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Expert Analysis

ETHICS AND CRIMINAL PRACTICE

When the Client's Approach Is Deadly

By
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A number of months ago, in a seemingly beside-the-point news story, President Barack Obama quietly removed District Judge Robert Chatigny—currently of the District of Connecticut—from the list of nominees to the U.S. Court of Appeals for the Second Circuit.[1]

As with many presidential nominations that are withdrawn during the Senate confirmation process, it seemed as though party politics was at play. After all, Judge Chatigny has enjoyed a distinguished career, both in private practice and as a district court judge. But it appears that his opinions in an extremely high-profile death penalty case may have cost him the promotion.[2]

The case involved the execution of Michael Ross, a convicted serial murderer and rapist who was sentenced to death in 2004 for the murders of four young women.[3] At some point following conviction, sentence and appeals, Mr. Ross' lawyer, at his client's insistence, ceased further challenges to the death sentence, preparing to proceed to execution. Mr. Ross' lawyer believed he was ethically obligated to carry out his client's wishes.

Judge Chatigny vehemently disagreed. In two companion federal actions filed a few days prior to the scheduled execution,[4] Judge Chatigny chastised Mr. Ross' attorney for violating his ethical obligations to Mr. Ross. Judge Chatigny felt that new evidence—including a letter from a prisoner indicating that Mr. Ross suffered from "death-row syndrome depression"—obligated the attorney to investigate Mr. Ross' competence before following instructions to waive all challenges to his execution.[5] In fact, Judge Chatigny practically threatened to disbar Mr. Ross' attorney for failing to fight the death sentence imposed on his client.[6]

But in the end, it was Judge Chatigny who was investigated for misconduct for, among other things, "abandon[ing] neutrality and becom[ing] an advocate on behalf of saving Ross from execution."[7] The Special Committee of the Second Circuit ultimately found the claims of misconduct against Judge Chatigny unwarranted. But as one can imagine, the allegations gave pro-death penalty members of the Senate Judiciary Committee plenty of ammunition to assault the judge's Second Circuit nomination. In light of this opposition, Judge Chatigny withdrew his nomination.[8]

What is the duty defense lawyers owe to their clients and the justice system (if any), when clients simply want to throw in the towel?

Judge Chatigny, his Senate confirmation process, his idiosyncratic views about the death penalty and the withdrawal of his nomination are not the subjects of this piece, except to introduce it. Rather, we consider the duty defense lawyers owe to their clients and the justice system (if any), when clients simply want to throw in the towel. Such a scenario can be particularly difficult for the zealous advocate, especially when abandoning defense advocacy may mean the death penalty!

Counsel's Conduct

It is noteworthy, at the outset, that the Second Circuit's Special Committee went out of its way in addressing the complaints against Judge Chatigny to commend Mr. Ross' defense counsel for his conscientious, pro bono, representation under extremely trying circumstances—especially given the uniqueness of Mr. Ross' wishes.[9] The committee further noted that it did not question counsel's compliance with his ethical obligations.[10] Indeed, the committee said, that based on counsel's "long experience and familiarity with…Ross, he was persuaded of his client's competence…[and] therefore considered himself ethically bound to respect his client's instruction to bring no further challenges and to resist the pressure exerted by Judge Chatigny to pursue doubts that the judge had about Ross' competence. [In fact,] *our finding that the judge committed no misconduct in no way implies that [counsel] was derelict in the conduct of his duties*."[11]

The real question, highlighted in *Ross*, however, boils down to this: When must counsel put aside his client's wishes and follow his own view of how to proceed? Rule 1.2(a) of the New York Rules of Professional Conduct says that "a lawyer shall abide by a client's decisions concerning the *objectives* of representation," but must only "*consult* with the client as to the *means* by which they are pursued."[12] The rule further says that in a criminal case counsel must abide by the client's decisions as to (1) a plea to be entered, (2) whether to waive jury trial, and (3) whether the client will testify.[13] Of course, counsel has an affirmative duty to strongly advise his client on how to proceed if he and the client disagree on any of these three issues.[14] Still, the final decision belongs to the client and counsel must honor it.

Rule 1.2(a)

Given that there are only three decisions specifically left to the client, one might expect commentary to the rule to give further insight into how decision-making in the criminal case should be allocated. But no; such clues do not exist—and, practically speaking, the drafters of ABA Model Rule 1.2(a), from which the New York Rule is drawn—acknowledge that "a clear distinction between 'objectives' and 'means' sometimes cannot be drawn."[15]

Suppose, for example, the objectively best way to defend a client is for counsel to imply during

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trial that the defendant's family member may have been responsible for the crime. Suppose further that the lawyer knows that the client is dead set against raising any argument that implicates the family member in the crime.[16] Or, to use another example, suppose counsel believes that the most strategic way to avoid conviction is to raise questions about his client's mental capacity. But the client is adamant that she does not want an issue of her mental capacity to be raised in any way.[17]

Rule 1.2 does not address it, so how must counsel ethically proceed under these circumstances especially where, as in these two hypotheticals, any lawyer worth her salt would recognize that her "zealous"—perhaps, call it Plan B—strategies would be the only viable defenses? Is it ethical for counsel to defer to a demurring client, willing to risk almost certain conviction as a matter of honor or pride? And, suppose, in these scenarios, the judge, as in *Ross*, boldly challenges defense counsel during trial for not raising such defenses.[18]

The rule doesn't say or suggest whether counsel must abide by the client's wishes to exclude these particular defenses. In other words—engaging in a talmudic exercise here—if the client's objective is obviously acquittal, could the attorney overrule his client's requests because he merely needs to consult, but not abide by, his client's wishes as to the means?

'Jones v. Barnes'

The attorney's duty of zealousness in cases where the attorney and client fundamentally disagree over strategy choices raises a difficult question; but there is not much law here. However, in *Jones v. Barnes*,[19] a majority of the U.S. Supreme Court held that defense counsel appointed to prosecute an appeal on behalf of a criminal defendant has no "constitutional duty" to raise every nonfrivolous issue in the appeal, even if the client demands that he does so. Stated differently, while the defendant has the ultimate authority to make certain fundamental decisions, including whether to appeal,[20] an indigent defendant has no constitutional right to compel his appointed counsel to press all nonfrivolous points if counsel, in his professional judgment, finds it strategically preferable not to press these points.[21]

In dissent, however, Justice William J. Brennan wrote: "[T]he role of the defense lawyer should be above all to function as the instrument and defender of autonomy and dignity in all phases of the criminal process."[22] Referring to the Court's decision in *Faretta v. California*, Justice Brennan explained that "the function of counsel…is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant."[23] In essence, then, for Justice Brennan, the court-appointed lawyer should be constitutionally obliged to raise every nonfrivolous claim the defendant wants raised, even though counsel, exercising her professional judgment, undoubtedly knows that raising too many issues will dilute the more compelling arguments. Justice Brennan recognized that the operative constitutional phraseology, after all, is "effective assistance of counsel."

Indigent Defendants

Justice Brennan's further comments reflect fundamentally on how lawyer conflicts with clients are typically resolved. In so doing, he emphasizes that David Barnes was represented by court-appointed counsel:

> temptations and resist them, and they endeavor to convince their clients that they will. It would be naïve, however, to suggest that they always succeed in either task. A constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need can only exacerbate the clients' suspicion of their lawyers. As in *Faretta*, to force a lawyer's decision on a defendant "can only lead him to believe that the law contrives against him."[24]

Clearly, Justice Brennan didn't suggest that the duty to abide by the client's wishes was greater for the court-appointed attorney. Still, without saying it in so many words, Justice Brennan implied an important distinction between private and appointed counsel—that where the defendant has the financial wherewithal to retain private counsel, the strategy he proposes is invariably implemented. Only rarely will counsel override the paying client's strategy, unless it compels illegal or unethical conduct by counsel, or the particular counsel is willing to forgo his fee and resign over the irreconcilable differences.

Setting aside the monstrous circumstance presented in *Ross*, if a paying customer insists on a tactic that is both legal and ethical, invariably it will be pursued, even if counsel has fully explained to the client that it is self-defeating. Yes, any attorney will try to talk his obstinate client out of a strategy that will exponentially increase his chances of a conviction or higher sentence; but, at the end of the day, if warnings do not succeed, the paid attorney will likely yield. And that's the way it probably should be.

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Under *Barnes*, this is not as likely for the indigent defendant. Not that court-appointed counsel is less committed than private counsel—frankly, in many instances they are far more committed. Rather, the indigent defendant simply lacks sufficient leverage or clout to insist that his strategy be enforced, especially when experienced counsel holds the objectively better view of what will work.

The author recently shared this dichotomy between appointed and retained counsel with a friend—a cynic, but a criminal defense attorney who would walk through hell for a client. He decried it. He reformulated the thought presented here and to him, and suggested that the author was basically arguing that "the perimeters of the lawyer's zeal vary directly in proportion to how much he's getting paid."

Not so. Assume a privately retained attorney—not an appointed one[25]—represented the Michael Ross who faced the death penalty that began this

article, and was paid $1 million by Mr. Ross for the representation. As before, after losing his direct appeals litigation, Mr. Ross instructed his attorney to cease further challenges against his appointment with death. Concluding that Mr. Ross was of sound mind—meaning, fully competent—to make that decision, he yielded to the client's wishes that he stand down and filed no further habeas petitions. Assume another, pro bono attorney represented Mr. Ross in the same death penalty case—but this time refused to honor Mr. Ross' request to stop the appeals process. Which attorney is more zealous? The one "caving," as it were, to his client's will? Or the one ignoring his client's wishes when it will potentially result in—shall we call it?—the "more favorable" outcome? A good argument could theoretically be made for either view.

Meaning, is it more zealous to resist the client's wishes or to simply abide by them when, in the attorney's professional view, the client is fully competent to understand the consequences of his decision, even though he prefers what clearly appears to be a far less favorable outcome? And ask yourself the same question in a scenario, more likely to face you, where the potentially adverse consequences of allowing the client to pursue his own strategic choices are far less dramatic than in *Ross*: if, after a warning, the client doesn't want you as his lawyer to present the best defense available to him—i.e., the one most likely to succeed—will you/should you simply stand down?

Even though he was cleared in the Second Circuit's review, Judge Chatigny paid an enormous price for challenging the conduct of an attorney, who may indeed have been the more zealous lawyer, when the client's intentions seemed pristinely clear, although dramatically questionable—indeed, deadly. Or do you think that attorney lacked the zealousness ethically required of him by being unwilling to override his client's choice?

1. Edmund H. Mahony, "Judge Robert Chatigny Drops Off Obama's List of Nominees for 2nd Circuit Court of Appeals," THE HARTFORD COURANT, Jan. 5, 2011.

2. See *In re Charges of Judicial Misconduct*, 465 F.3d 532 (2d Cir. 2006) (providing an overview of the charges of misconduct brought against Judge Chatigny for his behavior in *Ross v. Lantz*, 2005 WL 181883 (D. Conn. Jan. 26, 2005) and *Ross v. Rell*, 2005 WL 282615 (D. Conn. Feb. 3, 2005)).

3. See *State v. Ross*, 269 Conn. 213, 849 A.2d 648 (2004).

4. *Ross v. Lantz*, 2005 WL 181883 (D. Conn. Jan. 26, 2005); *Ross v. Rell*, 2005 WL 282615 (D. Conn. Feb. 3, 2005).

5. See *In re Charges of Judicial Misconduct*, 465 F.3d at 543, 548 ("A defendant facing execution may waive challenges to that execution, but only if he is competent to do so").

6. See id. ("So I warn you, Mr. Paulding…you better be prepared to deal with me if in the wake of this an investigation is conducted and it turns out that what Lopez says…is true, because I'll have your law license.") (quoting Jan. 28, 2005 Trans. at 29); On April 22, 2005, in an unpublished opinion by Judge Clifford of the Superior Court of Connecticut, the court concluded that "Ross suffers from mental disorders, but those disorders taken individually or together do not substantially affect his ability to make a rational choice among his options." *State v. Ross*, 2005 WL 1155012 at *10 (Conn. Super. April 22, 2005). Mr. Ross was executed on May 13, 2005. William Yardley, "Execution in Connecticut: Final Day; One View of Killer's Execution: 'It Was Just a Cowardly Exit,'" N.Y. TIMES, May 14, 2005, at B1.

7. See *In re Charges of Judicial Misconduct*, 465 F.3d at 535.

8. See supra note 1.

9. See *In re Charges of Judicial Misconduct*, 465 F.3d at 534, n.1.

10. See id.

11. See id. (emphasis added).

12. N.Y. RULES OF PROF. CON., RULE 1.2(a) (emphasis added).

13. N.Y. RULES OF PROF. CON., RULE 1.2(a).

14. Commentary to Rule 1.2 further provides that the client's authority does not reach beyond "the limits imposed by law and the lawyer's professional obligations." For example, "[a] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2 cmt. [1] (1999); see also, Cohen, J., "When the Client's Strategy Is Self-Defeating," NYLJ, July 31, 1997.

15. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT 1.2 cmt. [1] (1999); FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS, §3.07 (4th ed. 2004).

16. See, e.g., FREEDMAN & SMITH, §3.07 (detailing the murder-kidnap trial of a group of Hanafi Muslims who wished to take the blame for crimes they may not have committed in order to protect their religious leader. Despite their strong desires to take the fall, their lawyers decided to put on evidence adverse to their leader and conducted a hostile cross-examination of him).

17. See e.g., FREEDMAN & SMITH, §3.07 (detailing the story of Unabomber, Theodore Kaczynski, who refused to raise an insanity defense in order to avoid the death penalty).

18. In truth, besides having to deal with the judge going forward, the judge's view of the defense strategy should theoretically at least have no role in how counsel proceeds. Of course, parenthetically, the judge's remonstrations of counsel for declining to pursue a defense may help persuade the defendant of the error of his ways.

19. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). While not stated in Rule 1.2 (a), the Court in *Barnes* recognized that taking an appeal is one of the "certain fundamental decisions regarding the case" that an accused has the ultimate authority to make. *Barnes*, 463 U.S. at 751.

20. Id. at 751.

21. Id. at 754.

22. Id. at 763.

23. Id. at 759 (emphasis in original); see *Faretta v. California*, 422 U.S. 806, 820, 95 S.Ct. 2525, 2533 (1975) ("[A]n assistant, however expert, is still an assistant.").

24. *Jones v. Barnes*, at 761-62; *Faretta*, at 834.

25. Mr. Ross' attorney, T.R. Paulding, was involved in the case as early as 1995, when he was appointed as "standby counsel" by a Superior Court judge in the New London courthouse. By the late 1990s, Mr. Ross began working with public defenders on his various appeals, but reconnected with Mr. Paulding in 2004 when he decided to proceed to execution. Corey Kilgannon & Stacey Stowe, "A Defense Lawyer Whose Life Has Become 'Unreal,'" N.Y. TIMES, Jan. 30, 2005.