

Fraud Sentence Enhanced for Abuse of Trust

Must the Defendant And Victim Have a Personal Relationship?

By Stanley A. Twardy, Jr. and Doreen Klein

The Federal Sentencing Guidelines establish factors that a court is authorized to consider in imposing a sentence upon a criminal defendant, and assign numeric values to those factors in an effort to achieve some consistency in sentencing. Though the factors mostly stay the same, their precise parameters are constantly evolving. One evolving factor is the “abuse of trust” or “use of special skill” enhancement, described in the Guidelines under § 3B1.3.

The abuse-of-trust enhancement provides that a defendant’s sentence must be increased if the defendant “abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense ...” The application notes suggest that there must be a personal relationship between the defendant and the victim, giving examples that appear to require something more than an ordinary business relationship: “an embezzlement of a client’s funds by an attorney serving as a guardian, a bank executive’s fraudulent loan

scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.” 18 USCS Appx. § 3B1.3 note 1.

WHAT THE COURTS SAY

Despite these seemingly straightforward examples, distinguishing situations where the enhancement is appropriate can be difficult. The Second Circuit, for example, has taken pains to distinguish a garden-variety fraud from one in which the enhancement may be applied, even while it has struggled to articulate that distinction clearly. In *United States v. Hirsch*, 239 F.3d 221, 228 (2d Cir. 2001), the defendant was an investment advisor. The court made clear that the abuse-of-trust enhancement applied because the defendant had a “fiduciary *and personal* relationship (rather than an arms-length relationship) with his investors” (emphasis added). The court seemed intent on clearing up any confusion that might be created by applying the enhancement in a fraud context, noting that every fraud involves the elements of a defendant’s violation of a legal obligation to be truthful and the victim’s reliance on the misrepresentation. The court noted that it was necessary to determine the extent to which the defendant’s position gave him the freedom to commit a “difficult-to-detect” wrong, adding that the defendant’s position must involve discretionary authority entrusted to him by the victim.

Subsequently, in *United States v. Santoro*, 302 F.3d 76, 80 (2d Cir. 2002), the court explicitly held that a fiduciary relationship is not required for the abuse-of-trust enhancement to apply to a stockbroker. The “defendant-broker affirmatively establishes a trust relationship by recommending a stock to his clients.” The court affirmed an enhanced sentence because it found that the defendant had recommended a legitimate stock expressly for the purpose of gaining his clients’ trust as a prelude to defrauding them with a subsequent recommendation of a fraudulent stock.

SIGNIFICANT CONSISTENCY

These cases are consistent with each other in at least one significant respect. Up until now, the Second Circuit appears to have required that there be a personal, one-on-one relationship between the defendant and the victim. So have other circuits.

The Eleventh Circuit developed this theme in *United States v. Morris*, 286 F.3d 1291, 1295 (11th Cir. 2002), vacating an enhancement based on misrepresentations by *co-conspirators* that the defendant who was given the enhanced sentence was a professional trader and licensed attorney. The court reasoned that, by its nature, the abuse-of-trust enhancement cannot be appropriately applied to a defendant based upon the representations of others. The Seventh

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Circuit, in *United States v. Burke*, 125 F.3d 401 (7th Cir. 1997), has ruled similarly, in vacating an enhancement and remanding for the district court to determine whether the defendant, a lawyer, relied upon relationships he previously had established with three victims of his Ponzi scheme to further his fraudulent securities scheme. If the defendant had little or no personal contact with his customers and no access to their confidential financial information from earlier interactions, his mere acquaintance with them was not a close enough relationship to create a position of trust.

Absent a personal relationship, even defendants who occupy roles traditionally considered ones of trust and who exploit their status to advance a fraudulent scheme have been held not to be subject to the enhancement. For example, in *United States v. Hall*, 349 F.3d 1320 (11th Cir. 2003), the defendant was a pastor who managed and promoted a fraudulent investment scheme. The court held that while the defendant may have used his status as a pastor to develop the trust of investors, he had no "personal trust relationship" with any of the investors, and it was error to apply the enhancement. Similarly, in *United States v. Caplinger*, 339 F.3d 226 (4th Cir. 2003), the defendant posed as an accomplished physician in order to attract investors to his company, which marketed an AIDS drug. The court held that the defendant did not have the requisite relationship with investors necessary to support an abuse-of-trust enhancement.

Any argument that a personal relationship is a prerequisite to imposing the abuse-of-trust enhancement, however, may be undermined by a sentence recently affirmed by the Second Circuit in a summary order joined by retired U. S. Supreme Court Justice Sandra Day O'Connor (sitting by designation). *United States v. Evergreen International et al.*, No. 1:01-cr-01243 (E.D.N.Y. Dec. 20, 2005) (amended judgment as to Polina

Sirotina), *aff'd*, 206 F. App'x 71 (2d Cir., Nov. 21, 2006). In an unpublished memorandum that may signal a trend in the Second Circuit, the panel affirmed an expanded sweep of the enhancement to cover individuals whom the victim never even knew, rejecting the contention of defendant Polina Sirotina that the abuse-of-trust enhancement should not apply to a manager who lacks direct contact with the victims, even if the enterprise she managed was concededly fraudulent. *See* 206 Fed. App'x. 71.

In *Evergreen*, the defendant Polina Sirotina and her co-defendants worked at Evergreen International Spot Trading, a boiler room that represented itself as trading in foreign currencies. Evergreen's clearing firm was co-defendant First Equity Enterprises, Inc., which sent investor funds totaling \$37 million to Evergreen's putative trading partner, Forex International Ltd., a foreign company controlled by fugitive co-defendant Andrei Koudachev. No trades took place; instead, Koudachev and an accomplice stole the money.

Sirotina, along with her co-defendants, was convicted after a jury trial of conspiracy to commit mail and wire fraud and on substantive counts of mail fraud and money laundering. She was sentenced to 102 months based upon the abuse-of-trust enhancement, among other considerations. On appeal, Sirotina disputed the application of that enhancement, claiming that Koudachev and others were the main architects of the fraud, and that she had no trust relationship with any of the victims. In affirming her sentence, the panel noted that Sirotina helped set up a separate clearing firm because she thought it would look better to customers; directly controlled the nominal head of the clearing firm; authorized an Evergreen employee to misrepresent himself as a director of the clearing firm in opening a bank account; told outside counsel that the clearing firm was "independent"; directed an employee to establish a trading

agreement between Evergreen and Forex and to cover his tracks thereafter; and established a clearing agreement between Evergreen and First Equity that required customers to open accounts at First Equity.

With respect to Sirotina's co-defendant, the panel, in affirming his sentence enhanced for abuse of trust, explicitly noted his direct contact with the victims at a client lunch used to conceal a broker's identity. But the affirmance of Sirotina's enhanced sentence appears to be based on the victims' trust of the *institution* as opposed to any specific individual. Because Sirotina was the public face of the institution, her sentence was enhanced even though she never had any direct contact with the victims.

CONCLUSION

Given the wealth of case law analyzing the abuse of trust under the Sentencing Guidelines, the enhancement of Sirotina's sentence based on her title rather than on any actual relationship with the victims is a significant and unfortunate expansion. Just as the frauds are constantly changing and evolving, so too are the Guidelines factors that support sentencing for those schemes.

