District of New York is conducting the court's business, perhaps not fully and completely, but sufficiently to uphold the protection of the Constitution, statutes, and rules of the United States for those involved.

Legal History

The Associate's Dilemma: Joe Fortenberry, Mahlon Perkins, and the Kodak Antitrust Trial

By C. Evan Stewart

In the December 1979 issue of *Esquire*, Steven Brill published an article ("When A Lawyer Lies"); it has become the widely-accepted story of what went wrong in the most important antitrust trial of the 1970s: *Berkey Photo v. Kodak*.

The Conventional Wisdom

On April 20, 1977, Alvin Stein, Berkey's lead lawyer (a partner at Parker, Chapin, Flattau & Klimpl), was taking the deposition of Kodak's expert witness, Merton Peck, a distinguished professor of economics at Yale. Kodak's law firm was its long-standing outside counsel, Donovan Leisure Newton & Irvine, one of the country's leading litigation firms. And defending Peck at the deposition were Mahlon F. Perkins, Jr., and Joseph Fortenberry.

Perkins, the son of a United States diplomat, was born in China, where he lived until he was 14. Thereafter, Perkins came to the U.S. to go to school, ultimately enrolling at Phillips Exeter Academy. After graduating from Exeter, Perkins matriculated at Harvard College. During World War II, he served in the Office of Strategic Services (toward the end of the war, he parachuted into Peking to assist in the release of POWs, for which he was awarded the U.S. Army's Soldier's Medal for Valor and the Chinese Order of the Flying Cloud). After the war, Perkins entered Harvard Law School; and after graduation he joined Donovan Leisure – the firm founded by the O.S.S.'s head, General William ("Wild Bill") Donovan. At the time of the *Kodak* trial, Perkins (according to Brill) was "one of the firm's most respected partners."

Joe Fortenberry, originally from Mississippi, went to Harvard and then to Yale Law School. After clerking for a federal appeals judge, he joined Donovan Leisure in 1970. At the time of the *Kodak* trial, Fortenberry (according to Brill) "was on the perfect big-time lawyer's career path": he was "not only . . . brilliant but [was] also . . . engaging and enjoyable to work with"; he was "a well-liked, personable genius"; and his "prospects for being made a partner at the prestige firm the following year were excellent."

Professor Peck was a very important witness for Kodak. His task was to advance the narrative that Kodak's market domination was the result of its skill, hard work, and innovative products, and not because of other less honorable methods (e.g., illegal tie-ins, the acquisition of competitors). At his deposition, Stein pressed for all the materials Peck had generated and used in arriving at his conclusions, including everything Donovan Leisure had provided to him. Peck responded that he had shipped everything back to Donovan Leisure. At that point, Stein angrily demanded that Perkins immediately produce all of the documents. Perkins' response: that would not be possible, he had destroyed them.

That was not true. In fact, the documents were sitting in a suitcase in Perkins' office. Moreover (according to Brill), not only did Fortenberry know his boss was lying, he whispered in Perkins' ear about the suitcase (and the documents therein), but Perkins waved him off during the angry back and forth with Stein. Two weeks later, Perkins submitted an affidavit to the court in which he doubled down on his misrepresentations(s) vis-à-vis the "destroyed" documents.

In January 1978, the *Berkey v. Kodak* trial was winding down, with Professor Peck as the final witness for Kodak. On cross-examination, Stein pressed Peck about the materials used to reach his conclusions.

This led Judge Marvin Frankel to review the whole history of the "destroyed" documents. Faced with this new and intensive scrutiny of the episode, Perkins broke down and confessed his wrongdoing, which Stein then used before the jury to destroy Peck's credibility and thereafter secure a "spectacular $113 million verdict" (a verdict reversed on appeal because the measure of damages was improper; ultimately, Kodak settled the matter by paying Berkey a few million dollars).

Perkins was prosecuted and pled guilty to contempt of court; he was sentenced to one month in prison (which he served). Although he resigned from the firm (on March 20, 1978), Perkins did not lose his law license.

Fortenberry was the real focus for Brill, however. Citing to the Code of Professional Responsibility (then DR 7-102 (R) (reporting fraud on a tribunal); and then DR 8-102 (A) & 8-103 (reporting another lawyer's "dishonesty, deceit, or misrepresentation"), Brill wrote: "Fortenberry was obligated to speak up when Perkins lied. Instead, he said nothing to anyone." Brill went on to quote an unnamed "close associate" of Fortenberry's: "What happened to Joe was that he saw Perk [Perkins' nickname at the firm] lie and really couldn't believe it. And he had no idea what to do. I mean, he knew Perkins was lying, but he kept thinking that there must be a reason. Besides, what do you do? The guy was his boss and a great guy."

The remainder of Brill's piece was an examination of the pressures on associates at large law firms and the quandaries facing them if they see wrongdoing (a Fortenberry "situation"). He concluded with a quote from Judge Frankel: "There isn't any way for an associate to handle that problem."

The Real Story: Telling the Firm

Not surprisingly, the conventional wisdom (à la Brill) is not quite the whole (and more interesting) story. It turns out that I was also an associate at Donovan Leisure at the time (I was a summer associate in 1976; I started full-time on September 26, 1977). I knew the principals of this story. And since the time I started teaching professional responsibility at the Fordham Law School in 1996, I have devoted one class session to reviewing this tragic episode. (I have also taught it in my Cornell law class since 2006.)

On January 12, 1978, a memo from Donovan Leisure's Executive Committee was directed to "All Associates and Paralegals." We were to assemble at 3 p.m. the following day (Friday the 13th) in the Belvedere Suite on the 64th Floor of 30 Rockefeller Plaza. The next day at the appointed hour, I saw (and heard) Samuel W. Murphy, Jr., for the first time.

Murphy was the firm's preeminent litigator and a legendary figure in the bar. I had not seen him before because he had mostly been in Minnesota defending himself (and the firm) against a contempt citation issued by a federal judge because of Murphy's strong defense of his client, American Cyanamid (*see* "Jumping on a Hand Grenade for a Client," *Federal Bar Council Quarterly* (November 2009)) (the reversal of that contempt citation remains the leading decision on opinion work product; *see In re Murphy*, 560 F.2d 326 (8th Cir. 1977)).

Murphy succinctly detailed the unfortunate events at the trial's end (John Doar, Kodak's lead trial counsel, had just delivered his summation on January 11; the jury, after deliberating for nine days, would return its verdict on January 22), Perkins' inexplicable conduct, that the firm was being advised by ex-federal judge Simon Rifkind (of Paul, Weiss), and that the firm was doing everything it could to protect Kodak's interests (Murphy reported that he had deployed fellow partner, Kenneth N. Hart, to rally the shell-shocked Donovan Leisure trial team). Fellow Executive Committee member, John E. Tobin, then sought to assure the stunned assemblage that the firm would survive this unfolding tragedy and that we would all be needed to continue to work hard to service the firm's stable of other clients. We then shuffled out silently and took the elevators back down to our offices at 30 Rock.

The Real Story: Three Document Issues

Right after Perkins had told Stein in Peck's deposition that he had destroyed Peck's documents, there was another major document problem. John Doar, a partner of the firm, had shown Peck the four trial notebooks he intended to use for Peck's testimony; they included all

the questions he intended to ask, as well as all the answers he expected to receive. When Doar revealed this to Stein, Stein objected (*see* Rule 612, F.R.E.), but Doar claimed those materials were attorney work product and need not be produced. Stein raised Doar's blunder to Magistrate Sol Schreiber, who ordered Doar to hand over the notebooks. Doar appealed that order to Judge Frankel. This led to a May 5, 1977 hearing, a session that quickly turned its focus onto Perkins' "destruction" of the Peck documents. Frankel ordered Perkins to submit an affidavit about the "destruction;" and it was that affidavit which constituted the basis for Perkins' criminal conviction. It is more than ironic that Perkins' deposition outburst obscured Doar's huge mistake – a mistake, in and of itself, which undoubtedly would have destroyed Peck's testimony and credibility. Amazingly, the judge did not order Doar to produce the notebooks (74 F.R.D. 613) – although, as a matter of law, it was/is not even a close call (*see* "Positively 4th Street: Lawyers and the "Scripting" of Witnesses," *NY Business Law Journal* (Summer 2014)).

The second document issue involved a letter Peck had written to Donovan Leisure in November 1974, early on in his work for Kodak. In that document Peck told the firm he was unable to conclude (at that point in his work) that a 1915 antitrust consent decree entered into by Kodak was not a contributing factor to Kodak's subsequent market dominance. Although Magistrate Schreiber had ordered the production of all expert reports, including "interim" ones, the trial team did not consider Peck's 1974 letter as falling into the "interim" category.

Fast forward to Peck's testimony in January 1978. With Doar questioning Peck on the reason(s) for Kodak's preeminent market position, Stein argued to Judge Frankel that he should be able to inquire about the 1915 consent decree. Judge Frankel took the matter under advisement and said he would rule the following day. Overnight, Doar and his trial team dug up the 1974 Peck letter and decided if Frankel ruled in Stein's favor it would have to be produced.

The next morning, however, Frankel ruled that the 1915 decree was too remote in time and would be too prejudicial. But Stein formed a different way to attack, asking Peck whether he had generated any relevant work product before 1975. When Peck answered in the affirmative, Stein demanded it, and the document was produced. This turn of events had two critical consequences. First, it allowed Stein to blow up Peck before the jury. An unprepared Peck could not explain how the seemingly contradictory letter jibed with the opinion he had offered in response to Doar's questions. As one Donovan Leisure lawyer recounted: "[Peck] was completely at sea. He looked like a fool, he sounded terrible, he wasn't answering properly, he wasn't making any sense." In short, it was the 1974 document that was the tipping point in Peck's destruction as a witness.

The second consequence was that an incensed Judge Frankel ordered Doar to produce an affidavit explaining why the 1974 letter had not been produced earlier and for another affidavit to be submitted on Perkins' "destruction" of the Peck documents. When Perkins could not bring himself to lie under oath a second time, he confessed to his earlier perjury. That then allowed Stein – on Peck's last day as a witness – to drop the other hammer down on the now hapless Peck, ending his cross-examination with questions about the "destroyed" documents and Perkins' perjury.

The third document issue is perhaps the most bizarre. The documents in the suitcase in Perkins' office had virtually all been produced to opposing counsel and, in any event, had no real substantive impact on the trial. Perkins had lied for no reason (or had he?).

Why Did Perkins Lie?

Perkins was the wrong man, for the wrong job, at the wrong time. The business model that General Donovan had established for his firm was unique. Donovan did not want the firm to be made up of generalists; rather, he wanted his partners to have niche specialties. Thus, for example, there would be certain partners whose only job was to be brilliant, creative geniuses; they would sit in their offices, ponder their partners' most difficult questions, and then come up with impossible solutions. There would be other partners who, although called litigators, never went to court; their specialty was brief writing. That was Perkins' niche (conversely, in Murphy's words: "[Perk] doesn't get up on his feet.").

In fact, he was generally considered to be the firm's best writer.

So what was a lawyer, who had no real experience in sharp-elbow trial practice, doing heading up the critical expert witness phase of the most important, hotly contested antitrust trial of the 1970s? Donovan Leisure had been stretched to the limit, not only by its obligations to Kodak, but also by a whole host of other major, complex cases (indeed, that was the reason Murphy was unable to take the lead in Kodak, as the client initially desired). As such, Perkins, being a good team player, agreed to step in to help out on Kodak. While that was admirable on one level, he would be entering an arena which was not only a war zone, but also one with which he had no experience or aptitude.

Then there was an obvious culture clash. Perkins was not only from a genteel, upper-class, establishment world, he was also the most gentle man in Donovan Leisure's partner ranks (while he was not really one of the firm's "most respected partners" on a professional level, Perk was in fact one of the most revered – hence, the shock to most of us that, of all the partners, he would be the one to act unlawfully). Stein, on the other hand, was a Brooklyn born, street-fighter type, with years of in-the-trenches trial experience. Thus, when Stein angrily demanded that Perkins immediately bend to his will in the heat of the moment, Perkins got his back up, snapped, and lost his way. As Perkins later said to Judge Frankel: "that answer came into my head for some reason at the deposition. I had not planned to make that answer; I don't believe that I had really considered it." But having crossed this fateful Rubicon in a heated instant, Perkins thought he was trapped and did not seek counsel or consider correcting his obvious misrepresentation(s).

What About Fortenberry?

First off, it is important to understand who Fortenberry really was. Contrary to Brill, Joe was not "brilliant," "engaging," "enjoyable to work with," "a well-liked, personable genius"; moreover, he would not have made partner. Joe was smart, but a loner, nerd type, who affected a quirky, professorial persona (he smoked a pipe, self-nicknamed himself "El Lagarto" (the alligator)), and regularly published law review articles on esoteric subjects – (I remember one on "hirsute jurisprudence"). Fortenberry appeared to believe his future at the firm was in the creative genius niche.

As for the "situation" in which he found himself, the evidence is not compelling. Fortenberry at the time, and for the rest of his life, categorically denied that he knew about Perkins' misconduct or that he had whispered in Perkins' ear at the deposition about the suitcase. And initially, Perkins avowed that he "did not discuss [the documents] with Mr. Fortenberry," and that "Mr. Fortenberry had no knowledge . . . of the contents of [Perkins'] affidavit." But later, in what appeared to be an attempt to help Joe, Perkins suddenly remembered that "Mr. Fortenberry . . . whispered in my ear, something to the effect . . . 'You have forgotten about the suitcase.'" When told about Perkins' refreshed memory, Fortenberry was startled and thus began his categorical denials. Regardless, Fortenberry's career at the firm was thereafter under the black cloud of the Perkins' debacle and, until his "All Hands" departure memo on July 27, 1979, Joe walked around the office a beaten man with glazed eyes. Notwithstanding, the firm helped him get a job in the Antitrust Division at the Justice Department in Washington. Joe died a few years later of a heart attack; I believe it was of a broken heart.

The Fortenberry "Situation"

The associate quandary posed in Brill's article was actually directly teed up by *In the Matter of Kristian Peters*, M-2-238 (S.D.N.Y. April 10, 2008).

In that case, Peters, a seasoned litigator and a (then) partner at a well-known NYC law firm, had received deposition transcripts covered by a protective order in a case before Judge Harold Baer. On the eve of Peters voluntarily dismissing the Southern District of New York action and seeking to file an identical suit in Boston, Judge Baer ordered the return of all documentation covered by the order. To forestall part of that return, Peters instructed a first-year associate to "scribble all over" unmarked deposition transcripts; she believed (wrongly) that by so "scribbling" on the transcripts they would be converted into attorney work product and thus not be subject to being returned. The associate promptly

reported the instruction to senior members of the firm, which then launched an investigation.

This incident was brought to Judge Baer's attention and an evidentiary hearing was conducted. Peters testified her instruction was merely a "joke" or that she was being "facetious" or " sarcastic." Questioned by Judge Baer, however, the associate testified: "It was absolutely not in jest." Peters received a multi-year ban from practicing in the Southern District.

Postscripts

- Two associates at Donovan Leisure directly benefited from Perkins' departure: a good friend of mine received responsibility for Perkins' client, the 4As (the leading trade association for advertising agencies); and I received responsibility for Perkins' client, the National Board of the Y.W.C.A. of the USA.
- John Doar's public career (first in the Justice Department's Civil Rights Division, and later as Chief Counsel for the House Impeachment Committee for President Nixon) had been exemplary; but he was not exempt from criticism within the firm and in the numerous public accounts of the *Kodak* trial and the Perkins' affair. Since it was Doar's first complex trial of any kind – let alone the most important antitrust trial of the 1970s – it is no surprise that things did not go as planned, and that hindsight could be especially tough. Finding himself increasingly isolated, Doar announced to the firm on December 22, 1978 he was leaving Donovan Leisure effective January 2, 1979. In his "All Hands" memo, Doar wrote that he wanted to practice law "independently" and had made his decision "some time ago."
- I was lucky to work on a number of matters with Murphy and on many trials and appeals with Hart (whose autographed picture is in my office). They were great lawyers, great mentors, and great men.
- Each of the "All Hands" memos referenced herein (including Fortenberry's "El Lagarto" departure memo) is in my DLN&I file. At one point during my tenure at the firm I was assigned to Fortenberry's old office; I found it a comfortable place in which to work.
- So what is the "real" lesson of the unfortunate Kodak episode? In my view it is the following: when (not if) you make a mistake under pressure, do not internalize the problem and double-down on it (like Perkins did); instead, seek good counsel from someone whose judgment you trust so you can rectify/mitigate the damage.