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ETHICS AND CRIMINAL PRACTICE

Expert Analysis

# 'Counseling' an Innocent's Guilty Plea

This past August we attended a "destination wedding" in Jamaica—hottest weekend of the summer, and right in the middle of the hurricane season. Still, it turned out very nice and joyous for us. But not for everyone.

Why? Two days after the wedding, one woman who attended with her husband was passing through Montego Bay airport security on the way back to the States. A corporal (two chevrons on right sleeve) in the Jamaican Constabulary Force, the airport gens d'armes, inspected her belongings and claimed he found a bullet (although no gun) in the woman's carry-on bag.

The woman, irate at the mere thought of being accused of trying to carry a concealed loaded bullet onto a plane, cavalierly and raucously erupted at the constable who had accused her: "I've been framed by you people"—"flaked" in the lingo of NYC police. This is never a good idea, and so the result was easily predictable. She was immediately taken into custody, interrogated for many hours and imprisoned in a dark, dank, holding cell accompanied by the worst female miscreants Jamaica has to offer.

Despite the efforts of a number of "well-connected" Jamaican lawyers who seemingly appeared deus ex machina, nothing could be done for her. Frustrated at their inability to gain her release and their unwelcome advice—that, notwithstanding her protestations of innocence, pleading guilty was "the only way to go" if she ever wanted to see the light of day, particularly outside of Jamaica—the woman and her family discharged the lawyers.

Two days and two long, harrowing—back to the wall, one-eye-open—nights later, the woman, brought to her knees by the indignities she suffered and finally "seeing the light," entered a guilty plea in court, under oath, to possession of a bullet. She paid a $325 fine (US), and was released from custody. Quickly enough then, she and her family left Jamaica, obviously never to return (unless completely insane)—all the while singing, God Bless America!

By **Joel Cohen**

True, the lawyers had it right: a guilty plea, a suspended sentence and a fine was the best way to go: "a generous offer," to use their phraseology. Especially since in a foreign country, it is virtually impossible to prove one's innocence to a possessory charge—drugs, small weaponry or other contraband—after answering "yes" to the airport constabulary's question: "Did you alone pack your baggage?" Indeed, airport personnel around the world now routinely ask the boarding traveler that question, under a protocol designed to deter the carrying of contraband, particularly if it contains an explosive (which a loaded bullet does). Sure, one may stand on principle and seek full exoneration at trial. But the cost is often to remain imprisoned, or at least detained in the foreign country pending trial (given that the visitor has no "roots in the community").

Can you as an ethical lawyer, who purports to abide by the law, tell a client who adamantly protests innocence to plead guilty?

Given these realities, would you, as a layman, counsel your close relative to remain in the foreign country, maybe even in prison—visions of "Midnight Express" dancing in your head—insistent on a trial to prove innocence, when a simple (albeit false, fingers-crossed) admission of guilt would earn her prompt and safe passage to the Good Old USA—with no further consequence? Undoubtedly no! No ethical dilemma here: sometimes a lie is the path of least resistance to a greater good (C.f., Frankfurt, H., "On Truth," Knopf, 2008).

### A Lawyer's Ethics

But you're not a layman. You are a member of the bar. You have ethical responsibilities beyond those which pertain to the man on the street. Can you as an ethical lawyer, who purports to abide by the law and your ethical duties, do in an American criminal action what these Jamaican lawyers were willing to do in the Caribbean—tell a client who adamantly protests innocence to plead guilty?

Well, to be sure, no one can argue that a lawyer behaves ethically when she counsels, or even sits by and knowingly allows an innocent client—that is, a client who adamantly maintains that he is innocent—to lie to the court and say, as he must, that he is actually guilty (and, as is the conventional practice, state (false) facts supporting that plea).[1] Indeed, that lawyer, when the plea allocution is taken under oath, may even be acting illegally—by suborning perjury.[2]

An attorney, of course, may sometimes skirt the question, maybe taking some minor liberties with the truth, resting in the notion that he really doesn't "know"[3] that the client is truly innocent—indeed, he has actually come to believe, based on the evidence presented to him, that the client is actually guilty. Many clients, after all, often tell their lawyers "I'm innocent," when no one in the world, including counsel, would believe them.

That said, one supposes that if the lawyer does not believe in the client's innocence, telling a client, nonetheless, that "the path of least resistance" is to plead guilty, even under oath, may arguably be an acceptable, albeit nettlesome, practice (even though counsel surely wouldn't want to see that scenario written up about her on the front page of the New York Times). And probably, counsel wouldn't want to see memorialized in a habeas corpus petition described in the pages of this Journal his confidential, pre-pleading conversation with his client: "Yeah, yeah, yeah, I know you're innocent, but you really need to plead guilty to cut your losses and put this behind you with a soft landing." Who needs that?

Still, the real issue is presented when the attorney truly believes in her client's innocence and the client basically says that he will have to lie to the court and, if necessary, lie under oath when sworn allocutions are the protocol of the court. Of course, sworn allocutions are the order of the day in the federal court[4] and are becoming increasingly more frequent in state supreme court.

In the lower criminal courts things may be far different. There, innocence-claiming defendants may be remanded for long periods awaiting trial because they lack sufficient funds for bail, only to sometimes gain acquittal after having served many more months in jail awaiting trial (when speedy

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trial rights are effectively denied).[5] Contrarily, if they were to plead guilty at arraignment or at the next calendar call—mindful, by the way, that such guilty pleas are not under oath—their sentences would likely be far less. Put yourself in the shoes of that lawyer, who believes from the depth of his soul that the defendant is truly innocent, and is asked to advise her client how to proceed, when the district attorney and judge have essentially offered to "give the courthouse away" with an extraordinarily lenient plea deal.

### False Pleas

But where do the ethicists stand on this? Of course, they are not unmindful that the system, even in the person of the Supreme Court of the United States,[6] does allow what amounts to a "false" guilty plea—that is, a defendant who can't afford to roll the dice given the potentially onerous sentence (maybe even death) after trial, may be allowed, as a matter of constitutional law, to plead guilty despite his protestation of innocence. But these *Alford*[7] guilty pleas, or *Serrano*[8] pleas as they are known in New York, are rarely accepted,[9] and the courts, in the case of such a plea, are clearly advised on the record that the lawyer has been told by his client that he innocent. The lawyer's hands in such a case are ethically clean—in what has been characterized as "expedient falsehood,"[10] whereas the authorities roundly condemn a practice that, for lack of a better word, "enables" (allows or assists) an innocent to falsely plead guilty.

### Ethical Views

For example, one ethics commentary—indeed, the American Bar Association—provides that "[i] f the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a guilty plea, the lawyer may not properly participate in presenting a guilty plea, without disclosing to the court."[11] Likewise, a law review commentator offers that "[i]t borders on unethical conduct by a lawyer to participate in a plea of guilty by a client who is in fact not guilty… [F]or a lawyer to stand silent while the innocent defendant lies to the judge (falsely confessing guilt) is to perpetrate a fraud on the court."[12]

And if this were not enough, Chief Justice Warren Burger, when he still served on the D.C. Circuit, wrote in a law review article that "[w]hen an accused tells the court he committed the act charged to induce acceptance of the guilty plea, the lawyer to whom contrary statements have been made owes a duty to the court to disclose such contrary statements so that the court can explore and resolve the conflict."[13]

With great respect to the late Chief Justice and the others, just imagine telling a judge that your client falsely plans to plead guilty in order for the judge to resolve the conflict that exists between your ethical duties and your client's desire to go home to his family as soon as possible. Just imagine—telling the judge that your client plans to lie and plead guilty, when the prosecutor, the judge and the crime victim all truly want him to plead guilty and clear up the calendar! Wouldn't you and your client and indeed, everyone including the court itself, be far better off if you never asked him about his guilt or innocence in the first place, especially when you believe the client is lying when he protests his innocence to you just before the plea? Indeed, in the words of the noted Professor Anthony Amsterdam, the decision is ultimately left to a lawyer's "individual conscience," that when a guilty plea is "distinctly to the defendant's advantage," it may well be that "a hard decision follows."[14] And hard as it might be for the lawyer, consider the client's role in all of this (when he probably would have been better off keeping his big, "innocent," mouth shut when talking to his lawyer in the lockup).

### Where to Go

In the face of the authorities cited above and others, I do not for a moment wish to argue here that a lawyer should take a client's confidential disclosure of innocence to the grave and go full speed ahead with the client's guilty plea and seemingly false narrative of factual guilt sufficient to support that plea, when he privately confides that he is criminally blameless. Indeed, there are ethical proscriptions against such action, despite what lawyers in the trenches might admit to one another at day's end in the "confessional" of the saloon.

The system does allow what amounts to a 'false' guilty plea—that is, a defendant who can't afford to roll the dice may be allowed, as a matter of constitutional law, to plead guilty despite his protestation of innocence.

This is not to say that there isn't a valid argument that defendants who are thoroughly, meticulously and ethically advised about the dangers and consequences of pleading guilty, despite their claims of innocence, shouldn't have the liberty to plead guilty consistent with the prosecutor's theory of the case, while privately maintaining their innocence. It may well be that the current system needs to be drastically overhauled, as articulately argued by Professor Josh Bowers in his compelling article "Punishing the Innocent" in the May 2008 University of Pennsylvania Law Review.[15] Professor Bowers would opt for a model that eliminates the ethical conundrum that currently handcuffs the lawyer (at least in theory) and instead allows a properly-admonished defendant to plead guilty, when pleading guilty (and the concomitantly favorable sentence deal being offered) is objectively the best result for him. Simply put, Mr. Bowers' "system" would make it "ethical" to counsel an innocent or innocent-sounding client about pleading guilty, or at least allow counsel to stand silent—presumably responding in the negative when the judge asks counsel, as is typical as part of the guilty plea catechism, "is there any reason why your client should not plead guilty?"

Until that day arrives, however, just don't forget what the ethicists, and indeed, what Chief Justice Burger have to say on the subject. Justice Burger wasn't leaving it to our conscience. In fact, when Professor Monroe Freedman (with whom, parenthetically, I strongly disagree on this point), articulated a model where sometimes a lawyer has to countenance his client's perjury, Justice Burger attempted to have Professor Freedman disbarred.[16]

By the way, were you actually expecting a clear and simple answer to this difficult problem?

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1. See N.Y. Rules of Prof'l Conduct R. 3.3(b) (2009) (replacing the Disciplinary Rules of the Code of Professional Responsibility, effective April 1, 2009) ("A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal").

2. See New York's perjury statutes: N.Y. Penal Law Article 210; William C. Donnino, Practice Commentary to New York Penal Law §200.00 (2010) ("A person who suborns or procures another to commit perjury is, according to the principles of accomplice liability, guilty of the perjury committed by the person who was suborned"); see also 18 U.S.C. §1622 ("Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both"). See also Title 18, U.S. §1001, for false statements to a federal court during guilty plea allocutions that are not under oath.

3. See In re Grievance Committee of United States District Court, District of Connecticut, 847 F.2d 57 (2d. Cir. 1988) (finding no ethical violation where attorney did not actually know that witness intended to perjure himself; the court said that mere suspicion of fraud is not sufficient to violate the rule).

4. Fed. Rule Crim. Proc. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath…").

5. See, generally, David Feige, "Indefensible" (Little Brown & Co. 2006).

6. *North Carolina v. Alford*, 400 U.S. 25.

7. Id.

8. *People v. Serrano*, 15 N.Y.2d 304.

9. See, e.g., *Silmon v. Travis*, 95 N.Y.2d 470, (2000) ("*Alford* pleas are—and should be—rare…. [I]n New York, such a plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt"); *People v. Richardson*, 72 A.D.3d 1578, (4th Dept. 2010) (denying defendant's *Alford* plea where there was insufficient evidence of guilt in the record").

10. Josh Bowers, "Punishing the Innocent," 156 U. Pa. L. Rev. 1117, 1171 (2008) (discussing the system's tolerance for certain types of false pleas—i.e., those "expedient falsehoods" where the defendant pleads to a factually impossible crime, but still admits truthfully that she did "something wrong").

11. Am. Bar Ass'n Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §5.3, at 241 (1970).

12. Jack B. Zimmerman, "Things Aren't Always as They Seem at First Glance," 40 S. Tex. L. Rev. 227, 228 (1999).

13. Warren E. Burger, "Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint," 5 Am. Crim. L.Q. 11, 15 (1966).

14. Anthony G. Amsterdam, "Trial Manual for the Defense of Criminal Cases," §215, at 363 (5th ed. 1988).

15. Bowers, supra note 10.

16. Monroe H. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," 64 Mich. L. Rev. 1469 (1966); Ralph J. Temple, "Monroe Freedman and Legal Ethics: A Prophet in His Own Time," 13 J. Legal Prof. 233, 235 (1988).