1 MR. MARTIN: We have -- no.
2 THE COURT: Or you do object?
3 MR. MARTIN: Both defendants object.
4 MR. COLLINS: Must have had a bad lunch.
5 MR. BHACHU: Judge, I mean, I think this is just
6 reflected in the cases. This instruction has been given
7 multiple times.
8 MR. MARTIN: Your Honor, I tried the Rodi case.
9 MR. BHACHU: Hold on.
10 MR. MARTIN: I'm sure the --
11 MR. BHACHU: The court reporter.
12 (Discussion off record. Mr. Collins exited.)
13 MR. MARTIN: Mr. Bhachu said it was given. I don't
14 doubt him. I just -- I don't remember it.
15 But the reason why this instruction is objectionable in the
16 context of this case, it states that: "The same transaction
17 may constitute bribery and official misconduct under Illinois
18 law."
19 That may be true for purposes of Illinois law, but
20 in this case, we're dealing with RICO conspiracy, where an
21 essential element is a pattern of racketeering activity,
22 which must be two or more acts which must be related but
23 separate from each other, and there must be continuity and
24 all those elements, and this instruction is very dangerous in
25 that it could allow one event, one alleged transaction to

1 form a pattern of racketeering activity.
2 I don't see why this instruction is necessary. I
3 don't know what it's clarifying. And we object strongly to
4 this instruction.
5 MR. ROONEY: We join in that, Your Honor.
6 Our concern is, and Mr. Martin said it, it obscures
7 the requirement for separate and distinct transactions and
8 really is going to serve the purpose of confusing the jury on
9 that issue, and we object strenuously to this.
10 MR. FARDON: Judge, it is accurate as a matter of
11 law.
12 And, you know, it was not our intention to create
13 that confusion, but we will withdraw the instruction.
14 THE COURT: Withdrawn.
15 55?
16 MR. MARTIN: Your Honor, 55 is the Pinkerton
17 instruction. We object to it.
18 And the Court will recall from the Fawell trial, we
19 had a lot of back-and-forth on whether a Pinkerton
20 instruction can be given in the context of a RICO conspiracy
21 charge.
22 The problem that we see is that if the jury looks
23 at count -- looks at the mail fraud charge and finds guilt,
24 then the racketeering conviction is going to follow without
25 individual analysis to the racketeering elements.

1 The concept of RICO conspiracy has been criticized
2 because it expands the concept of vicarious liability pretty
3 far. Adding Pinkerton into the mix, we believe, is
4 objectionable.
5 If the Court were going to give this instruction,
6 it's going to conflict with one of the concluding
7 instructions.
8 And what Your Honor states is that each count of
9 the indictment -- it's government's instruction number 108 --
10 is to be considered separately and separate consideration on
11 each count, and I can pretty much assure you when the jury
12 works through this and reads the Pinkerton and realizes what
13 it says and then looks at 108, they're going to see a
14 conflict and we're going to get a note.
15 We would object to the Pinkerton instruction being
16 given in this case. The government's case should stand or
17 fall on its own merits as to what the defendants did in this
18 case as opposed to using concepts of vicarious liability in
19 the context of a RICO conspiracy.
20 MR. ROONEY: We join in that objection, Your Honor.
21 MR. FARDON: Judge, I mean, this is a major issue,
22 and this is a completely different context, respectfully,
23 than Fawell, although I think the Court did give a Pinkerton
24 type instruction in Fawell.
25 Fawell was not a conspiracy case, Judge. There was

1 no racketeering conspiracy count. It was a substantive
2 racketeering case, and that was the basis of Mr. Martin's
3 objection to Pinkerton liability, which is conspiracy
4 liability.
5 Mr. Martin made the argument that given the fact
6 that we've charged a substantive RICO count and embraced
7 within that count the different kinds of crimes that were
8 also charged as substantive crimes in that indictment, that
9 the Pinkerton threatened to confuse and mislead the jurors as
10 to how they could reach a verdict on the different counts of
11 the indictment. That was the argument that we argued for
12 hours before this Court, and the Court, I think, ended up
13 giving some modified version of a Pinkerton type instruction.
14 Judge, this is, in essence, the pattern Pinkerton
15 instruction, modified to meet the Court's instruction given
16 in the Spano case, and, Judge, it's absolutely applicable.
17 I mean, Pinkerton is all about co-conspirator
18 liability for substantive crimes, and this is exactly what
19 the Pinkerton case held, exactly what it stands for, which is
20 that if you are engaged in a conspiracy, you can be held
21 responsible for the crimes of your co-conspirators if those
22 crimes were committed in furtherance of the conspiracy and as
23 a foreseeable consequence of that conspiracy.
24 That is the law. That's exactly what Pinkerton
25 stands for. It's exactly applicable in this case. Because

1 in this case, you have a RICO conspiracy charged in Count 1.
2 You also have a number of substantive mail fraud crimes that
3 are charged in subsequent counts. And as to any one of
4 those, Pinkerton liability may or may not apply. That's an
5 issue for the jury to decide.
6 But, clearly, this is an appropriate context for
7 this case and, frankly, does not raise the same issues,
8 because this is charged differently than the Fawell case.
9 MR. MARTIN: And, Your Honor, just to respond to
10 that, I did some research this morning. I could not find a
11 case in which a Pinkerton instruction has been approved in a
12 RICO conspiracy case. I was hoping that maybe a case came
13 down after Fawell, but I couldn't find anything.
14 And the reason why I couldn't find anything,
15 because it appears to me that the U.S. Attorney's manual
16 recommends against the government submitting a Pinkerton
17 instruction in a RICO conspiracy case, and the U.S.
18 Attorney's manual that contains that recommendation is cited
19 in the Neapolitan case, 791 F.2d 489, page 505, note 7.
20 And the reason why that is prohibited is the reason
21 which I initially argued, is that the combination of RICO,
22 which is a very broad offense that sometimes judges and
23 lawyers have a hard time figuring out what it means, the
24 combination of RICO and Pinkerton could lead to unwarranted
25 extensions of liability.

1 I don't know why this rule applies in every case.
2 And the prosecutors are told by the Department of Justice in
3 Washington they should not submit this instruction. It's
4 recommended against doing that. And now, all of a sudden, in
5 this case, it's going to be the first one, that I can see, in
6 which a RICO conspiracy charge includes a Pinkerton charge.
7 If I saw a Court of Appeals case which has approved
8 this, then that would be a different matter, but at this -- I
9 couldn't find it. Maybe my research was faulty. But I
10 just -- I can't find a case where this has been approved.
11 MR. BHACHU: Judge, this instruction was given by
12 Judge Grady in the Spano case, and I believe Mr. Martin
13 mentioned earlier that --
14 THE COURT: He was in that case.
15 MR. MARTIN: I was in that case, and I don't know
16 if we objected to it. And that's a different case. It's a
17 District Court judge.
18 THE COURT: Right, but --
19 MR. MARTIN: We may have objected to it, but it
20 wasn't an issue on appeal. I know that.
21 MR. FARDON: Judge, let me also say -- I mean, Mr.
22 Martin references the U.S. Attorney manual. I suppose -- and
23 I certainly, as always, take Mr. Martin at his word, but, you
24 know, I don't -- you know, first of all, I don't have the
25 benefit of having that in front of me, because I didn't know

1 it was going to be raised. I don't know whether it is
2 specific, direct conspiracy as opposed to substantive
3 racketeering counts which do give rise to different
4 considerations, I think.
5 Judge, my understanding of the law is that a
6 conspiracy is a conspiracy. I don't know of any legal reason
7 to treat a racketeering conspiracy different than a narcotic
8 conspiracy different than a 371 conspiracy.
9 And this is the pattern instruction, in essence,
10 explaining and defining conspirator's liability for
11 substantive crimes committed by co-conspirators. That's the
12 law of the land. It has been since the Supreme Court decided
13 Pinkerton in 1946.
14 We had earlier today a request for and we
15 capitulated to a request for instructions as to the elements
16 of conspiracy in the context of defining the racketeering
17 crime here. That's fine, Judge, so be it, but then to want
18 to embrace those -- the requirement that the government prove
19 those elements without also instructing the jury on the law
20 as it applies to conspiracies, and that's embraced and set
21 forth by the Seventh Circuit in the pattern instructions,
22 it's just not fair, it doesn't make any sense.
23 And we do think this is a big issue, Judge. I
24 think Pinkerton liability is an issue in this case because of
25 the way the case is charged, and I do think the jurors are

1 entitled to take in consideration responsibility for
2 co-conspirator conduct other than the sort of terms as
3 defined by the instruction.
4 MR. BHACHU: Judge, the only other thing I would
5 add in addition to Mr. Fardon's comments is that the Supreme
6 Court has made clear that in the context of a RICO
7 conspiracy, general propositions in law relating to
8 conspiracies does apply.
9 I think that point was made clear by the Supreme
10 Court in Salinas, where it actually applied a number of
11 different conspiracy theories that are generally found in law
12 to RICO consequences. They're no different than other
13 conspiracies.
14 In fact, the purpose of the RICO statute is to be
15 far-reaching, because it was intended to reach such things as
16 organized crime, king pins, et cetera, that were otherwise
17 more difficult to reach with other statutes.
18 So the policy here seems to lean towards actually
19 addressing RICO as it were any other type of conspiracy. For
20 that reason, the Pinkerton instruction should apply.
21 MR. MARTIN: And that's exactly my argument, that
22 the policy of RICO has to be far-reaching. You don't have to
23 have the predicate acts committed. The defendant doesn't
24 have to agree that he personally committed the acts. We're
25 getting an instruction that says the acts do not even have to

1 be committed. The participation in the enterprise can be
2 direct or indirect.
3 You have words like "conduct the affairs," which I
4 have no idea what it means, but it sounds pretty bad.
5 And you have such a broad crime. Now we're going
6 to add Pinkerton on top of it. And that's the objection.
7 Now, I agree that there's nothing in the RICO
8 statute that says you can't use a Pinkerton instruction. All
9 I'm saying is that this would be a unique case in that there
10 is no precedent in the Court of Appeals, as far as I can
11 tell, for approving this instruction.
12 I'm not saying it's wrong that it be given, because
13 the Seventh Circuit said that it's not wrong or improper, but
14 it has to be looked at.
15 And in looking at it, I would like to see a case
16 where a Court of Appeals has said: You know what? You can
17 take the broad concepts of RICO, combine it with Pinkerton,
18 and that's okay.
19 There is a concept of personal liability that a
20 defendant should be held accountable for what he does, for
21 what he agreed to, and this just goes too far and we object.
22 THE COURT: Okay.
23 MR. PEARCE: Your Honor, I would like to add, on
24 behalf of Defendant Ryan, you know, precedent in the United
25 States Attorney's manual aside, there are practical and

1 doctrinal reasons that Pinkerton just doesn't apply here.
2 The Pinkerton is a doctrine by which you hold the
3 conspirators responsible for substantive offenses in which
4 they did not directly participate. It's a device that you
5 use to impose derivative liability, and this indictment
6 doesn't do that.
7 This indictment -- each offense that defendants are
8 charged with, they are charged with directly participating.
9 And so I'm not -- I just don't understand what Pinkerton does
10 here.
11 I mean, it's not as if they charged a conspiracy in
12 which George Ryan participated in the mail fraud counts in
13 which he didn't directly participate, and they're trying to
14 hold him liable for those mail fraud counts. They have
15 charged that George Ryan participated directly in all the
16 counts, in all of the substantive counts that he is charged
17 with.
18 So as a doctrinal matter, I just don't think
19 Pinkerton applies here.
20 MR. FARDON: And, Judge, and those are hotly
21 contested issues and have been hotly contested by the defense
22 in this case, point by point, blow by blow, brick by brick.
23 Was George Ryan involved? How was he involved?
24 Judge, we've had six months of that, and to now
25 deprive the jurors of the -- of a straight-up, accurate legal

1 instruction about co-conspirator liability, I mean, I think
2 that Mr. Pearce's argument actually cuts against the result.
3 You know, I do also just want to note for the
4 record that in the Fawell case, there was -- despite the
5 substantive RICO concerns that Mr. Martin raised and the
6 Court took up, there was an instruction given.
7 And the copy I have doesn't have any of the
8 instruction numbers on it, but I have it and I can tender it
9 to the Court.
10 There was a modified version of 5.10 related to
11 conspirator -- co-conspirator liability.
12 So it's not as though this Court did not give any
13 sort of co-conspirator liability instruction in the Fawell
14 case. And, again, the Fawell case didn't even charge a
15 conspiracy, and here we have that charge.
16 THE COURT: Okay. I want to back up for a second,
17 all the way to the discussion about the prosecutor's manual,
18 which ironically we have got defense counsel telling us
19 about.
20 You are saying that that manual says this
21 instruction ought not be given in a RICO conspiracy case and
22 cites Neapolitan?
23 MR. MARTIN: No. The Neapolitan case cites the
24 manual.
25 And there's a discussion about Pinkerton

1 instructions in a RICO conspiracy in the Neapolitan case.
2 THE COURT: Correct.
3 MR. MARTIN: The court didn't resolve the issue.
4 They said it's not wrong or improper to give one, but caution
5 and restraint should be applied.
6 They go on to cite the manual, in which the manual
7 of the federal prosecutor -- well, it's quoted in the case,
8 page 505, note 7.
9 THE COURT: The --
10 MR. MARTIN: Now, and -- on this -- the Neapolitan
11 case was 1986. The manual is -- at least on the bench memo I
12 have here is 1990. I don't know if there's anything that's
13 been updated, but I do know that I haven't --
14 MR. PEARCE: It was the most recent version.
15 MR. MARTIN: The most -- I'm told the most recent
16 version does have the same language, that using Pinkerton in
17 a RICO case could lead to unwarranted extensions of
18 liability, and great care should be taken in applying
19 Pinkerton in a RICO case, and the Department of Justice will
20 not authorize a substantive RICO charge against a defendant
21 based on Pinkerton and so on.
22 THE COURT: Well --
23 MR. FARDON: Judge, I'm not sure what we're talking
24 about. I'm not sure what place this has in this courtroom.
25 I mean, first of all, that is not the law. Those

1 are internal communicated guidelines.
2 Second of all, they're not even dispositive. They
3 don't purport to tell prosecutors exactly when and how to
4 charge things. They're advisory.
5 Judge, you know, the law is the law. And, you
6 know, and every U.S. Attorney's Office -- and I know of
7 none where things are more carefully invented to comply with
8 the law than this one.
9 Decisions are made about how to charge cases. This
10 is a conspiracy case. This Pinkerton instruction is a
11 straight -- government's proposed instruction 55 is a
12 straight Pinkerton conspiracy liability instruction,
13 consistent with the pattern. That is the law.
14 I mean, Mr. Martin -- so I don't -- you know,
15 again, respectfully, and I understand we're talking about the
16 Department of Justice's manual, but I'm not sure what year
17 we're talking about, and, regardless, I don't really
18 understand what place it has in this discussion.
19 The issue is: Is this a lawful instruction that's
20 appropriate and applicable in this case? And I think it is,
21 it clearly is, Judge, on all fronts, on all of the reasons we
22 have already stated, not the least of which is this issue
23 about how this case has been tried.
24 That's all, Judge.
25 MR. ROONEY: Well, Your Honor, just very briefly,

1 to respond to Mr. Fardon.
2 The issue is not how the case has been tried. The
3 issue is how the case has been charged. And the case was
4 charged as a direct case, not a derivative case.
5 We did defend on the basis of the evidence in
6 support of the charges, but there's been charges of direct
7 participation.
8 THE COURT: I am puzzled by the comment that, you
9 know, that no Court of Appeals has addressed this, because
10 there are at least a couple of Court of Appeals cases that do
11 approve Pinkerton instructions in the RICO conspiracy
12 context, maybe others. I don't know.
13 But I'm sure you're familiar with Campione,
14 where -- it's a Seventh Circuit case -- giving a Pinkerton
15 instruction did not result in unwarranted extension of
16 liability in a RICO conspiracy prosecution.
17 And then -- that's a 1991 case -- much more
18 recently, we've got the Ninth Circuit United States versus
19 Shryock.
20 A Pinkerton instruction -- no, I'll get the
21 language.
22 "In the course of instructing on a RICO conspiracy,
23 the District Court gave a Pinkerton instruction.
24 "Appellants contend the instruction permitted the
25 jury impermissibly to find an appellant guilty of the

1 substantive RICO charge without finding that he personally
2 committed two acts of racketeering.
3 "The District Court did not err by giving the
4 Pinkerton instruction. The District Court repeatedly
5 instructed the jury could only convict appellants of the
6 substantive RICO charge if the jury found that appellants
7 committed two racketeering acts.
8 "Furthermore, the District Court instructed that
9 each" -- "that the substantive RICO charge differed from the
10 conspiracy RICO charge, because the substantive charge
11 required a finding that each appellant was guilty of at least
12 two of the charged racketeering acts.
13 "In light of these instructions, we cannot read the
14 Pinkerton instruction as permitting the jury to find
15 appellants guilty of RICO conspiracy on less than the
16 required elements."
17 I think it does seem to me that the argument was a
18 further stretch in Fawell than it is here, where there really
19 is a RICO conspiracy charge.
20 I am inclined to give this instruction. I
21 recognize there is an issue, but it seems to me that it's one
22 that the Court of Appeals is going to have to resolve for us.
23 If Judge Grady gave this instruction, that gives me
24 at least some further confidence that it is appropriate to
25 give it in this context as well.

1 Number 56?
2 MR. ROONEY: Your Honor, we did have an objection
3 to government 56, although I talked with Mr. Fardon over the
4 break, and we proposed a slight modification in the language.
5 I think Mr. Fardon has agreed to it, and assuming
6 that's how it's going to be written, we don't have an
7 objection.
8 THE COURT: And what's the modification? Perhaps
9 you can tell me right now.
10 MR. ROONEY: Zach, I don't have the language.
11 MR. FARDON: You know, I --
12 MS. BONAMICI: We do, sir.
13 MR. FARDON: I've got it, Judge. And I don't know
14 if Mr. Martin has had a chance to see it or not.
15 Mr. Rooney's request, which we have agreed to, is
16 after the second full paragraph in our instruction 56, to add
17 this language: "Proof of several separate or independent
18 conspiracies will not establish a single conspiracy alleged
19 in Count 1 unless one of the several conspiracies which is
20 proved is included within the single conspiracy alleged in
21 Count 1."
22 So that's the language, Judge. And I don't know if
23 Mr. Martin has a position or not.
24 MR. ROONEY: Yeah.
25 MR. LERMAN: That's our language.

1 MR. MARTIN: Okay. No objection.
2 THE COURT: All right. I will indicate it is going
3 to be modified.
4 MR. ROONEY: Wait, wait. I apologize. Yeah, there
5 were -- Zach, I'm sorry.
6 In the very first paragraph, again, this is the
7 same issue that we dealt with earlier. The third line,
8 "State of Illinois, common enterprise," we just think it's --
9 we believe the "State of Illinois" ought to be stricken. It
10 just ought to say "enterprise."
11 MR. FARDON: That's fine.
12 THE COURT: Okay.
13 MR. ROONEY: Thanks.
14 THE COURT: We are moving on, then, to number 57.
15 MR. LERMAN: And, Your Honor, on 57, I guess the
16 first paragraph is one that we would want to reconfigure
17 along the lines that we have discussed.
18 THE COURT: Was that the change that Ms. Bonamici
19 drafted?
20 MR. LERMAN: Correct. And --
21 THE COURT: Now, would you -- will the government
22 have any problem with that?
23 MR. FARDON: Yeah, Judge. That whole argument was
24 in the context of Mr. Martin raising it on the basis of his,
25 in essence, Rule 29 objection to it being roped into the

1 different types of categories.
2 THE COURT: Right.
3 MR. FARDON: Including especially obstruction in
4 the racketeering context. We're out of the racketeering
5 section. This is just what crimes these --
6 THE COURT: Yeah, I don't see the argument as
7 relating to these instructions. The fact is they are --
8 this -- that first paragraph is a very accurate statement of
9 what the charges are and does not lead to the confusion that
10 might have otherwise resulted.
11 MR. LERMAN: Okay, Your Honor. That's fine.
12 THE COURT: All right.
13 MR. LERMAN: We -- just we made some slight
14 modifications to what is the government's instruction 57, and
15 it's our number 38.
16 And the one change in language that I wanted to
17 point everybody's attention to is the second paragraph that
18 says, "First, that the defendant knowingly."
19 We suggest that the language -- that the end of
20 that sentence be -- end this way, that "materially false
21 pretenses, representations, or promises as charged in the
22 indictment" as opposed to "as charged in the particular count
23 you are considering," since there is only one mail fraud
24 scheme that's charged in the indictment. There aren't
25 different mail fraud schemes in each count.

1 THE COURT: Right. Any problem with that?
2 MR. FARDON: I apologize, Your Honor. We are
3 talking about the end of the first --
4 THE COURT: End of the second full paragraph.
5 MR. LERMAN: That begins with the word "first."
6 THE COURT: That begins with the word "first."
7 MR. FARDON: Okay. And it would say "as charged in
8 the indictment"?
9 MR. LERMAN: "In the indictment."
10 MR. FARDON: There's no problem with that, Judge.
11 THE COURT: All right. And, Mr. Lerman, you had
12 another observation to make here?
13 MR. LERMAN: I think that's it, Your Honor. I
14 think --
15 THE COURT: All right. And Mr. --
16 MR. MARTIN: Your --
17 THE COURT: Mr. Martin?
18 MR. MARTIN: Yes, we have a -- Judge, if you look
19 at the "If you find from your consideration" and "If, on the
20 other hand, you find from your consideration," those two
21 paragraphs say, "If you find from your consideration of all
22 the evidence that each of the proposition has been proved
23 beyond a reasonable doubt," the fear is that while all the
24 evidence conflicts with the idea that a --
25 THE COURT: Some of the evidence wasn't admissible?

1 MR. MARTIN: Right. Now, we submitted our
2 defendants' instruction 18 which state -- and I got this out
3 of a prior case -- that just states that, "If you find from
4 your consideration of all the evidence admitted against a
5 defendant," and we'd ask for that language to be given.
6 THE COURT: What's your number again, Mr. Martin?
7 MR. MARTIN: It is number 18.
8 THE COURT: What's the government's view on that?
9 MR. FARDON: Judge, I'm sorry. Just one moment.
10 THE COURT: Sure.
11 (Pause.)
12 MR. FARDON: Judge, that's fine. We will add that
13 language to that charge as well.
14 THE COURT: Okay.
15 MR. MARTIN: And, Your Honor, I've -- forgive me.
16 When we were talking about the RICO conspiracy elements
17 instruction, the same language needed to be added.
18 I did submit the language in the form of a
19 counter-instruction. I just forgot to mention it at the
20 time.
21 MR. FARDON: So where is that one?
22 THE COURT: Which one is that?
23 MR. MARTIN: The RICO --
24 MR. PEARCE: I believe it's 27, Marc.
25 MR. MARTIN: 27? It's government's instruction 27.

1 MR. FARDON: Judge, I don't know if this is going
2 to be a recurring sort of issue in the instructions.
3 Another resolution to Mr. Martin's issue would be,
4 as to all these places, just to say, "If you find that each
5 of these propositions has been proved," rather than the
6 reference to the "consideration of all the evidence."
7 You know -- and, again, I don't know if -- Mr.
8 Martin could probably say there are other places that he's
9 found this issue, but I do worry about just the sort of
10 repetition and the wordiness of it.
11 THE COURT: Yeah, what about just dropping "from
12 your consideration of all the evidence"?
13 MR. FARDON: Judge, I guess that -- that would be
14 our preference, as to both of those and if there are others.
15 THE COURT: You know, I like it anyway. They have
16 to know that what they are being asked to consider is all the
17 evidence. I mean, just to emphasize that, I think, could
18 very well be misleading.
19 I'm fine with just dropping that expression.
20 MR. LERMAN: That's fine.
21 MR. MARTIN: Okay.
22 MR. LERMAN: That's fine, Your Honor.
23 THE COURT: All right. Great.
24 6 -- I mean, I'm sorry, 58.
25 MR. LERMAN: Your Honor, we proposed an

1 alternative.
2 THE COURT: All right.
3 MR. LERMAN: It is our 39.
4 And the only difference is that we have added the
5 word "materially" to precede the phrase "false pretenses,
6 representations, or promises," and that's based on the Neder
7 versus United States case, 527 U.S.1, at page 20.
8 THE COURT: Any problem with that --
9 MR. LERMAN: That's our --
10 THE COURT: -- Mr. Fardon?
11 MR. LERMAN: Zach, that's our 39.
12 MR. FARDON: I'm sorry. I'm just --
13 THE COURT: It is just one word difference, I
14 think.
15 MR. LERMAN: Before each -- each time the phrase
16 "false pretenses, representations, or promises" is used, we
17 use the word "materially" in front of it.
18 THE COURT: You insert the word "materially," yeah.
19 MR. MARTIN: Your Honor, this instruction needs to
20 be considered in conjunction with whether the indictment's
21 going to go back or what form of the indictment's going to go
22 back.
23 We had proposed an alternate of Defendant Warner's
24 instruction 19.
25 Quite frankly, here is our fear, is if the

1 indictment goes back to Count 2, the jury could get it and
2 they could read this instruction, they could read the
3 directive that they only have to agree on one specific false
4 pretense, representation, or promise, and they could look
5 through the indictment and they can take an innocuous
6 allegation, like Larry Warner gave money to George Ryan's
7 secretary as a kitty for license plates, and say, "So you
8 know what? The witness on that was pretty credible. We're
9 going to find Mr. Warner guilty."
10 And he wouldn't be guilty of mail fraud, if that's
11 all they find, but this instruction potentially allows for
12 that when it tells the jury that they only have to agree
13 on -- they don't have to agree on all the acts.
14 And it really goes to whether the indictment's
15 going to be given and what form it's going to be given.
16 What mail fraud requires is a unanimous agreement
17 that the specific materially false pretenses,
18 representations, or promises be proved.
19 And the problem with Count 2 is that it alleges
20 more than false pretenses, false representations, or
21 promises. It alleges things that are not false. It alleges
22 things that in and of itself are not criminal.
23 So giving them this instruction in conjunction with
24 the entire indictment is very dangerous.
25 Now, I know that Mr. Genson feels very strongly

1 about the indictment and -- I mean, the concept in this
2 instruction I don't object to. It's really the indictment
3 combined with this instruction that's the problem.
4 So I would ask the Court to defer on this until we
5 hammer out what we're doing with the indictment.
6 MR. FARDON: Well, Judge, and I guess -- if I can
7 take those one at a time.
8 I mean, first of all, as to Defendant Ryan's
9 instruction 39, understanding the difference is the addition
10 of the word "materially" in a few different places, we don't
11 object to that.
12 THE COURT: Right.
13 MR. FARDON: And we -- you know, if this kind of
14 instruction be given, we would be happy to replace ours with
15 Ryan's 39.
16 As to -- there is, apparently, one other minor
17 difference than we've noticed in the Ryan's instruction, and
18 that is they have added -- excuse me, they have added the
19 words "in portion of" to the fourth line of the second -- I'm
20 sorry, "the portion of" in the fourth line of the second
21 paragraph.
22 I note that for the record. Again, we don't object
23 to that. We're willing to defer to that instruction.
24 As to Mr. Martin's argument and Defendant Warner's
25 instruction 19, I don't think this needs to be deferred or

1 tied to the issue of whether the indictment goes back.
2 I mean, obviously Mr. Genson does have strong
3 feelings, and he's let that be known to the Court, as do we,
4 and we have made our arguments to the Court about the jurors
5 need to see the indictment in this case.
6 Judge, the elements of mail fraud are defined by
7 the Court in these instructions, and they define it very
8 specifically, very particularly, including not only the
9 requirement of false pretenses, representations, or promises,
10 but that those be material.
11 The jury's job is to decide whether or not we have
12 proved each of those elements beyond a reasonable doubt;
13 nothing more, nothing less.
14 This case is absolutely no different than the
15 thousands of other cases that have some sort of mail fraud or
16 conspiracy charge in the sense that there's no risk of the
17 jurors getting confused about what their job is in terms of
18 deciding guilt or innocence on each of these, and there's no
19 risk, Judge, because the Court is going to instruct the jury
20 accurately and adequately on what the elements are and what
21 the definition of the terms used in the elements are.
22 What Mr. Martin wants to do is parse out, and this
23 is clear, particularly from the middle paragraph of their
24 proposed instruction, where they literally are requesting a
25 parsing out of what is allegedly materially false or

1 fraudulent versus what is not allegedly materially false or
2 fraudulent in Count 2 of the indictment.
3 And, Judge, it's not as if that as a practical
4 matter, you couldn't do that. There are a number of
5 different falsehoods that I think the jury could consider and
6 weigh, but as a practical matter, you can't -- you shouldn't,
7 you shouldn't do it because it is not an instruction of the
8 law, which is the point of these instructions.
9 So we do object to that. I don't think -- whatever
10 version of the indictment goes back, I don't think that this
11 kind of instruction is going to be appropriate.
12 MR. MARTIN: And, Your Honor, the -- how is the
13 jury supposed to know what in Count 2 is a false pretense, a
14 false representation, or a false promise? Everything in
15 Count 2 is not a false pretense, a false representation, or a
16 false promise, and that's why we object to the indictment
17 going back.
18 And I don't see the harm in telling the jury what
19 the alleged falsehoods are, and that way, they can look at
20 them and decide whether the government's proved them.
21 But the fear is that the jury will pick out an act
22 that is not within the category of false pretenses, et
23 cetera, find that it was proven and then find Mr. Warner
24 guilty of mail fraud, and that's why we object to this
25 indictment going back.

1 And I agree the jury has to know what the
2 defendant's charged with, but what's the harm in telling them
3 these are the falsehoods and --
4 MR. FARDON: Judge, that's like giving a special
5 verdict form or a bill of particulars or something to a jury
6 where that's just not the objective of these instructions.
7 I mean, I will remind, you know, the Court this
8 instruction that we're debating is government's instruction
9 58, which literally is right after the jurors are instructed
10 as to what the government must prove beyond a reasonable
11 doubt to establish guilt on mail fraud, the first of which is
12 that the defendant knowingly devised or participated in the
13 scheme to defraud or to obtain money or property by means of
14 materially false pretenses, representations, or promises as
15 charged in the indictment.
16 That's the element, Judge. That's based upon the
17 pattern. That's the law. This is no different than any case
18 where, you know, the Seventh Circuit has determined that
19 that's the pattern instruction to be given to the jurors and
20 not that, you know, you break out every, parse out every
21 paragraph or every sentence and ask them to consider them
22 separately, Judge. That's just not the point of these
23 instructions.
24 THE COURT: You know, it seems to me that the
25 concerns that have been raised here might be addressed, at

1 least to satisfy me, by -- in the verdict forms, or whether
2 we're using special interrogatories or the like.
3 I am going to reserve on this, because I think if
4 we ask the jurors to make -- well, we know we will be telling
5 the jurors they have to unanimously agree with respect to
6 which specific action has been proven beyond a reasonable
7 doubt, and as long as we're specific about what they're
8 choosing from, it may be, in my mind at least, satisfactory
9 to address the concerns that Mr. Martin's raised.
10 So I am going to reserve on this until we address
11 the question in connection with the verdict forms.
12 59?
13 MR. LERMAN: No objection, Your Honor.
14 MR. MARTIN: No objection.
15 THE COURT: All right. That will be given.
16 60?
17 MR. MARTIN: Your Honor, we object to 60. This is
18 the -- I think what we referred to as the half Pinkerton
19 instruction.
20 The jury is being given a number of instructions on
21 mail fraud. Many of them are coming from the pattern book.
22 This instruction is not within the pattern book.
23 The jury is being given a number of instructions on
24 vicarious liability, aiding and abetting concepts, conspiracy
25 concepts, and despite the number of instructions written by

1 the Seventh Circuit committee on those concepts, this is not
2 a pattern instruction, and we object to it.
3 MR. LERMAN: We join in the objection, Your Honor.
4 MR. FARDON: Judge, you know, the basic proposition
5 is co-conspirator liability, and we reference 5.10, which is
6 the Pinkerton instruction.
7 And my colleagues are going to set me straight if
8 I'm wrong, but my understanding is that that has, time and
9 again, been found to apply in the mail fraud context, and
10 that's what the case law holds, and I think we've cited cases
11 in that regard, and I think it's appropriate to tell the
12 jurors as much.
13 MS. BONAMICI: Your Honor, the pattern instructions
14 specifically include in instruction 4 co-conspirator
15 liability where a conspiracy is not charged, which would be
16 the case of a scheme.
17 MR. MARTIN: I'm sorry. I can't hear.
18 THE COURT: Yes, say it again.
19 MS. BONAMICI: The pattern instructions
20 specifically include a pattern instruction for co-conspirator
21 liability when the conspiracy -- when a conspiracy is not
22 specifically charged; for example, in a case exactly like
23 this one where a scheme is charged.
24 MR. LERMAN: Well, Your Honor --
25 MR. MITCHELL: Your Honor, that sort of -- this

1 sort of instruction is only appropriate where the defendant
2 has been charged vicariously for the acts of another.
3 Here, every mail fraud count at issue, the
4 defendants are charged directly, not vicariously. So there's
5 a question as to what this actually does.
6 MR. FARDON: Judge, I just -- I don't think that
7 argument is persuasive.
8 I mean, the instruction says: "A person may commit
9 mail fraud without personally committing every fraudulent act
10 that is part of that scheme."
11 I mean, clearly, Judge, we have broad-ranging
12 conduct that's at issue in this case, a number of different
13 leases, a number of different contracts. There have been
14 hotly contested issues from day one as to who did what or
15 didn't do what in connection with each of those different
16 things.
17 This is a fundamental legal principle which is: If
18 you enter the scheme and you otherwise find the other
19 elements in the scheme satisfied, then, you know, the
20 co-schemer is not off the hook by virtue of not having
21 participated in a single -- or each and every fraudulent act
22 that's part of the scheme, as long as it was a foreseeable
23 consequence to the scheme and committed in furtherance of the
24 scheme.
25 That's the law. That is the Pinkerton concept, and

1 it does apply in the mail fraud context, and there's every
2 reason for this jury to receive that kind of instruction in
3 this case given, again, the way it's been tried.
4 I'm making the same argument, Judge, I did when we
5 were talking about Pinkerton liability, and I don't hear
6 anybody contesting that, you know, that same sort of
7 co-conspirator liability applies in the mail fraud context.
8 MR. MARTIN: Your Honor --
9 MR. LERMAN: But there's no conspiracy to commit
10 mail fraud. That's the difference. It -- you are either
11 part of the mail fraud scheme or you are not, and the
12 elements instruction, Your Honor, which is government 57,
13 says, quite clearly, that the defendant -- if -- you are
14 guilty if the defendant knowingly devised or participated in
15 the scheme. That's the law. This is not a
16 conspiracy-to-commit-mail-fraud case.
17 MR. MARTIN: And, Your Honor, this instruction is
18 repetitive of government's instruction number 24, which is
19 Seventh Circuit committee 5.05, which is being given without
20 objection.
21 The language is almost the same. The instruction
22 that is being given reads: "An offense may be committed by
23 more than one person. A defendant's guilt may be established
24 without proof that the defendant personally performed every
25 act constituting the crime charged." So that idea is already

1 being given to the jury.
2 What this instruction does is it takes the
3 Pinkerton concept and grafts it to a mail fraud charge. What
4 Pinkerton says is that: If you are a member of a conspiracy
5 and further crimes were committed that were reasonably
6 foreseeable to the conspiracy, then you find the defendant
7 guilty of those offenses.
8 In this instruction, which, again, is not a pattern
9 instruction, does not tell the jury what to do. It doesn't
10 say: Okay. If you find he was a member of a scheme, find
11 him guilty of further counts.
12 That's what Pinkerton does, and the jury is getting
13 a Pinkerton instruction in this case.
14 So this instruction is repetitive. It's not
15 necessary in this case. It doesn't tell the jury what to do,
16 because there's no need to tell the jury what to do, because
17 they are already being told what to do if the defendant's a
18 member of the RICO conspiracy.
19 So we object.
20 MR. BHACHU: Judge, this instruction is
21 black-letter law. If Your Honor has the time or occasion to
22 look at the cases, I think those cases bear out the
23 instruction.
24 What I have not heard from counsel is any
25 suggestion there is a case out there that indicates it's

1 improper to give this instruction in the course of a mail
2 fraud case.
3 The cases we've cited indicate it is a proper
4 instruction, it is the law, and for that reason, it should be
5 given.
6 MR. MITCHELL: I think if you look at the Macy
7 case, Your Honor, it really makes the point, because there,
8 there was a derivative charge against the defendant related
9 to the mail fraud scheme, something that he didn't actually
10 do.
11 Count 7 in that case was a vicarious liability
12 count. And in that situation, where a defendant was actually
13 charged with a count that he did not directly commit, this
14 sort of instruction might be appropriate. But that just
15 makes the case here why it isn't.
16 The three cases at the bottom that are cited are
17 basically mailing cases. We're not disputing mailing, and
18 there's already a mailing instruction that the individual
19 defendant doesn't have to make the mailing.
20 So in light of all the objections we have heard,
21 I -- this is a highly problematic instruction.
22 THE COURT: You know, I am inclined to think that
23 we have already told the jurors this or we will be telling
24 the jurors this in one fashion or another.
25 Mr. Martin 's already identified a couple of other

1 instructions. 57 is one of them, and another one's, what,
2 24?
3 MR. MARTIN: Yes, Your Honor.
4 THE COURT: I am not sure we need to tell the
5 jurors the same thing again with respect to mail fraud,
6 because I think we've already -- we're already telling them
7 with respect to mail fraud that -- well, that all the
8 defendant need do is participate in this scheme. He's got to
9 participate knowingly, but that's obvious.
10 MR. FARDON: Judge, we made our arguments.
11 THE COURT: All right. I am going to sustain the
12 objection to this instruction.
13 We can move on to, I think, 61.
14 MR. MARTIN: May I have one moment, Your Honor?
15 THE COURT: Sure.
16 (Pause.)
17 THE COURT: While you are conferring, I'm going to
18 go open the door here.
19 MR. MARTIN: Your Honor, we object to the
20 instruction on behalf of Mr. Warner.
21 It's not a pattern instruction. It's confusing,
22 the way it reads.
23 The jury's going to be told that a scheme to
24 deprive another of honest services is a violation of the mail
25 fraud statute. I don't see the necessity for giving this

1 instruction.

2 MR. FARDON: Well, Judge, you know, I think,

3 respectfully, it's necessitated largely on Mr. Genson's

4 arguments, time and again, before this jury, including

5 through his cross-examinations.

6 We have heard him very effectively establish that

7 Mr. Warner is not a public official, didn't have any

8 fiduciary duty to state -- it's sort of a red-blooded

9 capitalism type argument that Mr. Genson properly and

10 effectively has made on behalf of his client, but it injects

11 an issue that the jury needs an instruction on, Judge, and

12 this is the law for an instruction.

13 (Mr. Pearce exited.)

14 MR. BHACHU: In that regard, Judge, the Lovett case

15 actually says: There can be no doubt that a nonfiduciary who

16 schemes with a fiduciary to deprive the victim of intangible

17 rights is subject to prosecution under the mail fraud

18 statute.

19 So it's clearly proper under the Lovett case which

20 cites United States versus Alexander for that proposition.

21 MR. MARTIN: And, Judge, I agree that the first

22 paragraph is an accurate statement of the laws, but the

23 second paragraph, when I said it's confusing, I don't know

24 what it means to a defendant who schemes with a public

25 official.

1 I don't think that that's real clear what that

2 means. And the jury's being given definitions about mail

3 fraud and just adds extra language that is confusing.

4 MR. FARDON: And, Judge, I would note that the

5 paragraph specifically, you know, is conditioned on all of

6 the elements of the offense, as set forth in these

7 instructions, being met.

8 I don't think there's any controversy about the

9 government's burden in terms of the defendant entering a

10 scheme. That's the first element they're instructed on.

11 So there is no language in there that is anything

12 but accurate as a matter of law, and we're not sort of --

13 we're not giving half a loaf. We remind them they have to

14 follow all the instructions.

15 THE COURT: I don't have a problem with this

16 either. I am going to overrule the objection.

17 It does seem to me that we -- it's -- this is some

18 information that we do need to give the jury, that Mr. Warner

19 himself does not have to be a public official in order to be

20 involved in such a scheme, and I don't think it's unduly

21 prejudicial or confusing.

22 All right. 62?

23 MR. LERMAN: Your Honor, we object to the last

24 sentence of that instruction.

25 We have proposed Ryan number 43 that deletes that

1 last sentence.
2 MR. MARTIN: As well as Warner 20.
3 And the last sentence of government instruction
4 number 62 is not in the pattern, and that's why we object to
5 it.
6 MR. MITCHELL: Actually, Your Honor, that language
7 comes from old specific versus general intent crimes, and
8 that distinction is actually disapproved by the pattern.
9 MR. FARDON: Judge, you know, first of all, as a
10 starting point, putting aside the last sentence, which we do
11 think is sort of innocuous and appropriate, what this
12 instruction reflects, Judge, is the pattern instruction but
13 modified in light of the Spano case.
14 And there's no -- there can be, given Spano's
15 holding, no contest but that, you know, the gain of money and
16 property does not have to be to the defendants. Spano very,
17 very clearly said that and talked about the altruistic
18 defendant who seeks only to benefit others.
19 This Court has recognized that, quoted that very
20 language in a pretrial order relating to anticipating
21 instructions.
22 This reflects the current state of the law. I
23 don't think -- other than modifying it in light of Spano, I
24 don't think there are any substantive changes.
25 Defendant Ryan's instruction 43 does not contain

1 those modifications. So as it's currently written and
2 contemplated, references a cause -- a gain of money or
3 property to the defendants, which is, again, just inaccurate
4 as a matter of law.
5 So that's, I guess, the principal and most
6 significant point.
7 MR. MARTIN: And Mr. Fardon brings up a good point.
8 And I agree that that's what Spano states, but it's not just
9 the intent to defraud, where the benefits might flow to
10 another person, or a scheme to defraud, where the benefits
11 might flow to another person aside from the defendant. The
12 way I read Spano is that other person has to be a knowing
13 participant in a scheme. It just can't be some third party
14 out there.
15 The government's instruction just states that the
16 benefits have to flow to another. Our instruction, Mr.
17 Warner 20, states that the other person to whom benefits
18 could flow has to be a knowing participant in the alleged
19 scheme.
20 MR. BHACHU: Judge, if I may address that point?
21 THE COURT: Sure.
22 MR. BHACHU: Spano cites the Lombardo case from the
23 Seventh Circuit, which is a bit older.
24 The Lombardo case makes it clear that the
25 beneficiary does not have to be a participant.

1 Because in that case, as you might know, Lombardo
2 was an individual that was trying to arrange for this -- the
3 sale of a property owned by the Teamsters Union to a senator
4 in order to curry favor with the senator.
5 Lombardo and the other defendants argued that the
6 benefit of this whole scheme was going towards the Teamsters
7 Union, because it was actually going to curry favor with the
8 senator who was in a position to actually have legislation
9 approved that would be a benefit to the Teamsters Union.
10 And so they said: Well, the benefit here isn't
11 going to me, Joey Lombardo, or somebody else that's part of
12 the scheme. It's going to a third party.
13 The Seventh Circuit rejected that notion in
14 Lombardo, which is cited in Spano, and said it doesn't
15 matter. And it said -- I believe it said: Well,
16 traditionally the benefits of a scheme are going to go to the
17 schemers, but it does not matter, because the mail fraud
18 statute doesn't focus on the beneficiary of the scheme as
19 much as the victim.
20 THE COURT: The victim.
21 MR. BHACHU: And for that reason, it does not
22 matter that the benefits of the scheme do not go to a
23 participant.
24 MR. FARDON: And, Judge, in that regard, I want to
25 read a quote that this Court quoted from the Spano court in

1 this Court's pretrial memorandum opinion and order filed on
2 September 23rd of 2005, when some of the Spano issues were
3 litigated and the Court ruled.
4 And the quote, Judge, which appears on page 3 of
5 the Court's order from Spano -- so this is the Court quoting
6 from Spano -- "In the case of a successful scheme, the public
7 is deprived of its servants' honest services no matter who
8 receives the proceeds."
9 That's straight from the Spano case and, Judge, I
10 think undercuts Mr. Martin's interpretation of Spano.
11 THE COURT: Well, I -- that was a conclusion I
12 reached prior to trial. I think there has been at least -- I
13 am looking, because I thought there was at least one thing
14 that's come down since that just confirmed my view of this.
15 The only question that's left is: What about that
16 last sentence? And why is it troublesome?
17 MR. BHACHU: That sentence was given in the Fawell
18 instruction as well, Judge.
19 MR. FARDON: And, Judge, again, I don't know what
20 the specific objection to that is, but it's -- our -- and we
21 do think it's appropriate. It's a much less significant
22 issue than the Spano issue to the government.
23 THE COURT: I guess I'm not -- what's the concern
24 about that last sentence? I thought it was Ryan's counsel
25 who objected to that.

1 MR. MITCHELL: Yeah, it's --
2 MR. LERMAN: Well -- go ahead, Ray.
3 MR. MITCHELL: It's duplicative of the
4 circumstantial evidence instruction already given, but it's
5 also -- it's an actually outdated distinction in terms of --
6 it stems from discussions in specific versus general intent
7 crimes, and that's something that the pattern gets away from.
8 It's non-pattern.
9 And that's our objection to it.
10 MR. MARTIN: And, Your Honor, again, we have this
11 "all the facts and circumstances" language when, in fact, all
12 the facts and circumstances do not relate to Mr. Warner.
13 THE COURT: We'll strike the last sentence;
14 otherwise, the instruction will be given.
15 63?
16 MR. LERMAN: No objection, Your Honor.
17 THE COURT: And Mr. Martin?
18 MR. MARTIN: No objection.
19 THE COURT: 7 -- I'm sorry. 64?
20 MR. LERMAN: We do object, Your Honor, and we have
21 submitted Ryan 44 as the alternative.
22 And I will point to the Court the government's
23 instruction, which is their proposed 64, the second sentence
24 of that instruction says: "In defining honest services, the
25 duty of honest services," it says, "this means that the

1 defendant was required to serve the public interest with
2 honesty, good faith, and loyalty."
3 Your Honor, that is a hopelessly vague instruction
4 that I think allows the jury to do a lot of speculating and
5 gets into the problems that the courts and the case law talk
6 about in terms of common law criminal -- the federal common
7 law criminal statute of mail fraud.
8 We have tried to use the language in our proposed
9 44 that comes right out of the Bloom case, with our second
10 sentence meaning: "This duty means that a public official is
11 not permitted to misuse his office for private gain," and
12 that language is straight from Bloom. That is a bright line
13 that we think gives some meaning to the jury.
14 The idea that the jury is going to determine George
15 Ryan's criminal conduct here on the basis of whether they
16 think he acted with loyalty is hard for us to understand what
17 direction that gives the jury or how they're supposed to
18 define that.
19 MR. FARDON: Judge, there, we're talking apples and
20 oranges.
21 Defendant Ryan's instruction 44 relates to breach;
22 not defining the duty, but what constitutes a breach of the
23 duty.
24 The government has an instruction, and we will get
25 to government's instruction 68, that is a Bloom -- I

1 characterize it as a Bloom/Spano instruction that deals with
2 the private gain issue. And we, you know, we do stand by
3 that proposed instruction and think it's appropriate.
4 This is not -- this instruction, government's
5 exhibit -- instruction 64 we're talking about, is not about
6 defining breach. It's a breach of what? It's about defining
7 the duty.
8 And, you know, first of all, as to the first
9 sentence, I don't know that to be any meaningful contest
10 that, you know, for there to be a breach, that there has to
11 be a duty, and there is a duty, and it's appropriate for this
12 Court to instruct as to the duty of honest services to the
13 people of the State of Illinois.
14 The second sentence, Judge, is, I think, a very
15 tightly drawn sentence that is supported by the different
16 cases, and there are different instructions that have been
17 given in different cases in an attempt to sort of define what
18 the duty owed is in a sort of honest services context.
19 And this is not, in the government's view, anything
20 that is over the top or argumentative. I would be surprised
21 if Mr. Ryan actually contests this.
22 But, Judge, if we're going to talk about breach,
23 which is, you know, completely expected, just, you know, the
24 mail fraud statute and what breach may -- can or may
25 constitute a federal criminal mail fraud violation, if we're

1 going to give those instructions, as I assume we are, then
2 the starting point is to define the duty to be breached, and
3 I do think that this is a fair and not a prejudicial way of
4 doing it.
5 MR. LERMAN: Well, Your Honor, one other thing I
6 want to point out to the Court is that before we gave opening
7 statements in this case, the government tendered proposed
8 mail fraud instructions.
9 And, of course, that wasn't binding, and I don't --
10 I'm not suggesting the government's not allowed to change
11 their mind on what they think the standard ought to be, but
12 this wasn't -- this instruction 64 was not the standard that
13 they gave to the Court on the eve of opening statement.
14 And the language "honesty, good faith, and loyalty"
15 frankly I don't know that that instruction has been given in
16 any case. I'm not sure. I don't know if Mr. Fardon is
17 saying that it has been. I'm not aware that it has been.
18 So they -- what they tendered to Your Honor prior
19 to opening statement was language that dealt with the
20 antagonistic private agenda.
21 You know, Your Honor, I cannot imagine that we want
22 to instruct the jury that the concept of loyalty is one on
23 which criminal liability can be based. I don't know where
24 that's coming from. And --
25 THE COURT: Well --

1 MR. LERMAN: And to define honest services, there
2 are three adjectives used there.
3 Honest services means that you serve the public
4 interest with honesty. That doesn't tell them anything that
5 honest -- I mean, Your Honor, honestly, we could eliminate
6 the second sentence entirely here and not lose the meaning of
7 and the purpose of this instruction.
8 George Ryan owed a duty of honest services to the
9 people of the State of Illinois, and when we get to
10 instruction 68, if that's where Mr. Fardon wants to define
11 the standard for breach, we can do it there, but to tell them
12 that what honest services means is that you conduct yourself
13 with honesty and loyalty and good faith, I don't know how
14 those adjectives help us in this context.
15 The government, prior to opening statement, said to
16 Your Honor they proposed this instruction: "This duty means
17 that the defendant was required to serve the public interest
18 without an antagonistic private agenda."
19 I mean, now to come back at the end of the case and
20 say that honesty, good faith, and loyalty are the standards
21 for criminal liability and mail fraud, I don't think it's
22 founded in the law, Your Honor. And I --
23 THE COURT: You know --
24 MR. LERMAN: -- looked at some of these cases. I
25 don't think these cases hold that either.

1 THE COURT: Well, I have to just point out I think
2 the "antagonistic private agenda" language might have come
3 from me, and that doesn't necessarily mean it's good language
4 to use with a jury.
5 So now back to this proposal, I am also curious
6 about where the expression "honesty, good faith, and loyalty"
7 comes from, although, Mr. Lerman, I have to tell you the one
8 word you particularly attack, "loyalty," is the one that I
9 think the Seventh Circuit's actually used most recently in
10 that United States versus Boscarino case, which is an honest
11 services case, albeit in a private employment context.
12 Do I think this is vague? I don't know.
13 MR. LERMAN: Your Honor, that's why we provide -- I
14 don't know that our instruction number 44, which is an
15 accurate statement of the law -- I think it gives the jury
16 something. It gives the jury a definition that they can deal
17 with that has case law authority to it.
18 You know, I -- for instance, I look at U.S. versus
19 Holzer, and I wonder where -- well, anyway, I'm not going to
20 get into it. I mean, I have made my argument.
21 MR. FARDON: Judge, and, you know, I will just say
22 this. I mean, first of all, in terms of where the phrase
23 "honesty, good faith, and loyalty" -- Judge, there have been
24 different permutations.
25 THE COURT: Right.

1 MR. FARDON: I know at one point in the Fawell
2 case, we had submitted "utmost candor, rectitude, care,
3 loyalty, and good faith without antagonistic or private
4 agenda," and, Judge, those are terms that are lifted from the
5 different cases that discuss and contemplate the duty of
6 honest services.
7 THE COURT: I think that's why I used it in my
8 opinion. I'm --
9 MR. FARDON: And, Judge, Ms. Bonamici has pointed
10 out a lot of that language does come from the Seventh Circuit
11 case Burdett versus Miller, 957 F.2d 1375.
12 But, you know, having said that, I mean, I don't --
13 Mr. Lerman wants us -- to punish us for, I think, if
14 anything, maybe submitting a less aggressive, perhaps,
15 instruction in terms of defining the nature of the duty.
16 I guess, again, you know, Judge, it's not a major
17 issue, but I do think the vagueness is in -- if it's
18 anywhere, it's in leaving the first sentence standing alone
19 and then talking about what constitutes a breach without
20 talking about what's being breached in the first instance.
21 I mean, what is the duty of honest services?
22 That's a legal concept, it's a legal issue that I think this
23 Court has discretion to provide an instruction on.
24 I think the instruction we have given is an
25 appeal-safe instruction, given the use of those terms

1 repeatedly by different courts in addressing what duty exists
2 and what that means.
3 And I do respectfully think we can talk about
4 breach when we get to breach.
5 And I do think there are differences of opinion in
6 light of Spano between what Mr. Lerman's proposing in Ryan 44
7 and what we proposed in government's 68.
8 MR. BHACHU: And, again, the important thing,
9 Judge, is that the instructions do make clear later on that,
10 you know, mere violation of duty isn't sufficient to make out
11 a mail fraud violation. So there's no suggestion left with
12 the jury that it's because the Defendant Ryan might not have
13 been honest or acting loyally to the people, that he was
14 actually guilty of a mail fraud offense.
15 MR. LERMAN: Well, I'm not sure we're -- we need to
16 get to some of those instructions later, Your Honor, because
17 we are going to have some comments on those as well, but we
18 object to this language.
19 THE COURT: Well, let me ask the government what
20 its reaction is to Defendant Ryan's number 44.
21 MR. FARDON: Judge, again, you know, it is our
22 position that that deals with the issue of breach.
23 I mean, this is not sort of an affirmative
24 definition of what honest services -- what the duty means or
25 how it's defined. This is defining it by the breach, and

1 that is by taking the Bloom language, "A public official is
2 not permitted to misuse his public office for private gain,"
3 which, again, was Judge Easterbrook somewhat in dicta, but
4 has been accepted by this Court and accepted elsewhere as a
5 means of defining what can constitute a mail fraud violation
6 in this context.
7 So we don't shy away from Bloom, Judge. I don't
8 mean to suggest that at all. But this does speak to what
9 constitutes a breach versus what defines the duty.
10 You know, in terms of what constitutes a breach, we
11 have submitted our own instruction, which is government's
12 instruction 68, and we do think, Judge, that the law in terms
13 of -- you know, you talk about sort of vagueness. I don't
14 believe Judge Easterbrook provided any explanation as to what
15 he meant by the term "private gain," but what we now know
16 from the Spano opinion is that "private gain" does not have
17 to mean money in the defendant's pocket personally. There's
18 no -- there can be no contest about that anymore in light of
19 Spano.
20 And so our government exhibit -- or government
21 instruction 68 basically takes the Bloom "private gain"
22 concept and modifies it to comply with the law under Spano,
23 and specifically in the second sentence of our 68, which
24 says: "Where a public official or employee misuses his
25 official position or information he obtained in it for

1 private gain for himself or another, then that official or
2 employee has defrauded the public of his honest services if
3 the other elements of the mail fraud offense have been met."
4 So that, I think, responds to the Court's question.
5 We think that is the more accurate and appropriate
6 instruction in terms of defining the breach, where we do
7 think that's a separate issue from the second sentence in
8 government's instruction 68.
9 MR. LERMAN: And, Your Honor, just so you can see
10 what we -- our 45 is our suggestion for their 68, and --
11 THE COURT: Right.
12 MR. LERMAN: -- we have made some changes, and I
13 don't think we're oceans apart.
14 I am not arguing, by the way, with the Spano view
15 that the money doesn't have to go into one of the defendant's
16 pockets. Nobody's arguing that.
17 I think when Bloom says "private gain," private
18 gain is not confined to whose pocket it goes into, and I
19 think it draws an easy and definable line for the duties
20 of -- so that the jury can understand what it is they should
21 be focused on and where it is that the law requires the
22 defendants to -- what side of the line they have to stay on.
23 THE COURT: Here's what I am going to do.
24 I am going to overrule any objection to the first
25 sentence of government's number 64.

1 On the second sentence, I want to a spend little
2 bit more time reading these cases.
3 My quick look right now suggests that the word
4 "loyalty" gets used. I don't know about these others.
5 I am advised by the government that this is the
6 fairest summary of what the cases say, and I just want to
7 confirm that before I decide whether to give this
8 instruction, which I do think has an element of vagueness.
9 Remember that, you know, I made, pretty much, an
10 emphasis on the notion that, you know, Mr. Ryan's positive
11 contributions to the public interest, such as they are,
12 whatever they are, aren't really all that relevant. And so
13 some kind of generalized obligation to be -- to show good
14 faith and loyalty, it seems to me, arguably suggests that he
15 should be entitled to show that he did exactly that with
16 respect to a number of policy decisions that I viewed as
17 irrelevant and kept out.
18 So I'm at least a little concerned about that, and
19 I want to look at what the case law says about this issue.
20 Let's move on to 65.
21 MR. FARDON: Judge, I want to be very clear for the
22 record just in terms of -- I don't know that that exact
23 phrase, "honesty, good faith, and loyalty," appears in any
24 one of these cases.
25 THE COURT: No, I know, and I -- you did not

1 represent that, Mr. Fardon. In fact, I took a look, and I
2 don't think it does. You know, I punched that little phrase
3 in.
4 MR. FARDON: The truth is I have no idea, Judge,
5 but that's --
6 THE COURT: But I think what I was led to
7 understand is that this is the fairest summary of what all
8 these cases say in a general way, and I am prepared to
9 confirm that and make a determination about whether we should
10 give --
11 MR. BHACHU: Judge, just --
12 THE COURT: -- that second sentence.
13 MR. BHACHU: -- so we're clear, some of the cases
14 go to the first sentence, the proposition that a public
15 official --
16 THE COURT: Sure.
17 MR. BHACHU: -- owes honest services. And, again,
18 it's always going to be in terms of honest, faithful
19 services, as used on occasion.
20 The Burdett case is probably the one that has the
21 greatest applicability to the phrase that we ultimately rest
22 upon.
23 THE COURT: Okay.
24 MS. BONAMICI: And, actually, the Burdett case is
25 the one that forms the basis of it. However, we took out all

1 of the things that we thought were more argumentative.
2 THE COURT: Okay. So I'll --
3 MS. BONAMICI: We have really watered down that
4 definition.
5 THE COURT: I'll particularly check that one out.
6 65 and then we will -- and it's almost 4:00. We
7 will take a break at 4:00 o'clock.
8 MR. LERMAN: Yeah, Your Honor, we object to 65.
9 And if I could -- I just want to take a look at my
10 notes for a second.
11 This is -- it's not a pattern instruction. We
12 don't have a comparable instruction to point the Court to.
13 Clearly, the first sentence, Your Honor, I think
14 seeks to impose criminal liability on disclosure obligations
15 that are not otherwise subject to criminal law.
16 That first sentence, "A public official or employee
17 has a duty to disclose material information to a public
18 employer and, therefore, breach" -- a breach of that duty
19 supposedly, I guess from the government's standpoint, could
20 constitute the basis for a mail fraud conviction here, and I
21 don't think that's right or accurate in terms of what the law
22 is.
23 You can't criminalize a state law failure to
24 disclose in the way that this first sentence seeks to do.
25 I know that the second sentence -- I don't like the

1 way the second sentence is written, Your Honor.
2 I'm not sure -- Your Honor, I'm not sure why we
3 need this instruction. We didn't submit an equivalent like
4 it. I'm not sure what it accomplishes for us.
5 I think the first sentence is just -- is improper
6 and shouldn't be given to the jury.
7 The second sentence, I suppose a case like Keane or
8 something like it supports this proposition, but, again, I
9 don't know why this is being proposed.
10 MR. FARDON: Judge, it's being proposed --
11 MR. LERMAN: It was -- and just to finish -- and,
12 again, I'm not trying to punish the government for what they
13 did or did not submit when we had our initial discussions --
14 THE COURT: Right.
15 MR. LERMAN: -- about mail fraud. I'm not trying
16 to do that at all. But I will point out that this is not
17 something that was submitted in that initial set of
18 instructions.
19 And it may be that the government wants this now
20 that they have seen the evidence come in, and that's fine,
21 but I don't think this is an appropriate instruction.
22 MR. BHACHU: Judge --
23 MR. FARDON: The point --
24 MR. BHACHU: Zach, just a second, just a second.
25 A point of correction. I think something like this

1 was submitted in the earlier instructions that the government
2 did submit. It wasn't a standalone instruction. It came,
3 again, in the middle of it.
4 However, the cases on this subject are legion, that
5 this is an appropriate basis for honest services fraud.
6 For example, the Woodward case that we cite in our
7 papers, it says: "A public official has an affirmative duty
8 to disclose material information to the public employer.
9 When an official fails to disclose a personal interest in a
10 matter over which he has decision-making power, the public is
11 deprived of its right either to disinterested decision-making
12 itself or, as the case may be, to full disclosure as to the
13 official's potential motivation in light of the official
14 act." And that cites the Sawyer case.
15 There are also a number of Seventh Circuit cases
16 that also approve this instruction. There's the Keane case
17 from 1975, where the Seventh Circuit said: It was clear to
18 us that one breaches public trust by concealing a personal
19 financial interest from the public and a public body charged
20 with responsibility of passing judgment on matters affecting
21 a financial interest that the -- that person has.
22 This is unquestionably the appropriate -- an
23 appropriate instruction in an honest services case, and the
24 cases we cite make it abundantly clear that a number of
25 circuit courts of appeal have recognized this as a basis for

1 honest services fraud.
2 MR. FARDON: Judge --
3 MR. LERMAN: Your Honor, the --
4 MR. FARDON: -- if I could just add -- I'm sorry,
5 Brad.
6 MR. LERMAN: Go ahead.
7 MR. FARDON: If I could just add two points.
8 You know, the first is just in terms of -- since
9 this, you know, is a recurring theme -- and I actually mean
10 that respectfully, but I'm the one who drafted and submitted
11 the initial fraud instructions in the motion prior to.
12 The point of that, Judge, was in anticipation of --
13 and the motion specifically said it was in anticipation of
14 this quid pro quo corrupt dollars for contracts argument that
15 had been made in the papers, made on the website, made in the
16 press conference about Defendant Ryan.
17 And so we were dealing with and asking the Court to
18 deal with, on the front end, before opening statements, those
19 issues in particular. We did not purport it to be or intend
20 for it to be a comprehensive set of instructions, and I think
21 that was clear.
22 You know, Judge, let me say, more importantly, this
23 is a very big issue, from the government's perspective, and
24 here is why.
25 I mean, there has been a theme throughout this

1 trial, and appropriately so, of, you know, lack of sort of
2 nexus between the flow of benefits and/or the cash and the
3 contracts and leases and other official awards that are
4 alleged to be on the other sort of end of this flow of
5 benefits in either direction.
6 Judge, that's been a huge theme. The case law --
7 and this really leads into Amar's point. The case law, you
8 know, is unanimous that there are two different contexts, two
9 different scenarios that typically can lead to honest
10 services mail fraud convictions.
11 In addition to the Woodward case, which was just
12 cited, there's also the Panarella case, which is a Third
13 Circuit case, where the Third Circuit noted that: "Honest
14 services fraud typically occurs in two scenarios; first,
15 bribery and, second, failure to disclose conflict of interest
16 resulting in personal gain."
17 And in that case, holding that: "Where a public
18 official conceals a financial interest in violation of a
19 state criminal law and takes discretionary action in his
20 official capacity that the official knows will directly
21 benefit the concealed interest, the official has deprived the
22 public of his honest services, regardless of whether the
23 concealed financial interest improperly influence the
24 official's actions."
25 THE COURT: What's the citation there?

1 MR. FARDON: That is 277 F.3d 678, and the quote is
2 at 692-93.
3 And, Judge, I'll note that case and that quote was
4 also cited in our pretrial motion in connection with the mail
5 fraud instructions.
6 THE COURT: All right.
7 MR. FARDON: Judge, that is an independent legal
8 basis -- and it's not just the Panarella case. That is also
9 the holding of the Woodward case, the Sawyer case.
10 Woodward, 149 F.3d at 55, the First Circuit:
11 "Honest services fraud have typically been found in two types
12 of circumstances. Number one, bribery, where a legislator
13 was paid for a particular decision or action and, number two,
14 failure to disclose a conflict of interest resulting in
15 personal gain."
16 And, Judge, what we have in this case is evidence
17 related to concealment, and specifically concealment on
18 statement of economic interest forms -- and I can go down the
19 list of the different kinds of benefits that are alleged to
20 have been received by Mr. Ryan and not disclosed on those
21 forms, the most-obvious-of-which example would be the Harry
22 Klein comps in Jamaica, at the same time that he is making
23 official decisions that confer public benefits on Mr. Klein
24 in the form of the release and the modifications to the
25 currency exchange rates.

1 Judge, that is an independent basis for mail fraud
2 liability under the law and one which we have in spades in
3 this case.
4 And I do think that the jury, especially with the,
5 again, understandable desire on the other side to focus on
6 the bribery scenario that can lead to mail fraud liability, I
7 do think we are entitled to the instruction on this side of
8 the fence, which is really more the concealment side of the
9 fence, concealment in a manner that, you know, conceals the
10 potential benefit or flow of benefits to the public official
11 or others consistent with Spano --
12 MR. LERMAN: But --
13 MR. FARDON: -- and, again, bleeds into the other
14 elements of the offense which the Court is instructing on.
15 MR. LERMAN: -- Your Honor, the -- let me just
16 rewind us a little bit here, because, at least with respect
17 to Keane and the failure to disclose financial interest in
18 the Seventh Circuit, that relates to direct interest that the
19 public official has and fails to disclose.
20 If George Ryan was an owner, for example, of the
21 Joliet property and he failed to disclose his ownership,
22 that's Keane. That's the fact pattern in Keane.
23 The fact pattern in this case is closer, much more
24 analogous to the bribery fact pattern.
25 What Mr. Fardon just described, for example, with

1 Harry Klein is a failure to disclose benefits coming to Ryan
2 from Klein as a result of Klein's financial interest in the
3 South Holland property.
4 That's the allegation in the case. That's much
5 closer to the -- what Mr. Fardon said in his opening
6 statement I have always assumed was the theme of the
7 government's case, the hidden flow of benefits between people
8 who benefited from George Ryan's activities, allegedly
9 benefited from his activities as a public official, and the
10 benefits that they gave to George Ryan, allegedly, as a
11 result of that.
12 Those -- that is not the kind of disclosure that
13 Keane was talking about, for example. And when you talk
14 about Woodward and Sawyer -- and it's kind of ironic, because
15 I've been chastised on occasion for citing cases from other
16 circuits, and Ms. Barsella is often standing at the podium
17 saying, "But we live in the Seventh Circuit."
18 Panarella, for example, the Third Circuit case that
19 Mr. Fardon cited to the Court, rejects Bloom. It is not the
20 law of this circuit and, in fact, rejects the law of this
21 circuit.
22 Sawyer and Woodward are First Circuit cases that I
23 think go far beyond what's ever been decided here in the
24 Seventh Circuit in terms of their analysis.
25 And so really, Your Honor, I come back again to the

1 notion that this instruction invites the jury to convict
2 George Ryan without finding that he received any personal
3 gain.
4 There's nothing in this instruction that deals with
5 personal gain to George Ryan. This instruction is: If he
6 didn't disclose something, then you can convict him of mail
7 fraud.
8 That's how I'm -- I'm being simplistic with the
9 Court, but that's my principal objection to this. If he
10 doesn't disclose something on his statement of economic
11 interest, and that's all you need to find, you've got him for
12 mail fraud, and that is not what this case is about and
13 that's why this instruction bothers me as much as it does.
14 I do think that there's an attempt in some of these
15 instructions to minimize what the government actually has to
16 show this jury. They have promised them a hidden flow of
17 benefits that isn't -- that are related.
18 And, again, this isn't -- I'm not talking about
19 quid pro quo in the sense that one thing was given for
20 another, but there's a hidden flow of benefits, that's their
21 key theme. George Ryan was receiving things from certain
22 people who were receiving benefits, allegedly, from him over
23 time, and that's not what this instruction is inviting the
24 jury to convict him on, and I don't think -- I'm very
25 concerned about citing cases like Woodward, Sawyer, and

1 Panarella to the Court for the proposition that this is what
2 the jury ought to be looking at, and I don't think this
3 instruction should be given.
4 MR. FARDON: Judge, the charges and the
5 allegations, including in my opening, but, more importantly,
6 in the indictment in this case, go beyond just a flow of
7 benefits. They do allege that Mr. Ryan had an affirmative
8 duty to disclose, in compliance with the state disclosure
9 laws, his relevant and economic circumstances, including
10 gifts and benefits.
11 We've heard testimony about that. Those statement
12 of economic interest forms are in evidence.
13 And the reality is that lying on those forms in a
14 material manner, consistent with the other elements of mail
15 fraud, is and -- can be and is under the law sufficient in
16 terms of establishing a fiduciary breach, a breach of honest
17 services.
18 This instruction does not say you should find the
19 defendant guilty if. This instruction is defining what may
20 constitute a deprivation of honest services, which, again, I
21 do think is necessary and appropriate, not just because of
22 the nature of the allegations in this case, but because of
23 the nature of the defense to those allegations, which wants
24 to focus on sort of one category of alleged breach without
25 focusing on all the categories of breach.

1 MR. LERMAN: But, Your Honor --
2 THE COURT: Well, let me just suggest here -- I do
3 want to take a break, but let me just suggest that if the
4 point here is we're not saying: "This is what you have to
5 find in order to find a violation or find a breach," but
6 instead to say: "Here is how we are defining the scope of
7 the duty," then I wonder whether it wouldn't make more sense
8 to say -- and I recognize this may not eliminate any
9 objections there may be, but it may be more appropriate to
10 say in the second sentence: "An official or employee has an
11 obligation to disclose material or financial interests in any
12 matter over which he has decision-making power," or words to
13 that effect.
14 MR. LERMAN: Your Honor, but, again, my point is
15 that what Mr. Fardon is complaining -- Mr. -- George Ryan
16 doesn't have a personal financial interest in this case in
17 the decisions that he was making as a public official. The
18 allegation is that he was receiving things of value paid to
19 influence him from people who were benefiting from his
20 decisions.
21 This -- Alderman Keane had a personal financial
22 interest in an activity that he was making decisions over.
23 That's not this case. This case is George Ryan entering a
24 South Holland lease, allegedly, and then getting benefits
25 back from Harry Klein.

1 That -- so this is not applicable, it's not apt.
2 That's the point I'm trying to make to the Court.
3 MR. BHACHU: Judge, if I could just respond quickly
4 to that point?
5 It would -- and I think it's actually been
6 characterized, that argument has been characterized as absurd
7 by the Seventh Circuit in the sense that if -- we are to take
8 the view --
9 MR. LERMAN: I'm flattered.
10 MR. FARDON: They rule quickly.
11 MR. LERMAN: It's unbelievable.
12 MR. ROONEY: Did they hold on that?
13 MR. BHACHU: Yeah, it just came down.
14 The idea, I think, of the Seventh Circuit, when
15 presented with this type of argument, in a different context,
16 but the idea was that if somebody can set up an intermediary
17 or receive benefits through an intermediary and thereby avoid
18 duties that they would otherwise have by using an
19 intermediary, that wouldn't actually be attainable.
20 I think the Seventh Circuit said that they didn't
21 find their argument plausible, and since the defendant in
22 that case was convicted, neither did twelve members of the
23 jury.
24 The idea here is that you simply can't avoid your
25 duty of honesty as a public official by using an

1 intermediary. You can't -- you have a bag man to take a
2 bribe as an intermediary or you can't have an interest held
3 for an intermediary or interests diverted to others and then
4 say, "Well, I don't have a duty to disclose."
5 MR. LERMAN: I don't argue -- I'm not arguing with
6 that. I don't think I'm arguing with that point, Your Honor.
7 Just Bloom -- the Bloom case itself -- I mean,
8 this -- the Bloom case, I think, sends the -- sends a clear
9 message about where we ought to be on these jury
10 instructions.
11 Every conflict of interest cannot be the subject of
12 a mail fraud, and this instruction 65 is moving us
13 dangerously close to that.
14 I think this allows the jury to convict George Ryan
15 for failure to list something on his statement of economic
16 interest, and that can't -- without more -- and that can't
17 be -- that cannot be right.
18 MR. FARDON: Judge, I --
19 MR. LERMAN: There's got to be -- there has to be
20 personal gain involved. And I'm not saying it's got to go in
21 his pocket. I'm not arguing the Spano point. But there's
22 got to be a connection between what he does as a public
23 official and gain that he was receiving.
24 And this idea that the right to honest services is
25 violated if he fails to disclose the Harry Klein vacation

1 benefit without more allows for a conviction on less than
2 what the law requires in the Seventh Circuit.
3 MR. FARDON: Judge, two points. I know the Court
4 wants to take a break. I'm going to try to be really quick.
5 The first is it would be one thing if we were
6 taking this in a vacuum. We're not. We are talking about
7 and going to talk about the Bloom and Spano sort of
8 definitions of breach.
9 The second thing, Judge, is we would ask the Court
10 before ruling on this issue to look at the Woodward case, 149
11 F.3d 46, because, you know, for the -- for all the factual
12 distinctions Mr. Lerman wants to make -- I mean, that is a
13 case involving gratuities from a state rep -- from a lobbyist
14 to a state rep that the state rep, Woodward, was obligated
15 under Massachusetts law to disclose on interest forms any
16 gift in excess of a hundred dollars. He didn't do that.
17 And on appeal -- that was the basis for mail fraud
18 convictions. And on appeal, the Second Circuit specifically
19 said: "When an official fails to disclose a personal
20 interest in a matter over which he has decision-making power,
21 the public is deprived of its right either to disinterested
22 decision-making itself or, as the case may be, to full
23 disclosure as to the official's potential motivation."
24 So, Judge, this is not about the sort of
25 fine-tuning of Keane. And Mr. Lerman makes a factual

1 distinction of Keane, whether he had a financial interest in
2 the building or a financial interest in the actual contract,
3 whether you have the financial relationship with the person
4 benefiting from the building or the contract.
5 Judge, and, again, I want to shut up, but we have
6 this situation with Mr. Udstuen and this -- the evidence
7 shows how Mr. Udstuen was cut in on monies that Mr. Warner
8 was receiving from these different vendors, where Mr. Ryan
9 had decision-making authority over the different contracts.
10 We have benefits that are alleged -- and, again,
11 these are issues for the jury to decide as -- in terms of Mr.
12 Warner's relationship with Mr. Ryan in connection with those
13 contracts.
14 And Mr. Udstuen, I think the evidence will show,
15 and it's our argument, was Ryan's friend, not Warner's
16 friend, and that's why he was receiving a set -- a cut of
17 these proceeds.
18 I mean, this is an issue -- the point, Judge, is
19 this is an issue that is very much at play in this case, and
20 to be silent on the issue of what this means in terms of
21 obligation to disclose on the statement of economic interest
22 forms -- and we haven't asked to sort of speak specifically
23 to those, but we don't think it's a realistic option to be
24 silent on that issue, and we think this is a fair instruction
25 given all the other instructions.

1 MR. LERMAN: Yeah, Your Honor, just to finish it,
2 Woodward is a first second --
3 THE COURT: First Circuit.
4 MR. LERMAN: -- a First Circuit case, and I don't
5 think that the instruction -- the instruction, that second
6 sentence that's offered here, in light of the admonition from
7 Bloom about every conflict of interest cannot be a federal
8 crime, I don't think it's consistent with Bloom. I don't
9 know that Woodward is consistent with Bloom, but I don't
10 think we have to decide that today. Woodward is not the law
11 of the circuit that we're in.
12 THE COURT: But I am going to take a look at both
13 those cases, Woodward and Bloom, and make sure that Woodward
14 is not inconsistent with Bloom.
15 If it is not inconsistent with Bloom, I am inclined
16 to give the instruction. But I'll have to look at the case
17 law.
18 Let's take a short recess, and we'll resume in a
19 little while.
20 MR. ROONEY: Your Honor, how long are we going to
21 go today?
22 THE COURT: Till about a quarter to 5:00, if that's
23 all right.
24 MR. ROONEY: Thank you.
25 (Recess from 4:13 p.m. until 4:26 p.m.)

1 THE COURT: All right. We can go back on the
2 record.
3 We are up to government's instruction number 66.
4 MR. LERMAN: Your Honor, we object to 66.
5 This instruction is not -- it's obviously not a
6 pattern instruction, Your Honor, and I am concerned about
7 instructions like 65 and 66 which seem to be offered not so
8 much to educate the jury on some different aspect of the law.
9 I think this concept is covered in other instructions that
10 have been tendered by the government and also by the defense.
11 I think this is an instruction that is tendered
12 really with an eye towards the government shaping up its
13 closing argument. They would like something like this, and
14 they want to argue this instruction to the jury, and I am not
15 sure that it's appropriate.
16 It's not a pattern instruction. It doesn't -- it
17 also, Your Honor, in my view, is not an accurate statement of
18 what this Court has already held about this concept of
19 connection of benefits, that there needs to be a relationship
20 between the benefit conferred and the official action.
21 Language like -- and I'm reading now from the third
22 line of this instruction, "ensure favorable official action
23 when necessary."
24 I don't know what that means, and I -- I don't know
25 if that means that there's some sort of idea that there's a

1 repository of goodwill that's built up over time and then,
2 when necessary, it can be tapped into. I don't know what
3 that means, but that's not this case.
4 This case has allegations, and the way the
5 government has tried the case and the evidence that's come
6 in, there's a much more direct connection that's been
7 alleged, and that ought to be the instruction -- that ought
8 to be consistent with the instructions that are given.
9 I don't understand the second -- I don't understand
10 why we need the second sentence in this instruction at all.
11 Or if we have the second sentence, I don't -- well, anyway,
12 Your Honor, it -- we object because it's not a pattern
13 instruction. I think it's not an accurate statement of the
14 law. I think it's phrased in a confusing fashion.
15 THE COURT: You know, the trouble with saying
16 there's no pattern instruction is pretty apparent in this
17 case. There haven't been any pattern instructions since the
18 honest services theory was reinstated.
19 So I think during the period that they're -- the
20 Seventh Circuit pattern instructions were drafted was the
21 post-McNally and pre -- whatever it is, you know, phase.
22 So the absence of a pattern doesn't help. It makes
23 it more difficult. It doesn't establish that an instruction
24 of this nature ought not be given.
25 We do -- I think we do need to tell the jurors in

1 some fashion that they don't need to find a direct quid pro
2 quo in order to find a violation of the honest services
3 obligation.
4 So whether this is the precise right language or
5 not, I don't know, but this concept does need to be conveyed.
6 I don't know if you have got your own competing version.
7 MR. LERMAN: Well, Your Honor, I think it's going
8 to be covered -- I could be wrong, but I think the concept is
9 covered in later instructions and -- but in terms of -- I am
10 concerned about -- I don't think we should be using the
11 phrase "quid pro quo" with the -- if quid pro quo means that
12 this money or this benefit is given for this particular
13 official action, and that's what we mean by quid pro quo,
14 then -- and I think that's what the Court is referring to. I
15 understand that that's not a requirement, that that kind of
16 one-to-one match-up is not required, but there is a
17 connection and a relationship that the government does have
18 to prove, and it can't be to "ensure favorable action when
19 necessary." It's more than that. That's the language that
20 they use in that third line.
21 And I don't think that's -- I don't think that's
22 the law. That's a very broad statement that -- again, I
23 think the government's burden is far more direct and
24 definable than what's there.
25 I mean, George Ryan -- the allegation is that

1 George Ryan took certain action to benefit these -- to
2 benefit his alleged co-schemers, and it wasn't favorable
3 action when necessary. There's a direct allegation -- direct
4 allegations in this case about what the actions would be in
5 connection with contracts and leases, and --
6 MR. BHACHU: Judge, I think the law in this area is
7 also pretty clear.
8 It's kind of interesting. One of the cases cited
9 by the defendant in support of their instruction 35, an
10 unrelated instruction, is United States versus Arthur, which
11 is 544 F.2d 730. It is a Fourth Circuit case that the
12 defense has cited.
13 They haven't cited it for this proposition, but
14 that court actually held that: "A requirement of criminal
15 intent could be satisfied if the jury were to find a course
16 of conduct that favors and gifts flowing to a public official
17 became a pattern of official actions favorable to the donor,
18 even though no particular gift or favor is directly connected
19 to any particular official act."
20 Similarly, in that regard, the Wingate case from
21 the Seventh Circuit, to be sure that this principle also
22 holds currently in the Seventh Circuit, in Wingate, we had a
23 situation where there was a special agent who had adopted
24 some children from an alien.
25 After the adoption process for those children had

1 been completed, the agent extended a number of favors to that
2 alien in order to permit the alien to stay in the country.
3 The defense in that case suggested that there
4 hadn't been a quid pro quo actually demonstrated, and the
5 Seventh Circuit rejected that line of reasoning, indicating
6 that the provision of the benefit, that is, the adoption of
7 children, was consistent with the idea that the actions taken
8 by the agent were in response to the adoptions that had
9 occurred as well as potential adoptions in the future.
10 So there wasn't a tie of specific official action
11 to a specific benefit received in that case.
12 And in the Gorny case as well, which is a case from
13 1984, the Seventh Circuit also indicated that no particular
14 act would be contemplated in response to a benefit that's
15 conferred.
16 We also have the cases from the First Circuit,
17 Woodward and Sawyer, and now, yes, they are from the First
18 Circuit, counsel mentioned they are from the First Circuit,
19 but they have been cited with approval by the Seventh Circuit
20 on a number of occasions. And in both of those cases, there
21 is this concept.
22 The idea in the Woodward case was a person with
23 continuing and long-term interests who might engage in a
24 pattern of gratuity offenses to coax ongoing favorable action
25 could be found that they've actually committed a fraud.

1 So what you have in these cases is the proposition
2 that there is no necessity for quid pro quo, and this Court's
3 own decision had the same conclusion as well.
4 MR. MARTIN: Your Honor, Mr. Warner also objects to
5 this instruction.
6 I don't think I can add much to what Mr. Lerman
7 said. But we're injecting something into the case that's not
8 here for the jury, and that's this concept of quid pro quo.
9 It's not mentioned anywhere else in the
10 instructions. It is not charged in the indictment. We are
11 going to put three Latin words in there, and we're going to
12 get a question: What does quid pro quo mean? There's no
13 need to inject this concept in to the jury.
14 Now, if one of the defense lawyers got up there and
15 argued that this is what the government had to show, then I
16 could see a curative instruction. But without those
17 arguments, this instruction is unnecessary.
18 It's giving -- the jury has enough to deal with.
19 They're being given the mail fraud instructions. They're
20 being given an intent to defraud instruction. And if they
21 can't figure out from that what is required for mail fraud,
22 then we're -- then these instructions are not doing their
23 job.
24 Bloom tells us that honest services mail fraud in
25 the Seventh Circuit is a breach of fiduciary duty for

1 personal gain. We know from Spano that personal gain doesn't
2 have to go to the defendant.
3 But now adding on to that and talking about whether
4 it has to be a specific quid pro quo and whether the benefit
5 should be given when necessary as elements into this case are
6 going to confuse this jury and are not necessary.
7 MR. FARDON: Judge, not only will it not confuse
8 the jury, the jury absolutely needs this kind of instruction.
9 And the Court has already said that, and I just
10 want to reiterate it because -- Judge, and this is why we
11 submitted these instructions or draft instructions like this
12 prior to trial.
13 We heard from day one in Mr. Webb's opening about,
14 "Mark down in your notebooks, I want you to put a little X
15 every time a witness testifies that they" -- "George Ryan
16 paid or received a corrupt dollar in exchange for a contract
17 or in exchange for a lease."
18 We then heard, witness after witness, starting with
19 Mr. Fawell, Mr. Webb submit questions along the lines of,
20 "Did George Ryan ever, to your knowledge, take a dime in
21 exchange for granting a contract, granting a lease, some
22 official action?"
23 Judge, those are loaded questions, and they are not
24 the law. And that's why we raised these issues beforehand,
25 because we wanted to front with the Court and front with the

1 parties that what we knew was going to be an issue.
2 And, again, I'm not criticizing Mr. Webb. He's
3 trying his case the way he believes he needs to. But I am
4 saying this jury needs instruction on what the law actually
5 is, and I do think that this is an accurate statement of the
6 law.
7 Again, you know, whether or not there are word
8 choices that need to be tweaked, whether or not, you know,
9 the term "quid pro quo" has or hasn't come up -- I think it
10 has -- during the course of this trial or whether we, you
11 know, regardless decide not to reference a quid pro quo
12 versus just relying on the language in the sentence before
13 that, you know, again, whether we choose to say "ensure
14 favorable action" as opposed to "influence and potentially
15 influence official action," I mean, the -- there are
16 different choices.
17 But the fundamental principle that this jury needs
18 instruction on this issue is critical, and I do think that
19 this is at least the starting point for the Court to reach an
20 appropriate instruction.
21 MR. LERMAN: Your --
22 THE COURT: I am with the government on this,
23 perhaps not the precise language and perhaps not even the use
24 of the expression "quid pro quo." I don't know that we're
25 going to get notes from the jurors on that. I don't know

1 that we're not.

2 But I do agree that given much of the thrust of the

3 defense, it's appropriate for them to have this concept in an

4 instruction. It doesn't have to be worded quite this way,

5 and maybe we want to take out the words "when necessary," to

6 the extent that that's vague. But they are entitled to be

7 told that the government does not have to prove a specific

8 benefit in return for a specific act.

9 And we can just use language like that, if it's

10 helpful, but the jurors are entitled to know that.

11 MR. LERMAN: Well, Your Honor, and that sort of

12 language would be -- I mean, that would be better. I'm

13 not -- in other words --

14 THE COURT: They -- I'm happy to -- you know, for

15 there to be a redraft.

16 And, again, I agree with you in a way that "when

17 necessary" may be a bit confusing, and I also think that Mr.

18 Martin could be correct that the use of Latin could be

19 difficult.

20 But I think that they are entitled to be told that

21 the government need not prove, again, an exchange of a

22 specific benefit for a specific act or words to that effect.

23 MR. LERMAN: Can we attempt to redraft that, Your

24 Honor --

25 THE COURT: Sure.

1 MR. LERMAN: -- and submit something? Okay.

2 THE COURT: That's fine.

3 MR. LERMAN: We will. Thank you.

4 THE COURT: All right. Let's move on to -- I think

5 the next instruction is a long one, and this is number 67.

6 MR. LERMAN: Well, Your Honor, we object to this

7 instruction.

8 And to use the phrase that other lawyers have used

9 in discussing how they object, we strenuously object to

10 this --

11 THE COURT: All right.

12 MR. LERMAN: -- on a number of grounds.

13 But I think this instruction runs the risk of

14 erroneously expanding Mr. Ryan's criminal liability by

15 including -- for example, there's nine or eight -- I guess

16 there's nine provisions of state law that are referenced

17 here. Five of the nine provisions, Your Honor, are

18 noncriminal, just for starters.

19 So we are now criminalizing the mail fraud

20 instructions statutes that themselves are not -- or

21 obligations or regulations that in themselves are not

22 criminal under state law.

23 Some of the descriptions of the duties that are

24 described in this three-page or four-page instruction are

25 insufficient or incomplete.

1 For example, the gift ban instruction, if I'm right
2 here, and I'm just looking at my notes -- am I right about
3 this?
4 The gift ban instruction has a summary of what a
5 public officer is prohibited from soliciting or accepting,
6 but in the instruction, it omits no fewer than 23 exceptions
7 that are included in the statute, including things like a
8 gift from a relative, a commercially reasonable loan,
9 intra-office gifts, golf or tennis, food or refreshments, any
10 item or items from anyone having a cumulative value of less
11 than $100.
12 This is a -- and that is just an example of the
13 danger of putting this kind of summary in. I mean, the
14 government, I think, is cherry picking what they'd like the
15 jury to focus on in terms of honest services, and they have
16 picked nine statutes. They probably could have picked 15 or
17 they could have picked 3. It's not a fair representation.
18 It adds -- I think it adds the danger that this
19 jury is going to convict George Ryan of a federal criminal
20 offense based on a noncriminal state statute.
21 That's the thrust of our objection, Your Honor.
22 MR. MARTIN: And, Your Honor, Mr. Warner joins in
23 this objection.
24 I mean, in one sense, these aren't the duties he
25 owes, but in another sense, he is charged with scheming or

1 aiding and abetting Mr. Ryan's alleged violation of fiduciary
2 duty, and the question is: What is the content of the
3 fiduciary duty?
4 And we've argued this in various contexts in this
5 case, as well as in the Fawell case. But if you go back to
6 the Brumley decision out of the Fifth Circuit, the en banc
7 Fifth Circuit stated that the basis for a mail fraud, a
8 violation of state law would be sufficient.
9 And then in Bloom, the two-member panel rejected
10 the Brumley formulation, came up with their own formulation,
11 which is a violation of fiduciary duty for personal gain.
12 And in his dissent, Judge Bauer stated that: While
13 I think that the violation of state law should be a
14 sufficient basis for mail fraud, but that was not the
15 proposition accepted by the majority in Bloom.
16 Then in the Martin case, the Seventh Circuit stated
17 that: We understand there's this Brumley case floating
18 around out there. It does make a little bit of sense,
19 because it would allay concerns that defendants aren't
20 provided notice of what is illegal, but we're going to adhere
21 to Bloom for now. And until we change the law, that is the
22 law in the Seventh Circuit, and that's what the Martin case
23 stated.
24 And then in the Spano case, they reaffirmed the
25 Bloom standard in the sense that they stated that honest

1 services mail fraud is the violation of a fiduciary duty for
2 some -- I think they used the word "reward," which is -- we
3 take to mean the same thing as personal gain.
4 So what this instruction does is it really puts a
5 Brumley standard into this case, making state law the basis
6 for a mail fraud offense.
7 The objection we have to it is some of these things
8 are civil laws. Some of these statutes are precatory. Most
9 of them are not criminal laws, and it's enhancing these
10 noncriminal laws into a federal felony, which we object to.
11 Some of these statutes really have no applicability
12 to this case in the sense that they don't create criminal
13 prohibitions.
14 And the defendant is entitled to notice of what
15 violates the law, but the legislature or Congress has to
16 state that this is what violates the law.
17 And a precatory civil provision about workplace
18 violations should not be allowed to rise to the level of a
19 mail fraud violation.
20 So we object to this instruction. Either we're
21 going to give Bloom instructions and tell them what the
22 fiduciary duty is and talk about how a violation of that for
23 personal gain is a violation of mail fraud, or we are going
24 to rely on state law.
25 But the Seventh Circuit has already told us that

1 state law -- that they are not going down that road for now.
2 And until they tell us otherwise, we should remain faithful
3 to Bloom.
4 MR. FARDON: Judge, that is just simply not what
5 this instruction does. And there is a bit of a darned if you
6 do/darned if you don't component to the defense argument. I
7 mean, Judge, they don't want to define the duty, but they do
8 want to define the breach.
9 You know, the next instruction, the next
10 instruction is government's instruction 68, which is the
11 Bloom instruction: Not every instance of misconduct or
12 violation of a state statute by a public official or employee
13 constitutes a mail fraud violation.
14 Judge, that's even the prefatory language to the
15 defense proposed Bloom instruction, Defendant Ryan's
16 instruction 45: Not every alleged breach of fiduciary duty,
17 instance of misconduct, or violation of state statute or
18 office policy by a public official or employee constitutes a
19 mail fraud violation.
20 Judge, the jury needs to know what the duty is
21 before they can determine the breach and then they need the
22 Bloom/Spano instruction to determine, you know, what kind of
23 breach may constitute a mail fraud violation.
24 That is the law in the Seventh Circuit, and the
25 law, if anything, encourages definition of the duty and

1 definition of the breach, which these instructions go to
2 great pains to provide.
3 I'd also note, Judge, we -- for precisely those
4 reasons, notice of what the alleged duty was, notice of what
5 the alleged breach was, we charged these different state --
6 applicable state statutory provisions, which, again, Mr.
7 Lerman's picked one or two of them, but, Judge, there's stuff
8 in here about not doing political work on state time, there's
9 stuff about use of public funds for public purposes. There
10 are constitutional provisions, there are state law
11 provisions. Those are referenced in the indictment. They
12 have now been redacted out of the indictment to -- pursuant
13 to the Court's order in light of the concerns about the
14 length of the indictment in this case.
15 Judge, the point is we have an obligation, the
16 government has an obligation of proving each of the elements
17 of the crime beyond a reasonable doubt. There is not -- this
18 jury is being told as much, told what those obligations, what
19 those elements are, and, time and again, the government has
20 the burden of meeting them.
21 What does it mean, Judge? That's the -- the
22 Court's job is to instruct the jury on the law as to what
23 some of those different things mean.
24 When we're talking about what is the duty, these
25 are the state statutory and constitutional laws that define

1 that duty. And then the Bloom instruction is the law of the
2 land, modified by Spano in terms of what constitutes a
3 breach.
4 You can't give them one without giving them the
5 other, which is exactly what the defense is arguing to do.
6 I mean, you talk about confusing this jury, Judge,
7 I mean, how are they supposed to decide what constitutes a
8 breach, you know, for mail fraud purposes versus a generic
9 breach that the Bloom court was concerned about if they're
10 not told what the applicable state constitutional and
11 statutory provisions are in the first place?
12 It's a circular argument, you know, that the jury
13 needs to know what it's ruling on, and this -- you know, the
14 last thing, Judge.
15 There's nothing about the language of this proposed
16 instruction that says or suggests to the jury defendant's
17 guilty of any of these state -- this is a cold recitation of
18 what the laws are. It quotes the laws.
19 Again, if Mr. -- if there are specific objections
20 in terms of inclusion or exclusion -- Judge, we're not
21 playing hide the ball, Judge. If there are things that
22 should be in here, let's, by all means, put them in here.
23 I believe that most of those exceptions Mr. Lerman
24 referred to were really not, by any stretch, applicable to
25 this case. But we're not trying to play hide the ball. If

1 this needs to be modified, it needs to be modified.
2 But I do think -- you can't have your, sort of,
3 cake and eat it, too. Let's tell them what a breach is
4 without telling them what the duty is.
5 MR. LERMAN: Well, Your Honor, I thought the
6 government was arguing for instruction 64 so that there would
7 be a definition of duty.
8 And I'm listening to Mr. Fardon's argument, and it
9 occurs to me that part of the problem that we're facing is
10 that the honest services mail fraud is susceptible to being
11 very vague and in the nature of a common-law federal crime,
12 and this instruction doesn't solve that problem. It just
13 shows exactly how far-reaching the government can go in terms
14 of alleging a mail fraud violation.
15 For example, I mean, we've -- you know, the
16 government is proposing that the jury be told that an
17 employee may be discharged for doing any of the following
18 during regular working hours, and one of them is soliciting
19 money from any person for any political purpose.
20 And that becomes part of the duty that George Ryan
21 had that he can be convicted of mail fraud for violating, and
22 that cannot possibly -- there is a noncriminal state statute
23 that is now bootstrapped in this definition of duty that now
24 becomes the basis, the linchpin for a criminal conviction to
25 send George Ryan to jail, because the government chose to

1 charge this particular statute in the indictment as the duty
2 that they decided George Ryan had in this case, and I -- that
3 is not the law.
4 And I echo what Mr. Martin said. This is exactly
5 what Bloom was trying to avoid. That's why we've stuck with
6 the Bloom standard.
7 Bloom did not want to turn every -- every public
8 official has a duty not to violate some state law. The
9 violation of a state law cannot in itself be the breach of
10 duty by which a mail fraud is turned -- is the way you turn
11 it into a federal crime, and that's what the Bloom court was
12 struggling with.
13 And that's why this instruction is an illustration
14 of the danger that we're in if we get away from Bloom.
15 And, you know --
16 THE COURT: Well, can I --
17 MR. LERMAN: -- I don't know -- Your Honor, I don't
18 know how to deal -- the gift ban act was in -- it wasn't
19 in -- we have got a conspiracy or a scheme here that runs 12
20 years. The gift ban act was in existence for some of that
21 time, not all of that time. It was found unconstitutional
22 for two of the years during that time period.
23 What do we do with that? There's 23 exceptions to
24 that. How do we instruct the jury on all of that? How do we
25 tell the jury that this two-page or three-page recitation is

1 the duty that George Ryan owed to the State of Illinois?
2 It's clearly not. It's not -- it's neither
3 comprehensive nor is it accurate in the way it sets out what
4 it sets out. And Bloom tells us that we shouldn't be doing
5 this. This is not --
6 THE COURT: Can I --
7 MR. LERMAN: This is not what we should be doing.
8 THE COURT: Can I assume that you don't have a
9 problem with number 68?
10 MR. LERMAN: Hang on, Your Honor. We --
11 MR. MARTIN: Your Honor, I can speak on that for
12 Mr. Warner.
13 We don't have a problem with 68, but we did have a
14 problem with the language "violation of a state statute by a
15 public official or employee," for the same reasons I just
16 argued.
17 And I'd also add, Your Honor, when Congress wants
18 to make state law the basis for a criminal offense, it knows
19 how to do that in the RICO statute. The following acts
20 indictable under state law may be a racketeering act for
21 purposes of a RICO offense.
22 The travel act, violations of state law may be a
23 predicate for a travel act. The gambling prohibition, §
24 1955. The gambling can consist of state law violations. But
25 in the mail fraud statute, there is no similar language. The

1 drafters of 18 U.S.C. 1346 did not make state law the basis
2 for a mail fraud offense.
3 And until Congress speaks for the Federal
4 Government, to intrude on these state interests is
5 objectionable.
6 And that is the basis for concerns raised by some
7 judges about the mail fraud statute; that if we're going to
8 get this deep into the affairs of a state and talk about
9 state workplace violations and state labor laws, we need
10 Congress to make that more clear, and they haven't done that
11 yet.
12 And so that's part of our objection to both 67 and
13 the "violation of state statute" language in 68.
14 MR. BHACHU: Judge --
15 MR. LERMAN: Your Honor -- I'm sorry.
16 Just -- you asked if we had any objection to 68.
17 We proposed 45.
18 Our proposed 45 is not that far different from --
19 there's some language issues there and some phrases that
20 we've added, and we can parse through that.
21 But we have proposed 45, and I think that addresses
22 the principal issue in a consistent way with what I have been
23 saying.
24 MR. FARDON: Judge, I really do think there is a
25 threshold legal issue here, and, you know, I think Bloom is

1 being turned on its head.
2 And I understand, you know, Mr. Martin's making his
3 argument, but I do not think that's the law in this district.
4 Bloom presumes, and it's presumed, you know -- and,
5 again, maybe it's more than presumed. Maybe they give
6 specific case citations. But mail fraud violations can be
7 anchored in state crimes. They can be. I mean, Bloom
8 presumes that.
9 And what Bloom is doing is saying: Well, not every
10 breach of a fiduciary duty may constitute a criminal mail
11 fraud violation. So how do we define what breaches do and
12 don't? And one of the things they look to and rely upon are
13 state laws and state regulations.
14 And what Easterbrook is doing is sort of putting a
15 gloss on state laws and not every violation of a state
16 statute can constitute a federal mail fraud violation. So
17 what does? Well, when it's for personal or private gain.
18 That's what Bloom says.
19 So it does not, by any stretch, sort of debunk the
20 current state of the law that the -- you can look to state
21 law in defining duty for purposes of then establishing mail
22 fraud liability. Bloom is limiting the context in which
23 violations of state and other fiduciary obligations can
24 constitute mail fraud violations.
25 So I do think it's being turned on its head. And

1 the irony is it's being turned on its head in a way that I
2 think would be exactly inconsistent with the -- what I
3 understand, anyway, to be the Seventh Circuit's intentions in
4 Bloom and in other cases related to this issue, and that is
5 to define the parameters of exactly what it is we're talking
6 about.
7 We've got, you know, a statute that, it's been
8 argued in that case and argued in this case now, is vague.
9 Well, let's talk about -- let's not be vague. Let's talk
10 about exactly how we're defining the duty, how we're defining
11 the breach. That's what we're doing here, Judge.
12 Here, the state law on the book at the time that
13 are applicable in light of the facts presented before this
14 jury, we gave notice of them through the indictment.
15 And, you know, the -- again, we're not abandoning,
16 by any stretch of the imagination, either the Bloom
17 limitations on what can constitute a breach, given those
18 state laws and regulations, or the other elements of the mail
19 fraud statute that the government has to prove beyond a
20 reasonable doubt.
21 This jury, I believe, respectfully, can be trusted
22 to follow the Court's instructions that the government has to
23 prove each of those elements beyond a reasonable doubt. The
24 issue here is: Do they need to be educated on what
25 constitutes -- you know, what -- how you define what the duty

1 is and how you define what kind of breach may constitute a
2 mail fraud?
3 Those are purely legal issues. It is this Court's
4 purview and discretion to instruct them on those legal
5 issues, and I think it's an eminently fair and appropriate
6 way to do it that is a hundred percent consistent, I think,
7 with Bloom.
8 THE COURT: All right. Here --
9 MR. BHACHU: Judge, in that regard, if I could just
10 in two seconds --
11 THE COURT: Sure.
12 MR. BHACHU: In Bloom, page 655, the Seventh
13 Circuit said: "The misuse of office (more broadly, misuse of
14 position) for private gain is the line that separates
15 run-of-the-mill violations of state-law fiduciary duty," and
16 then it continues on to mention the defendant, "from federal
17 crime."
18 And what we have done here is we have listed some
19 of the duties the defendant was under and then indicate in
20 the following instruction that there has to be a misuse of
21 office in connection with that.
22 THE COURT: See, here's the way I read these
23 instructions.
24 Instruction number 67 says: There are a variety of
25 state laws that govern a state official's conduct, state laws

1 that provide X, Y, and Z, the purpose of that instruction
2 being to eliminate the concern that perhaps there was nothing
3 laid down in writing about what was or was not appropriate to
4 do under state law.
5 Then 68 goes on and says: But, by the way, just
6 because you violated one of those doesn't mean you are guilty
7 of mail fraud. Instead, there's got to be the showing that
8 the official in question misused his official position for
9 private gain for himself or another.
10 I really don't think there is -- I don't think
11 there's anything improper about setting out these state law
12 obligations.
13 I myself would prefer that we do it in a more
14 abbreviated way, because the argument is not going to be --
15 in fact, the argument's going to be the opposite of: If you
16 violated any of these Illinois laws, then you are guilty of
17 mail fraud.
18 Instead, what the government is saying, I think,
19 is: Here are a bunch of prohibitions that were on the books
20 that a state official was bound by. So it isn't as though he
21 or she had to just kind of guess what would be a violation of
22 any of those state laws.
23 But once that has been laid out, we narrow it
24 further and we say: Just because you violated those state
25 statutes does not mean you are guilty of mail fraud. In

1 addition, this showing that is described in Bloom has to be
2 met.
3 So, you know, what I would suggest, just to make it
4 a little bit clearer, might be to begin 67 with a statement
5 such as appears at the top of 68. In other words, not every
6 instance of misconduct or violation of a state statute by a
7 public official or employee constitutes a mail fraud
8 violation. There were state statutes on the books that
9 prohibited certain conduct, including the following.
10 And then, again: Not every instance, not every
11 violation of those state statutes would constitute a mail
12 fraud, but where a public official, and then you go on with
13 the rest of 68.
14 My only concern -- again, I think generally it
15 makes sense to tell the jurors what the obligations were and
16 then to go on to point out that we have to narrow those
17 obligations down for purposes of determining whether there's
18 a mail fraud violation here, and my only suggestion would be
19 if we could do that in a shorter way than laying out every
20 word of this.
21 I realize the defendant -- the government's
22 position is, "Look, this is the fairest way. This is
23 specifically what the statutes say," but it is very long and
24 daunting, and it does seem to me it might mislead the jury
25 into believing that somehow each one of these is a principle

1 that has to be considered and applied in this case, and
2 that's not the case.
3 MR. LERMAN: Your Honor, how is the --
4 MR. FARDON: Your Honor --
5 MR. LERMAN: But my concern is how is the jury
6 supposed to use any of it? What if there was no instruction
7 like this? Does the jury have to find a violation of
8 state -- in other words, suppose there was no violation of
9 state law. Is that a defense to mail fraud for the
10 defendants, we did not violate state law? What is the --
11 THE COURT: Well, it might be, it might be.
12 You know, the -- I don't know -- I mean, I think
13 this is -- it's an accurate statement of the law.
14 As I explained, I think the point here is that any
15 notion -- and I can imagine the argument being: How would
16 anybody know when he or she was stepping across the honest
17 services line? I can't imagine you wouldn't want to make an
18 argument like that.
19 MR. LERMAN: When you use your office for personal
20 gain.
21 THE COURT: Well, and the answer is --
22 MR. LERMAN: Bloom answers that question.
23 THE COURT: And the answer is there's no mystery
24 here. One answer is there are a lot of statutes that
25 specifically address the kind of conduct that's involved, so

1 it wasn't as though there was any mystery.
2 Now we're going to tell you, ladies and gentlemen
3 of the jury, that just because one of those laws was
4 violated, that by itself is not enough.
5 MR. LERMAN: But do you see what I'm saying, Your
6 Honor? That violation of state law is not -- it's not a
7 necessary element of mail fraud, and it's not -- it's not an
8 element at all of mail fraud.
9 Whether there is or is not a state statute that was
10 or was not violated by George Ryan or Larry Warner in this
11 case is not an element of mail fraud. The jury has to make
12 no finding with respect to that. There is nothing that
13 hinges on it, and that's the problem with what's being put
14 before the jury.
15 They are being -- this is being turned into a state
16 law prosecution. Here's some statutes. They clearly
17 violated those. This must be a mail fraud. That's the
18 problem with what's going on.
19 I'm being simplistic, but, Your Honor, it's neither
20 a defense to mail fraud nor a necessary element of mail fraud
21 to put forward what the state statutes were.
22 If I misuse my office, if I deprive citizens of my
23 honest services by misusing my office for personal gain, that
24 is the federal crime and it's got nothing to do with nine
25 particular statutes that the government chooses to bring to

1 Your Honor's attention, any more than if they brought
2 twenty-five or only three.
3 MR. FARDON: Judge, we will modify it in light of
4 the Court's concerns.
5 I mean, I couldn't -- you know, again, I think this
6 is clear that the parties are far apart on this issue.
7 I couldn't disagree more with Mr. Lerman in the
8 sense that we are obligated to prove beyond a reasonable
9 doubt each of the elements of the crime, including the
10 defendants not only devised and participated in a scheme to
11 defraud or obtain money and property, et cetera, and a scheme
12 to defraud includes this notion, as the jury will be
13 instructed, a scheme to deprive the people of Illinois of
14 their intangible right to the honest services of the public
15 officials or employees.
16 There are legal issues, Judge, as to what that
17 means. And just like with any other instructions, that is,
18 you know, what we're asking for and what the jury, I think,
19 is entitled to some instruction on, how do you define what it
20 means, you know, the intangible right to honest services of
21 public officials and employees.
22 Again, I do think there's an irony here in the
23 sense that, you know, they want to talk about, you know, the
24 breach only being private gain, but they don't want to talk
25 about, you know, what it is that defines the duty in the

1 first place, and I just don't know how -- you know, I do
2 think that there's some -- there's a jury issue here. The
3 jury needs to know what was on the table in terms of
4 commitments and obligations, and that's what's set forth in
5 there.
6 And then they need to know from the Court as a
7 matter of law if there are any violations, how do we decide
8 what those violations mean, both in terms of is it, you know,
9 is it a breach? If it's a breach, what makes it a breach
10 that can constitute a deprivation of honest services?
11 And even then, Judge, we still have the obligation
12 to prove each of those three elements that are charged in the
13 elements count beyond a reasonable doubt.
14 So we're really in definitional territory here,
15 which is the Court's purview, and I think to fail to instruct
16 the jury on, you know, each of those sort of basic steps of
17 the way, what is the duty, how do you define it, what are the
18 laws that were on the books at the time, what can constitute
19 a breach of those laws, what kinds of breach can constitute a
20 deprivation of honest services, all of those are definitions,
21 none of them speak specifically to guilt or innocence.
22 And then at the end of the rainbow and at the start
23 of the rainbow, there is the government's obligation to prove
24 beyond a reasonable doubt each of those elements with the
25 benefit of the Court's instruction as to what those

1 definitions mean within the elements.
2 That's the context in which this is offered.
3 That's the context in which it will be received. I think in
4 a case like this, especially, the jury is entitled to that
5 level of instruction.
6 MR. LERMAN: Well, and, Your Honor, I know it's
7 late, and I don't want to repeat myself, but just as an
8 example, to cite or describe the Illinois state gift ban act
9 in the context of a 12-year mail fraud, where that act was
10 not in existence during all 12 years, where it was actually
11 declared unconstitutional for a period of time as well, where
12 there are 23 statutory exceptions to it and a body of case
13 law and interpretation regarding it, how do we instruct the
14 jury regarding what George Ryan or Larry Warner's duties were
15 under that act in a paragraph?
16 THE COURT: If you want to make a specific
17 objection to number 5, I mean, I will take that up.
18 I personally think that each of these should be
19 expressed in a single sentence.
20 MR. FARDON: Judge, we will take a crack at
21 modifying it.
22 I do want to say number 5 does not speak of 12
23 years. I just -- you know, and, again, I guess my point
24 being if Mr. Lerman wants to raise particular objections -- I
25 mean, we have -- there's no hide the ball, there's no

1 mischaracterization. That's the law that are on the books.
2 If there are mistakes, they are inadvertent, and we are happy
3 to correct them.
4 And we will modify -- I hear the Court's concerns,
5 and we will take a crack both at modifying the introductory
6 language in the context and also parts they have --
7 MR. MARTIN: Zach, I object to 5, too.
8 THE COURT: There's a surprise.
9 All right. Are we going on to 68 and then wrapping
10 it up for tonight?
11 68 is the one as to which Mr. -- I think Mr. Ryan
12 has proposed an alternative number 20 --
13 MR. LERMAN: We propose 45, Your Honor.
14 THE COURT: 45.
15 MR. LERMAN: Our proposal is Defendant Ryan number
16 45.
17 MR. MARTIN: And Mr. Warner submitted number 22,
18 which is pretty similar to everything that's on the table.
19 I'm going to withdraw the first sentence on 22.
20 THE COURT: Which one, number 22?
21 MR. MARTIN: 22, right.
22 THE COURT: 22.
23 MR. LERMAN: Your Honor, just in terms of -- we
24 have added some language in 45, just to point it out to the
25 parties.

1 We have added language "not every breach of
2 fiduciary duty." We have added that language to the
3 government's proposal.
4 And also with respect to the "misuse of official
5 position or information," we have used the phrase
6 "confidential and proprietary information."
7 MR. MITCHELL: We did not.
8 MR. LERMAN: We did not?
9 MR. MITCHELL: No.
10 THE COURT: No, I don't think so.
11 MR. LERMAN: I'm looking at the wrong thing. We
12 dropped "information" altogether, I guess.
13 MR. BHACHU: Judge, our view of this instruction is
14 that it essentially kind of crafts away some of the language
15 that I think is actually taken from Bloom and the other cases
16 in the Seventh Circuit.
17 The concept there is that the employee -- the
18 public official misuses his office for the purpose of gain to
19 himself or another.
20 And in this instance, what we have is the employee
21 takes personal benefits with the understanding to perform
22 acts in his official capacity, which really limits the scope
23 of the instruction. It's not the way it's really presented
24 in the cases by the Seventh Circuit. It also kind of
25 suggests that the limitation here is limited to the context

1 of bribery.
2 Moreover, this instruction doesn't tell us what a
3 breach of fiduciary duty is. I believe this would be the
4 first time an instruction has actually referenced a breach of
5 fiduciary duty, and there's no real explanation for what that
6 is.
7 So to the extent there is some concern that the
8 jurors aren't going to understand what's going on by
9 introducing that concept without explaining what it is, that
10 will be problematic.
11 For those reasons, I think, and for the reasons Mr.
12 Fardon has, our instruction 68 is preferable for us. It is
13 more closely aligned with the cases from the Seventh Circuit.
14 MR. FARDON: Judge, I will add only that the two
15 words after what Mr. Bhachu read are "in exchange." I mean,
16 it says "would perform acts in his professional capacity in
17 exchange," which, Judge, is not the law, and that's -- I
18 mean, that's essentially trying to limit the mail fraud
19 statute to quid pro quo type bribery.
20 THE COURT: Well, actually, Mr. Warner -- Mr.
21 Martin's proposed instruction number 22 is really close to
22 the government's except -- eliminating, after eliminating the
23 first sentence, except that Mr. Martin also includes a
24 reference to "breach of fiduciary duty." I think, otherwise,
25 he's really on the same page.

1 MR. MARTIN: And, Your Honor, in fairness, you have
2 also ruled that the "knowing participant" language is not --
3 THE COURT: Right.
4 MR. MARTIN: -- applicable.
5 THE COURT: Ought not be included.
6 MR. MARTIN: Right. It should read "for himself or
7 another."
8 THE COURT: It doesn't have to be "a knowing
9 participant." It could be "another," which is what I think
10 the proposed 68 says.
11 MR. LERMAN: Your Honor, in terms of Mr.
12 Martin's -- we're on the government's. To the extent it
13 references "information," something I was saying earlier, we
14 believe that that ought to be "confidential and proprietary
15 information," not just any information.
16 "Publicly available information" is not on point in
17 terms of what's alleged in the case or what the jury ought to
18 be considering. It's got to be "confidential and proprietary
19 information."
20 MR. FARDON: Judge, I mean -- and, you know, again,
21 my only concern about that is just sort of definitional, what
22 does "confidential and proprietary" mean. I mean, would it
23 suffice to say "nonpublic information"? That, I think,
24 strikes us as maybe less objectionable.
25 I mean, I don't -- I understand Mr. Lerman's point.

1 I don't object to "principal." I'm not sure -- to say
2 "proprietary," I don't personally know what that means.
3 "Confidential" means different things to different people. I
4 mean, I would propose "nonpublic."
5 THE COURT: "Nonpublic"?
6 MR. LERMAN: I mean, it's -- Your Honor, it's more
7 than nonpublic. I mean, it's --
8 THE COURT: I mean, really a public official might
9 obtain information before the rest of the public that isn't
10 ultimately going to be private information, but is, at least
11 for a time, available only to the public official and maybe,
12 you know, a few others.
13 Would you consider that nonpublic -- you know,
14 confidential information?
15 MR. LERMAN: Well, I guess I -- Your Honor, I don't
16 know. I mean, I think a public official might learn
17 information at 4:00 o'clock that everybody else knows at 5:00
18 o'clock.
19 THE COURT: Just out of curiosity -- I mean, this
20 doesn't apply in this case at all -- but what if a public
21 official obtains information about, you know, some kind of
22 economic development that enables him -- which, you know,
23 will go to the public within minutes, but he or she is able
24 to trade on it? Would that be improper? I mean --
25 MR. BHACHU: Judge, I can answer that question.

1 I think it would, because there is a case from the
2 Seventh Circuit, one of the older cases, where somebody who's
3 working in futures trading was trading ahead of his
4 customers, and what he was doing was finding out what order
5 his customers wanted to place and then actually placing the
6 order to take advantage of a fluctuation in price that would
7 be caused by the customer's order, and the Court held that
8 that was actually deceit and also actionable under the
9 honest services mail fraud statute.
10 THE COURT: You see, that wouldn't really be
11 confidential information. It just would be information --
12 MR. LERMAN: But I don't think that would be mail
13 fraud or honest services either. We're talking about
14 securities law there, so --
15 THE COURT: Well, right.
16 MR. BHACHU: Judge, that would be --
17 MR. LERMAN: But I -- Your Honor, I guess where I'm
18 going is there is definitely an issue in the case regarding,
19 for example, Len Sherman wanting to move the administrative
20 hearings offices for over a year, or the move of 7 -- the
21 move from 188 West Randolph to 17 North State, which was
22 disclosed in the transition report, or the information in the
23 transition report about the state of the computer system at
24 the Secretary of State's Office.
25 In other words, there's got to be something about

1 the information that is itself confidential or proprietary.
2 It can't just be information that I learned because I read
3 the transition report and you didn't that allowed me to
4 profit or something like -- do you see what I'm saying, Your
5 Honor? And --
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1 THE COURT: Yes, I do, but I am not sure that's
2 right. I think that's really a narrow view of what the
3 public official's obligation is.
4 MR. LERMAN: I guess. Well, I don't know how else
5 to define it, your Honor. I don't think a public official
6 has an obligation with respect to information unless it has
7 some confidentiality or proprietary nature.
8 MR. FARDON: Judge --
9 MR. LERMAN: Not everything that a public official
10 learns as a public official is tear and confidential.
11 MR. FARDON: To take an example specific to this
12 case, Judge, the Grayville prison decision involving
13 Mr. Swanson, I think is analogous to the Court's
14 hypothetical, different principally in timing. But, Judge,
15 Mr. Ryan's decision to award the prison in Grayville which he
16 then shares with Mr. Swanson within two minutes of making the
17 decision even though everybody around the table has said keep
18 it nonpublic until Mr. Ryan makes a public announcement of
19 it, which happens a month or so later. That enables
20 Mr. Swanson to go out and cut this $50,000 lobbying deal.
21 THE COURT: I think Mr. Lerman would have to
22 concede that under his definition that that information would
23 count, right?
24 MR. LERMAN: That's the kind of factual basis -- I
25 am trying to make a distinction along the lines of that kind

1 of factual basis. In other words, not every piece of
2 information that a public official has is of the type that
3 Mr. Fardon is describing.
4 MS. BONAMICI: The fundamental principle, I think,
5 is the misuse of the position. I mean, that's really where
6 the focus needs to be.
7 THE COURT: I think it's information obtained by
8 virtue of the public official's position.
9 MR. BHACHU: That's right.
10 MR. MARTIN: Your Honor --
11 THE COURT: That's kind of the way -- I think more
12 or less the way Mr. Martin has drafteded it.
13 MR. MARTIN: I was going to withdraw 22 in lieu of
14 Mr. Ryan's instruction, but we started discussing mine and I
15 didn't speak up.
16 But Mr. Lerman has persuaded me. And the reason
17 why he has persuaded me is because in the indictment what is
18 alleged is the providing of material nonpublic information.
19 So the information that is at issue is described in the
20 indictment and the two adjectives "material" and "nonpublic"
21 are --
22 THE COURT: Okay. If that's what the indictment
23 says, I am persuaded.
24 MR. LERMAN: Material nonpublic information.
25 THE COURT: If that's what the indictment says, I

1 am on board with that. We will make that change in 68.
2 And I think we can push on further tomorrow.
3 Actually, this isn't bad progress. It's not great progress,
4 but not bad.
5 My assistant advises me that she's reached almost
6 all of the jurors and all seem fine with coming in next
7 Friday. I just thought I should convey that to you. I will
8 have to give you a final answer again tomorrow once we have
9 reached everybody.
10 In the meantime, what I am going to look at tonight
11 would be these two instructions that I have kind of tabbed
12 and, you know, the this whole dispute about Bloom --
13 Instruction No. 65, Instruction No. 64, the case law on that.
14 I am going to look into that and try to give you an answer on
15 those two by tomorrow morning.
16 I am also looking at the two competing redacted --
17 versions of the redacted indictment. And we may need to talk
18 about that a little bit.
19 But recognizing that each of you got the other's
20 draft today, I hope that you will look at it as well and see
21 whether there is -- at least we can eliminate some
22 controversies on that on your own. If not, that's what I am
23 here for.
24 So do you want to make it 10:00 o'clock again
25 tomorrow? Is that better for you than 9:30?

1 MR. LERMAN: That's great.
2 MR. MARTIN: Your Honor, I have a sentencing
3 scheduled at 10:00 o'clock tomorrow.
4 THE COURT: Do you have any idea how long that
5 would go?
6 MR. LERMAN: It's before Judge Leinenweber. I
7 mean, my role in it -- I am supposed to argue some guideline
8 issues, but I kind of have a feeling it's not going to be
9 short.
10 THE COURT: 11:30?
11 MR. MARTIN: I am sure we would be done by then.
12 THE COURT: Let's start at 11:30. I have got stuff
13 to do.
14 MR. FARDON: That's fine, Judge.
15 MR. LERMAN: That's fine, your Honor.
16 THE COURT: We will talk fast.
17 MR. ROONEY: Your Honor, just on that one motion
18 that we still have out there, sometime this week we got to
19 argue it.
20 THE COURT: We are talking about the Mr. Wright
21 motion?
22 MR. ROONEY: No. It's KC VanDerMolen.
23 THE COURT: KC, right.
24 MR. ROONEY: Fawell's testimony.
25 THE COURT: Got it. I entered an order yesterday

1 entering and continuing it to remind myself.
2 MR. ROONEY: It's on my to do list, and I will get
3 criticized if it doesn't --
4 THE COURT: I don't want that to happen,
5 Mr. Rooney. This is a tough enough case.
6 MR. LERMAN: Your Honor, the transcript that's
7 under seal that your Honor is going to review --
8 THE COURT: Right. I just got it e-mailed to me
9 now, so I will be able to take a look at it.
10 MR. LERMAN: We would also like to review it. Is
11 it possible if we want to be heard on it that we could have
12 the opportunity to talk to your Honor prior to a decision?
13 THE COURT: To be honest, I think you have been
14 heard on this.
15 MR. FARDON: Judge, that's the government's view.
16 We had a long discussion about this. I don't know that there
17 is anything left to say. Whatever the Court rules --
18 THE COURT: To summarize, my understanding is that
19 it's defense counsels' position that all of it should remain
20 under seal because it deals with matters of juror
21 confidentiality.
22 My view is -- and I think the government shares
23 this -- matters of juror confidentiality, regardless of the
24 fact that some of it -- a great deal of it appears to have
25 been disclosed in violation of my orders already, I myself

1 will stand by my decision that it should remain under seal.
2 To the extent that there is a discussion about the
3 ways and manners and potentialities as to how that order was
4 violated, I don't think that relates to juror
5 confidentiality.
6 MR. FARDON: That's very much the government's
7 view, your Honor.
8 THE COURT: I think the defense has been heard,
9 though. I intend to try to get -- I know the press has been
10 asking for this. I intend to try to get something out as
11 soon as I can.
12 Thank you.
13 MR. FARDON: Thank you, your Honor.
14 MR. ROONEY: Thank you, your Honor.
15 MR. MARTIN: Thank you, Judge.
16 (An adjournment was taken at 5:21 p.m.)F
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