Originally published in

New York Law Journal

October 07, 2019

When a Prosecutor Lies (To Save Lives)

By Joel Cohen

In his Ethics and Criminal Practice column, Joel Cohen unpacks the various issues arising from a recent hostage situation in Philadelphia, where the District Attorney made a promise of a reduced sentence to the suspected shooter for his peaceful surrender, and then later said he lied about the lower sentence.

When the lay world watches a dystopian nightmare unfold in real time, it typically views the nightmare far differently than do lawyers. The public, rightly so, simply wants the best possible outcome for the victims, or potential victims. Lawyers, however, particularly those who practice in the field, often view the nightmare through the harsh prism of the sometimes uncompromising ethical rules that guide them.

Against that backdrop, consider this. A man armed with an AR-15 automatic rifle is holed up in a row house. He fires hundreds of rounds, shooting six police officers who were serving a warrant. He takes as hostages two other officers and three other people. When cops get shot, as the shooter would clearly know, things are not likely to end well for the shooter either—frequently he is killed (or he survives as a cop-killer).

So, in the midst of the stand-off, the shooter calls his lawyer, a man named Shaka Johnson, who is a former Philadelphia police officer and Assistant DA. Johnson, sizing up the situation, proposes to his client (the shooter) that he (Johnson) should patch in the District Attorney himself. With the client's permission, the lawyer plugs DA Krasner into the call—but the DA has no experience as a hostage negotiator, and the shooter is "animated, excited, in a dangerous state," so—with everyone's approval—the DA conferences in the Police Commissioner. The call lasts only four minutes, but in it, to gain the shooter's peaceful surrender, the DA proposes a mere 25-year sentence, and later in the conversation reduces that low number even further to just 20 years—a ridiculously low sentence, given the coldblooded cop shootings in question. Hours later, the shooter surrenders, maybe based on the DA's promise or, as the Police Commissioner contends, because of a SWAT team tear gas barrage.

The DA, however, quickly recognizes (and undoubtedly knew all along during this horrific scenario) that the promise of a low sentence was extorted from him by an armed shooter with handcuffed hostages in tow. And so, after the siege, the DA admits—actually, boldly pronounces—publicly that he lied to the shooter when he promised a 20-year sentence. The DA

honestly told the public that his promise was "bull…t" or "phony baloney"—and that he did not intend to abide by that extorted promise.

This scenario, however, is not a law school hypothetical—it actually happened two months ago in Philadelphia, where District Attorney Larry Krasner made that precise promise to suspected shooter Maurice Hill while on the phone with Hill and Hill's lawyer, Johnson.

Now, the public considering this episode would undoubtedly conclude that Krasner was entitled to promise virtually anything to get the five hostages out safe and alive. And particularly given that Hill had actually asked his lawyer (Johnson) to intercede to help him stay alive, Johnson should himself have tried to do virtually anything to get the hostages out safely—presumably even if that goal required Johnson to stand idly by and let DA Krasner boldly lie to his client. Frankly, if I were Johnson, I myself would have remained mute—after all, Hill called me to help save his life.

But lawyers, particularly academics who deal with ethical consideration, are often forced to look at the situation through a different lens. Lawyers, and in particular prosecutors, aren't supposed to lie. See generally Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309 (2001). Yet, I suspect all understood that if Krasner told Hill that he would "get life" if he surrendered peacefully, Hill might have chosen instead to end the day à la Butch Cassidy and the Sundance Kid, going out in a blaze of gunfire—putting the hostages in dire peril. Nothing really to lose for Hill.

Now, to DA Krasner's credit, immediately after the surrender was effectuated without any further shootings, he acknowledged that he had deliberately made a false promise about the sentence. But wouldn't it have been better if Krasner had said something like, "In the heat of the moment and trying desperately to avoid any added bloodshed, I exaggerated my willingness to give Hill leniency in order to peacefully save the hostages; but now that the situation has calmed down, I have rethought my words." That would have been completely believable, wouldn't it?

Nonetheless, he probably spoke the truth to the public—i.e., I deliberately lied to him! (Parenthetically, Hill's preliminary hearing, which had originally been scheduled for early September, was adjourned to give the prosecutors more time to investigate and, it is anticipated, charge Hill with additional counts of attempted murder and assault on law enforcement. So it remains to be seen how Krasner's promise will be litigated—on both sides.)

As a strictly "due process issue," however, what rights would Hill have had he clearly accepted a quid pro quo offer to surrender to the police in exchange for the promised sentence—which apparently did *not* occur, as it seems, at least before litigation over this, that Hill never truly accepted Krasner's promised sentencing deal when he surrendered? In *Mabry v. Johnson*, 467 U.S. 504 (1984), the Supreme Court was faced with a defendant, Johnson, who was facing a death sentence but accepted a plea bargain with a sentencing recommendation of 21 years to be served *concurrently* with two other sentences he was already serving. In the following days

Johnson's counsel accepted the deal, but the prosecutor then told counsel that a mistake had been made and he withdrew the offer, instead offering to recommend that the sentences run *consecutively*, which Johnson ultimately (much happened in between) accepted to avoid the death penalty.

When Johnson later filed a habeas corpus petition basically seeking specific performance of the withdrawn offer of *concurrent* time, the Supreme Court, in an opinion by the late Justice Stevens, found that the prosecutor's "unfulfilled promise" was without "constitutional significance." Nor was it relevant whether the prosecutor had been negligent or otherwise culpable in first making and then withdrawing his offer. The court added this curious formulation: "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here, respondent was not deprived of his liberty in any fundamentally unfair way."

And, the court said, because Johnson's "plea was in no sense the product of governmental deception, it rested on no 'unfulfilled promise' and fully satisfied the test for voluntariness and intelligence."

What about Hill? If Hill had clearly accepted DA Krasner's offer of a 20-year sentence, would that offer, and Hill's concomitant surrender, have been a *fulfilled* promise so that Hill could try and enforce the "bargain" as a matter of criminal law? Likely not, given the hostage situation—but plea bargaining can be a dirty business, even if Krasner's conduct under duress was totally understandable.

But, here's the thing: What about Krasner's conduct—straight up (as he admits) lying to a shooter with the shooter's lawyer on the line, even if the lawyer (albeit not the client) thought the DA was lying? Hard to find precedent, although one brutal kidnapping of a seven-year-old girl comes to mind. In *Whitehurst v. Kavanagh*, 167 Misc.2d 86 (Ulster Co. 1995) aff'd 218 A.D.2d 366 (3d Dept. 1996), Whitehurst negotiated a written plea agreement—if he told where the kidnap victim was, he would receive no more than 15 years, even if she were found dead. Believing (hoping) she was still alive, Ulster County DA Michael Kavanaugh agreed, and Whitehurst sent him to find the victim who had been raped and murdered. When Kavanagh announced that he would seek the death penalty, Whitehurst unsuccessfully sought prohibition, i.e., an order preventing his prosecution. See Joel Cohen, "When Prosecutors Break Their Word," New York Law Journal, May 1, 1996.

It has long been the law that a prosecutor is a minister of justice, whose actions carry the imprimatur of the government: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78 (1935). It has been held that, at least in the context of a trial, the "prosecution has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth." *U.S. v. Universita*, 298 F.2d 365, 367 (2d Cir.), cert. denied, 370 U.S. 950. But we're dealing with plea bargaining, not with statements at trial.

All lawyers, prosecutors included, have a duty to "not knowingly make a false statement of fact or law to a third person." NY Rules of Professional Conduct, Rule 4.1; cf. ABA Model Rules of Professional Conduct 4.1 (adding that the false fact or law must be "material"). Nor shall a lawyer "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." NY and ABA Rule 8.4(c). As Professor Roy D. Simon explains in his discussion of Rule 8.4 in *Simon's New York Rules of Professional Conduct Annotated*, "Negotiation implicates Rule 8.4(c) because bluffing and outright deception are central to the negotiation process." But, what does Simon say about the Hill situation—where the prosecutor freely admitted that he had no intention whatsoever to comply with the promise he made (whether or not that promise induced Hill's surrender)? Solicited for a quote for this piece (and assuming the scenario presented above), Professor Simon offers this:

The Rules of Professional Conduct are intended to govern all lawyers in all types of practice in all situations—but the Rules do not fit neatly into extreme circumstances. The rule governing confidentiality (Rule 1.6) expressly allows a lawyer to breach confidentiality "to prevent reasonably certain death or substantial bodily harm," but the rules forbidding lawyers from engaging in conduct involving dishonesty, deceit, misrepresentations, and false statements do not contain any such exception. They should. And to preserve the sanctity of life, we should read that exception into those rules. In my view, a lawyer may lie to prevent reasonably certain death or substantial bodily harm. Krasner did nothing wrong.

Finally, not to overlook it, Hill's then-lawyer, Johnson, is in the unenviable position of having essentially lured Krasner onto the call with Hill. Johnson's one ethical obligation going forward is to tell the truth about the conversation if called as a witness at an evidentiary hearing. Did Johnson believe that Krasner's offer was real? We don't know.

But—and this is purely hypothetical—what if Krasner had ridiculously promised Hill, if he were to surrender, a five-year sentence for having shot six police officers and taken hostages, and Hill had immediately accepted the offer and surrendered—all while Johnson, his lawyer, knew there was no way Krasner would or could honor his ridiculous promise—and yet Johnson said nothing. If asked by Hill's attorney on the stand in this hypothetical, "Did you believe during the three-way call that the DA would honor his promise?" attorney Johnson would really be up against it, wouldn't he? Yes, he'd be obligated to tell the truth, but "the truth" is not always as clear cut as one might imagine.

Practicing criminal law on both sides of the divide, thus, is not for the faint of heart. And remember, the Hill case is largely sui generis. While Krasner's conduct may be understandable and essentially tolerable given the potentially fatal circumstances presented, prosecutors in typical cases not involving dangerous situations like in *Hill*, will be far less likely to be able to gain the benefit of the doubt or, frankly, the sympathetic "indulgence" of the discipline authorities and courts, if they outright lie to suspects or their lawyers.

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