



## LESSONS LEARNED FROM THE MICHAEL COHEN AND MICHAEL AVENATTI FIASCOS

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### **Tabloid Fodder That Matters: Legal Ethics Lessons from the Michael Cohen Fiasco**

*David Gustman*

Lawyers are rarely in the news. When they are, it is usually because they are providing comments on behalf of a high-profile client. Almost like a PR representative. In these instances, the lawyers are viewed as simply doing their jobs of representing their clients. Other times, however, lawyers are in the news for bad reasons, and they are consequently not viewed well. When this happens, questions arise as to how the lawyers got into the situations they are in, what laws or ethical rules they violated, and what they could have done differently as lawyers (and as people in general) to come out for the better.

This article examines the situation of high-profile attorney Michael Cohen and the lessons learned from his legal predicaments. More specifically, this article will examine the circumstances surrounding the criminal charges against Cohen, the ethical rules involved in his conduct, and some important considerations in representing high-profile clients.

### **Stormy Daniels**

The alleged affair between adult film actress Stormy Daniels and Donald Trump is the spark that brought Cohen to the forefront of the news. The alleged affair became national news in early 2018 when news outlets reported Cohen had allegedly paid Daniels \$130,000 in October 2016, a month before the presidential election, to stop her from discussing her alleged affair with Trump in 2006. What followed was a flurry of news stories in

which Cohen acknowledged paying Daniels, Daniels filed suit seeking to invalidate a non-disclosure agreement she signed related to the alleged affair, and Cohen sought a restraining order against Daniels in arbitration to bar her from disclosing information related to the non-disclosure agreement.

### **Michael Cohen's Federal Investigation and Conviction**

Cohen was first known to be under federal investigation in April 2018 when the FBI raided his law office, home, and hotel room for emails, tax records, and business records. In August 2018, Cohen was charged with and pleaded guilty to eight federal criminal charges: five counts of tax evasion, one count of making false statements to a financial institution, and two counts related to unlawful campaign contributions. In December 2018, Cohen was sentenced to three years in federal prison and assessed with monetary penalties. Additionally, in November 2018, after being charged by the Special Counsel's office, Cohen pled guilty to providing false statements in congressional testimony and received a two-month sentence to be served concurrently with his three-year sentence.

The criminal charges for which Cohen was convicted have both legal and ethical implications. The U.S. Attorney for the Southern District of New York laid out the criminal charges against Cohen. Between 2007 and January 2017, Cohen was an attorney for the Trump Organization while holding the title "Executive Vice President" and "Special Counsel" to Trump. Cohen was ostensibly acting in the capacity of in-house counsel for the Trump Organization as well as personal counsel for Trump himself. Cohen was licensed under the New York Bar and subject to New

York's Rules of Professional Conduct, which were first adopted in 2009 and are modeled after the ABA's Model Rules of Professional Conduct.

### **Tax Evasion and False Statements**

The counts for tax evasion and making false statements to financial institutions were, it appears, based on activity by Cohen entirely separate from his role as a lawyer for the Trump Organization or for Trump personally. Apart from his role with the Trump Organization, Cohen owned taxi medallions in New York City and Chicago as investments and leased them out to operators who would pay Cohen a portion of the operating income from the medallions. Cohen concealed millions of dollars of operating income by arranging to receive the medallion income personally instead of having the income paid to Cohen's medallion entities. Paying the medallion entities would have resulted in that income being included on Cohen's tax returns. Cohen also hid sources of income from brokering the sale of property, including a luxury handbag and consulting on real estate for an assisted living company. In total, Cohen failed to report more than \$4 million in income to the IRS.

As for the false statements charge, Cohen executed promissory notes, took out lines of credit collateralized by his taxi medallions, secured mortgages, and applied for a home equity line of credit with a combination of three different banks. None of these transactions involved work as an attorney but rather involved money for his own personal use on a condominium and a summer home. Throughout this series of transactions, Cohen consistently failed to disclose to the banks his full financial picture with the other banks and allegedly obtained a home equity line of credit that a bank would not have otherwise approved had Cohen been truthful. In essence, Cohen fraudulently concealed information from different banks to maximize his personal financial status and abilities.

The lesson to be learned from Cohen's tax evasion and false statements charges is simply: you should not commit federal crimes in your personal and business dealings. But as lawyers, we know we are held to a higher standard of conduct even outside the strict bounds of our law practice. Rule 8.4 of New York's Rules of Professional Conduct mandates a lawyer shall not, among other things, engage in: (a) illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer; (b) conduct involving dishonesty, fraud, deceit, or misrepresentation; or (c) conduct that is prejudicial to the administration of justice. A reasonable person—and certainly a reasonable attorney—should understand that Cohen's conduct in evading taxes and making false statements to banks violates federal law and the Rule

8.4. Cohen engaged in blatant misconduct that no lawyer should ever entertain. Indeed, Cohen has already felt the effect, for his days of practicing law are over because lawyers face automatic disbarment for a felony conviction under New York law.

### **Campaign Finance Violations**

Soon after Trump announced his presidential campaign in June 2015, the head of the National Enquirer, a popular tabloid magazine, coordinated with Cohen and other members of Trump's presidential campaign to help deal with negative stories about Trump's past extramarital relationships with women. The magazine offered to advise Cohen of negative stories during the campaign, and the parties understood that Cohen, working with the magazine, would then arrange for the purchase of those negative stories so as to suppress them and prevent them from influencing the election. Two stories were purchased from Karen McDougal and Stormy Daniels to keep their stories silent, though the Karen McDougal payment was only from the magazine and not Cohen or the Trump campaign and will not be discussed here. While this was happening, Cohen was still an attorney for the Trump Organization yet also was working with, advising, and making appearances on behalf of Trump's presidential campaign.

In October 2016, Stormy Daniels informed the magazine of her story and her willingness to make public statements about an alleged affair with Trump. The magazine then informed Cohen, who then negotiated a deal to pay \$130,000 of his own money to Daniels in exchange for a confidential settlement agreement. To facilitate the payment, Cohen created a shell corporation named Essential Consultants LLC. Cohen then drew money from the fraudulently obtained home equity line of credit and had the money deposited into a new bank account he opened for Essential Consultants. Cohen then wired the money from the bank account to Daniels. On the bank form to complete the wire transfer, Cohen falsely indicated the purpose of the wire was a retainer. When in reality, the purpose of the payment was to suppress the negative story about Trump. Federal election law prohibits individual campaign contributions in excess of \$2,700 per election and any corporate contributions directly to candidates. Cohen pleaded guilty to violating both of these prohibitions.

Cohen coordinated with members of the campaign about the hush money payments, yet in January 2017 Cohen sought reimbursement for the payment to Daniels from the Trump Organization, not Trump's campaign. Cohen presented executives of the Trump Organization with a copy of the bank statement from the Essential Consultants

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bank account showing the \$130,000 payment to Daniels. Executives then arranged to have Cohen paid back in monthly installments throughout 2017 by having Cohen submit invoices that requested payment pursuant to a retainer agreement for services rendered in that particular month. The Trump Organization accounted for these payments as legal expenses, when in truth, there was no retainer agreement, and the monthly invoices Cohen submitted were not in connection with any legal services he provided in 2017.

There are clear ethical issues with Cohen's behavior in connection with the hush money payments. Rule 8.4 on general attorney misconduct and dishonest behavior is applicable. Once again, Cohen engaged in conduct that casts a negative light on his fitness to practice law. Not only did he cooperate in fraudulent legal fee payment scheme, but he violated federal election law. Cohen once again allowed his desire to serve his client to outweigh his obligation to follow legal and basic ethical guidelines.

Cohen also failed to properly identify who his client was with regards to the efforts to curtail the news stories about Trump. Was Cohen acting as counsel for Trump personally, Trump's presidential campaign, or the Trump Organization? That question alone implicates Rule 1.13 governing the situation when organizations are the client. If Cohen was representing the Trump organization, then engaging in illegal behavior for Trump personally could be inconsistent with the lawful endeavors of the Trump Organization. Moreover, in this regard Cohen clearly violated Rule 1.5(b) on proper fee arrangements that requires an attorney to communicate to a client the scope of the representation and the basis or rate of fees for which the client will be responsible. Cohen may not have communicated what the scope of his legal services would be, for whom exactly, and how he would charge fees. This conduct may also have violated Rule 1.5(d) (3) because he charged "fees" based on a fraudulent retainer agreement.

Looking at the totality of Cohen's conduct, he had ethical obligations to pump the brakes, but it appears he failed to do so. Rule 1.2(d) states a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Under Rule 1.2(f), a "lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal." Rule 1.4(a)(5) required Cohen to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law." Cohen was

also required by the Rules to withdraw from representing any Trump entity in relation to the hush money payments because under Rule 1.16(b), an attorney shall withdraw from a representation when the attorney knows or reasonably should know the representation will result in a violation of the Rules or of the law.

Cohen may also have violated Rule 4.4(a), which provides that in representing a client, an attorney may not use means that have no substantial purpose other than to harm a third person or violate the legal rights of that person. Cohen's actions could have violated the rights of the individuals who wanted their stories heard.

Cohen has said on record, to the effect, that he acknowledges his unlawful conduct and that he engaged in that conduct as a result of loyalty to President Trump. It may sound simple, but when dealing with high-profile clients, it is not. High-profile individuals or corporations may request or suggest advice on a small component of a much larger scheme or course of actions that counsel is tasked with undertaking. The tip of the iceberg may not be illegal or unethical, but the larger picture and grander scheme may be, and the illegality may not occur or actuate until much later down the road. Nevertheless, it is ultimately the responsibility of the attorney to determine whether the request could, on its face or by implication, lead to illegal conduct or unethical actions in violation of the law or of the Rules of Professional Conduct. That is the higher standard to which all attorneys are charged.

### **False Statements**

In 2017, the United States Senate and House of Representatives Committees on Intelligence launched investigations into Russian election interference and possible links between Russia and individuals associated with political campaigns. Congress requested information from Cohen, but Cohen provided false information. In August 2017, Cohen sent a letter to the committees addressing his efforts at the Trump Organization to pursue a Trump branded property in Moscow, Russia. In the letter, Cohen made three material and false representations: (1) the Moscow project ended in January 2016 and was not discussed extensively with others in the Trump Organization; (2) Cohen never considered traveling to Russia for the project or asking Trump to travel to Russia for the project; and (3) Cohen did not recall any Russian government response about the project.

In September 2017, in anticipation of appearing before the Senate committee, Cohen released prepared remarks to the public, stating "This was solely a real estate deal and nothing more. I was doing my job." Cohen asked that the letter he previously sent be incorporated into his

testimony. According to the Special Counsel, Cohen knew his representations about the Moscow project were false and misleading. The Special Counsel asserted Cohen made the false statements to: (1) minimize the links between the Moscow project and Trump; and (2) give the false impression that the Moscow project ended before the Iowa caucus and the first primary for the election in hopes of limiting the ongoing Russia investigation.

Cohen has pled guilty to the false statements charge. At his sentencing hearing, Cohen is quoted as saying “I made these misstatements to be consistent with [Trump’s] political messaging and out of loyalty to [Trump].”

Like with Cohen’s earlier charges, ethical issues abound with his false statements to Congress. Cohen arguably violated one of the staple Rules of Professional Conduct, Rule 3.3, on candor before a tribunal. That rule prohibits attorneys from knowingly making a false statement of fact to a tribunal or failing to correct a false statement of fact previously made. Arguably, the congressional committees would fall under the definition of tribunal. Cohen also may have violated Rule 4.1, which mandates that while representing a client, an attorney shall not knowingly make a false statement to a third person.

All of this could have been avoided had Cohen not blindly followed and abided by his notion of client loyalty and instead followed his ethical obligations as a lawyer.

### **Larger Takeaways on Representing High-Profile Clients**

The Michael Cohen fiasco provides clear examples of what not to do as an attorney. Whatever the jurisdiction, whatever the type of legal employment, and whatever the type of substantive law practice, the Rules of Professional Conduct govern counsel’s actions. The prospect of personal reputation and financial gain can muddy the waters and make it difficult for attorneys to say no to high-profile and profitable clients. Cohen chose on many occasions to make the wrong decisions for expediency and is now paying a steep price for doing so. He is in jail and has lost the ability to practice law. His reputation is ruined.

Not only did Cohen violate federal law and the Rules of Professional Conduct when acting as counsel, he did so when engaged in personal business transactions. Once he became the subject of a federal criminal investigation, his tax evasion and bank fraud came to light.

When serving clients, especially high-profile and wealthy clients, it is vital that counsel remembers to act within the legal and ethical boundaries. Failing to do so can result in significant personal and professional hardship. And the client you served will more than likely abandon you and blame you for crossing the ethical and legal lines.



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David Gustman is Head of the Firm's Litigation Practice Group, Co-head of the Firm's Antitrust Practice Group and a member and former Chairman of the Firm's Executive Committee.

For over 35 years David has handled and served as lead trial counsel on a variety of complex business litigation matters involving antitrust, accounting, banking, bankruptcy, construction, finance, insurance coverage and broker disputes, real estate and securities. He is a "go to" lawyer for the Firm's most challenging and difficult cases, and is often called upon by clients to take over cases that have been previously handled by other counsel.

David provides antitrust counsel to joint ventures, trade associations, research consortiums and companies involved in mergers and acquisitions, as well as those facing antitrust claims. He has also successfully defended clients in connection with criminal antitrust investigations by the U.S. Department of Justice. He is a frequent speaker and author on various legal topics, including antitrust, class actions and mergers.

### Practice Areas

- Litigation
- Antitrust
- Appellate Litigation
- Class Actions
- Fiduciary and Partnership
- Insurance Coverage Disputes
- Litigation and Dispute Resolution
- Real Estate
- Securities Litigation
- Successor Counsel

### Honors and Awards

- Illinois Super Lawyers - Business Litigation, Antitrust Litigation, Securities Litigation - 2019 (cited in multiple years)
- Leading Lawyers - Antitrust Law, Commercial Litigation, and Corporation Law
- Chambers-USA Guide to America's Leading Lawyers for Business - General Litigation Recognized Practitioner - 2019 (cited in multiple years)
- The Best Lawyers in America® - Antitrust - 2017 (cited in multiple years)
- The Legal 500 - Leading Individual - Antitrust – Midwest for his work with Mergers, Acquisitions and Buyouts
- Who's Who Legal International, the Official Research Partner of the International Bar Association - One of the top 12 Illinois lawyers practicing Antitrust and Competition Law
- Martindale-Hubbell legal ability/ethical standards rating ("A-V") - Highest possible rating - 2019 (cited in multiple years)
- Illinois Leading Lawyers - 2019 (cited in multiple years)
- America's Top 100 High Stakes Litigators®

### Education

- J.D., George Washington University Law School - Editor, The George Washington International Law Review
- B.A., University of Michigan - with distinction, Economics

