to testify at trial that the Proskauer lawyers, rather than withdraw, convinced Weinstein to precipitously plead guilty to ensure that their role in the Rotenstein transaction did not come to light.

The only remaining question is whether the Proskauer lawyers' dual conflicts "adversely affected" their representation of Weinstein. In view of the actual conflicts with which Proskauer was faced, the question answers itself. In the view of unconflicted counsel (Schoen), the Rotenstein transaction would be the "centerpiece" of Weinstein's defense since it would show a "fully legitimate and reviewed, counseled deal" allowing defense counsel to demonstrate the tunnel vision with which the government viewed the

facts and using the Rotenstein transaction as a springboard for undermining the rest of the government's case. By contrast, Proskauer's own self-interest definitely lay in minimizing the Rotenstein transaction, and hoping that the transaction would never see the light of day at Weinstein's trial.

Where, as here, counsel advises a defendant to plead guilty because a trial would conflict with counsel's own self-interest, a resulting guilty plea is invalid. *Berberena*, 642 F. Supp.2d 445 (vacating guilty plea where the defendant was advised to plead guilty by counsel who suffered from an actual conflict); *See also United States v. Gambino,* 864 F.2d 1064, 1070-71 (3d Cir. 1988) ("Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it."). Moreover, even if Weinstein was determined to plead guilty, there is no way to know if Proskauer's urging Weinstein to accept the particular plea offer was driven by Proskauer's desire to obtain a plea and avoid trial at any cost, and thereby obscure or hide their conflict of interest. Under these circumstances, Weinstein's plea was obtained in violation of his Sixth Amendment right to unconflicted counsel.

Whether Klingeman may have nominally represented Weinstein at the same time that Weinstein was represented by Proskauer would not cure or mitigate the conflict.. First, there was no question of who was lead counsel and called the shots. Once Proskauer entered the case, Klingeman took a backseat. Indeed, trial preparation meetings were held only between Proskauer and Weinstein, and were not attended by

Klingeman. In fact, Klingeman was out of town on vacation when the government turned over the 3500 material, and he therefore did not even see the Rotenstein 3500 material until Janaury 2, 2012, the day before Weinstein entered his guilty plea.

Second, Weinstein's decision to plead guilty was, not surprisingly, based solely on Proskauer's advice; after all, only Proskauer lawyers had read the 3500 material and negotiated Weinstein's guilty plea immediately before Weinstein entered it. Certainly Klingeman's nominal appearance would not have cured or ameliorated the fact that Harris was a key witness at trial who could not both testify and represent Weinstein. Indeed, even if Harris was not going to be a witness, Harris could not unburden himself of his ethical conflict. *United States v. Locasio*, 6 F.3d 924, 933 (2d Cir. 1993) ("an attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented," thereby enabling the attorney to "subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination"); *United States v. Merlino*, 349 F. 3d 144, 152 (3d Cir. 2003) (citing *Locasio,* "disqualification may also be appropriate where it is based solely on a lawyer's personal knowledge of events likely to be presented at trial, even if the lawyer is unlikely to be called as a witness"). Finally, unconflicted co-counsel like Klingeman cannot cure lead counsel's conflict. *Kolodesh*, 2012 WL 1156334 at n. 14. Particularly where, as here, the conflicts are non-waivable, Klingeman's nominal status in the case was meaningless in connection with the conflict issue. *See United States v. Fulton*, 5 F.3d 605, 613 (2d Cir. 1993) ("The conflict here involves a bias arising out of

counsel's powerful self-interest in avoiding criminal charges or reputational damage and makes this a conflict of a different character than other conflicts").

Finally, in light of Proskauer's conflicted position, plainly revealed in the Rotenstein memo and the government's 302, and the potentially serious consequences for the Proskauer lawyers flowing from the facts underlying those conflicts, it is understandable that the Proskauer lawyers would resort to extraordinary measures to convince Weinstein to plead guilty in the hope that a guilty plea would obscure or prevent the disclosure of the conflicts revealed in the 3500 material. Certainly the timing was exquisite: retained only weeks before the scheduled start of Weinstein's trial, Proskauer advised Weinstein to plead guilty two days after receiving and reviewing the 3500 material conspicuously revealing Proskauer's conflict. Those extraordinary measures apparently included misinforming Weinstein that the Proskauer lawyers had spoken with the Court during which the Court strongly hinted that it would extend leniency to Weinstein if he pleaded guilty, a conversation the Court denied. Even if the Proskauer lawyers were not burdened by multiple conflicts, their willingness to mislead their client to plead guilty would be grounds to permit Weinstein to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, Weinstein should be permitted to withdraw his guilty plea.

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