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NEWS

When A Criminal Lawyer Withholds Critical Information From His Client

This article discusses what happens when a criminal attorney withholds information from his client, including hypothetical and real cases in which this has occurred.

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10 minute read

How can an attorney possibly deprive his client of a critical fact he needs to know when deciding how to wage his defense? Yet it happens.

So imagine this excruciating scenario. You're a criminal lawyer retained as local counsel (LoC) to represent a defendant on an extremely difficult charge – say, murder. Extremely experienced, you recognize, quiet as it is kept, that oftentimes, particularly in the state court system, off-the-record conversations among participants in a proceeding are the lubricant that facilitates the quest for justice. And the participants recognize the often-critical importance of maintaining the confidentiality of these conversations. Still, the importance of lawyers maintaining confidentiality can often go just so far.

The lawyers in the scenario described below concluded that probably the only way the client can possibly be acquitted of the homicide is for him to proceed non-jury – employing an extreme emotional disturbance defense. (Or perhaps something about the facts is so prejudicial to the defendant that a jury won't be able to get past it. Or, possibly, the defense would be so technical that a jury won't be able to fairly credit it.) And so, counsel advises the defendant to waive a jury believing that the judge assigned to the case will give him a fair shake – probably "fairer" than might a local jury. The client bows to his attorneys' wisdom and experience and accedes to their advice.

Accordingly, counsel communicates to the court the defense team's intention to "go non-jury" armed with an expert's opinion regarding his

“mental defect.” A few days later you, as LoC, encounter the judge’s law clerk in the courthouse hallway or you’re summoned to meet with him in chambers. Of course, the cynic/comic Lenny Bruce once famously said: “In the halls of justice, the only justice is in the halls.” Maybe sometimes in chambers, too. The clerk tells you – maybe, whispers in your ear – “don’t go non-jury.” Perhaps he even says, “The judge isn’t buying the expert’s opinion. Take my urgent advice – extremely bad strategy asking the judge to decide the facts.”

Any lawyer with half a brain would easily understand the thrust of the “advice”. That is, for whatever reason the judge won’t credit that defense, and counsel would be taking the client down the path of a “slow motion guilty plea” if he relies on it non-jury. You want to tell lead counsel *and the client* this inside dope. However, either you ask the clerk and he tells you that you can’t. Or he explicitly tells you “no, this is just for you to know” – at the outset of the conversation.

Ouch! What to do? If you repeat what you’ve heard, you violate a clear-cut confidence. And if it becomes known that you’ve breached, you’ve burned an important bridge in that judge’s chambers and maybe in the courthouse generally – word will clearly get around about you quickly. If you don’t, the unaware lead counsel – not to mention, most importantly, your client – will be walking directly into an all-but-certain conviction that he could only have possibly avoided if he was told what you know.

And so, to put it as directly as possible: do you opt to protect your personal reputation which will undoubtedly be sullied when it becomes known in the courthouse that you can’t be trusted with confidence? Or do you proceed in a way intended to protect your unaware client and his trial attorney?

Parenthetically, you sort of wonder about the law clerk. What was his purpose in telling you in the first place if you weren’t free to tell the client and lead counsel? Did he expect that you would simply come up with some BS – like “I had a bad dream about a non-jury trial in this upstate

county that I probably recognize better than you do"– in order to persuade lead counsel and the client to change their minds and proceed with a jury?

The above story presents the issue as starkly as possible, although the issue would be similar if you were, instead, the lead attorney and were "directed" by the clerk to not tell the client what you know. Yes, of course, as counsel, you might simply persuade the client that you had changed *your* mind and concluded that a jury trial strategy would be preferable. However, assume a headstrong and sophisticated client who needs to be better convinced that a jury trial was a better plan. And he would only be persuaded to relent on the idea of a non-jury trial if he was told by you that the clerk had pulled you by the coattail in the manner described above.

So let's assume that the unwitting lead counsel sticks to his plan of a non-jury trial. Meaning, no one tells him, the case is tried non-jury and the defendant is convicted of manslaughter in the first degree (albeit acquitted of murder). This is largely based on an actual case recently decided in Albany County, *People v. Gregory Thayer*, Indictment #: 70188-21, 10/1/24.

First, let's put aside the applicable ethics issues regarding a judge who seems to have prejudged the case as described here, and then nonetheless presides over the case non-jury. Or the conduct of the judge's clerk in having had an *ex parte* conversation with an attorney (and other issues raised in *Thayer* relating to the clerk's prior involvement in murder cases while an assistant district attorney).

Instead, let's focus solely on the role of LoC – who chose to keep to himself the critical and unambiguously prejudicial-to-the-client information he knew (astonishingly, until after a guilty verdict that was unavoidable when the case was tried non-jury before this judge). The issue would be similar if the counsel who kept the "secret" from the client was actually lead counsel. Same issue. Yes, it should be noted that in

Thayer LoC did suggest that the judge had prejudged the case, but he didn't tell lead counsel the "origin" of his concern – the most critical fact lead counsel needed to know in order to move disqualify the judge. Put simply, is there any basis whatsoever for a lawyer knowing that the presiding judge is unpersuaded by the intended defense to withhold that knowledge from the client who intends to waive a jury? Indeed, this even if telling the client (and/or the trial lawyer) would breach his promise of confidentiality made to the "insider" clerk.

The simple answer is "no." When the Loc finally told defendant Thayer's zealous lead counsel, Robert Gottlieb, of his conversation with the clerk – albeit, only after Thayer was convicted at trial – Gottlieb was understandably outraged. Stunned, he promptly engaged Joel Rudin, Esq., to prepare what amounts to a *habeas corpus* petition (*CPL 440 et seq.*). Given the appropriately aggressive allegations contained in that petition concerning what occurred in the trial judge's chambers, the *habeas* motion was reassigned to another Supreme Court Justice Roger McDonough of Albany County. That motion importantly included an expert ethics opinion from the well-regarded Professor Bruce Green of Fordham Law School.

Essentially, Professor Green determined that what Justice McDonough later called the "compromise solution" that the LoC created – *i.e.*, suggesting the judge's skeptical view of the defense theory but, critically, keeping Gottlieb in the dark about how he learned of those concerns – didn't come close to complying with his ethical obligations to the client. And specifically, as later determined by Justice McDonough after holding an evidentiary hearing, LoC's "unconscionable" withholding such critical information about the trial judge's view of the case pre-trial deprived Thayer of the "effective assistance of counsel" under the Sixth Amendment. Resultantly, Justice McDonough granted Thayer a new trial. *Thayer* Decision & Order, McDonough J., 10/1/24.

Professor Green's ethics opinion dealt with several issues including the trial judge's alleged prejudgment of the case and the law clerk's *ex parte* communication with LoC. Most importantly, he addressed LoC's "mums the word" strategy in dealing with Gottlieb – as violating his ethical and fiduciary duties to "reasonably communicate" with the client (*See* NY Rules of Professional Conduct, Rules 1.2(a) and 1.4). (Justice McDonough didn't address the other ethical issues presented by the case, which are not the subject of this article).

Indeed, while the decision to waive a jury trial ultimately belongs exclusively to a defendant, he can only make that decision after having learned the critical fact about the judge's view of the defense. That critical knowledge was denied him. And as for a decision whether to move to disqualify the judge -- even if *that* decision belonged to Thayer's counsel – -- Gottlieb (and the LoC) could only have made that decision in a meaningful way after having given that knowledge to the client and consulting with him.

As for the predicament of dealing with the conflicting "duties" or "loyalties" that LoC faced, his duty to Thayer was clearly not "trumped by a superior obligation". For example, if it involved a recognized loyalty to another client or duty under a court order, neither of which was present here.

Still, we live and practice law in the real world. One wonders what LoC should ideally have done when the judge's law clerk began swearing him to secrecy. Should he have said, "tell me nothing if I can't communicate it to my co-counsel and Thayer"? Once the law clerk told him the judge's thinking (or shall I call it "prejudging"), should LoC have told the clerk, "Sorry, I need to tell them both!"? Would it have been sufficient for LoC to tell lead counsel and Thayer: "Don't ask me how I know. . . . but I'm absolutely 100% positive that we don't want to go non-jury. Trust me!" And, if they agreed to back off about waiving a jury, would that have been sufficient? That is, if he didn't communicate to counsel and the

client that there was significant basis to believe (and assert) that the judge may have prejudged the defendant's guilt and that a recusal motion was necessary?

At day's end, as Justice McDonough ruled unequivocally in setting aside the conviction, LoC would have been obligated to tell lead counsel and the client exactly *what* he knew, and precisely *how* he knew it. One must ask why LoC didn't go to an ethics counsel or hot line for guidance. That would surely have told him that he needed to tell lead counsel what he knew – and then gone back to the law clerk and told him that "I'm sorry Mr. Clerk; the ethics expert *insists* that I'm ethically obligated to tell lead counsel and our client exactly what I know."

As an afterthought -- looking at the difficult circumstances presented here in the cool light of day, it is clear that local counsel had only one appropriate way in which to proceed. One wonders, though, if he didn't, why he didn't consult with a worthy confidante who could have imparted the practical and ethical advice he truly needed. A lesson for all of us!

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