

Withdrawal of Counsel in Criminal Cases

This comment deals with the professional problems and considerations involved when counsel for a criminal defendant seeks to withdraw from the case and terminate the attorney client relationship. Many of the ethical considerations required of a withdrawing attorney exist regardless of whether the client is a criminal defendant or a civil litigant. But the criminal defendant, and criminal appellant, present special problems and considerations due to the constitutional protections they are afforded.

I. General Policies Governing Withdrawal

A. *The Code of Professional Responsibility*

Once an attorney has accepted appointment or retention as counsel the attorney client relationship is established and may be terminated by the attorney only upon good cause.¹ The ABA Canons of Professional Ethics state, "The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self respect."² The Code of Professional Responsibility addresses the problem on two levels. On the first, generalized level, the ethical considerations concerning the second Canon of the Bar state that withdrawal should be made only under "compelling circumstances."³ More specifically in Disciplinary Rule (here-

1. 7A C.J.S. *Attorney and Client* § 108 (1980).

2. ABA CANONS OF PROFESSIONAL ETHICS No. 44.

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY (hereinafter referred to as ABA CODE, EC 2-32:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client

inafter referred to as DR) 2-110, the Bar attempts to define circumstances that are sufficiently compelling to require mandatory withdrawal and presumably less compelling circumstances that allow permissive withdrawal.⁴

any compensation not earned during the employment.

4. ABA CODE, DR 2-110:

Withdrawal from Employment

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harrassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) 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.

Before withdrawing attorneys are required, by the Code, to seek the permission of the court before which their case is pending.⁵ A look at the source of the courts' authority to approve such requests is instructive of the manner in which that authority is exercised.

B. Source of the Courts' Authority

The courts' discretionary authority to grant or deny withdrawal motions is derived from its inherent power to require attorneys to conduct themselves so as to promote the effective disposition of cases before it,⁶ and the courts' responsibility to protect the rights of criminal defendants within the adversary system. For example, when the withdrawal of counsel would interfere with the efficient and proper functioning of the court the trial judge is well within his discretionary authority to deny the motion.⁷ Likewise

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

5. *Id.*

6. *Fisher v. State*, 248 So. 2d 479 (Fla. 1971); see *Seleznow v. Shub*, 136 Misc. 365, 240 N.Y.S. 829 (1930).

7. See *SEC v. International Scanning Devices Inc.*, 415 F. Supp. 3 (W.D.N.Y.

the court may properly deny a motion to withdraw, even when the accused wants the attorney removed, if granting the motion would result in the accused being deprived of effective counsel.⁸ The courts have expressed a preference for the preservation of the adversary system in those cases involving indigents.⁹ Therefore a motion to withdraw that would result in the accused proceeding as his own attorney will be denied when the accused does not understand the consequences of proceeding *pro se*.¹⁰

The courts are then the arbiters of whether the cause alleged is sufficient to permit withdrawal.

C. What Constitutes Adequate Cause

As was noted above, an attorney may only withdraw upon a showing of adequate cause, and the courts have reserved the authority to determine whether the facts of a given case give rise to the necessary cause.¹¹ An analysis of the cases, however, reveals that no rule of general application as to what constitutes adequate cause is available.¹² "What constitutes 'good cause' depends, of course, largely on the circumstances at the time the lawyer deems it his duty to retire from the case or finds it desirable to do so. The duty to retire would be based on his being satisfied that the client is behaving or insisting that the lawyer behave in a manner contrary to ethical standards; the desire to withdraw might rest merely on his not choosing any longer to represent the client."¹³

What may be adequate cause in one context may be inadequate in another.¹⁴ But it can be stated with some authority that discovery of a client's perjury is cause of the highest order and is sufficient to compel withdrawal in all circumstances.¹⁵ It is also safe to say that an attorney who represents a criminal defendant

1974).

8. *People v. Jacobs*, 27 Cal. App. 3d 246, 103 Cal. Rptr. 536 (1972).

9. *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968).

10. *See People v. Jacobs*, 27 Cal. App. 3d 246, 265, 103 Cal. Rptr. 536, 548 (1972); *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973).

11. *See Angarana v. United States*, 312 A.2d 295 (D.C. 1973); *El Moro Food Distrib. v. W.M. Tynan & Co.*, 223 F. Supp. 717 (S.D.N.Y. 1963).

12. *See Gosnell v. Hilliard*, 205 N.C. 297, 171 S.E. 52 (1933).

13. H. DRINKER, *LEGAL ETHICS*, 140 (1953).

14. *Compare Gosnell v. Hilliard*, 205 N.C. 297, 171 S.E. 52 (1933) with *United States v. Uptain*, 531 F.2d 1281 (5th Cir. 1976).

15. *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967).

may not seek to withdraw merely because the accused confidentially discloses his guilt to the attorney.¹⁶

The ABA apparently recognized the difficulties inherent in any attempt to codify adequate cause and drafted DR 2-110 accordingly.¹⁷

II. Special Considerations in Criminal Cases.

A. Trial Counsel

The decision to allow an attorney to withdraw in a criminal trial will be made within the context of potentially adverse impact on the client. In this regard the court must weigh two potentially competing interests, (1) the cause alleged by the withdrawing attorney, and (2) the rights of the accused. The Constitution does not force a lawyer on a defendant but the court may inquire into whether the accused comprehends the impact of proceeding without one.¹⁸ Even though an accused may be actually conducting much of the defense on his own, it is not error on the court's part to deny a motion to withdraw.¹⁹

Two clear examples of courts balancing these competing interests are the cases of *Glavin v. United States*,²⁰ and *People v. Jacobs*.²¹ In *Glavin* the accused and a codefendant were represented by the same attorney. On the day set for trial counsel moved to withdraw from representing the named defendant, alleging a conflict of interest and disagreement between himself and his client.²² The trial judge remarked that both accused were entitled to a speedy trial, and commenting on the lateness of the motion, observed that the accused had ample opportunity prior to trial to secure new counsel.²³ On appeal the defendant claimed that the denial of the motion to withdraw, thereby requiring both defendants to be represented by the same attorney, deprived them of effective assistance of counsel.²⁴ The circuit court, citing the Su-

16. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 339 (1932).

17. ABA CODE, *supra* note 4.

18. *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973).

19. *Harris v. State*, 425 S.W.2d 642 (Tex. Crim. App. 1968).

20. 396 F.2d 725 (9th Cir.), *cert. denied*, 393 U.S. 926 (1968).

21. 27 Cal. App. 3d. 246, 103 Cal. Rptr. 536 (1972).

22. 396 F.2d at 726.

23. *Id.* at 726 n.1.

24. *Id.* at 727.

preme Court opinion in *Glasser v. United States*,²⁵ observed that denial of such a motion is reversible error "where there is some possibility that the appellants have divergent interests so that one or both might not receive 'untrammelled and unimpaired' assistance from common counsel."²⁶ The court observed that the record disclosed no such divergent interests and held the decision of the trial judge to be a proper exercise of discretion.

In *Jacobs* the accused was on trial for a criminal battery and was represented by an appointed public defender. Prior to trial the accused informed the court that he wanted to dismiss the public defender because of a "major conflict of interest". The alleged conflict of interest was that counsel urged the accused to plead guilty to a crime defendant had supposedly never committed.²⁷ The matter was battered back and forth through four subsequent hearings in which the accused became increasingly more persistent in his desire to proceed as his own attorney, and the rift between the accused and his lawyer became increasingly wider.²⁸ Finally, one week prior to trial the public defender asked to be relieved of the case, citing a major disagreement concerning a significant element of the case and an inability to communicate with his client.²⁹ The trial judge denied the motion just as he had previously denied the motion of the accused to assume his own defense.³⁰

The court of appeals affirmed the trial court and noted that the authority to grant or deny a withdrawal motion rested within the sound discretion of the trial judge. The court further stated that in order to sustain a claim of disagreement a withdrawing counsel must demonstrate that "the disagreement between attorney and client has so deteriorated the relationship between them as to substantially impair the client's right to the effective assistance of counsel."³¹

These cases illustrate what could be properly termed the "constitutional dimension of the question of cause." In other words the cause alleged by the withdrawing attorney must be (1) sufficiently compelling to overcome any countervailing constitutional protec-

25. 315 U.S. 60 (1942).

26. 396 F.2d at 727.

27. *People v. Jacobs* at 540, 27 Cal. App. 3d at 253.

28. *Id.*

29. *Id.* at 541, 27 Cal. App. 3d at 255.

30. *Id.*

31. *Id.* at 547.

tions of the accused (such as the right to speedy trial) or; (2) so compelling that to deny the motion would impair the protected interests of the accused.

B. Appellate Counsel

The United States Supreme Court addressed the question of withdrawal of appellate counsel in the case of *Anders v. California*.³² In that case the indigent appellant was convicted of a felony and received court appointed appellate counsel. Appellate counsel, after a study of the record, informed the California District Court of Appeal that the appeal was without merit and counsel was relieved of his appointment.³³ Anders, proceeding as his own attorney, requested the court to appoint other counsel, which request was denied.³⁴ The Supreme Court granted certiorari following the state Supreme Court's denial of his habeas corpus petition.

In the majority opinion Mr. Justice Clark writes, "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*."³⁵ Therefore appellate counsel have a duty to serve as their clients' advocate³⁶ which must be balanced against the lawyers duty to withdraw rather than pursue a frivolous claim.³⁷

The Court strikes that balance by requiring appellate counsel to conscientiously examine the record, and, if after doing so, the attorney finds the case to be wholly frivolous, the attorney is to so advise the court and request permission to withdraw. In addition the attorney is required to supply the court with a brief referring to anything in the record that arguably supports an appeal. The determination of whether the appeal is actually frivolous then falls upon the court. If the court determines that the appeal is without merit it may grant counsels' motion to withdraw, but if it finds merit in the appeal the court must provide assistance of counsel to the appellant.³⁸ Some courts, after finding merit, will merely deny

32. 386 U.S. 738 (1967).

33. *Id.* at 739.

34. *Id.* at 740.

35. *Id.* at 744.

36. *Id.*

37. *Id.*; ABA CODE, DR 2-110(c)(1)(2) *supra* note 4.

38. 386 U.S. at 744.

the withdrawal motion and counsel will continue to represent the defendant.³⁹

The United States Courts of Appeal have drafted supplements to the Federal Rules of Appellate Procedure which establish *inter alia* the procedures to be followed by attorneys who wish to withdraw from a case.⁴⁰ It is well within the discretion of the court to deny, without prejudice, a motion to withdraw as attorney on appeal where such withdrawal may result in the defendant being left without any guidance regarding the steps necessary to obtain new counsel and perfect the appeal.⁴¹

As is the case with the criminal defendant, the criminal appellant introduces a constitutional dimension to the propriety of an

39. See *Glass v. United States*, 405 F.2d 471 (7th Cir.), cert. denied, 394 U.S. 939 (1968); *United States v. Minor*, 444 F.2d 521 (5th Cir. 1971).

40. 2D CIR. R. 4(b) reads as follows:

Duties of Trial Counsel in Criminal Cases with Regard to Appeal by Defendant from a Judgment of Conviction; Motions for Leave to Withdraw as Counsel on Appeal in Criminal Cases

(a) . . .

(b) . . .

(c) . . .

(d) A motion to withdraw as counsel on appeal in a criminal case must state the reasons for such relief and must be accompanied by one of the following:

(1) A showing that new counsel has been retained or appointed to represent defendant; or

(2) The defendant's completed application for appointment of counsel under the Criminal Justice Act or a showing that such application has already been filed in the Court of Appeals; or

(3) An affidavit or signed statement from the defendant showing that he has been advised that he may retain new counsel or apply for appointment of counsel and expressly stating that he does not wish to be represented by counsel but elects to appear pro se; or

(4) An affidavit or signed statement from the defendant showing that he has been advised of his rights with regard to the appeal and expressly stating that he elects to withdraw his appeal; or

(5) A showing that exceptional circumstances prevent counsel from meeting any of the requirements stated in subdivisions (1) to (4) above.

Such a motion must be accompanied by proof of service on the defendant and the Government and will be determined, without oral argument by a single judge, see § 27.

41. *United States v. Crespo*, 398 F.2d 802 (2d Cir. 1968).

attorney's withdrawal.

III. Recourses Available When Withdrawal Is Denied

In most cases the denial of permission to withdraw will not create a situation wherein the attorney finds himself in an ethical dilemma that will not allow him to continue as counsel. The typical reported cases involve a denial of the motion without prejudice until some procedural requisite is met.⁴² However there are occasions where the attorney may find it necessary to seek review of the trial court's order denying the motion.

A. *Post Trial Review—appealable error*

As the *Glavin* and *Jacobs* cases discussed above indicate, the denial of counsel's motion to withdraw may amount to an infringement upon the due process rights of the criminal defendant. Where such an injury occurs, the denial order of the trial court may be alleged to be appealable error.⁴³

It is conceivable however that the facts which give rise to the cause asserted for withdrawal may be such that the attorney cannot in good conscience continue to represent the accused. When that occurs the attorney may be compelled to seek review of the denial prior to the case proceeding to judgment.

B. *Pre-Judgment Review*

The cases discussed in this section are civil actions, and research has not disclosed any criminal cases illustrative of the methods of review examined. But there exists no barrier to an attorney employing these procedures in a criminal action.

1. *Appealable Collateral Orders.*—An order by a court that is a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it" may be appealed.⁴⁴ The appellant must assert that the issue is "too important to be denied review and too independent of the case itself to require that review be deferred until the whole case is adjudicated."⁴⁵ This avenue of review has been used in civil cases in-

42. See *id.* at 803; *Glass v. United States* at 473.

43. See *State v. Franks*, 284 So. 2d 584 (La. 1973).

44. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

45. *Id.*

volving the denial of withdrawal motions,⁴⁶ and since collateral orders are appealable in criminal cases as well,⁴⁷ there should be no reason for an appellate court to deny review provided the attorney can establish the threshold requirements discussed above.

2. *Mandamus*.—If the action of a court in a discretionary matter amounts to an abuse of that discretion and a disregard of duty, and no other remedy is adequate, then mandamus will issue to compel the specific action that should have been taken.⁴⁸ Since there is no absolute right of an attorney to withdraw from a case, it will require a fact situation revealing a patent abuse of judicial discretion for mandamus to be an appropriate remedy.⁴⁹

3. *Appeal of Contempt Citation*.—This third method of seeking review is the least desirable because it places the attorney squarely at odds with the court and may work to the future disadvantage of the client. However this was the course followed in the case of *Fisher v. State*.⁵⁰ In this case the appellant first moved for permission to withdraw after being discharged by the court appointed receiver of the attorney's insolvent employer. The trial judge denied the motion and entered an order reinstating the attorney and his firm as counsel of record. When appellant failed to comply with the trial court's order he was held in criminal contempt from which he appealed. The Florida Supreme Court recognized the trial court's discretionary power but considered this denial to be an abuse of that power. The court stated in dictum that had the order been proper, the attorney's failure to comply was more properly classified as civil contempt than criminal contempt.

IV. Conclusion

There are no rules of general application for problems involving the withdrawal of attorneys in criminal cases. The courts decide whether to grant or deny such motions purely on a case by case basis by balancing the protected interests of the accused with the cause alleged by the withdrawing attorney. Any balancing test implies uncertain standards and this area is rife with uncertainty. Every attorney facing such a problem must proceed in good faith,

46. See *Tartaglia v. DeAragon*, 52 A.D.2d 876 (N.Y. App. Div. 1976) (mem.).

47. *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953).

48. 52 Am. Jur. 2d *Mandamus* § 311 (1970).

49. See *Linn v. Superior Court*, 79 Cal. App. 721, 250 P. 880 (1926).

50. 248 So. 2d 479 (Fla. 1971).

ever mindful of the command of the ABA Code to carefully consider and minimize any adverse effect on his client.⁵¹

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51. ABA Co, EC 2-32.