

NEW YORK COURT OF APPEALS ROUNDUP

ATTORNEY'S ATTEMPTED DECEIT, ATTORNEY AS UNSWORN WITNESS,
BLOOD SAMPLE SEIZURE AND TESTING

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Attorney misconduct was the subject of two Court of Appeals decisions we discuss this month. In one case, answering questions certified by the U.S. Court of Appeals for the Second Circuit, the Court agreed that an attorney may be held liable under [New York Judiciary Law §487](#) for an attempt to deceive a court, even if the attempt was ultimately unsuccessful, and that the opposing party's legal fees, trebled, could be awarded as damages. In the other, the Court upheld reversal of a criminal conviction due to the prosecutor vouching for the testimony of a witness during summation, thereby making himself an unsworn witness.

We also discuss a decision upholding the seizure of blood samples taken by a hospital in the course of treating the defendant, and introduction of the results of tests on those samples in his drunken driving trial.

Newly appointed Chief Justice Jonathan Lippman took no part in any of these decisions.

Attorney Deceit

Judiciary Law §487, a weapon little used in a litigator's arsenal, may gain more acceptance as a result of the Court's answer to [two questions](#) certified to it in [Amalfitano v. Rosenberg](#). It states:

An attorney or counselor who: . . . is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

We note that, although Amalfitano arose out of attempted deception of a court, the statute also applies to deception of, or collusion with intent to deceive, a party.

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The case arose out of an action in which Armand Rosenberg represented plaintiff Peter Costalas against his niece, Vivia Amalfitano, and her husband. Mr. Costalas claimed that the Amalfitanos had defrauded the family business by selling a building at 27 Whitehall St. in which he had an interest. The Amalfitanos moved to dismiss the complaint on the basis that, by written agreement, Mr. Costalas was no longer a partner in the family's business and had no interest in the property. Mr. Rosenberg, on behalf of Mr. Costalas, moved for summary judgment on the ground that the written agreement was a sham to avoid creditors and was never intended to be effective.

The Supreme Court dismissed the complaint, and the Appellate Division, First Department, reversed. After discovery, the Supreme Court again dismissed the complaint; this time [the Appellate Division affirmed](#).

The Amalfitanos, availing themselves of diversity jurisdiction, then sued Mr. Rosenberg in District Court, claiming the lawyer had violated §487 by his unethical behavior in seeking to deceive the state courts in the earlier lawsuit. Following a bench trial, Judge Naomi Reice Buchwald found that Mr. Rosenberg had violated §487 and that the Amalfitanos were entitled to \$89,415 in damages for their legal costs, trebled to \$268,245. Judge Buchwald held that Mr. Rosenberg acted unethically and unprofessionally in, inter alia, verifying the Costalas complaint and pursuing the action through two trials and the ensuing appeals when he knew that the complaint falsely alleged Mr. Costalas continued to be a partner in the 27 Whitehall Street Group partnership.

Mr. Rosenberg took the position that success is a prerequisite to §487 liability, and that because he ultimately failed to deceive the state court, no claim would lie. The District Court disagreed.

The Second Circuit certified to the New York Court of Appeals two questions: (1) whether an unsuccessful attempt to deceive would support a §487 claim, and (2) whether the costs of defending against a case founded on false representations were recoverable where the court to whom the representations were made never acted on the belief that the representations were true.

The answer to both questions, in an opinion by Judge Susan Phillips Read for a unanimous Court, was a resounding "yes." Judge Read presented a detailed recreation of the history of §487 as criminal in nature, starting from its origin during the 13th Century realm of King Edward I of England, through its codifications in various New York statutes, including as part of the [Penal Code in 1881](#), down to its placement into the Judiciary Law in 1965 when the Penal Code was revised. Section 487 is not, said the Court, a codification of the common law cause of action for fraud and does not require the deceit to have succeeded in order to be applicable to an attorney's conduct.

As to the second certified question, the Court answered that the recovery of treble damages under §487 does not depend upon a court's belief in the truth of the deceitful statements.

Prosecutorial Misconduct

The reversal of a criminal conviction due to the conduct of a prosecutor is a somewhat extraordinary result. Surely this is because the law in this area is reasonably clear, and prosecutors are trained as to the very limited ways in which their conduct can cause a conviction to be reversed. One of the ways is for the prosecutor to become an unsworn witness.

This was the situation in [People v. Moye](#), in which the Court unanimously affirmed [the reversal](#) of a conviction by the Appellate Division, First Department. The case was resolved in a Memorandum Opinion that followed upon the finely honed majority and dissenting opinions below (Justice James M. Catterson for the three-justice majority and Justice James M. McGuire for the two-justice dissent) that in a most comprehensive way explicated the critical facts and applicable law.

In affirming, the Court relied upon its decision in [People v. Lovello, 1 NY2d 436 \(1956\)](#), and reminded lawyers that it is always improper for counsel to become an unsworn witness by supporting his case with his own or anyone else's veracity and position.

The Court's decision turned on whether the prosecutor's summation, to which defense counsel took exception, was a permissible response to defense counsel's aggressive summation, and whether the prosecutor's statements were prejudicial to defendant. But the facts of the case provided an additional feature that made the Appellate Division's decision turn on more than just statements made in the two summations. The "more" involved the prosecutor having elicited "conflicting testimony" from two of his witnesses on the key factual issue and his direct participation in the events surrounding the conflicting testimony.

The charges arose out of a nighttime surveillance. Critical to the prosecution's case was whether photographs in evidence, taken by a surveillance team from a rooftop vantage point, supported the investigating officer's testimony that he could see defendant's hand passing drugs through a car's window. That trial ended in a hung jury, suggesting that the contemporaneous photographs did not convince all of the jurors that the alleged drug transfer was visible to the officer.

At the retrial, handled by the same prosecutor, the People introduced new photographs purportedly recreating the crime scene. These photographs were taken from the rooftop by a photographer employed by the District Attorney's office, in the presence of the investigating officer and the prosecutor. At trial, the investigating officer testified that during the recreation he could see the hand of another officer, who was in a car placed where appellant's car had been when originally photographed.

The photographer testified that she took photographs after the car had been moved at the recreated scene at the direction of the investigating officer, from where it had been initially placed by him to another site, because he concluded that it was impossible to see the hand of the officer in the car where first parked. From these facts, defense counsel argued to the jury in

summation that the investigating officer had committed perjury, and suggested involvement by the prosecutor.

In response, the prosecutor argued during summation that the photographer had to be mistaken, and that the investigating officer should not be seen as lying because any improper conduct by the officer with respect to the car's location would have to have been done in front of the prosecutor who was present and, if the officer was lying, "Well, that lies with me." Finally, in response to defense counsel's summation reference to the District Attorney firing someone, the prosecutor said that it was he who should be fired if the officer had lied.

It was stated below in the dissent that there was no conceivable response the prosecutor could have made to the accusation that the investigating officer was guilty of perjury in which he was complicit that would not be seen as "vouching" for the officer's truthfulness. What was most troubling to the majority below and dispositive in the Court of Appeals, however, was the prosecutor putting his own integrity "on the line." In addition, while the arguments by defense counsel concerning the prosecutor were arguably harsh, they were based on the conflicting proof introduced by the People's witnesses. By putting his integrity into the mix to support the officer's version of events over the photographer's, the prosecutor made a conviction almost inevitable, necessitating reversal of the conviction.

Blood Sample Seizure

The defendant in [People v. Elysee](#), challenged his convictions for manslaughter in the second degree, assault, and driving while intoxicated, on the basis that the results of tests on blood samples drawn by medical personnel without a court order should have been suppressed. The Court of Appeals unanimously rejected that argument, as well as his argument that the trial court should have charged the lesser included offense of criminally negligent homicide.

Early Christmas morning, defendant was involved in a four-vehicle accident in which one person was killed and several were injured. He was taken to Kings County Hospital. At 5:30 a.m., in accordance with its routine practice, the hospital drew a set of blood samples for treatment purposes. Early that afternoon, the Supreme Court issued an order pursuant to which additional blood samples were drawn at 2:50 p.m. Four days later, the blood samples drawn at 5:30 a.m. were seized pursuant to search warrant. Both sets of samples were tested.

Defendant moved to suppress the results of testing on the 5:30 a.m. samples, asserting that their seizure constituted an invasion of the physician-patient privilege. The motion was denied. The People's expert testified that, based upon the alcohol content of the 2:50 p.m. samples and reverse extrapolation, it could reliably be determined that defendant's blood alcohol level at the time of the accident was between .20 and .25 gram percent, and that this conclusion was substantiated by the blood alcohol levels of .21 and .23 gram percent found in the 5:30 a.m. samples.

Although both the prosecution and defense asked the trial court to charge the jury on criminally negligent homicide as a lesser included offense of second degree manslaughter, the court refused to do so.

The Appellate Division, Second Department, [affirmed the conviction](#). With respect to the 5:30 a.m. blood samples, it held the samples did not constitute “information” acquired in attending a patient that, pursuant to CPLR 4504(a), a medical practitioner may not disclose. The Court of Appeals upheld the introduction of the test results on the 5:30 a.m. samples, but on different grounds, and without resolving whether blood samples are “information” to which CPLR 4504 applies.

As explained in Judge Theodore T. Jones’ opinion for the Court, pursuant to Vehicle and Traffic Law §§1194[2][a] and [3], respectively, a person who operates a motor vehicle in New York is deemed to have consented to alcohol and/or drug testing under certain circumstances, and when a lawfully arrested vehicle operator has been involved in an accident in which someone else was killed or seriously injured, that operator may be compelled to undergo testing. Thus, even if defendant’s blood samples were protected by the physician-patient privilege, the Court found these statutory provisions would overcome it. And because the 5:30 a.m. samples had been drawn by an authorized person, it was irrelevant that the court order allowing their seizure was not issued until later.

On the second appeal point, the Court reiterated that “[a] person who fails to perceive a substantial and unjustifiable risk by reason of his intoxication acts recklessly rather than with criminal negligence.” It held that, given the overwhelming evidence of defendant’s intoxication at the time of the accident, the trial court was correct in concluding that no reasonable view of the evidence would support a finding of criminally negligent homicide and in therefore refusing to charge that crime.

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