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ISSUES IN THE THIRD CIRCUIT: SHOULD USING FACEBOOK AT WORK BE A FEDERAL CRIME?: THE THIRD CIRCUIT APPLIES HONEST SERVICES FRAUD TO PRIVATE INDIVIDUALS IN UNITED STATES v. MCGEEHAN

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LEXISNEXIS SUMMARY:

... Defense counsel should attempt to show that the defendant-victim relationship is akin to the BFTC-Navy relationship the Third Circuit determined was not subject to honest services fraud in McGeehan. ... The Supreme Court first held that the mail and wire fraud statutes did not cover intangible rights, such as the right to honest services, in McNally v. ... United States Courts continued to enforce citizens' right to honest services until the Supreme Court's 1987 decision in McNally v. ... While the Third Circuit declined to adopt either the materiality or the foreseeable harm standard, the court articulated how both standards should be applied within the Third Circuit. ... Assume Kevin is indicted for wire fraud for depriving his employer of its right to his honest services in violation of an amended Section 1346 that adopts the pre-Skilling interpretation of honest services fraud.

TEXT:

[*1007]

I. Introduction

Kevin works in the accounting department at Dunder Mifflin, Inc. n1 The Dunder Mifflin employee handbook prohibits the use of company computers for personal email or social networking websites. n2 Kevin understands this policy, but nonetheless keeps his Facebook webpage open while working so he can keep in touch with his friends. n3 He estimates that he is only occasionally distracted and spends at most one hour each day checking his friends' profiles and sending them messages. n4 Is Kevin guilty of a federal crime? n5

[*1008] Following the Third Circuit's decision in *United States v. McGeehan*, n6 Kevin has committed "honest services fraud." n7 The honest services fraud statute (*18 U.S.C. § 1346*) criminalizes an individual's use of the mails or wires in a manner that "deprives another of the intangible right of honest services." n8 According to Supreme Court Justice Stephen Breyer, Section 1346 potentially criminalizes the conduct of "100 million workers in **[*1009]** the United States." n9 And Kevin, under either of the two standards articulated by the Third Circuit in *McGeehan*, would be a criminal under the statute. n10

The Supreme Court, however, recently reined in the circuit courts' interpretation of the honest services fraud statute in *Skilling v. United States*. n11 Specifically, the Court concluded that the statute's limited scope renders it applicable only to cases involving "bribes and kickbacks." n12 To this end, defendants accused of violating Section 1346 must receive some benefit from their conduct; it is not enough that harm was inflicted through the breach of a fiduciary duty. n13 Accordingly, Kevin has not committed honest services fraud under the Supreme Court's authoritative interpretation of the statute.

In recent decades, Congress and the federal courts have struggled to define the contours of honest services fraud. n14 The Supreme Court first held that the mail and wire fraud statutes did not cover intangible rights, such as the right to honest services, in *McNally v. United States*. n15 Immediately thereafter, Congress enacted Section 1346 to reenact the pre-McNally case law and effectively overrule the Supreme Court's interpretation of the statute. n16 In its recent Skilling opinion, the Court recognized that the legislature might again react to its narrow interpretation of the honest services fraud statute and, in anticipation of such action, challenged Congress to "speak more clearly than it has." n17 Indeed, there is a significant possibility that Congress will enact one of two competing approaches adopted by the circuit courts to supersede the Skilling standard. n18

Notably, the Third Circuit considered both of these approaches in *McGeehan*, and, while not explicitly adopting one over the other, articulated a helpful interpretation of both standards with respect to the statute's [*1010] applicability to the conduct of private individuals. n19 In fact, Congress is now considering a bill to restore honest services fraud to its pre-Skilling status. n20

This Casebrief examines the Third Circuit's interpretation of honest services fraud in the private sector and serves as a guide to prosecutors bringing, or counsel defending against, actions before the court in the future. n21 Part II explains the early developments of the honest services doctrine, the enactment of Section 1346, and the case law developments since Section 1346's enactment. n22 Part III discusses the Third Circuit's application of the honest services law in *McGeehan* and offers a critical analysis of the case. n23 Part IV briefly discusses the Skilling opinion, its impact on honest services fraud, and foreshadows Congress's reaction. n24 Part V provides suggestions - relevant now and in the future - for practitioners in the Third Circuit. n25 Finally, Part VI concludes by emphasizing the importance of *McGeehan* and its future impact in the Third Circuit. n26

II. Background

A. Early Developments of Honest Services Fraud Before the Enactment of Section 1346

1. The First Mail Fraud Statute and the Development of the Intangible Rights Doctrine

Much of the current controversy surrounding honest services fraud arises from the history of the intangible rights doctrine and honest services fraud as it existed before the enactment of Section 1346. n27 The first mail fraud statute enacted in 1872 contained broad language making it [*1011] illegal to use the mails in connection with "any scheme or artifice to defraud." n28 The Supreme Court addressed the scope of this statute in *Durland v. United States* n29 and interpreted the phrase "scheme or artifice to defraud" broadly by holding that it includes offenses of an "extraordinarily wide range of deceptive conduct." n30 In 1909, Congress codified its intent more precisely by adding to the statute that actions directed at "obtaining money or property by means of false or fraudulent pretenses, representations, or promises" were likewise illegal. n31

In the years following these enactments, the federal courts of appeals expanded their interpretation of the scope of the mail fraud statute beyond just those instances where the victim was defrauded of tangible assets to the criminalization of schemes aimed at depriving victims of their intangible rights as well, including the right to honest services. n32 At first, the intangible rights doctrine developed primarily in the public sector. n33 Prosecutors typically used the mail fraud statute to prosecute either bribery of a public official or the failure of a public official to disclose information regarding a personal interest potentially affecting his or her judgment. n34 Biased decision-making or misuse of power for personal gain constituted a deprivation of honest services regardless of the tangible [*1012] harm to the public. n35 In the private sector, these intangible rights included an employer's right to the honest services of its employees. n36 Moreover, an employer's intangible rights also encompassed rights unconnected to any specific duty where the victim suffered no actual economic loss, such as the right to privacy and the right to "time, effort, money, and expectations." n37

2. The Addition of Wire Fraud

In 1952, Congress broadened the coverage of federal fraud protections by enacting the wire fraud statute. n38 The statute criminalizes the transmission of writings, signs, signals, pictures, or sounds by means of wire, radio, or television in interstate commerce - including Kevin's Facebook usage in the aforementioned hypothetical. n39 Although there is little legislative history, courts have construed the statute much in the same vein as the mail fraud statute. n40 Thus, the wire fraud statute has been interpreted, like the mail fraud statute, to protect intangible rights such as the right to honest services. n41

In both the private and public sectors, courts continued to use the intangible rights doctrine to criminalize behavior; however, the focus shifted from protecting the integrity of the mails to punishing white-collar criminals. n42 According to one commentator, this "exotic flower ... quickly overgrew the legal landscape in the manner of the kudzu vine until ... few ethical or fiduciary breaches seemed beyond its potential [*1013] reach." n43 The statute became an increasingly strategic tool to fight political corruption and economic misconduct. n44

3. Limiting the Reach of the Statutes: *McNally v. United States*

Courts continued to enforce citizens' right to honest services until the Supreme Court's 1987 decision in *McNally v. United States*. n45 In *McNally*, both private citizens and state officials of Kentucky had been convicted of mail fraud under Section 1341 for their participation in a self-dealing patronage scheme in which they used the mails to defraud the state of Kentucky of its intangible right to have its affairs conducted honestly. n46

The Court, however, reversed the convictions and held that both Sections 1341 and 1343 were limited to the protection of property rights and, therefore, did not cover intangible rights such as the right to honest services. n47 The Court relied upon the legislative history of the original mail fraud statute and noted that the statute reached only false promises and misrepresentations involving money or property. n48 Nonetheless, the Court did invite Congress to speak more clearly regarding whether Sections 1341 and 1343 provided the right to honest services. n49

The *McNally* Court, in reversing more than two decades of the circuit courts' intangible rights doctrine precedent, emphasized two concerns - notice and federalism. n50 First, the Court explained that when there are "two rational readings of a criminal statute, one harsher than the other, we [*1014] are to choose the harsher only when Congress has spoken in clear and definite language." n51 Second, the Court expressed concern that the federal government was intruding on state enforcement of misconduct by state officials and thus violating the fundamental principles of federalism. n52

4. Congress Responds to the Supreme Court

In direct response to the *McNally* decision, Congress, in 1988, enacted Section 1346. n53 This Section explicitly defines the intangible right of honest services as encompassed within the scope of Sections 1341 and 1343. n54 Therefore, a prosecutor pursuing a mail fraud charge could do so in conjunction with a traditional deprivation of property or money allegation or, alternatively, could proceed under a theory of the intangible right to honest services. n55 Senator Biden, in the legislative history of Section 1346, specifically stated that the congressional intent of the statute was to reinstate the pre-*McNally* case law pertaining to the scope of the mail and wire fraud statutes. n56

B. Development of Case Law Since the Enactment of the Honest Services

Fraud Law: A Split Among the Federal Circuits

Most circuits have considered the scope of Section 1346 in the private sector and agree on a need for its limits; however, there is little agreement on what these limits should be. n57 In interpreting Section 1346, courts [*1015] have expressed the same concerns as those reflected in pre-*McNally* case law - notice and federalism. n58 Lingering concerns with notice to public fiduciaries were resolved by Congress's concrete enactment after *McNally*. n59 Questions surrounding fair notice to private fiduciaries, however, still plague the courts. n60 Thus, courts remain vigilant as to the notice problem in the realm of private behavior because a wide range of conduct could unknowingly fall under the statute. n61 Further, concerns about the over-federalization of law and the intrusion on state criminal enforcement exist in the application of Section 1346 because the federal government is intervening in traditional areas of state control - the regulation of business relationships and the imposition of criminal punishment. n62

The circuits have split regarding the requirements of honest services fraud in prosecuting private fiduciaries. n63 The dominant standard among the circuits, including the First, Fourth, Sixth, Eleventh, and District of Columbia Circuits, is that the breach of fiduciary duty must cause harm [*1016] that is reasonably foreseeable. n64 However, the Second, Fifth, and Tenth Circuits have adopted a materiality standard. n65 The Third Circuit uses both standards in analyzing honest services fraud as applied to private fiduciaries. n66

1. The Foreseeable Harm Standard

The foreseeable harm standard requires that the defendant intentionally breached some fiduciary duty and "foresaw or reasonably should have foreseen" that the breach would cause economic harm to his victim. n67 The D.C. Circuit was the first circuit to adopt a foreseeable harm test in the 1983 case *United States v. Lemire*. n68 In *Lemire*, the court, con-

cerned with the government's "expansive interpretation in this and other recent mail and wire fraud cases," expressed "second thoughts" about the need to define the fraud. n69 Namely, "with the broadening of the scope of the statute to cover intangible harms" the court found a "certain amount of confusion and controversy over the outer boundaries of wire fraud." n70 Thus, the court perceived a need to limit the broad reach of honest services fraud as it pertains to private conduct. n71

[*1017] Accordingly, the D.C. Circuit held that an intentional failure to disclose a conflict of interest is not alone sufficient evidence of the intent needed to defraud an employer under the wire fraud statute. n72 Instead, the court required showing of a conflict of interest with the employer that carries "a significant risk of identifiable harm to the employer apart from the loss of his employee's loyalty and fidelity." n73 Furthermore, the harm must be such that "the defendant might reasonably have contemplated some concrete business harm to his employer." n74

Following the D.C. Circuit, the Sixth Circuit adopted a version of the reasonably foreseeable harm standard in *United States v. Frost*. n75 There, the court rejected the defendant's contention that Section 1346 only applied to public fiduciaries, and required the prosecution to prove that the defendant intended to breach a fiduciary duty and "foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." n76

Other circuit courts, including the First, Fourth, and Eleventh Circuits, have followed the D.C. and Sixth Circuits' lead by adopting substantially similar standards. n77 Among these circuits, the D.C. Circuit has [*1018] defined the least demanding standard because of the "might reasonably have contemplated" language renders convictions more attainable in its jurisdiction. n78 By contrast, the standard of the Sixth Circuit, which is largely followed by the First, Fourth, and Eleventh Circuits, is more stringent and requires that the defendant "foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." n79 In all of the circuits, however, the requirement of harm continues to puzzle and perplex those who try to determine the exact quantifiers by which the harm is to be judged. n80

2. The Materiality Standard

The materiality standard requires that the defendant possessed fraudulent intent and made "any misrepresentation that has the natural tendency to influence or is capable of influencing the victim to change his behavior." n81 The Second Circuit, in *United States v. Rybicki*, authored the most important opinion involving the materiality standard. n82 The *Rybicki* court stressed that the materiality requirement is only met when the employee's misinformation or omission would "naturally tend to lead or is capable of leading a reasonable employer to change its conduct." n83 Further, the court maintained that actual harm or pecuniary harm was not a necessary element that the prosecution must establish. n84 This standard has been followed by the Tenth and Fifth Circuits. n85

[*1019]

3. Third Circuit Jurisprudence Pertaining to Honest Services Fraud

Prior to *McGeehan*, the Third Circuit considered only three principal honest services fraud cases in the post-McNally time period. n86 These cases are *United States v. Antico*, *United States v. Panarella*, and *United States v. Murphy*. n87 Yet, the honest services at issue in these cases were allegedly owed [*1020] by public officials, not by private individuals. n88 Thus, the Third Circuit was first presented with the issue of whether to apply honest services fraud to private fiduciaries in *McGeehan*. n89 While the Third Circuit declined to adopt either the materiality or the foreseeable harm standard, the court articulated how both standards should be applied within the Third Circuit. n90

III. The Third Circuit's Pre-Skilling Interpretation of Honest Services Fraud

A. Factual Background and Procedural Posture of *McGeehan*

Between September 1994 and July 1998, Lawrence McGeehan served as the President and Chief Executive Officer of the Ben Franklin Technology Center (BFTC). n91 During this same time, Kathleen Haluska acted as the Vice-President and Chief Operating Officer of BFTC. n92 BFTC was a publicly funded, non-profit corporation based in Pittsburgh, Pennsylvania and its mission was to encourage the development and commercialization of new technology. n93 BFTC received funding from the Commonwealth of Pennsylvania upon the condition that it would spend such funds only for approved purposes, including any grants and administrative expenses that conformed to the mission of the organization. n94 In 1995, BFTC entered into an agreement with the United States Navy to administer a project in [*1021] which

the Navy provided funding while BFTC administered fund disbursements to subcontractors involved in the research and development of electro-optics technologies. n95 Together, McGeehan and Haluska were responsible for BFTC's daily operations and budget-related issues, including the agreement with the Navy. n96

McGeehan and Haluska were indicted and charged with twenty counts of mail fraud in violation of Sections 1341 and 1346, and two counts of wire fraud in violation of Sections 1343 and 1346. n97 The indictment alleged that McGeehan and Haluska caused BFTC to use its funding from the Commonwealth and Navy to pay for personal expenses and to cover other non-business related expenditures. n98 Specifically, the indictment alleged that defendants devised a scheme to defraud BFTC of their honest services by "misusing its funding, making excessive expenditures for purposes such as lavish travel and entertainment, subverting its fiscal controls, improperly withholding information from BFTC's Board of Directors, and threatening, intimidating, or removing employees who questioned their misuse of authority." n99 Both defendants were eventually sentenced to a thirty-four month term of imprisonment for each count, to be served concurrently. n100 The defendants appealed, however, claiming that the specific facts alleged by the prosecution in the indictments did not constitute honest services fraud. n101

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B. The Third Circuit Tackles Honest Services Fraud as Applied to Private Fiduciaries

The Third Circuit began its analysis in McGeehan by providing an overview of the current legal landscape of honest services fraud. n102 After discussing its past cases involving public officials, the court acknowledged that McGeehan presented a new issue: whether the honest services fraud statute can be applied to private conduct. n103 The court then discussed honest services fraud allegations as they applied to each victim - BFTC and the Navy. n104

1. BFTC Counts: Breach of Fiduciary Duty

First, the court found that the indictment allegations sufficiently demonstrated that the defendants owed a fiduciary duty to BFTC by virtue of their status as corporate officers. n105 Second, the court concluded that the alleged intentional violation of this duty, as set forth in the indictment, was sufficient to serve as the basis for an honest services fraud charge without "offending principles of fair notice or threatening to convert mere breaches of contract into federal crimes." n106 In so doing, the court dismissed the defendants' argument that honest services fraud typically only covers bribery and failure to disclose a conflict of interest resulting in personal gain. n107 The court affirmatively held that "a collateral fiduciary duty can provide the source of the honest services owed under Sections 1341, 1343, and 1346." n108 Consequently, the breach of a duty can serve as the basis of a "deprivation of the intangible right of honest services" claim. n109

In assessing the honest services claim at issue, the court considered whether to adopt the foreseeable harm standard or the materiality standard. n110 Here, it suggested the importance of establishing a standard that **[*1023]** would "avoid the over-criminalization of private relationships." n111 The court first evaluated the foreseeable harm standard of the Sixth Circuit, stating that rather than showing that the defendant actually intended to inflict economic harm on the victim, the prosecution need only prove "that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim." n112 It then contrasted this standard with the Second Circuit's materiality standard, and concluded that some circuits favor the latter because a material misrepresentation is a fundamental principle in the law of fraud. n113 Under this materiality standard, the "misrepresentation or omission at issue for an honest services fraud conviction must be material, such that the information or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct." n114

The Third Circuit declined to expressly adopt one standard over the other, finding that it need not decide which requirement is appropriate because the conduct alleged in the indictment "clearly satisfies both standards." n115 Specifically, the court determined that because the defendants intentionally and deceptively misappropriated BFTC's funding for their own personal expenditures, it was reasonably foreseeable that this breach of fiduciary duty would cause economic harm to BFTC. n116 Furthermore, this breach of fiduciary duty was also material because a corporation would have altered its conduct to prevent the misuse. n117 Thus, McGeehan and Haluska's breach of fiduciary duty met both standards. n118

2. The Navy Counts: Breach of Contractual Duty

The remaining counts in the indictment alleged that McGeehan and Haluska's conduct caused BFTC to breach its contractual obligation to another [*1024] business entity - the Navy. n119 Unlike the BFTC counts, the Navy counts did not involve services owed pursuant to a recognized fiduciary relationship. n120 Here, the court found that the government must "allege more than the breach of non-fiduciary contractual duties in order to charge a private individual with honest services fraud." n121

The court then required that there be a fiduciary duty as an element of honest services fraud. n122 The court further noted, however, that the duty of "good faith and fair dealing" inherent in a contract does not serve to impose a fiduciary duty on BFTC. n123 Thus, the Third Circuit vacated the convictions of McGeehan and Haluska pertaining to the counts alleging that they breached their duty of honest services to the Navy. n124

IV. The Supreme Court Reigns in Honest Services Fraud

In light of the lower courts' conflicting interpretations of honest services fraud, it is not surprising that the Supreme Court granted certiorari in three separate cases involving this issue during its 2010 term. n125 Justice Scalia's dissent from denial of certiorari in *Sorich v. United States* n126 paved the way for the Court's review of *United States v. Weyhrauch*, n127 *United States v. Black*, n128 and *Skilling*. n129 In June of 2010, the Supreme Court dealt prosecutors a blow by narrowing the scope of honest services fraud in *Skilling*. n130

With *Skilling*, the Court held that "honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks." n131 Thus, defendants accused of violating Section 1346 [*1025] must have received some benefit from the conduct; mere harm resulting from a breach of fiduciary duty does not suffice. n132 The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided, either directly or indirectly, for the purpose of improperly obtaining or rewarding favorable treatment in certain situations. n133

The Court also challenged Congress "to speak more clearly than it has." n134 Specifically, if Congress desires to expand the Court's interpretation of honest services fraud, it must "employ standards of sufficient definiteness and specificity to overcome due process concerns" if it is to "take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee.'" n135 The Court hinted that the standard Congress adopts must answer several important questions:

How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? n136

If McNally provides any hint as to the future of honest services fraud, Congress may attempt to overrule the Court by reenacting prior case law through legislation. n137 In fact, Congress is currently considering a bill to restore honest services fraud to its pre-*Skilling* status. n138 While the future of honest services fraud legislation remains unclear, Congress could very well adopt one of the two competing honest services fraud standards utilized by the circuit courts. n139 The Third Circuit discussed both of these standards in *United States v. McGeehan*. n140 Accordingly, McGeehan provides both prosecutors and defense attorneys with valuable insight for future prosecutions, presuming that Congress will rise to the Supreme Court's challenge and articulate a clearer standard.

[*1026]

IV. Guidance for Third Circuit Practitioners in Light of McGeehan and *Skilling*

Although a great deal of controversy continues to surround the use of honest services fraud to criminalize private conduct, McGeehan provides meaningful future guidance for attorneys practicing in the Third Circuit when Congress answers the Supreme Court's challenge to more clearly define the contours of the honest services fraud statute. n141 Both defense counsel and prosecutors alike can gain valuable insight from McGeehan. n142

Recall the Facebook hypothetical presented in the introduction. n143 Kevin, an employee at Dunder Mifflin, accessed Facebook at work despite his employer's policy prohibiting the use of work computers to access social utility

websites. n144 Assume Kevin is indicted for wire fraud for depriving his employer of its right to his honest services in violation of an amended Section 1346 that adopts the pre-Skilling interpretation of honest services fraud. n145 Until Congress passes a more expansive honest services fraud statute, Kevin will not be guilty of any crime because he has not committed a kickback or bribe under Skilling. n146 In analyzing this hypothetical or any case where a private individual is indicted for honest services fraud, however, the following guidelines - extracted from McGeehan and other Third Circuit cases - may prove helpful after Congress acts. n147

A. Practical Guidelines for Defense Counsel

As a preliminary matter, defense counsel needs to examine the relationship between the defendant and the victim. n148 The classification of this relationship is critical in determining what duty the defendant owes to the victim. n149 In our hypothetical, Kevin is in an employee-employer relationship with Dunder Mifflin. n150 Defense counsel must attempt to characterize the relationship as merely contractual in nature. n151 As the Third [*1027] Circuit established in McGeehan, the government must allege more than the breach of "non-fiduciary contractual duties" in an indictment. n152 Per McGeehan, allegations of a breach of "good faith and fair dealing" inherent in a contract are not enough. n153 Thus, defense counsel must characterize the Kevin/Dunder Mifflin relationship as purely contractual and assert that Kevin does not stand in a fiduciary relationship with the victim. n154 Defense counsel should attempt to show that the defendant-victim relationship is akin to the BFTC-Navy relationship the Third Circuit determined was not subject to honest services fraud in McGeehan. n155 In any employee-employer relationship, defense counsel will have a difficult time persuading the court that an employee, like Kevin, does not owe a fiduciary duty to the employer, particularly when the rules and policies are detailed in an employee handbook. n156

Second, defense counsel should encourage the court to firmly adopt the foreseeable harm standard over the materiality standard. n157 Many commentators argue that the materiality standard sets too low a bar to prosecution for honest services fraud for private fiduciaries because it requires little or no actual harm to the company. n158 The materiality standard captures some behavior that the reasonably foreseeable standard does not, including economic harm that is completely unforeseeable or harm that is not economic in nature, such as reputational harm. n159 Therefore, defense counsel should urge the court to adopt the foreseeable harm standard because it focuses on actual harm and damage to the victim, making it a more accurate test. n160

Under the materiality standard, Kevin is guilty as charged. n161 No employer would knowingly allow Kevin to spend an hour on Facebook each day instead of working, even if the employer is Dunder Mifflin. n162 Assuming Kevin accesses Facebook at work forty-eight weeks per year, and five [*1028] days per week, he has effectively deprived his employer of 240 quality hours of work. n163 Thus, Kevin's conduct easily meets the materiality standard. n164

Under the foreseeable harm standard, in contrast, Kevin has a better argument for acquittal. n165 Kevin, who knowingly violated Dunder Mifflin's policy regarding social utility networks, may not reasonably foresee that by spending an hour each day for non-work purposes, he is breaching a duty of loyalty to the company and causing harm. n166 Perhaps Kevin believes that Facebook refreshes his focus on his work throughout the day and that he makes up for the lost hour in his spectacular productivity. n167 Thus, Kevin has a better argument under this standard. n168

Third, and perhaps most importantly, defense counsel must urge the court to exercise extreme caution so as to not over-criminalize behavior. n169 There must be a limit at which the law can punish behavior, lest we live in an overregulated society. n170 This is Kevin's best argument. n171 Counsel should assert that because Congress has not articulated a clear standard, Section 1346 regulates the conduct of public officials rather than private individuals like Kevin. n172 Inherent in the role of a public official is the duty to make decisions based on the best interest of his or her constituents. n173 Citizens elect public officials, and when officials act corruptly, they violate a natural political contract. n174 In the private sector, [*1029] however, such a strict duty of loyalty is not found in ordinary private relationships and cannot be inferred from a strict reading of the statute. n175 Even if an employee handbook sets clear rules, defense counsel should argue that the statute is sufficiently vague such that it fails to inform Kevin that his conduct is a federal crime. n176 Further, defense counsel can argue that the principals of separation of powers and federalism mandate that the breadth and scope of the statute is limited. n177 After all, do we really want to punish people like Kevin when there are "100 million workers in the United States" acting similarly? n178

B. Practical Guidelines for Prosecutors

First, the prosecution must characterize the relationship between defendant and victim as one that is fiduciary in nature such that the defendant owed a clear duty to the victim. n179 The Third Circuit has specifically held that a breach of this

fiduciary duty is sufficient to serve as the basis of an honest services fraud charge without "offending principles of fair notice or threatening to convert mere breaches of contract into federal crimes." n180 To prove successful, the prosecution must succeed in analogizing this relationship to the BFTC-McGeehan relationship that involved an inherent fiduciary duty, rather than to the BFTC-Navy relationship that was characterized as purely contractual in McGeehan. n181 In the employee-employer context, the prosecution will easily satisfy this burden by showing that Kevin owes the prototypical fiduciary duty of loyalty to Dunder Mifflin. n182

Second, the prosecution should encourage the court to adopt the materiality standard. n183 Under the materiality standard, the prosecution can successfully convict a defendant who may cause unforeseeable harm to a [*1030] company, so long as that harm is material. n184 Under this standard, the prosecution need only show that Kevin's conduct, if discovered by Dunder Mifflin, would have led the company to change its conduct to correct the behavior. n185

Third, prosecutors should maintain that Section 1346 is an important and relevant statute because it is practically flexible in application and serves as a tool for prosecutors to punish conduct that cannot readily be charged under other statutes. n186 In this vein, Section 1346 serves as a "stopgap device" to deal on a temporary basis with new phenomenon "until particularized legislation can be developed and passed to deal directly with the evil." n187 In Kevin's case, however, the prosecution would have an exceedingly difficult time persuading a judge to allow the indictment because Kevin is merely an employee accessing Facebook at work, not a criminal mastermind. n188 In an ideal world, no prosecutor would bring this charge; however, according to McGeehan, there is nothing that prevents a prosecutor from doing so. n189

IV. Conclusion

Honest services fraud has been, and will continue to be, an extremely controversial law. n190 As evidenced by the Supreme Court's challenge to Congress to articulate a clearer standard in *Skilling*, honest services fraud remains unsettled law. McGeehan sets out clear hurdles that prosecutors and defense attorneys will face under either standard, if adopted by Congress, when practicing before the Third Circuit. n191 Practitioners must carefully define the duty owed between the defendant and victim, advocate for either the materiality or foreseeability standard to best serve their clients' interests, and carefully place arguments within the broader themes of federalism, separation of powers, and vagueness. n192 Nonetheless, until [*1031] the Third Circuit revisits this issue, private fiduciaries must carefully consider their conduct and not deprive others of their intangible right to honest services. n193 While the law has been used to indict significant breaches of duty, like McGeehan, resulting in substantial economic loss, prosecutors continue to push the limits of this law as applied to other private conduct. n194 Thus, employees should avoid status updates, wall posts, and picture tags while at work because, unless Congress is willing to accept the Supreme Court's limiting principle, something as simple as accessing Facebook could result in an unsuspecting employee receiving a federal criminal sentence.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Statutes of Frauds Requirements General Overview Criminal Law & Procedure Criminal Offenses Fraud-Wire Fraud Elements Governments Fiduciary Responsibilities

FOOTNOTES:

n1. The character and company names used in this hypothetical are derived from the National Broadcasting Channel (NBC) primetime television show "The Office." For more information about the premise of and characters on "The Office," see <http://www.nbc.com/TheOffice/> (last visited November 29, 2010). For more information about Dunder Mifflin, the fictitious paper company profiled on "The Office" and used in this hypothetical, see Dunder Mifflin, <http://www.dundermifflin.com/> (last visited November 29, 2010).

n2. For an example of actual employee handbook policy provisions regarding internet usage, see Susan M. Heathfield, *Internet and Email Policy*, About.Com, http://humanresources.about.com/od/policiesandsamples1/a/email_policy.htm (last visited Nov. 29, 2010) (authorizing employees' internet usage for conducting company business only). For a fictitious argument supporting the use of social networking sites during work hours as articulated by a character from "The Office," see Mi-

chael Scott, Scott's Shots, Dunder Mifflin, Inc.: Scranton Newsletter (Scranton, PA.), Jan. 21, 2010, available at http://www.dundermifflin.com/newsletter/scranton/scranton_012110.shtml (advocating for employees to actually use social networking websites by stating: "People, it's time to get with the 2010's, this is not your momma's social networking site (although it is my mom's) ... everyone is doing it.").

n3. See Sharon Gaudin, Study: 54 Percent of Companies Ban Facebook, Twitter at Work, *Wired* (Oct. 9, 2009), <http://www.wired.com/epicenter/2009/10/study-54-of-companies-ban-facebook-twitter-at-work/> (finding that social networking websites divert employee attention away from more pressing priorities).

n4. See *id.* (finding that studies show some employees use social networking websites as much as two hours per work day).

n5. See, e.g., Frank C. Razzano & Kristin H. Jones, Prosecution of Private Corporate Conduct, *Bus. L. Today*, Jan.-Feb. 2009, available at <http://www.abanet.org/buslaw/blt/2009-01-02/razzano.shtml> (finding several line-drawing issues in prosecuting private individuals). Razzano and Jones ask: "How can we know when a lack of absolute honesty and candor will result in prosecution?" *Id.* (stating that all dishonesty, lack of candor, or fundamental fairness is captured by statute). Furthermore, Razzano and Jones give several hypothetical situations that could fall under the statute:

An employer's employee manual prohibits personal calls. Does an employee who in violation of this workplace rule calls her sitter to check on her children become a federal felon? Does an associate at a law firm who writes a complaint letter on firm stationary to a retailer who has sold him shoddy merchandise without approval from a partner commit a crime where use of firm letterhead is generally restricted to firm business? How about the partner who treats the general counsel of a prospective client to a Super Bowl weekend in the hope that the next big case will come his way? Is a salesperson who, without advising the customer of the known difficulties in programming the unit, sells a customer a sophisticated multimedia sound system in order to earn a large commission a potential candidate for the big house? All of these scenarios involve some form of deception and, if the mails and wires are used in the execution of these seemingly common examples, they could potentially be the predicate acts for a federal crime.

Id. (identifying examples of conduct that could in fact lead to prosecution and conviction).

n6. *584 F.3d 560 (3d Cir. 2009)*.

n7. See *id.* (finding private individual guilty of honest services fraud). For a further discussion of the Kevin hypothetical, see *infra* notes 143-89 and accompanying text.

n8. See *18 U.S.C. § 1346* (2006). Section 1346 defines "scheme or artifice to defraud" which is contained in both the mail and wire fraud statutes. See *id.* §§1341, 1343 (defining scheme or artifice to defraud). The mail fraud statute reads, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered

by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

Id. § 1341 (emphasis added). The wire fraud statute reads, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Id. § 1343 (emphasis added).

n9. See Gary S. Chafetz, *The Final Days of Honest-Services Fraud*, Huffington Post (Dec. 10, 2009), <http://www.huffingtonpost.com/gary-s-chafetz/the-final-days-of-honest-b-387403.html> (discussing Justice Breyer's comments during oral argument in recent honest services fraud case).

n10. For a further discussion of the Kevin hypothetical, see *infra* notes 143-89 and accompanying text.

n11. See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (disagreeing with Fifth Circuit's construction of Section 1346).

n12. Id. (holding that "honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks").

n13. See *id.*

n14. For a discussion of the Third Circuit's honest services fraud jurisprudence, see *infra* notes 86-124 and accompanying text.

n15. See *McNally v. United States*, 483 U.S. 350, 352 (1987).

n16. Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as 18 U.S.C. § 1346 (2006)).

n17. *Skilling*, 130 S. Ct. at 2933 (calling for congressional clarity as to Section 1346).

n18. For a further discussion of the two competing approaches, see *infra* notes 57-85.

n19. See *United States v. McGeehan*, 584 F.3d 560 (3d Cir. 2009) (considering for first time Section 1346 as applied to private conduct).

n20. See Samuel Rubinfeld, Leahy Introduces Bill to Expand 'Honest-Services' Statute, Wall St. J. (Sept. 28, 2010), <http://blogs.wsj.com/corruption-currents/2010/09/28/sen-leahy-introduces-bill-to-restore-honest-services-replacement/> (discussing possible congressional reform efforts).

n21. For a discussion of the Third Circuit's analysis of the honest services doctrine, see *infra* notes 86-124 and accompanying text. For suggestions to practitioners bringing or defending similar cases before the court, see *infra* notes 141-89 and accompanying text.

n22. For a discussion of the honest services doctrine's background, see *infra* notes 27-90 and accompanying text.

n23. For a discussion of McGeehan, see *infra* notes 91-124 and accompanying text.

n24. For a discussion of Skilling and future implications of the ruling, see *infra* notes 130-38.

n25. For tips and suggestions for practitioners, see *infra* notes 141-89 and accompanying text.

n26. For an assessment of McGeehan's potential impact, see *infra* notes 190-94 and accompanying text.

n27. See generally Alice Anne Stephens, Note, The Evolution of the Harm Requirement in Honest Services Fraud, *36 Am. J. Crim. L. 71, 74 (2008)* (discussing relevance of intangible rights doctrine).

n28. See Michael K. Avery, Note, Whose Rights? Why States Should Set Parameters for Federal Honest Services Mail and Fraud Prosecutions, *49 B.C. L. Rev. 1431 (2008)* (stating that original legislative history indicates Congress intended to protect citizens from deprivation of only tangible assets such as money or property); see also Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (containing remarks by bill's sponsor, Rep. Farnsworth, that law was needed to prevent fraud by "thieves, forgers, and rapscallions generally").

n29. *161 U.S. 306 (1896)*.

n30. See *id.* at 313-14 (arguing that phrase encompassed "everything designed to defraud by representations as to past or present, or suggestions and promises as to the future").

n31. See Act of Mar. 4, 1909, ch. 321, 215, *35 Stat. 1130* (adding several sections to original mail fraud statute).

n32. See, e.g., *United States v. Clapps*, *732 F.2d 1148, 1153 (3d Cir. 1984)* (holding that mail fraud statute protects voter's right to fair elections); *United States v. States*, *488 F.2d 761, 766 (8th Cir. 1973)* (holding that indictment under mail fraud statute does state offense even where it does not contain allegations that anyone was defrauded of money or property).

n33. See, e.g., *Shushan v. United States*, *117 F.2d 110 (5th Cir. 1941)* (holding that scheme involving corruption of public official is fraud), overruled on other grounds by *United States v. Cruz*, *478 F.2d 408 (5th Cir. 1973)*; *United States v. Classic*, *35 F. Supp. 457 (E.D. La. 1940)* (holding that "scheme to defraud" includes deprivation of intangible right of good government when election commissioner committed fraud); see also John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done

About It, *101 Yale L.J. 1875, 1879 (1992)* (listing cases where intangible rights doctrine developed in public sector).

n34. See Nirav Shah, Mail and Wire Fraud, *40 Am. Crim. L. Rev. 825, 834 (2003)* (finding that intangible rights doctrine was used only to prosecute bribery or conflict of interest cases).

n35. See Ellen S. Podgor, Mail Fraud: Opening Letters, *43 S.C. L. Rev. 223, 233 (1992)* ("Prosecutors indicted and convicted public officials pursuant to the intangible rights doctrine with a finding that they had deprived the citizenry of the right to good government.").

n36. See, e.g., *United States v. Silvano*, *812 F.2d 754 (1st Cir. 1987)* (applying intangible rights doctrine to private sector); *United States v. Weiss*, *752 F.2d 777 (2d Cir. 1985)* (maintaining that intangible rights doctrine protected private relationships).

n37. See John E. Gagliardi, Back to the Future: Federal Mail and Wire Fraud Under *18 U.S.C. 1346*, *68 Wash. L. Rev. 901, 907 (1993)* (internal citations omitted) (discussing application of intangible rights doctrine to various private relationships).

n38. See Act of July 16, 1952, ch. 879, § 18(a), *66 Stat. 722* (current version at *18 U.S.C. § 1343* (2006)) (criminalizing "fraud by wire, radio or television").

n39. See *18 U.S.C. § 1343* (2006) (defining wire fraud).

n40. See Avery, *supra* note 28, at 1436 (finding statute to be patterned closely on mail fraud statute).

n41. See, e.g., *United States v. Louderman*, *576 F.2d 1383, 1387-88 (9th Cir. 1978)* (applying honest services element to mail fraud); *United States v. Donahue*, *539 F.2d 1131, 1135 (8th Cir. 1976)* (applying honest services element to wire fraud).

n42. See Carrie A. Tendler, Note, An Indictment of Bright Line Tests for Honest Services Mail Fraud, *72 Fordham L. Rev. 2729, 2734-35 (2004)* (discussing use of honest services fraud to combat modern white-collar criminals).

n43. See John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, *35 Am. Crim. L. Rev. 427, 427 (1998)* (advocating against expanding reach of honest services fraud).

n44. See Peter J. Henning, Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute, *36 B.C. L. Rev. 435, 438 (1995)* (listing several cases in which prosecutors used honest services fraud).

n45. See *McNally v. United States*, *483 U.S. 350, 352 (1987)*, superseded by statute, Pub. L. No. 100-690, § 7603, *102 Stat. 4181, 4508 (1988)*; *United States v. George*, *477 F.2d 508, 512 (7th Cir. 1973)* (holding that, in private context, government need not show that victim of scheme was actually defrauded or suffered loss to obtain honest services conviction); *United States v. Faser*, *303 F. Supp. 380, 384-85 (E.D. La. 1969)* (holding that government need not be defrauded of tangible assets such as money or property to successfully prosecute honest services fraud claim).

n46. See *McNally*, 483 U.S. at 352 (finding that state officials instructed company acting as Kentucky's workers' compensation agent to funnel commission checks to companies owned by official and other defendants in exchange for continual relationship with state).

n47. See *id.* at 359-60 (reversing district court). In rejecting the intangible rights doctrine, the McNally Court held that "the mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* (reversing appellate court interpretation of statute).

n48. See *id.* at 358-59 (noting that if Court were to construe Sections 1341 and 1343 to include honest services fraud, statute would remain ambiguous and federal government could thus become involved in impermissibly setting standards of good government for state and local officials).

n49. See *id.* at 360 (inviting Congress directly to "speak more clearly").

n50. See *id.* (stating that two primary concerns influenced decision).

n51. See *McNally*, 483 U.S. at 359-60 (citing *United States v. Bass*, 404 U.S. 336, 347 (1971)) (arguing for rule of lenity and notice).

n52. See *id.* at 360 (finding that intangible rights doctrine "involves the Federal Government in setting standards of disclosure and good government for local and state officials").

n53. Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (2006)).

n54. See 18 U.S.C. § 1346 (indicating that, for purposes of mail and wire fraud, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

n55. See Stephens, *supra* note 27, at 80 (discussing applications to both public and private fiduciaries).

n56. See 134 Cong. Rec. S17, 360-02 (1988) (statement of Sen. Biden). Senator Biden remarked specifically that, under the amendment, Sections 1341 and 1343 will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. See *id.* Biden also remarked that the intent of the amendment was to reinstate all of the pre-McNally case law pertaining to the mail and wire fraud statutes, without change. See *id.* (discussing statute's purpose). Biden stated that the statute now makes clear that "it is a crime to deprive any organization - such as a corporation or a labor union - of the loyal services of its employees." *Id.* (encouraging Congress to adopt statute to restore pre-McNally case precedent).

n57. See, e.g., *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc) (adopting materiality test); *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002) (adopting reasonably foreseeable harm test with de minimis harm requirement); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) (drawing distinction between duty enforceable in tort and duty enforceable in contract); *United States v. Vinyard*, 266 F.3d 320, 327-29 (4th Cir. 2001) (adopting reasonably foreseeable harm test), cert. denied, 536 U.S. 922 (2002); *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000) (adopting reasonably foreseeable harm test); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973-74 (D.C. Cir. 1998) (adopting reasonably foreseeable harm test); *United States v. Jordan*, 112 F.3d 14, 19 (1st Cir. 1997) (requiring government to prove some articulable harm to victim or some intended gain to defendant).

n58. See Stephens, *supra* note 27, at 77 (discussing courts' concerns with statute).

n59. See *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997) (stating that "the right of the public to the honest services of its official derives at least in part from the concept that corruption and the denigration of the common good violates 'the essence of the political contract'").

n60. See Stephens, *supra* note 27, at 77 (finding that statute has no precise instruction for private conduct).

n61. See *Frost*, 125 F.3d at 365 (explaining that concern with notice to public fiduciaries has always been somewhat mitigated by democratic assumption of accountability, whereas this does not exist in private sector). Furthermore, the court quoted one commentator who stated:

This refusal to carry out the intangible rights doctrine to its logical extreme stems from a need to avoid the over-criminalization of private relationships: "If merely depriving the victim of the loyalty and faithful service of his fiduciary constitutes mail fraud, then the ends/means distinction is lost. Once the ends/means distinction is abolished and disloyalty becomes a crime, little remains before every civil wrong is potentially indictable."

Id. (quoting John C. Coffee, Jr., From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 *Am. Crim. L. Rev.* 117, 167 (1981)).

n62. There are also counterarguments touting the efficacy and political neutrality of federal prosecution of local public officials; however, it is beyond the scope of this Casebrief to discuss more specific federalism implications of Section 1346. See generally George D. Brown, New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?, 60 *Wash. & Lee L. Rev.* 417 (2003); George D. Brown, Should Federalism Shield Corruption?--Mail Fraud, State Law and Post-Lopez Analysis, 82 *Cornell L. Rev.* 225 (1997).

n63. See Stephens, *supra* note 27, at 87 (listing circuit splits).

n64. See generally *United States v. Vinyard*, 266 F.3d 320 (4th Cir. 2001) (stating that harm must be reasonably foreseeable); *United States v. Martin*, 228 F.3d 1 (1st Cir. 2000) (adopting foreseeable harm standard); *United States v. Devegter*, 198 F.3d 1324 (11th Cir. 1999) (questioning the foreseeable harm standard but nonetheless adopting it); *Frost*, 125 F.3d at 346 (advocating for foreseeable harm standard); *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (finding that best standard for evaluating honest services fraud is foreseeable harm standard).

n65. See generally *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006) (adopting materiality standard); *United States v. Rybicki*, 354 F.3d 124, 146 (2d Cir. 2003) (en banc) (creating materiality standard); *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (finding materiality standard appropriate).

n66. For a further discussion of the Third Circuit's use of these standards, see *infra* notes 102-124 and accompanying text.

n67. See *Vinyard*, 266 F.3d at 320 (adopting foreseeable harm standard).

n68. See *Lemire*, 720 F.2d at 1334-39 (discussing foreseeable harm standard). In *Lemire*, the defendant was an employee of Raytheon Corporation and was in charge of delivering housing as part of Raytheon's contract with the Kingdom of Saudi Arabia. See *id.* at 1332 (explaining agreement to provide housing for construction of missile base). The defendant, however, bypassed Raytheon's contract by independently agreeing to broker a deal

through a separate shipping company and thus caused Raytheon to be overcharged in shipping costs. See *id.* (stating that government argued Raytheon was overcharged because submitted bid was based on information from Lemire that contract would be awarded to IMS). This allowed Interconex to calculate the shipping charges based on being able to charter just one ship rather than send housing piecemeal. See *id.* (discussing scheme allowing for excess profits, which were then distributed in kickbacks to defendants through Generation Holding).

n69. *Id.* at 1335 n.8 (internal citations omitted).

n70. *Id.* at 1336 (expressing concerns with applying Section 1346 to private conduct).

n71. See Stephens, *supra* note 27, at 87 (discussing foreseeable harm standard created by D.C. Circuit as applied to private conduct).

n72. See *Lemire*, 720 F.2d at 1337 (maintaining public/private distinction, specifically stating that this standard did not apply to public officials, only private fiduciaries).

n73. *Id.* (stressing that harm must be significant).

n74. *Id.* (distinguishing foreseeable harm standard from older materiality standard, assuming that by requiring foreseeable harm, harm must be material because business context demands that it concern financial bottom line). The D.C. Circuit later reaffirmed *Lemire* in *United States v. Sun Diamond Growers of California*. See 138 F.3d 961 (D.C. Cir. 1998), *aff'd* 526 U.S. 398 (1999) (upholding foreseeable harm standard). The case concerned whether campaign contributions were given to Henry Espy, the brother of Secretary of Agriculture Mike Espy. See *id.* (confirming that foreseeable harm standard is appropriate test). Henry Espy ran an unsuccessful campaign for Congress and acquired substantial debt in the process. See *id.* at 969 (explaining that Espy asked Sun Diamond's lobbyist, Douglas, for help with his brother's campaign debt). Douglas solicited the contributions and then billed Sun Diamond for the cost of the contributions and falsely listed them as tickets to a dinner in Washington. See *id.* (questioning whether this action by private fiduciary falls under honest services prong of Section 1346 and adhering to its interpretation of honest services fraud in private context, holding that defendant need not have intended harm, but rather "might reasonably have contemplated" some economic harm to his employer).

n75. 125 F.3d 346 (6th Cir. 1997). Frost, a professor at the University of Texas Space Institute and the owner of a company that provided atmospheric science research, instructed his students who were NASA or Army employees to secure contracts for his company. See *id.* at 352-53. In return, the defendant would aid the students in preparing for their masters or doctoral thesis by giving them access to internal documents at his company. See *id.* (discussing illegal kickback scheme).

n76. See *id.* at 368 (rejecting defendant's contention that Section 1346 only applies to public fiduciaries, although noting that honest services theory application is more problematic in private sector where relationships are founded more on economic benefit and less on common good).

n77. For a further discussion of the jurisprudence in these circuits, see Stephens, *supra* note 27, at 90-92.

n78. See *Sun Diamond Growers of California*, 138 F.3d at 974 (discussing more relaxed "might reasonably have contemplated" approach).

n79. See *Frost*, 125 F.3d at 368 (adopting more stringent standard).

n80. For a further discussion of approaches to argue before the court, see *infra* notes 141-89 and accompanying text.

n81. See *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981) (adopting materiality standard).

n82. See *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc). The defendants in *Rybicki* were employees of a personal injury law firm who secretly paid off the insurance adjusters in the cases they covered. See *id.* at 127 (discussing scheme in which lawyers would pay adjusters tips). Neither the lawyers nor the claim adjusters reported the payments to their employers. See *id.* (discussing facts of case). The court concluded that the defendants' actions violated the honest services doctrine because they had acted in their own interest which led to a material misrepresentation or omission of information disclosed. See *id.* (finding fault under material misrepresentation standard).

n83. *Id.* at 145 (finding employer relies on its employees' conduct).

n84. See *id.* (finding materiality test most accurate because it was based on all elements common to entire body of law). Furthermore, the standard encapsulates all economic harm that would cause the employer to change its behavior, and thus all behavior that would fall under the reasonably foreseeable standard. See *id.* (adopting materiality test over foreseeable harm test).

n85. See *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (adopting materiality test); *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981) (same).

n86. See *United States v. McGeehan*, 584 F.3d 560, 566 (3d Cir. 2009) (discussing materiality and foreseeable harm standards).

n87. See *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003); *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001). In *Antico*, the defendant was an official for the Philadelphia Department of Licenses and Inspections who failed to disclose a variety of improper financial arrangements, including referring paying customers to the mother of his child as a way of avoiding payment of child support. See *Antico*, 275 F.3d at 261-65 (finding that *Antico* also entered into variety of other improper financial arrangements). The court concluded that *Antico*'s obligation to disclose his personal interest in the official business he was handling arose by virtue of both state and local laws. See *id.* at 263-64 (noting further that "even if we were to read these [statutory] conflict of interest provisions as restrictively as *Antico* suggests, we find that his conduct violated the fiduciary relationship between a public servant charged with disinterested decision-making and the public he serves"). Further, the court explained that this fiduciary relationship imposed upon the official a duty "to disclose material information affecting an official's impartial decision-making and to recuse himself ... regardless of a state or local law." See *id.* (finding that *Antico*'s intentional concealment of his conflict of interest violated both state and local law, as well as his fiduciary duty to general public). The court also concluded there was sufficient evidence to uphold *Antico*'s conviction for honest services. See *id.*

In *Panarella*, the defendant was an owner of a tax collecting business who was charged with being an accessory after the fact to a state senator's commission of honest services fraud. See *Panarella*, 277 F.3d at 679-81 (discussing state senator's fraud and tax evasion). *Panarella* did not dispute that the senator concealed a financial interest in his business contrary to Pennsylvania's disclosure statute, which criminalized such conduct, but rather, disputed that in the absence of an allegation that the senator misused his office for personal gain, the superseding information failed to state an offense. See *id.* at 691-92. The court held that "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346." *Id.* at 691 (reasoning that determination of whether public official had misused his office for personal gain was ambiguous standard). The court further determined that the violation of Pennsylvania's disclosure statute served as a "better limiting principle for purposes of determining when an official's failure to dis-

close a conflict of interest amounts to honest services fraud." *Id.* (citing breaches of duty in failure to disclose). The state statute at issue in *Panarella* provided clear notice for purposes of the rule of lenity that nondisclosure of the official's conflict of interest was criminal. See *id.* at 693. In addition, the court continued, the intrusion into state autonomy was significantly muted, because the conduct that amounted to honest services fraud was conduct the state itself had chosen to criminalize. See *id.* at 694. The court's holding had a "sound basis in both doctrine and policy," as the official's conduct fell "squarely within the classical definition of fraud," which in its "elementary common law sense of deceit ... includes the deliberate concealment of material information in a setting of fiduciary obligation." *Id.* at 695 (internal quotation marks and citations omitted).

In *Murphy*, the defendant was neither a publicly-elected or publicly-employed official; rather, he served as chairman of a county political party. See *Murphy*, 323 F.3d at 10 (reversing defendant's conviction for honest services fraud because government failed to identify any "clearly established fiduciary relationship or legal duty in either federal or state law between *Murphy* and Passaic County or its citizens"). Furthermore, the court looked to state law to ascertain what standards of fiduciary care the public officials were required to meet in order to determine whether the officials defrauded the citizens of their right to honest services. See *id.* at 115 (noting that in *Antico* and *Panarella*, court assumed, based on extensive pre- *McNally* case law, that public officials have duty to provide honest services to public). In other words, collateral state laws established what type of fiduciary duty was required in those cases and limited the scope of honest services fraud. See *id.* at 116 (determining that limiting principle was inherently important because "plain language of § 1346 provides little guidance as to the conduct it prohibits" and explaining that "the deprivation of honest services is perforce an imprecise standard" (quoting *Panarella*, 277 F.3d at 698)). For this reason, the court chose to endorse the decisions of other courts of appeals that have interpreted Section 1346 more stringently and required a state law limiting principle for honest services fraud. See *id.* (concluding that without fiduciary relationship, "it was improper for the District Court to allow the jury to create one").

n88. See *McGeehan*, 584 F.3d at 564 (distinguishing *McGeehan* from past cases).

n89. See *id.* (noting that issue of honest services fraud as applied to private fiduciaries was novel issue for court).

n90. For a further discussion of the opinion, see *infra* notes 91-124 and accompanying text.

n91. See *McGeehan*, 584 F.3d at 563 (identifying nature of *McGeehan*'s position at BFTC).

n92. See *id.* (identifying nature of *Haluska*'s position at BFTC).

n93. See *id.* at 562 (discussing development of BFTC and sources of funding).

n94. See *id.* (detailing arrangement between BFTC and Commonwealth). Further, any breach of this arrangement could have jeopardized BFTC's state funding. See *id.* (setting forth contractual obligations).

n95. See *id.* at 563 (explaining that project was named National Network for Electro-Optics Manufacturing Technology (NNEOMT)). The project agreement provided that any funds the Navy provided were to be used solely for the purpose of administering the project. See *id.* (describing specifics of agreement).

n96. See *id.* (acknowledging responsibilities of NNEOMT).

n97. See *id.* (alleging seven additional counts of fraud against United States in violation of 18 U.S.C. § 1031).

n98. See *id.* (discussing defendants' indictment).

n99. *Id.* (internal citations omitted) (discussing counts one through nine of indictment). Counts ten through twenty-two of the indictment alleged that BFTC, under the defendants' management, "owed the United States Navy a duty of honest services pursuant to its contract to administer NNEOMT." See *id. at 564* (alleging that defendants "devised a scheme and artifice to defraud the United States Navy of the intangible right of honest services"). Counts twenty-three through twenty-nine alleged that defendants knowingly caused BFTC to execute a scheme and artifice to defraud and obtain money from the Navy in excess of one million dollars or more. See *id.* (alleging that defendants used mail and wire communications to use NNEOMT funds for unauthorized purposes).

n100. See *id.* (discussing trial process). Both defendants initially pleaded not guilty, however, during trial, Haluska entered an unconditional guilty plea and McGeehan proceeded to verdict and was convicted on eight counts. See *id.* (sentencing both defendants to thirty-four month terms of imprisonment for each count, to be served concurrently, and imposing three years of supervised release).

n101. See *id. at 564* (stating that Third Circuit's standard of review is plenary).

n102. See *id. at 565* (discussing statute, rulings by Supreme Court, response by Congress, and interpretation by Third Circuit as applied to public fiduciaries). For a detailed discussion of the history of honest services fraud, see *supra* notes 27-56 and accompanying text.

n103. See *McGeehan, 584 F.3d at 569* (finding that case law supports conclusion that private actors can owe "honest services" under Section 1346).

n104. See *id.* (developing both standards although declining to specify which to adopt).

n105. See *id. at 570* (finding that defendants were obligated to disclose any personal interests in matters over which they had decision-making power).

n106. See *id.* (holding that indictment made out necessary elements of honest services fraud and district court did not err by denying motion to dismiss these counts).

n107. See *id. at 571* (finding that appellants' acts of diverting corporate funds to finance their own personal expenditures were self-serving and thus could be covered under conflict of interest standard).

n108. *Id.* (finding collateral fiduciary duty in McGeehan and Haluska's duties to BFTC).

n109. *Id.* (internal citations omitted).

n110. See *id. at 572* (discussing important aspects of both standards).

n111. See *id.* (suggesting that other courts of appeals have added additional requirements to safeguard against over-criminalization).

n112. See *id. at 571* (discussing Sixth Circuit's Frost jurisprudence requiring prosecution to demonstrate that defendant "foresaw or reasonably should have foreseen that [the entity to whom the fiduciary duty is owed] might suffer an economic harm as a result of the breach").

n113. See *id.* (citing Rybicki for proposition that "the non-de minimis reasonably foreseeable harm test ... limits the scope" of Section 1346 (internal citations omitted)).

n114. See *id.* (internal citations omitted) (finding that victim's knowledge of scheme would tend to cause victim to change his or her behavior).

n115. See *id.* (finding that McGeehan and Haluska were guilty under either test).

n116. See *id.* (discussing McGeehan and Haluska's conduct).

n117. See *id.* (contemplating BFTC's potential corrective action).

n118. For a further discussion of both standards, see *supra* notes 67-90 and accompanying text.

n119. See *McGeehan*, 584 F.3d at 569 (finding that these counts advanced theory of honest services fraud that was not within core categories of prior Third Circuit cases).

n120. See *id.* (asserting that these counts involved contractual relationship).

n121. *Id.* (finding government's allegations insufficient).

n122. See *id.* (asserting that existing fiduciary duty is in fact element of offense).

n123. See *id.* (discussing significance of duty that must exist).

n124. See *id.* at 575 (vacating and remanding to district court for further proceedings).

n125. See Lisa L. Casey, Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud, 35 *Del. J. Corp. L.* 1, 67-68 (2010) (discussing controversy surrounding honest services fraud).

n126. See *Sorich v. United States*, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting) (disagreeing with denial of certiorari).

n127. The specific question presented in *Weyhrauch* was "whether a federal honest services mail fraud prosecution under 18 U.S.C. §§1341 and 1346 requires proof that the conduct at issue also violated an applicable state law." *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008).

n128. See *United States v. Black*, 530 F.3d 596, 600 (7th Cir. 2008), cert. granted, 129 S. Ct. 2379 (U.S. May 18, 2009) (No. 08-876).

n129. 130 S. Ct. 2896 (2010).

n130. See *id.* at 2933 (limiting honest services fraud liability to situations in which perpetrator receives some bribe or kickback).

n131. See *id. at 2933* (narrowing reach of honest services fraud statute to avoid problems of unconstitution-
al vagueness).

n132. See *id. at 2931* ("To preserve the statute without transgressing constitutional limitations, we now hold
that [Section 1346] criminalizes only the bribe-and-kickback core of the pre-McNally case law.").

n133. See *id. at 2933-34* (discussing types of personal benefits that must accrue to perpetrator of honest ser-
vices fraud).

n134. See *id. at 2933* (limiting honest services fraud liability to "only seriously culpable conduct").

n135. *Id. at 2933 n.44* (requiring greater degree of specificity from Congress before expanding criminal
prohibitions of honest services fraud).

n136. *Id.*

n137. See Peter J. Henning, *How the Skilling Ruling Reins In White-Collar Cases*, N.Y. Times, June 25,
2010, available at
<http://dealbook.blogs.nytimes.com/2010/06/25/how-the-skilling-ruling-reins-in-white-collar-cases/>.

n138. See Rubinfeld, *supra* note 20.

n139. See *id.* (hypothesizing that how Congress might address issue is "very much an open question").

n140. For a further discussion of McGeehan, see *supra* notes 91-124 and accompanying text.

n141. For a further discussion of how practitioners should interpret McGeehan, see *infra* notes 148-89 and
accompanying text.

n142. See *id.* (discussing practical value of opinion).

n143. For a discussion of the Kevin hypothetical, see *supra* notes 1-4 and accompanying text.

n144. See *id.* (discussing Kevin's employment status).

n145. See *id.* (discussing hypothetical indictment for accessing Facebook in violation of employee hand-
book policies).

n146. For a discussion of the bribe and kickback limitation in Skilling, see *supra* notes 130-138 and accom-
panying text.

n147. For a further discussion of the guidelines, see *supra* notes 141-89 and accompanying text.

n148. See *United States v. McGeehan*, 584 F.3d 560, 567-68 (3d Cir. 2009) (confirming that first issue to be
explored is scope of "honest services" owed).

n149. See *id.* (explaining that relationship between parties is often defined by extent of duty owed to one another).

n150. For a discussion of the Kevin hypothetical, see *supra* notes 1-4 and accompanying text.

n151. See *McGeehan*, 584 F.3d at 569 (finding that merely contractual relationships are not included in statute).

n152. See *id.* (finding that government must allege more in indictment).

n153. See *id.* at 574 n.12 (discussing duty that must exist).

n154. See *id.* (showing that fiduciary relationship furthers honest services fraud analysis).

n155. See *id.* (finding that mere contractual obligations were not enough for indictment).

n156. For a discussion of other hypothetical scenarios involving employee handbooks that fall victim to the honest services fraud statute, see *supra* note 5.

n157. For a discussion of the differences between the two standards, see *supra* notes 67-90 and accompanying text.

n158. See *Stephens*, *supra* note 27, at 80 (discussing practical differences between two standards).

n159. See *id.* at 92-96 (arguing that prosecution has better chance of gaining conviction under materiality standard rather than foreseeable harm standard).

n160. See *id.* at 87-92 (stating that foreseeable harm standard is more difficult standard for prosecution to satisfy).

n161. For a discussion of the materiality standard, see *supra* notes 81-85 and accompanying text.

n162. For a discussion of the Kevin hypothetical, see *supra* notes 1-4 and accompanying text.

n163. See *id.* (basing calculation on assumption of four weeks of vacation during year).

n164. For a discussion of how the materiality standard is the easier standard to meet, see *supra* note 84 and accompanying text.

n165. For a discussion of the foreseeable harm standard, see *supra* notes 67-80 and accompanying text.

n166. For a discussion of the underlying Kevin hypothetical, see *supra* notes 1-4 and accompanying text.

n167. See *id.*

n168. For a discussion of why the foreseeable harm standard is a more difficult standard for the prosecution to meet than the materiality standard, see *supra* note 84 and accompanying text.

n169. See Tendler, *supra* note 42, at 2740 (noting that statutory language codifying honest services doctrine potentially permits prosecutors to apply honest services fraud statute quite broadly). Over-criminalization refers to the excessive reliance on a criminal sanction, especially with *malum prohibitum* types of crimes. See *id.* at 2761 n.243, 2762 (arguing that because *malum prohibitum* crimes such as honest services fraud are not necessarily immoral, over-criminalization of such crimes may lead to excessively intrusive regulation of private behavior).

n170. See *id.* at 2762 (finding that over-criminalization can lead to increased disrespect for law, discriminatory enforcement, and waste of judicial resources).

n171. See *id.* at 2762-63 (arguing that indefinite criminal statutes such as honest services fraud should be applied sparingly lest they no longer provide constitutionally required notice to potential wrongdoers of criminality of their actions).

n172. See *id.* at 2741-42 (arguing for justification of scenario as applied to public officials because their inherent job description is to serve for good of public).

n173. See Tendler, *supra* note 42, at 2741-42 (showing that politicians form natural contract with constituency).

n174. See *id.* (supporting honest services fraud as applied to public individuals).

n175. See *id.* at 2742 (finding that even when they do exist, nature and fiduciary duty of loyalty in private sector differs in kind from public sector obligation and that this distinction bears heavily on problem of fair notice).

n176. For a discussion of vagueness concerns, see *supra* notes 15-17 and accompanying text.

n177. See *id.* (discussing plethora of constitutional issues inherent in vagueness of statute).

n178. See Chafetz, *supra* note 9 (arguing against constitutionality of honest services fraud).

n179. See *United States v. McGeehan*, 584 F.3d 560, 569 (3d Cir. 2009) (finding that merely contractual relationships are not included in statute).

n180. See *id.* at 569, 71 (finding that case law supports conclusion that "private actors can owe 'honest services' under Section 1346").

n181. See *id.* at 574 n.12 (showing that outcome of McGeehan stems from classification of relationship between parties).

n182. For a discussion of the underlying Kevin hypothetical, see *supra* notes 1-4 and accompanying text.

n183. For a discussion of why the materiality standard is the easier standard to meet, see supra note 84.

n184. For a discussion of the materiality standard, see supra notes 81-85 and accompanying text.

n185. For a discussion of the materiality standard, see supra notes 81-85 and accompanying text.

n186. See Tandler, supra note 42, at 2740 (discussing congressional policy concerns behind enactment of Section 1346).

n187. See *id.* at 2761-62 (finding that this malleability releases federal prosecutors from often technical jurisdictional requirements found in other federal fraud statutes).

n188. For a discussion of the underlying Kevin hypothetical, see supra notes 1-4 and accompanying text.

n189. See *United States v. McGeehan*, 584 F.3d 560, 569 (3d Cir. 2009) (allowing prosecution of private conduct along parallel circumstances as Kevin Facebook hypothetical discussed above).

n190. For a discussion of the controversy surrounding honest services fraud, see supra notes 11-20 and accompanying text.

n191. See *McGeehan*, 584 F.3d at 569 (giving sufficient analysis of both standards).

n192. For a discussion of prosecutorial and defense strategies, see supra notes 141-89 and accompanying text.

n193. For a further discussion of the consequences of violating the honest services fraud statute, see supra notes 1-4 and accompanying text.

n194. For a further discussion of how the Kevin hypothetical illustrates a possible abuse of this law, see supra notes 141-89 and accompanying text.