New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 27
TUESDAY, AUGUST 9, 2011

ETHICS AND CRIMINAL PRACTICE

Expert Analysis

When a Lawyer Wants (Or Needs) Out

By **Joel Cohen**

The legendary Jimmy Breslin would often write anecdotes about "Klein, the Lawyer"[1]—a fast-on-his-feet, Damon Runyon-like criminal lawyer in Queens County. "Klein" was a real character, to be sure, but one who appeared in the pages of the Daily News pseudonymously. Since departed, Klein was beloved not only for his quips in the courtroom, but also for those in the hallways of the criminal courts around town. One could say he presided as president pro tempore of "the Rotunda Bar Association."

Often his cases were called and the judges wanted them moved, but Klein had not yet received his "honorarium" for achieving justice for his clients (but not too much justice, if you know what I mean). Faced with that scenario, he would typically, with a wink of the eye, tell the judge that an important witness, "Mr. Green," had not yet arrived—and that Klein could not proceed without him.[2] The judges usually would adjourn—or, if it appeared that Mr. Green was permanently missing, would let Klein out of the case, perhaps replacing him with a lesser light at the bar who would be compensated for his legal services from the state's coffers.

Klein, it seems, never needed to spout the time-honored "my client and I are having irreconcilable [conflicts or] differences."[3] In those days, speedy trial clocks were a mere inconvenience and the bar and its members were more disposed to relegating ethical lapses to the pious remonstrations of academic journals. Indeed, non-compliance by the client with legal fee obligations is a grounds for (non-mandatory) withdrawal by the lawyer—it was then, and remains so now. Times, however, have changed on the ethics front, as has the general sophistication of clients.

A comment to Rule 1.16 of the New York Rules of Professional Conduct provides that a lawyer may indeed withdraw, or at least seek to withdraw, if the client refuses to abide by the terms of their fee agreement. However, lawyers are expected to have anticipated and foreseen the financial burdens of representation:

> The burdens of uncertainty therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal.[4]

If Klein had been confronted with this comment, he may have been out of luck. That's why the conventional wisdom for the criminal lawyer remains, "get it up front."

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While fee disputes are often the reason why lawyers want out of a case, ethical considerations may come into play for a host of other problems that arise during the course of a representation. If the client is not prejudiced financially (or otherwise) by a lawyer's intention to withdraw and the court has no objection to the substitution by new counsel (meaning, no consequent delay), the "no harm, no foul" analysis will typically enable the withdrawing attorney to prevail, if another attorney is available to substitute in promptly—or more-or-less promptly.

Mandatory Withdrawals

Moreover, there are four scenarios where the lawyer must withdraw from a representation. In the language of Rule 1.16,[5] the lawyer "shall' (meaning he must) withdraw, if—1) continuing to represent the client will violate the rules or law; 2) the lawyer's physical or mental condition will hamper his ability to represent the client; 3) the client insists that his lawyer take action in the litigation—e.g., issue a defense trial subpoena simply designed to harass or maliciously injure the subpoenaed individual; or 4) as is obvious, if the lawyer is discharged.[6]

Voluntary Withdrawals

Voluntary withdrawals in representing individuals sometimes present a more complicated issue. A lawyer may withdraw[7] if: 1) withdrawal will not adversely affect the client; 2) the client is using the lawyer's services for criminal purposes; 3) the client has used the lawyer's services for criminal purpose, and the lawyer learns of it; 4) the lawyer fundamentally disagrees with the client's strategy; or 5) the client flatly disregards payment obligations to the lawyer (see Klein, the Lawyer, supra).[8]

There are more. For example, if 6) the client insists upon a defense that is unsupportable under existing law (somewhat akin to 4, supra);[9] 7) the client will not cooperate in the representation, or makes it unreasonably difficult to proceed;[10] 8) the lawyer simply can't work with his co-counsel; 9) the lawyer's physical or mental condition makes him ineffective (also grounds for mandatory withdrawal, supra); 10) the client knowingly and freely assents to the withdrawal; 11) the client believes the tribunal will find other good cause for the withdrawal (whatever that means); or 12) the client insists that the lawyer pursue an illegal or rules-barred strategy (also a combination of items 2, 3, 4 and 6, supra).

In each instance, whether in mandatory or voluntary withdrawal scenarios, a lawyer may not withdraw if the law requires the permission of the tribunal, and that permission is denied. Specifically: "[w]hen ordered to do so by the tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[11] To accomplish the withdrawal, the lawyer may need to rely on client confidences, properly revealed in an in camera submission not provided to the adverse litigant (in a criminal case, the prosecutor).[12]

Difficulty 'Getting Out'

It might be somewhat easy, and would not violate privilege or confidentiality obligations, to tell the judge that "I'm simply not getting paid, and I have personal bills to pay." Though, seeking withdrawal in more complicated scenarios (e.g., a client in opposition) the withdrawal may effectively require the lawyer to compromise his confidentiality duty. Simply put, telling the judge that "my client and I are having an irreconcilable conflict," may simply not cut it—especially when the judge is unwilling or unable to read between the lines.

Curiously, comment 3 to the New York rule says that "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."[13] The comment is indeed surprising and either aspirational, or was drafted by someone who has rarely been in a courtroom or before a judge hell bent on moving her docket.

The issue more typically arises where a criminal defendant wants to testify and the lawyer "fundamentally" opposes him doing so. The attorney, then, is having an "irreconcilable difference" with

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the client, perhaps not because of the veracity of the proposed testimony but because, in the experienced lawyer's view, the testimony that the client proposes to give will undermine his defense.

Explaining to the judge the attorney's reticence to have the client testify, albeit without going into the details of the proposed testimony, will probably not be too imposing. Not great, but not terrible to say "my client wants to testify and I firmly believe he shouldn't. He can win the case without it." Notably, comment 7 to the rule says that "a client's intended action [e.g., such as testifying where the common issue of perjury is not implicated] does not create a *fundamental disagreement* simply because the lawyer disagrees with it."[14]

The problem is far more stressful where the lawyer opposes the client's testimony because the lawyer "knows" that the defendant will necessarily commit perjury if he testifies, and the lawyer refuses to sponsor it. The issue was starkly presented to the Supreme Court in *Nix v. Whiteside*,[15] where, in the face of the client's stated plan to testify falsely, the lawyer told his client that, among other things, he would tell the judge that he was committing perjury—a questionable path, indeed, by the lawyer, albeit one condoned by a unanimous Supreme Court (and by the New York Court of Appeals as well).[16] Worth noting: If a lawyer withdraws because he has good cause to believe the client intends to commit perjury, he does not give up the right to unpaid fees.[17]

'United States v. O'Connor'

Recently, the U.S. Court of Appeals for the Second Circuit was faced with a different dilemma, where the client sought to vacate his conviction over the refusal of the court to grant the attorney's application to withdraw before trial. The defendant, Dean Sacco,[18] represented by appointed counsel, Kelly Fischer, was convicted of sex trafficking, selling a child to produce child pornography and producing child pornography. Although, when he was appointed, Mr. Fischer clearly understood the nature of the odious conduct with which Mr. Sacco was charged and even though he had reviewed every page of the 100 pounds of discovery material, it was only a few days before trial—when he reviewed the used condom containing the child's DNA—that he viscerally decided he could no longer go forward. As he promptly told the trial judge, "While I could probably go through the motions to defend Mr. Sacco, my conviction would not be behind the representation."[19]

In affirming the district court's refusal to allow Mr. Fischer to withdraw, the court noted that when a lawyer is appointed by a court for an indigent defendant, "the lawyer should not seek to be excused from undertaking the representation, except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding."[20] Or put differently, as the Second Circuit had stated earlier, "a trial lawyer worthy of the name should be capable of subordinating his personal predilections to his professional duty."[21] Invoking Klein, the Lawyer, once again, it appears that "repugnance"—other than one's repugnance to performing legal services gratis—had no impact on the court's decision (given that Mr. Fischer was appointed).

Overview

Typically, two factors will affect whether a judge will let an attorney out of a criminal case: 1) Will the defendant be prejudiced by the withdrawal—typically financially, but often also by the defendant's ability to have the case tried or resolved in timely fashion? and 2) Will the court's docket be adversely impacted—meaning, will the judge and her docket be severely inconvenienced by accommodating a substitution of counsel and accordingly delaying a trial?

If, in *O'Connor* (where counsel was appointed), the trial attorney had become "repulsed" earlier by the trial exhibits, and a substitute counsel could have replaced him promptly, the trial court's denial of an application by counsel to withdraw would likely have been viewed differently on appeal. Simply put, a denial of a relatively early application to withdraw due to the attorney's stated inability to "give it his all" might have been viewed more sympathetically if he was convicted and sought to vacate his conviction claiming ineffective counsel based on the court's denial of the withdrawal application.

The rule of thumb for an attorney who recognizes early on that he may ultimately need to seek 'voluntary withdrawal' for one reason or another, is to come to terms with it quickly—that is, at a point before the court will reflexively say 'It's too late, counselor.'

The rule of thumb for an attorney who recognizes early on that he may ultimately need to seek "voluntary withdrawal" for one reason or another, is to come to terms with it quickly—that is, at a point before the court will reflexively say "It's too late, counselor," or before the defendant will be prejudiced by having shelled out too much to an attorney unwilling or unable to go the distance. As the text accompanying footnote 4, supra, makes clear, the burden of persuasion in such instances will often fall on the lawyer—not the client—especially when the court concludes that the client is not a sophisticated consumer of legal services, and it was the attorney who should have known better.

1. "Jimmy Breslin's Doing Famously, but He's Still Out to Write Wrong," Gross, K., People Magazine, 6/16/86.
2. "It's Time Again to Wait for Mr. Green," Alan Chartock—blog 5/31/05.
3. See *People v. Jones*, 580 N.Y.S.2d 5 (First Dept. 1992).
4. Rule 1.16, New York Rules of Professional Conduct, Comment 8A.
5. See generally Rule 1.16(b), New York Rules of Professional Conduct.
6. Rule 1.16(b) provides as follows:

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

7. Rule 1.16(c)1-13 provides:

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

8. *HSW Enterprises Inc. v. Woo Lae Oak Inc.*, 2010 WL 1630686 (S.D.N.Y.); *Stair v. Calhoun*, 722 F.Supp.2d 258 (E.D.N.Y., 2010).
9. See *People v. Moore*, 445 N.Y.S.2d 992 (First Dept., 1982).
10. *Karimian v. Time Equities Inc.*, 2011 WL 1900092 (S.D.N.Y.).
11. Rule 1.16(d) provides:

If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

See also, *People v. McMillan*, 561 N.Y.S.2d 512 (Sup. Ct., Bx. Co., 1990); *Matter of Cronk*, 856 N.Y.S.2d 186 (2d Dept. 2008); *In re Kuzmin*, 2010 WL 3980018 (2d Cir., 2010).
12. *In re Gonzalez*, 773 A.2d 1026 (D.C., 2001).
13. Comment 3 to Rule 1.16 provides:

[3] Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rule 1.6 and Rule 3.3.

14. Emphasis added; see Rule 1.2 regarding the allocation of responsibility between client and lawyer.
15. 475 U.S. 157 (1986).
16. *People v. DePallo*, 96 N.Y.2d 437 (2001).
17. *A Sealed Case*, 800 F.2d 15 (7th Cir., 1989).
18. *United States v. O'Connor*, 2011 WL 2417143 (2d Cir.).
19. Id. at 11 et seq.
20. Id. at 13-14; Code of Professional Responsibility EC 2-29.
21. *Fiumara v. United States*, 727 F.2d 209, 212 (2d Cir.), cert denied 466 U.S. 951 (1984).