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New York's Real Scandal

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Joe Nocera

“The scandal isn’t what’s illegal,” goes one of Michael Kinsley’s best-known sayings. “The scandal is what’s legal.” I offer you l’affaire Sheldon Silver as a case in point.

Silver, who for two decades was the all-powerful speaker of the New York Assembly, was indicted last Thursday for a variety of alleged illegal actions. Chief among them was his failure to list outside income on his financial disclosure forms, and his steering \$500,000 from a state slush fund he controlled to a doctor who specialized in mesothelioma — a rare, deadly cancer — in return for client referrals. Silver says he’ll be vindicated, but Preet Bharara, the U.S. attorney who indicted him, has won the cooperation of a number of key participants, including said doctor, whose name is Robert Taub. We’ll return to him in a minute.

Despite the rather obvious potential for conflict of interest, it’s perfectly legal for a New York legislator to earn outside income. Few took fuller advantage of this than Silver, who for more than a decade was paid millions of dollars by two law firms. One of them was Weitz & Luxenberg, a big-time New York plaintiffs’ firm that specializes in bringing lawsuits on behalf of people with mesothelioma, which results primarily from exposure to asbestos.

Though Silver is a lawyer, he knew nothing about asbestos litigation — nor did he ever do any actual lawyering for the firm. So what did he do? The firm now says it brought him on — at a base salary of \$120,000 a year — purely to lend it prestige. But in truth, Silver did much more than that. As speaker of the Assembly he could ensure that the legislature did nothing to clip the wings of the plaintiffs’ bar, like setting a cap on damages.

He could also solicit client referrals, for which he would receive a piece of the action. This is where Taub comes in. Many doctors who specialize in mesothelioma

have a pretty explicit tit-for-tat: They refer patients to firms that help fund their research. A legal bribe, you might call it. Before Taub and Silver began doing business, the doctor asked for funding from Weitz & Luxenberg. The firm said no. So instead, Silver instructed the Department of Health to make two \$250,000 grants to fund Taub's research. (In a statement, Weitz & Luxenberg said it had no knowledge of Silver's quid pro quo.)

When the grant money ran out, Taub began referring most of his patients to Simmons Hanly Conroy, a big asbestos firm in Illinois. But he still made the occasional referral to Weitz & Luxenberg to curry favor with Silver. In return, Silver got Taub's son a job, and directed \$25,000 in state funds to his wife's charity. Perfectly legal.

There is one other thing Silver could do for Weitz & Luxenberg. He could help make sure that the New York judiciary would look favorably on asbestos cases. The chief judge of the New York State Court of Appeals, Jonathan Lippman, is a childhood friend of Silver's. And, in 2008, Lippman placed Silver's good friend Arthur Luxenberg — yes, the same Luxenberg who was paying Silver \$120,000, plus referral fees — on a committee that recommends judicial appointments. Six months later, a judge named Sherry Klein Heitler was assigned to lead New York City's dedicated asbestos court.

Defense lawyers say that since then, the asbestos court has become the plaintiffs' bar's best friend. Prior to Heitler's appointment, the court had deferred punitive damages claims indefinitely for the sensible reason that since companies stopped making asbestos products decades earlier there was no behavior to correct. But after Weitz & Luxenberg requested that this deferral be lifted, Heitler brought punitive damages back. Mesothelioma cases that had very little in common were consolidated, which pressured defendant companies to settle and, when they didn't, could lead to huge jury awards. According to a 2013 report by the American Tort Reform Association, the average jury award for an asbestos claim in New York City since 2007 is \$21.7 million. That is "roughly seven times the \$3.1 million average award in courts throughout the rest of New York State."

And no firm has had more success than Weitz & Luxenberg. According to the economic consulting firm Bates White, it handles some 53 percent of the city's mesothelioma filings. The court itself acknowledged Weitz & Luxenberg cases take

precedence over others. It has also won the most money. In July 2013, it won \$190 million for five plaintiffs, the most awarded in a New York City asbestos case.

Weitz & Luxenberg insists that the judiciary treats everyone fairly, and that it reaps the biggest awards because it does the best job. That may be so. But it couldn't hurt that Silver also played an important role in setting judicial pay, and that in 2011 his commission appointee cast the deciding vote in getting the state judges a 27 percent raise.

Which, of course, is perfectly legal.

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