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by U.S. First-Class Mail

March 14, 2013

Mark D. Harris, Esq.
Proskauer Rose, LLP
11 Times Square
New York, NY 10036

Re: Letter w/ Exhibits
Rakofsky v. Washington Post, et. al.
Index No.: 105573/2011

Dear Mr. Harris,

Enclosed please find a copy of a letter and exhibits submitted to the court on March 14, 2013 by the plaintiff on his own behalf.

If you have any questions, please contact me anytime.

Very Truly Yours,

MATTHEW H. GOLDSMITH, ESQ.

Encl.

March 13, 2013

Dear Judge Hagler,

First, thank you for presiding over this case. I know that it can't be easy and am grateful to Your Honor for Your Honor's effort.

At the end of our hearing on February 25, 2013, Your Honor stated, "I know I have the other motions that I haven't been able to get to..." (see Exhibit 11, Page 29, Line 16). I realized then that many of the facts and important aspects of our case may have gone unnoticed by Your Honor or may not have appeared significant to Your Honor because Your Honor did not have an opportunity to read our Opposition documents and other materials. Therefore, I will very succinctly explain the most basic arguments at this time that, respectfully, Your Honor should consider before deciding the ABA's unbelievably specious motions to dismiss and for sanctions. (That said, there is much very important material that is already in the record, which is already in Your Honor's possession, including many Exhibits evidencing certain defendants' publications, such as "Nazis killed millions of Jews...How can something that feels so right be wrong?" (in a section of an Internet website entitled "Joseph Rakofsky," close to a photograph of me and an elderly relative wearing yarmulkes, which was copied from my personal and private Facebook page without my consent), etc.) *See* Exhibit 12.

Further, on February 25th, Your Honor indicated that Your Honor was proceeding under a grave misunderstanding of the relevant facts. When Mr. Goldsmith stated that a conflict between me and my client precipitated the mistrial, Your Honor stated, "The transcript spoke otherwise. That's not what Judge Jackson said." (see Exhibit 11, page 14, line 25.) However, we have included as Exhibits to each and every Opposition document (that, respectfully, Your Honor has "not been able to get to") the entire transcript for Thursday, March 31, 2011, and pointed out that Judge Jackson stated "[T]here appears to be a conflict that has arisen between counsel and the defendant...[T]his is **not** an issue of manifest necessity (emphasis added)... ...I'm inclined to grant a mistrial, but I want [Mr. Rakofsky's client] to sleep on it overnight." Judge Jackson said this on Thursday, March 31, 2011, and later again on the next day. On Friday, April 1, 2011, Judge Jackson stated, "Let me say that this arose in the context of counsel, Mr. Rakofsky, approaching the bench and indicating that there was a conflict that had arisen between he and Mr. Deaner. Mr. Deaner, when I acquired of him, indicated that there was, indeed a conflict between he and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial..."

The fact is, Mr. Goldsmith's statement to Your Honor on February 25th is precisely what Judge Jackson said. As Your Honor will discover when Your Honor reads the Opposition documents and the transcripts attached thereto, there was never any criticism of me by Judge Jackson about my performance or about anything pertaining to me when Judge Jackson expressly stated in open court that there was a conflict between me and my client on the record and that, because of the conflict, he was inclined to declare a mistrial. There was never any discussion of my having done anything that might have raised ethical issues, which I never did; as Your Honor will discover when Your Honor reads the Opposition documents and the Exhibits attached thereto, the complaint, which was filed by and thoroughly investigated by the D.C. Bar Counsel as a result of their reading the defamatory publications concerning me in the media, was dismissed and the individual who made the allegation was punished for having made it. As any reasonable fact-finder would conclude, my motion to withdraw as counsel on Thursday, March 31, 2011, solely because of a conflict that existed between me and my client, caused the mistrial and it is clearly on the record and in the transcript and already in Your Honor's possession. Respectfully, it's really that easy.

The ABA's motion for sanctions against Plaintiffs and their counsel is founded upon what it argues as the "truth" of their publication, which is posited upon statements Judge Jackson made on Friday, April 1, 2011, concerning my performance in the brief portion of the Deaner trial that preceded the events that resulted in its ending in a mistrial. Its motion misconceives what it was in the ABA publication and it assumes incorrectly that the defamation alleged by Plaintiffs results from Judge Jackson's statements that I performed poorly in the brief. It is not the fact that Judge Jackson stated that I performed poorly in the portion of the trial of the events that gave rise to the mistrial. That is assumed in every lawyer's first trial, which the Deaner case was for me, as I proclaimed to the jury in my opening statement. The gravamen of Plaintiffs' complaint is that the ABA published that my "poor performance" was the cause of a mistrial to the assumed harm to the defendant (though the facts of the Deaner case prove otherwise), when, in fact, it was really my motion to withdraw on Thursday, March 31, 2011, that caused the mistrial.

When defamation is based on one event causing another, the order of such events must be understood. Indeed, the order of the events lies at the heart of that, which in this case, constituted defamation. Your Honor stated, "It's basically sophistry and semantics. You're just saying it's in the wrong order....) *see* Exhibit 11, page 27, line 18. One of many errors of the ABA's argument is this: the fact that Judge Jackson criticized my performance is irrelevant to the issue of the existence of defamation; less-than-perfect performance that does not result in harm to the defendant does not constitute defamation. The existence of defamation depends upon the effect of a statement upon the presumed lay reader of the publication. Therefore, as we have already stated consistently in our Opposition documents, the mere statement that Judge Jackson thought my performance was less than perfect is irrelevant to the existence of defamation, especially under the "no harm, no foul" legal principle. However, to a lay reader of the ABA publication, rather than upon a skilled and dispassionate legal logician to whom the concept might initially seem to be a mere matter of sophistry and semanticism, the effect is undeniable (even to the ABA): the lay reader was clearly left with the understanding that it was my poor performance at trial that caused a mistrial and harmed my client in the process rather than my motion to withdraw as counsel.

On February 25, 2013, Mr. Harris, attorney for the ABA, stood in your courtroom and stated to Your Honor that the ABA is unlike the other defendants in this matter (see Exhibit 11, Page 9, Line 23) and requested that Your Honor impose sanctions against me and my attorney, Mr. Goldsmith. Mr. Harris made a number of false statements to Your Honor. For instance, Mr. Harris stated that the ABA was unlike the other defendants in this law suit. However, even though the ABA clearly is not a member of the media, just like the other media companies and bloggers, the ABA, nevertheless, published: "Judge William Jackson declar[ed] a mistrial on Friday...The Judge ruled after reviewing a motion by an investigator claiming Rakofsky suggested he "trick" a witness." The transcript from April 1, 2011 proves that Judge Jackson never said that (or anything like it). (*See* Exhibit 6.) This clearly constitutes Defamation *per se*, rendering my naming the ABA as a defendant in my law suit perfectly reasonable and proper.

Further, Mr. Harris expressly stated that the ABA was unlike the other defendants in that they didn't financially benefit from their articles. This was also a false statement made by Mr. Harris. As Your Honor can plainly see in Exhibits 7 and 8, the ABA sold advertisements just like the other media companies and bloggers named in this suit; presumably, the more visitors the ABA website received, the more money the ABA could charge to those businesses who would wish to advertise on the ABA

website. (Such attachments were and are Exhibits in each and every one of our Opposition documents.) Even Your Honor seemed to be influenced by Mr. Harris' lies and stated: "The ABA is not a paper that is there to sell more newspapers...They don't get money for selling a paper, a dollar, like whatever it may be." *See* Exhibit 11, Page 24, Line 3. The ABA then sent emails to every lawyer in their entire database with a summary of the articles and a hyperlink to access them, so the recipients would visit the ABA website and be exposed to the various advertisements as well as the defamatory articles. It is crucial to realize that a business (such as the ABA) can generate much more money from an online readership than it could from a printed newspaper, such as the "New York Tribune" that Your Honor invented on February 25th, which would seem to concentrate on a limited geographic area. *See* Exhibit 11, Page 24, line 17. That Mr. Harris would consume judicial resources proclaiming to be unlike the other defendants when, in fact, in many respects, the ABA's acts have been even more calculated and even more destructive to me personally and professionally is beyond belief.

In addition, at the February 25, 2013 hearing, Mr. Harris deviously intimated that I refused to eliminate the Negligence cause of action from my proposed 2nd Amended Complaint. However, in my July 2012 letter to Your Honor, I clearly stated that if Your Honor felt that the Negligence cause of action was inappropriate and should be removed, then I would remove it.

Further, on February 25, 2013, Mr. Harris stated that I requested the stay, which was instituted for nearly a year, although this is not true. I requested a stay, but after it had terminated, it was re-instituted by Judge Goodman (for her own personal reasons); I requested a stay for only a reasonable and standard period of time. However, it has been nearly 2 years since we filed the Complaint and there has been almost no movement since.

Moreover, at the February 25, 2013 hearing, Mr. Harris did not dispute that it was I who initiated the mistrial by moving to withdraw on Thursday, March 31, 2011. Instead, he validated it by stating to Your Honor that Judge Jackson merely formally declared the mistrial on Friday, April 1, 2011. On Thursday, March 31, 2011, Judge Jackson said repeatedly that he was inclined to grant the mistrial, but wanted my client "to think about it overnight." In other words, all acts required to accomplish the mistrial had already been done; the only thing left was for my client to think about it. All of this can be seen in the transcripts attached hereto as Exhibit 5. (Of course, I provided the Thursday, March 31, 2011 transcripts to Your Honor as Exhibits in each and every one of our Opposition papers as well.) The issue is not when Judge Jackson formally declared the mistrial, but why he did so.

On January 6, 2013, my attorney, Matthew Goldsmith, submitted a letter to this Court which stated:

> Dear Judge Hagler,
>
> I just re-read the transcript from the June 28, 2012 hearing (p. 66, Lines 5 and 6). When Your Honor asked me if "the email talks about trick and is that fair reporting," I realized only upon reading the transcript that I didn't understand what Your Honor was asking me as this Court's question related to the "old lady," who was not ever a witness in the Deaner case. Please allow me to be perfectly clear: As we have stated clearly and categorically in all our filings with the Court in opposition to motions to dismiss in which the issue was raised, the "old lady" was NOT a witness either for the Government or for the defendant. Therefore, it was not "fair reporting" to state in any publication that Mr. Rakofsky, in his email to his investigator, asked the

investigator to "trick a witness," in part because the "old lady," the person to whom the email referred, was not a witness. In fact, such a statement was defamatory *per se*, as the case law we provided to this Court easily demonstrates. I apologize for any confusion this may have caused to Your Honor.

I wanted to draft a letter to this Court immediately upon learning of the misstatement, before Court opened, because I would like to clear up any potential confusion to assist the Court and the preservation of the record and point out that, even though all of our Opposition documents make it crystal-clear that the subject of the Washington Post article was NOT a witness, I misspoke on June 28, 2012 with respect to that issue.

I respectfully stand by our only allegations and submissions as set forth in the Amended Complaint and all of our Opposition documents as they relate to fair reporting that to accuse Mr. Rakofsky and his law firm of attempting to trick a witness is false and untrue and defamation *per se*. Period.

However, at our hearing on February 25, 2013, ABA counsel, Mark Harris, tried to pull a fast one on Your Honor. At that time, Mr. Harris stated to Your Honor: "Mr. Goldsmith has now conceded both of these facts. That was one of the things that came out of the June 28 conference. Reading from the transcript itself, Mr. Goldsmith said, 'Please trick the old lady, that is a fair report of what the email stated.'" *See* Exhibit 11, Page 3, Line 18. On February 25th, it was Mr. Harris who attempted to trick Your Honor by mendaciously intimating that a misstatement inadvertently made by Mr. Goldsmith, which was corrected by Mr. Goldsmith approximately 7 weeks before the February 25th hearing, in early January 2013, was an example of Mr. Goldsmith "conceding" the ABA's point. Mr. Harris apparently didn't believe Your Honor would be aware on February 25th that Mr. Goldsmith, on or about January 6th, explained and cleared up his misunderstanding of Your Honor's question, which Your Honor asked Mr Goldsmith at the June 28 conference. This is yet one more instance of many examples of the bad faith under which the ABA and Mark Harris bring their motions.

I could go through the transcript from the February 25, 2013 hearing and point out each and every false statement Mr. Harris made to Your Honor, but I know that is not the best way for Your Honor to spend Your Honor's time. (In any event, the materials we submitted to this Court -- that are already in Your Honor's possession – clearly demonstrate that many of the statements Mr. Harris uttered to Your Honor in Your Honor's own courtroom were false statements.) Many of the statements are directly contradicted by the Opposition documents and other materials we already submitted 11 months ago. The simple fact is, the ABA consumed Your Honor's time and resources and requested sanctions against me and my attorney, even though it was they who defamed me. They now attempt to use their enormous resources to intimidate me with the threat of sanctions when it is they who clearly violated the law and piled on to effect the complete destruction of my reputation and business. In addition, they did this and harmed this Court in the process by subjecting Your Honor to a hearing they sought in bad faith. Further, the ABA's request for sanctions ultimately cost me several thousand dollars in attorney fees. The simple fact is, the ABA is even more pernicious than many of the other defendants named in this matter because it is asking Your Honor to permit it to conduct its business in any way it sees fit (regardless of who is destroyed) and then hide behind its "purpose" (see Exhibit 11, page 9, line 23) as it consumes this Court's resources, as well as my own.

I realize, by filing my pleadings and other materials, I have already asked Your Honor to read a massive amount of information. I spent all of my savings and all of my time researching, writing and

manufacturing the pleadings and especially the Opposition documents in Your Honor's possession, but understand that it would take some time for Your Honor to be fully conversant with the facts. I know Your Honor has many other cases, each involving litigants who are also requesting and expecting Your Honor to read their materials as well. Therefore, I will provide the main points to this matter as succinctly as possible.

On Thursday, March 31, 2011, I moved to withdraw as counsel for Dontrell Deaner because of a conflict that existed between me and my client. On Thursday, March 31, 2011, the Judge stated that His Honor was inclined to grant the mistrial formally; respectfully, this fact alone should indicate to Your Honor that it was my motion to withdraw that precipitated the mistrial (that was formally declared on the record the next morning). The determination to grant a mistrial was stated on Thursday, March 31, 2011, following Mr. Deaner's agreement to waive his Constitutional Due Process rights and the formal announcement of it was expressly postponed solely to give Mr. Deaner overnight the opportunity to consider his waiver of his Constitutional rights. The first action taken by Judge Jackson on Friday, April 1, 2011, was to inquire of Mr. Deaner whether he still wished to waive his Constitutional rights, which he did, which resulted in the formal announcement of the mistrial.

There was never any criticism of my performance by Judge Jackson or by anyone on Thursday, March 31, 2011. (Of course, I provided the Thursday, March 31, 2011 transcripts to Your Honor as Exhibits in each and every one of our Opposition documents, but I have attached another copy to this letter, for Your Honor's convenience. *See* Exhibits 4 and 5.) On Thursday, March 31, 2011, Judge Jackson stated, "[T]here appears to be a conflict that has arisen between counsel and the defendant...[T]his is **not** an issue of manifest necessity (emphasis added)..." All of Judge Jackson's and my statements are in the transcript. As any reasonable person would easily see, the mistrial was precipitated by my motion to withdraw (although, the judge formally made his decision on the following day, April 1, 2011). Further, I stated in my letter to Your Honor written in early July 2012:

> We understand that Your Honor has suggested the possibility that the cause of the mistrial may be affected by the concurrence of more than one possible cause. We respectfully submit that such reasoning misapplies the meaning of "cause" and that a ruling of a mistrial during trial can have only one cause: that, without which, the subject of the cause could not exist, better referred to, perhaps, as the "proximate cause." Respectfully, at the Deaner trial, there could only be one specific event which caused the mistrial (i.e., the proximate cause). That can only be the motion by Mr. Rakofsky to withdraw as the lead counsel for Dontrell Deaner on Thursday, March 31, 2011, since that was the act without which the mistrial would never have arisen and which preceded any acts that might be thought by the Court to have affected Judge Jackson's subjective statements on Friday, April 1, 2011, which necessarily followed in point of time to Mr. Rakofsky's motion to withdraw. To the extent that Judge Jackson may be thought to have been affected in his statements of Friday April 1, 2011, to have been influenced in those statements by acts other than Mr. Rakofsky's motion, those influences necessarily followed, in point of time, the motion to withdraw and thus, cannot be said to be the cause of the mistrial. Further, any suggestion that unethical or illegal acts attributed to Mr. Rakofsky "partially" caused the mistrial (as certain defendants have published), therefore, cannot stand, since Judge Jackson stated on the record that His Honor learned about such allegations on April 1, 2011, only after Mr. Rakofsky moved to withdraw as lead counsel for Mr. Deaner.

The ABA published, "Judge William Jackson declar[ed] a mistrial...after reviewing a motion by an

investigator claiming Rakofsky suggested he "trick" a witness." This is not an opinion, but rather a false statement of fact. Thus, I merely wish to present this evidence (as well as other evidence) to a jury and ask them to decide whether the ABA (and other defendants) broke the law. I'm not asking for anything extraordinary, but only only for the bare minimum.

This brings us to the other major issue. I wrote an email to an investigator using the unfortunate word "trick" about a neighbor of my client's. She had already proclaimed that she was not at the shooting, had not seen anything or anyone on the night of the shooting and could not have known anything about the shooting because she was not present. She said this to me, my law partner, Sherlock Grigsby, and my client's mother. I wanted a 3rd party to hear her say it as well, so I could put the 3rd party on the stand and impeach this woman, if the Government were to offer her as a witness; therefore, I hired an investigator to accomplish this. The reason I felt that the investigator might need to trick the woman into repeating her statements made to us (as opposed to "*changing*" testimony, which never existed, because she, never having been a witness, never testified) because the Government paid its fact witnesses (as opposed to merely expert witnesses) to testify against my client. ***See* Exhibit 1**. (Again, this fact is well documented in the materials provided in both the Amended Complaint and in the Opposition documents to certain defendants' Motions to Dismiss, which included transcripts to hearings in which District of Columbia detectives testified in court, under oath, that such so-called "witnesses" were being compensated with money to testify against my client. Again, I attach to this letter these same transcripts for Your Honor's convenience.) It was she who stated to us (and later to the 2nd investigator we hired after the 1st investigator failed to perform) that she was gambling on the night of the shooting and was not at the premises. I was reasonably concerned that this woman, like other individuals before her, would lie to the Government in exchange for money. After all, this woman was my client's neighbor, an admitted habitual gambler and also lived with my client in the projects of Southeast Washington, D.C.

On February 25, 2013, Your Honor inquired of Mr. Goldsmith whether the "old lady" was a "prospective" (or "potential") witness for the Government. He stated that she, of course, was not a witness. Understanding the question to address my knowledge while preparing for Mr. Deaner's trial, Mr. Goldsmith answered the question as to my knowledge in the affirmative. However, my knowledge is not (and was not) relevant as to whether the subject of the email was a "prospective witness." In *United States v. Dontrell Deaner*, no witnesses were identified prior to trial and all witnesses were known to everyone except the Government as "Confidential Informants." Therefore, as far as I was concerned, almost anyone was capable of being named as a "Confidential Informant" because the Government paid its fact witnesses (as opposed to merely expert witnesses) to testify against my client (and all of my client's neighbor's were destitute and needed money). In fact, the "old lady" was not a "prospective witness" for the Government to the knowledge and intent of the Government. Even at trial, the Government never named the woman on their list of potential witnesses. Even if she were considered by the Government to be a "potential witness," which she clearly was not, there is a marked difference between being a so-called "potential witness" and being a "witness."

Viewing the question that Your Honor asked from the knowledge and standpoint of the Government, the old lady never was a prospective witness and the question should have been answered in the negative by Mr. Goldsmith. Nevertheless, this fact consistently appeared in the record from the day I filed this law suit and it has been clearly established through proofs that Your Honor had and continues to have before him. They remain in Your Honor's possession.

In short, the response to Your Honor's question should be deemed that she was not a so-called "prospective witness." Since the status of the old lady as a "prospective witness" or not depends not on my knowledge, but is solely dependent on the knowledge and intent of the Government, which never intended to call her as a witness and therefore, never considered her to be a "prospective witness," she was not a "prospective witness." That the Government never intended to call her as a witness, results in the plain conclusion that she was not a "prospective witness."

It was only at the very end of the hearing on February 25, 2013, that Your Honor stated, "I know I have the other motions that I haven't been able to get to..." Therefore, up until the moment that Your Honor stated this, Mr. Goldsmith was not aware that Your Honor had not read our Opposition documents. Because of this fact, to make sure the record is crystal clear, when Mr. Goldsmith stated to Your Honor on February 25th that the non-witness was interviewed (see Exhibit 11, page 23, line 8) he was under the impression that Your Honor would realize (from having read our Opposition documents) that the non-witness was interviewed by only me and Mr. Grigsby, my very experienced co-counsel. The non-witness was never interviewed by the Government (either before or after the trial) and accordingly, never gave testimony. Thus, contrary to ABA's and Washington Post's defamatory publications, which attributed to me the commission of the crime of witness tampering, there could be no testimony to "change." Respectfully, the ABA's publication that I attempted to engage in witness tampering, which is a crime, is Defamation *per se*. The same is true for the Washington Post and the other defendants

Last, the document in Judge Jackson's possession on April 1, 2011 was submitted by an individual who was not involved in any way in Mr. Deaner's case and therefore, had no standing to submit any documents to Judge Jackson. Although, he was, at one point hired to be our investigator, he did no work for us and accordingly, received no compensation. Instead, he tried to use my email to blackmail me into paying him, not with my money, but with the Government's voucher (from Criminal Justice Act funds), and thereby, defrauding the Government. I refused to lend my approval to his receiving the voucher that would result in his being paid with Government monies, even though he blackmailed me and promised me in writing that he would use it to harm me and my career and it would not have cost me or my client any money at all to do it. *See* Exhibit 9. (Again, this fact is well documented in the materials provided in both the Amended Complaint and in the Opposition documents to certain defendants' Motions to Dismiss.) Because this individual did not have standing to submit documents to Judge Jackson, this individual underhandedly submitted the document to a different Judge (and not to Judge Jackson), who, in turn, delivered it to Judge Jackson on the morning of Friday, April 1, 2011 (as Judge Jackson so stated on the record).

In the document, the "investigator" made a number of false statements about me. Judge Jackson uttered absolutely none of the false statements on the record. Instead, he merely stated that he "wasn't sure what to make of it" and neutrally stated that it "raises ethical issues." If what the investigator wrote were true, which it was not, then the allegations might have raised ethical issues, but his allegations were provably false. In fact, the D.C. Bar Counsel thoroughly investigated, found no ethical violation against me and dismissed the matter. (See Exhibit 10). (Their investigation was brought, not because anyone filed a complaint against me, but instead, solely because the D.C. Bar Counsel became aware of the statements published about me in the media and by other bloggers. The "investigator" who submitted the specious document, instead, was suspended and ultimately, was found no longer to be eligible to receive CJA vouchers).

The fact is, the ABA published that I engaged in witness tampering, which, as Your Honor well knows, being a criminal act, is Defamatory *per se*, not to mention many other defamatory statements about me and my law firm. This fact, by itself, establishes that the ABA's motion for sanctions was brought in bad faith and that sanctions should not be imposed against Plaintiffs or Mr. Goldsmith. This fact alone warrants that sanctions be imposed against the ABA and Mr. Harris. However, even though it has cost me several thousand dollars to be represented by my attorney at the February 25, 2013 hearing, I do not ask Your Honor to impose sanctions against either the ABA or Mr. Harris for bringing their motion for sanctions in bad faith, but am simply asking for my day in Court.

Further, one of the ABA articles does nothing except discuss comments made by other individual bloggers, thereby republishing the defamation; it does not even purport to be a report on a judicial proceeding.

I know Your Honor has received an enormous amount of information from us. I am grateful to Your Honor for accepting this case, as complicated as it is, and for providing me with the "fair shot" I requested when we first met. Thank you.

Respectfully submitted,

Joseph Rakofsky, Esq.

UNITED STATES OF AMERICA :
:
versus : Criminal Action No.
:
DONTRELL DEANER, : 2008-CF1-30325
:
Defendant. :
----------x

Washington, D.C.
Friday, January 9, 2009

The above-entitled action came on for a preliminary hearing before the Honorable FREDERICK WEISBERG, Associate Judge, in courtroom number 318.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

VINET BRYANT, Esquire
Assistant United States Attorney

On behalf of the Defendant:

DANIEL QUILLIN, Esquire
Washington, D.C.

Kristin Gilliam (202) 879-1072
Official Court Reporter

A. Yes.

Q. Did you prepare it?

A. No, my partner.

Q. But, again, you indicated that you were present for the witnesses -- for the interviews of the witnesses who were named in that warrant; am I correct?

A. That's correct.

Q. Now Witness 1 in the warrant, does Witness 1 have a relationship with the Metropolitan Police Department?

A. Yes.

Q. And what is the nature of that have relationship?

A. Confidential informant.

Q. How long has Witness 1 had this working relationship with MPD?

A. Over 20 years.

Q. And during that time did Witness 1 receive monetary compensation for the information it provided to the police?

A. Yes, it did.

THE COURT: You mean in this case or in other cases?

MS. BRYANT: In other cases, Your Honor.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

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ITED STATES OF AMERICA :

v. : Criminal Action No.:

IRELL DEANER, : 2008-CF1-30325

Defendant. :

----------X

Washington, D.C.
Monday, March 28, 2011

The above-entitled action came on for a Jury Trial before the **HONORABLE WILLIAM JACKSON,** Associate Judge, and a jury duly impaneled and sworn in, in Courtroom Number 319, commencing at approximately 1:42 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

VINET BRYANT, Esquire
Assistant United States Attorney
Washington, D.C.

On behalf of the Defendant:

JOSEPH RAKOFSKY, Esquire
SHERLOCK GRIGSBY, Esquire
Washington, D.C.

* * * * * * *

they aren't expected to be here tomorrow, then I guess if they have to sit on Wednesday. That's fine. Thank you, your Honor.

MR. RAKOFSKY: Your Honor, we have a couple of questions. Number 1, Do you anticipate sitting on Fridays?

THE COURT: I do, and the reason why I do is because trial time is a precious commodity. I would have to look and see what I have set for Friday. I know I have a sentencing set for Friday. Sometimes I have preliminary hearings and felony status conferences. But if I know that my morning is going to be pretty busy, then I will have the jury come in at noon so at least we get some trial time in. I just don't believe in just sort of killing the entire day. Particularly in light of the fact that the defendant said that they are going to take a week. So I need all the days and all the trial time I can get.

MS. BRYANT: I understand, your Honor, and I normally would not have an issue. I had specifically requested of Judge Leibovitz that we not sit on Friday, April 1st because of a personal matter that will take me out of the jurisdiction on that date. When we thought we would be before here, she had granted that request of the Government; so I made plans according.

THE COURT: All right. I guess, we won't be sitting on Friday.

MS. BRYANT: I apologize.

THE COURT: So that's where we are.

MR. RAKOFSKY: Your Honor, with respect to, I think one of the earlier issues we were talking about, the phencyclidine, is it permissible for me to make a statement in the opening without specifically identifying the phencyclidine but indicating that there are substances involved which we believe elicited this behavior?

THE COURT: No. It just seems to me that the behavior speaks for itself. But if you've got -- Again, it seems to me that -- because either I'm going to admit that or I'm not going to admit it. As I said, there's a predicate for the behavior -- I mean, as I said, a lot of this is not -- I mean, I'm not sure how somebody can opine -- an expert can opine -- typically, if someone wants to explain irrational behavior, bizarre behavior, but that's not what's being elicited here.

So let's assume for the moment that somebody is robbing a store and the store person doesn't want to be robbed and starts fighting back. Is that bizarre behavior? If that person happens to have some illegal

P R O C E E D I N G S

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UNITED STATES OF AMERICA :

v. : Criminal Action No.:

DONTRELL DEANER, : 2008-CF1-30325

Defendant. :

----------X

Washington, D.C.
Wednesday, March 30, 2011

The above-entitled action came on for a Jury Trial before the **HONORABLE WILLIAM JACKSON,** Associate Judge, and a jury duly impaneled and sworn in, in Courtroom Number 319, commencing at 9:42 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

VINET BRYANT, Esquire
Assistant United States Attorney
Washington, D.C.

On behalf of the Defendant:

JOSEPH RAKOFSKY, Esquire
SHERLOCK GRIGSBY, Esquire
Washington, D.C.

* * * * * * *

Margary F. Rogers, BS, CRI Telephone (202) 879-4635
Official Court Reporter

MR. GRIGSBY: With regards to the punishment --

THE COURT: I can't hear you.

MR. GRIGSBY: I said, with regards to punishment about Javon's -- it's part of the record now. I don't see a reason --

THE COURT: What do you mean "it's part of the record"? It's not apart of this case yet, not before this jury.

Two things, please don't refer to the young man as a "boy". I assume that Javon Walden is not a boy. So I advise everyone to not reference -- you can say "young man". You can say a number of different things or use his name, but please. The -- typically this comes out of a context of -- it's really not relevant what he's facing or how many years he got and what his sentence was.

MR. RAKOFSKY: Your Honor, respectfully, it is so incredibly relevant; and this man, Javon Walden, was offered a deal. He was charged with first-degree murder. He was offered second-degree murder. And when he had everything to lose and absolutely nothing to gain, when he was presented with a deal that most people would do anything for, he said on the record, to another judge while he was being sentenced, that this was not a robbery, that there was never any attempt

friends, right in front of this security camera for everybody to see. Do you know a lot of people who would do that?

THE COURT: Counsel, let's not argue. Save that for closing argument. Just tell what the facts are going to be, what the evidence is going to show in this case, please.

MR. RAKOFSKY: And you are going to learn from the Government's own toxicologist and the Government's own medical examiner that there is very good reason --

THE COURT: Counsel, come to the bench.

(Bench Conference.)

Counsel, we have spent an enormous amount of time talking about this, didn't we?

MR. RAKOFSKY: Yes, Your Honor.

THE COURT: Okay. And what was the Court's ruling?

MR. RAKOFSKY: The Court said I couldn't mention PCP.

THE COURT: The Court said you couldn't mention a PCP or the toxicology. That's what I said, and I repeated it, and I repeated it. So what part of my ruling didn't you understand?

MR. RAKOFSKY: I thought you didn't want me to make a specific reference --

I said you are not bound by the Government's theory that this was a robbery. And I said you could talk about behavior, you cannot talk about PCP.

And so what's the relevance of talking about toxicology if you're not talking about drugs? What does it matter?

MR. RAKOFSKY: Your Honor, I plan to lay the proper foundation. You said I could do that.

THE COURT: No, you can't lay the proper foundation because so far we haven't heard anybody. You can't lay a proper foundation because you don't have an expert so far.

MR. RAKOFSKY: I'm relying on their expert that they're going to --

THE COURT: Their expert has some expertise on that?

MS. BRYANT: I talked to the toxicologist. She didn't complete that report and append it to the autopsy.

THE COURT: You have to have a good faith basis to believe that you can get evidence in because it's beyond the kin of the average layman as to what the effects are, somebody who's competent to testify that this amount and this particular person produces this type of behavior. And you haven't proffered a single

a document called -- we intend to offer into evidence a document called "The Affidavit." This affidavit, just like any other affidavit --

MS. BRYANT: Your Honor, may we approach?

THE COURT: Yes.

(Bench conference.)

MS. BRYANT: Are we talking about the affidavit supporting the arrest warrant?

MR. RAKOFSKY: Yes, we are. It's perfectly germane. Their whole investigation was based on statements made in this affidavit, and you are going to see they are patently false, patently false. You are going to see that --

THE COURT: But what is the relevance of that?

MR. RAKOFSKY: It's the motivation for this prosecution, Your Honor. It is the fact that from the very beginning, throughout this entire investigation, Detective Littlejohn, in particular, did a ridiculously terrible job. When you see what he has done, he's done a ridiculously terrible job. It was a terrible job. And so it is important that they see the statements that Detective Littlejohn signed his name to. That is the foundation of this prosecution.

THE COURT: Okay. Let's not talk about stuff that may or may not -- or evidence that may or may not

this man who says Mr -- who says he saw the shooting and who said he saw Mr. Elliott get shot in the chest, also first said that he did not see Dontrell with the gun. Then later, he said he did see Dontrell with the gun.

Now, you are going to see that there are other witnesses involved in this investigation. Another of whom you are going to hear from, his name is Michael Hickman. He was identified to us as Witness Number 4. You are going to see that Witness Number 4 is going to tell you that he saw the shooting also. He's going to tell you he saw the shooter, and he's going to tell you that he saw the shooter -- before I get to that, he's going to tell you that Mr. Elliott and Javon were -- and Dontrell -- were tussling. Okay? Tussling.

You are going to see that this man also says Dontrell did not have a gun. Okay. What's so important about Witness Number 4 saying that Dontrell did not have a gun? What would possibly be so important about Witness Number 4 saying Dontrell did not have a gun? You are going to see that not only does he say that Dontrell didn't have a gun, you are going to see that he says that Javon, the shooter, did not have a gun. Okay?

happened. It must be attempted robbery. Ms. Bryant must prove beyond a reasonable doubt that Dontrell knew -- that Dontrell knew there was an attempted robbery, or there would be an attempted robbery, which she will not be able to do, you will see.

And we do not have to prove anything. Dontrell is already protected with the presumption of innocence. We don't have to say anything. It is Ms. Bryant who must prove beyond a reasonable doubt, beyond, with real evidence, not lies, real evidence that Dontrell participated in the so-called attempted robbery in front of his home, in front of his friends, and neighbors, and family, in front of the police department surveillance camera. That's what Ms. Bryant must prove, beyond a reasonable doubt.

I suggest to you that the Government -- strike that -- that there's a lot of reason to doubt the Government. Okay?

Your Honor, this is my first trial. This is my first trial, and ladies and gentlemen --

MS. BRYANT: Your Honor, may we approach?

THE COURT: Yes, ma'am, please.

(Bench Conference.)

MS. BRYANT: I'm at the point where I'm getting ready to say, "We need to pick a new jury." I cannot

you not to refer to the young men who are out there as boys because, by last count, Javon Walden is 21-years-old. He's not a boy.

And so unless you're referring -- that was my only comment. And I think you, quite honestly, tried to adhere to the Court's ruling. You slipped a couple of times, but you've been trying to adhere to the Court's ruling in that regard. But to sit there and say to this jury, "This is my first trial,"...

MR. RAKOFSKY: The whole point, Your Honor, is that they not be prejudiced -- that Dontrell not be prejudiced for my errors. That is not fair to Dontrell. I've worked hard on this case. I've spent over a 1,000 hours in this case. I've done more for this case than any other lawyer could possibly do for this man, and I am the one he wants to represent him, and I am going to make mistakes, and they are entitled to know that.

THE COURT: I understand that, but telling them, "This is my first trial," doesn't -- every attorney makes mistakes during the course of the trial. Every attorney does. It just happens. That's the nature of trials. Judges make mistakes during the courses of trials. That's the nature of trials. Okay. My job here is to protect the defendant's rights here and also

evidence is going to show. And then, finally, you turned to me and said, "This is my first trial," and in front of the jury. And I must say, in my years, I have not had that experience, but do not involve me in your opening statement by turning to me and...

I'm going to let you put on your defense. I want you to be able to put on your defense. He's entitled to it. These are serious charges. He's entitled to have a robust defense. I'm not preventing you from doing that, but those were my rulings and that's why there were objections, and that's why they were sustained.

So we'll come back here at 2:00 to see where we are.

MR. RAKOFSKY: Thank you, Your Honor.

MS. BRYANT: Your Honor, if I may, just briefly, for the record, I just -- I really want to make a record of the fact that particularly counsel's last statement was extremely inflammatory, and it was engendering sympathy from the jury for his client based on his inexperience. I think that is highly inappropriate. I would not, at all, object to the selecting of a new jury on that basis. If we are not going to do that, I would like permission of the Court to address the fact that the case need not be decided

based on sympathy, at a minimum, in my closing.

THE COURT: I'll do something, either through a cautionary instruction to the jury about that statement and the like.

MS. BRYANT: Thank you, Your Honor.

THE COURT: All right.

(Whereupon a recess was taken from 12:30 p.m. to 2:12 p.m.)

DEPUTY CLERK: Calling United States v. Dontrell Deaner, Case Number 2008-CF1-30325.

MS. BRYANT: Vinet Bryant on behalf of the United States Government. Good afternoon, your Honor.

THE COURT: Ms. Bryant.

MR. RAKOFSKY: Joseph Rakofsky and Sherlock Grigsby for Dontrell Deaner.

THE COURT: Good afternoon.

MR. RAKOFSKY: Good afternoon.

THE COURT: All right. The defendant is now present.

DEPUTY CLERK: Are you ready for the jury?

THE COURT: No. I would like counsel and the defendant to approach the Bench, please.

(Bench Conference.)

Good afternoon, Mr. Deaner.

When we finished, just before we recessed, you

recall that your lawyer announced to the Court -- Mr. Rakofsky announced to the jury that this was his first trial. I wanted to inquire of you as to your comfort level with that.

Now, I understand that you have chosen him and that's your right to have counsel of your own choosing. I don't want to interfere with that. If you want him as your lawyer in this case and are satisfied with him as your lawyer, I will honor that, but I just didn't know how you felt in light of that disclosure. Did you know that?

DEFENDANT: Yes.

THE COURT: Okay. Are you satisfied with that?

DEFENDANT: Yes.

THE COURT: Okay. I just wanted to make sure. Thank you very much.

(Open court.)

I'm concerned, and I want to make sure that what happened during the course of the opening statement does not continue throughout the trial. I said this, again, yesterday, and I said this, I believe, this morning before we got started, that I really wanted to focus -- to make sure that if there was something of dubious admissibility to clear it with the Court before mentioning it to the jury.

I said -- now, I don't know whether it was skillful -- skillfully injecting it into the jury -- to the jury in opening statement and disregarded my prior ruling about the toxicology report, but it was there. There were things that were irrelevant, and I just want to make sure that during the course of the examination of the witnesses -- again, I'm going to give wide latitude, as I do, on cross-examination. These are serious cases. The charges are serious, and there are serious implications for both the defendant and, of course, the Government, but I want to make sure that people do not ran a foul of my ruling -- rulings, particularly on issues which are highly prejudicial, issues for which there is no good-faith basis, or issues for which there is no competent evidence that could be introduced to support it.

So I just -- we're not just going to start slinging things around. Again, there's a lot of -- the Government has some witnesses. There's a lot of, as I understand from the opening statement, a lot of issues that can be explored on cross-examination going to bias and credibility, and I am going to give full rein to the defendant to engage in that. But I'm not going to allow things that are highly inflammatory and prejudicial, calculated only to confuse the jury about

the issues in this case. So I just want you -- all parties to be aware of that.

Does the Government want a curative instruction at this particular point, or do you want to wait until the closing?

MS. BRYANT: I would ask for a curative instruction just with respect to the last issue that was raised, Your Honor, about the level of experience of the attorneys in the room.

THE COURT: Okay. And the form that that would take?

MS. BRYANT: I'm not even sure. I apologize to the Court because I've never encountered this, but --

THE COURT: In one sense, a curative instruction might highlight it.

MS. BRYANT: Yeah, that's what the problem is. That's why this is such a hard call to make. I can argue it, your Honor.

THE COURT: All right. Very well.

Let's get the jury.

(Jurors present.)

All right. Good afternoon, ladies and gentlemen. You may be seated. We are ready to proceed with the testimony in this case.

Ms. Bryant, call your first witness, please.

Q Oh, so it's fair to say multiple times?
A Yes, sir.
Q More than five?
A I couldn't tell you.
THE COURT: Next question. Next question.
MR. GRIGSBY: Brief indulgence.
No further questions.
THE COURT: Any redirect?
MS. BRYANT: No, Your Honor.
THE COURT: All right. You may step down.
THE WITNESS: Thank you.
THE COURT: Next witness.
MS. BRYANT: Court's briefest indulgence.
Okay. Then, at this time, the Government calls Dr. Marie-Lydie Pierre-Louis.

* * * * *

Thereupon,

MARIE-LYDIE PIERRE-LOUIS,

having been called as a witness for and on behalf of the Government and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRYANT:

Q I do believe that I have somehow twisted your name. So I want to make sure that I have it right.

Can you please state your name in the correct order.

A I'm Dr. Marie-Lydie Pierre-Louis.

Q Okay. I think I had it right the first time. Can you spell all that for us?

A Yes. It's spelled M-A-R-I-E hyphen L-Y-D-I-E, P-I-E-R-R-E hyphen L-O-U-I-S.

Q Doctor, by whom are you employed?

A By the Office of the Chief Medical Examiner in the District of Columbia.

Q And how long have you been with the office of the Chief Medical Examiner?

A I started there in July 1985.

Q What is your current position?

A I am the Chief Medical Examiner.

Q And how long have you been Chief Medical Examiner?

A Starting with interim in 2003, acting in 2004, and Chief Medical Examiner. Yeah, that's about eight years.

Q Okay. Can you tell us a little bit about your educational background?

A I am a physician, and received my medical degree from the State University of Port-au-Prince in Haiti in 1975. I did, following that, two years of residency in internal medicine in the State University

Hospital, also in Port-au-Prince.

After that, I did a year fellowship in gastroenterology in Klinikum, Charlottenburg in West Berlin in Germany, and a four-year training in anatomy and Clinical Pathology at Howard University Hospital in the District of Columbia. After that, I did a one-year fellowship in forensic pathology at the Office of the Chief Medical Examiner.

I joined the staff in 1986 after my fellowship. I served as the Deputy Medical Examiner until September 2003 when I did the request of the Government. I took a position. I accepted to serve as the interim, then the acting, and then the Chief Medical Examiner for the District of Columbia.

Q Doctor, I think I have the number of years right, and I believe you said you have been with the District of Columbia Medical Examiner's office since 1985, correct?

A Yes.

Q Over the course of the last 26 years, how many autopsies would you say you've performed, if you had to estimate?

A Between 6,000 and 7,000.

Q And have you been previously qualified to testify as an expert in the field of forensic

pathology?

A Yes, I have.

Q How many times have you been so qualified?

A 500, 600 times.

Q In which courts have you been qualified as an expert?

A Mainly in the Superior Court of the District of Columbia, but I have also been qualified in the Circuit Courts of Upper Marlboro, Charles County, Rockville in Maryland, and in Virginia: Alexandria, Falls Church, Manassas, and Arlington County, and in Federal Court in the District and in Alexandria.

MS. BRYANT: Your Honor, with that, I would offer Dr. Marie-Lydie Pierre-Louis as an expert in the field of forensic pathology qualified to render an opinion to within a reasonable degree of scientific certainty as to the cause and manner of death of Frank Elliott on June 16, 2008.

THE COURT: Any objection?

MR. RAKOFSKY: No objection.

THE COURT: All right. Ladies and gentlemen, ordinarily witnesses are not allowed to give their opinion or the reasons for their opinion. There is an exception for this, and those are for expert witnesses. Expert witnesses are those folks, who because of their

into evidence.)

BY MS. BRYANT:

Q Now, what is the date of the Frank Elliott's death?

A He died on June 16, 2008.

Q And how old was he at the time of death?

A He was forty-one years old.

Q Now, when the autopsy was performed on his body, was that done on the same date or a different date?

A Was done on the same date of his death.

Q And did you personally perform the autopsy, or were you supervising?

A No. I performed the autopsy.

Q When you received the body of Mr. Elliott, was he still clothed?

A Yes. The body was clad in a short-sleeve t-shirt and denim shorts, black belt, checkered underpants, and white socks and sneakers.

Q And what was the condition of the t-shirt of the decedent?

A The garments were blood soaked, and there were two perforations, one on the back, one on the front of the t-shirt.

Q You say "two perforations." So does that basically mean two holes in the shirt?

A Two holes.

Q Okay. And you said one was on the back, the other on the front?

A Yes.

MS. BRYANT: Permission to approach, your Honor?

THE COURT: Yes.

BY MS. BRYANT:

Q Okay. Doctor, I am showing you what is -- what has been marked as "Government's Exhibit 85, 87, 88, 89, 90, 91, 92, and 93." Do you recognize those?

A Yes, I do.

Q Okay. And what are they?

A They are pictures of the decedent taken at the autopsy table at the time of the autopsy.

Q Do those photos fairly and accurately reflect the condition of Frank Elliott's body as you found it at the time that his autopsy was conducted?

A Yes.

MS. BRYANT: With that, Your Honor, I would move Government's Exhibits 85, and 87 through 93 into evidence.

THE COURT: Any objection?

MR. RAKOFSKY: No objection, Your Honor.

THE COURT: They will be admitted without objection.

(Government's Exhibits 85, 87, 88, 89, 90, 91, 92, and 93 were admitted into evidence.)

MS. BRYANT: Permission to publish to the jury, Your Honor?

THE COURT: Yes.

BY MS. BRYANT:

Q Doctor, can you tell us what it is that we are looking at?

A This is the first picture of the deceased. And, ladies and gentlemen, I recognize those evidence based on the case number that is unique to this specific case.

Q And why is a picture like this taken?

A For identification of the body.

Q Okay.

Showing you what has been marked as "Government's Exhibit Number 87." You said that the decedent was clothed at the time that he was brought to the Medical Examiner's office?

A Yes.

Q What is this that we are looking at?

A It's a set of dice.

Q Okay. Was this recovered from somewhere on the decedent?

A From the clothing.

Q Okay.

Government's Exhibit Number 88, can you tell us --

A Yes. I'm sorry.

It's a picture of the back of the deceased, and it's showing a gunshot wound of entrance to the back, to the backside of the back.

Q Okay. You said this is the entrance wound on the right side of the back?

A Yes.

Q I'm showing you Government's Exhibit Number 89.

A It is still a close-up picture of the back of the deceased, showing the long perforation with abrasion color to the right. This is closer to the spine, in this area.

Q So if we --

A And this is the gunshot wound of entrance. It's just a close-up of the gunshot wound of entrance.

Q And in order for us to orient ourselves, you said the left side of the photo would be closer to the spine?

A Yes.

Q And the right side would, then, be closer to his right shoulder?

A That's right.

Q Okay.

Now, how do you know that this is a entrance wound as opposed to the exit?

A I just explained why.

Q Okay.

A This is a round perforation with an abrasion color.

Q It's round?

A It's a round perforation.

Q Okay. So the entrance wound would be round?

A Usually, yes.

Q All right.

Now, show us what we are looking at in Government's Exhibit Number 90?

A You have kind of a slit wound. That is the exit wound.

Q You said, "It's kind of slit?"

A Yes.

Q Is that another way of saying that it's on an angle?

A It's kind of lineal.

Q Okay.

A It's not a round perforation. An exit wound tend to be slit-like, or kind of starlit. It's irregular.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal Action No.
	:	
DONTRELL DEANER,	:	2008-CF1-30325
	:	
Defendant.	:	

Washington, D.C.

March 31st, 2011

The above-entitled action came on for a Trial before the Honorable William Jackson, Associate Judge, in Courtroom Number 319.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

Vinet Bryant, Esquire
Assistant United States Attorney

On behalf of the Defendant:

Joseph Rakofsky, Esquire
Washington, D.C.

Sherlock Grigsby, Esquire
Washington, D.C.

CAROLINE MADDOX, RPR
Official Court Reporter
(202) 879-1447

THE COURT: Okay. What I -- I can tell you in open court. I didn't do a complete Monroe-Farrell inquiry, but I can tell you what I inquired of the defendant. And I can do that in open court.

MS. BRYANT: Yes, Your Honor. And I will. I just didn't want you to think I was somehow being disrespectful.

THE COURT: This is fine.

MS. BRYANT: Thank you.

(Close ex parte bench conference)

THE COURT: I'm just going to repeat what I did ex parte yesterday afternoon when I brought the defendant and both counsel up to the bench. I inquired of the defendant as to whether or not he was aware when Mr. Rakofsky was retained that this would be Mr. Rakofsky's first trial. He said he was. I then inquired was he comfortable with Mr. Rakofsky remaining as his counsel in this case. And he said he was. And that ended the conversation. It was sort of an abbreviated Monroe-Farrell inquiry which are typically done ex parte.

MS. BRYANT: Correct, Your Honor, and I understand that, I understand why the Government was not at the bench. But I've been asked to put several things on the record about the representation of the defendant in this case. I've had an opportunity to speak with my

uninvolved party without a dog in the fight, who could advise Mr. Deaner with respect to whether or not he really wants -- with the level of experience involved here, really wants to proceed in this matter.

That's what I've been asked to tell the Court. We are not advocating as such. We are raising the issue for the Court's determination. I want to make very, very clear that the Government is not taking a position on this but felt that at least it needed to be broached on record. And I'll respect and defer to the Court's decision.

THE COURT: Well, let me just say this: As I said, the lawyers are retained in this case, and the Court has limited, I believe, authority in retained cases because, otherwise, we would be interfering with the defendant's constitutional right to have counsel of his choosing. And he has chosen these lawyers. And I did inquire of him yesterday, and I don't believe anything has changed in that regard.

Now, the Court always retained supervisory authority over members of the Bar, inherent authority to supervise and regulate the conduct of the lawyers who are members of the Bar. And Mr. Rakofsky is appearing pro hac vice and has obviously agreed in that process to adhere to the ethical standards of the D.C. Bar. But there's no allegation here that Mr. Rakofsky or anybody associated

with the defense has engaged in anything unethical or has violated any ethics or rules of conduct. And I haven't found any quite frankly. My rulings yesterday concerned -- my rulings stand as they did, but I have not in any way, shape, or form found that Mr. Rakofsky or Mr. Grigsby engaged in unethical conduct.

MS. BRYANT: And we're not suggesting as much, Your Honor. I want to make that clear. I just wanted to make the record as I was asked to do before this Court.

THE COURT: Now, the Court does occasionally appoint counsel, conflict counsel, to assess whether or not there's a -- independent counsel to determine whether or not there's a conflict of interest, and if there is, whether or not it could be -- need to be an explicit waiver. So --

(Pause)

THE COURT: Mr. Grigsby? Mr. Rakofsky?

MR. RAKOFSKY: Yes, Your Honor.

THE COURT: What's your response to the Government?

MR. RAKOFSKY: To the extent that it requires a response, you know, we feel just as Your Honor feels that nothing has changed, and if Your Honor would like to inquire, he should feel free.

THE COURT: All right. The -- let's just wait a

second.

(Pause)

THE COURT: All right. I'm going to do a further inquiry up here at the bench of the defendant in the absence of his counsel.

(Ex parte bench conference)

THE COURT: Good morning, sir. Mr. Deaner, you've heard all of this because we talked about this yesterday.

THE DEFENDANT: Yes.

THE COURT: And as I said, it's not the Court's intention to interfere with your right to have whoever you want as a lawyer. I know Mr. Rakofsky was retained in this case, and he's the lawyer that you have chosen. My question to you a little bit more explicitly is this is not about hurt feelings, this is not about -- this is about the Court's concern of whether or not you have sufficiently experienced counsel to handle your case.

Now, were you aware when he became -- because he was not your original counsel. I believe it was Mr. Quillen.

THE DEFENDANT: Yes.

THE COURT: When he became your counsel in this matter working with Mr. Grigsby, were you aware that this would be his first trial?

THE DEFENDANT: Yes, that's the first thing I asked him.

THE COURT: Okay. And, nonetheless, you were satisfied?

THE DEFENDANT: Yes.

THE COURT: Are you still satisfied?

THE DEFENDANT: Yes.

THE COURT: Now, I could get another lawyer to work with you and talk with you about that if you want. Basically have you -- not necessarily get you new counsel but get another lawyer to advise you about whether or not the level of experience that he has is something that you feel comfortable with.

THE DEFENDANT: You say you can get another lawyer to --

THE COURT: Just to talk to.

THE DEFENDANT: I don't feel there's no need.

THE COURT: Okay. Are you sure about that?

THE DEFENDANT: Yes.

THE COURT: Okay. And are you satisfied with what he's done for you and the work that he's done for you?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the investigation that he's done in this particular case?

THE DEFENDANT: Yes.

THE COURT: All right. Because if you're not, I can get you another lawyer. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: But the time to think about that is now.

THE DEFENDANT: I'm fine.

THE COURT: You want to stay with Mr. Rakofsky and Mr. Grigsby?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

(Close ex parte bench conference)

THE COURT: I've again inquired of the defendant. I asked him explicitly whether he was satisfied with his lawyer. This is on the record, so this is not under seal. But I inquired of him rather specifically. I said, were you aware of this when he was retained? And he said, yes, that was the first question I asked him. I said that I could get another lawyer for him to advise him as to whether or not the level of experience was something that he felt comfortable with. He said he didn't want it. And I think any more pushing here is really interfere with his constitutional right to have a lawyer of his choosing.

MS. BRYANT: I would agree with that, Your Honor, and I thank the Court for making a more precise record.

THE COURT: All right.

BY MR. RAKOFSKY:

Q. Good morning, Mr. Rodriguez. Thank you for being here.

A. Good morning.

Q. The first question I'd like to ask you, sir, is: You said that you saw Mr. Elliott get shot in the chest; is that right?

A. Yes.

Q. Thank you, sir. I'm sorry, I had to ask that. I didn't hear Ms. Bryant ask that question.

A. Yes, sir.

Q. Sir, have you -- do you spell your name -- let me rephrase -- Gilberto Ingles Rodriguez --

A. Yes.

Q. -- is that your name?

A. Yes.

Q. Thank you, sir. What about Burt Rodriguez, is that you also?

A. Yeah.

Q. Okay. Thank you. How about Gilberto Rodriguez, is that you?

A. Yes.

Q. How about Gilberto Ingles Rodriguez, is that you?

A. Yes.

Q. How about For Dirty Rodriguez, is that you?

this particular witness because I'm trying to gauge which witnesses we'll reach today and what is the necessity of Jencks and I don't know.

MR. GRIGSBY: I believe there's a possibility we may need him for a little while longer.

MS. BRYANT: I'm sorry?

MR. GRIGSBY: There's a possibility we may need him for a little while longer.

THE COURT: What does a little while longer mean?

MR. GRIGSBY: Maybe a half hour. Unless we reserve the opportunity call him in our case; otherwise, I'd prefer to just get everything done.

THE COURT: Okay. But there is a tendency here to be repetitive, so we need to make sure that we're not going to be going over and asking the same questions over and over again.

MR. GRIGSBY: I understand.

THE COURT: All right. 2:30.

(Luncheon recess was taken)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA,	:	
versus	:	Criminal Action Number
DONTRELL DEANER,	:	2008 CF1 30325
Defendant.	:	

Washington, D.C.
Thursday, March 31, 2011

The above-entitled action came on for a jury trial, before the Honorable WILLIAM M. JACKSON, Associate Judge, in courtroom number 319, commencing at approximately 2:33 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

FINET BRYANT, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH RAKOFSKY and SHERLOCK GRIGSBY, Esquires
Washington, D.C.

Katy M. Zamora, RPR, CRR
Official Court Reporter
(202) 879-1047

PROCEEDINGS

THE DEPUTY CLERK: Matter before the court at this time, United States versus Dontrell Deaner, case number 2008 CF1 30325.

MS. BRYANT: Finet Bryant on behalf of the United States Government, good afternoon, Your Honor.

MR. RAKOFSKY: Joseph Rakofsky for Dontrell Deaner.

MR. GRIGSBY: Sherlock Grigsby, also, on behalf of Mr. Deaner, who is present.

THE COURT: We're waiting for a juror; is that right? Yes.

MR. RAKOFSKY: Your Honor, may we approach ex parte, please?

THE COURT: Yes.

(Bench conference.)

MR. RAKOFSKY: Thanks. Dontrell has been asking me -- wants me to ask questions for him and has been asking me to ask questions for him that I believe are very bad questions to ask. I will admit that he's been asking me for the whole day to ask these questions and I've just regularly said no to him. I had, you know -- I just -- I obviously want to do the right thing.

I know for certain that there's a communication barrier between us right now, and I know for certain he's

not happy with the way this examination is going, and, you know, he's entitled to feel any way he wants. I feel I'm doing the very best job for him but if it's going to require my asking his questions, it's -- it's -- I cannot do that. I believe his questions are bad questions. And I'm asking Your Honor, you know, I just don't think this can be reconciled and --

THE COURT: Well, has Mr. Grigsby talked to him? Have you talked to him?

MR. RAKOFSKY: He doesn't really like Mr. Grigsby that much.

THE COURT: Well, I've asked him twice whether he was satisfied. The issue of -- and he needs to understand that certain questions, you know -- that have to be -- what do you mean by bad questions?

MR. RAKOFSKY: Questions that I think are going to ruin him and I cannot have that.

THE COURT: If you need time to talk to him and to explain it to him, because sometimes it's very hard in the middle of examination to explain to him why it's a bad question, and if you want time to talk to him about that, you can go into the back and talk to him.

MR. RAKOFSKY: Your Honor, respectfully, I think now might be a good time and -- I think it might be a good time for you to excuse me from trying this case. I think

that -- I believe that I've worked very hard for him and I believe that -- I don't believe there is anybody who could have prepared for this case more diligently than I. But in light of -- this has been an unusual trial, and in light of this very serious barrier, I think now might be a good opportunity for --

THE COURT: We're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial.

MR. RAKOFSKY: But I'm trying to do this so that I -- I mean, he's going to tell you that he's very -- he doesn't trust me and I bet you if you asked him, he will say that.

THE COURT: Well, I asked him that this morning.

MR. RAKOFSKY: In his defense, I don't think that this morning was enough time for him to appreciate the situation he is in. Only 24 hours have passed basically since the opening statement and I feel like, Your Honor, now just, you know, there's no --

THE COURT: I'll ask him. I'll voir dire him.

MR. RAKOFSKY: Thank you very much. May he approach?

THE COURT: Yes.

(Attorneys left. Defendant is present.)

Good afternoon, Mr. Deaner.

THE DEFENDANT: Yeah.

THE COURT: You wanted to address the Court?

THE DEFENDANT: Yeah.

THE COURT: What do you want to address the Court about?

THE DEFENDANT: Just, after he did the cross-examination I learned, man, he, like, every question I asked him to write down -- I write down for him to ask, he just won't ask, you know what I'm saying? And I try to tell Mr. Grigsby, like he's just ignoring me.

THE COURT: Okay. Sometimes a question that you might want to ask could very well be very harmful to you in your case, and it's really a lawyer's judgment that -- that's why lawyers are trained to be able to make those type of decisions.

THE DEFENDANT: See, when I ask him, before I asked him I refer to Mr. Sherlock, and he be like, yeah, that's a good question because we have evidence to back it up. And he just won't ask him. He just won't ask. And when I refer to Sherlock, he say he just here just because Joseph can't be here by himself. So he's basically saying he can't make the decision, it's on Joe, and I give it to him but he can't say nothing. Like he approve of it, but he can't make the final decision because Joe got to do it.

THE COURT: And was it the questions of this

witness that you wanted to ask, not the other witnesses who have testified?

THE DEFENDANT: No, it was just this one.

THE COURT: Some of the questions that he may have wanted to ask, because he tried to ask and legally it couldn't be asked and so there was an objection.

THE DEFENDANT: Well, those his own questions that he asked when he was objecting to. And I was trying to tell him like basically stick to the point, the questions that he was asking when he was asking stuff that really -- like you could see in my notes that I was writing on there, telling him the questions really that he ask really don't matter, for real, you know what I'm saying? The case that we got. I knew the case because it's my case and the evidence and everything and just like he won't listen. I got the notes to show you and everything.

THE COURT: Well, I shouldn't look at those notes because those are personal and confidential notes between you and your lawyer and I shouldn't be seeing those. I'm not disputing that you've asked him questions and he has said no. I'm not disputing what you're saying. All I'm saying to you is that sometimes there is a difference between a lawyer -- a layman, like yourself, understanding of what should be asked and a lawyer's

judgment of basically saying, if I ask that, it's going to hurt my client, it's going to hurt you.

THE DEFENDANT: Yeah, I know, that's why before I gave it to him I gave it to Sherlock and he said it was all right because we got evidence to back the question for when he answer it. He just won't ask it.

THE COURT: And so what do you want the Court to do?

THE DEFENDANT: See if I can get another lawyer.

THE COURT: If I get another lawyer, it's going to have to start all over again and the only way I could get another lawyer is for you to ask me to get another lawyer, which means that this trial is going to end and a mistrial will be declared and we'll start all over again. You understand?

THE DEFENDANT: Yes.

THE COURT: All right. Can you step back.

THE DEFENDANT: Thank you, Your Honor.

(End of bench conference.)

THE COURT: Mr. Rakofsky and Mr. Grigsby, please come forward.

(Bench conference.)

He has requested new counsel, and from all other things he said, he's asking you questions to ask and that you have refused to ask them and he has said that

Mr. Grigsby has, when he's shown them to -- I'm not telling you whether it's true or not, okay, I'm just telling you what he said -- that Mr. Grigsby says that there is good questions, we've got evidence to back them up, but then when he shows them to you, you don't ask them, so...

Again, I'm not talking about the veracity or the truth of that or what it has -- could very well be his perception of what's going on, but if I do appoint new counsel, we're talking about a mistrial had and a waiver of any double-jeopardy claim that would happen to the defendant. And I told him that. So I'm not sure what I'm going to do right now.

MR. RAKOFSKY: Is he willing to sign the waiver?

THE COURT: Of double jeopardy?

MR. RAKOFSKY: Yeah.

THE COURT: (Judge nodded.) But I'm not sure whether I'm going to grant that or not. It just seems to me that -- all right. We're just going to take a break here. I'm going to explain to Ms. Bryant what's going on.

(End of bench conference.)

Ms. Bryant, the defendant has requested new counsel, and there appears to be a conflict that has arisen between counsel and the defendant. I have explained to him that if the Court does that, he will be

waiving any double-jeopardy claim on a retrial. It will probably also involve his continued -- a delay in the new trial because new counsel would have to come in on this case, learn the case, get discovery, do an investigation and it's not like we can do this -- just turn around and do a new trial next week or next month.

Do you understand that, Mr. Deaner?

THE DEFENDANT: Yes.

THE COURT: I can't decide this right now. But I'm leaning towards granting the request in light of all the circumstances of this case as I see. So I don't know what the government's position -- it's really -- it doesn't really involve the government, the government doesn't need to take a position here, because I said, it's he that's asking for, quote, unquote, technically a mistrial and so there's really no double-jeopardy issue as far as the government is concerned.

MS. BRYANT: The Court is not making findings at this time?

THE COURT: No.

MS. BRYANT: Then the government will reserve an opinion until the Court makes findings.

THE COURT: Take a brief recess, 20 minutes. I'll tell the jury that we're being delayed.

MS. BRYANT: Thank you.

(Court in recess from 2:45 p.m. until 3:12 p.m.)

THE DEPUTY CLERK: Your Honor, recalling United States versus Dontrell Deaner, case number 2008 CF1 30325.

MS. BRYANT: Finet Bryant on behalf of the United States government.

MR. RAKOFSKY: Joseph Rakofsky for Mr. Deaner.

MR. GRIGSBY: Sherlock Grigsby for Mr. Deaner.

THE COURT: All right. Mr. Deaner is present.

When we adjourned just about 15 minutes or so ago, Mr. Deaner, you had requested that the Court provide a different attorney for you; is that right?

THE DEFENDANT: Yes.

THE COURT: Now, we had -- you and I had a conversation yesterday about your lawyer; do you recall that?

THE DEFENDANT: Yes.

THE COURT: And then again today we had a conversation, earlier this morning about that as well; do you remember that?

THE DEFENDANT: Yeah.

THE COURT: Now, did that in any way influence your decision as to whether or not you want another lawyer?

THE DEFENDANT: No. No, it didn't.

THE COURT: You understand that because you are

requesting a lawyer, if the Court grants your request, the Court will declare a mistrial, that is this jury will be discharged and this case will at least, for the time being, end; you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand that because you are asking for that to happen, that is to say you are asking for a mistrial, you're waiving your right to double jeopardy; that is to say, you are waiving your right because -- to double jeopardy because the government will be able to prosecute you again. You understand?

THE DEFENDANT: Yeah.

THE COURT: You also understand that if we do that, if I do grant a mistrial and the government elects to prosecute you for this again, it will probably result in your continued detention until the case is resolved; do you understand?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still wish to -- for this Court to declare a mistrial and to grant you another lawyer?

THE DEFENDANT: Yes.

THE COURT: Ms. Bryant, are there any questions you believe the Court needs to ask of Mr. -- because I'm not going to rule today; I'm going to have him think about

THE COURT: All right. So we'll continue -- I'm going to send this jury home. Now, I've already told them that they're not going to be here tomorrow because they are not sitting, so I assume that they're going to make other plans, but I'm going to discharge this jury and send them home today. And if I grant the request, I'll have them come in on Monday at 9:30 and send them home.

THE DEPUTY CLERK: You don't want me to get their numbers and just call them tomorrow and tell them?

THE COURT: That's true, we can do that. But I won't have an opportunity to thank them for their service.

MS. BRYANT: As would I.

THE DEPUTY CLERK: All right.

THE COURT: All right. So we'll see you in the morning, Mr. Deaner.

(Jury present.)

You may be seated. Good afternoon, ladies and gentlemen. Ladies and gentlemen, we are stopping proceedings today and I'm going to be sending you home today, momentarily. Some legal issues have come up and it's going to be quite some time before we resolve those, so there's no sense in having you sit back there waiting for 45 minutes, an hour, hour and-a-half. So I'm going to send you home at this time.

The legal issues that have come up may in fact

result in you not coming in on Monday. What I will -- if that is the case, what I will do is we will get identification from you, we will call you tomorrow and let you know one way or the other so that you can make appropriate plans and not have to -- as I said, I try my best to keep the mystery out of this and not sort of like not tell you until the last minute or something. This is something that just came up this afternoon, and, as I said, I just don't think it's fair to have you sit back there for hours while we resolve those matters.

And it makes absolutely no sense to have you come in on Monday as well if it's not going to be resolved. So have a good weekend. Have a good Friday. We planned on not sitting Friday, tomorrow, in any event, but I think if those issues are resolved, I will be able to let you know. We will call you and let you know one way or the other if you're needed on Monday.

Thank you, and have a good afternoon.

THE JUROR: Did you want us to write our information down?

THE DEPUTY CLERK: Yes, just put it in your notebooks. You can do it in the jury room.

(Jury not present.)

THE COURT: So I will see you folks 9:30 tomorrow morning.

MS. BRYANT: Your Honor, just one question. I was under the impression the Court was going to tell them to return on Monday. If there is a decision where we are not going forward, I would just hate to leave them with the impression that somehow the government had done something to create a mistrial in this matter. I think that that's just kind of unfair.

THE COURT: I don't think they have the -- I don't know how they could get that impression.

MS. BRYANT: Well, I'd like to think that they wouldn't have that impression, but there was certainly things said that might otherwise lead them to believe that there's ulterior motives here and I'd just hate to leave them with that impression. I will defer with the Court. I understand the Court's decision. I was just under the impression that the Court was going to bring them back.

THE COURT: Well, it was my -- you know, this would not have been -- I mean, it would have been an easy issue if suddenly, you know, the jury was sitting tomorrow, but that was my concern in weighing that. But, you know, also weighing the fact that they're coming down here, you know, having to come down here and -- when they could make other plans and the cost to them of that.

MS. BRYANT: Yes, Your Honor, I mean, I understand.

THE COURT: I just don't think it's fair to have 14 people come down here, because if they come down here in the morning, at least their morning is shot and people are making child care arrangements and all kinds of things that they don't otherwise need to do.

MS. BRYANT: Yes, Your Honor.

THE COURT: I do know some of the jurors have young kids. And that was just because I overheard a hallway conversation of them talking to their young kids on the phone, and so I assume that they're -- so that's the major consideration.

MS. BRYANT: Yes, Your Honor.

THE COURT: All right. So we'll return tomorrow at 9:30.

(Proceedings concluded at 3:22 p.m.)

CERTIFICATE OF REPORTER

I, Katy M. Zamora, RPR, CRR, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the jury trial in the case of the UNITED STATES OF AMERICA versus DONTRELL DEANER, Criminal Action Number 2008 CF1 30325, in said court on the 31st day of March 2011.

I further certify that the foregoing 17 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 21st day of April 2011.

Katy M. Zamora, RPR, CRR
Official Court Reporter

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

----------X

UNITED STATES OF AMERICA :

v. : Criminal Action No.:

DONTRELL DEANER, : 2008-CF1-30325

Defendant. :

----------X

Washington, D.C.
Friday, April 1, 2011

The above-entitled action came on for a Jury Trial before the **HONORABLE WILLIAM JACKSON**, Associate Judge, and a jury duly impaneled and sworn in, in Courtroom Number 319, commencing at approximately 9:46 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

VINET BRYANT, Esquire
Assistant United States Attorney
Washington, D.C.

On behalf of the Defendant:

JOSEPH RAKOFSKY, Esquire
SHERLOCK GRIGSBY, Esquire
Washington, D.C.

* * * * * * *

Margary F. Rogers, BS, CRI Telephone (202) 879-4635
Official Court Reporter

P-R-O-C-E-E-D-I-N-G-S

DEPUTY CLERK: The matter before the Court at this time, United States versus Dontrell Deaner, 2008-CF1-30325.

MS. BRYANT: Vinet Bryant on behalf of the United States Government. Good morning, your Honor.

THE COURT: Good morning.

MR. GRIGSBY: Good morning, your Honor. Sherlock Grigsby on behalf of Mr. Deaner.

THE COURT: Good morning.

MR. RAKOFSKY: Joseph Rakofsky for Dontrell Deaner. Good morning.

THE COURT: Good morning.

(Defendant present.)

THE COURT: Good morning, Mr. Deaner.

DEFENDANT: Good morning.

THE COURT: Mr. Deaner, when we adjourned yesterday -- right before we adjourned yesterday, you said that you wanted a new lawyer in this particular case, and we had -- I had explained to you that if I did give you a new lawyer, we would have to abort the trial, let's say. We will have to dismiss the jury. I also explained to you that the Government would be able to prosecute you again for these charges. And you said you understood that, but you still, nonetheless, wanted

another lawyer.

I also explained to you that it could probably result, more than likely, in your continued detention until this case is actually -- the other -- the case is tried. And you said you understood that. And I asked you to think about it overnight.

Have you had an opportunity to think about that?

DEFENDANT: Yes.

THE COURT: And is it your desire to have a new lawyer?

DEFENDANT: Yes.

THE COURT: Let me say that this arose in the context of counsel, Mr. Rakofsky, approaching the bench and indicating that there was a conflict that had arisen between he and Mr. Deaner. Mr. Deaner, when I acquired of him, indicated that there was, indeed, a conflict between he and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial and appeared -- and according to Mr. Deaner, there was a conflict as well between local counsel, Mr. Grigsby's legal advice and Mr. Rakofsky's legal advice.

I must say that even when I acquired of Mr. Deaner, I -- as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some length for

over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky -- put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.

It appeared to the Court that there were theories out there -- defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a -- not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner. And had there been -- If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.

So I am going to grant Mr. Deaner's request for new counsel. I believe both -- it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder

trial.

So I'm going to grant the motion for new trial. And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an e-mail in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.

So that's where we are. And I'll figure out what to do about that case. But it just seems to me that -- so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the -- As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.

So I'm going to grant the motion. We'll set this over -- Do you want to retain a lawyer, another lawyer or do you want me to appoint you another lawyer?

DEFENDANT: I don't understand the question.

THE COURT: If you cannot afford a lawyer, I will appoint you a lawyer.

DEFENDANT: Okay.

THE COURT: There are some good, competent lawyers who have tried these cases before.

DEFENDANT: Yeah. I would like for you to do that.

THE COURT: Okay. So what I'm going to do is I'm going to have you come back next Friday, and I'll appoint a lawyer, in the meantime, and they will get an opportunity to go over and see you at the jail.

DEFENDANT: Okay.

THE COURT: All right.

MS. BRYANT: That completes our matters before the Court, your Honor. May I be excused?

THE COURT: Yes.

MS. BRYANT: Thank you.

THE COURT: You might want to take a look at this pleading.

MS. BRYANT: I was, actually, going to ask, but I don't know if I --

THE COURT: Mr. Grigsby and Mr. Rakofsky.

MS. BRYANT: May we have copies?

THE COURT: I don't know what to do with it. I don't know whether you should see it or not.

MS. BRYANT: Okay. Well, I'll accept the Court's --

THE COURT: There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues.

That's my only copy.

MR. GRIGSBY: Your Honor, I was just going to look out here and then bring it back, your Honor.

MR. RAKOFSKY: Your Honor, is that something you wanted to discuss?

THE COURT: No. But you might want to discuss it with somebody else.

MS. BRYANT: Your Honor, that was filed in the court?

THE COURT: It was delivered to Judge Leibovitz this morning. She sent it over to me because this case was originally Judge Leibovitz's.

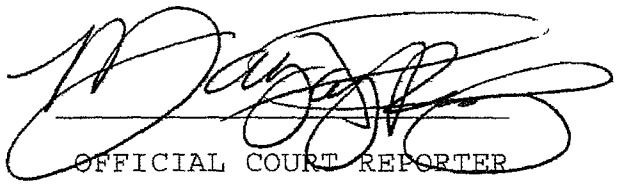
(The proceedings adjourned at 9:55 a.m.)

CERTIFICATE OF REPORTER

I, MARGARY F. ROGERS, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the Jury Trial in the case of the ***UNITED STATES OF AMERICA v. DONTRELL DEANER, Criminal Action No. 2008-CF1-30325*** in said Court on the 1st day of April, 2011.

I further certify that the foregoing 7 pages constitute the official transcript of said proceedings, as taken from said shorthand notes, my computer realtime display, together with the audio sync and tape recording of said proceedings.

In witness whereof, I have hereto subscribed my name, this 12th day of April, 2011.



OFFICIAL COURT REPORTER

CRIMINAL JUSTICE

Lawyer Who Never Tried a Case Proud of Murder Mistrial on Facebook, Humiliated in Interview

Posted Nov 5, 2011, 7:41 pm CDT
By Debra Cassens Weiss

New Jersey lawyer Joseph Rakofsky appeared pleased in a Facebook post after a Washington, D.C., judge declared a mistrial due to the defense lawyer's trial performance.

"1st-Degree Murder.. MISTRIAL!" Rakofsky wrote, according to the Washington City Paper. Seven of his friends indicated they liked the status update. But in an interview with the publication, Rakofsky admitted he was "humiliated" by a press account of the proceeding.

Rakofsky had confessed to jurors weighing the fate of accused murderer Dontrell Deaner that he had never tried a case before, according to an account by the Washington Post. Judge William Jackson cited that inexperience in declaring a mistrial on Friday, saying the lawyer did not have a good grasp of trial procedures. The judge ruled after reviewing a motion by an investigator claiming Rakofsky suggested he "trick" a witness.

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tried a case before, according to an account by the Washington Post. Judge William Jackson cited that inexperience in declaring a mistrial on Friday, saying the lawyer did not have a good grasp of trial procedures. The judge ruled after reviewing a motion by an investigator claiming Rakofsky suggested he "trick" a witness.

Rakofsky had tried the case with local counsel, but they often had disagreements, leaving Deaner "visibly frustrated," according to the Washington Post account. On Friday, Deaner told the judge he wanted a new lawyer.

"People put lies on the record and people are reading about these lies. Rakovsky complained in the City Paper interview

Rakofsky graduated from Touro law school in 2009 and obtained a law license in New Jersey less than a year ago. His website, however, claims he has worked on murder, embezzlement and conspiracy cases. "When I say I've worked on those cases, that doesn't mean I've worked on those cases on my own," he told the Washington City Paper. "I was working with other lawyers, interning and stuff."

Prior coverage.

ABAJournal.com: " 'Astonished' Judge Declares Murder Mistrial Due to Defense Lawyer Who Never Tried a Case"

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Comments

1 **Tim**
Apr 5, 2011 8:08 AM CDT

According to WaPo, the defendant will spend another year in jail waiting for a retrial.

If Rakofsky does any better, his client may never get out.

2 **Lee**
Apr 5, 2011 9:55 AM CDT

Bragging about one's incompetence on Facebook? That's beyond rich. Just when I thought I had seen it all in the glamorous practice of law, stories like this one prove me wrong.

2. Cooley's New Florida Law School Enrolls 104 Students, Exceeding Expectations
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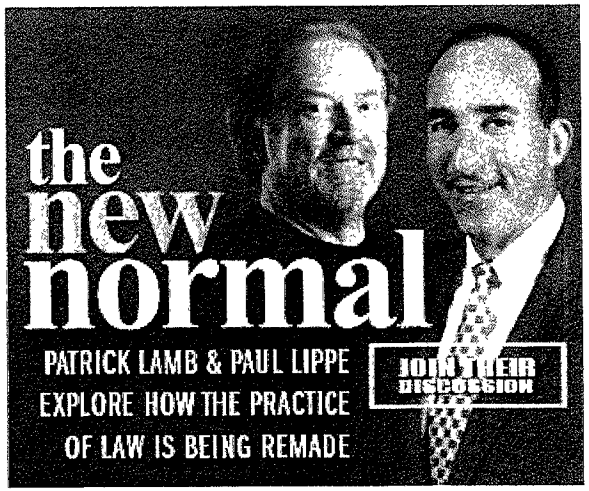

ABA » The Righthaven Experiment: A Journalist

BLAWGWHISPERER

Around the Blawgosphere: Joseph Rakofsky Sound Off; Client Poachers; and the End of Blawg Review?

Posted April 2011 02:51 PM CDT
By Sarah Randag

Updated: If anything had the legal blogosphere going this week, it was Joseph Rakofsky, a relatively recent law grad whose poor trial performance as defense counsel in a murder trial prompted the judge to declare a mistrial last Friday.

Rakofsky admitted during a rambling opening statement that this murder defense case was his first murder case. Brett Clark at JDs Rising noted Rakofsky was in a similar situation to *My Cousin Vinny* Gambini, minus Gambini's "Marisa Tomei-esque fiancee there to save the day."

Many bloggers saw the Rakofsky debacle as a consequence of what they see as an increased emphasis on marketing (even if it stretches the truth) without a parallel focus on work product.

Washington D.C. Jamison Koehler at Koehler Law was the first to pick up on the story and checked out Rakofsky's website back when it was still online. Koehler said Rakofsky stated "on his website that he *interviewed* at a well-respected investment bank with branches all over the world." (Emphasis added.)" Mark Bennett at Defending People grabbed a screen shot of the website, complete with "fraudulent trustworthy

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3. Don't Give It Away: Value Doesn't Mean Cheap or Free
4. As Top Leaders Join Winston & Strawn and O'Melveny, the Collapse of Dewey & LeBoeuf Appears Imminent
5. Was Lawyer's Rhymed Dec. 23 Riff on 'Night Before Xmas' an Ethics Violation? Appeals Court Will Rule
6. Cooley's New Florida Law School Enrolls

Rakofsky's website back when it was still online. Koehler said Rakofsky stated "on his website that he *'interviewed* at a well-respected investment bank with branches all over the world.' Emphasis added.)" Mark Bennett at Defending People grabbed a screen shot of the website, complete with "fraudulent trustworthy grey-haired lawyer pictures."

Criminal Defense blogger Brian Tannebaum was at the Legal Marketers Association Annual Conference on Monday, when interest in the story peaked, and he was disappointed that no speakers reacted to it: "The marketers took the opportunity, on a day where their advice and strategies were the talk of the Internet, to say nothing. Everything about marketing must remain positive, nothing critical, nothing negative, just pay the cash and get clients. They don't worry about your ethics, and don't want you worried about theirs."

At Simple Justice, Scott Greenfield thought it was ironic that just days after the Rakofsky story broke, Jay Shepherd's column "Six Steps to Becoming an Expert" ran at Above the Law. The six points, in "the obligatory list format favored by marketers trying to sell simpletons," win a case, get some ink, do a CLE, write an article, help your colleagues, and repeat.

"This is the modern path to success in the law, just lie your butt off to everybody who will listen, feign expertise you don't have and see how many fools will let you slide in along the way," Greenfield wrote. "Cover up the dead bodies of your incompetence and when you get lucky, promote the hell out of yourself as if you're the real thing."

Maxwell Kennerly at Litigation & Trial and Blonde Justice wonder if client Dontrell Deamer had an experienced public defender on his case before the decision was made to hire Rakofsky. The anonymous Blonde Justice, who says she is a public defender, writes: "I see something similar sometimes in criminal court, too. Sometimes a private lawyer will come in the courtroom and say something like 'I've never done a criminal case before, how do I ...?' On one hand, everyone has to start with something, everyone was new once. On the other hand, I can just picture their client thinking, 'I'm so glad my family pooled their money for this *real lawyer* who is so much better than that *public pretender* I had before.' Meanwhile, their lawyer is asking me how to do the job."

Not Guilty reported that Washington, D.C. lawyer David Benowitz is going to be appointed on this case. Benowitz is "a home grown (meaning trained by D.C. Public Defender Services) lawyer with well over a dozen years of strictly criminal defense experience under his belt," writes Not Guilty blogger Miriam Seddiq, who says she is of counsel to Benowitz's firm. Seddiq also revisited Rakofsky again today in a post largely focused on Susan Prentice-Sao, a Michigan criminal defense lawyer accused of ineffective assistance by the prosecutor opposing her.

Not the Last Blawg Review

Last Friday, April Fool's Day, George M. Wallace hosted Blawg Review #305 at his blawg, a fool in the forest. For those unfamiliar: On a weekly basis for the past six years, law bloggers have taken turns "hosting" Blawg Review on their own blawgs by way of writing a post rounding up interesting posts on other blawgs that week. A reader could always find the week's host at the Blawg Review blog. However, the site's April 1 post (and the April 1 tweet from the mysterious "Ed") indicated Blawg Review is gone for good. "Ed"

Before Xmas' an Ethics Violation? Appeals Court Will Rule
6. Cooley's New Florida Law School Enrolls 104 Students, Exceeding Expectations
7. More Than Half of Bias Plaintiffs in ABF Study Deemed Their Lawyers Incompetent
8. Ex-Partner Blames Legal Recruiters, Excessive Pay Guarantees, Angry Colleagues for Dewey's Downfall
9. Ex-Dewey Vice Chair Says Firm Owes Him $61M; Secretaries Told of Layoffs, Departures Pick Up
10. Law School 'Wonderland' Stats Show 93% of Grads Employed, Despite 15K BigLaw Job Cuts

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Client Poachers

At MyShingle.com this week, Carolyn Elefant notes that this week she spent a day and a few hundred dollars to go to an industry conference this week with the primary aim of preventing other lawyers from "poaching" a client of hers who was also attending. And her concerns weren't unfounded, she said. "Even with my oversight, at least one consultant made an overt, brazen play for my client as I stood by." She adds that she's been poached once or twice in the past.

"It's easy to fall into complacency and assume that if you treat clients well and provide exceptional representation, they won't look elsewhere," Elefant wrote. But "most poachers will promise—nay, even guarantee your client the impossible: lower fees, added expertise and a superior outcome. You can't compete with a fantasy lawyer. In my recent situation, I witnessed the poacher making promises for money and results that he could not possibly deliver."

Updated April 11 with information that Blawg Review is back on.

Related Topics
@BlawgWhisperer, Criminal Justice, Law Firms, Solos/Small Firms

Comments

1 **Glenn Stephens**
Apr 8, 2011 4:38 PM CDT

On Rakofsky .

Touro Law School? Isn't Touro a tractor company? They have a law school?

Seriously, which is more morally questionable and professionally suspect? Fighting the good fight poorly like Rakofsky? Or fighting the bad fight well like so many lawyers?

Hmmmmm

OFFICE OF BAR COUNSEL

February 12, 2013

Joseph Rakofsky, Esquire
888 Eighth Avenue, Apt.3-O
New York, N.Y. 10019

Re: Rakofsky/Bar Counsel
Bar Docket No. 2011-D188

Dear Mr. Rakofsky:

In 2010 you were engaged to represent Dontrell Deaner in a felony murder case that was being prosecuted in the District of Columbia. You were and are not a member of the D.C. Bar. On May 26, 2010, you were admitted to the D.C. Bar *pro hac vice* for the purpose of representing Mr. Deaner.

We opened this matter because of media reports that the trial judge, who eventually granted a mistrial in the case against Mr. Deaner, was highly critical of your performance. After investigation, we have concluded that your performance displayed problems associated with a new lawyer trying his first case, but we have not concluded that it was so deficient as to violate the competency standards set forth in Rule 1.1 of the District of Columbia Rules of Professional Responsibility. It is clear that you worked many hours on Mr. Deaner's case and that you did your best to defend your client. It is also clear that your grasp of the rules of evidence and of criminal procedure was inadequate. While we find this to be a close case, we have concluded that there is not clear and convincing evidence that you violated Rule 1.1. Accordingly, we are dismissing this matter.

Sincerely,

Hamilton P. Fox, III
Assistant Bar Counsel

HPF:act

From: Adrian Bean <boyznhoodinvestigations@yahoo.com>
Date: Wed, 16 Mar 2011 13:14:47 -0700 (PDT)
To: <triallawyerusa@gmail com>
Subject: Payment for Investigative Services Rendered: U.S. v. Dontrell Deaner

To: Mr. Joseph Rakofsky,
Attorney at Law

From: Adrian K. Bean, Investigator

I am writing to inform you that a letter and an Invoice for investigative services rendered in the Dontrell Deaner case were recently delivered to the office of your co-counsel, Sherlock Grigsby. As I informed Mr. Grigsby,the deadline for payment on that Invoice is **by the close of business on Thursday March 17, 2011.** Please contact Mr. Grigsby for the details.

Since I was never given a reason for my dismissal as the investigator in this case, and since the Client appeared pleased with my services, I can only conclude that my refusal to engage in the unethical and possibly illegal conduct requested in your e-mail of October 6, 2010 ("trick Leigh (old lady into....))" is the reason for my exit.

Please be advised that if the payment requested on the Invoice is not made by tomorrow, I intend to immediately file a Motion with the Court to seek compensation. I further intend to submit my entire investigative file, including your October 6th e-mail, as an attachment to that Motion. To avoid the time-consuming and troublesome Court intervention in this matter, I would respectfully request the appropriate compensation for my services. Please respond by e-mail to the above address.

Your assistance in this matter would be appreciated.

AKB

(March 16)

Adrian,

You repeatedly lied to us and did absolutely no work for us. You may have watched the video footage, but that was not the assignment. I feel that you are not entitled to anything, at all. However, Mr. Grigsby believes you should at least be paid something. I completely disagree with him, but I am willing to consider paying you something for your incredible ineptitude -- it's been a long time since I've seen a person as ineffective and dishonest as you. We will agree that you be paid $150 from the voucher, but no more. If you disagree, file what you need to file and I will do the same. If you agree to the $150, you will be paid in full and we each move on with our lives.

You have no idea how kind Mr. Grigsby has been to you in this matter. If it were only up to me,

you would be guaranteed no payment whatsoever, a licensing hearing and criminal charges.

Joseph

Sent from my Verizon Wireless BlackBerry

-------- Original Message --------
Subject: Payment for Investigative Services: U.S. v. Dontrell Deaner
From: Adrian Bean <boyznhoodinvestigations@yahoo.com>
Date: Mon, February 14, 2011 2:46 pm
To: sherlock@thegrigsbyfirm.com

TO: Mr. Sherlock V. Grigsby,
Attorney At Law

This is to confirm that I delivered a copy of my Investigative Report for the above-referenced case to your office on Thursday February 10, 2011. A copy was also delivered to Mr. Deaner.

Please contact me by e-mail **on or before Friday February 18, 2011** regarding compensation for my services. Specifically, I would like to be informed as to the method of payment for these services (CJA Voucher or Private Invoice). I would respectfully request that either a payment be made (Invoice) or a Voucher provided to me (CJA) by the following **Friday February 25, 2011.**

It is my hope that this matter can be resolved without Court intervention. If it cannot be, I will have no choice but to file a petition for payment by submitting my case files and all correspondence in this matter to the Court.

Your response in this matter would be appreciated.

Sincerely,

Adrian K. Bean

(February 16)
Mr. Bean,

Can you please submit an itemized list of all work performed as well as the date and time it was performed.

Also, I never received a response to my previous email regarding the reimbursement on the other case. Please let me know when to expect this, so that I may inform my client. Thank you for your prompt attention to these matters.

****

Sherlock Grigsby
Attorney at Law
601 Pennsylvania Ave, NW Suite 900
Washington, DC 20004
(202)421-1594

(October 6, 2010)
Adrian,

Thanks for helping.

1) Please trick [redacted] (old lady) into admitting:

a) she told the 2 lawyers that she did not see the shooting and

b) she told 2 lawyers she did not provide the Government any information about shooting.) This happened a couple of months ago.

2) Canvas neighborhood for witnesses

3) Surveillance camera is triggered by a device that is activated by sound.

Get information regarding:
A) how surveillance camera was installed -- this was described to us as a big production
B) how it is supposed to work
C) how it actually works
D) what deficiencies exist
E) where are our opportunities to argue either misconduct or human error

4) we will provide you with a script of questions to ask Lacey, our witness. This must be videotaped. I or Sherlock will probably be with you when this needs to take place.

Thank you.

Joseph
917 319 2699
Sent from my Verizon Wireless BlackBerry

(October 18, 2010)
Adrian,

Let's talk on Wed to discuss what you've accomplished so far.
Thank you.

Joseph

Sent from my Verizon Wireless BlackBerry

(November 2, 2010)

Adrian,
Have you made any progress? Call me this week to discuss what you've accomplished.

Joseph
(917) 319-2699

(November 4, 2010)
Adrian,

Thanks for helping us. I've decided that I'm going to use a different P.I. Sherlock Grigsby requested that I stick with you, but I found someone else that works better for me.

Make contact with Sherlock to get paid (if you haven't already); he is more familiar with the voucher system than I. Thank you for your efforts.

Joseph

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 17

----------X

JOSEPH RAKOFSKY and RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,

-against-

Index No. 105573/11

THE WASHINGTON POST COMPANY, et al.,

Defendants.

----------X

Transcript of Motion Proceedings
New York Supreme Court
111 Centre Street
New York, New York 10007
February 25, 2013

B E F O R E:

HON. SHLOMO S. HAGLER, JSC

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* * * * * * * * * * * *

ELLEN RUBIN, CSR, RPR
Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007
Phone: (646) 386-3093

Proceedings

THE COURT: Good afternoon.

This is a motion by the American Bar Association to hold the plaintiffs responsible for payment of legal fees pursuant to CPLR 8303-a and the New York Court Rules 130 et seq.

Counsel, your motion.

MR. HARRIS: Thank you, your Honor.

Mark Harris, Proskauer Rose for the American Bar Association, Debra Cassens Weiss and Sarah Randag.

Your Honor, I think the place to begin is with the issue about the meritlessness of the plaintiff's case. And that's the first thing that the Court should consider.

The statements published by the ABA were true and truth is an absolute defense. And I want to briefly go through that argument, even though your Honor heard a similar argument at the motion to dismiss stage.

The two statements that are at issue, just for simplicity I will refer to the first one as the e-mail statement. This is the one that said that the judge declared a mistrial after reviewing an e-mail which stated that Rakofsky had tricked -- asked this investigator to trick a witness.

And the second statement has to do with performance. That's the one in which the statement by the ABA said that the -- Mr. Rakofsky's poor trial performance

prompted the mistrial.

First of all, these statements are literally true. In the first case, the statement that the judge declared a mistrial after reviewing the e-mail, that's in fact, the case. And the transcript of that proceeding, which is before your Honor, shows it to be the case. He mentioned the e-mail and then he declared a mistrial.

The second one is also literally true. The judge said that Mr. Rakofsky's performance was not up to a reasonable standard of competence and so I will grant the motion. As your Honor said at the conference on June 28th on the motion to dismiss, it was generous to describe this as only poor, probably a much harsher adjective could have been used.

The second thing that's happened, your Honor, is that Mr. Goldsmith has now conceded both of these facts. That was one of the things that came out of the June 28 conference. Reading from the transcript itself, Mr. Goldsmith said, "Please trick the old lady, that is a fair report of what the e-mail stated." That's the first statement. The second statement is that he said that Judge Jackson, the trial judge in that case, believed Rakofsky's performance fell below a reasonable standard. So the facts, the truth of the two statements that the ABA made, has been well established.

Now, the only argument that I believe that Mr. Goldsmith has made to suggest otherwise, is that somehow the connection between the evaluation of these events and the mistrial hasn't been established. In other words, he concedes the e-mail. He concedes the poor performance. What he contests is that neither one of those caused the judge to declare the mistrial.

Again, I believe those arguments, like the overall case that the plaintiffs have brought, is frivolous. First of all, again, as a literal matter, neither one of those arguments is correct. It's clear from reading the transcript that the judge reviewed the e-mail and then he declared the mistrial. The first statement did not say there was causation. It said that one happened after the other, that's true.

The second statement, the judge made quite clear that that was the motivating reason behind his decision. But even, your Honor, even if that was not the case, even if causation somehow was not conceded, the entire argument is privileged for reasons again that your Honor said, at the conference back in June, which is that what is obviously defamatory here were the statements about how Mr. Rakofsky had performed and what happened with the e-mail. It's not the causation, that your Honor said, again back in June, what do I care whether or not there was

a mistrial in this case, if the judge has labeled Mr. Rakofsky's performance as being poor or has said that there was an e-mail that had been submitted to him which directed one of Mr. Rakofsky's employees or independent contractors to trick a witness.

I think that's the first part of the analysis, that these statements are true. That brings us to the second part, which is the motion for sanctions itself. As your Honor mentioned, we are proceeding under both Sections CPLR 8303-a and NYCRR130.1. The main difference between the two provisions is that one provides for mandatory sanctions, that's the first, and the second one makes them discretionary. There is also a difference in what -- exactly what type of sanctions and costs can be awarded under each.

But the things they both have in common is that the standard is frivolousness. And a frivolous action is defined as one for which there is no genuine basis in law or fact, nor a good faith argument for a change in the law. That is clearly satisfied here. And again, Mr. Goldsmith's arguments as to why they are not satisfied are themselves frivolous. He argued in his papers that there is some separate requirement of bad faith under 8303. That is simply not true. And the case that he himself cites, McGill versus Parker, which is in his papers and in our

papers, that case itself establishes that. The very case he cited established that all that one needs to show for frivolousness is that the party who engaged in the conduct knew or should have known that there was no genuine basis. There is no separate bad faith requirement. If you bring an action which has no merit and clearly has no merit, that itself is brought in bad faith.

The only other argument that I was able to extract from his papers is some argument that somehow we didn't challenge every single cause of action. He labeled the two actions that he claims we did not challenge were the intentional infliction of emotional harm and New York Civil Rights Law. That is also dead wrong We challenged both of those. The objection to both of those is the same, which is that the entire action is predicated on words, words which were true. Doesn't matter, as your Honor said in June doesn't matter how you label it it's all the same tort. And it should be dismissed and is sanctionable for the same reasons.

I want to then turn to the reasons for sanctions, your Honor. Sanctions are particularly appropriate in this case for three reasons. The first one is that this is a defamation case. Courts have said several times that defamation cases where the statements are true are particularly well-suited for sanctions. That's the

Hirschfeld versus Daily News case from the First Department. The ABA reporting in this case was as careful as it could have been. If your Honor goes backs and reviews the two articles where the statements appeared, in the first article, every sentence, I believe every single sentence says "the story says," referring to what the Washington Post had reported.

The ABA relied only on reputable sources. The Washington Post did not embellish the story and it had privilege upon privilege to do exactly what it did. I'm not even, in this argument, going through the publication privilege, because I don't think it's necessary But that's a whole separate argument as to why this action could never succeed.

Secondly, Mr. Rakofsky's and Mr Goldsmith's conduct here can only be described as incorrigible They have shown no concern for getting it right to act responsibly and not to force the defendants to spend money to defend this action. I'm not going to go through the whole sorry history of this case, but I want to just mention a few examples of this.

They brought motions while the case was stayed, a stay that they themselves requested This was before the case was transferred to your Honor One of the motions they brought in an earlier stage was denied as being

incomprehensible and nevertheless, they took it up on appeal. And I think most pointedly, in June 2012 your Honor gave as explicit a warning as I have ever seen that they should consider withdrawing the case or else suffer the consequences. And you spelled out exactly what the problem was with their case.

One problem had to do with the causes of action that were being alleged They somehow found a way to allege both defamation, which is an intentional tort, and also negligence. Your Honor also said that you had to look very seriously at the cross-motion for sanctions even with regard to the defamation claims themselves because, your words, "right now every time you state one argument," you meaning the plaintiffs, "it's then specifically in the record where it's true." In other words, there is just no merit to this.

How did the plaintiff's respond to that? They did not respond by withdrawing their claims They responded by sending in a letter to your Honor withdrawing no part of it. And the letter, the arguments that are in the letter, are simply the same thing as before. They don't address any of these points. The arguments themselves are frivolous. I'll give a quick example of that.

One of the clear things that the judge said on

the record which made it clear -- I'll be quick, your Honor -- which made it clear that there was no merit to -- excuse me, that the reason why he was granting the mistrial was because of the poor performance, was that he said, "Alternatively, I would find that they," in other words my decision to vacate, to declare a mistrial -- "is based on my observation of the conduct at the trial manifests necessity. I believe the performance was below what any reasonable person could expect in a murder trial."

Mr. Rakofsky and Mr. Goldsmith's response to that is that that sentence somehow assumed and presupposed, quote, a completed trial ending in a guilty verdict. That's is just not reading the same words I'm reading There is nothing in that statement that had to do with a completed trial. The judge was giving a reason as to why he was going to declare a mistrial And the reason was that this performance was below the level that a defendant in a murder trial had the right to expect.

They had made it clear that they are -- they're not interested in the rulings by this Court. They will not change their tactics and nothing is going to deter them.

The last thing I want to mention, your Honor, has to do with something that's specific to the ABA, which is that's the American Bar Association is a unique defendant for two reasons. First of all, the ABA's mission -- it's a

nonprofit organization, as your Honor is aware. It's mission is to uphold professionalism and issue and promote standards of conduct within the profession.

It didn't publish this article -- and I don't mean to cast aspersions on any other defendant, I'm just talking about the ABA -- it did not publish this article for any kind of titillation. They published these articles because it's their mission to make the profession know what's acceptable and what's not.

And the second thing, which is sort of the flip side of that argument, is that the ABA has no choice but to litigate a case like this. It's my understanding that the plaintiffs offered to any defendant that wanted to settle that it could settle for $5,000 payment to plaintiffs. The ABA can't do that. The ABA can't settle a case like this, which has to do with whether or not there has been misconduct by an attorney. It was forced to spend the money to defend itself.

The ABA rarely asks for sanctions against lawyers. This is one of the few cases where it has to do that, simply because there doesn't seem to be anything else that's going to persuade them to stop.

THE COURT: Thank you.

Opposition?

MR. GOLDSMITH: Your Honor, unfortunately, I do

have some exhibits that I would like to append to my affirmation in opposition that have just come to light recently since I filed my opposition and I think are relevant to a determination of this motion.

THE COURT: I know of no procedural authority that would give you the right to supplement submitted papers. Unless you get consent of the other side.

MR. GOLDSMITH: I mean, this would just be in lieu of having to make a motion to renew at a later time. But if I may, I will just discuss the exhibits.

THE COURT: You can discuss it, but you can't go beyond the four corners of your documents. That would dehors the record.

MR. GOLDSMITH: However, the ABA in their opposition, in their reply, offers new arguments and offers new affidavits that I have not had an opportunity to respond. And we just received a decision from the DC Bar Counsel as of last week that I had no ability to file.

THE COURT: Tell me what you are talking about and maybe I can rule on it

MR. GOLDSMITH: Okay.

Well, I'll start from the beginning. I mean, at this point the American Bar Association argues that this entire action is frivolous and focuses the bulk of its attention on one element of defamation that plaintiffs

claim is -- that plaintiff's defamation claims asserted in the amended complaint are true. It doesn't contest that Mr. Rakofsky has incurred damages from his legal career being destroyed, in part due to the two publications that it profited on, by Rakofsky's expense, to at least 400,000 members of legal industry. It only argues that these statements were proveably true.

THE COURT: I'm not understanding that argument. Because he's damaged, that's defamation?

MR. GOLDSMITH: I'm saying that they're arguing that the entire action is frivolous, but they're not contesting any other elements of the defamation claim. They're just making an argument as to one element of the defamation claim, that it was true.

THE COURT: Tell me what is not true.

MR. GOLDSMITH. Here's what's not true.

First, by my opposition, dated December 20, 2012, I point to various instances of Proskauer Rose -- their citations to just incorrect legal authority. They cite partial facts that they then intend to prove as true. And they cite erroneous factual accounts that are contained in the motion.

THE COURT: Can you give me an example?

MR. GOLDSMITH: Yes. I have -- well, just stating for the record -- have at paragraph 9, 10, 15, 16,

18 and 20 of my opposition where they do this. But first I will explain how their motion for frivolous conduct does this in their reply.

Now, what they exactly do is in their motion, they try to demonstrate how Proskauer affirmatively offered as an incorrect issue as to whether Rakofsky's poor performance was proveably true. So in their motion, what they do is they take the statement that Mr. Rakofsky's performance was proveably true and therefore, it's frivolous as a matter of law. But -- and this is how they cite this. At page 8 of their motion they state, "Plaintiffs somehow rationalize that assertions about Mr. Rakofsky's poor performance was defamatory." That's all they allege. At page 9 they allege, "That the characterization of Mr. Rakofsky's performance at trial as poor was clearly based on statements made by Judge Jackson on the record and no defamation claim could succeed."

This is not what we alleged -- this is not what was alleged in the amended complaint as a defamatory statement We -- the amended complaint alleged, very clearly, that the poor performance -- what was defamatory was the poor performance actually caused the mistrial in this case not only that the performance was poor. Let's just -- assuming it's offered conclusion that Rakofsky's trial performance was --

THE COURT: He actually said that. He said that -- you made his argument. He argued that the causation is what you're talking about, not the actual facts, which are all true.

MR. GOLDSMITH: Yes, well, the facts that underlie -- they, in their motion, they allege a number of statements to support the fact that Rakofsky's performance was poor That's not the defamatory statement that we are alleging in the amended complaint. We are not alleging that the -- that Rakofsky's performance was poor We are alleging that their characterization, their report that Mr. Rakofsky's poor performance caused the mistrial in question, which it did not

THE COURT: What caused the mistrial?

MR. GOLDSMITH: Mr. Deaner -- Mr. Rakofsky's client -- Mr Deaner's request for new counsel.

THE COURT: Because of why?

MR. GOLDSMITH: Because there was a conflict -- there were two conflicts in the case One was between Mr. Rakofsky and his client, Mr. Deaner. And there was a second conflict between co-counsel, Mr Borzouye, and Mr. Rakofsky as to advice to Deaner regarding the case

So based on those two conflicts --

THE COURT: The transcript spoke otherwise. That's not what Judge Jackson said

MR. GOLDSMITH: Your Honor, respectfully, that's exactly what Judge Jackson said, that that was the impetus for the mistrial. Judge Jackson, on the day before that this -- that Mr. Rakofsky was relieved as counsel, Judge Jackson specifically stated that, I would like you to take the day, the night, to think about whether or not you do want to go forward with this motion to -- or request to have Mr. Rakofsky withdrawn. If you do so, and Judge Jackson warned to Mr. Deaner that, one, a mistrial would probably be granted, and he would stay incarcerated and a new trial would presume. There was nothing on the record at that point about Rakofsky's poor trial performance.

THE COURT: So you're arguing that it's not the statement by Judge Jackson that the e-mail where he allegedly talked about tricking a witness is not the reason why there was a mistrial --

MR. GOLDSMITH: No, absolutely not.

THE COURT: -- and his performance, I forgot the exact words, but let's call it poor performance, is not the reason why he declared a mistrial.

MR. GOLDSMITH: No, it was absolutely not. The reason why --

THE COURT: And the defamatory statement is the lesser one that they reported that those two things caused the mistrial, rather than certain disagreements between

Mr. Rakofsky and his client and co-counsel.

MR. GOLDSMITH: Well, I think the record --

THE COURT: The innocuous portion caused the mistrial, rather than the more shocking two things, which you admit on the record are true.

MR. GOLDSMITH: I did not admit that on the record. Proskauer alleges that I admitted that on the record, but I did not admit that on the record.

If I could just address that point. I just merely stated at oral argument, I was reciting what Judge Jackson had said.

THE COURT: Of course. Don't get me wrong I'm not saying you admitted that your client did X Y or Z. I he wasn't even -- you got me wrong. What I'm saying is what Judge Jackson said about your client, you admitted he said.

MR. GOLDSMITH: Right. He did say --

THE COURT: Okay. I don't want to get you into trouble with your client. That's not what I'm trying to do here.

MR. GOLDSMITH: I was just conceding that that was said by Judge Jackson.

THE COURT: Correct. And that's what I meant as well.

MR. GOLDSMITH: Okay. But in conceding that,

[redacted] Joseph Pavlick about his performance, disciplinary proceedings presumably. And at this point neither I nor Mr. Rakofsky had any idea that these were pending.

However, the report of the Office of Bar Counsel clearly states that after a conclusion, we have concluded [redacted] after an investigation, we have concluded your [redacted] clear that your grasp of the rules may have been [redacted] we found this a closed case. We have [redacted] there is not any clear and convincing [redacted] that you violated any competency rules, and that

you worked many hours on Mr. Leather's case and you did your best to defend your client.

THE COURT: I'm not saying that your client is incompetent. I don't think the ABA is saying that your client is incompetent. They are just referring to the words of Judge Jackson that stated that his performance fell below the standard of competence.

MR. GOLDSMITH: Yes. But then what they do is, they attribute the fact that I just echoed that statement that was said and they allege that I am now stating before the Court that it's a poor --

THE COURT: No, no. That was never true. What you stated was that Judge Jackson said those words. You conceded that those were the statements made by the judge. I don't think anyone is arguing that you, yourself, are personally saying that Mr. Rakofsky is incompetent.

MR. GOLDSMITH: The ABA defendants do allege in their motion that I made an admission of fact that Mr. Rakofsky's performance was poor, based on the --

THE COURT: I don't think that's a credible argument, because it's what Judge Jackson said. It's not what you say. You're not a player here that can admit that one way or the other.

MR. GOLDSMITH: I agree. But my point is that there are many instances of where the ABA defendants are

[illegible]

THE COURT: Can you stop for a second, please?

(Brief pause.)

THE COURT: Back on the record.

MR. GOLDSMITH: Again, what they characterize as a defamatory statement that is allegedly true is that the [illegible] raised ethical issues. That is not -- that is not what we are alleging by our complaint as to be the defamatory statement.

What the statement that plaintiffs allege actually reads is that the judge declared a mistrial after reviewing a court filing in which an investigator had claimed Rakofsky fired him for refusing to carry out a suggestion to trick a witness.

Now, here are the three -- they only take issue with the one portion of that statement, saying this did raise ethical issues. Here is our proof that there were ethical issues. It's proveable. This is a frivolous

claim.

But there are three other propositions that are in this argument that are not provable on true -- the -- that the mistrial was declared after reviewing a court filing. The mistrial was declared before the court filing.

The request --

THE COURT: Repeat that again. The mistrial was declared after reading the e-mail or before?

MR. GOLDSMITH: The mistrial was declared -- Mr. Deaner requested that he have new counsel. The Court ordered new counsel. And then later in the proceedings they said in passing, oh, there is an e-mail that raises ethical issues and that was it. But that was not done before the mistrial was granted. They are saying that the mistrial was granted after reviewing that court filing.

THE COURT: Was the e-mail first?

MR. GOLDSMITH: No.

THE COURT: So the e-mail was after the mistrial was declared?

MR. GOLDSMITH: Yes. Yes, it was.

THE COURT: That's not my recollection of what I heard the last time. You're saying that -- so what day was the mistrial declared?

MR. GOLDSMITH: On Thursday.

THE COURT: Do you have a date? What Thursday?

[illegible]

MR. [illegible]: I think it was Friday, April 1st.

MR. GOLDSMITH: March 31st, Thursday, your Honor.

THE COURT: March 31st what year?

MR. GOLDSMITH: 2006.

THE COURT: And when did Judge Jackson review the [illegible]?

MR. GOLDSMITH: He reviewed -- we don't know when [illegible]. Judge Jackson just stated after [illegible], after the defendant was heard and the material was reviewed, okay, we'll give you new counsel, you [illegible] have a new trial and he gave him all the [illegible]. Then later on, right before the court broke for recess, the judge said, oh, by the way, there is an e-mail here that raises ethical issues. And then it was squashed. But it was not in any way the impetus or didn't even happen temporally before. The minutes will speak for themselves.

THE COURT: My recollection of reading the [illegible] was not that. I'll have to review it again, it's been a long time.

What else do you have to say, because I really have to close up soon?

MR. GOLDSMITH: So that was one false statement that the ABA defendants don't address.

The second false statement they don't address is there was no court filing. This e-mail was not part of a

[illegible] it wasn't part of [illegible]

[illegible] have [illegible]

THE COURT: What [illegible] matter if it's a court [illegible]?

MR. GOLDSMITH: [illegible] because that would be [illegible] a court filing.

THE COURT: [illegible] an oral application versus a court filing. What are the ramifications of that?

MR. GOLDSMITH: I think the ramifications of a court filing have a connotation that this is more serious, that this is possibly disciplinary as opposed to just a letter that a judge reviewed and then essentially discarded and didn't have any further use for.

THE COURT: Did it say court filing in order to hold him in contempt or for sanctions? Does it say that in the report?

MR. GOLDSMITH: No.

THE COURT: So you are inferring it meant that.

MR. GOLDSMITH: I think a reasonable inference, but the fact --

THE COURT: When I hear "court filing," means it's an application of some sort, like a motion, order to show cause. You can have many types of court...

MR. GOLDSMITH: So that's another issue. And then the suggestion that he tricked a witness. This was

a witness. This was somebody who the investigator had interviewed. It was not somebody who was --

THE COURT: Prospective witness.

MR. GOLDSMITH: Prospective witness.

THE COURT: That would be a witness

MR. GOLDSMITH: But it wasn't someone who was going to be testifying in the case. It was somebody who had been interviewed and that was it. I'm saying --

THE COURT: So instead of calling it a witness, didn't trick -- I remember reading the e-mail and the words "trick" were in there.

MR. GOLDSMITH: Yes.

THE COURT: So trick a person instead of a witness, is that better? If they said "person" it wouldn't be libel?

MR. GOLDSMITH: I think when you look at the whole totality of these whole circumstances, that a mistrial was declared after there was a court filing that alleged that Mr. Rakofsky tried to trick a witness is much different in its totality than a mistrial was declared having nothing to do with the fact that a letter was sent to a judge where potential witness was -- there was unethical issues raised.

It's just the whole connotation of the story, the ABA defendants are trying to make this into a way where

they can sensationalize their article.

THE COURT: The ABA is not a paper that is there to sell like newspapers like various -- I don't want to mention other newspapers that we have -- based upon circulation. They don't get money for selling a paper, a lot of it, like whatever it may be. Obviously, they have to have some revenue; I understand that.

MR. GOLDSMITH: Yes, Your Honor, I believe that that the ABA's -- just reviewing the ABA's bylaws, that some of their revenue is derived from these articles.

THE COURT: You're saying they're a sensationalist newspaper that --

MR. GOLDSMITH: I think that what they did in this case was they falsified facts to make a better story, which is what, I mean, we allege.

THE COURT: I could understand if it was, I won't mention the name, I'll make up a paper, the New York Tribune that sells millions of copies of papers and you want to have a catchy story in the front. But the ABA needed to make up the story to sell more of its newsletters, is that what you're arguing?

MR. GOLDSMITH: I'm arguing -- I don't know what the intention of the ABA was.

THE COURT: I'm going far afield and maybe I shouldn't.

anything else that you want to add?

MR. RAKOFSKY: Just to clarify the record.

It was March 31st, on a Thursday afternoon, when I moved to withdraw. I moved to withdraw because there was a conflict with my client. The judge at that time questioned my client and stated on the record a number of times that he was inclined to grant the mistrial, he just wanted my client to sleep on it.

The next morning, Friday morning, he granted that mistrial. There was no mention of any e-mail that said tricking. There was no mention of any witness. There was no mention of any poor conduct. The mistrial was already done at that point.

Then after that, there was -- the judge only said that this e-mail raises ethical questions. Raises ethical questions. Somehow, the defendants in this case translated "raises ethical questions" to tricked a government witness. There's a big difference between that. And I've had to pay the price, your Honor.

THE COURT: You are admitting on the record that Judge Jackson said that whatever you did raised ethical questions, ethical issues -- did you say ethical issues? What words did you use?

MR. RAKOFSKY: Your Honor, it's not my intention to deceive the Court. I submitted to your Honor the

[illegible] that [illegible] judge [illegible] that that [illegible]

THE COURT: [illegible]

MR. [illegible]: That's it.

THE COURT: [illegible] good thing for a lawyer

MR. [illegible]: I [illegible] invite it, but what [illegible] even [illegible] to the [illegible] different judge. He didn't submit [illegible] judge. He submitted it to a different judge who, [illegible] that judge, who said, I don't know what's going on here, but it would seem that raises ethical issues. That's with respect to that.

Now, with respect to -- that's basically it. Thank you, your Honor.

MR. GOLDSMITH: May I just have --

THE COURT: It's never a good idea to have the client speak, because he just -- I have to tell you -- I'm not going to say anything. Strike what I just said.

MR. GOLDSMITH: May I clarify one point?

THE COURT: You really can't, because I have one minute because I have to do one more case.

MR. GOLDSMITH: It will be less than one minute.

I just want to reread the transcript minutes, just very briefly. On page 5 Judge Jackson says, "I am

[illegible]

going to grant the motion for a new trial. Let's see, on page 2 he says, "It's my intent to grant the motion. I will set this over. Do you want to retain another lawyer? Can you afford another lawyer?" That was at page 2.

Then page 6, page 7. On page 7 the Court says, "There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues." This did not happen before the motion for a mistrial was granted. The ABA alleges that the e-mail was disclosed and then the mistrial was granted afterwards. This is just not the chronological series of events.

THE COURT: So defamation is based upon the chronological order? But everything the truth of the statements were all there.

MR. GOLDSMITH: Not in its conjunction. Again, I mean, I'm just repeating myself.

THE COURT: It's basically sophistry and semantics. You're just saying it's in the wrong order, but nonetheless, the substance of it is correct.

MR. RAKOFSKY: Your Honor, it's defamation per se.

THE COURT: Counsel, get the last word. Really, very quickly.

MR. HARRIS: I can't possibly respond to every ridiculous argument that I just heard.

[illegible]

THE COURT: My recollection [illegible] April Fool's day, April 1st.

MR. HARRIS: I am not going to [illegible] because there is [illegible] read. It's a very short proceeding [illegible] five pages.

THE COURT: I read it. I recall it was April Fool's Day. [illegible] You were being honest. Your client told me the day before.

MR. GOLDSMITH: I have it right here.

MR. RAKOFSKY: Your Honor, what I said was I made the motion the day before to withdraw. That's because of a conflict.

THE COURT: The record speaks for itself.

MR. HARRIS: Your Honor, just one final thing

[illegible]

[illegible] I'm going to grant the motion for a mistrial. My particular [illegible] reviewed it earlier than this proceeding. The statement is true. He reviewed the e-mail that morning and then he declared the mistrial.

THE COURT: Thank you all. Please get the transcript. I intend to decide this rather quickly because I know I have the other motions that I haven't been able to get to, because I had backlog when I took over this part. I finally got rid of all the backlog and it's your turn.

I will get a decision shortly. And I apologize for the long delay.

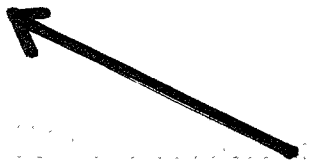
* * * * *

Certified to be a true and accurate record of the within proceedings.

Ellen Rubin, CSR, RPR
Senior Court Reporter

osurisothedead *And the Nazis killed million of Jews. Doesn't make killing Jews right.*

how can something that feels so right be wrong?



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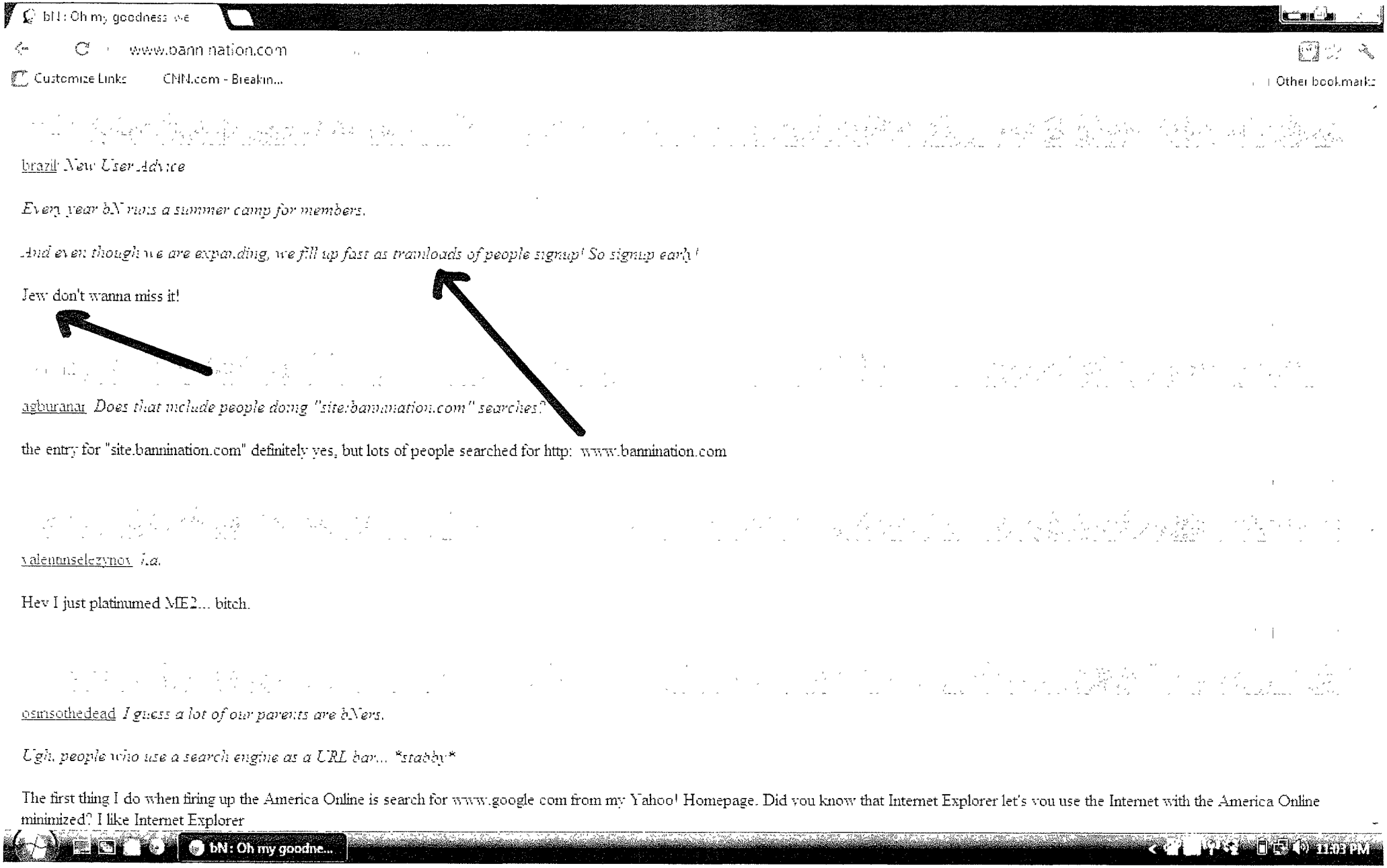
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valentinselezynov ha.
Hey I just platinumed ME2... bitch.
osmsothedead I guess a lot of our parents are bNers.
Ugh, people who use a search engine as a URL bar... *stabby*
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