LAWYER GIFTS TO UNION OFFICIALS AND THE STEERING OF INJURY CASES TO THOSE LAWYERS: FEDERAL CRIMINAL LAW IMPLICATIONS

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I. INTRODUCTION

Work in the building construction trades, maritime, auto, apparel, and other labor-intensive occupations, is often dominated by union representation

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of employees. In these types of physically demanding and hazardous work activities, severe injuries are frequent occurrences. As such, they are an abundant source of potential business for personal injury lawyers, both for workers compensation cases and "third party" litigation. The question presented by this Article is: If a lawyer or law firm were to give things of value, whether it be cash or gifts, to union officials with the goal of inducing union officials to steer injured members to those lawyers, could that activity implicate violations of federal criminal laws?

In answering that question, this Article identifies and explores four ways in which federal criminal laws may be violated by the aforementioned activity. It begins with the historical origins of the federal mail and wire fraud statutes including the "honest services" or "intangible rights" theory of criminal liability, culminating with the Supreme Court's decision in *Skilling v. United States*.[2] The second applicable statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as illustrated by *United States v. Parise*.[3]

The Article then proceeds to an analysis of 18 U.S.C. § 201 (the federal bribery and illegal gratuity statute) and 18 U.S.C. § 1954, which prohibits the giving of any "thing of value" in the context of a union employee welfare benefit or employee pension benefit plan.

Finally, the Article presents a hypothetical fact pattern involving lawyer gift giving as an endeavor to obtain referral of injury cases from union official recipients, and applies the law to the hypothetical facts. As will become evident, research shows that criminal law prosecutions have confronted this type of activity in the past, pursuant to the aforementioned statutes. A question remains as to whether federal investigating and prosecuting agencies have the inclination to make this type of criminal behavior a significant enough priority to bring prosecutions in the future, if found to exist. The conclusion suggests that they should.

II. MAIL FRAUD, WIRE FRAUD AND THE HONEST SERVICES DOCTRINE

A. Historical Origins

The federal mail fraud statute[4] and the federal wire fraud statute[5] criminalize "a scheme or artifice to defraud[]" and which uses mails or wires in furtherance of the scheme.[6] To meet the "in furtherance" requirement, it is not necessary for the defendant to personally participate in the transmission,

[2] Skilling v. United States, 561 U.S. 358, 400 (2010).
[3] *See generally* United States v. Parise, 159 F.3d 790 (3d Cir. 1998).
[4] 18 U.S.C. § 1341 (2012).
[5] 18 U.S.C. § 1343 (2012).
[6] United States v. Morales-Rodriguez, 467 F.3d 1, 7 (1st Cir. 2006).

so long as it is reasonably foreseeable that a wire transmission or mailing would occur in the execution of the scheme.[7] Mail and wire fraud are specific intent crimes.[8] Specific intent to defraud does not require proof of "wilfulness or any other proxy for knowledge of the law[,]" since mistake of law is not a defense to wire fraud.[9] The inferences and meaning taken from the words and conduct of bribery participants, as showing the requisite intent, are matters that juries are well capable of assessing.[10] Since honest services fraud involves a scheme that the participants make efforts to conceal, "circumstantial evidence is usually particularly important in proving the alleged corruption."[11]

The original mail-fraud statute, enacted in 1872, proscribed the use of mails to advance "any scheme or artifice to defraud."[12] In 1909, "Congress amended the statute to prohibit . . . 'any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations or promises*.'"[13] Over time, the various federal courts of appeal interpreted the statute to include not only deprivations of money or property, but also intangible rights.[14] The intangible rights theory came to be known as "honest services" mail fraud.[15] There is no requirement that one of the parties to "honest services" fraud be a public official.[16] Honest services mail fraud applies to private corruption and private employer victims.[17] "Honest services fraud occurs when an employee deprives his employer of its right to have its affairs conducted 'free from deceit, fraud, dishonesty, conflict of interest, and self-enrichment,' and consistent with the employee's fiduciary duties to the employer."[18] By 1982, all federal courts of appeal had embraced the honest services theory of fraud.[19]

B. The McNally Decision

In 1987, the United States Supreme Court ruled, in the landmark case of *McNally v. United States*, that the mail fraud statute was limited to money or property rights and did not extend to an intangible right of the public to good government.[20] In *McNally*, prosecutors alleged a self-dealing patronage

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7 United States v. Bahel, 662 F.3d 610, 641–42 (2d Cir. 2011).
8 *Morales-Rodriguez*, 467 F.3d at 7; United States v. McNeil, 320 F.3d 1034, 1040 (9th Cir. 2003) (wire fraud).
9 United States v Blagojevich, 794 F.3d 729, 739 (7th Cir. 2015).
10 United States v McDonough, 727 F.3d 143, 153 (1st Cir. 2013).
11 United States v. Dimasi, 810 F. Supp. 2d 347, 360 (D. Mass. 2011).
12 Skilling v. United States, 561 U.S. 358, 399 (2010).
13 *Id.*
14 McNally v. United States, 483 U.S. 350, 355 (1987).
15 *Skilling*, 561 U.S. at 404.
16 United States v. Potter, 463 F.3d 9, 16 (1st Cir. 2006).
17 United States v. Caldwell, 302 F.3d 399, 409 (5th Cir. 2002).
18 United States v. Kincaid-Chauncey, 556 F.3d 923, 939 (9th Cir. 2009).
19 *Skilling*, 561 U.S. at 401.
20 McNally v. United States, 483 U.S. 350, 357–59 (1987).

scheme by the petitioners Gray and McNally that defrauded the citizens and government of Kentucky of "intangible rights" including the right to have the Commonwealths' affairs conducted honestly, in violation of the federal mail fraud statute.[21] In particular, the prosecution alleged that a third individual, Howard P. Hunt, as chairman of the state Democratic Party, had *de facto* control over selecting the insurance agencies from which the Commonwealth would purchase its workman's compensation policies.[22] It alleged that Wombwell Insurance Company (an agent) agreed with Hunt that in exchange for a continued agency relationship it would share commissions in excess of $50,000 per year with other insurance agencies specified by him.[23] One of those companies was Seton Investments, which was controlled by Hunt and Gray, and nominally owned and operated by McNally.[24] The Supreme Court defined the issue as:

> [W]hether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions.[25]

The jury convicted petitioners and the Sixth Circuit Court of Appeals affirmed.[26]

The Supreme Court in *McNally* noted courts of appeal decisions that described the intangible rights theory as follows: "[A] public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud."[27] However, the Court read 18 U.S.C. § 1341 as "limited in scope to the protection of property rights."[28] Applying these principles to the facts, the Supreme Court found that "the jury was not required to find that the Commonwealth itself was defrauded of any money or property[]" or "control over how its money was spent."[29] Nor was the jury instructed "that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance."[30] As a result, the Supreme Court held

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[21] *Id.* at 352.

[22] *Id.* at 355–56 (noting that "an individual without formal office may be held to be a public fiduciary if others rely on him 'because of a special relationship in the government' and he in fact makes governmental decisions. . . . The Court of Appeals held that Hunt was such a fiduciary because he 'substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workman's compensation insurance contract to Wombwell and the payment of monetary kickbacks to Seton.'") (internal citations omitted).

[23] *Id.* at 360 (assuming, therefore, that Hunt was a state officer).

[24] *Id.* at 353.

[25] *Id.* at 360.

[26] United States v. Gray, 790 F.2d 1290, 1292 (6th Cir. 1986).

[27] *McNally*, 483 U.S. at 355.

[28] *Id.* at 360.

[29] *Id.*

[30] *Id.*

that the jury instruction on the substantive mail fraud count permitted a conviction for conduct outside the reach of 18 U.S.C. § 1341, and reversed the convictions.[31]

C. Congressional Response to McNally: 18 U.S.C. § 1346

Congress responded in the year following *McNally* by enacting a new statute, which stated that, for purposes of the mail fraud and wire fraud statutes: "[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[32]

III. DEVELOPMENT OF THE CASE LAW

A. Pre-McNally "Honest Services" Mail Fraud

The facts in *United States v. Price* show that Herman McMahan was business manager of Iron Workers Local 601 in Charleston, South Carolina.[33] Charles Price was the business and financial agent of Iron Workers Local 808 in Orlando, Florida.[34] The duties of McMahan and Price included representing the union to the public and recruiting new members.[35]

During his tenure, the financial wellbeing of Local 601 made dramatic improvement due, in part, to McMahan signing up new members from outside of South Carolina.[36] An F.B.I. investigation into the membership application process at Local 601 resulted in an indictment of McMahan and Price, among others.[37]

The indictment charged that McMahan, as business agent for Local 601, was responsible for certifying to the International Union that applicants were qualified and to ensure the "proper use, preparation and transmittal of all the membership applications."[38]

The indictment further alleged that:

> Price would recommend certain workers for membership and would then obtain three blank money orders for payment of the alleged membership fees. These members would be recommended to Local 601 by Price and McMahan would approve the applications and in turn receive monies "over and above the fees set by the union." In furtherance of this

[31] *Id.* at 361.
[32] 18 U.S.C. § 1346 (2012).
[33] United States v. Price, 788 F.2d 234, 235 (4th Cir. 1986).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

> scheme, the defendants caused a Form 7 membership application, for which they had received monies in excess of the set fees, to be delivered through the U.S. mails to the International.[39]

These facts formed the foundation for the charge that defendants engaged in a "'scheme or artifice to defraud the union and its members of their right to McMahan's and Price's faithful and disinterested performance of official duties, free from corruption, partiality, dishonesty and fraud,' in violation of 18 U.S.C. § 1341."[40] McMahan and Price were convicted.[41]

On appeal, defendants contended that economic loss or injury to the union was an essential element of a § 1341 mail fraud scheme to deprive the union of their "faithful and honest-services" and, since economic loss or injury to the union was neither alleged nor proven, the district court erred in denying their motion for judgment of acquittal.[42]

In response, the Fourth Circuit Court of Appeals pointed out that § 1341 included a category of deceptive schemes:

> [W]hich operate to deprive individuals of intangible rights or interests. . . This expansive interpretation was deemed justified since limiting § 1341 to deprivations of tangible interests alone would weaken the efficacy of the statute by excluding from its scope the multifarious schemes which deprive innocent victims of significant, often constitutionally protected, intangible rights.[43]

The Fourth Circuit looked with approval to § 1341 honest services mail fraud prosecutions of government officials,[44] and stated that:

> An elected union official who owes the union members and the public in general faithful and honest services should not be treated any differently, nor held to any different standard. In such a case economic injury need not be shown because the harm caused "lies in the fact that the public official is not exercising his independent judgment in passing on official matters." Thus, the union and its members were not receiving what they were entitled to, that is the honest and faithful services of their officials in the exercise of their official duties. It is in this way that the union was defrauded in this case, and because the mails were used in furtherance of that

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39 *Id.*
40 *Id.*
41 *Id.* at 236.
42 *Id.*
43 *Id.* at 236–37 (quoting United States v. McNeive, 536 F.2d 1245, 1248–49 (8th Cir. 1976)).
44 *See generally* United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

scheme, we affirm the convictions under 18 U.S.C. § 1341.[45]

B. Judicial Response to McNally

The response to *McNally* was immediate, and is illustrated by the decision in *United States v. Runnels*.[46] Frank Runnels was president of Local 22 of the United Automobile Workers ("UAW") union. Runnels was charged in a two-count indictment with mail fraud and conspiracy to commit mail fraud:

> The scheme charged involved the steering by Runnels of workers' compensation claims of retired auto workers to attorney Arnold Shapero and another attorney. In return for up-front money, as well as a monthly payment, Runnels would allow Shapero to attend the monthly luncheon for new retirees. Runnels would indicate to the retirees that Shapero and his law firm were the recommended attorneys for Local 22. The retirees would have their "right" to file post-employment workers' compensation claims explained to them and, at least indirectly, were encouraged to file such claims. Hundreds of claims were in fact filed.[47]

The government proceeded against defendant on an "intangible rights" theory, namely that defendant schemed to defraud the members of Local 22 of their right to have the business of the local "conducted honestly, fairly, impartially, free from corruption, collusion, partiality, disloyalty, dishonesty and fraud."[48] This was based on the fiduciary duty under law between a labor leader and his union members.[49]

"Runnels' defense was that he took no money from [the attorneys] and was only acting in the interest of his membership in seeing that they had good legal representation easily available to them."[50] Specifically:

> Runnels argues that Local 22 was not harmed, because its members received their full workers' compensation and the attorneys' fees were limited by state law and set by a state agency. The assumption underlying this argument, that the choice of a lawyer had no economic value, is belied by the facts. Shapero was willing to pay, and paid, $ 2,000 per month to ensure that Runnels would steer work from members of Local 22 to his firm. That money should have

[45] *Price*, 788 F.2d at 237 (internal citation omitted).
[46] *See generally* United States v. Runnels, 877 F.2d 481 (6th Cir. 1989).
[47] *Id.* at 482.
[48] *Id.*
[49] *Id.* at 482–83.
[50] *Id.* at 483.

> gone to the union members, not Runnels. Runnels could have negotiated a lower fee for the members of Local 22. Alternatively, he could have used that money to provide any of a variety of benefits to the members of Local 22. Had the choice of a lawyer been without value, Shapero would not have paid to influence it.[51]

Runnels was convicted by a jury on both counts of the indictment.[52] While the case was on rehearing, *en banc*, in the Sixth Circuit Court of Appeals, the Supreme Court decided *McNally*.[53] Since the defendant was charged with an intangible rights theory in depriving union members of their right to an honestly run union, the *McNally* decision required that Runnels' convictions be reversed.[54] However, the Sixth Circuit editorialized that "[i]t is unfortunate indeed that a conviction has to be reversed in a case in which the evidence so clearly established wrongful conduct on the part of the defendants."[55]

So, too, was the holding in *United States v. Price*.[56] After their convictions for honest services mail fraud were affirmed, the United States Supreme Court remanded the case for reconsideration in light of *McNally*.[57] On remand, the Fourth Circuit noted that: "The trial instructions, which stated that the jury could find the defendants guilty without finding that the defendants had defrauded anyone of money or tangible property, constitute prejudicial error after *McNally*."[58] The case was remanded to the district court with instructions to reverse the convictions and dismiss the indictment.[59]

C. Post-Amendment Decisions Before Skilling

In *United States v. Boyd*, an "honest services" criminal prosecution was brought against several officials of the United Transportation Union ("UTU").[60] The UTU is a labor union representing railroad, bus, airline and mass transit employees and retirees.[61]

> As a labor organization, the UTU is subject to the Labor Management Reporting and Disclosure Act ("LMRDA").

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[51] United States v. Runnels, 833 F.2d 1183, 1186 n.3 (6th Cir. 1987); United States v. Price, 788 F.2d 234, 237 (4th Cir. 1986) (in an "honest services" prosecution of union officials, "economic injury need not be shown because the harm" stems from the fact that the official "is not exercising his independent judgment in passing on official matters.").
[52] *Runnels*, 833 F.2d at 1188.
[53] United States v. Runnels, 877 F.2d 483–85 (6th Cir. 1989).
[54] *Id.* at 490.
[55] *Id.*
[56] United States v. Price, 857 F.2d 234, 236 (4th Cir. 1988)
[57] McMahan v. United States, 483 U.S. 1015, 1015 (1987).
[58] *Price*, 857 F.2d at 236.
[59] *Id.*
[60] United States v. Boyd, 309 F. Supp. 2d 908, 910 (S.D. Tex. 2004).
[61] *Id.*

> Section 501(a) of the LMRDA imposes several fiduciary duties on UTU's officers and agents, and section 432(a)(4) mandates that the UTU's officers and agents file annual reports disclosing any income or other benefit with monetary value derived from any business dealings with the UTU.[62]

The defendant Boyd, president of the UTU, and others were indicted based upon allegations that the defendants devised and implemented a fraudulent scheme to defraud the UTU and its membership of their honest services.[63] In particular, the scheme involved secret cash payments from attorneys who hoped to acquire or maintain a place on the union's list of Designated Legal Counsel ("DLC").[64] The "cash payments were allegedly used to fund defendants' union campaigns and for their personal use."[65]

The defendant Boyd moved for dismissal of the indictment on several grounds.[66] First, Boyd argued that the honest services fraud "[did] not amount to a crime as a matter of law because" the indictment did "not include any allegation of actual or intended harm to the UTU or its membership[;]" in other words, Boyd's conduct did not lead to the appointment of incompetent attorneys on the DLC, or that the union suffered economic loss.[67] The government pointed to the indictment, which contradicted Boyd's claim that the designated legal counsel were chosen on the basis of legal skill and fidelity to union members, when in truth the attorneys and Boyd were financially beholden to one another.[68] Second, Boyd argued that the LMRDA's 432(a)(4) reporting requirement only required reporting benefits from entities from which the UTU purchased goods or services, and that the UTU did not purchase goods or services from the DLC attorneys.[69] Finally, Boyd argued that the LMRDA contained its own enforcement mechanism to remedy election abuses without criminal prosecution for honest services fraud.[70] Boyd's arguments were rejected.[71] The court found support for its denial of the motion in the duties Boyd owed to the UTU and its members under 29 U.S.C. § 501(a) of the LMRDA, article 16 of the UTU Constitution, 29 U.S.C. § 432(a)(4) and 29 U.S.C. § 481(g).[72] Further, the indictment alleged a breach of these duties by Boyd engaging in commercial bribery.[73] The court ruled that "an indictment alleging honest services fraud need not explicitly allege

[62] *Id.* (internal citation omitted); *see generally* 29 U.S.C. § 401 (2012).
[63] *Boyd*, 309 F. Supp. 2d at 910.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 911.
[67] *Id.*
[68] *Id.* at 912.
[69] *Id.* at 911–12.
[70] *Id.*
[71] *Id.* at 912, 914.
[72] *Id.* at 913, 914.
[73] *Id.* at 913.

actual or material harm to the victims."[74] "The Government need only prove that the defendant's false representations were material. The materiality element is satisfied if the misinformation or omissions 'would naturally tend to lead or [are] capable of leading a reasonable employer to change its conduct.'"[75] Applying these principles to the facts, the district court held that if the breaches of duty alleged above were true, they would "naturally tend to prompt a reasonable employer to take measures to correct and prevent against such conduct in the future."[76] The court also held that an honest services fraud claim would not be pre-empted by the civil enforcement provisions of the LMRDA.[77]

Although it did not involve labor unions, the case of *United States v. Hausmann* was about defendant Hausmann, a Wisconsin personal injury lawyer, who referred certain of his clients to defendant Rise, a chiropractor.[78] Dr. Rise was paid for chiropractic services from insurance proceeds.[79] In return, Rise made corresponding payments, equal to twenty percent of the fees he collected for those services, to various third parties at Hausmann's direction.[80] Those payments totaled $77,062.87 and included $14,900 for handyman services, almost $32,000 to a lawyer and chiropractor marketing firm, and $2,000 for landscaping services at Hausmann's residence.[81]

The defendants were charged with conspiracy to commit mail and wire fraud.[82] The case came before the Seventh Circuit on Hausmann's challenge to the sufficiency of the indictment and Rise's appeal from the denial of his motion for judgment of acquittal.[83]

Defendant's first contention was that the government failed to prove the elements of mail and wire fraud underlying the conspiracy charge.[84] The Seventh Circuit looked to attorney Hausmann's fiduciary duty to his clients and to the Seventh Circuit law established in *United States v. Bloom*,[85] which held that liability under the "intangible rights" theory of the mail and wire fraud statutes, may apply where "[the] defendant misuses his fiduciary relationship (or information acquired therefrom) for personal gain."[86] It noted the client's dependence upon Hausmann to settle their personal injury claims and Hausmann's written representations to clients about the firm's

[74] *Id.*
[75] *Id.*; *see also* United States v. Milovanovic, 678 F.3d 713, 727 (9th Cir. 2012).
[76] *Boyd*, 309 2d at 914.
[77] *Id.*
[78] United States v. Hausmann, 345 F.3d 952, 954 (7th Cir. 2003).
[79] *Id.*
[80] *Id.* at 954 n.1.
[81] *Id.*
[82] *Id.* at 955.
[83] *Id.*
[84] *Id.* at 954–55.
[85] United States v. Bloom, 149 F.3d 649, 656 (7th Cir. 1998).
[86] *Hausmann*, 345 F.3d at 956.

compensation for its work.[87] It looked to the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, which provided that a "lawyer may not allow related business interests to affect [his legal] representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest."[88] The court noted that the trial proofs demonstrated "that Hausmann gained over $70,000 in kickback payments made to third parties for his personal benefit or entities in which he had some interest[] . . . and that such concealed payments deprived clients of the intangible right of honest services."[89]

The defendants contended that Rise's payment to third parties as directed by Hausmann were not kickbacks, but were the legitimate spending of income derived from the use of fees to which Rise was legally entitled.[90] "They maintain that Hausmann's clients had no right to the settlement funds paid to Rise nor, consequently, to the allocation of twenty percent of those funds to expenditures designated by Hausmann."[91] The court rejected this argument and explained that:

> This reasoning ignores the reality that Hausmann deprived his clients of their right to know the truth about his compensation: In addition to one third of any settlement proceeds he negotiated on their behalf, every dollar of Rise's effective twenty percent fee discount went to Hausmann's benefit. Insofar as Hausmann misrepresented this compensation, that discount should have inured to the benefit of his clients. It is of no consequence, despite Appellants' arguments to the contrary, that Rise's fees (absent his discount) were competitive, or that clients received the same net benefit as they would have absent the kickback scheme. The scheme itself converted Hausmann's representation to his clients into misrepresentations, and Hausmann illegally profited at the expense of his clients, who were entitled to his honest services as well as their contractually bargained-for portion of Rise's discount.[92]

Lastly, the court determined that the applicable law was not unconstitutionally vague, did not impermissibly rely on criminal statutes to enforce the terms of a private contract, nor violate principles of federalism by criminalizing conduct that is regulated by state law.[93]

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[87] *Id.* at 954–55.
[88] *Id.* at 956.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 957.
[92] *Id.*
[93] *Id.* at 958–59.

D. The Skilling Decision

In *Skilling v. United States*, the United States Supreme Court significantly restricted the "intangible rights" theory of mail and wire fraud, as reinstated by § 1346.[94] *Skilling* originated in the downfall of Enron Corporation, a major energy company.[95] A government investigation uncovered a conspiracy to elevate Enron's stock prices by exaggerating the company's financial wellbeing.[96] This led to the defendant Skilling, an Enron executive, being charged with a scheme to deceive Enron's shareholders by manipulating Enron's publicly reported financial results and making false public statements about Enron's financial performance.[97] Skilling was convicted of multiple counts against him, "including the honest-services-fraud conspiracy charge[] . . . ."[98]

On appeal to the United States Supreme Court, Skilling argued that 18 U.S.C. § 1346 was unconstitutionally vague.[99] In response, the Court decided to construe, rather than invalidate, the law.[100] It began by pointing out that, immediately following *McNally*, Congress passed a new statute (§ 1346) to specifically include "the intangible right of honest services" within the definitions of the mail fraud (§ 1341) and wire fraud (§ 1343) statutes.[101] The Court believed that Congress, by enacting § 1346, "meant to reinstate the body of pre-*McNally* honest-services law[] . . . ."[102] The Court observed that, while the honest services doctrine occasioned divergent holdings from the Courts of Appeals, "[t]he 'vast majority' [or "core" of the pre-*McNally*] cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."[103] Therefore, the Supreme Court ruled "that [§] 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."[104] "[P]roscrib[ing] a wider range of offensive conduct[] . . . would raise [] due process concerns underlying the vagueness doctrine."[105]

1. The Fiduciary Duty of Union Officials

Skilling's requirement for breach of fiduciary duty in honest services fraud cases is directly applicable to union officials.[106] In *United States v.*

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94 Skilling v. United States, 561 U.S. 358, 364 (2010).
95 *Id.* at 368.
96 *Id.*
97 *Id.* at 368–69.
98 *Id.* at 375.
99 *Id.* at 399.
100 *Id.* at 404.
101 *Id.* at 402.
102 *Id.* at 405.
103 *Id.* at 407.
104 *Id.* at 409.
105 *Id.* at 408.
106 United States v. Milovanovic, 678 F.3d 713, 722 (9th Cir. 2012) (interpreting *Skilling* for the proposition that "breach of a fiduciary duty is an element of honest services fraud" under 18 U.S.C. §§ 1341 and 1346).

Boffa, the Third Circuit Court of Appeals wrote that:

> There is little doubt that union officials owe union members a fiduciary duty. Section 501(a) of the Labor Management Disclosure Act of 1959 (LMDRA), 29 U.S.C. § 501(a) declares that union officials "occupy positions of trust in relation to such organization and its members as a group" and provides that "it is the duty of each such person . . . to refrain from dealing with such organizations as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . . ." This section imposes fiduciary responsibility in its broadest sense, and is not confined to financial dealings by union officials. [Thus,] the LMDRA established, as a matter of federal law, union members' right to the honest and faithful services of union officials.[107]

The United States Supreme Court has also stated it is "beyond dispute" that a fiduciary relationship exists "under any definition of that term," in the context of official union members.[108] It naturally follows, therefore, "that a scheme to defraud employees of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute."[109]

Business managers and business representatives of a union local are "officers, agents, shop stewards, or other representatives" of a union within the meaning of the LMRDA and occupy positions of trust with fiduciary duties to the local.[110] The right of union members to have the loyal services of union officials constitutes an intangible property right.[111] Because § 501 details the duties owed and the persons from and to whom they are owed, § 501 is not unconstitutionally void for vagueness, as measured against the standards of *Skilling v. United States*.[112]

However, in *United States v. Rybicki*, the Second Circuit Court of Appeals noted that "[b]ecause federal law imposes special duties of loyalty on union officials, analysis of such cases may depart from analysis of other

107 United States v. Boffa, 688 F.2d 919, 930–31 (3d Cir. 1982) (internal citations omitted).
108 *Skilling*, 561 U.S. at 407 n.41.
109 *Boffa,* 688 F.2d at 931.
110 McCabe v. Int'l Bhd. of Elec. Workers, 415 F.2d 92, 96 (6th Cir. 1969); Saunders v. Hankerson, 312 F. Supp. 2d 46, 58 (D.D.C. 2004) ("Section 501 imposes liability only on individual union officers for breach of fiduciary obligations, and does not impose any duties on labor organizations as such . . . . [T]he statute is intended to reach only natural persons.").
111 United States v. Coppola, 671 F.3d 220, 234 (2d Cir. 2012) (Hobbs Act prosecution).
112 *Id.* at 236.

private sector cases."[113]

2. Traditional Definitions of Bribery and Kickbacks

With *Skilling*'s limitation of "honest services" mail fraud crime to bribes and kickbacks, it is useful to look at what types of behavior constitute bribes and kickbacks. In *United States v. Rybicki*, a pre-*Skilling* private sector honest services fraud case, the court described typical bribery and kickback cases as involving secret payments to foster or continue "some sort of business relationship or transaction . . . ."[114] One example can be found in *United States v. Anderson*.[115] In Anderson, the defendant sought approval for proposed real estate developments in Aurora, Illinois.[116] After asking for and obtaining official action to support his projects, the defendant gave the City Planning and Development Committee chairman envelopes containing thousands of dollars in cash.[117] The defendant also offered $10,000 in cash to Aurora's Director of Public Works for his official help in another project.[118] Defendant was charged with, and convicted of, honest services fraud pursuant to 18 U.S.C. §§ 1343 and 1346, and bribery pursuant to 18 U.S.C. § 666.[119]

In *United States v. Hancock*, the Seventh Circuit noted that "the term kickback . . . is commonly used and understood to include 'a percentage payment . . . for granting assistance by one in a position to open up or control a source of income[] . . . .'"[120]

Rybicki noted that "[c]ases involving union officials tend to fit the pattern of the private-sector bribery cases."[121]

3. *Quid Pro Quo* and the "Stream of Benefits" Theory of Bribery

But what if the alleged bribe does not consist of cash-filled envelopes as in *Anderson*? What if the steering inducing payments take on a more camouflaged appearance such as meals, sports tickets, paid golf outings, or vacations and other gifts; in other words, a stream of benefits in exchange for official acts? In *United States v. Kemp*, the defendant Kemp was a former Philadelphia city treasurer.[122] The evidence showed that Ronald White, a Philadelphia lawyer, showered Kemp with gifts, including transportation and

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[113] United States v. Rybicki, 354 F.3d 124, 140 n.14 (2d Cir. 2003). Non-union private and public sector honest services fraud cases are integrated into this Article as deemed relevant by the author.
[114] *Id.* at 139.
[115] *See generally* United States v. Anderson, 517 F.3d 953 (7th Cir. 2008).
[116] *Id.* at 958.
[117] *Id.* at 959.
[118] *Id.*
[119] *Id.* at 960. 18 U.S.C. § 666 is a statute that prohibits corruption of officials who administer state and local programs receiving federal funds.
[120] United States v. Hancock, 604 F.2d 999, 1002 (7th Cir. 1979); People v. Bynum, 557 N.E.2d 238, 241 (Ill. App. Ct. 1990).
[121] *Rybicki*, 354 F.3d at 140.
[122] United States v. Kemp, 500 F.3d 257, 264 (3d Cir. 2007).

tickets to a Super Bowl with accommodations and meals, trips to New York and Detroit, numerous meals, and White also arranged for Kemp to receive tickets to an NBA All-Star game with its accompanying festivities.[123] It was alleged that White's corrupt payments and gifts allowed him to acquire control over Kemp's decision making, and that Kemp used that control to direct city contracts to companies that he favored.[124] The Third Circuit Court of Appeals described the "stream of benefits" theory of bribery as:

> "[P]ayments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." While the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent -- a specific intent to give or receive something of value *in exchange* for an official act -- exists.[125]

In *United States v. Jennings*, the Fourth Circuit Court of Appeals explained it this way:

> [T]he intended exchange in bribery can be "this for these" or "these for these," not just "this for that." Further, it is not necessary for the government to prove that the payor intended to induce the official to perform a set number of official acts in return for the payments. The quid pro quo requirement is satisfied so long as the evidence shows a "course of conduct of favors and gifts flowing to a public official *in exchange* for a pattern of official actions favorable to the donor." Thus, all that must be shown is that payments were made with the intent of securing a specific *type* of official action or favor in return. For example, payments may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. This sort of "I'll scratch your back if you scratch mine" arrangement constitutes bribery because the payor made payments with the intent to exchange them for specific official action.[126]

In *United States v. Bryant*, the Third Circuit noted that this "exchange" has its origins in *United States v. Sun-Diamond Growers*, which stated that bribery requires "a *quid pro quo* -- a specific intent to give or

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[123] *Id.* at 265 n.5.
[124] *Id.* at 264.
[125] *Id.* at 282 (internal citations omitted).
[126] United States v. Jennings, 160 F.3d 1006, 1014 (1998) (internal citation omitted).

receive something of value in exchange for an official act."[127] *Bryant* then held that "'a *quid pro quo* may come in the form of a 'stream of benefits.'"[128]

Kemp agreed that *Sun-Diamond*'s statement of the *quid pro quo* requirement for bribery under 18 U.S.C. § 201(b) "is equally applicable to bribery in the honest services fraud context[] . . . ."[129] *United States v. Kincaid-Chauncey* also ruled that in a prosecution for honest services fraud, "at least an implicit *quid pro quo* is required."[130] And, while *United States v. Ganim* found a *quid pro quo* requirement in stream of benefits bribery, it concluded that *Sun-Diamond* was limited to the statutory context in which the case arose—18 U.S.C. § 201.[131]

The "stream of benefits" bribery concept of honest service fraud is still a viable theory of criminal liability, post-*Skilling*.[132]

E. Post-Skilling Decisions

1. Parties Liable for Honest Services Fraud

Can the attorneys who give gifts to union officials be in jeopardy of prosecution for honest services fraud, in addition to the union official recipients? The answer appears to be "yes." In *United States v. Urciuoli*, the defendant was former CEO of Roger William's Medical Center in Rhode Island.[133] The crux of the charge was that defendant bribed—with the pretext of an employment contract involving modest efforts and substantial compensation—a Rhode Island state senator for legislative assistance beneficial to the medical center.[134] The defendant was convicted of multiple counts of honest services mail fraud.[135]

On appeal, defendant argued that *Skilling* limited honest services mail fraud "to cover only the party to a bribe who owes a fiduciary duty . . . ."[136] The First Circuit Court of Appeals emphatically rejected the defendant's argument, writing that:

> Sections 1341 and 1346 by their terms cover *anyone* who engages in a "scheme" to deprive others of the intangible

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[127] United States v. Bryant, 655 F.3d 232, 240–41 (3d Cir. 2011); United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999).
[128] *Bryant,* 655 F.3d at 241.
[129] *Kemp*, 500 F.3d at 281.
[130] United States v. Kincaid-Chauncey, 556 F.3d 923, 943 (9th Cir. 2009).
[131] United States v. Ganim, 510 F.3d 134, 147 (2d Cir. 2007). For other cases illustrating the stream of benefits theory of bribery, *see* United States v. Ring, 628 F. Supp. 2d 195, 208 (D.D.C. 2009); United States v. Dimasi, 810 F. Supp. 2d 347, 354 (D. Mass 2011); United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009).
[132] *Bryant*, 655 F.3d at 241; *see also* Ryan v. United States, 688 F.3d 845, 852 (7th Cir. 2012).
[133] United States v. Urciuoli, 613 F.3d 11, 12 (1st Cir. 2010).
[134] *Id.* at 13.
[135] *Id.*
[136] *Id.* at 17.

> right to honest services. The courts . . . have consistently construed "scheme" in this context to mean that *those who bribe* . . . take part in a scheme to deprive . . . of the honest services of those they attempt to influence. . . . [N]othing in *Skilling*'s language or context suggests that the Court was distinguishing between the fiduciary who received the bribe and the non-fiduciary who gave it[] . . . .[137]

2. Jury Instructions and Harmless Error

Although it did not involve dealings between union officials and lawyers for the referral of personal injury matters, *United States v. Rodrigues* applied *Skilling* principles in a union kickback and steering context.[138] In *Rodrigues*, the defendant was State Director of the United Public Workers, AFSME Local 646, AFL-CIO ("UPW").[139] In that capacity, "Rodrigues negotiated contracts with dental and health insurance providers, . . . on behalf of UPW members and their families."[140] At Rodrigues' request, these providers included "consultation fees" in their contracts.[141] "These fees were effectively to be paid by UPW members as part of their insurance premiums . . . but the fees eventually ended up in the pockets of persons Rodrigues designated as the 'consultants.'"[142] Those consultants were (1) Al Loughrin, who was the stepfather of Rodrigues' girlfriend and secretary and (2) shell companies of which Rodrigues' daughter was "sole shareholder, only Director, and simultaneously the President, Vice President, Secretary, and Treasurer."[143] "During the investigation of these relationships and transactions, it was discovered that neither designated consultant did any real consulting work on these contracts, and that part of the 'consultant's fees' were diverted to Rodrigues's personal use[,]" all without knowledge of the UPW.[144]

A jury convicted Rodrigues of "theft of honest services" from the UPW and its members, and numerous other crimes.[145] After his conviction was affirmed, the Supreme Court decided *Skilling*.[146] The jury in *Rodrigues* had not been instructed in accordance with *Skilling*, so the Ninth Circuit Court of Appeals had to decide whether that error was harmless.[147]

At the outset, the Ninth Circuit Court of Appeals pointed to the

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137 *Id.* at 17–18 (emphasis added).
138 United States v. Rodrigues, 678 F.3d 693, 696–97 (9th Cir. 2012).
139 *Id.* at 694.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.* at 694–95.
145 *Id.* at 695.
146 *Id.*
147 *Id.*

Skilling definition of kickback as: "[A]ny money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]."[148] In its second analytical step, the court looked to the indictment to ascertain whether Rodrigues had been put on notice that he was facing charges that qualified as kickbacks.[149] It held that it did.[150]

Next, the court examined the record and found overwhelming evidence that Rodrigues "steered" consulting fees to his own and his daughter's use; namely, to discharge a personal $10,000 loan to a sham consultant (Al Loughrin) for a sprinkler system installed on Rodrigues' property, and for a truck purchased by his daughter, but titled in Rodrigues' name.[151]

The defense argued that the "consultant's fees" paid to others could not qualify as kickbacks because the fees were not paid directly to him.[152] In response, the Ninth Circuit wrote that: "[T]o honor Rodrigues's argument would allow a person committing honest services fraud to avoid legal responsibility simply by directing illegal payments to a co-conspirator. Such a rule foolishly would create a loop-hole through which all kickbacks could then slither unchecked, thereby eviscerating § 1346."[153] Finally, "Rodrigues protests that this fee arrangement cannot be a kickback because it was not the result of 'coercion or a secret agreement.'"[154] The court rejected this argument by pointing out that the arrangement kept secret three salient facts:

a) The consultants did no consulting work;

b) Rodrigues was funneling money to his own and his daughter's use;

c) The deal increased insurance premiums to UPW members and their families without any corresponding benefit.[155]

The court found this to be "actionable fraud by material omission committed against the UPW and its members."[156]

In resolving the ultimate issue before it, the court looked at the evidence and found that Rodrigues actually received kickbacks; determined

148 *Id.* at 697.
149 *Id.*
150 *Id.*
151 *Id.* at 699.
152 *Id.* at 700.
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*

that the absence of a *Skilling* kickback instruction did not impair the fundamental fairness of the trial; and held that if a *Skilling* kickback instruction had been given, the verdict would have been the same.[157] Thus, the court held that the omission of a *Skilling* kickback instruction was harmless error.[158]

3. Is Tangible Harm an Element of Honest Services Fraud?

In *United States v. Nayak*, the defendant owned multiple outpatient surgery centers.[159] To attract business, Nayak made payments to physicians that referred patients to his centers.[160] These bribes and kickbacks included cash payments and payments for referring physicians' advertising expenses.[161]

Nayak was charged, in an indictment and a superseding information, with honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346.[162] Neither charging instrument alleged that Nayak caused or intended to cause any tangible harm to the patients in the form of higher costs or inferior care; in fact, the government conceded to the district court that the scheme did not cause patients any physical or monetary harm.[163] Nayak moved to dismiss, which was denied by the district court.[164] He then entered a conditional guilty plea, and preserved his right to appeal pursuant to Federal Rule of Criminal Procedure 11(a)(2).[165]

On appeal, Nayak claimed that actual or intended tangible harm to the victims was an element of the crime of private corruption of honest services mail fraud.[166] Since this element was not stated in the indictment and superseding information, he argued that they were legally insufficient.[167]

At the outset, the Seventh Circuit Court of Appeals looked to the plain language of 18 U.S.C. § 1346 (the post-*McNally* mail fraud statute).[168] It noted that a literal reading, which specifically contemplated prosecutions based on deprivations of *intangible* rights, would defeat defendant's argument that the government was required to prove *tangible* harm to convict him.[169] The court acknowledged that some cases within the Circuit had imposed

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157 *Id.*at 701.
158 *Id.*
159 United States v. Nayak, 769 F.3d 978, 979 (7th Cir. 2014).
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.* at 980.
168 *Id.*
169 *Id.*

limiting constructions on § 1346.[170] However, those cases "said nothing about requiring tangible harm to the *victim*; it was tangible benefit to the *defendant* that triggered federal criminal liability."[171] Despite the fact that the defendant's conduct appeared to fall within the confines of § 1346 as interpreted by *Skilling*, the defendant urged the Seventh Circuit to create a limitation of the statute, described as follows:

> [A] requirement that the victims of *private* honest-services fraud suffer actual or intended tangible harm. Congress, he argues, accidentally painted with a too-broad brush in § 1346 by stating that *all* schemes to deprive another of the intangible right to honest services are schemes to defraud. According to Nayak, Congress really intended this language to apply only to schemes by public officials; § 1346, therefore, does not apply to him.[172]

Nayak relied on the Eighth Circuit's decision in *United States v. Jain*, which differentiated between private and public corruption cases, and reasoned that:

> When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible "rights" have been violated. . . . Thus, prior intangible rights convictions involving private sector relationships have almost invariably included proof of actual harm to the victims' tangible interests.[173]

The Seventh Circuit rejected Nayak's reliance on *Jain* for several reasons.[174] First, there is no textual basis in § 1346 for distinguishing private versus public corruption and "§ 1346 applies exclusively to the *intangible* right of honest services, so tangible harm need not be shown."[175] Second, the Supreme Court in *Skilling* explicitly stated that "§ 1346[] appli[es] to state and local corruption *and* to private-sector fraud."[176]

Next, Nayak argued that the *Skilling* court "did not explicitly determine what elements are required to prove a violation of § 1346 by a private actor."[177] The Seventh Circuit Court of Appeals responded to this

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170 *Id.*
171 *Id.*
172 *Id.* at 981.
173 *Id.*; *see generally* United States v. Jain, 93 F.3d 436 (8th Cir. 1996).
174 *Nayak*, 769 F.3d at 982.
175 *Id.*
176 *Id.*
177 *Id.*

argument as follows: "True, but it did not need to: it is contradictory to require the government to show actual or intended tangible harm when the crime being prosecuted is defined as causing or intending to cause *intangible* harm."[178]

Finally, Nayak pointed to the Seventh Circuit Court of Appeals private corruption case of *United States v. Hausmann*, which he read as requiring tangible harm to the victim.[179] In particular, "Nayak seize[d] on the language requiring that the [illegal] scheme must be 'at the expense' of the defendant's victims, arguing that this [language] requires a showing of tangible harm in private corruption cases."[180] The Seventh Circuit Court of Appeals went on to explain that:

> *Hausmann* did not say that the "expense" to the victim had to be a tangible one. . . . Rather, what we found objectionable was the intangible harm that Hausmann's clients suffered when their lawyer violated his fiduciary duty and deprived them of his honest services[] . . . . Nayak's *Hausmann* argument conflates harm with tangibility.[181]

In summary, the Seventh Circuit Court of Appeals stated that:

> [I]t is clear that Congress thought that the victims of fraud could be harmed even if the harm was only intangible—that was the purpose behind enacting § 1346. Although the schemes in many of our private corruption precedents had a pecuniary impact on the person to whom a fiduciary duty was owed, we have never said that tangible harm is required in such a case. Indeed, the intangible harm from a fraud can often be quite substantial, especially in the context of the doctor—patient relationship, where patients depend on their doctor—more or less completely—to provide them with honest medical services in their best interest. Even where a less important fiduciary interest is at play, though, the mail fraud statutes are clear: no showing of tangible harm to a victim is necessary.[182]

Therefore, Nayak's mail fraud charge was sufficiently alleged, and his conviction was affirmed.[183]

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[178] *Id.*
[179] *Id.* at 983.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 983–84.
[183] *Id.* at 984.

IV. RICO

The Racketeer Influenced and Corrupt Organizations Act ("RICO") is a federal statute, which provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[184]

The government must prove the following four elements in order to obtain a conviction under RICO:

> 1) [T]he existence of an enterprise affecting [interstate] commerce;
>
> 2) [T]hat the defendant was employed by or associated with the enterprise;
>
> 3) [T]hat the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and
>
> 4) [T]hat he or she participated through a pattern of racketeering activity.[185]

The statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[] . . . ."[186]

In *United States v. Parise*, "the [National Maritime Union ("NMU")] represent[ed] merchant marine seafarers who work[ed] on commercial shipping vessels."[187] A government investigation into corruption within the NMU uncovered a bribery scheme devised and implemented by Louis Parise Sr. (president of the NMU), his son Louis Parise Jr., and several attorney employees of the Sacks law firm.[188] In 1988, the Sacks law firm hired Parise Jr. as an investigator "responsible for delivering the bribes to the [union] port agents."[189] "Parise Sr. promised these legal referrals to Sacks in exchange for a kickback of 5% of the legal fees generated through NMU cases."[190] A Legal Services Plan ("LSP") was created in 1992 "through which attorneys were to

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184 18 U.S.C. § 1962(c) (2012).

185 United States v. Parise, 159 F.3d 790, 794 (3d Cir. 1998) (citing United States v. Console, 13 F.3d 641, 652–53 (3d Cir.1993)).

186 18 U.S.C. § 1961(4) (2012).

187 *Parise*, 159 F.3d at 793.

188 *Id.*

189 *Id.*

190 *Id.*

provide low or no cost legal services to union members. It was hoped that these members would then be more likely to retain [certain] attorneys, including Sacks, for their more lucrative cases. Parise Jr. was named 'co-administrator' of the LSP."[191]

Parise Jr. was found guilty of violating the RICO statute "based on the jury's finding that Parise Jr. had bribed Pegan and Rywelski in violation of Pennsylvania's commercial bribery statute."[192] On appeal, Parise Jr. first argued that the government failed to connect him with the indicted "enterprise" because several of the racketeering acts charged in the indictment were committed prior to the LSP being formed in September 1992.[193] The appellate court noted that a RICO "enterprise" "is 'an ongoing organization' whose 'various associates function as a continuing unit[;]' however, 'continuity does not require that each member of the enterprise participate in it from beginning to end.'"[194] The court noted that upon its formation, the LSP became part of the ongoing enterprise and was developed as another method of generating personal injury cases.[195] "The major participants in the enterprise remained essentially the same from 1988 on, demonstrating the continuity of the enterprise."[196] Thus, even though the LSP came into existence several years after the NMU Enterprise was formed, Parise Jr.'s actions prior to 1992 could properly support his RICO conviction.[197]

"Parise Jr. next asserts that all of the racketeering charges -- even those relating to post-1992 activity -- are deficient because the government failed to connect any of his alleged acts of bribery with his position as co-administrator of the LSP."[198] The appellate court rejected this argument and held that the defendant's conviction could be sustained without proof that his participation in the affairs of the enterprise flowed from his official role in the LSP.[199] RICO requires that a defendant be employed by *or* associated with an enterprise.[200] To establish "association," it only need be shown that a defendant be aware of the general nature of the enterprise and that the enterprise extends beyond his individual role.[201] Since the evidence showed that Parise Jr. "attended the initial meeting during which the bribery scheme was discussed[,]" this established the element of association.[202]

The third element necessary for a RICO conviction is whether the

[191] *Id.* at 793–94.
[192] *Id.* at 794.
[193] *Id.* at 794–95.
[194] *Id.* at 795 (internal citations omitted).
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 795–96.
[200] 18 U.S.C. § 1962(c) (2012).
[201] *Parise*, 159 F.3d at 796.
[202] *Id.*

defendant participated in the conduct of an enterprise's affairs.[203] Citing the United States Supreme Court in *Reves v. Ernst & Young*, the appellate court held "that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who . . . knowingly further the illegal aims of the enterprise by carrying out the directives of those in control."[204] On this point, the court found that Parise Jr. participated in the conduct of the affairs of the NMU Enterprise for several years before he was given the formal title of "co-administrator" of the LSP.[205] "In his role as investigator for the Sacks law firm, Parise Jr. was integral to the enterprise's plan to funnel personal injury cases to Sacks in order to reap a percentage of the money generated."[206] It observed that Parise Jr. travelled to various cities "paying off the union agents and informing them that Sacks was the official NMU attorney for the East Coast."[207] Parise Jr. was acting at the direction of his union president father who, as head of the enterprise, received substantial kickbacks from Sacks.[208] In 1992, when Parise Jr. became co-administrator of the LSP, he not only continued his payoffs of port agents, he also coordinated the efforts of LSP to select local attorneys to do the routine work for union members, and to channel more lucrative cases to attorneys selected by Parise Sr.[209] At trial, Sacks testified that Parise Jr. was present during the original meeting where the bribery plan was discussed.[210] The court decided that on these facts, "the jury could easily conclude that the government established a nexus between Parise Jr. and the affairs of the NMU Enterprise."[211]

Finally, "[i]n order to prove a RICO violation, the government must demonstrate that the defendant participated in the operation of an enterprise 'through a pattern of racketeering activity . . . .'"[212] The indictment alleged that Parise Jr. violated Pennsylvania's commercial bribery statute by paying union agents to refer personal injury cases to Sacks.[213] On this point, Parise Jr. argued that giving money to union employees for referral of personal injury cases did not constitute "conduct in relation to the affairs of the union" for purposes of the state's commercial bribery statute.[214] In essence, Parise's argument was "that because referring seamen to lawyers [was] not included among a port agent's official duties, it could not constitute 'conduct in relation to the affairs of' the employer."[215] He asserted that the union had "no interest

[203] *Id.*
[204] *Id.* (citing Reves v. Ernst & Young, 507 U.S. 170 (1993)).
[205] *Parise*, 159 F.3d at 797.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.* at 798.
[213] *Id.*
[214] *Id.* at 802–03.
[215] *Id.* at 798.

or stake in which lawyer an injured worker chooses, and that providing legal referrals is not within the scope of the port agents' employment."[216] The appellate court disagreed.[217] The constitution of the NMU described one of its purposes as helping its "'needy, sick and distressed' members."[218] The average seaman was not well educated or literate.[219] The union president "circulated a letter in which he named individual lawyers as the official 'union attorneys' for particular geographic regions."[220] "Sacks was named as the official attorney for the East Coast and was given office space in the union hall in New Orleans."[221] "Union members testified that they relied on [union] port agents for attorney referrals after suffering an on-the-job injury."[222] Based on those facts, the appellate court concluded that providing attorney referrals constituted "conduct in relation to the affairs of the union."[223]

In summary, given the unique relationship between the union, its members, and the port agents, the jury could reasonably find that Pennsylvania's commercial bribery statute had been violated and that this could form a predicate for purposes of RICO.[224] The defendant's conviction was affirmed.[225]

V. BRIBERY AND ILLEGAL GRATUITIES

Title 18 U.S.C. § 201 is a federal statute prohibiting bribery and illegal gratuities.[226] As explained by the Supreme Court in *United States v. Sun-Diamond Growers of California*:

> Subsection (a) of § 201 sets forth definitions

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[216] *Id.* at 798–99.
[217] *Id.* at 793.
[218] *Id.* at 801.
[219] *Id.* at 802.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.* at 803.
[224] *Id.* The Illinois commercial bribery statute states that "[a] person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs." 720 ILL. COMP. STAT. ANN. 5/29A–1 (West 1993). The Illinois district court noted that "[o]nly certain state offenses which are . . . 'punishable by imprisonment for more than one year' constitute 'racketeering activity' under the RICO statute." Perino v. Mercury Fin. Co. of Ill., 912 F. Supp. 313 (N.D. Ill. 1995). At the time of the *Perino* decision in 1995, commercial bribery in Illinois was only punishable by a fine not exceeding $5,000, and therefore, could not trigger RICO. 18 U.S.C. § 1961(1)(A). However, effective January 1, 2004, the sentencing provision for commercial bribery, 720 ILL. COMP. STAT. ANN. 5/29A-3 (West 1995), was amended to create a two-tiered sentence: (a) for benefits less than $500,000, commercial bribery is a Class A misdemeanor; and (b) for benefits of $500,000 or more, commercial bribery is a Class 3 felony.
[225] *Parise*, 159 F.3d at 804. Subsequent to the appellate court's affirmance, defendant filed a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2255. Parise v. United States, No. 96-273-2, 2000 U.S. Dist. LEXIS 9034 (E.D. Pa. June 20, 2000). He claimed that since each of the bribe payments were made to union agents outside of Pennsylvania, he did not violate that state's commercial bribery statute. The court found that the statute did not have extra-territorial effect, granted the petition, and vacated his convictions. *Id.*
[226] 18 U.S.C. § 201 (2012).

> applicable to the section -- including a definition of "official act," § 201(a)(3). Subsections (b) and (c) then set forth, respectively, two separate crimes -- or two pairs of crimes, if one counts the giving and receiving of unlawful gifts as separate crimes -- with two different sets of elements and authorized punishments. The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia*, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official." The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo* - a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.[227]

This law, by its terms, references the giving of something of value to "a public official."[228] The statute defines a "public official" as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof[] . . . in any official function, under or by authority of any such department, agency, or branch of Government[] . . . ."[229]

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[227] United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999) (citing 18 U.S.C. § 201 (2012)).

[228] *Sun-Diamond Growers*, 526 U.S. at 404.

[229] 18 U.S.C. § 201(a)(1) (2012).

In *Dixson v. United States*, the issue before the Supreme Court was the meaning of the term "public official," in the federal bribery statute.[230] The city of Peoria had received two federal block grants that were funded through the Housing and Community Development Act of 1974 ("HCDA").[231] The Act was passed by Congress to address the social, economic, and environmental problems facing cities.[232] As a federal block grant, the expenditure of federal funds and the day-to-day administration of the program were delegated to state and local authorities; however, the federal government retained control to assure compliance with statutory objectives and implementing regulations.[233] Peoria designated United Neighborhoods, Inc. ("UNI"), a social service organization, as the city's sub-grantee to administer the federal block grant funds.[234] UNI hired petitioner Dixson, who became responsible for contracting and fiscal control.[235] "Petitioner Hinton's duties included contracting with persons applying for housing rehabilitation assistance, and contracting with demolition firms."[236] The petitioners were indicted under 18 U.S.C. § 201(a), which charged that they used their positions to receive "$ 42,604 in kickbacks from contractors seeking to work on UNI's housing rehabilitation projects."[237] Petitioners moved to dismiss the indictment on the theory that "as executives of a private nonprofit corporation unaffiliated with the Federal Government, they were never 'public officials'" within the contemplation of the statute.[238] Their motions were denied, they were convicted as charged, and the Seventh Circuit Court of Appeals affirmed.[239]

In the Supreme Court, petitioners argued that they could not have acted "'for or on behalf of the United States' because neither they nor their employer UNI ever entered into any agreement with the United States or any subdivision of the Federal Government."[240] The government's view of a "public official" was that the term covered persons in privity with the United States as well as private individuals responsible for administering federally funded and federally supervised programs.[241]

Since the statutory language in § 201(a) did not adequately define the scope of the term "public official," the Court looked to the statute's legislative history to ascertain Congress's intent.[242] The Court noted that from the

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[230] Dixson v. United States, 465 U.S. 482, 485 (1984).
[231] *Id.* at 484.
[232] *Id.* at 486.
[233] *Id.* at 486–87.
[234] *Id.* at 484.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 485.
[238] *Id.* at 489–90.
[239] *Id.* at 485.
[240] *Id.* at 490.
[241] *Id.*
[242] *Id.* at 491.

beginning, "Congress drafted its bribery statutes with broad jurisdictional language[] . . . ."[243] And, prior to the 1962 statutory revisions, federal courts had interpreted the statutes and the phrase "person acting for or on behalf of the United States" with expansive reach.[244] The Supreme Court believed that when drafting § 201(a), Congress was aware of prior federal bribery statutes and the broad judicial interpretation of them.[245]

Based on this legislative history, the Court held that § 201(a) is a:

> "[C]omprehensive statute applicable to all persons performing activities for or on behalf of the United States," whatever the form of delegation of authority. To determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the federal bribery statute.[246]

The Court clarified that this definition did not apply to all employees of local organizations responsible for administering federal programs, but instead "[t]o be a public official under § 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy."[247] Since petitioners accepted responsibility for distributing funds, and therefore assumed an official role in administering a federal social service program, their convictions were affirmed.[248]

There do not appear to be any reported cases at this time explicitly deciding whether a union officer is a "public official" within the meaning of 18 U.S.C. § 201. However, as was stated in *United States v. Boffa*, § 501 of

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[243] *Id.*

[244] *Id.* at 492.

[245] *Id.* The Court also relied on the House Judiciary Committee's explicit endorsement of the Second Circuit Court of Appeals' decision in *United States v. Levine*, 129 F.2d 745 (2d Cir. 1942), which held that the defendant's responsible position made him a "public official," notwithstanding the absence of a direct contractual bond between the defendant and the United States. *Id.* at 493–96.

[246] *Id.* at 496.

[247] *Id.* at 499.

[248] *Id.* at 497, 501. The determination of whether an individual is a "public official" within the meaning of § 201(a)(1) is a question of law, not fact, and as such it is a matter for resolution by the court. United States v. Madeoy, 912 F.2d 1486, 1494 (D.C. Cir. 1990). Post-*Dixson* cases illustrating the broad, judicial interpretation of "public official" include *United States v. Madeoy*, where the court found an appraiser had official federal responsibilities because the government guaranteed loans based on his recommendations. *Id.* Also, in *United States v. Strissel*, the city housing director administered federal funds in a federal program, therefore the nature of his responsibilities were clearly federal. United States v. Strissel, 920 F.2d 1162, 1163 (4th Cir. 1990). Furthermore, in *Untied States v. Velazquez*, the county deputy sheriff supervised federal inmates and the court found that his responsibilities were federal in nature. United States v. Velazquez, 847 F.2d 140, 141–43 (4th Cir. 1988).

the LMRDA (commonly called the Landrum-Griffin Act) is a federal statutory source for the fiduciary duties of union officials.[249] In *United States v. Bane*, the Court explained "that in enacting § 501 Congress imposed the broadest possible fiduciary duty upon union officers and employees."[250] And in *Hood v. Journeymen Barbers*, the court described the purpose of § 501 as being "a direct and far-reaching response to . . . the misuse of union funds and property by union officials in its every manifestation."[251] The fiduciary duty imposed by § 501 cannot be waived even by the union's own governing instruments.[252] Thus, it is clear that union officials "occupy positions of public trust."

Section 501 also imposes "federal responsibilities" on union officials.[253] In *Phillips v. Osborne*, the court explained that the Landrum-Griffin Act was passed in response to the McClellan Committee Report, which uncovered "widespread practices of misappropriation of union funds and illicit profits by union officers, as well as repeated instances of violence and racketeering."[254] Congress, therefore, was concerned with regulating the internal affairs of labor unions in the hope that if unions became internally more democratic many of those abuses would be eliminated.[255] In *United States v. Goad*, the Eighth Circuit Court of Appeals stated that "[s]ection 501 should be interpreted broadly in order to insure that elected union officials fulfill their responsibilities as fiduciaries to their members[] . . . ."[256] The *Goad* court explicitly noted that the union officers' conduct "are matters of proper concern to the Federal Government."[257]

As fiduciaries occupying positions of public trust and shouldering an obligation to fulfill their federal responsibilities, a reasonable argument can be made for the proposition that union officers are "public officials" within the meaning of 18 U.S.C. § 201, and subject to the risk of federal prosecution for bribery.[258]

VI. UNION WELFARE AND PENSION BENEFIT PLANS, 18 U.S.C. § 1954

18 U.S.C. § 1954 states, in relevant part:

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[249] United States v. Boffa, 688 F.2d 919, 930–31 (3d Cir. 1982).

[250] United States v. Bane, 583 F.2d 832, 834 (6th Cir. 1978).

[251] Hood v. Journeymen Barbers, 454 F.2d 1347, 1354 (7th Cir. 1972).

[252] United States v. District Council, 778 F. Supp. 738, 750 (S.D. N.Y. 1991) ("A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.").

[253] *See generally* Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).

[254] *Id.* at 828.

[255] *Id.* at 828–29.

[256] United States v. Goad, 490 F.2d 1158, 1162 (8th Cir. 1974).

[257] *Id.* at 1163.

[258] 18 U.S.C. § 201 (2012).

> Whoever being—
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> an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
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> . . .
>
> an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
>
> . . .
>
> receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both[] . . . .[259]

In *United States v. Kirkland*, the court held that in order to establish a § 1954 violation, the government must prove a motivational link or nexus "between a thing of value conferred on a trustee and a specific action, decision, or duty of the trustee who receives the thing of value."[260] The court also held that the government does not need to prove that a defendant knew that giving a gratuity was illegal.[261]

Kirkland involved Capital Consultants Inc. ("CCI"), an investment firm, for various union employee pension and welfare benefit plans, subject to 18 U.S.C. § 1954.[262] CCI failed, and the plans suffered catastrophic financial losses, which, in turn, produced drastically reduced union pensions for retired workers.[263] Multiple defendants were indicted for illegally giving or receiving gratuities in violation of 18 U.S.C. § 1954.[264] The court found that the defendant Dean Kirkland, (CCI's principal salesperson), gave multiple hunting and fishing trips, rifles, and Denver Broncos and Colorado Rockies sports tickets to persons who were, at the time of receipt, a trustee of one or more of the plans described in 18 U.S.C. § 1954.[265]

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259 18 U.S.C. § 1954 (2012).
260 United States v. Kirkland, 330 F. Supp. 2d 1151, 1170–71 (D. Or. 2004).
261 *Id.* at 1171.
262 *Id.* at 1156.
263 *Id.*
264 *Id.* at 1157.
265 *Id.* at 1171–73.

Regarding the "because of" requirement in 18 U.S.C. § 1954, the court held that it was enough for the government to prove that the gratuity giving was made in anticipation of, or because of specific past actions that Kirkland intended to reward.[266] The court rejected the government's argument that it need only prove a trustee's actions or decisions were "a" motivational factor, however slight, in regard to the gratuity.[267] It also rejected the defense's request for a "but for" or "primary factor" test in the giver's motivation, or the recipient's motivation, in receiving the thing of value.[268] Rather, since 18 U.S.C. § 1954 did not define the words "because of," the court gave these words their ordinary dictionary meanings.[269] It held, then, that the government was required to prove "that a substantial factor in Dean Kirkland's motivation to give the thing of value was the trustee's specific past or anticipated actions or decisions."[270]

On the evidence, the court found proof that Dean Kirkland knew that making business inroads "would require him to develop personal relationships with the trustees who made the decisions to place union trust funds with investment managers like CCI."[271] To that end, Dean Kirkland was given a generous expense account to entertain trustee and other clients, and CCI would "write off" those expenses.[272] In addition, "[w]hen Dean Kirkland spent CCI money to entertain clients on hunting and fishing trips, he targeted the business managers and chairmen of the trusts because they typically controlled the [money] available for management by CCI."[273] Kirkland also knew that CCI would not continue to approve the hunting and fishing trips unless the trustee who received the trips ultimately voted to invest, increase, or maintain their investments in CCI.[274] When "scrutiny of Dean Kirkland's practices intensified, he attempted to justify the trips by saying they were for 'family' or just 'friends' and, in any event, that 'nobody will know about it.'"[275] The court also found that the recipient of the gratuities voted in favor of investing substantial funds with CCI.[276] Dean Kirkland was found guilty of multiple counts against him.[277]

VII. HYPOTHETICAL FACT PATTERN

The managing partners of a hypothetical law firm (hereinafter referred to as "Law Firm") know that serious work injuries are frequent

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266 *Id.* at 1174.
267 *Id.*
268 *Id.*
269 *Id.*
270 *Id.*
271 *Id.* at 1175.
272 *Id.* at 1175–76.
273 *Id.* at 1176.
274 *Id.*
275 *Id.* at 1179.
276 *Id.* at 1179–81.
277 *Id.* at 1195–96.

occurrences in the union dominated building construction industry in the city where Law Firm practices. They also know that injured workers often ask their union business agents and representatives for the name of a lawyer to handle their workers' compensation and third-party litigation claims. The managing attorneys of Law Firm embark on a campaign to cultivate relationships with union officials, with several goals in mind:

> a) Ingratiate themselves with union officials, so that those union officials steer their injured members to Law Firm;
>
> b) Obtain the unions' private membership lists, so that Law Firm can send its promotional materials via direct mail to thousands of union members, which is not available to Law Firm's competitors;
>
> c) Obtain exclusive use of union halls as satellite law offices to meet with, and sign up, injured union members as clients; and
>
> d) Obtain designation as the union's exclusive law firm for work-related injuries, which Law Firm can utilize to attend union meetings and promote itself as the firm which members are required to use, to the exclusion of other law firms.

In order to achieve these goals, Law Firm lavishes streams of gifts on union officials: free meals, sports tickets, golf equipment and outings, free or discounted legal services to union members for non-injury legal work, clandestine payments to fund the college expenses for children of union business agents, and construction implements with Law Firm's name on them for union officials to distribute to the union membership.[278] As a result of its efforts, Law Firm achieves its goals, and receives significant amounts of money from injury cases steered to it by union officials who received this "stream of benefits."

Case law clearly indicates that the stream of gifts in this context is clothed with the hallmarks of corruption. In this hypothetical, the stream of gifts is made for the purpose of inducing union officials to steer their injured members to Law Firm, as well as to provide Law Firm with exclusive rights to its nonpublic membership list and use of its union halls for law firm business. "The provision of access to material nonpublic information in return for benefits . . . is certainly misuse of office within the context of an honest services bribery scheme."[279] As in *Runnels* and *Hausmann*, it is no

[278] *See, e.g.*, Plea Agreement, United States v. Control Components, Inc., No. 09-CR-162 (C.D. Cal. July 24, 2009) (Defendants in Federal Corrupt Practices Act prosecution pleaded guilty to multiple violations of the FCPA including payment of college tuition for children of certain persons in exchange for business advantages).

[279] Ryan v. United States, 759 F. Supp. 2d 975, 1001 (N.D. Ill. 2010).

defense that the union officials were allegedly acting in the interest of the membership in having good legal representation, or that the members received proper workers' compensation benefits and paid attorneys' fees as established by law.

The gifts would appear to fall in the "stream of benefits" theory of bribery, which is made with the unspoken but obvious intent of retaining the union official's services on the "as needed" basis described in *Kemp*—anticipated steering of the injured union members "whenever the opportunity presents itself." In the hypothetical fact pattern, an honest services fraud case appears to be viable against the gift-giving attorneys at Law Firm, as well as the union officials steering injury cases, who are recipients of those gifts and benefits.

VIII. CONCLUSION

As the above analysis demonstrates, there are multiple theories by which the giving of things of value to union officials as motivation for the steering of workers' compensation and personal injury cases may constitute crimes under federal criminal laws, both as to the attorneys who gave, and the union officials who received the things of value. First and foremost would be the "honest services" or "intangible rights" concepts of mail and wire fraud. Both parties to the activity stated in the hypothetical might also have exposure to criminal liability pursuant to a RICO analysis, the federal bribery statute, and the statutory prohibitions contained in 18 U.S.C. § 1954 pertaining to union welfare and pension plans.

The improper giving to union officials may manifest itself in traditional notions of bribery and kickbacks, or the stealthy and innocuous-appearing "stream of benefits." Regardless of form, the effect is to corrupt the fiduciary duty of union officials by undermining their independent judgment on official matters, violate the codes of professional conduct for attorneys, and cause harm to the public by denying it an informed and independent choice in obtaining legal services.[280] It creates an unfair competitive advantage for the lawyers who acquire wealth by this illegal activity—and a distinct disadvantage to the lawyers who compete for business honestly in the legal marketplace. In order to maintain the integrity of federal criminal laws and to promote a fair and equal marketplace for legal services, an objective observer would suggest that law enforcement would be making good use of federal resources by taking a more active role in investigating and potentially prosecuting the illegal giving of things of value to union officials having fiduciary duties, which are made as an inducement for the steering of

[280] When an injured union worker is directed by his union official to a specific lawyer, the injured worker may not get the opportunity to consider other choices for legal representation as he will most likely follow the recommendation of this higher-up person of authority.

workers' compensation and personal injury clients to the gift-giving attorneys. This activity can be, has been, and should be prosecuted.