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FROM: ELENA RUTH SASSOWER, Coordinator

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MESSAGE: Our Perspective Column is too important for yr not to have in front of yr the various Law Journal pieces to which it refers. They are enclosed, as is yesterday's published Letter to the Editor.

Rush yr.

6/17/97

Turnover of Lawyers Seen as a Problem

Attorney General Dennis Vacco's worst enemy would not suggest that he tolerates unprofessional or irresponsible conduct by his assistants after the fact. The real issue is how Mr. Vacco's policies and actions contribute to the incidence of shoddy lawyering in the first place.

Within a year after taking office, Mr. Vacco had largely remade the Department of Law. Almost one-third of the staff was fired, and the number who jumped before they were pushed brought the turnover close to 50 percent. Under the best of circumstances, such a drastic overhaul would create problems, but these circumstances were not the best. Treating the reasons for this makeover as subject to dispute would insult the intelligence of your readers. It is enough to say that while talent and experience were neither actively discouraged nor entirely absent among the new hires, they were qualities of only secondary relevance.

That assessment is, perhaps, a matter of opinion; but whether defaults, sanctions, judicial rebukes, or other signs of sloppy work by the Department of Law have increased on Mr. Vacco's watch, as recent *Law Journal* reports suggest, is a question of fact, subject to verification.

Clement J. Colucci
Bronx, N.Y.

Mr. Colucci was formerly an Assistant State Attorney General.

LETTERS

Assistants' Lapses Not Tolerated by Vacco

A recent article in the *Law Journal* discussed a report and recommendation by U.S. Magistrate Judge Theodore H. Katz in *McClain v. Lord*, 95 Civ. 4918 (SDNY), which recommended that a default judgment be entered against the defendant, and the decision by U.S. District Judge Peter K. Leisure to accept the recommendation. Judge Katz's report and recommendation cited failures by an Assistant Attorney General to meet deadlines and comply with court orders as the basis for the default (*NYLJ*, April 24).

The Attorney General does not tolerate employees' failure to meet court-ordered deadlines or noncompliance with the federal and local civil rules. Attorneys and managers in the Department of Law are expected to adhere to these requirements and to strive for the highest professional standards. The actions criticized by Judge Katz are totally unacceptable. In fact, the attorney assigned to *McClain* has been dismissed.

In addition, two of the "earlier decisions" Judge Katz cites concern missed filing dates and other failings that occurred before the current administration took office. The attorney assigned to those cases, a senior attorney in the competitive class of the State Civil Service, has also been dismissed, after arbitration, as a consequence of his failures. Meanwhile, one of those cases, *Waul v. Coughlin*, 93 Civ. 753 (SDNY), went to trial last month before a jury, which returned a verdict in our favor.

In a more recent case mentioned in the article, *Billups v. West*, 95 Civ. 1196 (SDNY), Magistrate Judge Henry Pitman vacated previously imposed sanctions as unduly harsh, saying that "although there may have been a technical failure to comply with a deadline, defendants did not display indifference to their obligations to the court" and that "the events that took place in this case were an aberration."

In *Trammell v. Greiner*, 95 Civ. 383 (SDNY), the other case cited by the *Law Journal*, the assistant has been counseled, and the case aggressively continued, resulting in a recent recommendation by Magistrate Judge Michael H. Dolinger for summary judgment in favor of the defendants.

These additional facts do not excuse the failures by assistants assigned to the cases. They do, however, make clear that the Attorney General does not accept, and will not tolerate, unprofessional or irresponsible conduct by members of the Department of Law.

Donald P. Berens Jr.
Albany, N.Y.

The author is Deputy State Attorney General.

5/5/97

S NEWS

date

The State Commission on Judicial Conduct has had to curtail some investigations because of budget constraints, the Commission's chairman, Henry T. Berger, said in testimony before the City Bar's Ad Hoc Committee on Judicial Conduct yesterday. More than 30 witnesses testified during a full-day hearing on the Commission's effectiveness and procedures. Mr. Berger said its $1.6 million budget is the same as it was in 1978.

LETTERS

To the Editor

Remedial Legislation No Answer to Lying

The essay by Matthew T. Lifflander entitled "Liars Go Free In the Courtroom" (*NYLJ*, Feb. 24) was well-stated, well-documented and well-meaning. However, I have my doubts that remedial legislation can avert the problem which is the subject of the essay. Surely, if the Ten Commandments (and specifically the Ninth Commandment) have not been sufficient inspiration to deter lying under oath, no well-crafted legislative directive will have more success.

The pervasiveness of sworn lying is perhaps more rooted in societal attitudes than in anything else. Where in times past the phrase, "my word is my bond," had significant meaning, we all now question what meaning it has today. The crux of the matter is that at all levels of society, many people no longer consider themselves accountable for their actions. This denial of accountability has not only spawned a litigious society which has been the subject of so much criticism, but by further extension, it has naturally resulted in irrational statements and flat outright lies. Whether the lying transpires under oath in a live courtroom setting, or at a deposition or through an affidavit, the result is still devastatingly the same. Condonation of the lying by client and misguided legal advocate simply reinforces an "ends justifies the means approach" which totally sabotages all professional goals and objectives.

The last line of defense is the judiciary. The judiciary presently is armed with sufficient authority and power to deal with the lying, but the subjective refusal of the judiciary to consistently confront the lying has significant consequences: the misdeeds and the lying are perpetuated because the violators verily believe that they are immune from punishment; believing they are so immune, the violators then repeat their misdeeds and lies which creates more negative litigation activity; our colleagues and their clients who take the system seriously and make a special effort to follow the rules consistently are utterly disillusioned; further, those of us who take the rules seriously are unable to reasonably predict the outcome in a litigation because of the underlying randomness in judicial application to the problem; and we are consequently deprived of a sense of confidence in our system of justice, while our clients tend to view the system as a genuine mockery.

I have never been a judge and I do not believe that I will ever be a judge in the future. I respect the judiciary and I sincerely know that it is very difficult for a judge to navigate through self-serving, self-aggrandizing, pompous statements which we sometimes sprinkle in our self-important affirmations and affidavits advocating the disembowelment of our adversaries. However, there are certain instances where the judiciary is armed with enough documentary evidence and enough consistent testimonial evidence to, in its discretion, confront the misdeeds and the lying and deal with it. It is regrettable that at those times, certain members of the judiciary disappoint us. By the same token, there are judges who confront these problems appropriately (if not severely) and they stand out for their courage and sensitivity. In my opinion, being a judge is probably a very lonely experience, laden with responsibility which our colleagues sometimes inexcusably clutter in their zealous advocacy. However, no matter how lonely or difficult that task may be, the judicial process should not alienate the hard working, serious members of our profession and the sincere clients who deservedly expect a more reasonable and consistent result.

Mark D. Lefkowitz
New York, N.Y.

LETTERS

To the Editor

3/13/97

Punish Perjurers

Matthew T. Lifflander's recent Perspective piece, "Liars Go Free In The Courtroom" (*NYLJ*, Feb. 24, p. 2), is brilliant in both its analysis and suggestions for change. He is right to suggest that perjury is a pervasive problem throughout our system. Unfortunately, not enough lawyers and judges view it as a significant problem.

Some years ago there was a murder case in my county where there was a partial acquittal on the basis of what clearly appeared to be fabricated and recently concocted evidence which had been previously successful in an unrelated but well known Manhattan murder case. The successful defense theory in the Manhattan case was pirated for Nassau. At a bar association dinner I asked the judge (now deceased), presiding over the Nassau case, whether there was any consideration given to perjury or subornation of perjury. The answer was a less-than-enthusiastic no. Perhaps that explains the apathy on this point of perjury, but it also suggests an ethical lapse worth pursuing.

When judges, lawyers, witnesses or litigants lie under oath, this is serious criminal conduct which should be prosecuted to the fullest extent of the law by the Judicial Conduct Commission, grievance committees and prosecutors. Perjury and suborning perjury are not acceptable legal strategies. Rather, they demonstrate an unfitness for the practice of law as much as commingling or embezzlement do. Deliberate lying under oath warrants removal from the bench, disbarment and prosecution. These are not singular or exclusive remedies. They should collectively be pursued. As Mr. Lifflander has illustrated, the economic costs of perjury are severe. Yet perhaps, the far more compelling issue is the damage caused by perjury to the moral and ethical fibers of society and the law.

Lastly, Mr. Lifflander has urged the creation of a separate tort for perjury. That may be necessary too, but in the meantime, lawyers and judges ought to be cognizant of the fact that committing perjury or defamation in the context of a legal proceeding, is not privileged. It is prosecutable and actionable. The damages caused to careers and reputations by perjury and subornation of perjury should be more clearly perceived, evaluated and compensated to the extent they can be. In the meantime, Mr. Lifflander's suggestions should be given every consideration by lawyers, judges and our legislatures.

Thomas F. Liotti
Garden City, N.Y.

NEW YORK LAW JOURNAL

2/24/97

PERSPECTIVE

Liars Go Free in the Courtroom

BY MATTHEW T. LIFFLANDER

SERIOUS CRIME IS committed every day in front of judges and juries in courts across America. The crime is perjury, the essence of which is intentionally giving false testimony under oath. Usually it goes unpunished.

Perjury is the quality-of-life crime that pervades the judicial system. Just as getting rid of street vendors and squeegee men had a significant impact on how New Yorkers feel about themselves and their city, prosecuting perjury in civil cases would vastly improve the public perception of lawyers, judges and the judicial system itself. Millions, if not billions, of dollars could be saved if those who lie under oath feared punishment.

The immediate victims of this crime are other litigants, but the enormous economic impact of false testimony is passed on to the public by adding to the cost of products and services that all of us eventually pay for. Our liability insurance premiums include the significant expense of the settlements, judgments and legal expenses related to such cases. Taxpayers are burdened disproportionately by excessive municipal tort claims. New York City paid over a quarter of a billion dollars to claimants last year (*NYLJ*, July 29) — about $35 per resident. City lawyers say that up to 10 percent of the claims against the city involve fraud or misrepresentation (*New York Times*, Dec. 5, 1996).

Highly experienced plaintiffs' and defendants' medical malpractice lawyers estimated under oath at a State Assembly hearing in 1977 that medical records were falsified in at least 10 percent of their cases.

People who lie under oath or submit altered documents in an effort to perfect a claim against a deep pocket or to cover their own mistakes — are cheating all of us. Perjury not only violates the law, it violates Judeo-Christian tenants and makes a mockery of George Washington's cherry tree which set a standard for first graders of my generation. Many Americans are concerned about the decline of morality. It is a big issue.

The time is ripe to attend to the impact of un-prosecuted perjury on so many aspects of our society. "Tort reform" bills pending in Congress and state legislatures would limit damage awards to legitimate victims of negligence for "pain and suffering." New Jersey Governor Christine Whitman just proposed a plan to cut insurance costs for those who agree to take less when they are injured. Such limits are of dubious constitutionality and generally not acceptable politically as lawmakers opt to leave determination of the value of a lost limb or the related pain and suffering to juries. Reducing the prevalence of perjury in civil litigation would do much more than any tort reform bill to alleviate the unfair encumbrance imposed on all of us by excessive litigation, and no litigation can more readily be categorized as "excessive" than those cases containing claims or defenses based on false testimony.

During the recent well-publicized trial of a Bronx police officer who was eventually acquitted on a charge of criminally negligent homicide, Justice Gerald Sheindlin called the conflicting testimony of police witnesses arise between witnesses who actually saw things differently. The testimony of honest witnesses should never be deterred.

ASK ANY ACTIVE trial lawyer how often witnesses lie and people will be astounded at their answers. Those who are willing to discuss reality would certainly be able to relate extensive experiences with false testimony by both plaintiffs and defendants in civil cases. The following examples are very familiar to active practitioners. Fakers are caught by videotaped surveillance. Plaintiffs swear that their medical problem is attributable to the accident until the defendant discovers medical records showing that the same injury had been treated long before the accident. A defendant tells a story under oath that differs from the one he told the investigating officers at the accident scene.

Such incidents are often discovered during pretrial discovery. Occasionally the discovery will cause one side or the other to lose their case, but more often the result is a settlement for a lesser amount because the defense fears those jurors who might overlook obviously perjured testimony out of sympathy to the injured victim who lies on the witness stand claiming that he did not understand the question he lied about in his pretrial depositions. The case is settled and the perjury is forgotten. Nobody is prosecuted or otherwise discouraged. While judges have a discretionary right to refer evidence of perjury in their courtroom to prosecutors, few do so because such referrals are usually ignored by prosecutors who really do have more important crimes to fight. They simply cannot spend their time prosecuting liars, especially for the benefit of some commercial litigant or another.

Public confidence in the American system of justice is regularly eroded by reports of decisions which seem unfair. We cannot avoid the fact that nearly every survey reports that judges and lawyers are held in low esteem. On the other hand, the daily television schedule, the weekly best-seller list, and the local movie guide, as well as the six o'clock news all make it pretty clear that the public has a consuming interest in the work that lawyers do and what happens in our courts.

This dichotomy is best understood by the thought that there really are a lot of opportunities to enhance our profession in the public eye when we do our best work, and that most of the things that we use our lawyering for are truly worthwhile.

Certainly one of the things that the public holds against our profession and, indeed, the system of justice itself, are the well-reported decisions that seem to the average non-lawyer reader to have come out unfairly and justify condemnation of the bench and bar, whether it be an acquittal or a conviction in a criminal case or what appears to them to be an excessive award in a civil matter. Vast differences in the amounts of jury verdicts regularly rendered in different counties of the same city or state are difficult to justify to laymen or business

cited perjury on so many aspects of our society. "Tort reform" bills pending in Congress and state legislatures would limit damage awards to legitimate victims of negligence for "pain and suffering." New Jersey Governor Christine Whitman just proposed a plan to cut insurance costs for those who agree to take less when they are injured. Such limits are of dubious constitutionality and generally not acceptable politically as lawmakers opt to leave determination of the value of a lost limb or the related pain and suffering to juries. Reducing the prevalence of perjury in civil litigation would do much more than any tort reform bill to alleviate the unfair encumbrance imposed on all of us by excessive litigation, and no litigation can more readily be categorized as "excessive" than those cases containing claims or defenses based on false testimony.

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In 1994, Police Department investigations and the Mollen Commission exposed the extent of "testi-lying" by police officers protecting their brethren or attempting to convict those they deem to be criminals. The Mollen Commission also reported on the extent police perjury was accepted by the law enforcement community. As a result, the problem is now receiving considerable attention.

PERJURY IN CIVIL litigation, on the other hand, is far less familiar to the public and receives virtually no attention. There is a dearth of reported cases documenting punishment for false testimony and very little has been written on the subject. Even the Internet is practically bare on the issue of perjury in civil cases.

Last year, U.S. District Judge Denise L. Cote, after finding "compelling" evidence that a defendant committed perjury in a trial involving a business dispute, declined a request to sanction him because he had lost the case. The judge said she was unable to decide with certainty if his attorney knew the testimony to be false when it was given. The judge did suggest that "the integrity of the judicial process" was at stake when perjured testimony is offered at trial. *Arnold v. Spanierman*, No. 94 Civ. 2501, 1966, WL 139796 (SDNY March 27, 1996), *NYLJ*, May 2, 1996.

In another federal case reported at about the same time, Judge Peter L. Leisure declined to seek prosecution of a litigant who submitted a false affidavit because the parties subsequently agreed to withdraw it so it did not turn out to be material to the decision, even though the judge admonished the parties about "the serious consequences of knowingly submitting false testimony." *Bob's Best Foods Inc. v. Isabell's Bakery Inc.*, No. 95 Civ. 2828, 14/26 Star. Dec. 063 (SDNY, March 27, 1996), *NYLJ*, May 2, 1996.

Judicial tolerance of perjury reached the apex of our judicial system when the U.S. Supreme Court in a 1994 decision (*ABF Freight System Inc. v. National Labor Relations Board*) decided that the NLRB acted within its discretion in reinstating an employee who had been found to have lied under oath in the government agency's proceedings, despite the Supreme Court finding that the NLRB had displayed what Justice Antonin Scalia called "... an unseemly tolerance of perjury." 510 U.S. 317, 114 S.Ct. 835 (1994).

What portion of civil cases are tainted by perjured testimony? In accident-claim cases it is enormous but it happens in all sorts of other civil cases and administrative proceedings as well. Perjury is also pervasive outside of the courtroom in arbitrations of labor grievances, in Workers Compensation hearings, in insurance fraud and in such mundane rip-offs as applications for various governmental benefits.

Obviously we must distinguish between outright lies and differences in opinion, or those differences which esteem. On the other hand, the daily television schedule, the weekly best-seller list, and the local movie guide, as well as the six o'clock news all make it pretty clear that the public has a consuming interest in the work that lawyers do and what happens in our courts.

This dichotomy is best understood by the thought that there really are a lot of opportunities to enhance our profession in the public eye when we do our best work, and that most of the things that we use our lawyering for are truly worthwhile.

Certainly one of the things that the public holds against our profession and, indeed, the system of justice itself, are the well-reported decisions that seem to the average non-lawyer reader to have come out unfairly and justify condemnation of the bench and bar, whether it be an acquittal or a conviction in a criminal case or what appears to them to be an excessive award in a civil matter. Vast differences in the amounts of jury verdicts regularly rendered in different counties of the same city or state are difficult to justify to laymen or business leaders. When these things happen, we do not always hear about it, but readers, viewers, and listeners everywhere are deprecating our profession because of what appears to them to be unfair or worse. The perceived failures of our system of justice are blamed on lawyers and judges when people do not understand the complexities of a legal situation or the facts not covered by press reports. Business people are appalled by what they deem to be wasteful or excessive expense in litigation they encounter.

Catching and punishing those who lie in court would go a long way toward building greater confidence in the judicial system and would earn a greater appreciation of the higher values of our profession. By acting in concert to deter, reduce and punish perjury, our profession has a great opportunity to serve society and enhance its own image.

CAN ANYTHING REALLY be done about this prevalent problem? How can we motivate sufficient prosecution to deter perjurers? Should we create a new civil tort for those injured by someone's false testimony? The issue is timely and big enough to justify creation of either a state Moreland Act Commission investigation by the Governor and the Attorney General, or a well-financed legislative investigation at the state or federal level. Either would provide the necessary subpoena power to reveal the true extent of the problem and provide some expertise to develop new creative deterrents to false testimony. Some which should be considered:

- Create a new tort for those injured by deliberate false testimony under oath, allowing victims to recover damages and legal fees.
- Motivate prosecutors to accept more responsibility for prosecuting those who lie under oath by providing them with dedicated resources from a special fund generated by a small tax on large judgments and large contingent fees.
- Coordinate the economic interests of municipalities, manufacturers, and insurance companies to create an independent investigative resource to support prosecutors with fully prepared cases.
- Provide civil trial judges with the power to impose a new civil penalty for those found to have perjured themselves in a civil case, and allow judges to make adjustments up or down to judgments where perjury is established.

Surely there are many other ideas worthy of serious consideration. What is called for now is action by those armed with subpoena power, the Governor, the Attorney General and the legislative leadership, that would lead to effective reform.

Matthew L. Lifflander, *a partner in Rubin Baum Levin Constant & Friedman, is a member of the Board of Editors of the* Law Journal.