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## Is it a Crime? The Empty Defendant's Chair at the Knoedler Civil Trial

By Jessica Preis\*

On February 10, 2016, the highly watched case, *De Sole v. Knoedler Gallery, LLC*, settled out of court. The events leading to the settlement date back either to 2004 when Eleanore and Domenico De Sole purchased a forged painting attributed to Mark Rothko from Knoedler Gallery (the “Gallery”), or to 1990s when Glafira Rosales, a Long Island-based art dealer walked into the Knoedler Gallery with a story that she knew a son of a collector who had some paintings he wanted to sell. At the time, Ann Freedman was the long-standing President of Knoedler Gallery; she has been quoted as “believing in” Rosales’ paintings. Freedman and Knoedler proceeded to sell dozens of paintings either consigned by or sold by Rosales. After the story broke that these works were fake and the gallery closed, the De Soles and other buyers sought restitution for the the fakes they purchased for millions of dollars. Additionally, the U.S. Attorney began a criminal investigation to punish the wrongdoers. One particular claim that could be raised in both the civil and criminal contexts is fraud.

### **Background of Law:**

Fraud is defined and handled differently in civil and criminal cases. In the civil context, fraud is defined more broadly and is oftentimes based in tort and contract law. The Restatement of

Restitution delineates that fraud entails misrepresentation, concealment, or nondisclosure by individuals intending to cause others to make a mistake. Thereby, the defrauders induce their victims to refrain from or enter into particular transactions. In the civil realm, the plaintiff has the burden to prove by clear and convincing evidence that the defendant committed fraud. Penalties include restitution by paying back the victims and payment of fines.

In criminal law, there is no universally established statute addressing or defining fraud. However there is consensus by scholars and lawyers that criminal fraud involves an element of deceit.

According to United States District Judge Edward J. Devitt, fraud is “the intentional or deliberate misrepresentation of the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right.” Therefore, fraud is deceit which can be committed by words, conduct, or an omission such as silence, with the intention of someone else acting upon it and incurring an injury. In order to obtain a guilty verdict, the government has the burden to prove someone committed fraud “beyond a reasonable doubt” in the criminal context.

Individuals who are convicted of committing criminal fraud face penalties such as imprisonment, probation, fines, and restitution.



What did the artist see? Elizabeth Williams (above) drew court sketches at both criminal and civil trials involving Rosales, Knoedler Gallery, Ann Freedman and others. Show with William’s works, entitled “Knoedler Trial Courtroom Illustrations” is currently on display.

### **History of Litigation:**

Defendants in the civil cases have included, with some variation, the Gallery, Ann Freedman, and Rosales. During the De Sole trial, however, only attorneys for the Gallery and its former Director were present. Auspiciously, Glafira Rosales, the other major player in the legal fiasco, was absent from the recent De Sole civil proceeding. The Gallery was originally subpoenaed by the Grand Jury on September 14, 2009. Thereafter, it paid the firm Herrick Feinstein \$700,000 to

assist with the subpoena. The De Soles argued that Freedman must have known Rosales was selling the Gallery fakes because she was selling the paintings far below market value. Some may wonder why Ann Freedman was the only named individual defendant in the De Sole case (in other instances civil plaintiffs have also named art advisors among the culpable parties). Especially since on September 16, 2013, Rosales pled guilty in a Manhattan federal court to conspiracy to sell fake works of art, conspiracy to commit money laundering, and various other fraud and tax-related crimes arising out of the forgery scheme. After all, Rosales's ultimate targets paid over \$80 million for the artwork she delivered to Knoedler for sale. The case against her was named *USA v. Rosales*. According to the [New York Times](#), Rosales cooperated with federal prosecutors, probably in hopes that she would receive a reduced prison sentence by assisting in additional arrests. [Preet Bharara](#), United States Attorney for the Southern District of New York, reported that Rosales agreed to forfeit \$33.2 million and her home in Sands Point, New York to pay restitution to the victims of her crimes. Interestingly, it seems Rosales changed residence. In 2005 she lived at 10 Station Road, Great Neck, New York. In 2008, she was listed as residing at 21 Elm Court, Sandy Point, New York.

There are some practical reasons not to name Rosales as a defendant: it is unlikely that she would have maintained sufficient funds to pay the De Soles back. The De Soles likely brought the lawsuit against Knoedler Gallery because they wanted monetary compensation for the forged Rothko that cost them nearly \$8.5 million. According to an assistant U.S. Attorney, Rosales was sued civilly along with Freedman and Knoedler, however her case did not progress because she was arrested on May 21, 2013. She asserted her Fifth Amendment right not to incriminate herself. After pleading guilty and paying nearly \$4 million to the government, there would be no sense to admit to the crime. Additionally, the money paid out would ultimately be given to the injured plaintiffs.

### **Sentencing in criminal proceedings:**

There is a question as to why Rosales has not actually been sentenced despite pleading guilty in the criminal proceedings. Generally, in a plea bargain, the prosecutors in the case negotiate charges and possible sentencing with the defendant. The government may make certain concessions to induce the defendant to agree to a specific lesser guilty charge in place of a lengthy and expensive trial where the defendant could ultimately be charged with a more severe crime. In this case, [Art Newspaper](#) reported that Rosales cooperated with the U.S Attorney's office to help build cases against others, as mentioned before, which may include Ann Freedman. In 2013, the government requested a stay in the civil litigation due to the ongoing criminal investigations against Rosales. Specifically, the government was concerned that the civil suit would undermine the criminal investigation.

### **Speculations:**

The federal prosecutors may have made a deal with Rosales so that she could help strengthen the case against the worst perpetrators in the crime scheme, who in their mind would most likely be Ann Freedman and Knoedler Gallery as an entity. In such a scenario, Rosales would have made a deal to testify against individuals like Freedman.

Inquiring minds may want to know as to whether the government may have a criminal case against Freedman and Knoedler Gallery. If so, why has the government not filed those suits and is there a statute of limitations to do so? Typically, the statute of limitations begins to toll once the particular crime is completed. According to federal law, depending on the specific type of fraud committed (i.e. [tax offenses](#) or major frauds against the United States), the statute of limitations vary anywhere between three and seven years. The U.S. Attorney may not have charged Freedman in a criminal case during the civil litigation for cautious and strategic reasons. It is possible that the U.S. Attorney wanted to wait out the civil proceedings in order to strengthen the criminal case against Freedman. Before the civil litigation, the prosecutors' investigators may not have had knowledge of or access to all the same witnesses. Without such witnesses, the federal prosecutor's case may be seriously weakened due to a lack of probable cause. Now, there is a full record that will ultimately help the U.S. Attorney with its potential case. Moreover, if the civil case failed, it would be very unlikely for a criminal case to succeed with the higher burden of proof, guilt beyond a reasonable doubt.

Recently there has been some progress in the criminal arena that will making this continuing forgery saga even more interesting. On February 16, 2016, Spain's National Court came to a ruling that [Jesus Angel Bergantinos Diaz](#), a businessman involved in the commissioning of the forged art can be extradited to the United States to face criminal charges in New York federal court. This process will be time consuming because Diaz will most likely appeal the extradition. Other individuals charged include Diaz's brother, Jose Bergantinos Diaz, and Pei Shen Qian, the Chinese artist responsible for creating all the forgeries. Pei Shen Qian, like both Diaz brothers fled the United States. In his case, he travelled back home to China.

The civil proceedings relating to the Gallery forgery scandal have proven very momentous and dynamic. It begs the question whether there will be similar litigation in the criminal realm against individuals like Rosales. We must wait and see!

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