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Ethics in Negotiations: Making an Offer They Cannot Refuse without Becoming Don Corleone

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I. INTRODUCTION

Where is the line between zealous advocacy and bribery in litigation? Is that line somehow different in the bankruptcy context? This paper explores these question in light of two recent developments in the law. The first is the ongoing Michael Avenatti case, where Avenatti was charged with violating the Hobbs Act and 18 U.S.C. § 875(d). The second is *In re Butler*,[1] a recent bankruptcy case out of the Southern District of Texas where the court found that an attorney had violated 18 U.S.C. § 152(6) by offering to refer clients to another lawyer in exchange for reconsidering a previous settlement agreement. This paper will proceed by describing these two cases and the statutes that cover them. It will then propose a bankruptcy hypothetical and analyze whether it would represent zealous advocacy or illegal bribery.

II. THE MICHAEL AVENATTI CASE AND THE HOBBS ACT

A. The Case

Avenatti contacted Nike on behalf of his client, a youth basketball coach. His purpose: to make Nike an offer it couldn't refuse. Avenatti claimed to have evidence that Nike employees had funneled money to basketball recruits in violations of NCAA rules. He threated to release this information at a public press conference on the eve of Nike's quarterly earrings call and the annual NCAA baseball tournament. He would only call off the press conference if Nike paid $1.5 million to his client and if Nike would retain him—at a cost of between $15 and $25 million—to conduct an internal investigation of Nike.

Avenatti made these demands over the course of numerous phone calls and meetings. Then, at the conclusion of the meeting on March 24, 2019—a meeting that Avenatti claimed was Nike's last chance to yield to his demands—he was arrested outside of Nike's office. Avenatti was charged with violating the Hobbs Act and its companion statute 18 U.S.C.§ 875(d).

B. The Statutes

The Hobbs Act makes it illegal for any person to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do…."[2] 18 U.S.C. § 1951(a). The Act defines "extortion" as the obtaining of property from another, with his consent, induced by wrongful use or actual or threatened force, violence, or fear, or under color of official right."[3]

The act covers two types of threats: fear of physical violence and fear of economic harm.[4] Both types of threats must be "wrongful" to trigger the statute. Threats of physical force to obtain

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[1] *In re Butler*, No. 19-30007, 2019 WL 2618069, at *1 (Bankr. S.D. Tex. June 26, 2019).

[2] 18 U.S.C. § 1951(a).

[3] *Id.* at § 1951(b)(2).

[4] *See United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012) (extending the Hobbs act to cover fear of economic harm); *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't*, 770 F.3d 834, 838 (9th Cir. 2014) ("Fear, in the context of the Hobbs Act, can include fear of econominc loss."); *Rennell v. Rowe*, 635 F.3d 1008, 1012 (7th Cir. 2011) (same).

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