PONZI SCHEMERS & OTHER SCAMMERS

A conversation with noted criminal defense attorney **Ben Brafman**

BY RABBI YITZCHOK FRANKFURTER

Benjamin Brafman is an American criminal defense attorney and founder of the Manhattan-based law firm Brafman & Associates.

Famous scammer Bernie Madoff

Do you think there's been an uptick in scams in our community, or is history just repeating itself?

I wouldn't necessarily say that there are more of these cases, but the punishment is more severe than it was years ago. Many years ago, if you committed fraud within the community, you either worked out a payment plan with the victims or they didn't go to the government because you were a friend or neighbor or because of the issue of *mesirah*, so people didn't know about it. Today, these types of things are publicized, so knowledge of them has increased.

There are two elements to a Ponzi scheme. There's the crime, and then there's the civil aspect, where people try to recover their money. I would imagine that the investors aren't interested in putting the guy in prison, because the possibility of recovery would be reduced.

That has not been my experience. When a Ponzi scheme fails, it's very rare that the investors are able to get their money back unless the person pleads guilty and the court orders restitution. I just had a case where a victim received several million dollars because the court ordered restitution. Some people in the community created a fund and the perpetrator ended up repaying the victim a couple of million dollars, which wasn't all of the money he lost. As a result, the judge gave the defendant a year behind bars. Had the defendant come to court owing all that money without making an effort to pay it back, I think the sentence would have been substantially harsher. In federal court, a lot depends on who your case is assigned to.

Is there a difference between state and federal criminal prosecutions?

Yes. In a state prosecution, you can work out a plea in advance with a promise of what the sentence will be, and that becomes part of the plea agreement. In federal court, however, that's never the case. Rarely will a prosecutor agree to recommend a specific sentence. If you are cooperating and provide what they call "substantial assistance to the government," they can recommend leniency or a lower sentence, but the ultimate decision is up to the court. In my experience, the difference between judges may determine whether you receive ten years or 18 months.

Some judges have a very sympathetic philosophy when it comes to imposing sentences, whereas other judges aren't at all sympathetic, especially in a case where you take advantage of people who aren't very sophisticated or have a lot of money. The defendant's actions are therefore seen as more egregious. A lot of people in the community who agree to invest in what turns out to be a Ponzi scheme simply rely on the representations made by the guy who's committing the fraud.

A court sketch of Frank DiPascali Jr. (R), a longtime employee of Bernie Madoff, taking the stand in federal court

My advice is that if you're sitting next to someone in *shul* who approaches you with an investment opportunity that sounds too good to be true, it often isn't true. You really need to do some investigation. Speak to a lawyer or accountant to have him or her examine the proposal. If a *frum* lawyer who is really good and honest looks at some of these investment opportunities, I think he can spot red flags and advise you to stay away.

You said something very interesting about the difference between federal and state court. When a person is being prosecuted in federal court there's less of an incentive to plead guilty than in state court, and it might pay to just go through the trial and hope for the best.

That's not always the case. You do get credit for accepting responsibility. There's a feeling among most federal judges that someone who accepts responsibility and is able to show the court real contrition and remorse is deserving of a break on sentencing. Some judges will even give a substantial variance from what the guidelines would suggest for the crime. Sometimes if you go to trial and are convicted, the judges won't punish you for going to trial, but it does create a whole series of issues that you don't confront when you plead guilty. When you go to trial, if you can show that you did not intend to defraud anyone, then G-d bless you. But if you go to trial and choose to testify and the jury doesn't believe you, the court can consider what they view as perjury in deciding what sentence to give you.

That's why some of these cases can't be tried. Some cases just can't be won, because you're going to have ten people come into court and tell the same story and show that the payments that were given to the first group of investors came from later investors. Eventually, in a Ponzi scheme, the whole investment comes apart. The late investors didn't get anything and the early investors got some payments, but nowhere near what they invested. If someone comes to you and says, "If you invest a million dollars, I'm going to give you 12% every month," I think you should look at that with some degree of skepticism.

You said that in most Ponzi scheme cases there's no pot of gold at the end of the rainbow; all of the assets are depleted and there's nothing left. However, in the case of the most recent famous schemer, Bernie Madoff, they were able to collect a lot of money from him.

The Madoff Ponzi scheme was different from the way Ponzi schemes usually work. A lot of money was ultimately recovered for Madoff's victims, but that's because there were a lot of lawsuits against banks and brokerage houses that should have known that it was fraudulent. In other words, it wasn't really recovered from Madoff. He did invest certain monies, and there were assets they were able to look to recover money from, but it took years and didn't diminish the crime he was accused of. In most Ponzi schemes, such as smaller ones that affect the *frum* community, there's no money available at the end of the day. The assets always go to pay older investors with any money they retrieve from newer ones. They borrow money from A, then they get investor B and use his money to pay the interest they promised to investor A.

There's a new term that at least one judge has used in a case I was involved in as an attorney. She used the term "affinity fraud." That was a case where someone from the Orthodox community preyed on people he knew. These were the people he *davened* and learned with, so no one suspected him. In the end, there was very little if any money to pay anyone. They could sue him, of course, but suing someone who's sitting in prison is a difficult undertaking. Many lawyers don't want to take these cases because there's really no point.

You said that, as in the case of Madoff, if the banks and investment firms should have known that something was wrong or turned a blind eye, they can be pursued, which is a very interesting aspect to all of this.

Yes, but that's not always the case. Many Ponzi schemes don't involve banks or investment companies. A lot of them involve real estate, which is often used to whet the appetites of people looking for a substantial return on their investment. If anyone

promises you the same substantial interest payment every month, I would caution you to either stay away completely or do your own investigation, as it's impossible for someone to promise a certain percentage on your investment and actually pay it out of earnings. It doesn't work that way. Interest fluctuates, and especially in real estate, if you're buying into a building, it's very hard to understand why there would be a substantial interest payment available every month that's exactly the same. It's just very unlikely.

I guess the investor is being pulled in two directions. One is the common sense aspect of what you're saying, and then there's the desire to make a quick buck.

I think greed is always a factor in someone's investment in a Ponzi scheme where people are promised a definite return on their investment. It's a terrible *chillul Hashem* when it involves the *frum* community.

Are Ponzi schemes the most common of these scams, or is it just one of many?

I think it's one of many, and it's used because it generally seems to work for a period of time. Unfortunately, it also means being confronted with *mesirah* issues. Are you going to testify against the person who got you involved? Sometimes the answer is that you have to, as the government will subpoena you and you really don't have a choice. If you fight the subpoena from the government or the DA's office, are you going to be successful? I will also tell you that there are a lot of well-respected *rabbanim* who give permission to testify in such cases because the alternative is becoming much more difficult for someone to deal with. They're both terrible choices.

Sometimes people are repeat Ponzi schemers, in which case it's almost a mitzvah to stop them. I assume that's also taken into consideration.

Right.

Attorney Ben Brafman speaking at a press conference

Does the law recognize the concept of a Ponzi scheme, or is it just another type of fraud?

New York State has a crime on the books called a scheme to defraud, which is what a Ponzi scheme often is. In federal court, I've never seen a statute that mentions the words "Ponzi scheme," but that's what the government calls it when it's over, and it's what the judges use as a factor in sentencing. With regard to federal crime, where the person is either charged with wire fraud or mail fraud, even though you don't have to mail anything, the sentences can be very tough because there are federal sentencing guidelines. Although they are no longer mandatory, the judges are required to look at them as a starting point. The federal sentencing guidelines are really fueled by the amount of the fraud, and in a Ponzi scheme the amount is often in the tens of millions of dollars. I've seen cases where people who perpetrated Ponzi schemes ended up getting five, ten, 15 or 20 years in prison. Madoff ended up getting life, and he died in prison.

I guess there are two types of Ponzi schemers: those whose entire plan was based on fraud, and those who started out legitimately and then ran into difficulties. Does the law make a distinction between the two?

Those facts are somewhat relevant in what a court ultimately does, because when someone starts a fraudulent scheme from the get-go, it's viewed as a terrible crime. The number of victims is also relevant in deciding where the guidelines begin. Some of these schemes involve dozens and sometimes even hundreds of victims. Judges look at someone who perpetrates that kind of fraud as a really bad person. By contrast, someone who goes into a legitimate investment but then it turns into a very bad idea and he uses the money to try to salvage it, I think the argument can be made that the fraud is less egregious. A good lawyer can look at those facts and essentially argue that the defendant isn't really a terrible person who set out to prey on his friends and neighbors. You can make an argument that has some merit. A lot depends on who the judge is and what the charges are.

Unfortunately, the facts sometimes demonstrate that the money was used to support a lavish lifestyle, and the court will look at that. People buy houses and go on vacations using money they've gotten from community members. Each sentence is really different and depends on the specific acts.

In some cases, the judge feels that regardless of what the project started as, the person ended up stealing from lots of people. In such a case, his judgment in trying to salvage a failing business is examined. Was it reasonable? Did he really try to put the money back into the project in an effort to save it? Another question is whether a defendant has someone against whom he can cooperate. Did he have a partner or an accountant or bank officer who knew what was going on? The person's sophistication can also be a factor. Is he a lawyer or accountant? A lot of these cases have professionals who are involved in creating the appearance of legitimacy.

I know of a case where a lawyer claimed that he was keeping all of the investment money in an escrow account, but the account was really being used to fund his elaborate lifestyle. Every month he sent out assurances that the money was being maintained, and at the end of the case there was nothing left. Ironically, this lawyer has thus far escaped indictment.

Justice is supposed to be blind, but when Orthodox Jews go before a court, do you find that they have more of an uphill battle to prove their innocence?

I've been asked this question a lot. Can an Orthodox Jew who comes into court with a yarmulke, beard and *tzitzis* receive a fair trial? The answer I routinely give is that I've been trying cases in state and federal court for 45 years, and I've only seen an Orthodox Jew in the jury pool once or twice. A lot of Orthodox Jews get their jury summons and come up with an excuse. Maybe that's one of the reasons people believe that a *shomer Shabbos* Jew can't get a fair trial. But I don't think that's necessarily true. I don't know of any cases where someone who was Orthodox didn't receive a fair trial.

If you're looking for an investment, deal with people you see as experts in the field or have an expert review the facts and give you an opinion before committing to anything.

What I can tell you is that sometimes an Orthodox Jew who pleads guilty to one of these cases will get a very severe sentence, as the judge views someone who appears to be very religious and then picks and chooses which *mitzvos* he's going to keep as a hypocrite. Such defendants can even get an extra year or two, even if the judge isn't necessarily an anti-Semite.

Does a good lawyer only count at trial, or does he also help when pleading guilty?

I think you need a good lawyer period, because a good lawyer can assess the case and tell you honestly what your chances of winning are. A good lawyer can also deal with the prosecutors, the US attorney's office, and the DA's office and try very hard to show them why you shouldn't be required to plead guilty to crime A or crime B. They can get you a better plea. Moreover, a good lawyer who knows his way around the system is always a better choice than someone who isn't experienced and may go in and say things that aren't helpful to you. I've seen cases where a lawyer has recommended a result that only gets the client in more trouble, and it doesn't resonate with either the judge or the prosecutors.

Even when you plead guilty, a good lawyer has a lot of work to do. There's a sentencing memorandum that has to be prepared in which you can explain to the judge that the leader of the scheme was himself a victim. Many defendants are embarrassed because they got members of the community involved in what turned out to be fraud but they never intended to do that, although at some point maybe they didn't care that trying to save the investment required them to mislead others. But those cases are somewhat more sympathetic than when someone really doesn't care from the beginning.

Are most of these cases related to real estate?

Not necessarily. Sometimes the investment is in the diamond business or something that's more sophisticated but doesn't really involve a tangible product that you can go out and check. I've seen many of these cases where even if you went out and checked you wouldn't necessarily find evidence that it's a fraud because there are layers of companies, and it really requires a forensic accountant to go through to analyze. My advice is that if you're looking for an investment, deal with people you see as experts in the field or have an expert review the facts and give you an opinion before committing to anything.

What I think is lacking is education about these things in the Orthodox community. Community leaders don't talk about it, and as a result people are taken in by the guy who sits next to them in *shul*. As I said, I don't think the number of frauds has increased. What has increased is the number of frauds the public knows about because some of them involve substantial sums of money, and people are more likely to talk about it when a reporter calls after the information is leaked.

It's always a pleasure to speak to you, especially when I'm not your client who needs advice about a criminal prosecution.

I agree. I don't want you as a client. »