

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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:
THE PEOPLE OF THE STATE OF NEW YORK, :
:
- against - :
:
Anthony Marshall and :
Francis Morrissey. :
:
Defendants. :
-----X

**Indictment No.
6044 – 07**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT
MARSHALL’S MOTION TO PRECLUDE EXPERT TESTIMONY
REGARDING LEGAL STANDARDS AND PROFESSIONAL
PRACTICE STANDARDS**

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Mr. Marshall submits this memorandum in support of his motion to preclude the district attorney from calling Alex Forger, a trusts and estates lawyer, as an expert witness in trusts and estates law.

INTRODUCTION

The district attorney intends to call Mr. Forger to offer expert opinions on (i) “the patterns” that purportedly reflect Mrs. Astor’s testamentary plans and intentions as embodied in her many wills and codicils, (ii) whether Mr. Christensen or Mr. Whitaker conducted themselves according to Mr. Forger’s definition of customary and acceptable standards of professional practice, and/or (iii) whether the drafting style used by Mr. Whitaker in the Second Codicil somehow can be said to have been employed intentionally to confuse Mrs. Astor. This proffered testimony is either irrelevant, not beyond the ken of the jury, and/or designed to usurp the jury’s fact-finding role and aimed at telling the jury what conclusion to reach. Because the Court is the only judge of the law and counsel are perfectly capable of arguing inferences to the jury based on the evidence in the record, Mr. Forger must be precluded from offering these opinions.

I. Whether There Are Patterns in Mrs. Astor’s Wills Reflecting Her Testamentary Plans Is Not A Proper Subject for Expert Testimony

The prosecution has said that it wants to call Mr. Forger to “comment on” the patterns of testamentary plans and intent it says are evident in Mrs. Astor’s wills and codicils. *See* Transcript of Proceedings, March 30, 2009 at 250-51. That is not, however, a proper subject of expert testimony.

By stipulation, all of the wills and codicils are in evidence. They are written in English. If any “pattern” can be found in the text of Mrs. Astor’s wills and codicils, it is

only relevant to the extent that the alleged “pattern” reflects Mrs. Astor’s thinking; otherwise it is an irrelevant construct imposed on the text of the documents. And it is undisputed that Mr. Forger has no knowledge whatsoever of Mrs. Astor’s testamentary thinking. He therefore will contribute nothing as an expert, but instead will simply be speculating on Mrs. Astor’s possible thinking, offering opinions based on inferences that the jury, which has heard all the factual testimony in this case, is in a much better position to draw for itself. Or he will be taking the place of counsel, arguing that the jury accept his version of what the wills and codicils mean Mrs. Astor was thinking. None of this testimony is admissible or permissible.

The jury is perfectly capable of finding the facts that support whatever pattern, if any, it concludes exists and is relevant. Allowing some retained expert to come into court and offer his opinion of what Mrs. Astor’s wills say about her life-long testamentary plan, a reflection of her state of mind about which Mr. Forger knows nothing, would usurp the role of the jury to find the facts relevant to its verdict. *See United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (“When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert’s judgment for the jury’s.”) (original emphasis).

The parties have had ample opportunity to clarify through the questioning of fact witnesses any ambiguities in the language. This carefully selected jury plainly has the language skills and the intelligence to decide what patterns, if any, are evident in Mrs. Astor’s wills and codicils and how, if at all, such patterns bear on the factual questions it must decide, including Mrs. Astor’s intent.

Any contention by the district attorney that Mrs. Astor's wills and codicils are too complex for the jury to understand without expert testimony would be baseless. For example, in *Hess v. Zoological Society of Buffalo, Inc.*, 134 A.D.2d 824 (4th Dep't 1987), a contract provided that

if portions of the project are not completed, 'compensation * * * shall be payable to the extent services are performed on such portions * * * based on (1) the lowest bona fide bid or negotiated proposal or, (2) if no such bid or proposal is received, the most recent Statement of Probable Construction Cost or Detailed Estimate of Construction Cost for such portions of the Project.'

Id. Defendant argued that this dense, legal language required explication by an expert witness to explain an asserted ambiguity regarding the phrase "negotiated proposal." *Id.* at 825. The court disagreed, holding that it was proper to exclude any expert testimony regarding the language of the legal document. *Id.*

The only case the prosecution has cited for the proposition that expert testimony is admissible in this case is *People v. Schwartz*, 21 A.D.3d 304 (1st Dep't 2005). But that case involved the routine question of whether an expert can testify regarding the highly complex regulations that govern securities offerings. *Id.* at 308. That case did not involve wills, nor did the expert there begin to do what the prosecution wants Mr. Forger to do here: opine about Mrs. Astor's testamentary intentions, a key factual issue the jury must decide for itself.¹

There has already been fact testimony from Mr. Auchincloss and Mr. Christensen regarding the definition of numerous legal terms – e.g., what a will is (Tr. 873-874), what

¹ If the prosecution believes there are particular provisions of particular wills and/or codicils that are too technical to be understood by the jury, it should identify those so that the Court, after argument, can rule whether there is any need for expert testimony. See *People v. Lee*, 96 N.Y.2d 157 (2001) (it is for trial judge to make ruling on admissibility of proffered expert testimony).

“testamentary capacity” is (*id.* at 874-875), what a marital deduction is (*id.* at 4150-51), the difference between a general and a limited power of appointment (*id.* at 4152), what executors and administrators are (*id.* at 4156), what a bequest or legacy is (*id.* at 4181), what the residuary estate is (*id.*), what a charitable remainder unit trust is (*id.* at 4200), what a vested remainder interest is (*id.* at 4415), what precatory language is (*id.* at 4464), what a *Putnam* affidavit is (*id.* at 4876) and many others. Moreover, Mr. Whitaker also can provide such fact testimony if necessary when he testifies. Having been involved in Mrs. Astor’s estate planning, both Mr. Christensen and Mr. Whitaker can easily explain any relevant language from a prior will. This is particularly true of Mr. Christensen, who represented Mrs. Astor for many years and was a partner at Sullivan & Cromwell, the firm responsible for the vast bulk of the testamentary instruments in question and in evidence. If there is an ambiguity in some provision of a will or codicil, then either Mr. Christensen or Mr. Whitaker is perfectly capable of explicating it, but the prosecution has identified no such ambiguity (nor do we expect them to).

The prosecution knows this, yet still wants to parade Mr. Forger before the jury. The tactic is plain: having cloaked Mr. Forger with the mantle of “expert,” the prosecution wants to have him make inferences from the text of the various wills and codicils and then offer his expert opinion on what Mrs. Astor intended. But that is no different than the argument counsel will make to the jury at the end of the case. In each case, a lawyer is analyzing facts in the record, drawing inferences from them, and asking the jury to accept those inferences.

An expert cannot be “allowed to adopt the role of counsel.” *Valentin v. City of New York*, 1997 WL 33323099 (E.D.N.Y. 1997); *see also In re Air Crash Disaster at*

New Orleans, La., 795 F.2d 1230, 1233 (5th Cir. 1986) (“the trial judge ought to insist that a proffered expert bring more than the lawyers can offer in argument”). The prosecution and defense each will make closing arguments to the jury. Because the law prohibits an expert from essentially presenting the arguments of counsel at trial, the Court should preclude Mr. Forger from opining about Mrs. Astor’s intentions as reflected in her wills and codicils.

II. There Is No Need For Expert Testimony Regarding Professional Ethics Or The Standards Of Practice For Trusts and Estates Lawyers

The prosecution apparently seeks to have Mr. Forger opine that both Mr. Christensen and Mr. Whitaker labored under improper conflicts of interest. The only point of such opinion testimony is to support a prosecution argument that the testimony of Messrs. Christensen and Whitaker that Mrs. Astor was mentally competent on December 18, 2003 and January 12, 2004 is unworthy of belief. But any such expert opinion must be precluded because (a) it is improper to use the testimony of a third party to impeach the prosecution’s own witnesses, and (b) such testimony is not relevant and is unfairly prejudicial.

A. The prosecution cannot call Mr. Forger to impeach the credibility of other prosecution witnesses

The prosecution already has called Mr. Christensen in order to elicit testimony from him that it will argue proves its theory that Mrs. Astor would not have wanted to change her will to make it possible for her son to give money to his wife. Likewise, the prosecution plans to call Mr. Whitaker in order to establish that he was retained to replace Mr. Christensen but was never told that Mrs. Astor had been diagnosed with dementia and had not met her prior to the day she signed the Second Codicil. Thus, these two

lawyers are the prosecution's "own witnesses."

Nevertheless, the prosecution seeks to call Mr. Forger as an expert on trusts and estates law so that he can offer opinions designed to impeach the credibility of Mr. Christensen and Mr. Whitaker. With respect to both of these respected lawyers, the attack is essentially the same: each sold out his own professional integrity and breached his fiduciary duty to Mrs. Astor in order to curry favor with her heir and earn big fees. Thus, the prosecution seeks to have Mr. Forger opine that Mr. Christensen labored under an improper conflict of interest by representing both Mr. Marshall and Mrs. Astor and, consequently, failed to provide Mrs. Astor the undivided loyalty that the rules of professional practice require. *See* Tr. 97 (arguing that Mr. Christensen had an "enormous conflict"). And it further intends to have Mr. Forger opine that Mr. Whitaker abandoned his professional responsibility to protect Mrs. Astor's interests by meeting with her in advance of the Second Codicil because "he stood to gain over a million dollars in legal fees" and was "all too happy to obtain a new high profile celebrity client." Tr. 193-94. The only purpose for that testimony is to establish for the jury that each of these witnesses engaged in misconduct that bears on the credibility of their exculpatory testimony regarding Mrs. Astor's lucid mental state on December 18, 2003 (First Codicil) and January 12, 2004 (Second Codicil), respectively. But the law forbids this sort of attack on the credibility of a party's own witness.

"The party who calls a witness certifies his credibility. Therefore, a witness may not be impeached by the party at whose instance he testifies." *People v. Sexton*, 187 N.Y. 495, 509 (1907). "The general rule prohibit[s] the impeachment or discrediting of a witness by the party calling him," including by "(1), the calling of witnesses to impeach

the general character of” one of its other witnesses. *Becker v. Koch*, 104 N.Y. 394, 400-401 (1887). New York continues to follow this common law rule. *See Prince, Richardson on Evidence* (11th Ed. 1995) §6-419; Martin, Capra & Rossi, *New York Evidence Handbook* (2nd Ed. 2003) §6.5.1. The prosecution relied heavily on *Becker* in opposing our application to preclude the prosecution from impeaching Mr. Christensen by confronting him on direct examination with questions designed to suggest to the jury that he labored under an improper conflict of interest. *See* Letter of ADA Seidemann dated May 26, 2009 (“Seidemann Ltr.”).² But even the prosecution must concede that *Becker* itself squarely prohibits a party from calling *other* witnesses to impeach the credibility of its own witness. *Becker*, 104 N.Y. at 401.

“The rule against impeaching one’s own witness prohibits the party from offering . . . evidence tending to show the witness unworthy of belief[.]” *Richardson* §6-421, including “evidence of a witness’s partiality.” *New York Evidence Handbook* §6.5.1. (citing *Carlisle v. Norris*, 215 N.Y. 400, 408-409 (1915)). As the prosecution has conceded, a “party may not generally impeach . . . the general or specific credibility of” its own witnesses. *See* Seidemann Ltr. at 2 (quoting *Spampinato v. ABC Cons. Corp.*, 35 N.Y.2d 283, 287 (1974)). This rule thus prohibits the prosecution from impeaching its own witnesses by seeking to establish “immoral or criminal acts” they allegedly committed. *Richardson*, §6-42 (citing *People v. Minsky*, 227 N.Y. 94 (1919)). And while a “party may introduce evidence and swear witnesses to contradict any *fact*

² We respectfully submit that the Court erred in accepting the prosecution’s interpretation of *Becker* as permitting a party to launch a wholesale attack on the credibility of its own witness while that witness is on the stand. While the opinion in *Becker* can be read this way, a subsequent decision of the Court of Appeals makes clear that “[w]here the only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable.” *People v. Minsky*, 227 N.Y. 94, 99 (1919). By letter dated June 4, 2009, we have moved to renew our objection to such improper impeachment with respect to Mr. Whitaker’s testimony.

testified to by his witnesses[,]” the party may do so *only* “where it appears that such testimony is *not* offered for the purpose of impeachment.” *Remington Arms Co. v. Cotton*, 190 A.D. 600, 610 (1st Dep’t 1920) (emphasis added).

Impeachment is a form of proof “whose purpose is, in part, to discredit the witness” and support the party’s argument that his testimony should not be credited in whole or in part. *People v. Walker*, 83 N.Y.2d 455, 461 (1994). Any opinion testimony by Mr. Forger that Mr. Christensen had a conflict of interest would be designed to serve one purpose: to suggest that in trying to serve two masters Mr. Christensen did something unethical, immoral and wrong, and that his having done so undermines his credibility as a witness to Mrs. Astor’s mental capabilities on December 18, 2003.³ Likewise, any opinion by Mr. Forger that it was a breach of professional standards for Mr. Whitaker to preside over the execution of an instrument such as the Second Codicil with a client like Brooke Astor without having met her first is relevant only as an attack on his credibility – an opinion designed to persuade the jury that Whitaker was falling over himself to snare a “celebrity” client and sacrificed diligent, ethical practice to burnish his resume. *See Tr.* at 193.

The above conduct – selfishly abandoning one’s fiduciary duty to a client – by a lawyer, if true, would “significantly reveal a willingness or disposition on the part of [either Christensen and/or Whitaker] voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society.” *Walker*, 83 N.Y.2d at 461. And proving that a witness engaged in such misconduct – and exhibited

³ Having just sat through the four-day direct examination of Mr. Christensen – replete with argument with and confrontation of the witness – it is plain beyond any credible dispute that the prosecution is going to argue to this jury that Mr. Christensen should be believed about certain facts but that the jury should not credit his testimony that Mrs. Astor was lucid on December 18, 2003.

such a poor character for honesty – is a classic attack “on the general character of the witness,” *Becker*, 104 N.Y. at 401, or at a minimum an attack on “the general or specific credibility of” the prosecution’s own witness. *Spampinato*, 35 N.Y.2d at 287. Both are prohibited.

The prosecution cannot have it both ways. It cannot call a witness and ask the jury to embrace his testimony on some facts, and then call another witness in order to impeach the credibility of its own witness’s testimony on other facts. *Becker*, 104 N.Y.2d at 401; *Minsky*, 227 N.Y. at 99-100.⁴

We do not contend that the prosecution is bound by whatever testimony Mr. Whitaker or Mr. Christensen gives. The prosecution is free to attempt to prove the relevant facts it wishes to prove – principally, that Mrs. Astor was not mentally capable of giving her property to her son on January 12, 2004 – through other evidence. *Spampinato*, 35 N.Y.2d at 288 (Breitel, C.J., concurring). But that is a very different thing from offering evidence designed to impeach credibility. As noted above, a “party may introduce evidence and swear witnesses to contradict any *fact* testified to by his witnesses [but only] where it appears that such testimony is *not* offered for the purpose of impeachment.” *Remington Arms Co.*, 190 A.D. at 610 (emphasis added). In other words, “a party may prove a material fact in the case by other witnesses, although the incidental effect is to contradict another of the party’s witnesses.” *Richardson* §6-419. But Mr. Forger has no *fact* testimony of any kind to offer. Because his testimony would be offered solely to impeach Messrs. Whitaker and Christensen, it must be precluded.

⁴ For this reason, Mr. Marshall successfully moved to strike an improper question from ADA Loewy suggesting that Mr. Christensen believed that Mr. Whitaker was a “second rate lawyer.” See Tr. 4843-45. Counsel moved to strike any testimony from Mr. Christensen that was elicited in order to impeach Mr. Whitaker, but it appears that, after the Court granted the above motion to strike, the only testimony in the record is that Mr. Christensen does not recall what he said regarding Mr. Whitaker.

B. Expert testimony regarding whether Messrs. Christensen or Whitaker complied with professional practice standards is irrelevant, confusing, and unfairly prejudicial

The proffered expert testimony of Mr. Forger is also inadmissible because it is irrelevant, confusing and unfairly prejudicial.

First, neither Mr. Christensen nor Mr. Whitaker is on trial here for malpractice or in defense of a charge that he violated the ethics rules that govern professional practice. Therefore, it is simply not relevant whether either had a conflict or otherwise violated professional standards. The only relevant thing is Mr. Marshall's state of mind. And there is no evidence, nor could there be, that he was aware of the governing standards of professional estates law practice, or that he believed that a conflict of interest existed for these attorneys, or that he was purposely trying to benefit from this alleged conflict (a conflict that the attorneys involved deny they had and therefore could not have been disclosed by them to him).⁵

⁵ We note that Mr. Christensen's discussions with Mr. Marshall regarding Mrs. Astor's estate planning did not amount to a conflict of interest. As Mr. Christensen testified, he represented Mr. Marshall with respect to his own estate plan, not with respect to Mrs. Astor's. So far as Mrs. Astor's estate was concerned, Mr. Christensen represented only one client – Mrs. Astor. With her knowledge and/or at her direction, Mr. Christensen conferred with her son (who also was her designated agent with power over, *inter alia*, estates matters) about certain matters, but there was nothing improper about that. As the comment to MRPC 1.7 by the American College of Trusts and Estates Counsel explains:

It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the 'family'.... Recognition should be given to the fact that estate planning is fundamentally non-adversarial in nature....

Second, an “expert” lawyer is not permitted to testify about the legal standards that govern conduct. *See, e.g., Russo v. Feder*, 301 A.D.2d 63 (1st Dep’t 2002) (legal malpractice); *United States v. Bilzerian*, 926 F.2d 1285, 1294-95 (2d Cir. 1991) (securities fraud). For example, in its criminal prosecution of a lawyer for various fraud charges related to the operation of a sham law firm, the government in *United States v. Kaplan* sought to introduce the testimony of a legal expert that the defendant had violated professional ethics rules. The court granted a motion to preclude such expert testimony because the defendant lawyer was not charged with violating the disciplinary rules at issue, but with mail fraud and other such charges. *United States v. Kaplan*, 02 Cr. 883 (S.D.N.Y. 2004).⁶ Thus, even where the lawyer whose conduct is in question is a defendant in a fraud case, there is no basis to admit expert testimony regarding whether he violated the standards of professional practice. *A fortiori*, where, as here, the lawyer is *not* a defendant, the prosecution cannot be allowed to present expert legal opinion testimony regarding whether the lawyer (a mere witness) complied with ethical rules.

To be sure, in some cases, particularly in the highly complex field of securities regulation, experts can testify regarding the intricacies of a regulatory system. *See Marx & Co. v. Diner’s Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977).⁷ And, in cases of malpractice – where the central issue is whether the defendant attorney’s conduct was negligent – expert testimony from a lawyer may be relevant to prove the “objective

⁶ Judge Batts’s unpublished decision in *Kaplan* is attached hereto as Exhibit A.

⁷ As the court in *Marx* explained, “[a]lthough testimony concerning the ordinary practices in the securities industry may be received to enable the jury to evaluate defendant’s conduct against the standards of accepted practice, . . . testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissible, and may not be made so simply because it is presented in terms of industry practice.” *Id.* at 509.

standard of the profession's commonly prevailing practices.” *Russo*, 301 A.D.2d at 69.⁸

This case raises none of these issues. At most, Mr. Forger’s opinions here would relate to the conduct of Messrs. *Christensen* and *Whitaker*, not Mr. Marshall. But since neither Mr. Christensen nor Mr. Whitaker is a defendant here, expert testimony about their conduct would only confuse the jury. Such testimony would simply invite speculation by the jury that it is being asked to judge whether either or both of these lawyers followed the ethical rules, when in fact that issue is not before it. Moreover, it would unfairly prejudice Mr. Marshall, because to the extent that Mr. Forger opines that Mr. Whitaker and Mr. Christensen violated professional standards, Mr. Marshall will be tarred by his association with them.

Third, no expert opinion by Mr. Forger would be beyond the ken of the jury on the central issue of Mrs. Astor’s state of mind. In other words, this jury is perfectly capable of deciding the factual issues regarding Mrs. Astor’s state of mind without need of Mr. Forger’s opinions. As Richardson has explained, “the Trial Judge should consider that modern juries are not bereft of educated and intelligent persons who can be expected

⁸ Indeed, even in *Russo* – which *was* a legal malpractice case – the First Department held that testimony of a legal expert purporting to declare what is or is not malpractice is inadmissible:

Essentially, the [expert] was offering a legal opinion as to what performance or absence thereof constitutes legal malpractice. But making those determinations is the function of a court. As we recently pointed out in another case, “expert witnesses should not . . . offer opinion as to the legal obligations of parties . . . ; that is an issue to be determined by the trial court. Expert opinion as to a legal conclusion is impermissible.” * * * An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party’s conduct. * * * We do not rely on an attorney’s affidavits to tell us what constitutes malpractice. Moreover, the [expert testimony] offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent.

Id. at 68-69 (internal citations omitted). Because whether Mr. Whitaker’s or Mr. Christensen’s conduct complied with Mr. Forger’s definition of the applicable ethical rules and standards of professional practice is not relevant here, the Court should preclude any expert testimony offered to criticize Mr. Whitaker’s or Mr. Christensen’s professional performance.

to apply their ordinary judgment and practical experience” to the matters they must decide. *Richardson* § 7-301 (internal citation omitted). Indeed, any lay person can be a subscribing witness to a will, and New York law specifically allows such a lay person to offer his opinion about the testator’s mental state. *Matter of Vickery*, 167 A.D.2d 828 (4th Dep’t 1990). But Mr. Forger is a lawyer who did not witness any will signing. His opinion will not help the jury; it can only distract it from the issues at hand by focusing attention on the conduct of lawyers and not on Mrs. Astor’s state of mind (a subject about which Mr. Forger indisputably has no personal knowledge).

In short, there is no need for legal expert opinion in this case. As the Supreme Court stated in *Salem v. United States Lines Co.*, 370 U.S. 31 (1962) (a complex negligence case involving naval architecture):

expert testimony not only is unnecessary but indeed may be properly excluded in the discretion of the trial judge ‘if all the primary facts can be accurately and intelligibly described to the jury, and if they, as [people] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.’

Id. at 35; *accord Havas v. Victory Paper*, 49 N.Y.2d 381, 386 (1980).⁹

⁹ Where, as here, the proposed testimony does not concern a subject “calling for professional or technical knowledge possessed by the expert and beyond the ken of the typical juror[,]” it is error to admit it. *Nevins v. Great Atlantic and Pacific Tea Company*, 164 A.D.2d 807 (1st Dep’t 1990) (permitting an engineer to testify as an expert as to the custom and practice of removing snow in New York City was reversible error); *GMAC Commercial Credit LLC v. Mitchell- B.J., Ltd.*, 272 A.D.2d 51 (1st Dep’t 2000) (“North Fork was not entitled to introduce testimony from a banking expert since it failed to demonstrate how the proposed expert testimony would clarify an issue involving professional and technical knowledge beyond the ken of the typical juror.”); *People v. Wiggins*, 16 Misc.3d 1136(A), 2007 WL 2598351 (N.Y. Sup. 2007) (expert testimony in a criminal trial as to false confessions is not admissible because “recognizing a lie is not a subject beyond the ken of the average juror”).

III. It Would Be Improper For Mr. Forger to Opine About Whether The Language Used In The Second Codicil Was Designed To Fool Mrs. Astor

The prosecution also intends to have Mr. Forger opine that the language Mr. Whitaker used in the Second Codicil was somehow part of the defendants' alleged scheme to defraud. Thus, the prosecution has proffered that:

[Mr. Forger] could also comment on a number of the changes in the Second Codicil, odd changes which we suggest the evidence will show are only consistent with somebody, namely, Mr. Morrissey and Mr. Marshall, wrongly trying to enrich themselves at Brooke Astor's expense. Even the wording of it designed to fool Brooke Astor as to what their intent was. These are some of the items which we believe we have every right to prove through an expert.

Transcript, March 30, 2009, at 251. No such expert testimony is admissible here, for several reasons.

First, the proffered expert testimony does not involve a matter beyond the ken of the jury and is offered simply to tell the jury what conclusion to reach. Indeed, the prosecution will be calling the very lawyer who *drafted* that codicil, Warren Whitaker. If the language needs interpreting, he is in the best position to do so. Mr. Forger's proffered testimony on this point is simply a preview of an *argument* that the DA will make in summation about the language of the codicil – that it was too confusing and designed to deceive or mislead Mrs. Astor. In short, the prosecution wants to offer Mr. Forger to opine about the intent of Messrs. Marshall and Morrissey (and Whitaker), another subject completely beyond his knowledge. Plainly, the jury is capable of reading the language of the Second Codicil, assessing it in the context of the other evidence in the case, and reaching a determination about whether the language is probative at all regarding the mental state of Mr. Marshall or Mr. Morrissey. *See Richardson* §7-301. And an expert cannot be allowed to adopt the role of counsel by simply previewing the party's legal

theories. *Valentin v. City of New York*, 1997 WL 33323099 (E.D.N.Y. 1997); *see also In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) (“the trial judge ought to insist that a proffered expert bring more than the lawyers can offer in argument”).

Second, absent evidence that either defendant *asked* Mr. Whitaker to use opaque or technical language, it is not even *relevant* whether Mr. Forger thinks the language is confusing or indirect. Put another way, Mr. Forger’s opinion that Mr. Whitaker is a bad draftsman is not relevant to the issues on trial here. Without some nexus to the defendants – some proof that one of them told Whitaker to confuse Mrs. Astor – Mr. Forger’s opinion regarding that language is irrelevant, not helpful to the jury, and should be excluded.

Third, for the reasons explained in Point II(B), *supra*, it is irrelevant how Mr. Whitaker’s drafting measures up against the standard that Mr. Forger may opine is customary and proper. This is not a malpractice case, and Mr. Whitaker is not on trial.

CONCLUSION

For all these reasons, the prosecution should be prohibited from offering opinion testimony from Mr. Forger or any “legal expert” at trial.


Dated: New York, New York
June 4, 2009

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

02 Cr. 883 (DAB)
ORDER

SOLOMON KAPLAN,

Defendant.

-----X

DEBORAH A. BATTIS, United States District Judge.

Before the Court is the Defendant's motion to preclude testimony from two expert witnesses proposed by the Government on: 1) the disciplinary and ethical rules governing the conduct of attorneys practicing in New York state, and 2) the various factors that insurance companies employ in order to determine fraudulent claims. Also before the Court is the Government's request to have the Court instruct the jury regarding the New York State Attorney Disciplinary Rules.

Fed. R. Evid. 402 provides that only relevant evidence is admissible; relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Moreover, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person"; however, it is admissible to establish the Defendant's intent. Fed. R. Evid.

404(b).

A. Legal Ethics Expert

The Government argues that expert testimony regarding the Defendant's violation of the New York State Attorney Disciplinary Rules is admissible because it is relevant to the Defendant's criminal intent. (Gov. 3/15/04 at 3; 3/22/04 at 2.) The Government cites numerous appellate cases - albeit none from the Second Circuit - that the Government argues support its position that the expert testimony in this case is relevant to the Defendant's intent to commit the crimes of which he is charged. Each of the Government's cases is distinguishable, either because the defendants allegedly violated "rules" or "policies" that were nearly identical to the charged criminal offenses,¹ or because

¹ See United States v. Rabbitt, 583 F.2d 1014, 1028, 1029 (8th Cir. 1978) (Speaker of Missouri House of Representatives charged with receiving legal work from lobbyist in exchange for improper influence on legislation; professional rules barred acceptance of things of value to influence public duties); United States v. Machi, 811 F.2d 991, 999-1000 (7th Cir. 1987) (attorney charged with conspiring to obstruct justice by representing an ability to influence the outcome of a criminal case; rules prohibited lawyer from implying ability to influence improperly a judicial proceeding). In United States v. Klauber 611 F.2d 512, 520 (4th Cir. 1979) the Defendant objected to admission of information about the Maryland barratry statute and Code of Professional Responsibility. The Fourth Circuit held that these were admissible because "[b]oth were relevant to the attitude Klauber, as a member of the Bar, should have maintained toward practices that were proven," but did not discuss which portions

they address wholly different points of law.² The Government also errs in attempting to analogize this case to those wherein rules of "regulated industries" have been admitted as probative of a defendant's criminal intent, since in all the cases cited, the rules that were violated were nearly identical to the crime

of the Code of Professional Responsibility were admitted.

² In both United States v. Kellington, 217 F.3d 1084, 1098-99 (9th Cir. 2000) and United States v. Kelly, 888 F.2d 732, 734 (11th Cir. 1989) the defendants sought to introduce disciplinary rules to show their lack of criminal intent, explaining their conduct by alleging that they had attempted to comply with the ethical rules. Admission of evidence for that purpose does not support what the Government is seeking to do here, namely, introducing testimony on the disciplinary rules as evidence of the Defendant's criminal intent. United States v. DeLuca, 630 F.2d 294, 301 (5th Cir. 1980), also cited by the Government, does not address the admissibility of the Code of Responsibility; instead, the Fifth Circuit considered the sufficiency of the evidence in the conviction of an attorney.

charged.³

Here, the disciplinary rules that Kaplan allegedly violated bear only an attenuated relationship to the crimes charged in the Indictment. The Government has charged the Defendant with mail fraud, health care benefit fraud, health care fraud, witness tampering, false statements, and conspiracy to commit mail fraud, health care benefit fraud, health care fraud, and witness

³ See United States v. Castiglia, 894 F.2d 533 (2d Cir. 1990) (bank officer charged with conspiracy, misapplying bank funds, and making false entries in bank records; bank rules barred officer from making personal or commercial loans to himself without bank approval and from authorizing more than one million dollars in unsecured loans to any one borrower, and required disclosing outside business relationships, particularly those with bank customers); United States v. Clark, 765 F.2d 297 (2d Cir. 1985) (defendants charged with aiding and abetting bank officer's misapplying federally-insured bank funds, interstate transportation of fraudulently taken and converted bank checks and related offenses; bank rule limited officer from lending more than \$75,000 to any single borrower or group of borrowers without superior's approval); United States v. Cordell, 912 F.2d 769 (5th Cir. 1990) (bank president charged with false entry of bank records and misapplying bank funds; bank rule required bank normally to honor or return checks presented by end of business day; United States v. Burger, 773 F.Supp. 1430 (D.Kan. 1991) (defendants charged with conspiracy, bank fraud, and false statements to a federal agency; internal policies of savings and loan association); United States v. Gilbert, 668 F.2d 94 (2d Cir. 1981) (defendant charged with conspiracy to manipulate securities trading and violating federal securities law; earlier SEC civil consent decree signed by defendant contained SEC reporting requirements); United States v. Cox, 543 F.2d 1042 (2d Cir. 1976) (charged conduct violated laws prohibiting conspiracy to violate federal securities and to commit fraud; court properly admitted evidence of past similar conduct under Fed. R. Evid. 404(b)).

tampering. (Indictment S3 02-CR-0883.) These are crimes with which any individual, whether non-lawyer or lawyer, could be charged. The Defendant is no more guilty or not guilty because he is a lawyer, and therefore the fact that he is a lawyer is ancillary to the charges here. Mr. Kaplan is not charged with violating the ethical rules and therefore the disciplinary rules are collateral.

The Government notes that under the New York State Attorney Disciplinary Rules, a lawyer shall not knowingly use false evidence in the representation of a client, and also shall not counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.⁴ DR 7-102(A)(4); DR 7-102(A)(7). At this stage in the proceeding, the Court does not know whether the

⁴ The Government also makes note of DR 3-102(A) (lawyer shall not share legal fees with a non-lawyer), 3-103(A) (lawyer shall not partner with a non-lawyer in the practice of law), DR 5-107(C)(1) (lawyer shall not practice in the form of a professional corporation authorized to practice law for a profit if a non-lawyer owns an interest in the corporation, DR 5-107(C)(3) (lawyer shall not practice in the form of a professional corporation authorized to practice law for a profit if a non-lawyer has the right to direct or control the professional judgment of a lawyer, DR 2-103(B) (lawyer shall not pay fees for client referrals), DR 2-103 (lawyer shall not let a person who employs or pays the lawyer to render legal services for another to direct or regulate his or her professional judgment in rendering such legal services), and DR 2-111(A) (lawyer may only sell a law practice where the lawyer is retiring from the private practice of law, including the cessation of private practice of law in the geographic area). None of these rules is even remotely similar to the charges in the Indictment.

Government can establish that Mr. Kaplan knew this rule. However, even if he did know DR 7-102(A)(4) or DR 7-102(A)(7), it comes no closer to establishing whether he committed the crimes charged. Whether or not the Government has evidence that he knew about the rules, it doesn't relieve the Government of its burden of establishing the elements of the crimes actually charged in the Indictment. Mr. Kaplan did not need to be a lawyer to commit the crimes charged; if Mr. Kaplan were a plumber, we would only be focusing on the elements of the crimes charged in the Indictment.

Accordingly, the Defendant's motion to preclude the legal expert is GRANTED, and no legal expert shall testify as an expert. The Government in its case in chief is precluded from presenting any evidence, testimonial or documentary, that addresses legal ethics, the disciplinary rules, or common legal practices.⁵ Fed. R. Evid. 402.

Additionally, the Court DECLINES the Government's request to instruct the jury regarding specific disciplinary rules.

⁵ However, should the Defendant, either in cross examination or in its defense case, "open the door," the Government may move to address that in its rebuttal case.

B. Insurance Industry Expert

The Government also seeks to admit testimony of an insurance industry expert, who the Government proposes will testify about the various factors that insurance companies employ in order to determine whether an automobile accident has been staged, and also about her investigation of an allegedly staged accident about which the Government will produce other evidence and testimony.

The Government has not established how the insurance industry's factors for determining whether an accident has been staged is relevant to the charges in this case. The Defendant does not work in the insurance industry; he is an attorney. The Government has provided nothing to indicate that the Defendant has used, or even known about, factors used by the insurance industry. The Government refers the Court to United States v. Vladimir Koriakov, S4 02 Cr. 201 (WEP), a case before Judge Pauley wherein an insurance expert was permitted to testify. In that case, however, the Defendant was an insurance broker, and therefore insurance practices in a case involving insurance fraud would appear to be relevant. In this case, by contrast, any special knowledge of insurance professionals is not imputable to the Defendant, and therefore such evidence is not relevant.

Accordingly, the Court GRANTS the Defendant's motion to

preclude the Government's proposed witness as an insurance experts. However, this does not preclude the insurance investigator from testifying about what she did in the case she investigated.

SO ORDERED.

Dated: New York, New York
March 25, 2004


DEBORAH A. BATTIS
United States District Judge