Originally published in

New York Law Journal

Analysis

November 7, 2020

Resigning Because One's Criminal Client Has Gone Awry?

By Joel Cohen

Every criminal defense lawyer who has ever lived has been met with this: "How can you represent such a person?" And, "Is there someone you wouldn't represent?" In his Ethics and Criminal Practice column, Joel Cohen tackles the issue of terminating representation once the representation is underway, using Steve Bannon and his attorney, William Burck, as an example.

Steve Bannon is a wild card under the best of circumstances. His far right politics and sometimes-support of President Trump notwithstanding, virtually no criminal lawyer except a dyed in the wool NeverTrumper would have declined to represent him when he was indicted for alleged fraudulent online fundraising for "We Build the Wall." That's the nature of the criminal biz model, after all.

But, when it started to look like Joe Biden would be victorious, Bannon's lawyer asked the court to be relieved of the representation. Why? Although counsel's motion gave no reason, presumably it was because Bannon published a video on YouTube, Twitter and Facebook invoking medieval punishment: "I'd like to go back to the old times of Tudor England. I'd put the heads [of Dr. Fauci and FBI Director Christopher Wray] on pikes, right? I'd put them on the two corners of the White House as a warning to federal bureaucrats. You either get with the program or you're gone."

Presumably, and its only presumably, suggesting that Fauci and Wray should be beheaded was more than enough for Bannon's super lawyer—really, a super lawyer—William A. Burck of the prestigious Quinn Emanuel Urquhart & Sullivan law firm. Maybe it was just too much for the firm. Or for both. And, given Bannon's "I am Thomas Cromwell in the court of the Tudors" pronouncement, anyone could recognize why a lawyer or firm would want to withdraw—especially when withdrawing so early in the case would likely cause the client no real prejudice. There are other lawyers who would take the case given that no real trial date was contemplated for the near future.

* * *

Every criminal defense lawyer who has ever lived has been met with this: “How can you represent such a person?” And, “Is there someone you wouldn’t represent?” After all, a captious public concludes that even criminal lawyers must draw a line at some point because of a personal sense of propriety. Hitler?

Now, of course, lawyers may sometimes feel compelled to decline a representation ab initio because the client’s conduct is so odious to the lawyer or to his firm (or, perhaps, that firm’s clients). All understandable and ethically permissible. There is no affirmative obligation to initially undertake a representation—we’re not living in a one horse, one lawyer, town where declining a representation will leave the client with literally no lawyer to defend him.

You may recall that former Solicitor General Paul Clement was faced with the predicament of choosing between client and firm. He had been retained to represent the House of Representatives in defending the Defense of Marriage Act when, for whatever reason, the King & Spaulding firm at which he was then a partner, asked him to withdraw from the representation. To his credit, rather than “fire” the client, Clement resigned from the firm and took the client with him.

That, though, is not always doable for a variety of reasons. Sometimes the client’s conduct is so offensive *after the representation has begun* that the attorney feels the need to get out. Still, what are the ethics of withdrawing, particularly in a criminal representation or in a high profile case where a knowledgeable public might draw a negative inference about the client from the withdrawal? That is, where the client has said or done something so offensive personally or otherwise, post-retention, when an indictment is already pending, that it warrants a resignation. This, particularly when the attorney is unable to articulate in his application to withdraw the motivating reason for the withdrawal lest he severely prejudice the client.

Now, there’s a vast difference between the ethics of declining a representation and terminating one once the representation is underway. An attorney is pretty much totally free (ethically) to decline a representation for any reason—ranging from you simply don’t like the color or his tie, to his being a mass murderer. Ever the muse of “zealous representation,” the late Monroe Freedman, took that position in his famous debate with Michael Tigar over the latter’s controversial decision to represent John Demjanjuk, the so-called “Ivan the Terrible” of Treblinka. But Tigar knew going-in what Demjanjuk was accused of.

Now, NY Rule of Professional Conduct and the ABA Model Rules, both at 1.2, do say that representation “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Yet, ABA Rule 1.16 provides that the lawyer may withdraw where “the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Assuming, of course, that Bannon told Burck in advance that he intended to make the remark about Fauci and Wray and Burck asked him not to and even threatened to resign if he did—although unlikely that Bannon would ask his attorney to vet his offensive comment—Burck’s right to seek withdrawal would be clear under the “fundamental

disagreement" out. But wouldn't it be also clear under the reach of Rule 1.16 if Bannon had blindsided Burck?

Interestingly, New York Rule 1.16 ("Declining or Terminating Representation") doesn't have the "repugnant" safety valve, although it does have the "fundamental disagreement" language. And New York Rule 1.7(a)(2) might give the New York lawyer solace that there's an equally simple way out. It says that a lawyer shall not represent a client if a *reasonable* lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or personal interests." Not quite as neat as ABA Rule 1.16's "repugnancy" criterion to withdraw, but it makes a lot of sense.

Besides that, one could imagine that a lawyer representing an individual engaged in the YouTube conduct Bannon engaged in could ethically withdraw because "the client fails to cooperate in the representation or otherwise renders the representation unduly difficult to carry out employment effectively" (Rule 1.16 (c)(7); cf. ABA Rule 1.16(c)(6)). Just imagine being an attorney, *in anti-Trump New York City*, representing a defendant viewed as an associate President Trump, when you, as counsel, want to keep the substantive trial issues as low key in the public eye as possible, whereas the client insists on keeping himself as public as he can in an aggressive, Trump-like manner. Making himself an enemy of the very people who will be on his jury.

We don't presume to know whether Burck's decision to withdraw was his personal decision or his law firm's understandable concern about its client base or its attorneys' unhappiness with the representation, particularly once Bannon went off the reservation. Obviously, there are some lawyers—ardent Trumpers, probably—who would have simply laughed off Bannon's repulsive remark and continued to defend him.

The tricky part is where a judge—there are many—demands to know, on-the-record, the justification for the withdrawal motion when it is late in the game and threatens damage to the judge's scheduling. A truthful answer may be prejudicial to the client—i.e., a public perception that "the guy's own mouthpiece won't continue to represent him." In Bannon, it's easier—Burck withdrew early in the game and Bannon's comment was so widely publicized, the judge would have to have been living under a rock—she is not—to have not known about it. But telling the judge the problem on the record (as is required under federal procedure), even if in camera, might prejudice the defendant in the judge's eye. And this hypothetical judge might not be accepting of a simple "irreconcilable conflict with my client." Does a lawyer or his client want to tell the judge the real problem? Hardly.

One possible route is to ask the presiding judge to appoint a magistrate judge or another district judge to hear the lawyer's reason in camera and maybe even ex parte, and report her "up or down" conclusion to the presiding judge. While the lawyer might not even want to confidentially report a possibly offensive privileged conversation to a judicial officer who will

have no other role in the defendant's case, it does protect the client from a judge's prejudice, however offensive what he may have said or done, or "repugnant" it might be to the lawyer.

Joel Cohen *practices white collar criminal defense law as senior counsel at Stroock & Stroock & Lavan. He teaches a class at both Fordham and Cardozo Law Schools based on his book "Blindfolds Off: Judges On How They Decide" (ABA Publishing, 2014).* ***Dale J. Degenshein****, a partner at Armstrong Teasdale, assisted in the preparation of this article. The views expressed here are those of the authors and not their firms or clients.*