

U.S. v. GELLENE: MORE TO THE STORY

1. Introduction:

- 1.1 Who am I, and who cares about John Gellene?
- 1.2 Short answer: Gellene's case is a cautionary tale, but not necessarily the one we think.

2. Background: *U.S. v. Gellene*, 182 F.3d 578 (7th Cir. 1999)

- 2.1 Bucyrus—Erie (BE) LBO
- 2.2 BE's Lawyer, Larry Lederman, goes to Milbank
- 2.3 BE's Bankruptcy:
 - 2.3.1 Gellene's Role & Retention:
 - “[F]or better or worse, you're stuck in Wisconsin.” 182 F.3d at 582, n. 4
 - 2.3.2 Gellene's Conflict: Salovaara (see attached schematic)
 - 2.3.3 Gellene's (Two) Disclosures:
 - “[A]fter due inquiry I am unaware of any other current representation by Milbank of an equity security holder of institutional creditor of [BE]. 182 F.3d. at 583.
 - 2.3.4 A Plan is Confirmed; a Fee Application is Filed—and Approved
- 2.4 **Things Get Ugly:**
 - 2.4.1 JNL Discovers Milbank Represented Salovaara
 - 2.4.2 Things Get Uglier: UST tells USA; Gellene Indicted
 - 2.4.3 Gellene is Convicted:
 - 18 USCS § 152 (3) *A person who . . . (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 15746 of title 28, in or in relation to any case under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both.*
 - 18 USCS § 1623(a). (a) *Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any PROCEEDING before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration*

3. The Meaning of Gellene's Story

- 3.1 Conventional Wisdom: REGAN, EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004):

- Question: “How had [Gellene] fallen so far so fast?” (12)
- “Understanding how Gellene's experience was both similar to and different from other lawyers helps us construct an account of what happened that is more complex than the claim that Gellene was an ethical rogue, or that Milbank was fundamentally corrupt.” (10)

- “*Gellene’s personality is not dramatically different from that of other lawyers, and may in fact be functional for succeeding in highly competitive law practices* (294)
- “[I]f Gellene had a character flaw, it was that he tended to lie when he wanted to avoid the consequences of his own negligence. That surely is not admirable, but it is understandable.” (302)
- “*The culture of the large law firm is shaped by three especially notable features: a tournament among partners, the presence of specialized practice groups, and the creation of teams of lawyers to handle high-stakes projects for clients*” (304) (ex: THE “TOURNAMENT OF LAWYERS” (GALANTER & PALAY)).

3.2 More to the Story

4. **What Does It Mean?**

4.1 When do lawyers get in trouble?

- The client is a criminal (*Refco* & Joseph Collins)
- The lawyer is a criminal (Mark Dreier)
- The “X” Factor

4.2 Team production and commodification

- Credit Crisis
- Robosigning

4.3 The Venue Debate: *LoPucki* (2005) v. *Skeel*, et al.

Facts:

Gellene (partner at Milbank) represented Bucyrus in Ch 11. Filed Rule 2014 declaration that didn't disclose Milbank's representation of senior secured creditor (South Street) or related parties (Greycliff Partners, Salovaara, and Eckert). Disclosed representation of Goldman Sachs (largest equity shareholder) and Jackson National Life Insurance Co. (JNL – largest creditor).

US Trustee and JNL filed objections. Court ordered second declaration with more detail. The second statement detailed Milbank's representation of Goldman Sachs and the "Chinese wall" the firm would use. It did not disclose representation of South Street, Greycliff or Salovaara. It included this statement: "After due inquiry I am unaware of any other current representation by Milbank of an equity security holder or institutional creditor of [Bucyrus]."

On two occasions, a Milbank partner (Toni Lichstein) raised the possibility of conflict of interest with Gellene. Both times Gellene said it was not a problem and all disclosure obligations were satisfied.

At a hearing regarding Milbank's request of over \$2MM in atty's fees, Gellene testified about the second disclosure filed, but did not testify that Milbank represented Greycliff and South Street. The court awarded \$1.8MM in fees and expenses.

JNL later discovered that Milbank represented Salovaara and filed a motion to disgorge fees. Gellene did not respond to the motion, and lied to his partners about the due date for his answer. He also altered the JNL filing to conceal the date it was signed.

Gellene filed a third declaration, explaining an error in legal judgment by omitting the representations of South Street and Salovaara and taking "full personal responsibility" for it.

Gellene was charged and indicted on two counts of knowingly and fraudulently making false material declarations under penalty of perjury in violation of 18 USC § 152(3) (for filing the first two declarations), and one count of using a document while under oath knowing that it contained a material false declaration in violation of 18 USC § 1623 (perjury for testifying about 2nd declaration at fee hearing). After a 6 day trial, the jury found Gellene guilty on all three counts. He was sentenced to 15 months in prison, a \$15,000 fine, and two years of supervised release following his incarceration.

Issues / Analysis:

A. Bankruptcy Fraud under 18 U.S.C. § 152(3)

- Does "fraudulently" within 18 USC 153(2) mean intent to deceive, or intent to defraud?
Gellene argues that he must have had a specific intent to alter or impact the distribution of assets.

The Court found “fraudulently” means intent to deceive, and it does not matter whether deception is aimed at thwarting the bankruptcy court or the parties to the bankruptcy.

- Was Gellene’s failure to disclose representation of a major secured creditor “material?”

Yes. Materiality requires that the false oath or account relate to some significant aspect of the bankruptcy case in which it was given, or that it pertain to the discovery of assets or to the debtor’s financial transactions. Materiality does not require proof of the potential impact on the disposition of assets. No doubt that misstatement about other affiliations is a material misstatement. Bankruptcy Rule 2014(a) requires disclosure of any connections with debtor, creditors, and any other party in interest.

- Was there sufficient proof of Gellene’s guilt to convict?

Yes. Gellene was an expert in bankruptcy and the disclosure requirements. Lichstein asked him twice about the potential conflict of interest. He withheld the info for over 2 years.

B. Perjury under 18 U.S.C. § 1623

- Since Gellene didn’t reference the paragraph mentioned in the indictment (“I am unaware of any other current representation”) at the perjury hearing, did he “use” the declaration?

Yes. A fair interpretation of the record is that the main concern was Milbank’s divided loyalties (not only the Goldman Sachs issue). The statement at issue assured the court that aside from Goldman Sachs, there were no other areas of representation of which Gellene was aware.

- If the second declaration was literally true, can it be the basis of a perjury conviction?

Yes. Gellene is raising this issue for the first time on appeal, so must demonstrate a “manifest miscarriage of justice” to obtain reversal. If falsity is established by a “common sense reading” of the language used, the conviction can be upheld. No miscarriage of justice here – it was reasonable for jury to find that Gellene’s supplemental declaration was false.

- Did the district court abuse its discretion in admitting 404(b) evidence?

No. Gellene made intent an issue in this case, so the gov’t was entitled to rebut his argument that he did not have the requisite fraudulent intent for the charged crimes. And the jury was instructed to use the evidence solely on the issue of fraudulent intent.

(Evidence was presented that Gellene claimed to be a member of the NY bar since 1981, and practiced law in NY from 1981-1990, but was never actually a member of the NY bar. Made

misrepresentation to CO bankruptcy court concerning failure to produce discovery documents. Also made misrepresentation to WI bankruptcy court in this case concerning Milbank's relationship with Lotus Cab Company.)

- Did the district court abuse its discretion in enhancing sentence for abuse of position of trust?

No. Gellene claims he did not occupy a position of trust with Bucyrus, the court, creditors, or his law partners. The court found a position of trust with Bucyrus and with the bankruptcy court, and that he abused both of those positions of trust.

- Did the district court properly consider Gellene's claimed inability to pay the \$15,000 fine?

Yes. Gellene had the opportunity to prove his inability to pay at a lunch meeting regarding his pre-sentence investigation. He did not dispute that he made over \$2.72MM in a 4 year period at Milbank. He provided no grounds for the court of appeals to reevaluate the decision.

Holding:

Gellene knew of Milbank's representation of Greycliff, South Street, and Salovaara, and intended to conceal that information. All 3 of Gellene's convictions are upheld, and the firm must disgorge \$1.8MM in fees.

Statutes Gellene violated:

18 USCS § 152 (3) Concealment of assets; false oaths and claims; bribery

A person who--

...(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11; ...

shall be fined under this title, imprisoned not more than 5 years, or both.

18 USCS § 1623(a). False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

Sentence enhancement statute:

USSG 3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

Bankruptcy Code provisions:

11 USC § 327: Employment of Professional Persons

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

...

- (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor,

unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

FRBP 2014: Employment of Professional Persons

(a) Application for an order of employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

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