SUPREME COURT NEW YORK COUNTY
CRIMINAL TERM 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:
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THE CLERK: Calling People of the State of New York versus Donald J. Trump, Indictment Number 71543 of 2023.

Appearances, starting with the People.

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

Good morning, everyone.

THE COURT: Good morning, People.

MR. BOVE: Good morning, your Honor.

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

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

THE COURT: Good morning, counsel.

Good morning, Mr. Trump.

All right.

We have a witness on the stand.

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

MR. STEINGLASS: I don't think so.

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

Thank you very much. It is helpful.

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

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

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

Let's get the witness, please.

(Pause.)

THE LIEUTENANT: Ready for the witness, your Honor?

THE COURT: Yes, please.

THE LIEUTENANT: Witness entering.

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

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

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

I remind you that you are still under oath.

THE WITNESS: Yes.

THE COURT: All right.

Let's get the jury, please.

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

THE COURT: Okay.

(Pause.)

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

THE COURT: Yes.

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

THE COURT: Yes, I will.

THE SERGEANT: All rise. Jury entering.

(Jury enters.)

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THE COURT: Please be seated.

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

MR. STEINGLASS: Yes.

MR. BOVE: Yes.

THE CLERK: Thank you.

THE COURT: Good morning, Jurors.

Ms. Hoffinger.

MS. HOFFINGER: Thank you, your Honor.

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CONTINUED CROSS-EXAMINATION

BY MS. HOFFINGER:

Q Good morning, Mr. Costello.

A Good morning.

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

A That's correct.

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

(Displayed to the aforementioned parties.)

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

A I do.

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

A That's correct.

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

A I did.

I provided a lot of emails to your Office.

Q Thank you, sir.

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

MR. BOVE: No objection.

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

(So marked in evidence.)

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

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

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

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

A That's correct.

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

A Not with this email.

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

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

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

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

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

Q Okay. Thank you.

A -- which you have.

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

A Right.

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

A That's not true.

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

A No. That was not the first meeting.
You are quoting from a different email that is --
Q I'm just asking you a question?
A That is much later.
Q I'm not quoting from an email yet.
And I'm just asking you a question and you said, "No;" is that correct?
A I said "No," that's correct.
Q And you are very close to Rudy Giuliani; correct?
A Yes.
Q And you've known him for 50 years?
A I have.
Q And he has been to your wedding?
A Yes, he was.
Q Okay. Now, didn't you confirm to Michael Cohen in an email two days later that you had, in fact, told him that your relationship with Rudy could be very useful to him?
A Yes.
Q Okay.
MS. HOFFINGER: So let's take a look at People's 203 in evidence, please.
If you could put that up.
(Displayed.)
A Yes.
Q You sent this email; correct?

A Correct. I did.
Q To Mr. Cohen?
A That's correct.
Q Two days after meeting him?
A That's correct, yes.
Q I'm going to read it for the jury.
I'm sure you saw the news that Rudy is joining the Trump legal team.
I told you my relationship with Rudy, which could be very, very useful for you.
Robert Costello.
You sent that email to him; correct?
A Yes.
Q Okay. Now, when you said, "I told you my relationship with Rudy," didn't you mean that you had told him that at that first meeting --
A No.
Q -- on August 17th?
A No.
Q Okay. Let's take a look.
MS. HOFFINGER: Let's put up just for the witness and for the counsel and for the Court, People's Exhibit 512E for identification, please.
(Displayed for the aforementioned parties only.)
Q Mr. Costello, do you recognize this email that you sent

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

A Yes, I do.

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

A Absolutely, correct. More than a year ago.

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

MR. BOVE: No objection.

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

(So marked in evidence.)

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

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

Here is your email to your partner, Jeffrey Citron:

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

That was your email; correct?

A Correct.

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

correct?

A No, that's not correct.

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

(Displayed.)

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

A Yes, I do.

Q I will read to the jury from the email:

Michael, I just spoke to Rudy Giuliani and told him I was on your team.

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

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

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

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

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

I told him I would after speaking to you further.

Bob.

That was your email, correct, to Michael Cohen?
A Yes.
Q And the email speaks for itself; right, sir?
A I'm sorry?
Q The email speaks for itself; right, sir?
A No, not quite, because there are surrounding circumstances --
Q Uh-huh.
A -- about that email, which I will be delighted to tell you about.
Q That's all right.
MS. HOFFINGER: Let's move on to the next one.
Can we put up People's 205 now, in evidence.
(Displayed.)
Q You sent this email to Michael Cohen on April 21st of 2018; right?
A Yes, I did.
Q And you provided that email to our Office as well; correct?
A Absolutely.
Q I will read to the jury from it.
From Robert Costello to Michael Cohen. Subject line "Giuliani."
I spoke with Rudy. Very, very positive. You are loved. If you want to call me, I will give you the details.

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

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

Rudy said this communication channel must be maintained.

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

Sleep well tonight. You have friends in high places.

Bob.

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

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

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

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

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

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

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

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

MS. HOFFINGER: Can we now show just to the

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

(Displayed to the aforementioned parties only.)

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

A Yes.

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

A I did, yeah.

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

MR. BOVE: No objection.

THE COURT: Accepted into evidence.

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

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

Thank you.

(Displayed.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Displayed.)

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

In my opinion, this is the clear correct strategy.

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

Bob.

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

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

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

Q Thank you.

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

Q Thank you for that response.

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

A Sometimes.

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

(Displayed.)

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

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

Q It says "Update draft."

A Right.

Q Correct?

A Right.

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

A Yes.

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

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

(Displayed.)

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

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

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

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

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

Q Okay.

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

(Displayed.)

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

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

perhaps we have been played here.

Let me know what you want to do.

You sent that email; correct?

A Yes, I did.

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

A Yes.

Do you want me to explain it?

Q No, sir.

Because you had not been paid; is that right?

A No.

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

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

Q No, sir.

A When I said "being played" --

Q Excuse me, sir.

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

THE COURT: There is no pending question.

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

(Displayed.)

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

A That is correct.

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

Yes or no?

A Let me read it.

Q Sure.

(Witness reading document.)

A Okay.

Your question is?

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

A No.

Q Okay.

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

Put that up for the jury, please.

(Displayed.)

Q From Robert Costello to Michael Cohen.

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

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

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

I think you are wrong because you are believing the

narrative promoted by the left wing media.

They want you to believe what they are writing.

Many of them are already writing that you are cooperating.

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

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

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

That's your email; correct?

A That's correct.

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

If you could just blow up the third paragraph. Thank you so much.

(Displayed.)

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

They want you to cave.

They want you to fail.

They do not want you to persevere and succeed.

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

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

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

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

Whether you exercise that ability is totally up to you.

You wrote that to him; right?

A I did.

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

A Angry? No.

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

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

Q Okay.

A I was informed --

Q Weren't you --

A And I informed Jeff Citron of that.

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

A I don't think that's correct.

Q Okay.

Yesterday, you were asked a question by defense counsel:

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

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

Do you remember that?

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

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

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

Do you remember testifying to that yesterday?

A Yes, I do, uh-huh.

Q Okay.

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

(Displayed.)

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

A Yes, I do.

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

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

Q Okay.

A -- as well as this one..

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

MR. BOVE: No objection.

THE COURT: 512H is accepted.

(So marked in evidence.)

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

(Displayed.)

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

A That is correct.

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

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

A Yes, I did.

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

(Displayed.)

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

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

I'm in a golf tournament tomorrow early and again on Sunday. What should I say to this asshole?

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

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

A Yes, it does.

Q You still -- withdrawn.

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

A Can you repeat that?

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

A Absolutely not.

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

A Ummm, no.

In fact, if you look at the email --

Q Yes or no, sir?

Yes or no?

A Okay.

Q Is your answer no?

A I did --

Q Did you not lose control of him?
A I did --
Q You did lose control of him?
A No. I answered no.
Q Okay.
And you didn't lose control of him when he pled guilty on August 21st, 2018?
A What do you mean by that?
Q You are stating under oath that he had violated two separate campaign finance violations in coordination with and in the direction of Donald Trump --
MR. BOVE: Objection.
THE COURT: Overruled.
Q -- for the initial purpose of influencing the election; yes or no?
A You are asking me if I lost control when he pled guilty?
Q Correct.
A I certainly didn't have any control when he pled guilty.
Q Understood.
And you still have a lot of animosity against Michael Cohen; don't you?
A I don't have any animosity. I just don't think Michael Cohen is telling the truth --

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

A No.

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

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

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

A I went there to testify.

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

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

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

A I was intimidating him?

Q Yes, that's my question.

A That's ridiculous. No.

MS. HOFFINGER: Nothing further.

THE COURT: Any redirect?

MR. BOVE: Yes, Judge, thank you.

May I inquire, Judge?

THE COURT: Please.

MR. BOVE: Thank you.

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REDIRECT EXAMINATION

BY MR. BOVE:

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

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

Thank you.

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

MR. BOVE: Yes.

Thank you.

MS. HOFFINGER: You're welcome.

(Displayed.)

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

(Displayed.)

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

A That is correct.

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

Do you see that?

A I do.

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

Do you see that?

A I do.

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

A False.

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

I think we have this one.

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

(Displayed.)

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

Do you see that?

A Yes.

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

Do you see that on Page 2?

A I do.

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

A I do.

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

A That is a false statement.

MS. HOFFINGER: Objection, your Honor.

THE COURT: Overruled.

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

This is something that Ms. Hoffinger put in yesterday.

(Displayed.)

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

A That is correct.

Q On April 20th of 2018?

A Correct.

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

A Yes.

(Displayed.)

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

Do you see that quote?

A Yes.

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

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

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

A Yes.

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

A Exactly.

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

A That's the way -- yeah.

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

A Who he was.

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

A Correct.

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

Zoom in on rows 6 through 8.

(Displayed.)

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

A Right.

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

A That's correct.

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

A Right.

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

(Displayed.)

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

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

(Displayed.)

Q And you talked about this email with Ms. Hoffinger. Do you see the reference on the last line to "being played here?"

A Right.

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

MS. HOFFINGER: Objection.

THE COURT: Overruled.

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

A No, not at all.

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

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

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

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

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

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

MS. HOFFINGER: Objection.

A -- McDermott Will & Emery.

THE COURT: Sustained.

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

A Yeah, sure.

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

And if we could zoom in on the email.

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

A Correct. I do.
Q And this is an email that you sent to Michael Cohen that day; correct?
A That's right.
Q And this is the day after that email you sent to your son with the quote from Michael Cohen?
A Right.
Q Correct?
A That's correct.
Q And do you see at the top where you wrote: "Attorney-client communication privileged?"
A Yes.
Q Why did you write that?
A Because it was an attorney-client communication and, therefore, privileged. That's why I wrote it.
Q That's your perspective; right?
A Yes.
Q Did Michael Cohen write back to you and say: Hey, wait a second, you are not my lawyer?
A No.
Q And did you write back and say: Hey, wait a minute, you didn't even send me a Retainer Agreement?
A No.
Q And did he actually write back and say: Hey, I'm talking to a bunch of lawyers right now and I haven't made a

decision?

A No, he didn't.

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

A Yes.

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

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

(Displayed.)

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

(Displayed.)

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

Do you see that?

A I do.

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

A Correct.

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

A That is correct.

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

A That is correct.

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

A He asked me to.

Q And, now, let's focus on the words "back channel."

Between Michael Cohen, you, and Rudy Giuliani, who first used the word "back channel?"

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

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

A That's right.

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

A Yes.

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

A Yes. That is right.

MS. HOFFINGER: Objection.

THE COURT: Sustained.

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

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

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

A Right.

Q What did you mean by that?

MS. HOFFINGER: Judge, beyond the scope.

THE COURT: Sustained.

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

THE COURT: Sustained.

MS. HOFFINGER: No, it was not.

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

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

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

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

THE COURT: Please approach.

MR. BOVE: Yes, your Honor.

(At Sidebar.)

******

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

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

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

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

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

THE COURT: You can't use --

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

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

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

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

MR. BOVE: Yes, Judge. Understood.

(Sidebar concluded.)

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?

A Exactly.
Q Did you ever pressure Michael Cohen to do anything?
A I did not.
Q Did you ever have control over Michael Cohen?
A Clearly not.
Q Does a lawyer ever control his client?
MS. HOFFINGER: Objection, your Honor.
THE COURT: Sustained as to form.
Q I just want to ask you a question right now.
You are experienced in how you practice law?
MS. HOFFINGER: Objection.
THE COURT: Sustained.
Q Did you have control over Michael Cohen, sir?
A No, I did not.
Q In every single document that we've looked at during your testimony, you provided them to these guys a year ago; correct?
A I did.
Q Including the email you sent to your son where you quoted Michael Cohen and indicated that he had told you that you were his lawyer; right?
A That is true.
Q And that's an email that he sent to you after that meeting at the Regency Hotel; correct?
A Yes.

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

A That is correct.

MS. HOFFINGER: Objection.

A That is correct. Many times.

MS. HOFFINGER: Objection.

THE COURT: Sustained.

MS. HOFFINGER: Move to strike.

THE COURT: It is stricken.

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

MS. HOFFINGER: Objection. Beyond the scope.

THE COURT: Sustained.

A Correct.

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

A Correct.

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

MS. HOFFINGER: Objection.

THE COURT: Sustained as to the leading.

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

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

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

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

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

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

A I did.

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

A Correct.

MS. HOFFINGER: Objection.

THE COURT: Sustained.

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

(Indicating the People's table.)

MS. HOFFINGER: Objection.

A Yes.

THE COURT: Sustained.

MR. BOVE: I have nothing further, Judge.

THE COURT: Any recross?

MS. HOFFINGER: Just two questions, your Honor.

****

RECROSS-EXAMINATION

BY MS. HOFFINGER:

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

May 3rd; did you say?

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

Q On May 3rd?

A Yes.

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

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

A This looks like it, yeah.

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

A It says "As of."

Q "As of April 20th, 2018?"

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

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

A That is correct.

Q And he never paid you; correct?

A That is correct.

MS. HOFFINGER: Thank you.

THE COURT: Anything else?

MR. BOVE: No, Judge.

Thank you.

THE COURT: Thank you, sir.

You can step down.

(Witness excused.)

****

THE COURT: Counsel?

MR. BLANCHE: Your Honor, the Defense rests.

THE COURT: People?

MR. STEINGLASS: Nothing further, Judge.

THE COURT: Okay.

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

The Defense just rested today.

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

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

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

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

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

It's not always possible.

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

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

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

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

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

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

But, in fact, these instructions now take on even

greater significance.

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

Please continue to keep an open mind.

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

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

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

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

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

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

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

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

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

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

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

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

All right. Thank you.

I will see you in a week.

THE COURT OFFICER: All rise.

(Jury exits.)

****

THE COURT: Thank you.

Please be seated.

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

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

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

Is there anything else that we need to cover?

MR. STEINGLASS: No.

Thank you, Judge.

MR. BOVE: Just a procedural question, Judge.

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

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

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

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

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

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

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

submissions to your Honor.

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

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

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

MR. STEINGLASS: Thank you.

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

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

THE COURT: Good afternoon.

Please be seated.

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

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

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

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

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

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

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

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

Those were the substantive emails that I received.

Today, I also received four joint submissions.

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

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

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

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

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

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

MR. COLANGELO: No, your Honor.

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

THE COURT: Okay.

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

There are, obviously, a few issues that remain.

I would like to start by going through the

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

Let's start with the proposal instructions on FECA.

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

Can I hear from you on that?

MR. BOVE: Yes, your Honor.

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

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

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

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

But, there's no illegal conspiracy.

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

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

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

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

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

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

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

That's a very serious concern for us.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Bove mentioned the case People v. Wisan.

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

in the earlier submission.

I have not briefed that case.

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

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

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

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

THE COURT: Sure.

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

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

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

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

And another reason that it is -- both sides have

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

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

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

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

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

How do you respond to that?

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

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

The legislature could have said "through criminal

means" and didn't.

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

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

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

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

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

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

THE COURT: Sure.

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

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

THE COURT: Thank you.

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

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

Why do you need that instruction?

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

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

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

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

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

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

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

It is worded inaccurately.

In any event, this is extraneous and confusing.

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

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

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

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

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

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

MR. BOVE: Yes, Judge.

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

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

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

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

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

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

We understand the Court's ruling.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I agree.

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

I think that here it becomes confusing.

Some of the issues are confusing enough, I think.

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

Let's go down to the next paragraph.

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

MR. COLANGELO: Thank you, your Honor.

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

Our purpose in adding this additional language was twofold.

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

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

That's the first reason.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We don't think that's supported.

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

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

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

THE COURT: Let me read it into the record.

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

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

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

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

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

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

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

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

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

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

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

We didn't make up examples.

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

MR. COLANGELO: A couple of things.

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

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

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

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

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

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

If the Court is inclined to go with the final

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

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

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

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

Again, I'm reserving decision on that.

That's my inclination right now.

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

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

I don't have a major problem with that.

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

MR. BOVE: That would be fine with us.

Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

You remember Mr. Pecker's testimony.

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

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

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

Those are not facts that the FEC --

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

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

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

And you don't object to striking the "legitimate

press function is a broad concept"; right?

MR. BOVE: No, your Honor.

THE COURT: All right.

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

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

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

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

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

In this case, it's two crimes.

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

I thought it was misleading to make it only one.

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

THE COURT: Okay.

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

That's applicable also.

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

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

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

And it certainly is applicable in this case.

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

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

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

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

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

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

THE COURT: Let's talk about this case.

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

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

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

(Whereupon, Senior Court Reporter Theresa Magniccari relieves Senior Court Reporter Laurie Eisenberg, and the transcript continues on the following page.)

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

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

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

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

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

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

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

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

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

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

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

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

All right.

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

THE COURT: Yes.

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

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

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

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

Okay. All right.

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

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

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

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

Can we just delete it?

MR. STEINGLASS: No objection.

COURT REPORTER: Can you spell that, please.

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

Let's go down to the next one.

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

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

MR. COLANGELO: Thank you, your Honor.

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

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

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

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

intent.

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

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

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

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

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

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

intent to defraud should mean here under these circumstances.

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

It continues on the next page.

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

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

THE COURT: You're right.

Let me hear from you.

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

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

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

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

sentences on that.

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

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

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

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

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

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

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

Legally, there are two reasons this would be error.

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

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

MR. COLANGELO: Just two quick points.

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

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

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

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

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

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

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

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

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

Why is this basically not duplicative of that?

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

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

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

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

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

THE COURT: I will reserve decision on that.

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

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

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

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

appropriate charge.

You also oppose intent to defraud. Tell me why.

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

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

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

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

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

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

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

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

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

One other point here, your Honor, unlike in the

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

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

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

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

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

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

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

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

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

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

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

Right?

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

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

So, should the jury be instructed about what they

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

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

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

But I will hear from you.

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

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

THE COURT: Yes.

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

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

THE COURT: What are you referring to?

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

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

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

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

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

that is the balanced way to go forward.

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

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

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

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

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

about that is very significant for the People here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

or aid another crime.

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

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

The second, mens rea.

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

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

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

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

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

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

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

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

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

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

Continuing on the next page. "Evidence that

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

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

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

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

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

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

Here there is standard CJI language on conspiracy.

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

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

THE COURT: I understand.

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

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

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

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

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

that both have that wilfulness mens rea.

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

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

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

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

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

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

(Continued from the previous page.)

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

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

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

That's not a concession.

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

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

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

Tell me about the final two paragraphs.

MR. BOVE: The -- on paragraph -- excuse me. On Page 2 --

THE COURT: Page 2. That sounds right.

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

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

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

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

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

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

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

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

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

They are similar concepts, "mere presence".

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

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

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

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

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

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

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

The extensive argument regarding the evidence of

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

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

THE COURT: That's a different argument.

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

MR. BOVE: We certainly think so.

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

And the jury can certainly reach that finding.

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

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

important here.

We're going to get to the next part.

This part we're pulling from CJI.

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

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

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

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

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

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

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

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

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

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

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

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

meeting.

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

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

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

THE COURT: Let's turn to "unlawful means".

Start with the People.

MR. COLANGELO: Thank you, your Honor.

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

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

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

accomplishing a single offense.

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

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

We understand the law that's been cited here.

We think your Honor has some discretion.

This is, obviously, an extraordinarily important case.

We do have a motion pending from yesterday, still.

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

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

MR. BOVE: Certainly.

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

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

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

THE COURT: I agree.

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

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

Looking at Paragraphs 2 and 3, those seem very similar to me.

What's the difference between those two paragraphs?

MR. COLANGELO: So, your Honor, we have a couple of concerns with Defense proposal.

The first is that it refers to a requirement that there be proof that the goal of the conspiracy was to promote the election of a person by unlawful means.

And, as we've discussed, the -- the actual commission of the predicate crime does not need to be

established beyond a reasonable doubt, so we think it's confusing and inaccurate to refer to a requirement of proof.

Again, the only proof obligation the People have, which is a high one, is to establish that this Defendant had made or caused false entries in the business records of his enterprises, with an intent to defraud and the intent to conceal the commission of another crime. But, there's no proof requirement as to the object crime.

So, we oppose the use of the word "proof".

I think the second key disagreement here is we believe the Court should advise the jury that there are three different unlawful means that the co-conspirators intended to execute in order to promote the Defendant's election unlawfully: violations of the Federal Election Campaign Act, falsification of other business records, and the violation of Tax Laws.

And we understand -- and I believe this is a sufficiency argument.

We understand that the Defense opposes that third category, the violation of Tax Laws.

MR. BOVE: Judge, we think that the Government does have to put forward some proof of the objects of the 17-152 conspiracy. Because if they don't prove up criminal objects, then there is no criminal conspiracy.

In that event, there is no predicate to elevate the 175.10 charges up to a felony.

So, under these circumstances, the way the Government chose to put this theory of this case to this jury, there does need to be proof. Because, otherwise, the jury could find that there was a conspiracy to promote President Trump's election without unlawful means, in which case, that would not support what the Government is going to ask this jury to do.

So, we think that our language is an accurate statement of the law, and proof is required that there were criminal objects of this conspiracy. Because, otherwise, there's no unlawful means. In that event, there's no 17-152 conspiracy, and there's no basis to elevate this up to a felony.

THE COURT: Yes.

MR. COLANGELO: Under People v. Mackey, the People weren't even required to identify any object crime.

As the Court knows, in The Trump Corporation trial, the jury instructions did not identify an object crime.

In nearly all burglary cases, the Court doesn't identify an object crime.

We attempted to do so to make the evidence as clear as possible for the jury and to help them understand

the facts of the case.

But, where there's no obligation to identify even the object crime, there is no reason to be held to the proof standard of the object crime.

What we have to prove is the Defendant's intent and the intent to aid or conceal.

MR. BOVE: Mackey had to come up at least once at this conference.

Look. There's a very significant difference between the facts in Mackey and a burglary charge, where the Court of Appeals said there can be evidence of criminal intent of the fact of the entry, the manner in which the burglary happened.

This is not that case.

And your Honor has discretion here.

The really important issue is: The predicate that the Government is moving forward on requires proof of unlawful means.

The jury cannot infer that the predicate is established just by the fact that there was an agreement to promote President Trump's election in 2016.

Of course there was. He won.

They have to establish some kind of unlawful means to make that a crime.

That makes this very different from Mackey.

That's why we structured these proposals in the way that we did.

THE COURT: Looking at violation of Tax Laws on Page 3, Section 3.

People.

MR. COLANGELO: Thank you, your Honor.

As we understand it, the Defense objection to including this charge at all is that I believe the Defense is arguing that the evidence is insufficient to establish Tax Law violations.

We just think the trial record refutes any argument along those lines.

The record shows, both through witness testimony and the documentary evidence, including Weisselberg's handwritten notes on the Essential Consultants' bank statement at People's Exhibit 35, Jeff McConney's contemporaneous handwritten notes, People's 36, the record shows that part of the intended concealment here was to camouflage the reimbursement as income so it wouldn't be noticed. And in order to camouflage it as income or as a consequence of camouflaging it as income, they doubled it, they grossed it up for tax purposes.

Weisselberg and McConney even wrote down "grossed up" on People's 35, "times two for taxes" on People's 36. So, falsely identifying corporate payment as

reimbursement -- as income rather than reimbursement.

And then, as the Court also saw through the 1099s that were submitted to the IRS, carrying forward that deception through documents that not only were intended to be, but ultimately were, submitted to Government agencies, all is evidence of false -- submission of false information to Tax Authorities; and those elements, alone, establish the City, State and Federal Tax violations that we identified.

MR. BOVE: The problem with this theory, Judge, and the reason that it shouldn't go to the jury is that Michael Cohen testified that he didn't know anything about it.

And I'm referring to the transcript at 3490, Lines 6 through 9.

He was asked: "What, if any, understanding do you have about why he" -- why Allen Weisselberg -- "grossed that reimbursement up to $360,000?"

"Answer: I don't know. And, to be honest, I didn't even really think about it. I just wanted to get my money back."

That testimony is the reason that the tax predicate should not go to this jury, because what the Government's theory is, is that they're talking about tax filings by Mr. Cohen.

He didn't agree to do anything.

There's that 1099 Miscellaneous Form which just only reflects and it confirms in an open way that payments were made to Mr. Cohen. The Trump Organization was transparent about this.

That's not evidence of some kind of agreement to make false tax filings by Mr. Cohen.

And Mr. Cohen testified that he didn't know anything about it.

So, that's the factual basis for this argument.

MR. COLANGELO: I don't think that testimony can fairly be characterized as indicating Mr. Cohen didn't know anything about it.

He separately testified that it was grossed up because he was going to take it as income.

He knew full well it was not income. He knew it was a reimbursement.

The trial record supports it was a reimbursement because it tracks directly the $100,000 to Keith Davidson.

Arguably, there's competing evidence the parties can present to the jury.

We don't remotely think it's income for work.

We think the transcript shows he knew he was getting income for reimbursement that they were calling "income" when it's not.

He also said over and over again that the checks were reimbursement, they were not payment for a retainer for services rendered.

So, all of that supports the view that he knew he was getting money called "income" when it wasn't.

That, alone, supports the tax violation, Judge.

(Whereupon, Senior Court Reporter Lisa Kramsky relieves Senior Court Reporter Laurie Eisenberg, and the transcript continues on the following page.)

(The following proceedings are continued from the previous page.)

MR. BOVE: Separate from the factual issue here, Judge, we do have our additional position, which is that these -- this back and forth that we are talking about, and we don't think that the inferences that were just described are supported by the trial record.

But even if they were, an agreement after the election to do these things is not an agreement to promote President Trump's candidacy in the 2016 election.

A conspiracy doesn't automatically continue past the accomplishment of its objectives.

And so, the issue here is that on the Government's theory, when President Trump won, the conspiracy -- this is 17-152 -- the conspiracy was accomplished.

And so, for that additional reason, as a matter of law, the tax predicates should not go to the jury on this theory because they could not have possibly have promoted President Trump's election, because it had already happened.

THE COURT: Yes?

MR. COLANGELO: I think the Court rejected that argument, as a matter of law, in your Honor's decision on Omnibus Motions in February.

And, in any event, the trial record clearly

supports, and a rational juror could conclude, that where one of the purposes of the conspiracy was to hide damaging information and where there was an agreement made in advance to conceal the nature of the transactions, that the ultimate consummation through the repayment agreements is part of a continuous course of conduct.

And it doesn't matter that it happened a few months after the election, rather than before.

MR. BOVE: But those are factual arguments, Judge.

What the statute that we're talking about prohibits is promoting a candidate in an election. The election was over at this point.

These alleged tax crimes that we weren't even allowed to ask Mr. Cohen about are not -- they didn't -- they are not unlawful means on the Government's theory of an election that has already happened.

There is also no evidence that The Trump Organization took a deduction on this or that President Trump took a deduction on this.

There is no evidence of any tax filing on the company's side either.

And so, there is just not enough evidence for these things to go to the jury.

MR. COLANGELO: I think the Court addressed that argument as well, in granting the People's motions to quash

the subpoenas to Mr. Cohen who could -- where your Honor held that evidence regarding his ultimate tax treatment of the payments is irrelevant to the question of whether, when they decided in January 2017 to gross it up, and to do so in order to conceal the reimbursement as income, whether that, at that moment, included an intent to commit tax law violations, which we believe it did.

THE COURT: All right. I have one more question, then I want to take a short break.

The People have submitted proposed language for Counts 32 through 34.

Have you had a chance to look at them?

MR. BOVE: We have, Judge.

And our concern with the proposal is that to try and summarize the elements at the end, as well as the description of which document is attached to which count, would be to sort of limit the jury's consideration or at least there would be a risk of them confusing their consideration of all of the things that you told them about each of the counts.

So, we think the better course would be at the beginning of the counts to then give them the substance of -- the real substance of what's at issue here, such as:

Ladies and gentlemen, what I'm about to say applies to Counts 1 through 34.

At the end I will be clear with you about what documents applies to each count so that they understand beforehand what applies to each count; and this is so that they can understand -- it's very abundantly in an excess of caution, so that they understand that everything you're saying applies to each count.

MR. COLANGELO: Your Honor, our proposal was drawn from charges that this Court has given in other cases and was based on our understanding of the Court's typical practice of reciting the elements of the offense at the end of a recitation of multiple counts where there are many consecutive counts.

I'm not sure we have a strong view one way or the other.

If the Court thinks that there is a more artful way to do it, we obviously would not object.

THE COURT: I -- I think the proposal that we have right now would lay out the elements right at the beginning before count 1, and then right at the end, after count 34.

I have no problem giving the instruction you are requesting as well.

That's fine.

Okay. Let's take ten minutes.

(Recess taken.)

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THE SERGEANT: Remain seated. Part 59 is back in session.

THE COURT: All right. That was pretty much what I had.

I would like to hear if you have any issues or arguments that you would like to bring to my attention now.

MR. BOVE: Yes, your Honor, thank you.

There are some instructions that we requested in the defendant's request submission that you referenced.

THE COURT: Yes.

MR. BOVE: I think that we don't have controversial arguments about too many of them, but there are a couple of them that are worth discussing.

We proposed a limiting instruction with respect to bias that is specific to President Trump.

It is one that we modified from the instruction that your Honor gave at the Trump Org trial that we think is appropriate here.

There are sort of parallel competing proposals to some extent, but I don't know that the differences are material.

THE COURT: Can you direct me to the page in your submission that you are referring to?

MR. BOVE: Yes, Judge, one second.

(Pause.)

THE COURT: Here it is. Page 5.

MR. BOVE: Right.

We've also requested an instruction.

THE COURT: Do you want to talk any more about that one?

MR. BOVE: No, your Honor.

THE COURT: All right. I would like to hear from the People.

MR. STEINGLASS: We would like to talk -- we would like to be heard on it.

First of all, we don't think that this is necessary, this charge.

I think the voir dire has satisfied this problem. I think this charge was more appropriate -- and Mr. Bove cites the Trump Corporation trial, it was more appropriate there where the defendant was not -- well, this defendant was not a defendant in that case.

And your Honor, I believe, the point of that instruction was trying to remind the jury to keep Mr. Trump out of the last trial because it wasn't -- he was not a named defendant.

I don't think that instructing a jury that they shouldn't hold bias against the defendant is necessary; however, I think -- I mean, and I think that your Honor's standard charge talks about excluding sympathy and bias.

So, I think it's covered by the standard CJI charge.

If -- and I think Mr. Bove inadvertently stated this incorrectly, it's not that we have competing proposals, we don't think that this charge is necessary at all, but if you are going to give it or a charge like it, we would propose the more neutral language on Page 17 and 18 of our response.

THE COURT: Well, as you know, Mr. Bove, that's not an instruction that's normally given.

There are several times in the Court's instructions that I refer to bias, fairness, implicit bias.

And in this case, I believe the questionnaire had about 42 or 43 questions and then, of course, the voir dire was pretty extensive.

Because the People are going along with a modified version of what you're suggesting, I will go ahead and include it, even though it's not something that I normally do.

So, I will include the People's version on Pages 17 and 18 of their submission.

MR. BOVE: Thank you, Judge. The next request is on Page 6.

It's just turning the page over, relating to a curative or a limiting instruction that these so-called hush

money payments are not inherently illegal.

I think that the logic of this type of instruction is similar to the limiting instruction that we discussed earlier about what intent to defraud does not mean.

This is, I think, something that is straightforward, and should be clarified to the jury so that they're not misled by the use of certain terms that both sides are going to use in their arguments and fairly so.

We think it should be clear to the jury that hush money alone is not illegal.

MR. STEINGLASS: What the Defense is asking is for you to make their arguments for them within the jury charge.

They can argue whatever they want, as long as it's a reasonable view of the evidence.

They can certainly say this to the jury, if they want, but it's totally inappropriate for the Court to marshal the evidence in a way that just makes the defendant's argument for him.

THE COURT: I think this came up numerous times during the course of the trial.

I think several witnesses were asked that question several times.

The answer was always: It's not illegal. It's not a crime.

And I expect that in your summation you are going to argue the same.

And I don't think the People are going to dispute that, because they can't.

So, but I think to take it to the next level and actually give an instruction from the bench is taking it too far, and I don't think it's necessary.

MR. BOVE: Understood.

So now we're moving to Page 7, Judge.

And it's an instruction about evidence that was not offered for its truth.

And so, we broke this out in terms of documents that came in in that fashion on witness testimony.

I think that with respect to the documents, we are largely in agreement.

And there is a dispute about the witnesses, meaning there was testimony from Hope Hicks and from Mr. Cohen about public reactions and responses to the Access Hollywood tape.

Our position is that the only basis for that testimony to come in was not for its truth, but rather for its impact on the listener.

Here, I assume the Government's theory is that President Trump necessarily was one of the listeners, and they're going to make arguments about how he reacted to

these statements that they've elicited.

What we are seeking is an instruction that clarifies and confirms that factual assertions in those reactions were not offered for their truth.

Things about, for example, the RNC's reaction to the tape and how that might impact their association with President Trump in his campaign at the time.

The Government disputes how this evidence came in with respect to Ms. Hicks.

And I think we would like to clarify here.

Your Honor will recall that there were -- there was a series of questions during Ms. Hick's direct examination about reactions, and at some point -- and we did not object to those, not because we believed they were coming in for the truth, but because sitting here I understood why they were coming in for their impact on the listener.

At some point, the questioning, from our perspective, became cumulative in that, as we've said before, in our view there is sort of a tipping point for evidence that's not coming in for its truth becomes unduly prejudicial.

When we reached that point, I asked for a sidebar. At sidebar I referenced the hearsay issue.

I said I understood that there is a time and place for this type of evidence, and I think we've gone over the

threshold.

So, I think it's clear on the record that we understood why the evidence was coming in and the instruction that we are asking for on Page 78 just makes that clear to the jury.

And we think that's important and we don't think it should be very controversial because there is no other basis for the communications and the testimony that we are referencing this instruction.

THE COURT: People.

MR. STEINGLASS: Okay. So, if we're just talking about the Access Hollywood tape and the reaction to it, I don't think that that -- I don't think that such a limiting -- that the evidence was limited in that way.

And I don't think that the Court gave a limiting instruction then, and I don't think the Court should give a limiting instruction now.

The nature of the reaction by the Republican Party, by other prominent Republican senators, by other members of the public, the fact that that was the reaction had an impact on the listener, being the defendant.

And so, I don't even think it matters whether it's true that John McCain, for example, withdrew his endorsement.

I think the point is that John McCain withdrew his

endorsement and what impact that had on the defendant so I think that this charge is confusing.

I think it's unnecessary.

I think it retroactively limits the evidence. And, you know, I'm not even quite sure what prejudice the defendant is seeking to cure here.

MR. BOVE: We are seeking to be precise with the jury about the admissible bases for which evidence came in at the trial.

And I didn't object when Ms. Hicks was testifying. I explained why I didn't object.

There was one permissible basis for this testimony, and I think Mr. Steinglass just described it.

Except he also described a factual assertion by Senator McCain, and that factual assertion doesn't come in for its truth, the fact that he was withdrawing his support. That's my point.

This should not be controversial. It comes in for its impact on President Trump; and that's what this says.

MR. STEINGLASS: I'm not quite sure that that's what the instruction that they are suggesting says, but we can all agree that the evidence of the reaction of others is coming in for its impact on the defendant, and his state of mind and the impetus to lock up the Stormy Daniels story.

THE COURT: I agree, but what I can do is go back and read those portions of the transcript.

So, if you can email me directly those pages that you are referring to.

I'm happy to go back and look at it again, but right now I'm in agreement with the People.

MR. BOVE: We will take a look, Judge.

But I actually think that we've cited in our submission the transcript excerpts that we are concerned about.

And --

THE COURT: I'm sorry, you are referring to Page 7?

MR. BOVE: Yes, your Honor.

The transcript --

THE COURT: What pages?

MR. BOVE: It carries over.

THE COURT: I'm just looking for the pages of the transcript that you are referring to.

MR. BOVE: It's in the footnotes.

THE COURT: I see.

MR. BOVE: 23 and 24, I'm sorry.

THE COURT: Yes.

Thank you.

MR. BOVE: We are just seeking to be clear and precise with the jury about the purpose for which they can

consider that evidence.

There were times where news articles came in where we sought to do that affirmatively during the course of the trial, there were other times that we elected to wait until this point.

That wasn't a waiver, Judge.

Those -- that's for Ms. Hicks who testified or Mr. Cohen to testify about what out-of-court declarant said to be offered for its truth was obviously inadmissible, it could only come in for the basis that Mr. Steinglass described.

And we will ask that you clarify it for the jury and to be clear with respect to the evidence that was entered into the record.

THE COURT: I will go back over the evidence, and I will consider it.

MR. STEINGLASS: Now, that last clause of Mr. Bove's statement seems to say that it's not just the Access Hollywood tape, that we're talking about other exhibits that came in.

So, rather than get into a back and forth about this, unless your Honor wants me to, I will just point your Honor to our response to the defendant's request to charge, in which we basically say that it's really not necessary for you to give further instruction on documents that came in

subject to certain limitations because you've already done that.

And even if you are inclined to do that, they've asked for limitations on documents that came in without limitations.

In other words, kind of retroactively.

THE COURT: Right.

MR. STEINGLASS: Changing the purpose for which these documents were received. And we certainly oppose that.

THE COURT: All right.

MR. BOVE: The next request, Judge, is on Page 9.

And this is -- what we are seeking is just for your Honor to reiterate to the jury the limiting instruction around Mr. Cohen's FECA pleas, and the AMI Non-Prosecution Agreement as well as the Conciliation Agreement.

We have proposed some language.

The Government has sought some modifications and your Honor will use in your discretion.

THE COURT: I think limiting instructions are appropriate.

I will take a look at the language and see what's being proposed.

But I gave limiting instructions during the course of the trial, I think it's appropriate to give the jury the

charge.

MR. STEINGLASS: And just to clarify, we are fine with the limiting instruction that you gave during the trial.

The language that the Defense is proposing in their submission is outrageous.

Such as: AMI did not admit to any violations of the law in those agreements.

This is not the limiting instruction that you gave; this is an argument.

THE COURT: I'm not commenting on the language that the defense has suggested.

MR. STEINGLASS: Okay.

MR. BOVE: I wasn't trying to be outrageous.

The reason that we put that in the proposal, Judge, and it was queued up in the Government's response, is that there was a comment at sidebar about whether or not the non-pros is evidence of a violation of FECA by AMI.

Our concern gets back to the purpose of the limiting instruction in the first place.

There is a suggestion in the Government's reply to our request, that there is some kind of dispute that the jury needs to evaluate about whether -- what that non-pros reflects and whether it reflects a violation.

We think that type of argument would be wholly

inappropriate in front of the jury, unless somebody opens the door to it.

I have been clear about our intentions with respect to the door.

So there really shouldn't be any argument from the Government in summations about what that non-pros reflects on behalf of AMI, because that would be making arguments about the non-pros as substantive evidence of President Trump's guilt.

The only reason -- like the FECA pleas, the only reason that the non-pros is in evidence is with respect to Mr. Pecker's credibility.

It's not in evidence as substantive proof of anything.

And so, to be arguing to the jury about whether and to what extent it reflects a violation to be inappropriate --

MR. STEINGLASS: Judge, you gave a limiting instruction.

The limiting instruction was not just limited to Mr. Pecker's credibility; it was the surrounding circumstances.

There are arguments that can be made.

And I agree that there are arguments that cannot be made.

We do not intend to suggest that Michael Cohen's guilty plea or that AMI's Non-Pros Agreement is evidence of the defendant's guilt, but it is relevant to more than credibility.

That's what your Honor's limiting instruction that, I believe the Defense drafted, said.

And we think that you should give that same instruction and that we should be able to make the arguments that you have allowed us to make and not make the arguments that you have not allowed us to make.

And we do not intend to make the arguments that you have not allowed us to make.

THE COURT: My intention right now is to give substantially the same instruction that I gave during the trial.

MR. BOVE: Understood. We are concerned about what was just said.

In terms of the potential for arguments that go beyond just the extent to which these agreements and documents bear on Pecker's credibility and Cohen's credibility.

Anything that gets near this line, Judge, with the jury in summations would be extraordinarily prejudicial and so we would hope that the People will be extremely conservative in their approach on this.

And if they feel that they are close to the line, we should talk about it outside of the presence of the jury. This is a critical issue.

THE COURT: We don't need to keep going back and forth with this.

I will just reiterate again, I have it right here. I will read it again.

This is regarding AMI:

"You have just heard testimony that while David Pecker was an executive at AMI, AMI entered into a Non-Prosecution Agreement with Federal Prosecutors as well as a Conciliation Agreement with the Federal Election Commission, that evidence was permitted to assist you, the jury, in assessing David Pecker's credibility and to help provide context for some of the surrounding events. You may consider that testimony for those purposes only. Neither the Non-Prosecution Agreement nor the Conciliation Agreement was evidence of the defendant's guilt, and you may not consider them in determining whether the defendant is guilty or not guilty of the charged crimes."

I don't think we need to go back and forth with this.

MR. STEINGLASS: Agreed.

THE COURT: What else?

MR. BOVE: Next on my list is our proposed

instruction about involvement of counsel, Judge.

And I'm just trying to grab the page number. I believe it's Page 12.

We think that the door was opened by the Government on direct examination of Mr. Cohen and Mr. Pecker by -- through a series of questions about a conversation that Mr. Pecker had with Mr. Cohen relating to the Agreements involved -- that concern Ms. McDougal.

And we flagged this issue in advance of the trial, that in the records that were disclosed to us, there was this comment about the agreement being "bulletproof."

It is a fair inference from that, the use of that word by Mr. Pecker, that what he meant was that it had been vetted by counsel.

He actually testified, I believe on direct, that it had been vetted by counsel.

What happened then, Judge, is that Mr. Cohen -- and this was to some extent from us unexpected -- Mr. Cohen confirmed that he communicated that word to President Trump. That was an evidentiary link we hadn't necessarily anticipated at this trial, absent President Trump taking the stand.

Once that evidentiary link was made, there is a fair inference that he -- he understood that to mean that it had been vetted by counsel, that the Agreement was legal.

Why does that matter at this trial?

We haven't put on a formal advice of counsel defense.

I'm not seeking to retread that.

What we are seeking to do, though, Judge, is to argue that this is extremely probative of President Trump's intent and, in particular, whether or not the Government can meet their burden of establishing intent to defraud, and the other types of intent that we talked about today, willfulness as to FECA, et cetera.

And so, the fair inference from this conversation that's in evidence, supports us, and supports this instruction, and at a minimum, even if the Court is not going to give the instruction, this is an argument that we wanted to raise at this conference and flag because we do think it's appropriate, both with respect to the bulletproof comment and the inferences that President Trump drew from it, and from the general fact that this entire trial is entirely predicated on the testimony of an attorney who worked for President Trump and that he was entitled to draw some inferences from that fact.

The Government seeks competing inferences. They seek to prove them beyond a reasonable doubt. We understand that.

But our position is that this is an exceedingly

fair argument for the Defense to make when we challenge the Government's burden, even if the Court is not going to give the instruction we have requested.

MR. COLANGELO: Your Honor, this is a retread.

Your Honor rejected this argument on March 18th in your Order granting the People's motion in limine to exclude any argument regarding reliance on advice of counsel.

To the extent that Mr. Bove is making an opening-the-door argument, this defense and any argument based on this defense is both legally and factually unavailable for a number of reasons.

The first is that under New York Law, a prerequisite for making any argument like this is that the defendant himself testifies in order to establish a prima facie case of his state of mind.

The defendant exercised his constitutional right not to testify and subject himself to cross-examination. But having done so, having done so, he can't then seek to introduce argument or present argument to the jury regarding his intent.

And the New York Law that I'm referring to, there is a case called People versus Lurie, L-U-R-I-E, 249 AD 2d 119.

That's a First Department case.

So, legally unavailable because the defendant

didn't establish the basis for this claim himself anyway.

The second, as the Court already recognized, and again as a legal matter, the presence of counsel concept, particularly when it's based on some claim of reliance regarding what a third party's lawyer may have said, is also legally unavailable.

And we cited a case here in Court called Lek Securities Corporation 2019 West Law 573944.

That's a Southern District of New York case from 2019.

That case held that a defendant can't assert a reasonable or good faith reliance based on a third party's representation of advice to third party received through consultations with counsel to which the defendant himself did not have access.

And then, there is a factual reason why that particular analysis applies with strong force in this case, which is that the testimony also shows that Mr. Pecker didn't give even remotely close to a full presentation of the facts to the lawyer that he consulted.

He, in fact, testified that he specifically authorized his General Counsel to give to the outside lawyer simply the McDougal contract and didn't advise the lawyer of any of the underlying facts that would be necessary to determine whether the contract did or didn't evidence of

violation of Campaign Finance Law.

He didn't tell him about the agreement in Trump Tower.

He didn't tell him that his real purpose was to influence the election.

He didn't tell him that he didn't value the services that McDougal was going to provide at 150 grand.

He only valued it at 25 grand.

He didn't give him -- he didn't tell him about the intended assignment of the life rights back to Mr. Trump after the fact.

So, none of the facts that an attorney would have needed to rely on in order to make an informed judgment about the lawfulness of that contract were even presented to the attorney, which is why a defendant can't rely on third party advice for this kind of defense in the first place.

THE COURT: Mr. Bove, I don't think it's necessary --

MR. BOVE: Well, Judge, with respect to --

THE COURT: I really don't think it's necessary to respond.

MR. BOVE: Judge, Judge, this is an issue about the Government's burden on a state of mind.

THE COURT: I understand, I understand the issue.

If you want to go ahead and say something else, go ahead.

MR. BOVE: I would, Judge.

Everything that was just said about Mr. Pecker's intent and what he communicated to his attorney doesn't bear on the argument that we want to make at all.

We are not suggesting that we -- our argument does not rely on whether or not what Mr. Pecker said was accurate.

Our argument relies on the fact that Mr. Pecker said to Michael Cohen: "This is bulletproof."

That the fair inference from the "bulletproof" comment is that it was legally vetted.

Whether and to what extent and how Mr. Pecker did that doesn't bear on what was said to President Trump. Mr. Cohen said to President Trump: I have been told that the agreement was "bulletproof."

President Trump was entitled to draw an inference from that when his own attorney is communicating it to him that it had been property vetted.

It doesn't -- that argument doesn't depend on Mr. Pecker being truthful with his attorneys.

THE COURT: All right. Look --

MR. COLANGELO: Your Honor, can I make an additional argument?

THE COURT: Look, Mr. Bove, this is an issue that has been going on for a very, very long time.

Going back to, I think it was December of 2023, I'm not sure of the date, the People filed a motion asking this Court to require the Defense to once and for all decide and give notice whether the Defense was going to rely on the defense of advice of counsel.

I wrote a decision on this. My decision is dated February 7th.

In that decision, I directed the Defense to provide Notice of Disclosure of your intent to rely on the defense of advice of counsel by March 11th, 2024, and to produce all discoverable statements and communications within his possession or control by the same date.

Subsequently, in response -- and the answer was we're not relying on advice of counsel, therefore, there is no waiver; there is no need to submit any documents.

Later on, the defense of advice of counsel morphed into something called the presence of counsel, which I had never heard of and I was not familiar with, but I addressed it in the motions in limine.

And at that time, I indicated that you are precluded from arguing this legal claim of presence of counsel.

There was no such thing. It's just a way to get

around having to turn over documents related to the advice of counsel.

Now, this term, "presence of counsel," has morphed yet again into something called involvement of counsel.

THE COURT: I understand why you want it, this instruction from the Court.

And I understand why you want to be able to make the argument.

My answer hasn't changed and, honestly, I find it disingenuous for you to make the argument at this point.

Please don't get up.

I let you speak; right.

I let you speak.

Let me speak.

MR. BOVE: All right.

Yes, your Honor.

THE COURT: It was -- it was concerning when notice was not given initially in response to my Order of February 7th.

It was concerning when the term was changed to presence of counsel.

I couldn't believe when I saw it again in your submission now calling it involvement of counsel.

And I understand the argument that you are making. I'm telling you, my ruling is, the jury will not hear that

instruction from the bench, nor are you permitted to make that argument. Period.

MR. BOVE: I understand. I just want to complete the record.

THE COURT: Go ahead.

MR. BOVE: I'm not being disingenuous with your Honor.

I didn't -- this involvement of counsel wasn't intended.

And I don't think it did change in any way the substance of the argument that we want to make.

Our argument is based on testimony that happened after the rulings that you just described at this trial, when Michael Cohen testified that he told President Trump --

THE COURT: You said that already, Mr. Bove.

MR. BOVE: But then you called me "disingenuous," and I'm trying to explain myself.

THE COURT: But I heard it the first time, and I heard it the second time.

MR. BOVE: In addition, nothing we are trying to argue would require a waiver by President Trump.

He doesn't control Mr. Pecker's privilege. That's clear.

And the attorney -- the other attorney I'm talking about, Michael Cohen, testified at the trial.

THE COURT: And I'm not suggesting that you required a waiver.

What I'm saying is that this is an argument that you have been advancing for many, many months.

This is something that you have been trying to get through to the jury for many, many months.

It's denied.

It's not going to happen.

Please don't raise it.

What else?

MR. BOVE: I think the last thing on this is, Judge, is the proposed exfoliation instruction.

It's on Page 13.

We think that the factual basis -- this is an exfoliation instruction relating to the destruction of evidence of Michael Cohen and the phones.

The factual basis for this instruction comes from the testimony of Mr. Daus, who analyzed the phones and he talked about the factory reset of the phones, which he also described as wiping, which result in the deletion of data from those phones.

The Government's response is that there was some testimony that there was a subsequent backup or syncing of the phones.

But there is testimony -- Mr. Daus was unable to

testify and could not testify, because he wasn't able to do the analysis about what that -- what was actually loaded back onto the phone.

So, we think for that reason, the exfoliation instruction is appropriate.

In addition, there was testimony from Mr. Daus about the use of the apps like Signal and Dust and Telegram that sent messages to quote, "explode" or "self-delete."

I'm referring to the transcript at Page 2058.

And so, we think for both of those things an exfoliation instruction is appropriate.

MR. STEINGLASS: So far as, I've never seen an instruction like this.

It's certainly not in the CJI, and it's also just flat out wrong in terms of Mr. Bove's characterization of the testimony.

The testimony was that there was a factory reset on one of Michael Cohen's phones, followed by, as defendant fails to note, the restoration of the entire backup file onto that phone, which was then forensically downloaded and analyzed by Mr. Daus, the entirety of which was given to the Defense.

So there is absolutely no basis for a charge like this.

Once again, the Defense is asking your Honor to

charge the jury as though their arguments are both factual and legal ones.

They can make whatever arguments they want, although, I would suggest that they -- those arguments be based in the actual record and not the imaginary record.

MR. BOVE: I think, if your Honor reviews the testimony of Mr. Daus, what you will see is that there was -- there was a factory reset, I believe it was in the Fall of 2016 in a very relevant time frame.

That there was testimony that there was a sync. That the sync came from a laptop with a user name from Michael Cohen, and that he was unable to verify in any way what was loaded back onto the phone because he never had access to the laptop.

Not at all what Mr. Steinglass just said about a complete backup.

And our argument is not that the evidence was deleted for the purposes of this instruction, the factual basis is not that evidence was deleted in 2020 when he reset it again or in 2023 when it was mishandled, the inference is in 2016 when he did the reset, and he loaded something else that we don't know about onto the phone.

In addition, the use of the apps that involve self-exploding messages and the deletion of messages that he concededly sent in 2016 also supports the instruction.

THE COURT: You did a very effective job of cross-examining that witness.

I think you laid an excellent foundation for your summation, on your arguments on summation.

I think that there is a good basis for that.

And you are free to do that, but I'm not going to give an instruction on exfoliation to the jury in my charge.

MR. STEINGLASS: Are you done?

MR. BOVE: Yes.

MR. STEINGLASS: So I have a few more issues to raise.

One of which is very easy.

It should be very easy.

Your Honor gave an instruction on redactions in the exhibits.

I would just ask you to give it again.

Does anybody need a copy of it?

Mr. Bove?

MR. BOVE: No.

MR. STEINGLASS: Can I hand it up?

(Handed.)

MR. STEINGLASS: So, that one is easy.

There are two more.

One, I think we didn't discuss the accessorial

liability charge that we sent around.

And I believe it was a joint submission this afternoon.

I wanted to point out two quick things about it. First of all, it's maybe a little bit difficult to understand the way this was done.

But, for example, if your Honor looks on Page 1 and 2.

Do you have a copy of it with you or I have an extra copy?

THE COURT: Direct me to what time that came through?

MR. STEINGLASS: I have no idea.

THE COURT: I think it was this afternoon?

MR. STEINGLASS: It was this afternoon. I will just hand up a copy.

(Handed.)

MR. STEINGLASS: So, I just want to make it clear, we crossed out the note, as appropriate.

That's because we both agree that that language should be given.

That's on Page 1 and Page 2, where the optional language is there, that we both agree that it should be given.

That's what crossing out the note means.

There is only one word that we disagree with in this entire charge and that is the mens rea requirement.

So accessorial liability accomplice, of course, to the FBR charge -- and you know we very much disagree with, but understand Mr. Bove's argument about willfully as it applies to the FECA.

We oppose that, and your Honor has held that in abeyance, but under no circumstances should the accessorial liability charge be read with the mens rea of willfully because it applies to the FBR charge.

And the only mens rea in the FBR charge is intentionally.

So, the correct mens rea for that charge should be intentionally not willfully.

MR. BOVE: The CJI charge, the model charge that we're talking about lists as examples intentionally, recklessly, with criminal negligence.

I don't believe that to be an exhaustive list of the options we've talked a lot about the willfully mens rea today.

You have our position.

THE COURT: Thank you.

MR. STEINGLASS: And, lastly, Judge, there was -- and I'm not casting any aspersions here.

And I will hand a copy up to the Court, and I have

given a copy to the Defense.

There is a curative instruction that we are requesting on Retainer Agreements.

Through their cross-examination of three separate witnesses, the Defense erroneously suggested that Retainer Agreements in New York State don't have to be in writing. They did that on cross of McConney.

I'm directing your Honor to the transcript Page 2401:

"QUESTION: Retainer Agreements can be verbal; correct?"

"ANSWER: To my knowledge, yes."

That's incorrect.

They cannot be verbal.

I direct your Honor, if you don't mind, let me just find this, please.

It's at 22 NYC CC 1215.1.

I can hand up copies, if your Honor wants.

I have already sent them to Mr. Bove.

Do you want a copy?

THE COURT: Sure.

MR. STEINGLASS: Okay.

Just a minute.

(Handed.)

MR. STEINGLASS: Give me a minute to find it, but I

will just make my argument.

THE COURT: I can find it.

That's fine.

MR. STEINGLASS: Thank you. So back to the transcript.

It's the cross-examination of Mr. Cohen, after a long conversation about Retainer Agreements.

Mr. Bove asks -- and I'm directing the Court to Pages 3957 through 3961 of the transcript.

THE COURT: 3957.

MR. STEINGLASS: 3957 to 3961.

After a long conversation about not having a Retainer Agreements and, by the way, there's nothing wrong with that.

There is a long colloquy back and forth about how there was no Retainer Agreement even after Mr. Cohen left The Trump Organization and became the Personal Attorney to the President.

And culminating with the following question:

"QUESTION: Because you know under New York Ethics Rules, you don't need a Retainer Agreement to do work for a client; do you?"

And the answer to that was elicited erroneously was, "No."

This was also done with Mr. Davidson on

cross-examination, on Pages 1896 through 1897 in the transcript.

"QUESTION: And that engagement, that attorney-client engagement was not committed to writing; was it?"

"ANSWER: It was not."

"QUESTION: And there is nothing wrong with that; is there?"

"ANSWER: There is not."

"QUESTION: That's an ethical practice to have an attorney-client relationship without an engagement letter; right?"

"ANSWER: Yes."

So, as I said, I'm not ascribing any bad motives to the Defense team, but those are just misstatements of the law.

And I think that it is incumbent upon your Honor to cure those misperceptions of the law.

And I do have a copy.

It's somewhere in here.

THE COURT: Thank you.

MR. STEINGLASS: Of both of the New York City Rules and Regulations as well as some case law that interprets them.

(Handed.)

MR. STEINGLASS: And I will just cite those cases for the record.

Give me one moment.

People -- well, the first and foremost case is Seth Rubinstein PC versus Ganea, 41 AD 3d 54 Second Department 2007.

There is also a matter of Brown 133 AD 3d 7 First Department from 2015.

And Barry Mallin and Associates PC versus Nash Metalware Co., Inc., 18 Misc. 3D 890.

That's a Civil Court of New York County case from 2008.

So, we believe that this instruction is necessary to cure the erroneous impression left that there is nothing improper about not having a written Retainer Agreement.

It is, in fact, the law.

MR. BOVE: We don't think that's right, Judge. First of all, the rule that was just cited, 1215.1, is followed by 1215.2, which sets forth a series of exceptions, including at subparagraph B, a situation where representation with the attorneys' services are the same kind as previously rendered and --

THE COURT: Do you have a copy of that?

MR. BOVE: Yes, Judge, I do.

(Handed.)

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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

depend on the existence of a formal Retainer Agreement or upon payment of a fee.

That's one case that I will hand up with the highlighted portion.

I have also got Edelman. I just handed that to Mr. Steinglass.

This is also a Second Department case. An attorney-client relationship may arise even in the absence of a written Retainer Agreement. That's at Page 997.

I will hand that up.

(Handed.)

THE COURT: Thank you.

MR. BOVE: Lastly, Pellegrino, First Department, your Honor.

While the existence of the relationship is not dependent upon the payment of a fee or an explicit Agreement.

And I am reading there from Page 99.

And I will hand that up as well.

So, what we're really getting at here is that we think that the Government's witnesses testified in a manner that was consistent with the law that I have just cited.

So, there is certainly no curative instruction necessary.

Though I appreciate the concession that we weren't

trying to do anything inappropriate.

In fact, the Government's witnesses were testifying correctly.

And this is also a situation, Judge, there has been several times today where we've said we are not going to have instructions that sort of credit or put weight on other arguments.

This is the Government seeking to have weight put on their argument about whether a Retainer Agreement is required.

Those authorities establish that that's not the case.

But, in any event, this is a matter that their own witnesses testified about, and it's for the jury.

MR. STEINGLASS: I think Mr. Bove is missing the point of what I was handing up those cases for.

I agree that those cases are in the context of whether fees can be collected.

But they cite to the New York City Code of Rules and Regulations, and they acknowledge the existence of the rule that requires them.

This is not about whether or not there is a dispute over legal fees between the parties.

This is about whether it was correct for the Defense to ask questions of the witnesses to imply -- not to

imply, to outright state, that there is no requirement for a written Retainer Agreement.

And there is.

And the theoretical exception that Mr. Bove points to in 1215.2 sub B is not applicable here because even Mr. Cohen testified that he did maybe ten hours of legal work for Mr. Trump and his family in the entire year of 2017.

So, to say that 1215.2 sub B, which is an exception to the rule requiring a Retainer Agreement when the attorney services are of the same general described as previously rendered to and paid for by the client as though that somehow covers what Mr. Cohen was doing for the Trump Organization for the ten years before when he was on salary, is, I think, I don't want to say disingenuous because that's a pejorative, but not appropriate and does not cure the fact that they have misled the jury.

THE COURT: All right. I will read the rules.

I will read the decisions and I will get back to you on that.

Anything else?

MR. STEINGLASS: That's it for us, Judge.

MR. BOVE: Nothing else. Thank you.

THE COURT: If after reading the rules and the decisions I determine that there is a requirement that there

be a retainer, we are going to have to have a follow up as to how to deal with this.

But until I get to that point, there is no need to argue it.

We are going to make every effort to get our jury charges to you by the end of the day Thursday so you can have the full four-day weekend to work on your summations.

If anything comes up, please do not wait until Tuesday to let me know; send us an email; give us a call and let us know what's going on.

Thank you.

MR. STEINGLASS: Thank you.

MR. BOVE: Thank you, your Honor.

(Matter adjourned to Tuesday, May 28th, 2024 at 9:30 a.m.)

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