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# Liability Under N.Y. Judiciary Law § 487—How Bad Does It Have To Be?

By Philippe Adler

New York Judiciary Law § 487 is a familiar adjunct to suits alleging negligence, breach of fiduciary duty, and/or breach of an engagement agreement against lawyers and law firms. After reciting those claims in the complaint, plaintiff will plead that counsel was ''guilty of [] deceit or collusion'' or ''consent[ed] to [] deceit or collusion,'' in either case ''with intent to deceive the court or any party,'' and based thereon will assert a violation of § 487(1).

The statute's provision for treble damages ensures that New York plaintiffs will maintain a lively interest in this cause of action. But the circumstances under which plaintiffs can take advantage of such a claim have been unclear, because the statute is short and its wording is open-ended, leaving much interpretive work for the courts.

*Philippe Adler is a partner at Friedman Kaplan Seiler & Adelman, where he represents AmLaw 100 law firms in defense of claims, including claims of malpractice. He also represents public and private companies as well as individuals in federal and state courts and before arbitral panels in disputes involving claims for breach of contract, fraudulent transfer, business torts, breach of fiduciary duty, common law fraud, and securities fraud.*

Section 487, which provides both civil and criminal causes of action, reads:

> An attorney or counselor who:
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> 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. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
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> Is 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.

The text of the statute indicates that, rather than a malpractice or even a sanctions orientation, it has a law enforcement orientation. The statute describes an attorney as ''guilty,'' rather than as ''liable for.'' The statute imposes a requirement that there have been ''intent'' to do wrong (intent is not an element of malpractice), in particular the kind of intent that may be criminal in nature—''willful[ness].'' And of course, the treble damages permitted by the statute are ancillary to the criminal punishment it allows: the wrongdoing at issue will first and foremost make the attorney ''guilty of a misdemeanor, [with] the punishment prescribed therefor in the Penal Law.'' Unsurprisingly, before being moved to its current location in 1965, the statute was contained within New York's Penal Law, and before that finds its ''ancient origin in the criminal law of England.'' See *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 25 Law. Man. Prof. Conduct 76 (N.Y. 2009).

Under a plain reading, if plaintiff can prove the attorney engaged in ''deceit''—meaning falsification, concealment, or cheating, see *Kawashima v. Holder*, 565 U.S. 478 (2012)—with intent, then plaintiff may recover under § 487. There are no further explicit hurdles to a finding of liability. For example, even though the word ''guilty'' is used, the statute does not require plaintiff's evidence to meet the high criminal threshold of proof beyond a reasonable doubt.

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**Judicial Interpretation.** But in practice, judges have added many further restraints on the use of § 487 in civil litigation, none of which have an obvious basis in the text of the statute, and some of which are even at odds with that text. For instance, in *Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP*, 12-cv-9459, 2013 BL 417132 (S.D.N.Y. July 2, 2013), the court found that the attorney's deceit had to either be directed at the court or occur during the course of a pending judicial proceeding.

Judges have further held that, where the deceit at issue is directed to a court, it must be a New York court in order for the deceit to be actionable under § 487. See *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978).

As another example, in *Seldon v. Bernstein*, 503 Fed. Appx. 32 (2d Cir. 2012), the court affirmed the dismissal of a § 487 claim on a timeliness basis—plaintiff's error was in not raising the alleged deceit giving rise to the claim during the pendency of the proceeding in which it occurred, even though plaintiff was aware of the alleged misconduct at the time.

Also, because the § 487 pleading is in the nature of a cause of action for fraud, courts will dismiss claims for a lack of particularity, as in *Pieroni v. Phillips Lytle LLP*, 140 A.D.3d 1707 (N.Y. App. Div. 4th Dep't 2016), especially where scienter is pled in a conclusory manner. See *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 32 Law. Man. Prof. Conduct 5 (N.Y. App. Div. 1st Dep't 2015).

Further, courts will dismiss where plaintiff shows no injury proximately caused by the attorney's deceit. See *Gumarova v. Law Offices of Paul A. Boronow, P.C.*, 129 A.D.3d 911 (N.Y. App. Div. 2d Dep't 2015). This is notwithstanding that trebled damages under the statute ''are not designed to compensate a plaintiff for injury to property or pecuniary interests,'' see *Schweitzer v. Mulvehill*, 93 F. Supp. 2d 376 (S.D.N.Y. 2000), but rather are penal—they are a deterrent and also serve as a punishment for the attorney.

Courts have even imposed a standing requirement, finding that only a client may sue the attorney for deceit under § 487. See *Lipin v. Hunt*, 14-cv-1081, 2015 BL 78553 (S.D.N.Y. Mar. 20, 2015). Thus, if the victim of the deceit was not the attorney's client, then that victim has no claim, at least under § 487. In *Rogath v. Koegel*, 96-cv-8729, 1998 U.S. Dist. LEXIS 15624 (S.D.N.Y.), the court dismissed the § 487 claim, ''[h]aving determined that Defendant owed no duty to Plaintiff because Defendant represented Plaintiff's adversary.'' Of note, this standing limitation exists despite the statute including within its ambit deceit by the attorney against ''any party,'' not merely against the attorney's client.

A small number of courts have dismissed where § 487 claims are deemed redundant of claims for common law fraud. See *Koch v. Sheresky, Aronson & Mayefsky LLP*, No. 112337/07, 2010 N.Y. Misc. LEXIS 2195 (N.Y. Sup., N.Y. Cty.).

Perhaps most important, many courts continue to hold that in addition to deceit by an attorney, there must be ''a chronic and extreme pattern of legal delinquency'' before a § 487 claim is made out. See *Brady v. Goldman*, 16-cv-2287, 2016 BL 406103 (S.D.N.Y. Dec. 5, 2016). This is sometimes phrased as a requirement that the conduct be extreme or egregious. See *Ray v. Watnick*, 15-cv-10176, 182 F. Supp. 3d 23 (S.D.N.Y. 2016).

These common law impediments to § 487 claims are justified by courts as protective of robust advocacy. See *Haggerty v. Ciarelli & Dempsey*, 374 Fed. Appx. 92 (2d Cir. 2010); *Curry v. Dollard*, 52 A.D.3d 642 (N.Y. App. Div. 2d Dep't 2008); *Michalic v. Klat*, 128 A.D.2d 505 (N.Y. App. Div. 2d Dep't 1987).

**Policy Concerns.** The implication of such decisions—though not often spelled out—is that New York courts fear allowing litigants free rein to take § 487 claims to trial would have a chilling effect on zealous representation. For this reason, some jurisdictions make lawyers' statements in legal proceedings absolutely immune from attack – a doctrine which § 487 operates in derogation of. (In New York, it seems that prosecutors are the only lawyers who can count on being insulated from § 487 claims. See *Rudow v. City of New York*, 822 F.2d 324 (2d Cir. 1987); *Cornett v. Obermaier*, 91-cv-6799, 1992 U.S. Dist. LEXIS 5828 (S.D.N.Y.).) By acceding to the hurdles erected by the defense bar to § 487 claims, New York judges have blunted the impact of § 487 as an exception to the privilege that lawyers otherwise enjoy to express themselves freely in litigation.

But there is an equally important public policy concern cutting the other way—the reliability of our system of justice. If attorneys who are privileged to speak and write without fear of repercussion use that freedom not to advance the legal interests of their clients but to deceive their clients or the court in a way that undermines the legal process, this might overcome the traditional impulse to privilege attorneys' statements. In *Specialized Indus. Servs. Corp. v. Carter*, 99 A.D.3d 692 (N.Y. App. Div. 2d Dep't 2012), the court explained that treble damages under § 487 ''are designed to punish attorneys who violate the statute and to deter them from betraying their 'special obligation to protect the integrity of the court and foster their truth-seeking function.' ''

The decades-long tension between a broadly-worded statutory remedy and a long list of judge-made restrictions on its use has yielded just a few reported cases that have awarded significant treble damages against lawyers or law firms for intentional deceit under § 487. One such instance is *Amalfitano*, above, where the district court assessed trebled damages of $268,245.54.

The answer to this stand-off may be legislative. Section 487 could be amended to clarify its elements, its scope, and the requisite proof. Or the statute could simply be abrogated, upon a recognition that it is too difficult to square it with the great liberties that our system allows to practitioners.

The status quo, however, is unsatisfactory. Courts lack consistency in how they address defenses to § 487 claims. Indeed, for many of the defenses noted above, there is authority that limits them in a significant way or casts doubt on their viability. And not all of these defenses follow from the text and logic of the statute.

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