大成 DENTONS

"Hey it's just like Law and Order"

Stephen L. Hill, Jr.

CLE SEMINAR FOR IN-HOUSE COUNSEL
CHICAGO I JUNE 2019

"…ripped from the headlines"

Recent media coverage of the Michael Cohen and Michael Avenatti sagas, as well as recent prosecutions of other lawyers, renew substantive questions about the role of the attorney in representing their clients, the viability of legal privileges in these settings and the duty of disclosure to the court (or silence in this setting).

The typical scenario that surprisingly might put you in the middle of the headlines

- A client responding to a subpoena
- A client's submission to a government agency
- A client that wants to hide assets from another
- A client that makes representations related to a transaction
- A client that makes public statements about its financial performance
- A client that wants to do business in another country

Let's walk through that situation…

Your client walks into your office and lays out a story that sounds a little like, but not quite a fact-pattern from your first year criminal law school class. At the end of the your client's summary, he/she turns to you and says:

1. Can you file the necessary paperwork?

2. Can I tell that same story in court tomorrow?

3. Can you write a demand letter for me that is really aggressive?

Our problem sets up some hard choices

- How do we decide?
- What are the lawyer's professional obligations in this situation?
- How far is too far?

The place we start is with the rules that govern our practice

The lawyer will not commit a criminal act and/or act of dishonesty (Illinois Rules of Professional Conduct 8.4)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) **engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.**

(d) engage in conduct that is prejudicial to the administration of justice.

Adopted July 1, 2009, effective January 1, 2010.

Let us take the courtroom scenario

In any scenario we start with the “Scope of Representation” (Illinois Rules of Professional Conduct Rule 1.2)

- **Scope of Representation**

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.

Adopted February 8, 1990, effective August 1, 1990.

You cannot foist a lie on the court…

The lawyer will not make a false statement or submit the false statement of another (Illinois Rules of Professional Conduct 3.3)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

What steps are required in the event you become aware of your client's false testimony or representation (Rule 3.3)

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Notes 5-7 for Rule 3.3. further define the duties when submitting evidence

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] ***If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.*** If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

The standard for refusing a client's request to tender testimony (Note 9)

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

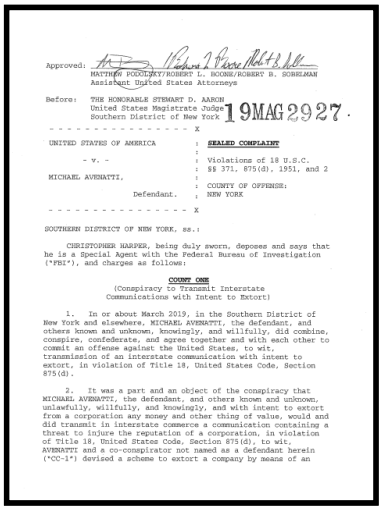
Ignoring the obvious when talking to the client does not work (Note 8)

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

What to do if you learn the evidence is false?

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done–making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

How far is too far?: The lawyer's demand that became a criminal charge



Approved: _____
MATTHEW PODOLSKY/ROBERT L. BOONE/ROBERT B. SOBELMAN
Assistant United States Attorneys

Before: THE HONORABLE STEWART D. AARON
United States Magistrate Judge
Southern District of New York

19MAG2927

UNITED STATES OF AMERICA : SEALED COMPLAINT
- v. - : Violations of 18 U.S.C. §§ 371, 875(d), 1951, and 2
MICHAEL AVENATTI, : COUNTY OF OFFENSE: NEW YORK
Defendant.

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHRISTOPHER HARPER, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI"), and charges as follows:

COUNT ONE
(Conspiracy to Transmit Interstate Communications with Intent to Extort)

1. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, knowingly, and willfully, did combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, transmission of an interstate communication with intent to extort, in violation of Title 18, United States Code, Section 875(d).

2. It was a part and an object of the conspiracy that MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully, willfully, and knowingly, and with intent to extort from a corporation any money and other thing of value, would and did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, in violation of Title 18, United States Code, Section 875(d), to wit, AVENATTI and a co-conspirator not named as a defendant herein ("CC-1") devised a scheme to extort a company by means of an

COUNT ONE
(Conspiracy to Transmit Interstate Communications with Intent to Extort)

1. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, knowingly, and willfully, did combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, transmission of an interstate communication with intent to extort, in violation of Title 18, United States Code, Section 875(d).

2. It was a part and an object of the conspiracy that MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully, willfully, and knowingly, and with intent to extort from a corporation any money and other thing of value, would and did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, in violation of Title 18, United States Code, Section 875(d), to wit, AVENATTI and a co-conspirator not named as a defendant herein ("CC-1") devised a scheme to extort a company by means of an

"You have hurt my client and here is what I am going to do"

ii. AVENATTI further stated, in substance and in part, that he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value. In particular, AVENATTI stated, in substance and in part, that he had approached Nike now because he knew that the annual NCAA tournament – an event of significance to Nike and its brand – was about to begin and further because he was aware that Nike's quarterly earnings call was scheduled for March 21, 2019, thus maximizing the potential financial and reputational damage his press conference could cause to Nike.

iii. AVENATTI further stated, in substance and in part, that he would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the team coached by Client-1; and (2) Nike must hire AVENATTI and CC-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct such an internal investigation, Nike would still be required to pay AVENATTI and CC-1 at least twice the fees of any other firm hired.

Here is what the Department of Justice thought of your letter

COUNT THREE
(Transmission of Interstate
Communications with Intent to Extort)

5. On or about March 20, 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, unlawfully, knowingly, and willfully, and with intent to extort from a corporation any money and other thing of value, did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, and did aid and abet the same, to wit, AVENATTI, during an interstate telephone call, threatened to cause substantial financial harm to Nike and its reputation if Nike did not agree to make multi-million dollar payments to AVENATTI, and further agree to pay an additional $1.5 million to Client-1.

(Title 18, United States Code, Sections 875(d) and 2.)

You don't necessarily need to get indicted to know the line in Illinois

Rule 1.2. Scope of Representation

- **(e)** A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary actions to obtain an advantage in a civil matter.
- **(f)** In representation of a client, a lawyer shall not:
- (1) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or reasonably should know that such action would serve merely to harass or maliciously injure another;
- (2) advance a claim or defense the lawyer knows is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by a good-faith argument for an extension, modification, or reversal of existing law; or
- Adopted February 8, 1990, effective August 1, 1990.

The lawyer may have a conflict

The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

What does the client's conduct (and yours) do to the privilege?

The starting point: The purpose of the attorney-client privilege

- "The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law,'" aiming "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981)).
- The privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754, 757 (D.C. Cir. 2014).

The same approach to the attorney client privilege is the same in Illinois

- The purpose of the privilege, which belongs to the client (*Decker*, 153 Ill. 2d at 313), is to encourage and promote full and frank communication between the client and his or her attorney, without the fear that confidential information will be disseminated to others. *People v. Simms*, 192 Ill. 2d 348, 381 (2000); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 117-18 (1982).
- The privilege embodies the principle that sound legal advice and advocacy are dependent upon such full and frank communication. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Establishing the attorney-client privilege in Illinois

- This court has recognized the following essential elements for the creation and application of the attorney-client privilege:

(1) Where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser, and (8) except the protection be waived. *People v. Adam*, 51 Ill. 2d 46, 48 (1972) (quoting 8 John H. Wigmore, Evidence § 2292, at 554 (McNaughton rev. ed. 1961)).

The attorney-client privilege in Illinois is a broad one

Although this formulation of the privilege suggests that only communications "by the client" are protected from disclosure, the modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client. Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 6.6.1, at 585 (2002). See also *Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc.*, 265 Ill. App. 3d 654, 660-61 (1994) (rejecting the argument that only communications from a client to an attorney are covered by the attorney-client privilege); *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (1990) (observing that the attorney-client privilege applies "not only to the communications of a client to his attorney, but also to the advice of an attorney to his client").

The privilege does not survive the crime-fraud exception

- The doctrine of the crime-fraud "[e]xception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *In re Sealed Case*, 676 F.2d at 807.
- "Attorney-client communications are not privileged if they 'are made in furtherance of a crime, fraud, or other misconduct.'" *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)).

Establishing the exception

- "To establish the exception . . . the court must consider whether the client 'made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act,' and establish that the client actually 'carried out the crime or fraud.'" *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) (quoting *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997)).
- To satisfy its burden of proof as to the crime-fraud exception, the government may offer "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." *In re Grand Jury*, 475 F.3d at 1305 (internal quotation marks omitted). It "need not prove the existence of a crime or fraud beyond a reasonable doubt." *In re Sealed Case*, 754 F.2d at 399.
- Because the privilege belongs to the client, it is the client's intent that determines whether the crime-fraud exception applies. That means the exception could apply even if the attorney was not a knowing participant in the underlying crime or fraud.

Illinois' approach to the crime-fraud exception

- The crime-fraud exception, relevant here, is one of the recognized limits to the attorney-client privilege. The exception is triggered "when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity." *Decker*, 153 Ill. 2d at 313. "[W]here the crime-fraud exception applies, no attorney-client privilege exists whatsoever." *Id.*
- The rationale underlying the crime-fraud exception is intimately connected to the nature of the attorney-client relationship. As we explained in *Decker*, "in seeking legal counsel to further a crime or fraud, the client does not seek advice from an attorney in his professional capacity." *Id.* The client either conspires with the attorney or deceives the attorney. In the former case, the privilege will not apply because it cannot be the attorney's business to further any criminal object. In the latter case, the privilege does not apply because the attorney's advice has been obtained by a fraud. *Id.* In other words, the attorney-client privilege "takes flight if the relation is abused." *Clark v. United States*, 289 U.S. 1, 15 (1933).

Crossing the line in Illinois

- A client, of course, may consult with his or her attorney about the legal implications of a proposed course of conduct, or how to defend against the legal consequences of past conduct, without triggering the crime-fraud exception. Such good-faith consultations are protected by the attorney-client privilege. *Decker*, 153 Ill. 2d at 314; 8 John H. Wigmore, Evidence § 2298, at 573 (McNaughton rev. ed. 1961).
- The privilege does not extend, however, to a client who seeks or obtains the services of an attorney to further an "ongoing or future crime or fraud." Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 6.13.2, at 976 (2002). Such a client "will have no help from the law." *Clark*, 289 U.S. at 15. See also Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, in Section of Litigation, American Bar Association 253 (3d ed. 1997) ("All the policy reasons that support the existence of the [attorney-client] privilege are said to cease as soon as the line is crossed from advice on conforming one's actions to the mandate of the law or defending against the consequences of past actions into the domain of contemplated or actual illegal action.")

The burden of proof in establishing the exception

- Disclosure of otherwise privileged attorney-client communications under the crime-fraud exception cannot be based solely on a charge of illegality unsupported by any evidence. *Decker*, 153 Ill. 2d at 321. Rather, "[t]o drive the privilege away, there must be something to give colour to the charge." (Internal quotation marks omitted.) *Id.* (quoting *Clark*, 289 U.S. at 15).
- Specifically, the proponent of the crime-fraud exception must present evidence from which a " 'prudent person' " would have a " 'reasonable basis to suspect' ": (1) " 'the perpetration or attempted perpetration of a crime or fraud, and' " and (2) " 'that the communications were in furtherance thereof.' " *Decker*, 153 Ill. 2d at 322 (quoting *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984)).
- The difficulty of making this evidentiary showing lies in the fact that the best and often only evidence of whether the exception applies is the allegedly privileged communication itself. *Id.* "However, if the communication itself is used to make the initial determination of whether the crime-fraud exception applies, the privilege is violated and the protected interest suffers because of the forced public revelation." *Id.*

Thank you

大成DENTONS

Dentons US LLP
4520 Main
Suite 1100
Kansas City, Mo. 64112
United States

Approved: _____
MATTHEW PODOLSKY/ROBERT L. BOONE/ROBERT B. SOBELMAN
Assistant United States Attorneys

Before: THE HONORABLE STEWART D. AARON
United States Magistrate Judge
Southern District of New York

19MAG2927

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA	:	**SEALED COMPLAINT**
	:	
- v. -	:	Violations of 18 U.S.C.
	:	§§ 371, 875(d), 1951, and 2
MICHAEL AVENATTI,	:	
	:	COUNTY OF OFFENSE:
Defendant.	:	NEW YORK

- - - - - - - - - - - - - - - - - - X

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHRISTOPHER HARPER, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI"), and charges as follows:

COUNT ONE
(Conspiracy to Transmit Interstate Communications with Intent to Extort)

1. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, knowingly, and willfully, did combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, transmission of an interstate communication with intent to extort, in violation of Title 18, United States Code, Section 875(d).

2. It was a part and an object of the conspiracy that MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully, willfully, and knowingly, and with intent to extort from a corporation any money and other thing of value, would and did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, in violation of Title 18, United States Code, Section 875(d), to wit, AVENATTI and a co-conspirator not named as a defendant herein ("CC-1") devised a scheme to extort a company by means of an

interstate communication by threatening to damage the company's reputation if the company did not agree to make multi-million dollar payments to AVENATTI and CC-1, and further agree to pay an additional $1.5 million to a client of AVENATTI's.

OVERT ACTS

3. In furtherance of the conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about March 19, 2019, in Manhattan, MICHAEL AVENATTI, the defendant, and CC-1 met with attorneys for NIKE, Inc. ("Nike") and threatened to release damaging information regarding Nike if Nike did not agree to make multi-million dollar payments to AVENATTI and CC-1 and make an additional $1.5 million payment to an individual AVENATTI claimed to represent ("Client-1").

b. On or about March 20, 2019, AVENATTI and CC-1 spoke by telephone with attorneys for Nike, during which AVENATTI stated, with respect to his demands for payment of millions of dollars, that if those demands were not met "I'll go take ten billion dollars off your client's market cap . . . I'm not fucking around."

(Title 18, United States Code, Section 371.)

COUNT TWO

(Conspiracy to Commit Extortion)

4. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, and others known and unknown, unlawfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, on an interstate telephone call, AVENATTI and CC-1 used threats of economic harm in order to obtain multi-million dollar payments from Nike to AVENATTI and CC-1, and further to obtain an additional $1.5 million for Client-1.

(Title 18, United States Code, Section 1951.)

COUNT THREE

(Transmission of Interstate Communications with Intent to Extort)

5. On or about March 20, 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, unlawfully, knowingly, and willfully, and with intent to extort from a corporation any money and other thing of value, did transmit in interstate commerce a communication containing a threat to injure the reputation of a corporation, and did aid and abet the same, to wit, AVENATTI, during an interstate telephone call, threatened to cause substantial financial harm to Nike and its reputation if Nike did not agree to make multi-million dollar payments to AVENATTI, and further agree to pay an additional $1.5 million to Client-1.

(Title 18, United States Code, Sections 875(d) and 2.)

COUNT FOUR

(Extortion)

6. In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, willfully and knowingly, did attempt to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, AVENATTI used threats of economic harm in an attempt to obtain multi-million dollar payments from Nike, and further to obtain an additional $1.5 million for Client-1.

(Title 18, United States Code, Sections 1951 and 2.)

BACKGROUND TO THE EXTORTION SCHEME

The bases for my knowledge and for the foregoing charges are, in part, as follows:

7. I am a Special Agent with the FBI and I have been personally involved in the investigation of this matter, which has been handled jointly by Special Agents of the FBI and of the United States Attorney's Office. This affidavit is based upon my personal participation in the investigation of this matter, my conversations with other law enforcement agents, witnesses,

and others, as well as my examination of reports and records. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

8. Based on my involvement in this investigation, and set forth in greater detail below, I have become aware of a multi-million extortion scheme in which MICHAEL AVENATTI, the defendant, and CC-1 used threats of economic and reputational harm to extort Nike, a multinational corporation engaged in, among other things, the marketing and sale of athletic apparel, footwear, and equipment. Specifically, AVENATTI threatened to hold a press conference on the eve of Nike's quarterly earnings call and the start of the annual National Collegiate Athletic Association ("NCAA") tournament at which he would announce allegations of misconduct by employees of Nike. AVENATTI stated that he would refrain from holding the press conference and harming Nike only if Nike made a payment of $1.5 million to a client of AVENATTI's in possession of information damaging to Nike, *i.e.*, Client-1, and agreed to "retain" AVENATTI and CC-1 to conduct an "internal investigation" - an investigation that Nike did not request - for which AVENATTI and CC-1 demanded to be paid, at a minimum, between $15 and $25 million. Alternatively, and in lieu of such a retainer agreement, AVENATTI and CC-1 demanded a total payment of $22.5 million from Nike to resolve any claims Client-1 might have and additionally to buy AVENATTI's silence.

RELEVANT ENTITIES AND INDIVIDUALS

9. As set forth further below, and based on my involvement with the investigation to date, I am aware of the following:

a. MICHAEL AVENATTI, the defendant, is an attorney licensed to practice in the state of California, with a large public following due to, among other things, his representation of celebrity and public figure clients, as well as frequent media appearances and use of social media.

b. CC-1 is also an attorney licensed to practice in the state of California, and similarly known for representation of celebrity and public figure clients.

c. Nike is a multinational, publicly-held corporation headquartered in Beaverton, Oregon. Nike produces and markets athletic apparel, footwear, and equipment, and also sponsors athletic teams in many sports, including basketball, at various levels, including the high school, amateur, collegiate, and professional levels.

d. "Client-1" is a coach of an amateur athletic union ("AAU") men's basketball program based in California. For a number of years, the AAU program coached by Client-1 had a sponsorship agreement with Nike pursuant to which Nike paid the AAU program approximately $72,000 annually.

e. "Attorney-1" and "Attorney-2" work at a law firm based in New York and represent Nike.

f. The "In-House Attorney" is an attorney who works for Nike.

THE MARCH 19 MEETING WITH AVENATTI

10. Based on my conversations with other law enforcement officers, review of notes, text messages, and emails, and discussions with Attorney-1 who, as noted above, represents Nike, I have learned the following information, in substance and in part:

a. On or about March 13, 2019, Attorney-1 learned from a representative of Nike that CC-1 had contacted Nike and stated, in substance and in part, that he wished to speak to representatives of Nike. CC-1 had further stated, in substance and in part, that the discussion should occur in person, not over the phone, as it pertained to a sensitive matter.

b. On or about March 15, 2019, Attorney-1 spoke by phone with CC-1, and CC-1 stated, in substance and in part, that he was trying to be discreet on the phone, but that he and MICHAEL AVENATTI, the defendant, wished to speak with representatives of Nike in person.

c. On or about March 19, 2019, at approximately 12:00 p.m., Attorney-1, Attorney-2, and the In-House Attorney met with AVENATTI and CC-1 at CC-1's office in New York, New York, during which the following occurred, among other things:

i. AVENATTI stated, in substance and in part, that he represented Client-1, an AAU coach, whose team had previously had a contractual relationship with Nike, but whose

contract Nike had recently decided not to renew. According to AVENATTI, Client-1 had evidence that one or more Nike employees had authorized and funded payments to the families of top high school basketball players and/or their families and attempted to conceal those payments, similar to conduct involving a rival company that had recently been the subject of a criminal prosecution in this District. AVENATTI identified three former high school players in particular, and indicated that his client was aware of payments to others as well.

ii. AVENATTI further stated, in substance and in part, that he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value. In particular, AVENATTI stated, in substance and in part, that he had approached Nike now because he knew that the annual NCAA tournament - an event of significance to Nike and its brand - was about to begin and further because he was aware that Nike's quarterly earnings call was scheduled for March 21, 2019, thus maximizing the potential financial and reputational damage his press conference could cause to Nike.

iii. AVENATTI further stated, in substance and in part, that he would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the team coached by Client-1; and (2) Nike must hire AVENATTI and CC-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct such an internal investigation, Nike would still be required to pay AVENATTI and CC-1 at least twice the fees of any other firm hired.

iv. At the end of the meeting, AVENATTI and CC-1 indicated that Attorney-1 and Nike would have to agree to accept those demands immediately or AVENATTI would hold his press conference. In particular, CC-1 indicated that he and AVENATTI would contact Attorney-1, Attorney-2, and the In-House Attorney later that afternoon to discuss Nike's response.

d. Later that day, Attorney-1 left a voicemail for CC-1 indicating that Nike needed time. CC-1 subsequently returned Attorney-1's call and stated, in substance and in part, that AVENATTI had agreed to give Nike until Thursday (i.e. two days) to consider the demands before holding the threatened press conference.

e. After the conclusion of the meeting described above, representatives of Nike contacted representatives of the United States Attorney's Office for the Southern District of New York regarding AVENATTI's threats and extortionate demands.

THE MARCH 20 CALL WITH AVENATTI

11. Based on my conversations with other law enforcement officers and Attorney-1, my own observations, and my review of notes, text messages, audio recordings and draft transcriptions of those conversations, I have learned the following information, in substance and in part:

a. On or about March 20, 2019, at the direction of law enforcement, Attorney-1 sent CC-1 a text message to schedule a telephone call for later that day.

b. On or about March 20, 2019, at approximately 4:00 p.m., Attorney-1 and Attorney-2, who were in their offices in New York, New York, spoke to CC-1 on a telephone call that was consensually recorded and monitored by law enforcement. During the call, and at the direction of law enforcement, Attorney-1 asked CC-1 for more time to consider the demands made by MICHAEL AVENATTI, the defendant, and CC-1 the day before and/or another in-person meeting to discuss those demands. CC-1, who stated, in substance and in part, that he was in Miami, Florida, at the time, said that he would speak to AVENATTI to discuss the possibility of delaying the deadline for Nike's response and would further discuss with AVENATTI the possibility of setting up another in-person meeting.

c. Less than an hour later, at approximately 4:50 p.m., Attorney-1 and Attorney-2 again spoke to CC-1 on a telephone call that was consensually recorded and monitored by law enforcement. During the call, CC-1 indicated that he had spoken to AVENATTI, who was yelling and angry because he did not believe that Nike needed more time to respond to the demands for payment. CC-1 stated, in substance and in part, that Attorney-1 and Attorney-2 would need to provide some justification for delaying the deadline and that CC-1 would attempt to set up another call with AVENATTI so that Attorney-1 could discuss the request for an extension with AVENATTI directly.

d. Shortly thereafter, at approximately 5:10 p.m., Attorney-1 and Attorney-2 engaged in a three-way phone conversation with AVENATTI and CC-1 that was consensually recorded and monitored by law enforcement. During that call, the following, among other things, occurred:

i. AVENATTI reiterated that he expected to "get a million five for our guy" (i.e., Client-1) and be "hired to handle the internal investigation" adding that and "if you don't wanna do that, we're done here."[1]

ii. AVENATTI also reiterated threats made during the previous in-person meeting along with his demand for a multi-million dollar retainer to do an internal investigation. With respect to the internal investigation, AVENATTI made clear that his demand was not simply to be retained by Nike but to be paid at least $10 million dollars or more by Nike in return for not holding a press conference.

iii. In particular, AVENATTI stated, in part: "I'm not fucking around with this, and I'm not continuing to play games. . . . You guys know enough now to know you've got a serious problem. And it's worth more in exposure to me to just blow the lid on this thing. A few million dollars doesn't move the needle for me. I'm just being really frank with you. So if that's what, if that's what's being contemplated, then let's just say it was good to meet you, and we're done. And I'll proceed with my press conference tomorrow . . . . I'm not fucking around with this thing anymore. So if you guys think that you know, we're gonna negotiate a million five, and you're gonna hire us to do an internal investigation, but it's gonna be capped at 3 or 5 or 7 million dollars, like let's just be done. . . . And I'll go and I'll go take ten billion dollars off your client's market cap. But I'm not fucking around."

iv. AVENATTI and CC-1 continued to discuss how much AVENATTI expected to be paid by Nike for doing an "internal investigation." AVENATTI made clear his view that an internal investigation of conduct at a company like Nike could be valued at "tens of millions of dollars, if not hundreds," stating, in part, "let's not bullshit each other. We all know what the reality of this is," adding later in the conversation that while he did not expect to be paid $100 million, he did expect to be paid more than $9 million.

v. Finally, AVENATTI stated, in substance and in part, that he would agree to meet with Attorney-1 in person the following day, Thursday, March 21, the date of Nike's scheduled quarterly earnings call and the beginning of the NCAA tournament, to present the exact amount he demanded from Nike

[1] The quotations set forth in this Complaint are based on draft transcriptions of the recorded conversations, and are in preliminary form only and subject to change upon further review.

and under what terms it would have to be paid. AVENATTI further stated, in substance and in part, that Nike would be required to provide an answer the following Monday or he would hold his press conference.

THE MARCH 21 MEETING WITH AVENATTI

12. Consistent with the phone call described above, and based on my conversations with other law enforcement officers and Attorney-1, my own observations, and my review of a video recording and draft transcription of that video recording, I know that, on or about March 21, 2019, MICHAEL AVENATTI, the defendant, CC-1, Attorney-1, and Attorney-2 met at CC-1's office in New York. That meeting was consensually video- and audio-recorded by Attorney-1 and Attorney-2. During that meeting, the following, among other things, occurred:

a. At the beginning of the meeting, and at the direction of law enforcement, Attorney-1 stated that he did not believe that a payment to AVENATTI's client would be the "sticking point" but that Attorney-1 needed to know more about the proposed "internal investigation." AVENATTI stated, in substance and in part, that he and CC-1 would require a $12 million retainer to be paid immediately and to be "deemed earned when paid," with a minimum guarantee of $15 million in billings and a maximum of $25 million, "unless the scope changes." During the meeting, AVENATTI and CC-1 also stated, in substance and in part, that an "internal investigation" could benefit Nike, by, among other things, allowing Nike to "self-report" any misconduct, and that it would be Nike's choice whether to do so.

b. Attorney-1 noted that Attorney-1 had never received a $12 million retainer from Nike and had never done an investigation for Nike "that breaks $10 million." AVENATTI responded, in substance and in part, by asking whether Attorney-1 has ever "held the balls of the client in your hand where you could take five to six billion dollars market cap off of them?"

c. Attorney-1 also reiterated, at the direction of law enforcement, that Attorney-1 did not think paying AVENATTI's client $1.5 million would be a "stumbling block," but asked whether there would be any way to avoid AVENATTI carrying out the threatened press conference without Nike retaining AVENATTI and CC-1. In particular, Attorney-1 asked, in substance and in part, whether Nike could resolve the demands just by paying Client-1, rather than retaining AVENATTI and CC-1. CC-1 indicated that CC-1 understood that Nike might like to get rid of the problem in "one fell swoop," rather than have it "hanging

over their head." AVENATTI noted that he did not think it made sense for Nike to pay Client-1 an "exorbitant sum of money . . . in light of his role in this." AVENATTI and CC-1 then left the room to confer privately.

d. After returning, AVENATTI stated, in part, "If [Nike] wants to have one confidential settlement and we're done, they can buy that for twenty-two and half million dollars and we're done. . . . Full confidentiality, we ride off into the sunset. . . ."

e. AVENATTI then added that "I just wanna share with you what's gonna happen, if we don't reach a resolution." AVENATTI then laid out again his threat of harm to Nike, adding that, "as soon as this becomes public, I am going to receive calls from all over the country from parents and coaches and friends and all kinds of people - this is always what happens - and they are all going to say I've got an email or a text message or - now, 90% of that is going to be bullshit because it's always bullshit 90% of the time, always, whether it's R. Kelly or Trump, the list goes on and on - but 10% of it is actually going to be true, and then what's going to happen is that this is going to snowball . . . and every time we got more information, that's going to be the Washington Post, the New York Times, ESPN, a press conference, and the company will die - not die, but they are going to incur cut after cut after cut after cut, and that's what's going to happen as soon as this thing becomes public."

f. Finally, AVENATTI and CC-1 agreed to meet at Attorney-1's office on Monday, March 25, 2019. AVENATTI made clear that Nike would have to accede to his demands at that meeting or he would hold his press conference, stating in part, "If this is not papered on Monday, we are done. I don't want to hear about somebody on a bike trip. I don't want to hear that somebody has, that somebody's grandmother passed away or . . . the dog ate my homework, I don't want to hear - none of it is going to go anywhere unless somebody was killed in a plane crash, it's going to go zero, no place with me."

13. Based on my review of a Twitter account publicly associated with MICHAEL AVENATTI, the defendant, I have learned that, consistent with the threats communicated by AVENATTI, as described above, and within approximately two hours after the conclusion of the video-recorded meeting described above, AVENATTI posted the following message on Twitter:

Based on my participation in the investigation, and my review of the article referred to in the tweet described above, I am aware that the article refers to the prior prosecution involving employees of a rival company referred to by AVENATTI in his initial March 19 meeting with attorneys for Nike.

WHEREFORE, deponent respectfully requests that a warrant be issued for the arrest of MICHAEL AVENATTI, the defendant, and that he be arrested and imprisoned or bailed, as the case may be.

SPECIAL AGENT CHRISTOPHER HARPER
FEDERAL BUREAU OF INVESTIGATION

Sworn to before me this
24th day of March, 2019

THE HONORABLE STEWART D. AARON
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK