

“AND” / “OR” : HOW JUDGE COOPER REWROTE THE MICHAEL SUSSMANN INDICTMENT

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I've been tracking a dispute about the jury instructions in the Michael Sussmann trial, but only got time to check the outcome last night. At issue was whether some of the extraneous language from the indictment would be included in the description of the charge.

Here's the language the grand jury approved in the indictment.

On or about September 19, 2016, the defendant stated to the General Counsel of the FBI that he was not acting on behalf of any client in conveying particular allegations concerning a Presidential candidate, when in truth, and in fact, and as the defendant knew well, he was acting on behalf of specific clients, namely, Tech Executive-1 **and** the Clinton Campaign.
[my emphasis]

Sussmann had wanted the instructions to include that language claiming Sussmann was lying to hide *two* clients.

Mr. Sussmann proposes modifying the last sentence as follows, as indicated by underlining: Specifically, the Indictment alleges that, on or about September 19, 2016, Mr. Sussmann, did

willfully and knowingly make a materially false, fictitious, and fraudulent statement or representation in a matter before the FBI, in violation of 18 U.S.C. § 1001(a)(2), namely, that Mr. Sussmann stated to the General Counsel of the FBI that he was not acting on behalf of any client in conveying particular allegations concerning Donald Trump, when, in fact, he was acting on behalf of specific clients, namely, Rodney Joffe and the Clinton Campaign.⁵ The government objects to the defense's proposed modification since it will lead to confusion regarding charging in the conjunctive but only needing to prove in the disjunctive.

When Judge Cooper instructed the jury, however, he rewrote the indictment approved by the grand jury to reflect that maybe Sussmann was just hiding one client.

Specifically, the Indictment alleges that in a meeting on September 19, 2016, Mr. Sussmann did willfully and knowingly make a materially false, fictitious, and fraudulent statement or representation in a matter before the FBI in violation of 18 USC 1001(a)(2); namely, that Mr. Sussmann stated to the General Counsel of the FBI that he was not acting on behalf of any client in conveying particular allegations concerning Alfa-Bank and Donald Trump, when, in fact, he was acting on behalf of specific clients, namely Rodney Joffe **or** the Clinton Campaign. [my emphasis]

Now, perhaps there was some discussion I missed finding that the government only had to prove Sussmann was hiding one client – the disjunctive proof business, above. And perhaps it will not matter – I think Sussmann's team raised plenty of issues with Jim Baker's credibility such that

the jury will find the whole prosecution preposterous, but I also think Durham's team may have thrown enough cow manure at the jury to stifle rational thought.

But this slight change – unilaterally replacing “and” with “or” – seems to intervene to help Durham recover from one of the most abusive aspects of the prosecution, his failure to take basic investigative steps before charging Sussmann.

As I've repeatedly shown, Durham did nothing to test Michael Sussmann's sworn explanation for his meeting with Jim Baker – that he wanted to give the FBI an opportunity to intervene before a shitshow story happened during election season – before charging. He spent months and months after the indictment scrambling to find the documentation for the efforts the FBI made to kill the NYT story (and ultimately only found part of that documentation), evidence he should have consulted in advance.

Durham also never subpoenaed Jim Baker for related materials before charging this.

Those two facts are how it was possible that Baker only discovered the September 18, 2016 text in which Sussmann explained he was trying to help the FBI on March 4, 2022, almost six months after the indictment (though Andrew DeFilippis misrepresented this at trial).

We also know from Sussmann's discovery requests that Durham did little to explore Rodney Joffe's relationship with the FBI before charging. While Durham knew that Joffe had been an informant – and had forced FBI to remove him as such, allegedly as retaliation because Joffe wouldn't cooperate with Durham's investigation – it's not clear whether Durham had found two instances where Joffe had offered up more information about the Alfa Bank allegations to an FBI agent (not his handler) who knew his identity and could easily have shared it with investigators.

In other words, even if you think Sussmann was attempting to hide the Hillary campaign's role

in the underlying allegations (which is different from hiding the campaign's role in the meeting with the FBI, though Durham's team surely hopes the jury misses the distinction), the trial actually presented a fair amount of evidence that Sussmann *wasn't* hiding Joffe's role. The FBI *knew* of Joffe's role within days of Sussmann's meeting.

For months, Durham has been spinning a wild conspiracy theory claiming Joffe had direct ties to the Hillary campaign that he simply didn't have. That is the conspiracy theory he laid out in the indictment. That is the conspiracy theory he should be held to.

But Cooper rewrote that part of the indictment such that Durham is not being held to his own conspiracy theories when it matters.

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