THE TRUMP TEAM'S STRATEGIC ERRORS: SPECIAL MASTER EDITION

Between Michael Cohen's guilty plea and Paul Manafort's guilty verdict, I'm struck this week by how badly two strategic decisions they made have failed. I'll return to the issue of Manafort's "rocket docket" strategy. Here, however, I'd like to note how little Michael Cohen and Donald Trump (AKA Individual-1) gained by fighting to have a special master review the materials seized in the April 9 raid of Cohen's property.

As you recall, the Southern District of NY planned to use a taint team – basically, a second set of prosecutors – to sort through Cohen's possessions. But Cohen and (especially) Trump complained about the impropriety of doing so when the President is one of the clients involved. Cohen invented an attorney-client relationship with Sean Hannity.

And after listening to all those arguments,on April 27, Judge Kimba Wood appointed Barbara Jones special master to make privilege determinations. It was definitely the right decision for the legitimacy of the proceeding. It might even have gotten the review done as quickly as SDNY could have done so.

But Trump and Cohen gained very little beyond what will end up being more than half a million dollar bill for their troubles. (Jones' invoices for labor through the end of July, which are being split 50-50 between the plaintiffs – Cohen, Trump, and Trump Organization – and SDNY, add up to $1,050,022.)

It started on June 4, when Jones issued her first report on the hard copy documents and three devices that were the first things she received. Of the 172 items the plaintiffs tried

to claim privilege over, she agreed in just 169 cases. Jones disagreed with the claims about three items (the circumstances with this report are murky, as she later reconsidered one item, and this appears to be the batch of materials from which Cohen and Trump later decided to reverse their privilege claim surrounding 12 recordings).

On June 6, the president's lawyer, Joanna Hendon, wrote Kimba Wood on behalf of Trump, Cohen, and the Trump Organization, requesting that any challenge to a privilege determination appear under seal and *ex parte*. The next day the government responded that it had no problem with discussions of the content of documents to be submitted under seal and *ex parte*, but argued the legal discussions should be public.

> There is no reason why the Government and the public should be deprived of access to the balance of the filing — such as the law upon which Cohen and the two Intervenors rely, or their legal analysis to the extent it does not directly describe the substance of the documents in question.

In other words, SDNY argued that if the plaintiffs wanted to fight Jones' determinations, they would have to show their legal arguments in public.

In a June 8 order, Judge Wood agreed with the government that any legal discussion should be public. In response, the plaintiffs withdrew certain privileged designations, effectively deciding they weren't willing to challenge Jones' determinations with legal arguments the public could see.

After Jones amended her June 4 report on June 15, Judge Wood reviewed the substance of what Jones had found, effectively conducting a spot check of her work. Her June 22 order on the matter reveals that Michael Cohen did more consulting of lawyers than consulting as a

lawyer.

> The Court adopts the Report for the following reasons: 57 of these items are text messages between Plaintiff and his outside counsel, in which Plaintiff requests legal advice from his outside counsel or Plaintiff’s outside counsel provides legal advice; 55 of these items are text messages between Plaintiff and his outside counsel, in which Plaintiff requests legal advice from his outside counsel or Plaintiff’s outside counsel provides legal advice in anticipation of litigation; 22 of these items are email communications or portions of email communications in which Plaintiff receives or requests legal advice from outside counsel; 6 of these items are email communications in which Plaintiff receives or requests legal advice from outside counsel in anticipation of litigation; **7 of these items are email communications between Plaintiff and a client, containing legal advice made in anticipation of litigation; 1 of these items is an email communication in which Plaintiff receives a request to initiate legal representation;** 9 of these items are legal memoranda from outside counsel, providing legal advice to Plaintiff or a client of Plaintiff; 1 of these items is a letter from Plaintiff’s outside counsel containing legal 2 of these items are retainer agreements between Plaintiff and outside counsel, containing requests for legal advice10; 1 of these items is a litigation document containing notes for Plaintiff’s outside counsel, made in anticipation of litigation. The Court has also reviewed the 7 documents that the Special Master recommends withholding from the Government because they are Highly Personal. (ECF No. 81, at 2.) These documents all concern Plaintiffs family affairs and are not relevant to

> the Government's investigation. With respect to the above items, the Court ADOPTS the Amended Report. [my emphasis]

That is, in this first batch of documents, even the privileged ones only included 8 files in which Cohen was the lawyer providing advice. The rest involved Cohen getting advice for himself or a client.

On July 2 and July 13, Jones started releasing big chunks of non-privileged items. Almost 2.2 million items were turned over. On July 10, Cohen moved to share all these materials with Guy Petrillo. By this point, Cohen felt he had been abandoned by Trump and was preparing to flip against his client. July 23 is when Jones reported that Cohen and Trump had withdrawn designations of privilege with respect to 12 audio files, which were then released to the government (and began to be leaked on cable shows).

Here are the determinations Barbara Jones described making in reports dated July 19, July 24, July 28, August 2, and August 9. Claimed privilege, here, is what Cohen or Trump or Trump organization claimed. The next two columns show what Jones labeled those files as. The objections are items for which the plaintiffs still argued there was a privilege claim after her recommendations, though they did not fight any of these designations.

Report	Date	Claimed Privilege	Privilege/ Highly Sensitive	Non-Privileged	Objections
2	July 19	4,085	2,633	1.452	22
3	July 24	1,262	597	665	2
4	July 28	1,642	648	994	28
5	August 2	1,846	1,315	531	
6	August 9	4,808	2,250	2,558	3

In her summary, Jones described that altogether 7,434 items had been deemed privileged. Trump and or Cohen had objected to Jones' designations with regards to 57 items, but were unwilling to fight to have Wood overrule Jones' designation if their arguments would be public.

What Jones didn't mention is that along the way,

she had overruled the plaintiffs' designation of something as privileged or highly sensitive around 6,200 times (these numbers don't entirely add up, possibly because of overlapping categories).

While Trump and Cohen may have achieved the goal of delay, within 134 days after the raid on his home, Cohen had found a new lawyer and pled guilty to 8 counts. And while it's not clear whether Jones applied a similar or more stringent standard on privilege claims than SDNY's privilege team would have, as it was, the Trump people paid half a million dollars to try but fail to keep over 6,200 items out of government hands.

Update, 8/27: Oops! I forgot to add this language from the plea hearing, Prosecutor Andrea Griswold explained this about the evidence.

> The proof on these counts at trial would establish that these payments were made in order to ensure that each recipient of the payments did not publicize their stories of alleged affairs with the candidate. This evidence would include:
>
> Records obtained from an April 9, 2018 series of search warrants on Mr. Cohen's premised, including hard copy documents, seized electronic devices, and audio recordings made by Mr. Cohen.
>
> We would also offer text messages, messages sent over encrypted applications, phone records, and emails.
>
> We would also submit various records produced to us via subpoena, including records from the corporation referenced in the information as Corporation One and records from the media company also referenced in the information.

She makes it clear that the audio recording — apparently the same ones that Cohen and Trump

waived privilege over — were part of the evidence on those charges.

Update: Added more punctuation for those of you who thought I’d leave out an Oxford comma.