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ETHICS AND CRIMINAL PRACTICE

Expert Analysis

Asking for Trouble: When Lawyers Lie to Judges

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Without a doubt, one's reputation for honesty is of utmost importance in almost any profession and, most certainly, for members of the bar. Indeed, lawyers must vigilantly preserve and protect their credibility as closely as a surgeon would look after his or her hands since, without any, a lawyer's advocacy is simply in vain. This edict is emphatically true inside the courtroom. Simply put: Never ever lie to a judge! Period.

The reason for this rule is as obvious as the seatbelt law, though shockingly as likely to be disobeyed—at least to some degree. Take note: reputations within the legal community can spread faster than swine flu and be just as deadly. Imagine the judge who catches a lawyer, or believes she has caught a lawyer, in an outright lie.[1]

Putting aside for a moment the moral implications and potential formal consequences for the lawyer, the negative experience alone will likely cause the judge to discuss that lawyer's reputation over lunch, at a cocktail party and perhaps a "judges' support group." (God knows they need one just like us.) Armed with a cavalier tongue and simple willingness to "bend" facts, a litigator can lose his reputation in an instant—and it can be a long, if not impossible, road back to honor.

While an adversary who suspects a false representation has been made to the court is less likely to report the suspicion to the disciplinary committee, a judge who is aware of having been boldly lied to is capable of sanctioning and referring the attorney for discipline, whether out of duty,[2] pique, or both. Make no mistake, New York disciplinary committees have long instituted proceedings against lawyers for lying to the court, whether orally or in writing, and with public punishments ranging from censure to disbarment,[3] and private sanctions that vary and become increasingly problematic in the event of the lawyer's recidivism.[4]

Some attorneys may attempt to distinguish so-called "white lies" as different, or unworthy of reproach. Included in this bunch might be, e.g., prosecutors who reflexively (and institutionally) announce "ready for trial" at every calendar call when their readiness is uniformly recognized by the criminal bench and bar as flatly disingenuous at best, defense lawyers who tell judges setting trial dates that they're backed up with trials (that, in truth, are nearly resolved via plea agreements), or any attorney whose "long-planned" vacation trip was actually conceived the moment the judge decided to set a trial date. However innocuous these examples may seem, all lies uttered in or before the court are the same ugly color.

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One of the first and most obvious things we learn as lawyers, and, indeed, the disciplinary rules[5] make clear, is that lawyers must follow the same instructions given to clients in preparation for testimony: You cannot ever lie in court! And if a false representation is made to the court, even unintentionally, a lawyer who later realizes his error is affirmatively required to take reasonable measures to remedy the statement.[6]

Lest the authors appear overly uptight on the subject, nothing will act like more of a cold, stinging wake-up call for members of the bar than the story of a criminal lawyer—indeed, a retired Army Reserve officer and former state and federal prosecutor—who was, among other things, criminally charged for lying to a judge in the course of his representation of a criminal defendant.[7] Yes, criminally charged for the lie!

'People v. Paul Bergrin'

Paul Bergrin was a former top state and federal prosecutor in New Jersey turned defense lawyer, representing celebrities, street gangs, and military officials charged at Abu Ghraib. In January 2007, Mr. Bergrin was indicted in New York County for allegedly running $800,000 in credit card receipts through two shell companies to disguise the proceeds of a TriBeCa call-girl service.[8] It was alleged that Mr. Bergrin and two associates became involved in running the business when his client, Jacob Itzler, the owner of the escort service, was arrested in January 2005. In an extraordinary result last month, Mr. Bergrin's lawyer, Gerald Shargel, obtained for him a probationary sentence on just two minor misdemeanor counts.

In addition to the principal counts of the indictment, i.e., felony money laundering and promoting prostitution, which could have resulted in a 25-year sentence for Mr. Bergrin, the last count of the indictment was a misdemeanor count for violating Judiciary Law Section 487 (titled "Misconduct by Attorneys," or colloquially, Conduct Unbecoming an Attorney).[9]

While the Bergrin indictment does not describe it explicitly, reading between the lines, at a pertinent date in the conspiracy, Mr. Bergrin appeared before the Criminal Court to represent Mr. Itzler at his arraignment, and asked that Mr. Itzler be admitted to bail. To justify Mr. Itzler's release and presumably to convey that Mr. Itzler was gainfully employed, or maybe his innocence, it was alleged that Mr. Bergrin falsely represented that Mr. Itzler had been working as Mr. Bergrin's paralegal 14 hours a day for the past several months on legal matters in which Mr. Bergrin represented that client. In layman's terms, Mr. Bergrin lied to the judge in order to help his client out, and maybe to help himself out, since Mr. Itzler was allegedly the owner of the escort service in which Mr. Bergrin was involved.

Judiciary Law §487

When Mr. Bergrin, last month, pled guilty to two misdemeanors, he did not plead to this count. One can easily imagine the reason. Judiciary Law §487 provides, in part, that an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or a party," is guilty of a misdemeanor—potentially a year in jail, along with liability in civil matters.[10]

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A guilty plea to fraud and deceit would, indeed, potentially be the death knell for an attorney's career and any related disciplinary proceedings precisely because it involved a false statement to a court.[11]

This is not to suggest, now that Section 487 has been dusted off in *Bergrin*, that every prosecutor across the region is likely to open a "Major Lies Bureau" and prosecute each lawyer who appears to make false representations to a judge or party—indeed, lying even to an adversary or other party could violate Section 487 (hard as it is to believe). Nor are judges likely to install polygraph sensors at each podium and counsel's table any time soon. However, the *Bergrin* case should underscore for every lawyer the seriousness of the issue and that there, in fact, exists no wiggle room on the matter.

A review of the few reported cases where Section 487 was used to criminally charge a lawyer as well as the reported disciplinary proceedings for violations of now-effective Rule 8.4 of the Rules of Professional Conduct (formerly DR 7-102(A) regarding the duty of candor to the tribunal)[12] reveals that the motives of lawyers accused of false statements to the court are less than uniform. While many lawyers are found to have made false statements in an overzealous attempt to represent a client, e.g., employing a phantom illness or sudden unavailability on the part of a client or witness, others simply lie to help or "cover" the lawyer himself.

While this is clearly not an exhaustive list, but rather a taste of potential outcomes for offending lawyers, the case examples include; a censure for a lawyer's false denial of conduct at an evidentiary hearing; a six-month suspension for submitting a pro hac vice affidavit denying a lawyer's prior professional discipline; a suspension for three months for presenting the name of a deceased individual as a putative class representative; a three-month suspension for abusing trial subpoenas and making a false statement in court and false affirmation denying the conduct; and a two-year suspension for misrepresenting a client to be terminally ill in order to induce an asset distribution.[13] However, the sanction was permanent disbarment where a lawyer's misconduct included false testimony at trial, submission of a knowingly false client certification and the separate misrepresentation to a third party that an escrow order existed.[14]

Also disbarred were lawyers who improperly presented inflated fees and expenses to the court, a lawyer who submitted unadmitted evidence to the jury and then falsely denied his role in the misconduct both under questioning at a hearing as well as in a sworn affidavit, and a lawyer who made oral and written misrepresentations to the court regarding the ownership of the property at issue in order to effect the substitution of a defendant.[15] (Some of these cases involve egregious conduct separate and apart from the false statements before the court, which may have enhanced the sanction.)

Prosecutors' Falsity

While it often may seem to private practitioners that they get in hot water with judges more frequently than their governmental counterparts for dissembling or worse, there are indeed instances where judges have called prosecutors or other public servants in New York to task for such conduct. Most frequently, conduct of this nature by prosecutors would be addressed through a call from the judge to the chief prosecutor or chief assistant in the office: "This is what your assistant did in my courtroom today"—a message of "deal with him quickly, or I will" sort of thing. While such an outcome is, of course, not ideal for the offending prosecutor since his boss will not appreciate having received the call which may result in a loss of prestige in the office and/or the judge telling his colleagues what the offender did, the private admonishment is still preferable to formal action.

Occasionally though, something far worse happens. For example, in 2005, in *Matter of Stuart*,[16] the Second Department imposed a three-year suspension on an assistant district attorney for falsely telling the trial judge, in response to a *Brady* issue raised by the defense, that he had no knowledge as to the whereabouts of a certain witness despite several unsuccessful attempts to locate her. In fact, the prosecutor had himself met with the witness at her place of employment five days earlier. The prosecutor's defense to the charge of professional misconduct included character letters from two judges, testimony about his service to his churches and the U.S. Army JAG Corps Reserve, and his 12-year tenure as a prosecutor with 70 felony trials under his belt, and still it could not save him from himself.

In a less serious though certainly humbling example, a federal prosecutor in Brooklyn was excoriated by name by the Second Circuit in 1982 in *United States v. Jacobson*[17] for "serious inconsistencies between the government's brief and the actual record before the grand jury," along with other misrepresentations actually made by the prosecutor during oral argument before the Second Circuit itself.

Particularly troubling to the court was the fact that the misrepresentations related to grand jury transcripts to which the defense had no access. Said the court, "[W]e expect those government counsel involved to take heed of the seriousness with which we view inaccurate representations of fact, and those who supervise them to take affirmative steps to prevent a recurrence."[18] It was publicly reported that the prosecutor at issue was resultantly placed under intense supervision by the U.S. Attorney.

A different, but more recent example of the drastic correction of a prosecutor by a judge came after the Senator Ted Stevens federal corruption trial when three prosecutors were found in contempt for misconduct including failing to produce documents requested by the court.[19] U.S. District Judge Emmet Sullivan described the allegations as the most serious misconduct he had seen in 25 years, appointing a special prosecutor to investigate the Justice Department team.

Conclusion

The rules surrounding attorney honesty and candor before a tribunal are basic and should go without saying. However, in the real world of contentious disputes, demanding deadlines, and even innocent miscommunications between lawyers, clients and co-counsel, it is too often the case that facts presented to the court are less than pristine.

It is the rare lawyer who boldly intends to deceive a court with false representations or evidence, and more often the case that lawyers are simply sloppy or insufficiently careful with the facts. Whatever the circumstance may be and however minor the occasion, we must remember that our careers (and potential freedom!) are always on the line when one appears before the court and that no advocacy effort is worth bending the truth—even just a little.

1. See e.g., *United States v. Locascio*, 267 F.Supp. 306, 319 (E.D.N.Y. 2003), where Judge I. Leo Glasser somewhat famously found an attorney in the John Gotti, RICO/murder trial to have "defied credulity" by alleging under oath many years later after Gotti's death, in a motion for a new trial, that he had been constrained from offering an individualized defense for Frank Locascio, Gotti's co-defendant, because of Gotti's threat to kill him if he did.
2. 22 NYADC 1200.57 (Rule 8.3(a), formerly 1-103(A)); ABA Model Code of Judicial Conduct Rule 2.15(B) and (D).
3. Id. at 605.5(a).
4. Id. at 605.5(b).
5. Id. at 1200.25(a)(1) (Rule 3.3(a)(1), formerly 7-102(A)); 1200.32(Rule 4.1, formerly 7-102(A)); 1200.58 (Rule 8.4, formerly 1-102).
6. Id. at 1200.25(a)(3).
7. Anemona Hartocollis, "A Tough Defense Lawyer Finds He's in Need of One," N.Y. Times, Jan. 11, 2007. Astonishingly, Paul Bergrin was also recently indicted federally in New Jersey for orchestrating the murder of confidential witnesses against his legal clients. See David Kocieniewski, Lawyer's Ways Spelled Murder, U.S. is Charging, N.Y. Times, May 21, 2009, at A1.
8. *People v. Bergrin*, Ind. Nos. 6694/06 and 6693/08 (Sup. Ct. N.Y. Co.).
9. N.Y Judiciary Law §487 (2009).
10. Id. Note that Section 487 is limited to actions in one's professional capacity as an attorney. See *In re Kovler*, 253 B.R. 592 (Bankr. S.D.N.Y. 2000); *People v. Canale*, 658 N.Y.S.2d 715 (3d Dept. 1997) (charge dropped where false statement was made as an individual and not as an attorney).
11. N.Y Judiciary Law §90 (2009); 22 NY ADC 603.12 and 605.10(c).
12. See also Rule 33(1)(a) (Making A False Statement to A Tribunal), which provides that "a lawyer shall not knowingly…make a false statement of fact or law to a tribunal…." Also Rule 4.1 (Truthfulness In Statements to Others), provides that "in the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
13. *Matter of Brenner*, 840 N.Y.S.2d 349 (1st Dept. 2007) (six-month suspension for false affidavit denying prior professional discipline); *Matter of Gotbetter*, 794 N.Y.S.2d 346 (1st Dept. 2005) (three-month suspension for presenting deceased individual as putative class representative); *Matter of Burden*, 772 N.Y.S.2d 26 (1st Dept. 2004) (three-month suspension for abuse of trial subpoena process and lying in an affirmation to justify his conduct); *Matter of Holley*, 729 N.Y.S.2d 128 (1st Dept. 2001) (public censure for false statement to the court); *Matter of Dwyer*, 727 N.Y.S.2d 229 (4th Dept. 2001) (two-year suspension for attorney that, inter alia, falsely represented his client to be terminally ill).
14. *Matter of Lowell*, 784 N.Y.S.2d 69 (1st Dept. 2004).
15. *Matter of Heller*, 780 N.Y.S.2d 314 (1st Dept. 2004); *Matter of Aaron*, 662 N.Y.S.2d 511 (2d Dept. 1997); *Matter of Friedman*, 609 N.Y.S.2d 578 (1st Dept. 1994) (disbarment for submission of false affidavits, false statements under oath, and failure to remediate); *Matter of Schildhaus*, 259 N.Y.S.2d 631 (1st Dept. 1965) (disbarment for false representations to the court in order to effect the substitution of a defendant).
16. 803 N.Y.S.2d 577 (2d Dept. 2005).
17. 691 F.2d 110 (2d Cir. 1982).
18. Id. at 115-116.
19. Neil A. Lewis, "Justice Dept. Moves to Void Stevens Case," N.Y. Times, April 1, 2009.