

Professional Liability

1. **Warning: Judiciary Law §487**

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Lawyers are officers of the court, as such, they must be ethically responsible not only in the courtroom but in all aspects of their professional lives. The omnipresence of the attorney's ethical obligations assures that the law will be soundly interpreted and applied.

In order to guarantee lawyers have a heightened consciousness for their professional and ethical obligations inside the courtroom and beyond, there are several statutes and court rules to which members of the bar should pay serious attention.

A serious point for consideration by every member of the New York Bar is Judiciary Law §487, which provides:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion with intent to deceive the court or any party, or
2. Willfully delays the client's suit with a view to his own gain, or willfully receives any money or allowance for an account of any money which he has not laid out, or becomes answerable for

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

The statute is intended not merely to deter litigation abuse but the misuse of client funds in connection with litigation. The statute covers a lawyer's deception of the court or any party to the litigation including the lawyer's client or a party not represented by the lawyer whose conduct is in issue. The statute's intent is to deter serious misconduct that possibly rises to the level of criminality and as a result subjects the lawyer to treble damages to the injured party in a civil action.

A review of the cases will illustrate that the statute's basic prohibitions should constitute sufficient warning for not only the lawyer bereft of ethics who will only be stopped when he understands he faces stiff sanctions, but those lawyers with an ethical sense that they can lose when their advocacy exceeds proper bounds. It cannot be disputed that every lawyer can be so

absorbed in a case that he or she will not be sufficiently skeptical; the lawyer will close his or her eyes to the true facts in order to accommodate a client and/or be governed strictly by pecuniary motives. All of the foregoing can be the ledge from which the lawyer falls to be liable under §487.

Therefore, both the statute and the cases should receive periodic review so that the line will not be crossed by the lawyer's unethical conduct.

Case Review

A selective review of the cases demonstrates certain key points to determine whether there is a viable statutory cause of action. The overall tone of the case law presents the elements for a violation of §487 as requiring intent, or chronic and repetitive misconduct or unprofessional behavior; willful delay of the lawsuit for the lawyer's gain; causation of resulting harm; and conduct directed at and affecting only pending litigation.

In *Gelman v. Quicke*¹ plaintiffs commenced an action for libel and violations of Judiciary Law §487 arising from an insurance claim form under an employee dishonesty policy and an affidavit of a former employee allegedly mischaracterizing various transactions that implied that plaintiffs were wrongdoers. The court dismissed the complaint, which was affirmed by the Second Department in the absence of allegations of "deceit and collusion practiced by [an] attorney in a suit actually pending in court, with the intent to deceive the court or . . . [the other] party." The Second Department, quoting the Court of Appeals, held the correct interpretation of the statute to be as follows:

. . . *'[It applies] where [an] attorney intends to deceive the court or his client by collusion with his opponent, or by some improper practice.* They do not, we think, include a transaction antecedent to the commencement of the action, as the court could have no connection [to] any such proceeding. The 'party' referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court In the case at bar, the advice given by the defendant, which is complained of, preceded the action subsequently brought, and at [the same] time there was no court or party to be deceived within the meaning of the statute. It is obvious that a plain and intelligent distinction exists between an action of an attorney in reference to a suit pending in court, and a proceeding out of court.' (Emphasis added)

The affidavit in issue was created before the commencement of either this or a related federal action and it was "created for the purpose of filing an insurance claim." The affidavit was produced in discovery and accordingly, plaintiffs' pleading, on its face, failed to state a cause of action pursuant to Judiciary Law §487.

Intent

The First Department addressed the issue of intent in the context of the lawyer withholding information and his duty to speak. *Schindler v. Issler & Schrage PC*² held that attorneys who knowingly withheld crucial information from the court in an action involving estate property violated Judiciary Law §487. The court also held a criminal conviction was not a condition precedent to the civil action but civil relief could only be granted "where the attorney has 'engaged in a chronic, extreme pattern of legal delinquency.'"

Two defenses were asserted but were not sustained. The first was that other counsel advised it was permissible to withhold the information and that the mere withholding of information was not sanctionable. No advice as claimed was given and the court held there was a duty to speak. The court held,

Despite its attempt to shift the blame elsewhere, the conduct of the defendant law firm clearly falls within the prescription of Judiciary Law §487 in that [it] knowingly withheld crucial information from the court 'It is well-settled that when there is a duty to speak, silence may very well constitute fraudulent concealment . . . which is itself the equivalent of affirmative misrepresentations of fact . . . '. This is especially true where an officer of the court owes such an obligation to the tribunal (Code of Professional Responsibility DR7-102 [A][3]22 NYCRR 120033(a)(3)) . . .

Summary judgment was granted to plaintiff on the statutory cause of action for violation of Judiciary Law §487.

In *Gonzalez v. Gordon*³ the complaint charged the lawyers with multiple representation of parties in loan transactions while having undisclosed personal interests in the transactions. However, "the record . . . [was] devoid of proof that defendant engaged in a chronic, extreme pattern of delinquency needed to support the trial court's award of monetary damages pursuant to Judiciary Law §487 In particular, there is no evidence that defendant defrauded plaintiff or engaged in conduct intended to deceive."

In *Knecht v. Tusa*⁴ summary judgment dismissing the complaint was also granted as there was no intent to deceive or a chronic, extreme pattern of legal delinquency that proximately caused damages. Either of these elements is sufficient as noted by the Second Department in *Izko Sportswear Co. Inc. v. Flaum*.⁵ The Court held "[a] violation of the Judiciary Law §487 may be established either by the defendant's alleged deception or by an alleged chronic, extreme pattern of legal delinquency by the defendant." The foregoing, however, may be a distinction without a difference because a pattern of misconduct is usually one of the best and most effective means to establish intent.

Pending Judicial Proceeding

*It has to be recognized, however, that every form of professional misconduct or legal malpractice is not within the statute's prohibitions. In Hansen v. Caffry*⁶ the Third Department

held the deceit must be directed at a party or a court in a pending judicial proceeding and the preparation of deeds in connection with a real estate transaction was not conduct specifically intended to affect pending litigation.

Arguably there may be serious misconduct, however, in the absence of causation and monetary damages related to a pending lawsuit for which no viable cause of action exists pursuant to §487 of the Judiciary Law. In *Manna v. Ades*⁷ the fraud predated the court action. The Court held §487 did not apply because there was an absence of "any damages proximately caused by a deceit allegedly perpetrated on the court."

In *Parks v. Leahy & Johnson, P.C.*⁸ the plaintiff instituted an action based upon §487 and common-law fraud because in a prior negligence action the lawyer-notary notarized affidavits knowing his notary commission expired. The Court held:

the complaint was deficient because its allegations on the issue of damages were merely conclusory (see CPLR 3016(b)), the pleadings and affidavits do not support the conclusion that plaintiff would have been successful in the negligence case absent . . . [the lawyer-notary's] alleged fraud.

As a result of the causation element's absence the plaintiff's complaint was dismissed and the sanctions were reduced from \$10,000 to \$1,000. Notwithstanding the seriousness of the misconduct not only are causation and damages the required elements of proof, but the damages to be recoverable must strictly represent out-of-pocket loss. In *Kaiser v. Van Houten*⁹ the court held the absence of causes of action for recoverable damages negate any viability to a cause of action under §487. Since emotional distress was not recoverable in a legal malpractice cause of action there could be no recovery under §487.

A further review of the cases further defines the elements for a viable §487 cause of action. *Shenouda v. Cohen*¹⁰ articulates the proposition that a §487 cause of action cannot exist in the absence of other viable causes of action. It must be recognized, however, that legal malpractice does not always correlate with a meritorious §487 cause of action and the outlined elements to the statutory cause of action have to be independently satisfied before a viable §487 claim can have merit. *Izko Sportswear Co., Inc. v. Flaum*¹¹ also held that a §487 cause of action for intentionally deceiving a Bankruptcy Court was not subject to being dismissed because the legal malpractice cause of action was dismissed.

*A lawyer does not have to be serving in the role of a lawyer to be subject to sanction under §487. A law license in and of itself requires a lawyer not to deceive a court or any party to a litigation. The Supreme Court in NYAT Operating Corp. v. Jackson Lewis Schnitzer & Krupman, et al.*¹² held that a lawyer who testified in an examination before trial and allegedly lied was subject to liability under §487. The defense that he was not acting in his capacity as a lawyer was rejected.

*Wiggin v. Attorney Anonymous*¹³ further defines the scope of liability for lawyers that mislead the court and their adversary party to one's own client by willfully delaying a cause of action for the

lawyers own gain, i.e., excessive fees. In view of the fact that §487 has Disciplinary Rule and criminal law implications the conduct that is within its ambit is serious professional misconduct and a heightened consciousness as well as due care must be exhibited before such a cause of action is asserted.¹⁴

Observations

Judiciary Law §487 provides a remedy and a multiple of monetary damages for serious professional misconduct that adversely affects a pending litigation. Even though there are strict elements for the pleading and proof before an action can be brought or damages recovered, lawyers can and do succumb to violating the statute by being focused exclusively on economic gain and/or by the employment of overly aggressive and improper tactics in litigation, especially if the litigation is complex and protracted. A review of the statute and the cases should be a more than sufficient warning to avoid the risk of liability under Judiciary Law §487.

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Endnotes:

1. 224 AD2d 481; 638 NYS2d 132 (2d Dept. 1996).
2. 262 AD 226, 692 NYS 2d. 361 (1st Dept. 1999).
3. 233 AD2d 191, 649 NYS2d 701 (1st Dept. 1996).
4. 15 AD3d 626, 789 NYS2d 904 (2d Dept. 2005).
5. 20 AD3d 392, 798 NYS2d 136 (2d Dept. 2005).
6. 280 AD2d 704; 720 NYS2d 258 (3d Dept. 2001).
7. 237 AD2d 264, 655 NYS2d, 412 (2d Dept. 1997).
8. 81 NY2d 161, 613 NE2d 153, 597 NYS2d 278 (1993).
9. 2003 WL 22137465, 2003 NY Sup. 512, 66 (N.Y. Sup. Ct. 2003).
10. 17 AD3d 565, 793 NYS2d 180 (2d Dept. 2005).
11. 25 AD3d 534, 809 NYS2d 119 (2d Dept. 2006).
12. 191 Misc2d 80; 741 NYS2d 385 (NY Sup. Ct. 2002).

13. 115 Misc2d 1071, 455 NYS2d 205 (NY Civil Ct. 1982).

14. *In re Mackenzie*, 32 AD3d 189; 819 N.Y.S.2d 553 (2d Dept. 2006); *Wiggin*, supra., n.13.