IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v. Civil Action No. 2:08-CR-1324 LLR

SHOLOM RUBASHKIN

Defendant

DECLARATION OF STEPHEN GILLERS

STEPHEN GILLERS declares under penalty of perjury:

1. My name is Stephen Gillers. I am a law professor at New York University School of Law, where I have taught the rules and law governing lawyers and judges ("legal ethics") regularly since 1978. I lecture and teach about this subject nationally and internationally. I am author of a leading casebook in the field, Regulation of Lawyers: Problems of Law and Ethics (8th ed. Aspen 2009). I have spoken hundreds of times on the subject of legal ethics at state bar and American Bar Association meetings nationwide, at state and federal judicial conferences, and at law firms and corporate law offices. For more than a decade, I have been very active in the legal ethics work of the ABA's Center for Professional Responsibility. I have written widely in the area, including for academic journals and the law and popular press. Legal ethics is the main focus of my academic research. My resume is annexed as Exhibit A.

2. I have been asked to address the conduct of lawyers in the Office of the United States Attorney for the Northern District of Iowa ("USAO" or "the U.S. lawyers") in connection with the prosecution of Sholom Rubashkin.

3. For the reasons below, I conclude that the U.S. lawyers violated rules governing ex parte contact with the judge who presided at the trial of Mr. Rubashkin and in failing to inform Mr. Rubashkin's defense counsel at the inception of the criminal proceeding against Mr. Rubashkin or, at the latest, before the deadline for filing a motion to recuse, of the number of, and the substance of communications in, the ex parte pretrial contacts with the judge prior to the raid on Agriprocessors, Inc. ("Agriprocessors"), the business operated under Mr. Rubashkin's direction.

4. It is irrelevant to my opinion whether or not the contacts and the disclosure would have supported a defense motion for recusal of the judge or any other relief. My opinion is that the contacts should not have occurred to the extent that they did, and that, having occurred, Mr. Rubashkin's lawyers should have been told by the U.S. lawyers about them so that they could seek whatever relief (or further discovery) they believed to be warranted. If their efforts proved unsuccessful in the trial court, they would have been able to compile a full record for appellate review.

5. I have no personal knowledge of the facts on which I was asked to offer my opinion. I assume the truth of the facts alleged in the declaration of Nathan Lewin, dated August 4, 2010, and which are assumed to be true for purpose of his opinion in the affidavit of Mark I. Harrison, sworn to August 30, 2010. Of particular relevance are the allegations in paragraphs 4 through 45 of the Lewin declaration and paragraph 8 of the Harrison affidavit. As did the Harrison affidavit, I have set aside any inference from paragraphs 27-30 of the Lewin declaration that the judge saw a Power Point presentation identifying Agriprocessors as the target of the planned raid, and revealing that Mr. Rubashkin was to be arrested at the time of the raid, because these inferences are denied in the declaration of Richard L. Murphy, dated August 23, 2010. Other facts in this Declaration are those I have been asked to assume or that appear in the Lewin declaration. I assume as a fact that Mr. Rubashkin's trial for bank fraud, money laundering and other charges occurred before Chief Judge Linda Reade in October and November 2009 culminating in convictions on most of the counts. I also assume that the Freedom of Information Act (FOIA) request referenced below was made in February 2009 but that the responses to it

described in the Lewin declaration and Harrison affidavit were not received until March through July 2010.

6. The factual allegations in the Lewin declaration show the following. Unbeknownst to Mr. Rubashkin's trial and appellate counsel until 2010, Chief Judge Reade met on a number of occasions with representatives of the government including the USAO and others involved in the investigation and eventual prosecution of the defendant to discuss aspects of the planned raid on Agriprocessors. Court personnel were present at some of these meetings.

7. Neither the Chief Judge nor the USAO informed defense counsel of the number or scope of these meetings or the identity of those in attendance. Nor so far as is known was a transcript of the meetings created.

8. Consequently defense counsel did not know, at the time that Chief Judge Reade became the presiding judge in Mr. Rubashkin's criminal proceeding, whether Mr. Rubashkin, by name or position, was identified at the meetings. But I am asked to assume that the following is true: Mr. Rubashkin, who was vice-president of Agriprocessors, was initially charged with immigration violations following the May 12, 2008 raid on Agriprocessors, and bank fraud and other charges were later added to the indictment. Chief Judge Reade eventually severed the immigration and bank fraud charges, but evidence of alleged immigration violations was introduced as part of the bank fraud trial.

9. The FOIA responses are ambiguous with regard to the number of meetings with the Chief Judge. By my count, there were at least six meetings between October 2007 and March 2008 (Harrison affidavit ¶¶ 8a, 8b, 8d, 8e, 8g, 8i). There may have been more. The FOIA responses refer to an e-mail of April 11, 2008 that describes "weekly" meetings with the "Chief Judge" that also included "AUSA," which I assume means one or more assistant United States attorneys. Harrison affidavit ¶8m. Defense counsel do not know if the AUSAs at meetings with Chief Judge Reade included those who tried the case.

10. The FOIA responses are also vague about the substance of the meetings. Of particular moment are the references to communications that may have gone beyond pure logistics, in so far as it is possible to glean. For example, the Chief Judge was "briefed...regarding the ongoing investigation" at one meeting and in another, with the USAO and others present, the discussion included "an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation." Harrison affidavit ¶¶8b and 8g. Defense counsel do not know what "strategies" refers to nor what the "other issues related to the...investigation and operation" were. Chief Judge Reade is also quoted as having expressed her "support" for the raid and is reported to have requested from the USAO a "final gameplan" for the raid.

11. In short, defense lawyers were ignorant of the number and substance of these meetings when the Rubashkin indictment was assigned to Chief Judge Reade for trial and when she fixed a deadline for the filing of a motion to recuse her. I am asked to assume that, notwithstanding the February 2009 FOIA request, no agency of law enforcement, including the USAO, or anyone else provided this information to defense counsel before the deadline for filing a recusal motion.

12. No mention of the extent or content of the meetings between Chief Judge Reade and the USAO appears in the prepared statement of representatives of the Department of Justice and the Office of Immigration and Customs Enforcement before a House of Representatives subcommittee held July 24, 2008. In the testimony itself, the Department of Justice representative told the subcommittee merely that the Chief Judge was given a "heads up." Lewin affidavit ¶¶43-45. Nor does Chief Judge Reade's opinion in response to a recusal motion from an indicted Agriprocessor employee disclose the extent or contents of the pre-raid meetings between her and the USAO that are recounted in the FOIA responses.

13. The U.S. lawyers are subject to the Iowa ethical rules. 28 U.S.C §530B(a) provides: "An attorney for the Government shall be subject to State laws and rules, and local Federal

court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

14. The rules of this court provide: "The Iowa Rules of Professional Conduct, or any successor code adopted by the Iowa Supreme Court, govern all members of the bar of this court and, to the extent provided in subsection d.3 of this rule, those admitted pro hac vice. A violation of the standards established in those rules of conduct is 'misconduct' for purposes of this section." LR 83.1(g)(1). This rule was most recently adopted in December 2010, but the same court rule was in effect in the relevant time period. The current version of the Iowa Rules of Professional Conduct ("IRPC") became effective July 1, 2005.

15. Rule 32:3.5(b) of the IRPC, which binds the U.S. lawyers, provides: "A lawyer shall not...communicate with [a judge] during the proceeding unless authorized to do so by law or court order."

16. The reasons for this rule are not elusive. Addressing a prior version of the rule, the Iowa Supreme Court wrote:

> The purpose behind the rule prohibiting ex parte communications is to prevent "the effect, or even the *appearance*, of granting undue advantage to one party to the litigation."... [Citing in re Conduct of Thompson, 940 P.2d 512, 515 (Oregon 1997).]
>
> Improper ex parte communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. [Such communications] threaten [ ] not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice. [Citing In re Anonymous, 729 N.E.2d 566, 569 (Ind. 2000).]
>
> It is imperative that we avoid even the appearance of granting one party a *procedural* or tactical advantage over the other as a result of an ex parte contact. Both judges and lawyers must demonstrate due regard for the rights of parties to be heard....

> In general, a lawyer may not discuss with the court ex parte matters related to the merits of a pending proceeding. Such matters may be either substantive or *procedural*.[1] [Citing In re Conduct of Eadie, 36 P.3d 468, 477-78 (Oregon 2001).]

17. Rule 32:3.5(b) addresses ex parte communications during a "proceeding." I am told that the claim is made that there was no "proceeding" at the time of the meetings with the Chief Judge because as yet there had been no formal charge, and therefore this rule does not apply. This crabbed interpretation of an ethics rule is wrong for several reasons. It would read the rule to allow lawyers in civil and criminal matters to meet ex parte with judges without limitation on frequency or content so long as they refrain from filing the document (e.g., complaint, indictment) that formally begins an action, timing that is generally within their control. That in turn would enable lawyers opportunistically to skirt the rule and thereby undermine the very policies, cited in *Rauch, supra*, that justify it in the first place.

18. There are at least two distinct policies behind the rule against ex parte contact, each of which would be frustrated by a narrow reading of "proceeding." First, an ex parte communication about a matter can create the "appearance" of "advantage" independent of the substance of the communication, whenever the communication occurs. Second, the substance of the communication may bias or appear to bias the court against an opposing party, whenever the communication occurs. And in fact, we do use the word "proceeding" to refer to court events that antedate a formal charge. We commonly refer, for example, to grand jury proceedings, which occur before indictment. See, e.g., United States v. Stangeland, 2009 Westlaw 1371206 at *1 and *4 (D. Iowa 2009)(referring to "grand jury proceedings" and "prior proceedings" in the grand jury)(Reade, Ch. J.).

19. IRPC Rule 32:3.8(d), which binds the U.S. lawyers, provides:

> The prosecutor in a criminal case shall...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt

[1] Iowa Supreme Court Board of Professional Ethics and Conduct v. Rauch, 650 N.W.2d 574, 577-578 (Iowa 2002) (emphasis added).

of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

20. Comment [1] to this rule provides:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded *procedural* justice and that guilt is decided upon the basis of sufficient evidence. *See generally* ABA Standards of Criminal Justice Relating to the Prosecution Function. Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of rule 32:8.4. (Emphasis added.)

21. Rule 32:8.4(d) and (f) of the IRPC, which binds the U.S. lawyers, says it is "professional misconduct for a lawyer to…engage in conduct that is prejudicial to the administration of justice" or "knowingly assist a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law."

22. Although I have cited Iowa's Rules of Professional Conduct and although 28 U.S.C. 530B and the court's local rules require that United States lawyers in Iowa follow the IRPC, in fact the cited Iowa rules are common throughout the United States. The text of the rules derive from the equivalent provisions of the ABA's Model Rules of Professional Conduct which has been broadly adopted. The text of comment [1] to Rule 32:3.8 is substantively the same as the text of the comment to ABA Rule 3.8 comment [1]. The duties these rules impose are not unique to Iowa but are broadly adopted in the United States. Indeed, in construing Rule 32:3.5(b), the Iowa Supreme Court recognized this consensus through its citations to three decisions in two other American jurisdictions. See ¶16, *supra*.

23. In my opinion these rules required the following of the U.S. lawyers in this matter and their failure to act as described was misconduct:

a. They should not have participated in any discussion or communication with the Chief Judge that touched on "strategies" or "the ongoing investigation" or "other issues related to the CVJ investigation and operation." See ¶10, *supra*. IRPC 32:3.5(b)

b. If, as I assume to be true from the declaration of Richard L. Murphy, communication with the court was believed necessary to plan "logistics," such communication should have been conducted to the extent possible with court administrative personnel only or with other enforcement agencies like the Marshal's Service, not with the Chief Judge personally. Court personnel could have served as an intermediary to the Chief Judge if and when that was necessary. If personal approval by the Chief Judge of any purely logistical proposal had been limited to only what was essential, the USAO would have prevented the "appearance...of...advantage" to the government.

c. A detailed record should have been made of all communications with the Chief Judge. Communications with the Chief Judge, if necessary, should have been transcribed by a court reporter. That would have assured that defense counsel had an accurate record, which they needed and still need in order to decide whether the procedural rights of their client were violated. The fact of contemporaneous transcription would also have underscored to those present the ethical restrictions on the content of communications.

d. The U.S. lawyers should have informed Mr. Rubashkin's trial lawyers following his indictment of (a) the date and duration of all communications with the Chief Judge; (b) the identities of those present; and (c) the substance in detail of the communications. This was an affirmative disclosure obligation under Rule 32:3.8(d) and its comment. Their disclosure obligation included information relevant to the merits of the matter, which encompasses "procedural justice."

e. It appears from the affidavit of Richard L. Murphy that the U.S. lawyers believed that their contacts with the Chief Judge were proper and afford the defendant no basis to object to the Chief Judge presiding at his trial or to seek other relief. That is

irrelevant. The defendant's counsel may disagree and so advise their client. The defendant has a right to their informed advice. But counsel cannot protect the defendant's procedural rights if they are unaware of the information that the U.S. lawyers failed to preserve and reveal. The Iowa Supreme Court has held that "[t]he duty to disclose exculpatory evidence cannot be ignored because of a prosecutor's private belief that it is beside the point." [2]

f. The disclosure duty under professional conduct rules encompasses information that may provide a basis for objecting to procedural irregularities. This is especially true when, as here, that objection find its roots in the defendant's constitutional rights. The criminal system of adversary justice rests on constitutional mandate. The ethical prohibition against ex parte communications, as applied in criminal cases, and the prosecutorial disclosure duty, under both professional conduct rules and *Brady*, build on that constitutional mandate and are required by it. Just as a prosecutor cannot ethically or constitutionally conceal information that will impeach the credibility of a government witness, neither can she conceal information that provides the defense with a basis to argue that his constitutional and statutory rights to the fact and appearance of disinterested justice are compromised.

g. The question is not whether defense counsel would have succeeded in whatever relief they may have chosen to seek based on the information they did not have and were not given. The prosecutorial misconduct was complete when it occurred. It is no defense to say that in the view of the government lawyer, it would not have mattered anyway. That is not a decision for the government lawyer to make.

h. As a result of the failure to protect the defendant's ability adequately to assert his procedural rights, first by the failure to limit contact with the Chief Judge as described, and second by the failure to maintain a detailed record of the substance of all communications with her, there is much now that counsel does not know. (It may

[2] Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569, 572 (Iowa 1994).

be that a detailed record is available somewhere, beyond the redacted FOIA responses, in which case it should be provided to defense counsel.) The events here cannot be equated to a search or arrest warrant. These are issued ex parte but on written submissions pursuant to defined statutory procedures that provide for the creation of a full record, which will be available for later review by a defendant's lawyer. It was incumbent on the U.S. lawyers to take steps to create the equivalent of that full record here for later delivery to defense counsel. Prosecutors are charged to protect the rights of the accused. IRPC 32:3.8 comment [1]. Satisfaction of that duty is especially critical when those rights may be at risk but there is no lawyer for the accused present, or even identified, and able to protect them. And the need for a contemporaneous writing is accentuated here by the lengthy time span between the first meeting with the court and defendant's arrest, a span that increases the risk of failure of memory. In other words, the absence of an opposition prior to formal charges, rather than remove the contacts from the definition of "proceeding," did the opposite. It heightened the duty of the U.S. lawyers to protect those later charged.

24. For the reasons given, my opinion is that the U.S. lawyers should not have participated in the ex parte meetings with the Chief Judge to the extent that they did and, having done so, should have revealed their existence and the content of the communications (which they should have transcribed) to Mr. Rubashkin's lawyers as soon as they were identified after indictment. Neither the significant "scope" of the operation nor the "limited resources" of the Northern District of Iowa – Mr. Murphy cites both factors – can justify the lapses. Based on the facts I am asked to assume, no one in the run of meetings in 2007-2008 asked whether the presence of the Chief Judge was necessary to the objectives of the USAO and the enforcement agencies; no one took pains to ensure a transcription of the communications at any such meetings for later submission to defense counsel; and no one bothered to provide defense counsel, once they were identified, with information about the fact, frequency and content of the meetings. As a result, nearly three years after the first meeting with the Chief Judge, with the benefit only of redacted FOIA responses recently received, the defense lawyers are left to try to compile this history as best they can. That should not have happened.

Pursuant to 28 U.S.C. 1746 I hereby declare under penalty of perjury that the foregoing is true and correct.

Stephen Gillers

Dated: September 7, 2010